



 NYU | LAW

MOOT COURT BOARD

Lenny Levinson,
Plaintiff-Appellant,

-against-

LendSmart, Inc.,
Defendant-Appellee.

Record

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QUESTIONS PRESENTED

- (1) Whether a standalone website qualifies as a “public accommodation” under Title III of the ADA.
- (2) Whether Title III of the ADA prohibits a lender from imposing a higher loan interest rate based on a borrower’s disability.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTBROOK

<hr/>		:	
Lenny Levinson,		:	
	Plaintiff,	:	
		:	Docket No. 23-CV-2139384
-against-		:	
		:	OPINION AND ORDER ON
LendSmart, Inc.,		:	MOTION TO DISMISS
	Defendant.	:	
<hr/>		:	

WAN, J.:

INTRODUCTION

Plaintiff Lenny Levinson co-owns a small bakery with his twin brother, Liam. Lenny is deaf, making him disabled under the Americans with Disabilities Act (“ADA”). Defendant LendSmart, Inc. owns and operates LendSmart.com, an “alternative lending platform,” or, in other words, a website that offers loans using a proprietary algorithm that considers a loan applicant’s personal data.

Lenny applied for a loan through LendSmart.com to expand his bakery and was offered a loan with a 15.5% interest rate. His brother applied for the same loan and was offered a 4% interest rate. Lenny sued LendSmart for violating the ADA, which prohibits a “public accommodation” from discriminating on the basis of a person’s disability. LendSmart has moved to dismiss Lenny’s complaint for failing to state a claim. Because a business that operates entirely online cannot qualify as a “public accommodation” under the ADA, and because the ADA does not regulate loan terms, including interest rates, LendSmart’s motion is **GRANTED**.

FACTUAL BACKGROUND

Lenny Levinson is the pastry chef at, and co-owner of, LL Bakes. Levinson is deaf, making him disabled under the ADA. Levinson frequently posts on Facebook about his life and thoughts about being a part of the Deaf community. He is an active member of the Eastbrook Disability Coalition, a local community and advocacy center for people with disabilities.

On January 1, 2023, Levinson searched online for a loan provider, hoping to secure a loan to open a second LL Bakes location. He found LendSmart.com, a website owned and operated by LendSmart.

According to its website, LendSmart is a fintech lending company that “offers better loans through algorithmic credit evaluation using non-traditional variables, including employment, social network, and social media data.” LendSmart uses a proprietary algorithm to determine a loan applicant’s eligibility and, once approved, to set a loan’s terms and conditions.

Levinson submitted a loan application through LendSmart, providing it with, among other information, his legal name, birth date, address, and occupation. Within an hour of submitting his application, Levinson received an email from LendSmart informing him that he had been approved for a loan. The email provided the loan’s estimated terms, including an annual interest rate of 15.5%, which he believed was unusually high.¹

Surprised by the loan’s interest rate, Lenny asked his twin brother Liam Levinson, with whom he co-owns LL Bakes, to apply for the same loan. Liam is not disabled, but he grew up with Lenny and attended the same schools. Both have shared the income generated by LL Bakes evenly. Lenny and Liam are also both in fair financial standing, having never before defaulted on a loan or a credit card payment.

Liam submitted his application, and it was soon approved. LendSmart offered him a loan with an annual interest rate of 4%.

Shortly thereafter, Lenny filed this lawsuit alleging that LendSmart violated Title III of the ADA, which prohibits discrimination on the basis of disability in the “full and equal enjoyment” of goods and services provided by a “public accommodation.” 42 U.S.C. § 12182(a). LendSmart moved to dismiss the case under Federal Rule of Civil Procedure 12(b)(6) for Plaintiff’s failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

LendSmart does not dispute that its algorithm considered Lenny’s social media posts and disability when evaluating his loan application. It argues that (1) an online lending platform is not a “public accommodation” subject to the ADA because it lacks a connection to a physical establishment, and (2) even if its website does qualify as a “public accommodation,” Title III of the ADA does not regulate the terms of loans, including their interest rates. Defendant has not raised any other defense and has not argued that the higher interest rate offered for Lenny’s loan can be supported by sound actuarial principles, business risk analysis, or actual or reasonably anticipated experience.

¹ Civil usury in the State of Eastbrook is triggered at the interest rate of 16% per annum, so Lenny does not have a claim under the usury statute.

DISCUSSION

I. The ADA’s Use of the Term “Public Accommodation” Does Not Include Businesses That Operate Entirely Online.

Today, much of individuals’ interactions with businesses are facilitated through those businesses’ websites, bringing to the fore the issue of the accessibility of the web to people with disabilities. With retailers and service providers moving online, determining the ADA’s applicability to the design and operation of web-based businesses is essential to the further development of our online economy.

Title III of the ADA defines “public accommodation” through a list of examples of private entities considered public accommodations under the statute. 42 U.S.C. § 12181(7). The list includes, among other entities, “a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment,” § 12181(7)(E), and “a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service . . . or other service establishment,” § 12181(7)(F).

Although the ADA, which was adopted in 1990, does not specifically mention websites in its definition of a public accommodation, it suggests that the term encompasses only physical locations. Notably, each sub-paragraph of section 12181(7) is followed by a general residual clause. So, for example, section 12181(7)(E) reflects that public accommodations include a “grocery store, clothing store . . . *or other sales or rental establishment.*” (emphasis added). Although the examples list different kinds of “private entities,” they all describe physical locations.

By the doctrine of *noscitur a sociis*, “ambiguous [terms] should be interpreted by reference to the accompanying words of the statute.” *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998). Here, the enumerated examples of public accommodations must be understood to restrict its definition “to avoid the giving of unintended breadth to the Acts of Congress,” such as the ADA. *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). The residual clause in the definition of “public accommodation” should be interpreted “within the context of the accompanying words, and this context suggests that some connection between the good or service complained of and an actual physical place is required.” *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000).

Arguing for a broader reading of “public accommodation,” Plaintiff raises an informal guidance issued by the Department of Justice (“DOJ”) interpreting Title III. The ADA empowers the DOJ to promulgate regulations to carry out compliance with Title III, *see* 42 U.S.C. § 12186(b), and to issue guidance in interpreting Title III.² In

² *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the “interpretations and opinions of the” relevant agency, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”).

its March 2022 guidance, the DOJ provided that “[a] website with inaccessible features can limit the ability of people with disabilities to access a public accommodation’s goods, services, and privileges available through that website.” *Martinez v. Gutsy LLC*, No. 22-CV-409 (NGG) (RLM), 2022 U.S. Dist. LEXIS 214830, at *19 (E.D.N.Y. Nov. 29, 2022) (quoting DOJ, Guidance on Web Accessibility and the ADA (Mar. 18, 2022)). For that reason, the DOJ has “consistently taken the position that the ADA’s requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web.” *Id.* at *20.

We decline to give weight to the DOJ’s informal guidance. Congress, as early as 2000, has held hearings on its interpretation of the ADA, discussing whether the statute applies to standalone websites, and yet has conspicuously declined to act by enacting new legislation. *See Martinez v. Cot’n Wash, Inc.*, 81 Cal. App. 5th 1026, 1049–50 (2022) (discussing congressional hearings on the ADA).

The March 2022 guidance that Plaintiff relies on is ambiguous at best. While the DOJ interprets the ADA to include goods and services “offered on the web,” it does not explicitly extend Title III to cover websites that have *no connection* to traditional brick-and-mortar businesses. DOJ, Guidance on Web Accessibility and the ADA (Mar. 18, 2022) (“[T]he [DOJ] has consistently taken the position that the ADA’s requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web.”).

Given Congress’s failure to act and the ambiguity of the DOJ’s guidance, it is evident that Congress and the DOJ have not endorsed the inclusion of standalone websites under Title III. That lack of legislative and regulatory clarification does not give us free reign to expand the ADA. “Ours is not to draft [the] law . . . ours is to interpret the law as written.” *Martinez*, 81 Cal. App. 5th at 1052.

In sum, because LendSmart does not have any connection to a physical establishment open to customers, it is not a “public accommodation” within the meaning of Title III of the ADA.

II. Title III of the ADA Does Not Apply to the Terms of Loans.

Although this Court’s reading of the term “public accommodation” alone warrants dismissal of this case, we also considered whether Title III regulates the interest rates LendSmart offers its customers. Several circuit courts have held that Title III of the ADA regulates only access to the goods and services offered by a public accommodation, not the content of those goods and services. *See, e.g., Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1012 (6th Cir. 1997) (en banc) (holding that Title III does not govern the content of a disability plan offered by the plaintiff’s employer); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999) (dismissing a Title III claim against the plaintiff’s insurer because the ADA does not prohibit the insurer from

capping insurance benefits for AIDS or AIDS-related illnesses). While the Fourteenth Circuit has not addressed this issue, we find the Sixth and Seventh Circuits' analyses persuasive and embrace the distinction between access and content.

The DOJ has stated that the ADA's purpose is to "ensure accessibility to the goods offered by a public accommodation, not to alter the nature or mix of goods that the public accommodation has typically provided." *Parker*, 121 F.3d at 1012 (quoting 28 C.F.R. pt. 36, app. B at 734 (1991)). Its interpretation is consistent with "[t]he common sense of the statute" that "the content of the goods or services offered by a place of public accommodation is not regulated." *Mut. of Omaha*, 179 F.3d at 560. For example, under the ADA "[a] camera store may not refuse to sell cameras to a disabled person, but it is not required to stock cameras specially designed for such persons." *Id.*

If the ADA regulated the content of goods, it would impose enormous burdens on private businesses required to comply with it and on courts tasked with adjudicating alleged violations. If that was Congress's intent, it would have made that intention clear.

In *Webster Bank v. Oakley*, the Supreme Court of Connecticut applied the access and content distinction to the mortgage lending practice, holding that Title III "regulates a lender's provision of access to its mortgage loans, which are the goods and services that it offers, but does not regulate the content of those loan agreements." 830 A.2d 139, 163 (Conn. 2003). We adopt the same distinction here.

Here, Levinson was not denied access to LendSmart's loan service. Levinson was offered a loan, albeit with a higher interest rate than he expected. But the ADA guarantees only access to those loan services, not the terms of the loans provided.

CONCLUSION

For the reasons above, Title III of the ADA does not apply here. LendSmart's motion to dismiss is **GRANTED**.

IT IS SO ORDERED.

Harmon Wan

Hon. Harmon Wan
United States District Judge

Dated: August 9, 2023
Paddiefield, Eastbrook

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

_____	:	
Lenny Levinson,	:	Docket No. 23-CV-2139384
Plaintiff-Appellant,	:	
	:	NOTICE OF APPEAL
-against-	:	
	:	
LendSmart, Inc.,	:	
Defendant-Appellee.	:	
_____	:	

NOTICE IS GIVEN that Lenny Levinson appeals to the Court of Appeals for the Fourteenth Circuit the granting of Defendant-Appellee's motion to dismiss for failure to state a claim in the District of Eastbrook that was rendered on August 9, 2023, and entered on August 10, 2023.

/s/ Rebecca Lee
Rebecca Lee, Esq.

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Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished to Emilia Gallagher, Esq., Attorney for Defendant-Appellee, by electronic service on August 12, 2023.

/s/ Rebecca Lee
Rebecca Lee, Esq.
Attorney for Plaintiff-Appellant

In the
United States Court of Appeals
FOR THE FOURTEENTH CIRCUIT

DECEMBER TERM 2023
No. 23-CV-2139384

LENNY LEVINSON,

Plaintiff-Appellant,

v.

LENDSMART, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF EASTBROOK

ARGUED: DECEMBER 1, 2023
DECIDED: JANUARY 23, 2024

Before: DIESE, FLORA, AND WILKINS, *Circuit Judges*.

INTRODUCTION

The issue of the accessibility of the web to people with disabilities is a hotly contested issue in contemporary Americans with Disabilities Act (“ADA”) litigation. This is a case of first impression for this Court. We will consider, first, whether an online lender that maintains no physical premises qualifies as a “public accommodation” within the meaning of Title III of the ADA, and second, whether Title III regulates not only the accessibility features of a lending service provider, but also the terms of the loans offered.

The District Court, granting Defendant LendSmart, Inc.’s (“LendSmart”) motion to dismiss, held that a business that operates entirely online does not qualify

as a public accommodation, and that the ADA does not prohibit discrimination on the basis of disability in setting a loan interest rate.

For the reasons explained below, we **REVERSE** the District Court’s holding as to both questions.

Diese, *Circuit Judge*:

We review LendSmart’s motion to dismiss de novo.

BACKGROUND

LendSmart operates an online lending platform, LendSmart.com, which uses a “state-of-the-art credit evaluation algorithm” to offer “better loans” to borrowers. LendSmart markets itself as an alternative to a traditional bank. Plaintiff, Lenny Levinson, is a deaf person. On January 1, 2023, he applied through LendSmart.com for a loan to expand his bakery and was offered a loan with an annual interest rate of 15.5%. His non-disabled twin brother, Liam Levinson, with whom he co-owns his bakery, also applied for the loan and was offered one with an interest rate of only 4%.

According to LendSmart’s website, its algorithm considers a variety of “non-traditional variables, including employment, social network, and social media data.” Levinson posts frequently on his Facebook page about his reflections on living as a deaf person. Levinson alleged that LendSmart illegally discriminated against him in violation of Title III of the ADA by inferring from his social media accounts that he was disabled and, as a result, setting a significantly higher interest rate.

LendSmart moved to dismiss the case for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), raising two grounds for dismissal: (1) LendSmart is not a “public accommodation” because it lacks a connection to a physical establishment, and (2) even if LendSmart is a “public accommodation,” Title III does not apply because it only regulates access to the goods and services provided by a public accommodation, rather than the content of those goods and services. The District Court granted LendSmart’s motion. We now reverse its decision.

DISCUSSION

I. The ADA’s Use of the Term “Public Accommodation” Includes Businesses That Operate Entirely Online.

We disagree with the District Court’s holding that a “public accommodation” within the meaning of Title III of the ADA excludes standalone websites.

Title III of the ADA provides that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services,

facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a).

The district court reasons that because LendSmart maintains no physical presence, operating solely through its website, it does not qualify as a public accommodation subject to the ADA. This Court disagrees. Under a reasonable reading of Title III in light of its purpose, legislative history, and interpretation by the U.S. Department of Justice (“DOJ”), a business operating solely on the web can qualify as a public accommodation.

The ADA was enacted to “invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities,” 42 U.S.C. § 12101(b)(4), and to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” § 12101(b)(1). Treating in-person consumers and online-only consumers distinctly would cut against the ADA’s “clear and comprehensive” mandate to eliminate discrimination. *Id.*

Today, online retailers and service platforms are increasingly central to economic activity. As a result, excluding websites from ADA protections would render the ADA obsolete over time. LendSmart’s argument that Title III does not cover standalone websites is contradicted by the ADA’s legislative history, which “makes clear that Congress intended the ADA to adapt to changes in technology.” *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200–01 (D. Mass. 2012). The House Committee on Education and Labor (now the Committee on Education and the Workforce), which was tasked with drafting Title III’s definition of a public accommodation, noted that it “intend[ed] that the types of accommodation and services provided to individuals with disabilities . . . should keep pace with the rapidly changing technology of the times.” H.R. Rep. No. 101-485(II), at 108 (1990).

Finally, we disagree with the district court’s treatment of the DOJ’s informal guidance. DOJ, Guidance on Web Accessibility and the ADA (Mar. 18, 2022) (“[T]he [DOJ] has consistently taken the position that the ADA’s requirements apply to all the goods, services, privileges, or activities offered by public accommodations, including those offered on the web.”). Instead, we find that the DOJ’s informal guidance weighs in favor of reading Title III liberally to include websites under its definition of a public accommodation.

Under *Skidmore v. Swift & Co.*, the deference to which an agency’s opinion is entitled depends “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” 323 U.S. 134, 140 (1944). Applying these factors, this Court finds the DOJ’s guidance to be well-reasoned, informed by the agency’s “specialized experience,” *id.* at 139, and consistent with its position in recent

cases and settlements. *See Martinez v. Gutsy LLC*, No. 22-CV-409 (NGG) (RLM), 2022 U.S. Dist. LEXIS 214830, at *19–21 (E.D.N.Y. Nov. 29, 2022) (discussing recent DOJ consistency in ADA web accessibility standards). Although not controlling, this Court finds the DOJ’s guidance persuasive, weighing in favor of interpreting Title III to include businesses operating solely online.

II. Title III of the ADA Prohibits a Lender from Discriminating on the Basis of a Borrower’s Disability in Setting the Terms of a Loan.

We decline to embrace the distinction between access and content when it comes to the scope of Title III, and therefore reject the District Court’s finding that Title III regulates only access to loans, but not the terms of those loans.

Title III simply prohibits denying “the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.” 42 U.S.C. § 12182(b)(1)(A)(i). Nothing in the text of the ADA or its legislative history “explicitly precludes an extension of the statute to the substance of what is being offered by a business.” *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 20 (1st Cir. 1994).

Title III’s text is concerned with more than merely regulating a disabled person’s *access* to goods and services. The plain language of Title III ensures disabled persons the “full and equal enjoyment” of goods and services provided by a public accommodation, and an equal opportunity to “participate in or benefit from” those goods, services, privileges, and advantages. 42 U.S.C. §§ 12182(a), (b)(1)(A)(ii). Those provisions suggest “the statute was meant to guarantee them more than mere physical access” to a business. *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999).

Here, the core service that LendSmart provides is loan origination using its proprietary algorithm. An individual is denied the “full and equal” enjoyment of such a service, ensured by §12182(a), when they are offered an exceptionally high interest rate because of their disability status.

This case illustrates that the access versus content distinction, adopted by some courts, has no sound basis in law or policy. The discrepancy in the content of the services provided to a disabled person can in effect deny that person’s access. Although LendSmart did not outright refuse to provide Lenny a loan, the prohibitive interest rate it set had the practical effect of denying his access. To limit the scope of Title III to only those cases where services are denied outright would cut against the ADA’s comprehensive mandate to eliminate discrimination on the basis of disability.

CONCLUSION

Because we hold that Title III of the ADA applies to loan providers that operate entirely online, such as LendSmart, and because Title III prohibits a loan provider from offering a higher loan interest rate on the basis of a borrower's disability, the district court's decision is **REVERSED**.

IT IS SO ORDERED.

In the
United States Court of Appeals
FOR THE FOURTEENTH CIRCUIT

JANUARY TERM 2024
No. 23-CV-2139384

LENNY LEVINSON,

Plaintiff-Appellant,

v.

LENDSMART, INC.,

Defendant-Appellee.

FILED ON: JANUARY 30, 2024

Before: SUN, CHIEF JUDGE; DIESE, FLORA, FRANKLIN, SMITH, TANAKA, THOMPSON,
AND WILKINS, *Circuit Judges.*

ORDER

Appellee's petition for rehearing en banc and the response thereto were circulated to the full court. Thereafter, a majority of the judges eligible to participate voted in favor of the petition.

It is ORDERED that the petition be granted and the Court's judgment filed January 23, 2024, be vacated. This case will be reheard by the Court sitting en banc.

It is FURTHER ORDERED that the parties brief the following questions:

- 1) Whether a standalone website qualifies as a "public accommodation" under Title III of the ADA.
- 2) Whether Title III of the ADA prohibits a lender from imposing a higher loan interest rate based on a borrower's disability.