UNMODERATED DISCRIMINATION: AMENDING SECTION 230 TO FACILITATE ONLINE PLATFORM ACCESSIBILITY

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Abstract

As debates regarding Section 230 continue, questions remain as to the scope of its conferred immunity and whether it should be amended and scaled back. Left underdiscussed is the difficulty of managing content access on platforms alongside structural access to the platforms themselves. The Americans with Disabilities Act (ADA) has been inconsistently applied to online platforms and Section 230 of the Communications Act of 1934 acts as a secondary barrier waiting to block structural access when people with disabilities seek equal and fair access to online content.

This Note explores the intersecting doctrinal and policy challenges of the ADA and the Communications Decency Act (CDA), which created Section 230, and reviews how courts have upheld digital accessibility barriers that stem from both schemes. As products of an early Internet regulatory environment, the ADA and CDA desperately need 21st century overhauls. This Note focuses discussion on how future amendment can harmonize the two and alter Section 230 to remove categorical immunity defenses for online platforms where hosted content contributes to digital inaccessibility.

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INTRODUCTION

The Internet was once just a place in your house—a room with a desktop computer that was the sole connection point to the World Wide Web. Today, it is omnipresent and can be reached from your pocket, your couch, or even your refrigerator. Over the last several decades the world has experienced an Internet evolution, both physically and digitally. What was once the premier means of physically accessing online content, dial-up Internet, has since been retired, and billions are now being invested in modernizing the nation's physical access infrastructure.[1] Digitally, an entire universe of content has blossomed into existence. One can now shop online, reach friends on social media, and even stream video of a large language model trying to play Pokémon.[2]

But as the Internet has evolved, challenges remain for those with disabilities trying to access its content and those who create it. Plainly, the evolution has not enabled structural access to content on equal terms. Ordinarily one might think of equal content access in terms of accessible web layout, screen reader compatibility, video captioning, or image tagging with alternative text. Without these tools, people with disabilities may otherwise be excluded from accessing everyday content on the platforms they connect to. But not all content comes from the same source, and not all online platforms apply accessibility tools to every user-generated contribution. Even if a website is screen reader compatible, some of its content may nevertheless remain indecipherable once reached. How Internet content, especially content generated from third parties on a platform, is regulated continues to be a hotly contested issue, even decades into the Internet's thriving life.

In recent years, concepts like the modern public square, common carriers, or places of public accommodation have been proposed as frameworks for online content regulation. These concepts evoke ideas of free speech values, shared public resources, and broader concerns about sociopolitical cohesion, and their application to the

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[1] *AOL Pulling the Plug on its Dial-Up Service*, AOL (Aug. 11, 2025), https://www.aol.com/aol-pulling-plug-dial-185832103.html [https://perma.cc/QBA9-RNQW]; *Broadband Equity Access and Deployment Program: Overview*, NAT'L. TELECOMMS. & INFO. ADMIN., https://broadbandusa.ntia.gov/funding-programs/broadband-equity-access-and-deployment-bead-program [https://perma.cc/EU2N-G2J3] (last visited Nov. 1, 2025) (providing an overview of the $42.45 billion federal grant program aimed at improving physical Internet infrastructure in the U.S.).

[2] *ClaudePlaysPokémon*, TWITCH, https://www.twitch.tv/claudeplayspokemon [https://perma.cc/BBV3-NUP3] (last visited Nov. 4, 2025).

Internet prompts a flurry of questions: Should all online platforms and social media companies be treated as common carriers?[3] When does government jawboning turn into impermissible censorship?[4] Are government Twitter accounts "public forums" or "places of public accommodation"?[5] Often, answering these questions requires consideration of entire legal doctrines that share the underlying idea of nondiscriminatory content access.

But to answer questions about nondiscriminatory *content* access, one must first ask questions of nondiscriminatory *platform* access. This often-overlooked antecedent structural access issue plays a critical role in conceptualizing online content regulation. Consider, for example, the "modern public square."[6] Whether somebody has access to a public square can be thought of in two ways: structural inclusion (the grant of initial access to the forum) or moderated exclusion (the revocation of existing access from within). Though they may seem like two sides of the same coin, one is a prerequisite for the other: to be *moderated out of* the public square, one first must be given initial *access into* it. Online platforms plainly do not offer nondiscriminatory structural access.[7]

Although numerous everyday activities can be done online, many platform designs and decisions foreclose easy initial access to online content for people with disabilities.[8] Consider any number of social interactions, commercial transactions, educational opportunities, or modes of democratic participation.[9] A Twitter feed

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[3] Moody v. NetChoice, LLC, 603 U.S. 707, 751–52 (Thomas, J., concurring); *id.* at 794 (Alito, J., concurring); *see also* Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377 (2021).

[4] Murthy v. Missouri, 603 U.S. 43 (2024).

[5] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S.Ct. 1220, 1221–26 (2021) (Thomas, J., concurring).

[6] Packingham v. North Carolina, 582 U.S. 98, 107 (2017) ("North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.").

[7] For the purposes of this Note, "platforms" or "online platforms" will generally refer to websites, social media, and online platforms that host third-party content.

[8] *See* Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 591–92 (2020) (laying out the impacts of inaccessible online design, calling Internet accessibility "one of the most pressing civil rights challenges of the twenty-first century").

[9] For example: posting a tweet, leaving a Yelp review, finding a roommate, or selling a blender on Facebook marketplace (social); ordering

may be seeded with malignant, seizure-inducing gifs,[10] a pizza delivery application may not function with a screen reader,[11] a university's free online lectures might lack accurate closed captions,[12] and so too might a state legislature's online video stream.[13] Various ways people with disabilities engage with online content are often made difficult or impossible compared to people without disabilities. If the Internet is now the modern public square, then it is an imperfect one with inaccessible sidewalks and curbed edges discriminatorily keeping some people out. In effect, people with disabilities are left unmoderated, not by editorial choice, but by structural exclusion.

Even so, those who have structural platform access might be left unmoderated or functionally excluded due to the inaccessibility of content and editorial design choices of platforms. Platforms generally have broad legal immunity when they discriminate in content decisions. This immunity is the product of the Communications Decency Act (CDA),[14] a mid-1990s Internet speech law that effectively created immunity for many platforms' content moderation practices under Section 230 of the

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takeout, buying groceries, or reviewing customer product reviews (commercial); checking out a library book, using DuoLingo, or taking an online coding class (educational); or registering to vote or making a DMV appointment (democratic participation).

[10] *See* Cecilia Kang, *A Tweet to Kurt Eichenwald, a Strobe and a Seizure. Now, an Arrest.*, N.Y. TIMES (Mar. 17, 2017), https://www.nytimes.com/2017/03/17/technology/social-media-attack-that-set-off-a-seizure-leads-to-an-arrest.html [https://perma.cc/Z3GD-S3TJ] (describing an online attack where a user deliberately posted strobing images in reply to a user with epilepsy to successfully induce a seizure); Elizabeth Wolfe & Saeed Ahmed, *A Twitter Cyberattack on the Epilepsy Foundation Posted Strobing Images That Could Trigger Seizures*, CNN (Dec. 17, 2019, 4:05 PM), https://www.cnn.com/2019/12/17/tech/epilepsy-strobe-twitter-attack-trnd [https://perma.cc/Y5B8-ZBD3] (describing a similar coordinated cyberattack on the Epilepsy Foundation designed to induce seizure for people with photosensitive epilepsy).

[11] *See* Robles v. Domino's Pizza, LLC, 913 F.3d 898, 902 (9th Cir. 2019) (pizza tracker application was allegedly incompatible with screen readers).

[12] *See* Nat'l Ass'n of the Deaf v. Harvard Univ., 377 F. Supp. 3d 49, 54 (D. Mass. 2019) (online lecture and educational materials hub allegedly lacked consistent video captioning).

[13] *See* Reininger v. Oklahoma, 292 F. Supp. 3d 1254, 1258 (W.D. Okla. 2017) (online live feeds of the state of Oklahoma legislative bodies allegedly lacked any captioning).

[14] Enacted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56.

Communications Act of 1934.[15] With said immunity, platforms can moderate however they choose within the public square without consequence. They can amplify, curate, ban, and host third-party content without fear of liability for defamation, for censorship, or as a publisher of hosted content.[16] Platforms can moderate however they choose within the public square without consequence. Thus, even if one overcomes the structural exclusion problem for accessing content, platforms can still make discriminatory decisions that foreclose content access from within the "modern public square."

When Justice Thomas invokes the public accommodation doctrine as a means to address discriminatory content regulation, he seemingly sidesteps the antecedent structural exclusion issues that public accommodation law is actually meant to address.[17] Rather than consider who has access at the outset, he instead focuses on the rules applied to those already accessing content. This public accommodation approach jumps to nondiscriminatory content obligations (i.e., *what* is a permissible basis to exclude) without touching nondiscriminatory status obligations first (what is a permissible basis to exclude… as to *who*).[18] Yet public accommodations laws exist inherently to deal with the latter, and the doctrines stem from the physical world predating the Internet. When a place qualifies as a public accommodation, the government historically has been constitutionally allowed to "limit[] a company's right to exclude" people.[19] Title II of the Civil Rights Act forbids such a place from excluding people on the basis of their race, religion, or national origin, and the Americans with Disabilities Act (ADA) does the same for people with disabilities.[20]

The conflation of the status framework (addressing nondiscriminatory structural access) with a moderation framework (addressing nondiscriminatory content exclusion) is troubling given the breadth of legal immunity Section 230 offers for content

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[15] *See* 47 U.S.C. § 230(c).

[16] Blake E. Reid, *Section 230's Debts*, 22 FIRST AMEND. L. REV. 408, 417 (2024) ("Section 230 effectively immunizes platforms from liability for moderation or carriage decisions about user-generated content in most circumstances.").

[17] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1225–27 (2021) (Thomas, J., concurring).

[18] Consider an alternative framing provided by Goldsmith and Volokh, that of antidiscrimination principles based on status versus antidiscrimination based on content. *See* Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 TEX. L. REV. 1083, 1113–20 (2023).

[19] *Knight First Amend. Inst.*, 141 S. Ct. at 1223 (Thomas, J., concurring).

[20] *See* 42 U.S.C. §§ 2000a(a), 12182.

moderation decisions. Platforms generally cannot be held responsible for the content posted by third parties, and Congress only carved out a few exceptions to this immunity. Missing from the exceptions in Section 230(e) are exemptions from immunity where third-party content on a platform is outright inaccessible for people with disabilities. In essence, platforms can assert content immunity defenses against structural accessibility claims arising out of third-party content and courts have struggled to differentiate structural access from moderated exclusion in the ensuing immunity inquiry. In all, the result of the conflated frameworks is that discriminatory content practices may end up incorrectly protected by Section 230's moderation immunities and perpetuate continued structural access discrimination. Unmoderated discrimination.

This Note proposes a taxonomy that sharply distinguishes between *structural* content access and *moderated* content access for online platforms and argues that claims for discrimination arising under the former should be expressly exempted from any legal immunity provided for the latter. Part I addresses how current disability law hinders online antidiscrimination claims and thus prevents broader structural access to content. Part II addresses how this problem compounds when antidiscrimination claims against platforms run up against Section 230's immunities, exclusions, and exemptions for third-party content. Finally, given the ADA's lack of modernization and the current political climate veering away from equity and inclusivity frameworks, Part III makes concrete proposals to address the compounding access barriers in one amendment to Section 230, while mitigating administrability concerns that accompany disability and moderation liability frameworks.

I. STRUCTURAL DENIAL: THE INCONSISTENT APPLICATION OF THE ADA TO ONLINE PLATFORMS

> "[T]he Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should *keep pace with the rapidly changing technology of the times*."[21]

The ADA was enacted in 1990 and predated public use of the Internet.[22] The Internet, of course, seems to be the exact kind of

[21] H.R. REP. NO. 101-485, pt. 2, at 391 (1990) (House Report on the purposes of the Americans with Disabilities Act as an adaptive, forward-looking mandate for accessibility) (emphasis added).

[22] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; *see* Victoria Mosley, *The Americans with Disabilities Act v. the*

"rapidly changing technology" that legislators believed the ADA would keep pace with. As early as 1996, the Department of Justice (DOJ) had recognized the Act's purported applicability to websites and interpreted it broadly when exercising its ADA-related authorities.[23] Yet nearly two decades after its passage, when the Internet was flourishing, Congress amended the ADA without addressing general accessibility on the Internet, leaving Internet-related claims in limbo.[24] Textually, the ADA today still lacks clear statutory language that conclusively applies its antidiscrimination framework to websites, online platforms, and the Internet writ large.

In the shadow of this ambiguity, accessibility claims against online platforms have seen mixed success. Some claims are categorically barred, while others must meet tedious pleading standards to survive. The result is a patchwork of circuit precedents that in some instances entirely foreclose claims for platform accessibility. Though the Internet is flourishing today, online platforms can function far below the ADA standards for an ordinary place of public accommodation. This Part will illustrate (A) the textual ambiguities and challenges of applying the ADA to the Internet; (B) the fractured circuit split interpreting those ambiguities; and (C) further complications that arise when third-party content is a component of an ADA antidiscrimination claim.

A. TITLE III AND ITS TEXTUAL AMBIGUITIES

Built on the shoulders of prior antidiscrimination laws like the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act

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Internet: The More Use the Internet Gets, the More Accessible It Should Be, 45 W. NEW ENG. L. REV. 144, 152 (2023) ("[I]t was not until after the ADA was passed in 1990 that the internet became widely used to interact, buy, sell, share, chat, post, etc.").

[23] *Guidance on Web Accessibility and the ADA*, U.S. DEP'T OF JUST., C.R. DIV. (Mar. 18, 2022), https://www.ada.gov/resources/web-guidance/ [https://perma.cc/W5RS-AY6J] ("Since 1996, the Department of Justice has consistently taken the position that the ADA applies to web content.").

[24] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553; *see* Hassan Ahmad, Note, *Beyond Sight: Modernizing the Americans with Disabilities Act and Ensuring Internet Equality for the Visually Impaired*, 25 J. GENDER, RACE & JUST. 321, 328, 336–37 (2022) ("[T]he ADA Amendments Act of 2008 was passed in response to Supreme Court decisions Congress felt limited the rights of people with disabilities, rather than being passed due to modern technological advancements."; "Congress failed to address internet accessibility for the visually impaired in the 2008 amendments."); Michele Astor-Pratt, *"Let's Get 'Phygital'": How the Collision of Physical and Digital Commerce Compels the End of the Nexus Standard in ADA Adjudication*, 63 B.C. L. REV. 2227, 2261 (2022) ("Congress amended the Act in 2008, but declined to address websites or other nonphysical spaces when modifying Title III.").

of 1973, the ADA significantly expanded the rights of people with disabilities in everyday life.[25] Split into three titles, it addresses accessibility in public and private spaces through a variety of antidiscrimination and enforcement measures. Title II, for example, applies to state and local governments,[26] and the DOJ has promulgated web accessibility guidelines for public websites under it.[27] Although other federal frameworks similarly address web accessibility, they are narrow in scope like Title II, and leave most online platforms uncovered by their mandates.[28] Thus, the primary vehicle through which online content accessibility challenges are raised is Title III.[29]

Notably, Title III's place of public accommodation definition was meant to be broader than the one used twenty-five years earlier in the Civil Rights Act.[30] The enacted text makes this clear given the enumeration of twelve categories of places compared to the CRA's three.[31] Like any sweeping statutory enumeration though, these definitions prompted interpretation issues as to what unenumerated places qualify as a place of public accommodation too. Complicating these inquiries further is the fact that the twelve categories in Title

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[25] Christopher Buccafusco, *Disability and Design*, 95 N.Y.U. L. REV. 952, 993–95 (2020) (detailing how language in Section 504 echoes language of Title VII of the Civil Rights Act and how the ADA expanded liability compared to the narrow limits of Section 504's tie to federal funding).

[26] *See* 42 U.S.C. §§ 12131, 12132; *State and Local Governments*, U.S. DEP'T OF JUST., C.R. DIV., https://www.ada.gov/topics/title-ii/ [https://perma.cc/EK7J-9HQK] (last updated Apr. 30, 2025).

[27] 28 C.F.R. §§ 35.200–209.

[28] *See* Jonathan Lazar, J. Bern Jordan & Brian Wentz, *Incorporating Tools and Technical Guidelines into the Web Accessibility Legal Framework for ADA Title III Public Accommodations*, 68 LOY. L. REV. 305, 315–17 (2022) (describing, among other things, application of Section 508 of the Rehabilitation Act to federal government websites and the application of the Air Carrier Access Act to airline websites only, but not more); Ahmad, *supra* note 24, at 352 (noting the ADA remains silent regarding web content accessibility guidelines that can be imposed under Section 508).

[29] 42 U.S.C. § 12182.

[30] H.R. REP. No. 101-485, pt. 2, at 317 (1990) ("It is critical to define places of public accommodations to include all places open to the public, not simply restaurants, hotels, and places of entertainment (which are the types of establishments covered by title II of the Civil Rights Act of 1964) because discrimination against people with disabilities is not limited to specific categories of public accommodations.").

[31] *Compare* 42 U.S.C. § 12181(7) (ranging from daycares to zoos), *with* 42 U.S.C. § 2000a(b) (covering hotels, restaurants, and places of entertainment).

III seemingly refer only to physical places.[32] Thus, early Title III applicability disputes often centered on non-physical claims like whether insurance *policies* were required to be nondiscriminatory or just an insurance company's *offices*.[33]

Aside from the textual limitations, Title III has fact-bound limitations that cabin the obligations of places of public accommodation. Namely, a failure to make the place accessible may not bring liability if necessary changes would "fundamentally alter" the place or "result in an undue burden" on the private entity.[34] This reflects Congress's balanced tradeoff between a broad accessibility mandate and the economic realities of its associated costs.[35] Although the only private remedy for a Title III discrimination claim is injunctive, the practical effect is economic.[36] An offending party under Title III must bear the costs of compliance, and injunctive relief yields frustration from some private parties about the fairness of cost allocations resulting from an otherwise non-damage-based remedy.[37]

This burden-shifting framework is triggered once accessibility discrimination claims are sufficiently pleaded against a regulated party. But frequently, the inquiry is never reached for web content. Some courts foreclose initial discrimination claims altogether, relying on the textual limitations of Title III.

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[32] With the exception of 42 U.S.C. § 12181(7)(F) which can be read more broadly given inclusion of services which may not necessitate in-person establishments.

[33] *See* Reid, *supra* note 8, at 597 (describing Title III interpretation issues and how "two decades of litigation . . . calcified" the "physical place" debate that was ultimately applied to Internet-related litigation.); *see also* Astor-Pratt, *supra* note 24, at 2236–39 (detailing the early "insurance cases" and how Title III applicability debates later covered television show hotlines and website accessibility discrimination).

[34] 42 U.S.C. § 12182(b)(2)(A)(iii).

[35] Economic tradeoffs with mandated accessibility had animated the pre-ADA regulatory landscape. When the Department of Health, Education, and Welfare capitulated to concerns of accessible building costs, the Berkeley Center for Independent Living initiated its historic twenty-six-day sit-in to pressure the HEW Secretary to push forward with regulations that would require regulated entities to spend money on accessibility for the first time. *See* Buccafusco, *supra* note 25, at 994.

[36] *See* 28 C.F.R. § 36.501.

[37] *See* Buccafusco, *supra* note 25, at 1000 (noting entities who oppose the cost-allocation structure tend to think "[i]f businesses will not gain enough revenue to offset the costs of accommodation, then forcing them to accommodate is an inefficient use of resources, absent government subsidies" and could "alter aspects of their private property as violations of their autonomy as property owners").

B. INTERPRETING PLACE OF PUBLIC ACCOMMODATION

In the absence of a binding federal interpretation of Title III to Internet platforms, a patchwork of precedents has developed. Discriminatory platform practices, intentional or not, can thus persist without accountability depending on where a claim is brought.

Numerous commentators have called for a uniform reading of the ADA that covers Internet-related claims.[38] Others have called for a statutory amendment either by adding a thirteenth category to Title III or creating a new, digitally-oriented Title IV.[39] Legislators have also attempted to modernize the Title III framework, proposing to extend its coverage to the digital entities of physical businesses.[40]

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[38] *See* Olivia Garcia, *Bringing the ADA out of the Dark Ages: Social Media Websites Should Be Required to Meet the Accessibility Requirements of the Americans with Disabilities Act*, 56 U.S.F. L. REV. 303, 312–16 (2021) (arguing the ADA should be interpreted to apply to social media websites); Mosley, *supra* note 22, at 165–71 (arguing for a new "bright-line rule" that imposes Title III obligations on certain websites and e-commerce businesses based on web traffic or profit measures); Johanna Smith & John Inazu, *Virtual Access: A New Framework for Disability and Human Flourishing in an Online World*, 2021 WIS. L. REV. 719, 766–67 (2021) (endorsing a flexible, functional approach to the existing public accommodation categories to extend them to online analogues).

[39] *See* Ahmad, *supra* note 24, at 352–54 (reviewing proposed bills that would create a Title IV in the ADA, arguing the approach is better than mere DOJ guidelines); Astor-Pratt, *supra* note 24, at 2262–63 ("Congress should identify a class of digital spaces (including websites and/or mobile applications, perhaps those that are most frequently accessed) and add this class to its definition of 'place of public accommodation'"); Garcia, *supra* note 38, at 320 ("Congress should amend the ADA to explicitly state that a website can be considered a public accommodation."); Lazar et al., *supra* note 28, at 332–37 (outlining proposals to statutorily incorporate WCAG standards, create a notice and cure framework, or add a thirteenth category to Title III); Christopher Mullen, *Places of Public Accommodation: Americans with Disabilities and the Battle for Internet Accessibility*, 11 DREXEL L. REV. 745, 768–69 (2019) (calling for an amendment in line with the purposivist approaches of the First and Seventh Circuits that all websites should be covered by the ADA); Smith & Inazu, *supra* note 38, at 781–84 (arguing for ADA amendments that differentiate online content platforms based on their functions). *See generally* Zachary E. Shapiro, Allison Rabkin Golden, Gregory E. Antill, Katherine Fang, Chaarushena Deb, Elizabeth Clarke, Alexis Kallen, Hanya M. Qureshi, Kai Shulman, Caroline V. Lawrence, Laura C. Hoffman, Megan S. Wright & Joseph J. Fins, *Designing an Americans with Abilities Act: Consciousness, Capabilities, and Civil Rights*, 63 B.C. L. REV. 1729 (2022).

[40] *See* Press Release, Tammy Duckworth, U.S. Sen. for Illinois, Duckworth, Sarbanes, Sessions Reintroducce Bicameral, Bipartisan Legislation to Help Make Websites and Software Applications Accessible for Americans with Disabilities (Sept. 28, 2023),

But as the law stands today, the circuits are dramatically split on the existing language of Title III and employ a variety of tests to discern whether claims can be brought against online entities.[41] In effect, the case law is underdeveloped as to what is required of an online platform to meet the ADA's antidiscrimination mandate.[42] Though the circuit split has been detailed by numerous authors, a brief outline of the various approaches will illuminate how the disuniformity complicates broader online content accessibility.[43]

The current landscape can be characterized as split between three main approaches to interpreting Title III's digital applicability. The first approach is essentially a textualist one—the ADA categorically does not apply to the Internet. Under this interpretation, the Third, Sixth, and Eleventh Circuits require ADA claims to correspond to physical places.[44] The logic derives from the "plain meaning" of the

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https://www.duckworth.senate.gov/news/press-releases/duckworth-sarbanes-sessions-reintroduce-bicameral-bipartisan-legislation-to-help-make-websites-and-software-applications-accessible-for-americans-with-disabilities [https://perma.cc/H4A9-82RY] (introducing a proposed framework that would require entities currently covered by the ADA to maintain websites and software applications that are accessible for Americans with disabilities).

[41] Reid, *supra* note 8, at 597 ("Nearly two decades of litigation have calcified . . . the debate.").

[42] Notably, recent commentary has not aligned regarding the characterization of the controlling tests in each circuit. *Compare id.* at 598–99 (characterizing the Eleventh Circuit as a "nexus" jurisdiction and the Third Circuit as physical place only), *with* Lazar et al., *supra* note 28, at 321–24 (noting the uncertainty of the Eleventh Circuit's "intangible barrier" standard as distinct from a nexus standard and considering the Third Circuit a "nexus" jurisdiction).

[43] *See* Ahmad, *supra* note 24 , at 336–43 (describing the "nexus" test and the circuit splits differing from it); Astor-Pratt, *supra* note 24, at 2232–46 (detailing applications of the "nexus" standard); Garcia, *supra* note 38, at 309–12 (comparing circuit precedents determining whether the ADA applies to "non-physical locations"); Lazar et al., *supra* note 28, at 320–24 (describing the "nexus" theory, "intangible barrier" standard, and other tests); Mosley, *supra* note 22, at 158–65 (characterizing circuit law as split among the "intention," "nexus," and "impermissible barrier" test); Mullen, *supra* note 39, at 754–64 (outlining a narrow interpretation, broad interpretation, and the "nexus" test); Reid, *supra* note 8, at 598–99 (succinctly summarizing the three tests as "nexus-between-website-and-place," "standalone-websites-as-place," and "physical places only (no websites)").

[44] Ford v. Schering-Plough Corp., 145 F.3d 601, 614 (3d Cir. 1998) (public accommodation does not refer to non-physical access); Parker v. Metropolitan Life Ins. Co., 121 F. 3d 1006, 1014 (6th Cir. 1997) (rejecting claims regarding a disability insurance policy with more generous benefits for physical illness than mental illness disabilities, noting "[t]he clear

definition (i.e., a place is physical) and the fact that the twelve statutory enumerations all correspond to physical places.[45] Thus, a claim for screen reader compatibility, for example, will never make it past the pleading stage. If we return to the two-step paradigm of structural access preceding content access, this approach forecloses any meaningful structural access. Essentially, structural discrimination is always permissible for a platform, and questions of how the ADA interacts with discriminatory content practices are never reached.

The second approach is the converse, a purposivist approach that categorically applies the ADA to the Internet. This approach is generally followed by the First, Second, and Seventh Circuits.[46] These courts read the text expansively and allow claims consistent with the Act's broad mandate for disability accessibility.[47] In the two-step paradigm, this approach mandates structural access for people with disabilities (or at least the ability to bring such claims). Thus, in these circuits, claims of discriminatory platform practices affecting structural access to content may be reached because disabled users are entitled to structural access online just like they would be in the physical world.

Finally, between these categorical approaches is the "nexus" approach—the ADA may apply to an online platform so long as the claimed discrimination corresponds to a physical counterpart. This is conclusively the approach in the Ninth Circuit, and some

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connotation of the words in § 12181(7) is that a public accommodation is a physical place"); Gil v. Winn-Dixie Stores, Inc., 993 F.3d 1266, 1277 (11th Cir. 2021) (similar).

[45] *See* Mosley, *supra* note 22, at 160 (noting the Third, Sixth, and Ninth Circuits "subscribe to [a] textualist reading of Title III"); Mullen, *supra* note 39, at 756–58 (reviewing early precedents, noting the courts' adherences to a "narrow interpretation" of the definition of a place of a public accommodation); Astor-Pratt, *supra* note 24, at 2241 (noting ADA applicability to websites depends on "whether the court favors rigid textualist construction" of Title III).

[46] Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, 37 F.3d 12 (1st Cir. 1994) (association with physical location not required to be within reach of Title III); Pallozzi v. Allstate Life Ins. Co., 192 F.3d 28, 32 (2d Cir. 1999) (holding places of public accommodation do not have to be physical structures); Doe v. Mut. of Omaha Ins. Co., 179 F.3d 557, 559 (7th Cir. 1999) (similar).

[47] *See* Astor-Pratt, *supra* note 24, at 2241 ("[C]ourts favoring purposivism find the Act's legislative history supports a broader reading of Title III's language."); Mullen, *supra* note 39, at 761–64 (describing the First Circuit and Seventh Circuit's approaches that read the inclusion of goods and services in the statute to be an indicator for Congress's intent that the ADA be construed broadly irrespective of the physical nature of the place).

commentators note the Eleventh Circuit might implicitly follow a similar standard.[48] The nexus standard asks whether alleged inaccessible portions of a website have a nexus to a real-world place or service covered by Title III. A notorious application was *Robles v. Domino's Pizza, LLC*, where the court allowed claims to go forward against Domino's online pizza tracker that was incompatible with a screen reader.[49] Because it corresponded to a service arising out of a storefront, there was a sufficient nexus to bring an ADA claim.[50] However, the nexus standard remains narrow, given its earlier beginnings in *National Federation of the Blind v. Target Corp.*, where the court limited claims specifically to the parts of a website related to physical stores.[51] This approach leaves uncertain what claims for nondiscriminatory structural access could survive, but may foreclose discriminatory content practice claims even when structural access claims meet the nexus standard.

In sum, the circuits have created a patchwork of holdings limiting Title III's applicability to online platforms. Unsurprisingly, this disuniformity may be the reason many ADA cases settle, in part because the circuits differ from each other, and in part because some approaches leave unclear how much of an online accessibility claim will survive pleading.[52]

C. THE CONFOUNDING THIRD-PARTY ISSUE

It is hard to characterize the inconsistent application of Title III to online platforms as anything other than a failure to "keep pace with the rapidly changing technology of the times."[53] As more commercial and social interactions move online, the need for online accessibility grows.[54] Increased interactivity yields important

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[48] Robles v. Domino's Pizza, LLC, 913 F.3d 898, 898 (9th Cir. 2019); *see also* Ahmad, *supra* note 24, at 337–41 (characterizing the nexus standard and interpreting the Eleventh Circuit's early ruling in *Rendon v. Valleycrest Productions Ltd.*, 294 F.3d 1279 (11th Cir. 2002) as consistent with it).

[49] *Robles*, 913 F.3d at 904–05.

[50] *Id.* at 905–06 ("[The] nexus between Domino's website and app and physical restaurants . . . is critical to our analysis.").

[51] Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006); *see also* Astor-Pratt, *supra* note 24, at 2242–44.

[52] *See* Reid, *supra* note 8, at 599 n.51 (collecting articles discussing the frequencies of settlement "[a]s a result of this uncertainty").

[53] H.R. REP. No. 101-485, pt. 2, at 391.

[54] South Dakota v. Wayfair, 585 U.S. 162, 164–65 (2018) (describing the "present realities of the interstate marketplace, where the Internet's prevalence and power have changed the dynamics of the national economy"); *see also* Astor-Pratt, *supra* note 24, at 2227–32 (observing how online commerce and platform usage continues to evolve post-COVID).

questions about public accommodations doctrine because many platforms now inherently depend on and benefit from the voluminous content of third parties interacting. As such, the platforms should have a legal responsibility to ensure the third-party content is accessible. But separating platform access issues from content moderation issues might not be a clean inquiry.

Ordinarily, Title III addresses the structural access problem created by designs and decisions of places of public accommodation. These might be claims for screen reader compatibility, improved web layouts for keyboard-based browsing, provision of voice recognition, or video captioning. Essentially, the dispute is between a disabled plaintiff and the platform itself to address its inaccessible structural designs. But left unclear is whether Title III can also be deployed to make third-party content structurally accessible too. If a social media website allowed navigation with a screen reader, but every page ultimately reached lacked captioning, alternative text, or voice-over text, would the constructive denial of content access be the fault of the platform or its users?

Consider accessibility issues that arise out of modern businesses that connect consumers with shared interests. Monthly delivery box services are a popular means to try new meal recipes or fashionable outfits.[55] Nuuly, for example, is a monthly subscription service where customers can browse through a digital closet and rent clothing for the month before returning it or choosing to buy it. The digital closet has a massive user-to-user review section where renters post pictures to demonstrate how garments fit, sparkle, color match, or stretch. How might Title III apply to a platform like this when users provide no alternative text or descriptions of their images? In some circuits, because there is no physical storefront for the service, ADA claims are foreclosed entirely.[56] But in others, where a Title III

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[55] For example, meal services like Hello Fresh, Purple Carrot, and Blue Apron send customers ingredients and recipe cards while fashion providers like Nuuly, Rent the Runway, or StitchFix send customers curated outfits, shoes, and accessories.

[56] *Compare* Access Now, Inc. v. Blue Apron, LLC, No. 17-CV-1 16-JL, 2017 WL 5186354, at *4 (D.N.H. Nov. 8, 2017) (concluding the meal delivery service, satisfies the definition of place of public accommodation as it "may amount to an online 'grocery store'"), *and* Gathers v. 1-800-Flowers.com, Inc., No. 17-CV-10273-IT, 2018 WL 839381, at *1 n.1 (D. Mass. Feb. 12, 2018) (allowing claims to proceed against an e-commerce floral shop that conceded its websites are places of public accommodation), *with* Earll v. eBay, Inc., 599 F. App'x 695, 696 (9th Cir. 2015) (holding the ADA is inapplicable to eBay because it is not an "actual, physical place"), *and* Namisnak v. Uber Techs., Inc., No. 17-CV-06124-RS, 2018 WL 7200717, at *4 (N.D. Cal. Oct. 3, 2018) (concluding Uber's ride-share

claim gets through the digital door, the claim could be met with issues imposing liability on the platform for the content of its users, or in content moderation vocabulary, for third-party content.

Suppose in *Target*, the website allowed users to leave comments, reviews, or product pictures.[57] Title III claims might proceed if Target structurally designed its website without screen reader compatibility, regardless of third-party user choices. But if Target's website was screen reader compatible, and commenting users failed to provide informative titles or alternative text on a product review image, then it would be third-party neglect creating accessibility issues. In that instance, would a court bar any Title III claims against Target because the third-party is not the "place of public accommodation" itself? Or would a court view Target's structural accessibility duties holistically and impose a requirement that Target caption any photos left uncaptioned by a third party? What if, instead, the court found that customer reviews lacked a nexus to storefront experiences and barred claims entirely? Of course, even if Target lost on all the preceding questions, it would still have another way to try and moot an accessibility inquiry—Section 230 immunity.

An online platform might argue that inaccessible user-generated content is not their responsibility, because such content is that of a third-party provider.[58] As for the third parties, customers generating the reviews, they are not places of public accommodation themselves and similarly have no duty to make their content accessible. Thus, even where ADA claims overcome a nexus barrier, Section 230 hypothetically awaits to create another. Platform providers can run an enterprise with core social and commercial aspects rendered structurally inaccessible to users with disabilities if they can absolve themselves from liability for the content they host. This underscores the need to recognize *structural access* issues, whether created by a platform or its users, as distinct from the content *moderation* issues created by platforms alone.

II. MODERATED FORECLOSURE: HOW SECTION 230 ENABLES INACCESSIBLE CONTENT PRACTICES

"The Internet and other interactive computer services have flourished, to the *benefit of all*

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service, operated through an application, does not qualify as a place of public accommodation).

[57] For example, a user might rank their satisfaction, comment on how frequently a physical store restocks their products, or post a picture showing the product's true material quality and how it fared during shipment and delivery.

[58] 47 U.S.C. § 230(f)(3).

> *Americans*, with a minimum of government regulation."[59]

Another product of the 1990s, the CDA was enacted only six years after the ADA.[60] Much like the ADA, it was designed to flexibly account for rapidly developing technology, and Congress expressly codified as much.[61] Perhaps in 1996, members of Congress truly believed the Internet functioned to the "benefit of all Americans," but by 1999 it was abundantly clear some of the largest platforms did not.[62]

Section 230 was designed as a content moderation statute plain and simple. At its core, it protects an online platform's ability to moderate content without the disincentives of liability for publishing third-party content.[63] The protection is a broad statutory immunity against claims pertaining to third-party speech, with narrow exemptions.[64] It is this broad immunity that has led courts to improperly conflate structural access issues with content moderation issues and compound the existing challenges of applying antidiscrimination laws like the ADA to online platforms. That is, if a court concludes the ADA applies to the Internet, and an antidiscrimination claim under the ADA entails the content of a third-party (such as image-based reviews or independent-seller product photos without textual descriptions), it appears Section 230 could immunize platforms from the claim since liability would inherently depend on the content of others.

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[59] *Id.* § 230(a)(4) (emphasis added).

[60] Pub. L. No. 104-104 (1996).

[61] 47 U.S.C. § 230(a) (codified statement of findings).

[62] In November 1999, the National Federation of the Blind sued America Online (AOL) in the District of Massachusetts for the AOL platform's general incompatibility with screen readers. The case settled in less than a year, prompting commentators to speculate AOL was avoiding a ruling that it was a place of public accommodation under the First Circuit's disability-friendly *Carparts* standard. *See* Nat'l Fed'n of the Blind v. America Online, Inc., No. 99CV12303-EFH (D. Mass. 1999); *see also* Oscar S. Cisneros, *AOL Settles Accessibility Suit*, WIRED (July 28, 2000), https://www.wired.com/2000/07/aol-settles-accessibility-suit/ [https://perma.cc/P2X6-VVM9] ("By reaching an agreement, AOL for now avoids a suit that sought to declare its service a virtual 'public accommodation' as per the ADA.").

[63] JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 64–67 (2019); *see also* Brief for Senator Ron Wyden and Former Representative Christopher Cox as Amici Curiae Supporting Respondents at 6–14, Gonzalez v. Google LLC, 598 U.S. 617 (2023) [hereinafter Wyden-Cox Amicus Brief] (Senator Wyden and Representative Cox were the core drafters of Section 230 in 1996).

[64] *See* 47 U.S.C. § 230(c)(1), (e).

This Part will explore (A) the history and scope of Section 230 immunity; (B) caselaw illustrating the application of Section 230 to general federal antidiscrimination claims; and (C) one of the only concrete examples of a Section 230 immunity inquiry following the ADA pleading gate, where otherwise tenable Internet-related Title III claims were nevertheless defeated by Section 230 immunity.

A. IMMUNITY AND ITS LIMITATIONS

The legal backdrop that preceded Section 230's passage is well known to those who have studied online content regulation. As Internet usage took off in the 1990s and millions of Americans started accessing content and interacting with each other from their homes, multiple platform liability frameworks arose for the content being generated by users. Online platforms were hosting third-party speech, and the law left unclear what liability might arise if a platform moderator engaged in any form of editorial functions.

Two competing approaches to liability evolved out of cases in New York. The first was *Cubby, Inc. v. CompuServe*, where the court held an online platform could not be liable for defamation claims based on user posts on its message board.[65] Motivating the court's decision was CompuServe's fortuitous laziness: CompuServe had not attempted to moderate its forum and thus lacked editorial liability for problematic defamatory posts.[66] Opposite *Cubby* was *Stratton Oakmont, Inc. v. Prodigy Services Company*, where an online platform (Prodigy) was held liable for defamation claims against a user because of its "conscious choice" to exercise editorial control over its forum.[67] The *Stratton Oakmont* court distinguished *Cubby* based on the platform's voluntary moderation practices.[68] As such, the pair of rulings created a perverse incentive for platforms to not moderate so as to avoid uncertain liability for "less-than-perfect content moderation."[69]

Against this backdrop, Congress passed Section 230 to immunize imperfect moderation decisions. The core of immunity lies in 47 U.S.C. § 230(c). Under Section 230(c)(1), a platform is functionally immune from claims that treat it as a "publisher or speaker" of another's content.[70] Under Section 230(c)(2), a platform is similarly immune from liability for decisions related to content

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[65] 776 F. Supp. 135, 137 (S.D.N.Y. 1991).

[66] *Id.* at 139–41.

[67] Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995).

[68] *Id.* at *3–5.

[69] *See* Wyden-Cox Amicus Brief, *supra* note 63, at 7.

[70] 47 U.S.C. § 230(c)(1).

moderation.[71] Given the breadth of immunity, Congress also enacted Section 230(e), which today exempts from immunity five categories of cases.[72] Combined, the two subsections delineate when platforms may claim immunity from liability for another's content and when they cannot. Not long after its passage, the Fourth Circuit handed down *Zeran v. America Online, Inc.*, effectuating Section 230's broad framework for immunity, batting down a negligence claim against AOL for its failure to remove defamatory posts.[73] Though only binding on the Fourth Circuit, the *Zeran* decision was a trailblazer, and indicative of how other circuits would eventually rule on claims functionally treating platforms as speakers.[74]

Although Section 230 has become a stalwart defense for online platforms, it is not absolute. Recently, some courts have foreclosed immunity assertions against claims premised on platform design rather than user content. For example, in *Lemmon v. Snap, Inc.*, the court allowed a case to proceed against Snap, on the theory it negligently designed a speed-measuring filter for Snapchat that inadvertently led to the death of three young adults.[75] The court reasoned immunity was unavailable to Snap because the plaintiff's claim "simply [did] not rest on third-party content."[76] Rather, it rested on a duty to design the platform in a way that did not pose unreasonable risk of injury.[77] Following *Lemmon*, similar product defect challenges have successfully broken through Section 230 too.[78] The budding line of cases appears to limit platforms,

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[71] *Id.* § 230(c)(2).

[72] *Id.* § 230(e) (exempting federal criminal law, intellectual property law, state laws (so long as they are consistent with the section), communications privacy law, and sex trafficking laws from immunity).

[73] 129 F.3d 327 (4th Cir. 1997).

[74] Doe v. MySpace Inc., 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content." (citing Green v. Am. Online, 318 F.3d 465, 471 (3d Cir. 2003))); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123–24 (9th Cir. 2003); Batzel v. Smith, 333 F.3d 1018, 1030–31 (9th Cir. 2003); Ben Ezra, Weinstein, & Co. v. Am. Online Inc., 206 F.3d 980, 984–86 (10th Cir. 2000).

[75] 995 F.3d 1085 (9th Cir. 2021). The speed filter became part of a viral trend where Snapchat users tried to capture a snapchat at a high speed in the hopes of unlocking Snapchat platform rewards and social clout. *Id.* at 1089.

[76] *Id.* at 1093.

[77] *Id.* at 1092 ("The duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers.").

[78] *In re* Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig., 702 F. Supp. 3d 809, 830 (N.D. Cal. 2023).

precluding immunity against claims based on design, irrespective of user content on the platform.

Alternatively, courts have limited immunity based on a platform's own contribution to the hosted content. Perhaps the most notorious example is *Fair Housing Council of San Fernando Valley v. Roommates.com*,[79] where the Ninth Circuit issued a mixed holding on immunity depending on the platform's material contributions to "the alleged illegality of the conduct."[80] The online housing platform was allegedly violating the Fair Housing Act (FHA) when it required users to answer questions as they registered for its housing-match service.[81] Because of the imposed requirement, the platform was considered a "developer" of the discriminatory third-party content expressing illegal preferences and thus an information content provider ineligible to claim immunity.[82] However, the court allowed Roommates.com to invoke immunity from housing discrimination claims for its optional, free-form comment section, that was solely the product of individual users' choice of information, because it played no part in inducing or developing those choices.[83]

Notably, the majority in *Roommates.com* sidestepped an important question though: whether Section 230(e)'s exemptions should have foreclosed the FHA claims.[84] Judge McKeown lamented the decision not to address the exemptions in her partial concurrence. She expressly addressed Section 230(e), noting Congress "did not add" the FHA to the list of exemptions alongside intellectual property and federal criminal law.[85] Because the FHA existed at the time the CDA was enacted, Judge McKeown reasoned Congress

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[79] 521 F.3d 1157 (9th Cir. 2008).

[80] *Id.* at 1168.

[81] *Id.* at 1161, 1166 ("Roommate requires each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household. . . . Here, the part of the profile that is alleged to offend the Fair Housing Act and state housing discrimination laws—the information about sex, family status and sexual orientation—is provided by subscribers in response to Roommate's questions, which they cannot refuse to answer if they want to use defendant's services.").

[82] *Id.* at 1171–72 (interpreting § 230(f)(3) and concluding "Roommate is directly involved with developing and enforcing a system that subjects subscribers to allegedly discriminatory housing practice" making it a developer "in whole or in part" of the discriminatory content).

[83] *Id.* at 1174 ("Roommate is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by Roommate.").

[84] Though under the majority's theory, the platform liability was based on its own role as an information content provider, so there was never any immunity to then be exempt from. *Id.* at 1164.

[85] 521 F.3d at 1187 (McKeown, J., concurring in part and dissenting in part).

could have included it, but chose not to, and thus the court should not exempt FHA claims either.[86] As discussed below, this reasoning is not uncommon among judges engaged in Section 230 inquiries, but creates problems of its own.

At bottom, courts can limit Section 230 immunity by allowing negligent design claims, concluding that the platform developed the problematic content, or interpreting the statute's exemptions narrowly. Thus, the scope of true content immunity is still subject to judicial interpretation and remains uncertain today.

B. ANTIDISCRIMINATION CLAIMS AND SECTION 230

Given the ways courts have limited Section 230 immunity, it is worth considering how they might do so when responding specifically to Title III antidiscrimination claims brought related to third-party content. For example, a claim arising through Title III for structural access to a platform and all of its content has similarities to a negligent design claim that can overcome Section 230 immunity. Both claims stem from a platform's conscious design choices or processes that allow negligent or discriminatory, inaccessible content to persist. Just like the negligent design theory, liability under Title III is not intrinsically tied to the substance of any content provided by third-party users. Rather, the claim (say, for missing alternative text or captions) relies on a platform's failure to make that third-party content accessible in some way.[87] Thus, liability is premised on structural designs rather than substantive moderation.

In this way, disability-related discrimination claims over online content occupy a somewhat unique position in comparison to other federal discrimination claims. What makes third-party content discriminatory does not inherently depend on any message or meaning of the content being shared, or how that meaning is moderated. Instead, it is the way in which the content is presented on or by a platform that renders it inaccessible and thus inequitable. Whether that is an intentional choice of the platform, or negligent choice of its third-party users, the content remains inaccessible all the same.

However, if Title III claims are treated like other discrimination claims, then Section 230 immunity creates serious barriers to digital accessibility. Judge McKeown's reasoning in *Roommates.com* is a fair starting point to illustrate how courts could broadly foreclose antidiscrimination claims. Recall that she reasoned the platform was immune from FHA claims because the antidiscrimination law predated Section 230 but was absent from its exemptions. Logically,

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[86] *Id.* at 1187–88 (noting Congress also subsequently amended the CDA but still failed to add FHA claims to the exemptions).

[87] 42 U.S.C. § 12182(b)(2)(A)(ii)–(iii).

that reasoning extends to a whole sweep of antidiscrimination laws enacted before 1996, like the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, The Fair Credit Reporting Act of 1970, and the Americans with Disabilities Act of 1990. Read narrowly, Section 230(e) would greenlight a lot of "lawful but awful" discrimination practices, some of which would ordinarily be forbidden offline.[88]

Other courts have reasoned similarly in non-ADA contexts too. As early as 2003, courts were addressing the intersection of Section 230 immunity and federal antidiscrimination laws. In *Noah v. AOL Time Warner, Inc.*, a pro se plaintiff brought suit under Title II of the Civil Rights Act for AOL's failure to intervene when chat room users posted allegedly harassing, blasphemous, and defamatory content based on the plaintiff's religion.[89] The claim seems like a quintessential immunity example: one user suing a platform for the defamatory statements of another user. But before addressing any immunity, the court determined the Title II claim was insufficient on its own because it lacked causality regarding AOL's conduct. But the court went further, expounding two more independent reasons for its judgment. First, the court determined the claim failed because chat rooms were "not a 'place of public accommodation'" under the Civil Rights Act, distinguishing them as "virtual forums for communication."[90] Though the reasoning is not directly applicable to ADA cases, the court's second ground for judgment revealed a more troubling issue for both antidiscrimination frameworks—"§ 230's expansive [immunity] language … plainly reaches" federal civil rights statutes.[91] Thus, the court determined antidiscrimination claims generally could be foreclosed by Section 230 immunity, regardless of their merits.

In the two decades since *Noah*, other courts have concluded the same, either because online platforms are not "places of public accommodation" or because they were protected from claims not in Section 230(e)'s narrow list of exemptions. Just like *Noah*, many of these cases involved pro se plaintiffs attempting to bring (sometimes misguided) civil rights claims against online platforms.[92] For

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[88] For discussion of how Section 230 facilitates content moderation-based racial harms, see Spencer Overton & Catherine Powell, *The Implications of Section 230 for Black Communities*, 66 WM. & MARY L. REV. 107, 161–68 (2024).

[89] Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 535 (E.D. Va. 2003), *aff'd*, No. 03-1770, 2004 WL 602711 (4th Cir. 2004).

[90] *Id.* at 537, 541 (noting "'places of public accommodation' are limited to actual, physical places").

[91] *Id.* at 539.

[92] Whether it is prudent for the courts to reach the interaction of Section 230 and civil rights claims is outside the scope of this paper, though this

example, in *Hall v. Twitter*, a user alleged his account was suspended because he was white.[93] Although Twitter asserted Section 230 immunity, the court dismissed the antidiscrimination claim on the merits.[94] But rather than dismiss on obvious causality grounds, the court cited out-of-circuit cases to expressly hold online companies like Twitter were not public accommodations under Title II of the Civil Rights Act.[95]

One of those out-of-circuit cases was *Elansari v. Meta, Inc.*, where the plaintiff alleged Meta (Facebook) "discriminated against him… as a Muslim" based on its content moderation choices to amplify some news reporting organizations while banning others.[96] The plaintiff's claim, like the one in *Hall*, treated Facebook as a place of public accommodation.[97] There, too, the court concluded Facebook was not a place of public accommodation, but instead did so by relying on Third Circuit ADA case law.[98] What's more, the court independently ruled on Meta's asserted Section 230 immunity, agreeing that the claims were similarly barred.[99] Although this seems like an ordinary immunity case, the court's decision to expressly address the public accommodation question, and mix the ADA precedent with Civil Rights Act claims, at least hints at a proclivity by the judiciary to read Section 230 expansively against federal antidiscrimination claims, even disability accessibility ones.[100]

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author finds it troubling that courts make such broad, sweeping statements about federal antidiscrimination law when the issues may not have been fully briefed with all normative consequences in mind.

[93] Hall v. Twitter, No. 20-cv-536-SE, 2023 WL 3322952 (D.N.H. May 9, 2023), *aff'd*, No. 23-1555, 2024 WL 3386131 (1st Cir. 2024) (alleging under a § 2000a claim that he was discriminated against because Twitter could discern his race through the political content of his tweets).

[94] *Id.* at *5.

[95] *Id.* at *4.

[96] Elansari v. Meta, Inc., No. CV 21-5325, 2022 WL 4635860, at *1 (E.D. Pa. Sept. 30, 2022), *aff'd*, No. 22-3060, 2024 WL 163080 (3d Cir. 2024).

[97] *Id.* at *3.

[98] *Id.* at *3 (citing Peoples v. Discover Fin. Servs., Inc., 387 F. App'x 179 (3d Cir. 2010) for its holding that "public accommodation" is limited to physical places).

[99] *Id.* at *6.

[100] *See* Sikhs for Justice, Inc. v. Facebook, Inc., 144 F. Supp. 3d 1088, 1096 (N.D. Cal. 2015) (holding that the "CDA precludes Plaintiff's Title II claim" that was premised on Facebook's alleged discriminatory blocking of content in India based on the plaintiff's religious beliefs); Dennis v. MyLife.Com, Inc., No. 20-CV-954, 2021 WL 6049830, at *7 (D.N.J. Dec. 20, 2021) (dismissing FCRA claims against a website that published inaccurate information obtained from third parties, noting the CDA's exemptions in 230(e) do not include FCRA, the FHA, Title II of the Civil

However, there appears to be one exception not listed in Section 230(e) that courts nevertheless allow when addressing antidiscrimination claims: constitutional claims. In *Federal Agency of News LLC v. Facebook, Inc. ("FAN")*, FAN, a Russian news organization, alleged that Facebook partnered with the U.S. government to improperly remove its content and shut down its account.[101] FAN originally pleaded a Title II Civil Rights Act claim under Section 2000a, but the court dismissed it after determining it was barred by Section 230.[102] But FAN also brought a *Bivens* action for First Amendment violations which the court determined was not barred by Section 230 immunity.[103] Ultimately, the court concluded there were insufficient allegations that the government conspired with Facebook to trigger the state-action doctrine and First Amendment liability for the platform.[104] Though this type of claim may be infrequent, it is indicative of a possible constitutional exception to Section 230 with an uncertain scope and applicability.[105]

In the absence of express statutory exemptions for antidiscrimination claims, courts have consistently allowed Section 230 immunity to defeat civil rights claims. Perhaps this is warranted and consistent with Section 230's purposes regarding third-party speech, or perhaps this is an unintended side effect. However, it leaves ADA claims in a precarious position. Disability-related discrimination claims over inaccessible content are uniquely situated compared to content-based discrimination. Thus, even where Title

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Rights Act of 1964, or the ADA); Wilson v. Twitter, No. 3:20-CV-00054, 2020 WL 3410349, at *12 (S.D.W. Va. May 1, 2020), *report and recommendation adopted*, No. CV 3:20-0054, 2020 WL 3256820 (S.D.W. Va. June 16, 2020) ("Claims brought pursuant to federal civil rights statutes, such as Title II of the CRA, are not exempted from the immunity provided by the CDA."); Domen v. Vimeo, Inc., 433 F. Supp. 3d 592, 605 (S.D.N.Y. 2020) ("State antidiscrimination laws, however, are not exempted from the reach of the CDA.").

[101] Fed. Agency of News LLC v. Facebook, Inc., 432 F. Supp. 3d 1107, 1112–13 (N.D. Cal 2020).

[102] *Id.* at 1114.

[103] *Id.* at 1114. *Bivens* claims are a type of monetary claim derived from a federal official's direct violation of the federal Constitution and are sometimes referred to as constitutional torts. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

[104] *Id.* at 1126–27.

[105] For example, if a plaintiff sufficiently alleged facts to trigger the state-action doctrine against an online platform, effectively bringing it within the purview of the First Amendment, could the platform then assert a Section 230 moderation immunity against any subsequent civil rights deprivation claim under 42 U.S.C. § 1983? It seems so, given Section 230 does not differentiate between government or private platforms, and Section 230(e) does not exempt Section 1983 deprivation of rights claims.

III claims overcome some courts' nexus barrier, Section 230 may be lying in wait to block meaningful accessibility reform if they are treated the same.

C. ADA CLAIMS AND SECTION 230

With so many rulings disfavoring various federal antidiscrimination claims against online platforms, it is hardly surprising that disability claims would rarely fare better. Once a plaintiff clears the threshold question of Title III's online applicability, they still must clear the question of whether an accessibility claim is aimed at structural platform access or instead moderated content issues that could trigger Section 230 immunity.

While some structural access claims under Title III have seen success and been allowed to proceed against platforms, courts have rarely encountered a subsequent Section 230 immunity inquiry regarding the third-party content being accessed. Even though it is rare, how courts might handle the subsequent inquiry is a question that must be answered if the ADA is ever more broadly applied to online platforms. Given one court's handling of the ADA-CDA inquiry, discussed below, it seems Section 230 is a lurking barrier for online accessibility that might still foreclose such cases at the pleading stage. At least one scholar has raised this alarm in recent years but given the rarity of both ADA and Section 230 claims being fully analyzed in one case, the barrier looms largely as a potential issue not yet borne out.[106]

Among Internet-related Title III claims, numerous cases address structural platform design, like screen reader compatibility.[107] These claims often go directly to the software on a platform and the placement of links, content boxes, and underlying layouts for a screen reader to navigate.[108] However, other Internet-related claims arise out of a mix of content moderation and structural choices, like Facebook's allegedly faulty design that does not allow users to

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[106] *See* Reid, *supra* note 8, at 628 (noting the prospect that online platforms might invoke Section 230 as a defense to Title III claims); Blake E. Reid, *Race, Disability, and Section 230*, *in* BERKELEY CTR. FOR L. & TECH. & BERKELEY TECH. L.J. FALL 2024 SYMP.: RACE, RIGHTS, AND INNOVATION: CULTIVATING EQUITY IN THE DIGITAL WORLD (similar).

[107] *See* Reid, *supra* note 8, at 597 ("Nearly all Title III Internet-related litigation has been focused on websites, and primarily on compatibility with screen readers for blind people.").

[108] For example, the plaintiff in *Brooks v. Tapestry, Inc.*, brought suit against the Kate Spade website, alleging the website did not have proper alternative text for its links, failed to work with keyboard commands, and required the plaintiff to spend "an inordinate amount of time . . . compared to sighted consumers" to identify content on the website. No. 2:21-cv-00156-DAD-JDP, 2023 WL 2025024, at *1 (E.D. Cal. Feb. 15, 2023).

disable auto-playing gifs and videos "to prevent seizures."[109] The feature could be characterized as a structural design choice that forgets disability, or as a conscious moderation choice to maintain a user's attention to third-party content via auto-play and the colloquial doomscroll. Finally, some Internet-related claims directly implicate a platform's own content. Captioning, for example, was at the center of two significant cases in 2012 and 2014 where organizations that advocate on behalf of deaf and hard of hearing individuals brought claims against online platforms for inadequately-captioned video content.[110] Section 230, however, was not at issue, likely because both platforms were the primary information content providers and responsible for the posted videos at issue.

However, in *National Association of the Deaf v. Harvard University ("Harvard University")*, Title III captioning claims directly collided with Section 230 and revealed how collapsing structural access questions into content moderation questions becomes problematic.[111] At issue was Harvard's online educational content that allegedly lacked timely and accurate captioning for a significant amount of content.[112] The plaintiffs brought claims under Section 504 of the Rehabilitation Act and Title III of the ADA and alleged Harvard used "administrative methods, practices, procedures and policies that result in a lack of captioning or inaccurate captioning."[113] Of note, the plaintiffs challenged three forms of content: (i) Harvard's content posted on its own websites, (ii) Harvard's content posted on third-party websites, such as YouTube, and (iii) third-party content linked to or embedded on Harvard's own websites.[114]

The plaintiffs faced a somewhat surprising initial challenge regarding Title III's online applicability to Harvard's websites. Even

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[109] Lloyd v. Facebook, Inc., No. 21-cv-10075-EMC, 2022 WL 4913347, at *2 (N.D. Cal. Oct. 3, 2022). Recall the dangers of this platform design setup, whereby a moderated content feed could serve numerous seizure-inducing images consecutively on an individual with epilepsy. *See, e.g.*, Wolfe & Ahmed, *supra* note 10.

[110] Nat'l Ass'n of the Deaf v. Netflix, Inc., 869 F. Supp. 2d 196, 199 (D. Mass. 2012)*;* Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc. (*GLAAD*), 742 F.3d 414, 420-21 (9th Cir. 2014). For a thoughtful perspective on how state antidiscrimination claims like those in *GLAAD* might trigger issues with the dormant commerce clause, see Goldsmith & Volokh, *supra* note 18, at 1112–23.

[111] 377 F. Supp. 3d 49 (D. Mass. 2019).

[112] *Id.* at 54.

[113] *Id.* at 54, 63 (alleging a "failure to provide the captioning necessary to ensure effective communication and an equal opportunity for deaf and hard of hearing individuals to benefit from its online audiovisual content").

[114] *Id.* at 54.

though the First Circuit categorically allows Internet-related claims, and educational institutions are squarely covered under Title III,[115] Harvard argued for a nexus standard and claimed under Title III it had "no obligation to make content that originates with a third party accessible to disabled individuals" when it "merely hosts" the content.[116] While this sounds exactly like a Section 230 defense to Title III, the court held that ADA obligations could extend to third-party content a platform chooses to host and concluded the Title III claims could permissibly be raised.[117] Thus, the court seemingly found that nondiscriminatory structural access claims arising out of the ADA could impose obligations on a platform, even when the inaccessible content was that of another. But on the pleadings, the court could not determine the fact-bound question of whether Title III's "fundamental alteration" and "undue burden" framework based on the possible costs of captioning third-party content would absolve Harvard from liability.[118] Regardless, the first part of the opinion stands for an important Title III accessibility holding—structural access to a platform can be dependent on making third-party content accessible.

However, the court then turned to analyzing the Section 230 defense raised in response to an otherwise viable Title III claim, as applied to the third-party content. Although the plaintiffs framed their complaint as "disability discrimination based on a *lack of access* rather than on the *content of the speech*," the court concluded the claim was precluded by reason of the exemptions in Section 230(e).[119] The court was apparently unconvinced that the claim of nondiscriminatory structural access was distinct from a claim dependent on the information content of third-party posts, and effectively collapsed the access-moderation distinction into one immunity inquiry. The court noted the ADA was missing from Section 230(e) and analogized to a Seventh Circuit case that

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[115] *See* discussion *supra* Part I.B; 42 U.S.C. § 12181(7)(J).

[116] *Harvard University*, 377 F. Supp. 3d at 57–61.

[117] *Id.* at 61 (analogizing to Title III obligations for movie theaters and citing the DOJ's promulgated guidelines that require public accommodations to make auxiliary goods and services available before denying Harvard's motion for judgment on the pleadings).

[118] *Id.* ("This 'does not mean that Harvard must provide captioning as a matter of law. Harvard . . . may be able to demonstrate that providing captioning, or any other available auxiliary aid or service, "would fundamentally alter the nature" of its service or result in an undue burden.'").

[119] *Id.* at 66 ("The CDA exempts certain laws from its reach. Federal and state antidiscrimination statutes are not exempted.") (emphasis added).

foreclosed liability for the FHA on the same grounds.[120] Finally, the court analogized to *Doe v. Backpage.com*, where the First Circuit recognized the tension of Section 230 with sex trafficking laws before ultimately allowing platform immunity.[121] The court noted that legislative efforts like Title III and Section 504, while laudable, could not overcome their textual absence from Section 230(e) and thus proceeded to a *Roommates.com*-like inquiry as applied to Harvard's website. Functionally, the court took a *Roommates.com* approach rather than a *Lemmon* approach to immunity and turned its focus to who contributed to the content rather than viewing the claim holistically as one rooted in design duties of the place where the content was contributed.[122]

Applying the controlling three-part inquiry for Harvard to invoke immunity, the court easily concluded that Harvard's websites were interactive computer services and that the claims sought to treat Harvard as a publisher.[123] However, the court could not conclude whether Harvard itself was an information content provider as to "information on its platforms that originates with students, faculty members, or other scholars"[124] and denied the immunity defense as premature insofar as it related to that content.[125] But that ruling only addressed the first two content categories, and the court moved on to grant immunity for the third category: third-party content linked to or embedded on Harvard's websites.[126] The court concluded, in no uncertain terms, that when Harvard took content that it did not create or develop in whole or in part and embedded that content in its own audiovisual content, it would be entitled to Section 230 immunity.[127]

The holding seems to have misapplied Section 230 and possibly created an accessibility loophole for Harvard. If Harvard created a page on its platform and embedded an uncaptioned video hosted by another, under the court's theory, "Harvard cannot be [held liable as] an information content provider as to [the] embedded content."[128] But that ignores the fact that Harvard is the entity that "provided" the page and affirmatively chose to embed the content.[129] This is not an

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[120] *Id.* (discussing Chi. Laws. Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008)).

[121] *Id.* (discussing Jane Doe No. 1. v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016)).

[122] *See* discussion *supra* Parts II.A and II.B.

[123] *Harvard University*, 377 F. Supp. 3d at 67–68 (applying the *Lycos* inquiry).

[124] *Id.* at 69.

[125] *Id.*

[126] *Id.* at 69–70.

[127] *Id.* at 68–70.

[128] *Id.* at 69.

[129] 47 U.S.C. § 230(c)(1).

ordinary case of retweeting another user's video or hosting a landing page where somebody else uploads videos. If Harvard had embedded a patently defamatory (or inaccessible) video, it seemingly would have escaped all liability even though it affirmatively sought and incorporated the content into its own materials.[130] Given that the case was only at the pleadings stage and relatively little was known about the website's structure, it is entirely possible that the holding did not extend that far. And though the case has since settled, the ruling does invite speculation and uncertainty about Title III's application to all content on online platforms, whether host- or user-generated.[131]

In sum, there is a wide range of uncertainty and obstacles in bringing a Title III nondiscrimination claim against an online platform. Whether those obstacles are rooted in Title III online applicability tests or created by the wall of Section 230 immunity, the existing regulatory frameworks should be changed to provide clarity and enable better digital accessibility for all.

III. TOWARDS MODERATED NONDISCRIMINATION

While Congress has come close to amending the ADA in recent years and the DOJ has considered promulgating new regulations, no significant changes have come to fruition.[132] Section 230 has also been a target for recent reform, but similarly has gone unchanged.[133]

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[130] While it is possible the court's "embedded content" was nuanced and particular to the captioning content in the context of ADA, the court cannot have its cake and eat it too. Either Section 230 is rigidly, textually exclusive of ADA considerations or it is not.

[131] *See* Lucy Liu, *Harvard to Caption Online Video Content Following Lawsuit Settlement*, HARV. CRIMSON (Dec. 2, 2019), https://www.thecrimson.com/article/2019/12/2/Harvard-settles-caption-lawsuit/ [https://perma.cc/7W UC-8ZUT].

[132] *See* Mosley, *supra* note 22, at 154–58 (tracking DOJ guideline reforms and the sputtering of *The Online Accessibility Act* that would have added federal civil rights claims to the § 230(e) exemptions).

[133] Gregory M. Dickinson, *Section 230: A Juridical History*, 28 STAN. TECH. L. REV. 1, 27–32 (2024) (reviewing recent efforts to amend Section 230 to limit immunities for certain hosted content or practices like AI or profiting from user misconduct); *Legislative Proposal to Sunset Section 230 of the Communications Decency Act: Hearing Before the Subcomm. on Commc'ns & Tech. of the H. Comm. on Energy & Com.*, 118th Cong. (2024); Lauren Feiner, *Lawmakers are Trying to Repeal Section 230 Again*, THE VERGE (Mar. 21, 2025), https://www.theverge.com/news/634189/section-230-repeal-graham-durbin [https://perma.cc/5TRN-58VH]; Julia Shapero & Miranda Nazzaro, *Section 230 Fight Revived*, THE HILL (Apr. 2, 2025), https://thehill.com/newsletters/technology/5229136-section-230-fight-revived/ [https://perma.cc/JJ8A-23JB].

In the face of judicial uncertainty as to the bounds of Section 230 immunity and the applicability of Title III online, there is a dearth of caselaw that elaborates what is required for online platforms to not only make their content accessible, but the content of millions of their third-party users interacting as well. Together, the ADA and CDA stymie courts from reaching a burden-shifting inquiry to determine what content practices are fundamental alterations or undue burdens on the online platforms.

But digital accessibility should have been the default interpretation of the ADA and its mandate for general accessibility. Over three decades have passed since the ADA's adoption, and its impacts have been felt greatly by those with disabilities and those without.[134] The question of physical accessibility has not so easily been dismissed at the pleading stages of litigation in the way digital claims have been, and courts often progress towards accessibility inquiries that facilitate real change to places of public accommodation. If the ADA's broad mandate for accessibility is to be brought into the digital landscape, then the courts need to be empowered to apply the same burden-shifting approach to online content practices and not be blocked by Section 230 in doing so either.

As Congress reconsiders Section 230, legislators should seriously consider integrating the ADA's antidiscrimination frameworks into a modernized immunity approach. Amending Section 230 to account for Title III of the ADA is a ripe starting point, especially if Congress continues to ignore the issue of Title III's online applicability. This Part will tie together the ADA and CDA and provide concrete proposals to harmonize them with Congressional action. It will proceed by: (A) comparing the overlapping policy goal to address scale between the ADA and Section 230; (B) proposing means for facilitating total exemption for ADA claims from Section 230 immunity; and (C) providing alternative proposals for qualified exemptions from Section 230 using modern online design standards and other objective metrics like web traffic or net profits that may be more palatable in the current political climate.

A. THE INTERSECTION OF THE ADA AND THE CDA

Both Title III and Section 230 were enacted in the 1990s on the cusp of the Internet revolution, and both expressed broad statutory goals to enable flexibility in the face of technological change. As modernization efforts occur to bring the statutory regimes into the

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[134] *See* Buccafusco, *supra* note 25, at 999–1000 (discussing how federal disability policy created changes like ramps, elevators, and curb cuts that benefit the public at large).

21st century, Congress would do well to consider the overlapping policy considerations that each attempt to address.

For example, both areas of law work to address the significant challenges of scale. Title III addressed the sheer scale of inaccessibility of physical architecture and created an *ex post* injunctive remedy for private structural discrimination claims. Where any of the possible twelve places of public accommodation maintained an inaccessible environment for a person with a disability, they could be held liable and required to remedy their structural barriers. Under a backward-looking approach, inaccessible designs (say from decades-old buildings) could be evaluated under the burden-shifting "fundamental alteration," "undue burden," and "readily achievable" inquiries to ensure the large-scale remedial purposes of the ADA did not unduly impose financial costs on existing, private businesses.[135] Importantly, the ADA also took a forward-looking approach and subjected new construction to accessible design standards as a new default starting point.[136] Thus, the bifurcated framework permitted a backward-looking case-by-case inquiry on the one hand for old structures and mandated a forward-looking categorical standard on the other for new ones.[137]

Of course, this approach to distributing the social costs of accessible design was not perfect. Recently, serial litigation has raised concerns that litigation costs and the practical costs associated with injunctive relief might be too heavy a tax imposed on private entities.[138] Such a result overlaps with the concerns the drafters of Section 230 sought to avoid when they crafted immunity to prevent serial litigation that might otherwise chill online innovation of platforms.[139] If a platform were susceptible to incessant litigation

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[135] 42 U.S.C. § 12182(b)(2)(A); *see* Buccafusco, *supra* note 25, at 995–96.

[136] *See* Buccafusco, *supra* note 25, at 995–96.

[137] *See id.* at 958 (noting the ADA solves coordination problems to bring socially valuable changes, including designs like "ramps, elevators, and curb cuts [that] create accessibility for many users, whether they have a disability or not").

[138] *See* Lazar et al., *supra* note 28, at 327–331 (discussing the issues attendant to "drive-by" Title III lawsuits where serial plaintiffs sue multiple entities at once "without actually knowing whether [defendant] websites are accessible"); Astor-Pratt, *supra* note 24, at 2253–54 (commenting on the prevalence of "predatory litigation" under Title III and scholarly disagreement as to its value).

[139] *See* discussion *supra* Part II.A (recalling the competing frameworks of the *Stratton Oakmont* and *Cubby* courts); 47 U.S.C. § 230(b)(3)–(4) (codifying a Congressional goal of "encourage[ing] the development of technologies which maximize user control over what information is

over the content of others, it would never be able to invest time or resources into forward-looking approaches, new moderation techniques, or revolutionary platform designs.

Section 230 therefore reflected a different forward-looking policy than the ADA for the new construction of the Internet. There was simply no backward-looking Internet infrastructure to remedy, and platform developers and moderators were still in the nascent stages of hosting user content and interaction at a massive scale. Rather than anticipatorily impose a set of moderation and design standards, the CDA settled on a categorical choice to have none. So long as a claim did not fall into one of the narrow exemptions from immunity, a platform could moderate and make content decisions as it saw fit. Thus, where the ADA was geared toward forward-looking broad accessibility standards to prevent the design failures of the past, the CDA was geared toward forward-looking broad experimentation to enable design failures of the future.

Naturally, the goals of the two regimes are in tension, given that their responses to scale and new construction were different. As a result, Section 230's broad immunity can directly collide with Title III's broad antidiscrimination mandate. But courts have also interpreted both regimes and their purported breadth using similar approaches. To effectuate the goals of broad immunity or broad antidiscrimination, the judiciary has developed similar styles of reasoning. For example, some courts have taken a case-by-case, context-specific approach to content moderation immunity. Consider the holdings in both *Roommates.com* and *Harvard University* that parsed through individual content types, allowing only partial immunity if a platform did not contribute to the development of its hosted content.[140] This particularized framework is not unlike the Title III inquiries in *Target* and *Robles* that parsed through individual portions of websites to determine if a nexus connected them to physical storefronts and offerings.[141] Alternatively, other courts have ended their analyses under both regimes at a higher level. Consider, for example, the permissive standards that categorically allow Title III claims to apply to online platforms or the restrictive standards that categorically bar their application entirely.[142] This, too, is not unlike how courts treat Section 230 categorically, either granting broad immunity against negligence theories like those in *Zeran* or

received," and to "remove disincentives for the development and utilization of blocking and filtering technologies").

[140] *See* discussion *supra* Part II.B.

[141] *See* discussion *supra* Part I.B.

[142] *See* discussion *supra* Part I.B.

Backpage.com or by foreclosing immunity altogether, as in the product liability cases.[143]

At bottom, the ADA and CDA both address forward-looking design and scale questions, and the courts are capable of interpreting the regimes independently and together. Any Section 230 and Title III amendments will inherently be built on this shared foundation, and there is no reason both frameworks cannot be addressed together going forward. Though the Supreme Court has never squarely addressed the applicability of Title III to the Internet, it has not been shy in effectuating the ADA's "broad protection for the disabled" in unique and novel contexts.[144] Perhaps it is time that Congress follow suit and do the same with Section 230.

B. TOTAL EXEMPTION

While Title III has textual ambiguities that limit its application to online platforms, it also has textual ambiguities that make a harmonious reading of its burden-shifting framework with Section 230 difficult. That is, even if a Title III antidiscrimination claim were permitted to proceed against an online platform, how the content and platform are challenged could determine whether the claim evades Section 230 immunity or is doomed by it. When applied to an online platform, the language of the ADA that imposes antidiscrimination obligations on places of public accommodation could be read to impose moderation decisions and thus liability that is otherwise exempted by Section 230. As such, one approach to harmonizing the ADA and CDA might be to create a total exemption from Section 230 immunity for any claims arising out of the ADA and force the claims past the pleading stages and into a burden-shifting inquiry.

For example, Title III's antidiscrimination obligations trigger when a public accommodation blocks access to "goods [or] services" by failing to make "reasonable modifications in policies, practices, or procedures."[145] Liability can also be imposed for a failure "to take such steps as may be necessary" to prevent disabled individuals from being "excluded, denied services, segregated, or otherwise treated differently."[146] Textually, these claims should squarely apply to a

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[143] *See* discussion *supra* Part I.C.

[144] Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 132, 136–38 (2005) (ruling with a plurality acceding to a context-specific approach to applying Title III to certain portions of foreign-flag cruise ships, relying on the "readily achievable" framework, to ensure a harmonious application of the ADA with international law); Biden v. Knight First Amend. Inst. at Columbia Univ., 141, S.Ct. 1220, 1225 (2021) (Thomas, J., concurring) (noting that lower courts are split on the application of federal accommodations law to non-physical locations).

[145] 42 U.S.C. § 12182(b)(2)(A)(ii).

[146] *Id.* § 12182(b)(2)(A)(iii) (addressing auxiliary aids and services).

platform's own web design and layout choices. But left uncertain is how the language extends to platform actions like ignoring captioning requests on third-party content, curating social media feeds with auto-played strobing gifs, or allowing product postings with nondescriptive titles. On the one hand, such actions could qualify as platform "policies" or "practices" that constructively "exclude[]" or "den[y] services." On the other, they could qualify as permissible and immunized moderation practices for third-party content under Section 230. Even when a court concluded that a Title III claim might yield liability for hosting third-party content, like in *Harvard University*, it might then turn to Section 230(e) to preclude liability and immunize content hosts anyway.[147]

Thus, one modest proposal may be to simply insert a sixth statutory exemption into Section 230 that exempts immunity for all Title III claims:

> 47 U.S.C. § 230(e)(6) – No Effect on Public Accommodations Law
>
> Nothing in this section shall be construed to limit the application of the Title III of the Americans with Disabilities Act.

This proposal has obvious drawbacks of continuing to sidestep the Title III online-applicability issue currently splitting the circuits. Rather than impose ADA liability for platforms nationwide, this exemption would be deployed only in circuits where courts have already held Title III claims can be brought against online platforms (with or without a nexus requirement). Although it would create a fragmented liability structure across jurisdictions, at least one circuit has conclusively held that platforms can meet jurisdiction-specific accessibility requirements without triggering broader Dormant Commerce Clause concerns that arise from the Internet's interstate ubiquitousness.[148] Thus, an experimentation-friendly approach, consonant with Section 230's aims, may be apt. Omitting similar state law claims from the exemption in this proposal similarly reduces risks and challenges that states like California have faced in

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[147] Nat'l Ass'n of the Deaf v. Harvard Univ., 377 F. Supp. 3d 49, 61 (D. Mass. 2019) ("Harvard . . . may be able to demonstrate that providing captioning, or any other available auxiliary aid or service, 'would fundamentally alter the nature' of its service or result in an undue burden.").

[148] Greater L.A. Agency on Deafness, Inc. v. Cable News Network, Inc., 742 F.3d 414, 432–33 (9th Cir. 2014) (noting California state law accessibility claims against CNN's online platform withstood a dormant Commerce Clause challenge).

trying to balance accessibility mandates with the risks of repeat or abusive litigants.[149]

An alternative proposal could go one step further and expressly apply Title III to interactive computer services, sidestepping the circuit split for the purposes of a CDA immunity inquiry:

> 47 U.S.C. § 230(f)(2) – Interactive Computer Service
>
> The term "interactive computer service" means…. A provider of an interactive computer service shall be considered a place of public accommodation under Title III of the Americans with Disabilities Act.

Coupling this with a sixth statutory exemption described above would allow courts to bypass any question of whether Title III claims can be brought against online platforms and instead focus the inquiry on specific accessibility discrimination claims to determine what remedies might be enforced to make platforms accessible without "undue burden[s]."[150] Although this proposal would allow Title III claims to be brought against platforms as a matter of law, it would not mean the platforms are automatically liable for the accessibility of third-party content. Instead, a body of case law could finally develop under the ADA's burden-shifting framework that would address fact-bound questions about what platform practices are legally obliged without fundamentally altering a platform.[151] This is exactly how the *Harvard University* court reasoned it could rule had Section 230 not been a barrier, and such an amendment would have allowed that court to reach fact-bound questions regarding Title III obligations in the virtual world.[152]

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[149] Compare this proposal to 47 U.S.C. § 230(e)(3)–(5) where similar state law claims are also exempted from immunity. *See* Arroyo v. Rosas, 19 F.4th 1202, 1214 (9th Cir. 2021) (reviewing in detail California's legislative attempts to reel in litigants' use of state antidiscrimination claims under the Unruh Act and setting a standard in the Ninth Circuit that allows declining supplemental jurisdiction over state claims paired to ADA claims).

[150] 42 U.S.C. § 12182(b)(2)(A)(iii).

[151] *Id.*; *see* Reid, *supra* note 8, at 616–19 (observing "neither the courts nor DOJ have demonstrated a significant ability to interrogate the suitability of WCAG in serving Title III's goals, to alter and augment the content of WCAG to serve the goal of website accessibility, or to provide sophisticated and muscular enforcement of its terms").

[152] *Harvard University*, 377 F. Supp. 3d at 61 (declining to grant judgment on the pleadings regarding the applicability of Title III to hosted content).

Enabling courts to explore remedies under this framework might also raise the platform design floor to ensure all content is accessible at the outset, regardless of whether the content is user-generated or platform-created. Design standards are a touchstone of disability and public accommodations law. Throughout the 1960s, advocates created accessible design standards and pushed for governments to adopt them into local building codes.[153] Those standards were ultimately what informed the forward-looking approach to making physical society accessible under the ADA in 1990.[154] Analogous digital design standards like the Web Content Accessibility Guidelines (WCAG) have been in development for decades and could be a similar starting point for a court's forward-looking considerations.[155] Given the Department of Justice recently finalized a rule imposing WCAG standards on websites under its Title II purview, courts and Congress alike have no shortage of reference points for integrating the standards into a modernized immunity framework.[156]

C. CONDITIONED EXEMPTION

While amendment approaches which totally exempt Title III claims from Section 230 immunity would create bright-line rules and usher in normatively attractive platform designs, the current political appetite for inclusive and equitable modifications in everyday life is severely lacking and may make it difficult to incorporate the ADA into Section 230 amendments outright. Even more, the associated scale and implementation costs of a categorical application might make some observers hesitant. If courts miscalculated the costs of making platforms accessible or misperceived the feasibility of integrating accessible practices with the scale of third-party user content, small platforms could be overburdened quickly by remedial costs.

Thus, a less heavy-handed approach might better align with the initial aims of Section 230's content moderation regime that did not

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[153] *See* Buccafusco, *supra* note 25, at 986–96 (detailing how the work of Timothy Nugent led to the development of the ANSI 117.1 building design standards that would later become central elements to federal accessibility law).

[154] *Id.*

[155] Lazar et al., *supra* note 28, at 312, 325–27 (noting "governments around the world accept WCAG as the gold standard" and reviewing how WCAG compliance might be a measurable remedy for Title III claims and observing the Ninth Circuit's consistent ruling with the framework in *Robles*); *see also* Online Accessibility Act, H.R. 8478, 116th Cong. (2020) (attempting to require web accessibility under the ADA and incorporating WCAG as standards).

[156] *See* 28 C.F.R. § 35.200–205; 89 Fed. Reg. 31320 (Apr. 24, 2024).

unduly punish moderation practices, chill development, or mandate a one-size-fits-all approach. Rather than fully exempting antidiscrimination claims, Congress might instead condition CDA immunity on some baseline standards to ensure small online platforms are not taken offline due to unexpected costs of compliance (i.e., a screening framework). Those standards may be technical in nature like WCAG, commercial, or social. An example of how CDA immunity might be conditioned on technical standards would function similarly to a Section 230(e) exemption today and preclude immunity as a default if some defined standards were not met:

> 47 U.S.C. § 230(c)(3) – Qualified Protection
> To claim immunity from liability under this section, a provider of an interactive computer service must demonstrate the interactive computer service is compliant with all [online design standards set forth in Title III or in Regulations adopted under Title III].

Such an approach would align generally with the purposes of public accommodation doctrine—namely, if you act as though you are open to all, you should be designed such that you are open to all. Thus, to claim immunity based on others' speech, a platform must at least be structurally accessible for *all* others to engage in speech. Of course, this approach raises questions about "immunity" itself, which is supposed to limit litigation and prevent a platform from being caught up in legal costs; the approach is really more like a safe harbor. But any concern over litigation costs to prove compliance could be mitigated by incorporating the compliance inquiry into an affirmative defense at the pleading stage or perhaps by enabling the DOJ (or some other agency) to act as a registration or certification body. Such a process would centralize the fact-finding costs of compliance and enable a platform that is repeatedly challenged to assert a defense with relative ease and minimal cost.[157]

Alternatively, another approach to facilitating design standards is a notice-and-cure framework, whereby plaintiffs must first file administrative complaints and allow remediation attempts before going to court.[158] Such an approach aligns with the policy balancing

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[157] Though this certification approach may be inflexible and could allow an earlier certification to be used to mask later noncompliant activity.

[158] *See* Lazar et al., *supra* note 28, at 332–33 (discussing a ninety-day notice period proposal and noting pro-business advocates favor this approach while disability rights advocates disfavor it); *see also* Overton & Powell, *supra* note 88, at 180–82 (considering a similar notice and takedown proposal to Section 230 reform that would require platforms upon

of Title III's available relief being injunctive rather than damages-based, favoring practical resolutions and progress over instant monetary relief.

Finally, a conditioned immunity might curtail immunity based on social or commercial standards. On point here is Victoria Mosley's proposed "traffic or profit" test for screening Title III claims against websites.[159] Though this test was proposed to determine whether Title III generally applies to an online platform based on the platform's volume of web traffic or net profits, it could be applied as a broader Section 230 qualifier that takes as a given Title III's applicability to online platforms:

> 47 U.S.C. § 230(c)(3) – Qualified Protection
>
> A provider of an interactive computer service that either (i) [has X impressions, visits, interactions, or other similar user activity per month] or (ii) [generates $Y in annual revenue] must demonstrate the interactive computer service is compliant with all standards [set forth in Title III or in Regulations Adopted under Title III] to claim immunity under this section.

This approach is not unlike that taken by the Florida legislature in trying to regulate online platforms' moderation practices generally and meets the scale policy problem with a size-based solution.[160] There is also a clear benefit to this approach—smaller platforms that do not meet the X or Y metrics would not have their CDA immunity qualified at all and instead could benefit from some degree of laissez-faire design freedom as upstarts. This trades off total public accessibility, though, and may be inconsistent with existing public accommodations law that does not legally differentiate between a small five-table restaurant and a larger ninety-table one for the purposes of bringing discrimination claims (though liability may differ based on a factual burden-shifting cost inquiry). It might also raise issues of firstness and fairness, where people with disabilities must wait for broader public adoption before experiencing new content or designs. This approach, however, would apply Title III expansively to all kinds of interactive computer services, and

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notice to remove content a court "determined violates federal criminal law [and] federal civil law" among others).

[159] *See* Mosley, *supra* note 22, at 165–71 (advocating for a bright-line rule based on website traffic or net profits to determine whether a website or e-commerce business is a place of public accommodation).

[160] FLA. STAT. § 501.2041(1)(g) (conditioning definition of a "social media platform" on satisfying either a monetary or participant threshold).

Mosley's test seemingly covers nonprofit institutions like Harvard or other online information repositories that may not have readily identifiable profit measures to serve as a proxy for scale.[161]

In all, there are a variety of approaches that would better enable digital accessibility than the current state of the Internet today. Even if the ADA were amended to expressly apply Title III to online platforms, structural access may still be foreclosed by the content decisions of platforms and their users. An amendment to Section 230 may be a promising, if not required, approach that would enable courts to reach important questions about what constitutes accessible online platform access.

CONCLUSION

Nearly thirty years have passed since Congress enacted Section 230 and granted online platforms breathing room to experiment and design the Internet as we know it today. In that time the Internet has massively evolved, and online platforms have grown to be present in nearly every facet of life. But in those intervening years, Congress had the opportunity to amend the ADA and make accessible online design a new norm, and it failed to do so and failed to follow the ADA's mandate that accessibility and services "keep pace with the rapidly changing technology of the times." As a result, the federal judiciary was left with Congress's inaction and today follows a patchwork of interpretations that in some cases foreclose online digital accessibility entirely.

But whether an online platform's design is accessible is just one piece of the puzzle. Online platforms today inherently derive value not just from their design, but from the users they connect. One can order food, watch movies, buy clothing, find roommates, and date. Many of these activities involve user-to-user connection, reviews, idea-sharing, and more. Platforms bring people together and thrive on the generation of third-party content and connection. When such content is inaccessible because of a platform's intentional design or willful ignorance, equal participation for people with disabilities is all but foreclosed. Although the platforms do not generate the content themselves, they are responsible for hosting it, curating it, and presenting it "for the benefit of all Americans." They should be subject to the mandates of the ADA and should not be able to invoke Section 230 as a shield when their online gathering places benefit from inaccessible practices.

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[161] Consider, for example, how platforms like Scribd that function like digital libraries could raise similar Section 230 claims akin to Harvard. *See* Nat'l Fed'n of the Blind v. Scribd Inc., 97 F. Supp. 3d 565, 567 (D. Vt. 2015).

By recognizing issues of structural platform access as distinct from those related to moderated content access, it becomes clear that antidiscrimination claims regarding digital accessibility should not automatically trigger Section 230 immunity. Even so, statutory clarity is paramount, and the text of Section 230 should be amended to ensure platforms cannot absolve themselves of inaccessible platform practices using vague assertions of "publisher or speaker treatment" immunity. If online platforms truly are "modern public squares," then it is time to start treating them as such and impose digital public accommodation obligations that require nondiscriminatory content access for all.

It is time to moderate nondiscrimination.