



 NYU | LAW

MOOT COURT BOARD

Lenny Levinson,
Plaintiff-Appellant,

-against-

LendSmart, Inc.,
Defendant-Appellee.

Memorandum of Law

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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.

STATEMENT OF FACTS

Lenny Levinson is a deaf person who lives in Paddiefield, Eastbrook. In 2020, Lenny opened a bakery, LL Bakes, with his non-disabled twin brother, Liam. Since its opening, LL Bakes has enjoyed tremendous popularity, with Lenny leading the bakery as its pastry chef.

In January 2023, Lenny sought to open a second LL Bakes location. Notwithstanding LL Bakes’ success, Lenny required a loan to renovate the store and purchase necessary equipment. Having heard that the interest rates offered at local banks were relatively high, Lenny instead chose to apply for a loan on LendSmart.com.

LendSmart.com, owned by LendSmart Inc., is an “alternative lending platform.” According to its website, LendSmart “offer better loans through algorithmic credit evaluation using non-traditional variables, including employment, social network, and social media data.” Before offering an applicant a loan, LendSmart uses its proprietary algorithm to determine an applicant’s eligibility and set the loan’s terms and conditions.

Lenny filled out an application on LendSmart’s website. The application required him to submit, among other information, his name, birth date, address, and employment information. A few hours later, Lenny received an email that informed him he had been approved for a loan with a 15.5% interest rate—higher than he had expected given his decent credit history and successful business.¹

Lenny suspected that during the application process, LendSmart’s algorithm found his social media profile and discovered that he is disabled. Lenny is an active member of the Eastbrook Disability Coalition, the local community and advocacy center for people with disabilities, and he frequently posts about his life as a deaf person on Facebook.

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

Suspicious, Lenny asked Liam to apply for the same loan. Liam is not disabled, but has the same educational background as Lenny, and they split evenly the earnings from LL Bakes, which they co-own. Both also have similar credit scores. Liam applied with LendSmart and was offered a loan with a 4% interest rate.

PROCEDURAL POSTURE

Lenny sued LendSmart under Title III of the Americans with Disabilities Act (“ADA”), seeking an injunction against LendSmart for discriminating on the basis of a loan applicant’s disability. LendSmart moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). Fed. R. Civ. P. 12(b)(6).

LendSmart argued that (1) a business that operates as a standalone website, lacking a physical location, is not a “public accommodation” covered by the ADA, and (2) even if LendSmart qualifies as a “public accommodation,” Title III of the ADA does not regulate the terms of the loans LendSmart offers because Title III does not apply to the content of the services provided by a public accommodation. LendSmart did not dispute that it considered Lenny’s social media posts and his disability while evaluating his loan application.

The district court granted LendSmart’s motion, holding that a business without a physical establishment open to customers is not a “public accommodation,” and that Title III does not regulate the terms of the loans offered by a lender. Lenny appealed. The U.S. Court of Appeals for the Fourteenth Circuit reversed, holding that LendSmart, as a standalone website, does qualify as a “public accommodation,” and that Title III regulates not only access to the loans offered by a lender, but also the terms of those loans.

LendSmart petitioned the Fourteenth Circuit for a rehearing en banc. The Fourteenth Circuit granted the petition and ordered briefing on the two issues raised.

SUMMARY

I. The ADA’s Definition of the Term “Public Accommodation”

Title III of the ADA prohibits “public accommodations” from discriminating against an individual on the basis of their disability. While the law does not expressly limit its coverage to traditional brick-and-mortar locations, it does not provide any regulatory guidance for internet retailers or online businesses. *See* 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104. A long-standing circuit split exists over whether a business that operates as a standalone website and has no physical premises qualifies as a public accommodation within the meaning of the ADA.

Arguments between the parties will focus on this circuit split. If the court finds that “public accommodation” covers a standalone website, then Levinson would prevail on this issue. Levinson will argue that a broad reading of the term is consistent with the legislative intent and statutory purpose. He will also urge the court to give *Skidmore* deference to the Department of Justice’s (“DOJ”) informal guidance from March 2022, in which it claims to have 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. *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). Finally, Levinson can argue on policy grounds that the growing prevalence of internet businesses mandates the coverage of internet businesses by the ADA. *Mejico v. Alba Web Designs, LLC*, 515 F. Supp. 3d 424, 435 (W.D. Va. 2021). The statute’s reach would be significantly curtailed if it did not adapt to the changes in how private businesses operate.

If the court finds that “public accommodation” must be a physical place, then LendSmart would prevail on this issue, and Levinson’s claim cannot survive. LendSmart will argue that the definition of “public accommodation” in the statute indicates that it must be a physical place. 42 U.S.C. § 12181(7); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998). Regarding Levinson’s reference to the DOJ’s informal guidance, LendSmart will argue that this guidance should weigh against finding coverage of standalone websites, because the fact that the DOJ opted not to issue any regulations or formal guidance to this effect indicates that it is unwilling to extend Title III’s coverage to websites, which should caution the courts against doing so. *See Martinez v. Cotton Wash, Inc.*, 81 Cal. App. 5th 1026, 1048–1049 (Cal. Ct. App. 2022). Lastly, LendSmart can counter Levinson’s policy argument by pointing out that judges should not make policy in the ADA context without clear legislative guidance, as courts are not equipped to decide what accessibility features are feasible and desirable. *See Winegard v. Newsday LLC*, 556 F. Supp. 3d 173, 182–83 (E.D.N.Y. 2021).

II. Whether the ADA Applies to Loan Interest Rates

On the second issue, no circuit court has specifically considered whether Title III applies to the terms and conditions of a loan. The ADA’s text does not explicitly limit Title III’s scope of application to mere access to goods and services offered by a public accommodation. However, a number of circuits have adopted a distinction between access to a service and the content of that service. The Third, Fifth, Sixth, Seventh, and Ninth Circuits have all embraced this distinction in the context of insurance policies, holding that while the ADA regulates access to goods and services provided by public accommodations, it does not regulate the content of the goods or services provided. *See, e.g., Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 563 (7th Cir. 1999). On the other hand, the First and Second Circuits have casted doubt on this distinction. *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England*,

Inc., 37 F.3d 12, 19–20 (1st Cir. 1994); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 1999).

The parties will first debate whether the access versus content distinction is valid. They will then debate whether imposing a higher interest rate on loans for people with disabilities amounts to the denial of access to the lending service as a whole, or merely to the enjoyment of the content of the lending service.

On the first question, LendSmart will argue for the access versus content distinction to apply. It will point to the DOJ's interpretation of Title III:

The purpose of the ADA's public accommodations requirements 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. In other words, a bookstore, for example, must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books.

Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1012 (6th Cir. 1997) (quoting 28 C.F.R. § Pt. 36, app. B) (internal quotations omitted).

Levinson, on the other hand, will argue that there should not be a distinction between access to and content of the goods offered. He will point out that there is nothing in the statute or legislative history that precludes the ADA from being applied to the substance of goods and services that a “public accommodation” offers. *Carparts*, 37 F.3d at 20. Additionally, he can argue that the access versus content distinction arbitrarily and unjustifiably limits the reach of the ADA, because guaranteeing equal access to services necessarily touches on the content of those services. Rather than requiring LendSmart to change the nature of its business, Levinson only asks the court to find the ADA bars a lender from refusing people with disabilities the same service it would offer to people without disabilities.

Secondly, the parties will debate the characterization of LendSmart's conduct. LendSmart will contend that imposing a higher interest rate on loans to people with disabilities pertains to the content of its lending service and is beyond the scope of Title III. Levinson, on the other hand, will argue that imposing a higher interest rate on loans to people with disabilities is in fact denying them access to the lending service and therefore should be covered by Title III, regardless of whether this Court adopts the access versus content distinction. By making the interest rate prohibitively high, it was in fact denying him access to the loan services provided by LendSmart altogether. Lastly, Levinson may also argue on policy grounds that because fair lending laws do not cover discrimination in non-mortgage credit lending on the basis of disability, the ADA should be interpreted to fill that void and

guarantee redress to harms suffered by people with disabilities.²

DISCUSSION

I. Whether Standalone Websites Qualify as “Public Accommodations”

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 ADA defines the term “public accommodation” through an extensive list of examples. Under 42 U.S.C. § 12181(7), “[t]he following private entities are considered public accommodations . . . if the operations of such entities affect commerce.” The subsections that follow, A through L, each include a list of private entities and are followed by a residual clause. So, for example, subsection B defines a public accommodation as including “a restaurant, bar, or other establishment serving food or drink.” § 12181(7)(B). Similarly, subsection D reads, “an auditorium, convention center, lecture hall, or other place of public gathering.” § 12181(7)(D).

When the ADA was enacted in 1990, far fewer people used the internet and discrimination based on disability mostly occurred in person. Title III provides the standards required for businesses’ physical locations to properly accommodate disabled individuals, but it does not provide any regulatory guidance for the internet, websites, or mobile applications. *See* 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104.

The circuit courts are split over whether Title III’s definition of “public accommodation” includes businesses that operate entirely online. On one side of the debate, the Third, Sixth, and Ninth Circuits have decided to restrict a “public accommodation” to a physical place, holding that goods and services, including websites, offered by a “public accommodation” must have a “nexus” to a physical establishment to be covered under the ADA. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010–11 (6th Cir. 1997) (en banc); *Earll v. eBay*, 599 F. App’x 695, 696 (9th Cir. 2015). On the other side of the debate, the First and Seventh Circuits have extended the coverage of “public accommodation” to websites bearing no connection to traditional brick-and-mortar establishments. *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999).

² The primary lending law, the Equal Credit Opportunity Act, does not list disability as one of the protected attributes lenders are prohibited from considering. *See* 15 U.S.C. §§ 1691, 12 C.F.R. 1002.1(b). The Fair Housing Act lists disability as a protected attribute, but this Act only covers credit lending in relation to housing. *See* 42 U.S.C. § 3604(a).

A. The Circuits Are Split Over Whether a “Public Accommodation” Must Have a Nexus to a Physical Establishment.

1. The Third, Sixth, and Ninth Circuits require a nexus to a physical establishment.

The leading case on the question in the Third Circuit is *Ford v. Schering-Plough Corp.* 145 F.3d at 612–15. There, the plaintiff alleged that her employer discriminated against her on the basis of her mental disability because her employer-provided insurance policy imposed a two-year cap on benefits for mental disabilities but not physical disabilities. *Id.* at 603. On appeal, the Third Circuit held that the statute’s definition of “public accommodation” unambiguously excluded “non-physical access,” and therefore the plaintiff failed to make out a claim under Title III of the ADA. *Id.* at 614.

The court explained that the term “public accommodation” should be read in the context of other examples of public accommodations provided by the ADA. “The litany of terms, including ‘auditorium,’ ‘bakery,’ ‘laundromat,’ ‘museum,’ ‘park,’ ‘nursery,’ ‘food bank,’ and ‘gymnasium[]’ refer to places with resources utilized by physical access.” *Id.* (quoting 42 U.S.C. § 12181(7)(D)-(F), (H)-(L)). “Pursuant to the doctrine of *noscitur a sociis*, the terms . . . should be interpreted by reference to the accompanying words of the statute ‘to avoid the giving of unintended breadth to the Acts of Congress.’” *Id.* (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

In *Peoples v. Discover Fin. Serv.*, the Third Circuit reaffirmed its position when it held that a plaintiff could not claim discrimination under Title III of the ADA based on a credit card transaction that did not happen on property owned by the credit card company. 387 Fed. App’x. 179, 183–84 (3d Cir. 2010). Applying *Ford*, the court held that because the plaintiff used her credit card to pay for the transaction in her own apartment, which is not a physical property that the defendant owned, leased, or operated, she had failed to state a claim under the ADA. *Id.*

The Sixth Circuit has similarly required that the goods and services offered by a business have a “nexus” to a physical establishment for a claim to fall under the ambit of Title III of the ADA. *Parker*, 121 F.3d at 1010–11. In *Parker*, the Sixth Circuit held that the terms of an insurance policy obtained through the plaintiff’s employer were not covered by Title III. *Id.* “‘The prohibitions of Title III are restricted to ‘places’ of public accommodation” *Id.* at 1011 (quoting *Stoutenborough v. Nat’l Football League, Inc.*, 59 F.3d 580, 582 (6th Cir. 1995), *cert. denied*, 516 U.S. 1028 (1995)). According to the Sixth Circuit, “[a] ‘place,’ . . . is ‘a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the’ twelve ‘public accommodation’ categories.” *Id.* “Facility,” in turn, is “all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other

conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.” *Id.* The court held that while an insurance office is a public accommodation as expressly set forth in § 12181(7), a benefit plan obtained through the plaintiff’s employer is not a good offered by “a place of public accommodation.” *Id.* “There is . . . no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office,” and therefore the plaintiff’s claim failed under Title III. *Id.*

The Ninth Circuit has taken the same position. Though, notably, it was the first circuit to supply the “nexus” requirement to cases involving the accessibility of online websites. One leading case in the circuit is *Weyer v. Twentieth Cent. Fox Film Corp.*, 198 F.3d 1104 (9th Cir. 2000). In *Weyer*, the plaintiff sued her former employer and insurance carrier for offering and administering a plan that provided different benefits to people with mental disabilities and physical disabilities. *Id.* at 1107–08. The Ninth Circuit agreed with the Third and Sixth Circuits, holding that “an insurance company administering an employer-provided disability policy is not a ‘place of public accommodation’ under Title III.” *Id.* at 1114–15.

Later applying this rule to website accessibility, the Ninth Circuit in *Earll v. eBay, Inc.* considered whether eBay’s alleged failure to provide an accommodation to a hearing-impaired seller during a mandatory identity verification process conducted by telephone fell under Title III. 599 F. App’x at 696. Relying on *Weyer*, the court explained that a “‘place of public accommodation’ [requires] ‘some connection between the good or service complained of and an actual physical place.’” *Id.* at 696 (quoting *Weyer*, 198 F.3d at 1114). “Because eBay’s services are not connected to any ‘actual, physical place[],’ eBay is not subject to the ADA.” *Id.* at 696.

2. The First and Seventh Circuits do not require a nexus to a physical establishment.

The First and Seventh Circuits fall on the other side of the debate. The First Circuit interprets the term “public accommodation” broadly. In *Carparts Dist. Cent., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, the plaintiff sued his insurer, which lacked a storefront accessible to customers, for violating the ADA by capping insurance benefits for AIDS-related illnesses. 37 F.3d at 14. The court held that a public accommodation need not have “physical structures for persons to enter” to be covered by the ADA. *Id.* at 19.

Explaining its reasoning, the court observed that because the statutory definition of “public accommodation” included “travel services,” Title III also applied to “providers of services which do not require a person to physically enter an actual physical structure.” *Id.* According to the court, “[m]any travel services conduct business by telephone or correspondence without requiring their customers to enter

an office in order to obtain their services.” *Id.* That interpretation, the court explained, was also consistent with the ADA’s legislative history and Congress’s intention that “people with disabilities have equal access to the array of goods and services offered by private establishments and made available to those who do not have disabilities.” *Id.* (citing S. Rep. No. 116, 101st Cong., 1st Sess. at 58 (1989)).

Following this ruling, district courts in the First Circuit have found that other standalone websites are covered by Title III. *See, e.g., Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196 (D. Mass. 2012) (finding that video streaming service Netflix is a public accommodation within the meaning of Title III); *Access Now, Inc. v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 U.S. Dist. LEXIS 185112 (D.N.H. Nov. 8, 2017) (holding that the defendant’s website offering meal plans for purchase and delivery was a public accommodation under Title III, even though it had no connection to a brick-and-mortar business). Refusing to grant Netflix’s motion for judgment on the pleadings, the district court found that “*Carparts*’ reasoning applies with equal force to services purchased over the Internet,” and the Title III claim could proceed so long as the allegedly violating website “falls within a general category listed under the ADA.” *Netflix*, 869 F. Supp. 2d at 200–01. In this case, Netflix’s website could qualify as a “service establishment,” a “place of exhibition or entertainment,” and a “rental establishment” under 42 U.S.C. § 12181(7). *Id.* at 201.

The Seventh Circuit has also rejected the argument that a public accommodation must be a physical place. In *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed’n of Grain Millers*, the court noted that “[t]he site of the sale is irrelevant to Congress’[s] goal of granting the disabled equal access to sellers of goods and services. What matters is that the good or service be offered to the public.” 268 F.3d 456, 459 (7th Cir. 2001). In another influential case, *Doe v. Mut. of Omaha Ins. Co.*, the court found websites and businesses operating in electronic spaces fell squarely within the ambit of Title III. 179 F.3d at 559. The court reasoned that a store “that is open to the public cannot exclude disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do,” irrespective of whether the store maintains a physical or electronic presence. *Id.*

Following these two controlling opinions, at least one district court in the circuit has allowed a case involving a standalone website that sells bedding to proceed, finding that the website qualified as a “public accommodation.” *See Wright v. Thread Experiment, LLC Default Entered 7/16/2019*, No. 1:19-cv-01423-SEB-TAB, 2021 U.S. Dist. LEXIS 13214, at *8 (S.D. Ind. Jan. 22, 2021) (“[C]onsistent with the Seventh Circuit’s directives that ‘places of public accommodations’ are not limited to physical spaces, [we] . . . hold that Title III of the ADA governs websites that otherwise satisfy the statutory definition of ‘places of public accommodation’ under 42 U.S. Code § 12181(7).”).

3. District courts in the Second Circuit are divided.

The Second Circuit has not specifically ruled on the issue of whether website accessibility falls under Title III. Most district court rulings rely on an analogous Second Circuit decision: *Pallozzi v. Allstate Life Ins. Co.* 198 F.3d 28 (2d Cir. 1999). *Pallozzi* involves a lawsuit against an insurance company that refused to issue a policy on the basis of the plaintiffs’ mental health diagnoses. *Id.* at 31. Although there was undeniably a connection between the policies at issue in the case and the insurance company’s physical establishment, the court declared that Title III was meant to guarantee more than mere physical access; it also covered insurance underwriting practices. *Id.* at 32 (“[I]t seems clear to us that Title III was intended by Congress to apply to insurance underwriting.”).

District courts in the Second Circuit have applied this binding precedent to website accessibility differently. Some courts believe that the decision expanded the definition of “public accommodation” beyond physical structures and have found websites to be within its scope. *See Del-Orden v. Bonobos, Inc.*, 17 Civ. 2744 (PAE), 2017 U.S. Dist. LEXIS 209251, at *9 (S.D.N.Y. Dec. 20, 2017); *Panarra v. HTC Corp.*, 598 F. Supp. 3d 73, 79 (W.D.N.Y. 2022). Other courts, most prominently those in the Eastern District of New York, have rejected that interpretation and read the case as merely certifying that insurance underwriting is one type of the “goods and services sold by a place of public accommodation.” *Winegard v. Newsday LLC*, 556 F. Supp. 3d 173, 181 (E.D.N.Y. 2021). The physical place is still a “condition precedent” for a website to fall within the scope of Title III, and therefore a standalone website is excluded. *Id.*

B. The Parties Will Debate the Meaning of the Statutory Language.

To argue against dismissal of this case, Levinson will maintain that “public accommodation” should be interpreted to include standalone websites. Levinson can advance textual arguments, look to the statutory purpose, and refer to the legislative intent.

First, Levinson can cite to the First Circuit’s argument that by including “travel services” among the list of services considered public accommodations, Congress contemplated that “service establishments” includes providers of services which do not require a person to enter an actual physical structure, since many travel services conduct business exclusively by telephone or correspondence without requiring their customers to enter an office in order to obtain their services. *See Carparts*, 37 F.3d at 19.

Secondly, Levinson can argue that adopting a broad meaning of “public accommodation” is consistent with ADA’s statutory purpose and legislative history. Levinson can argue that the purpose of the ADA is to “invoke the sweep of [c]ongressional authority . . . in order to address the major areas of discrimination

faced day-to-day by people with disabilities.” 42 U.S.C. § 12101(b). The ADA was enacted to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,” § 12101(b)(1). It follows that treating consumers who purchased goods and services through a physical store differently from those who used a telephone or the internet would cut against the comprehensiveness that the statute aimed to achieve. *Id.*

On legislative history, Levinson can cite to the House Committee Report stating 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,” which suggests that even though the ADA did not include websites as a specific example of public accommodation, Congress intended its meaning to adapt to evolving technology. *Netflix*, 869 F. Supp. 2d at 200–01 (citing H.R. Rep. 101-485 (II), at 108 (1990)).

If the meaning of “public accommodation” includes websites, LendSmart’s website-only business is covered by Title III, and this claim should not be dismissed.

On the other side, LendSmart will argue that a “public accommodation” must have physical structures, primarily relying on a textual reading of the statute. Although each subparagraph of the definition of “public accommodation” in 42 U.S.C. § 12181(7) is followed by a general residual clause (e.g., “bakery, grocery store, clothing store . . . or other sales or rental establishment”), one thing they all have in common is that they are all physical places. LendSmart will invoke the doctrine of *noscitur a sociis* or *ejusdem generis* to argue that the enumerated examples of public accommodation restrict the definitions of the residual terms. “The principle of *noscitur a sociis* requires that the term, ‘place of public accommodation,’ 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*, 198 F.3d at 1114; *see also Ford*, 145 F.3d at 614. The doctrine of *ejusdem generis* supports the same outcome. *See Winegard*, 556 F. Supp. 3d at 178 (holding that the residual clause’s meaning should be confined to the characteristics of the specific items listed before it). Additionally, LendSmart can invoke a plain meaning argument that the statute’s use of the phrase “place of” to modify the term “public accommodation” also suggests that § 12182(a) was not meant to reach a standalone website. *Id.* at 179.

The above statutory interpretation tools weigh in favor of restricting the meaning of “public accommodation” to physical establishments, leading to the conclusion that Title III only covers those goods and services provided in connection with a physical establishment, excluding those offered by a standalone web business like LendSmart. *See Ford*, 145 F.3d at 613. To counter Levinson’s purposivist arguments, LendSmart can remind the court that interpretations guided by statutory intent and legislative history cannot deviate from the text itself. The multiple

indications of a restrictive meaning of “public accommodation” cannot be overlooked just because the statute states a broad purpose.

C. The Parties Can Debate the Weight the DOJ’s Informal Guidance Should Be Afforded.

Aside from debating the meaning of statutory language, competitors may also consider legislative and agency actions that might clarify the meaning of “public accommodation.” However, any such arguments are likely to be on the weaker side. Congress has never addressed the question of whether public accommodations include private commercial websites. Nevertheless, Congress did amend the Rehabilitation Act of 1973 to require federal agencies and organizations that receive federal funding to make their websites accessible to people with disabilities by June of 2001. J. Royce Fichtner & Troy J. Strader, *An Analysis of U.S. Website Accessibility Court Cases: Are Standalone Websites Subject to ADA Requirements?*, Universal Access Info. Soc’y (2024), <https://doi.org/10.1007/s10209-023-01080-0>.

As for the DOJ, which is empowered to issue specific regulations detailing compliance with the ADA, it has never issued a formal rule or interpretation on whether public accommodations include websites. *Id.* However, it did issue informal guidance in March 2022, in which it claimed to have 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 standalone websites. U.S. Dep’t of Just., *Guidance on Web Accessibility and the ADA* (2022), <https://www.ada.gov/law-and-regs/ada/>.

The parties may debate how courts should act in the absence of guidance. Levinson can argue, as the Eastern District of New York did in *Martinez v. Gutsy LLC*, that this informal guidance should get *Skidmore* deference and be considered as an additional factor weighing in favor of including standalone websites. No. 22-CV-409 (NGG) (RLM), 2022 U.S. Dist. LEXIS 214830, at *19–20 (E.D.N.Y. Nov. 29, 2022). *Skidmore* deference is a principle of judicial review of federal agency actions that applies when a federal court treat a federal agency’s interpretation of a statute administered by the agency as having persuasive reasoning. According to *Skidmore*, “a guidance document is entitled to deference depending 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.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Applying these factors to the case at hand, the *Gutsy* court found the DOJ’s guideline to be well-reasoned, informed by the Department’s “specialized experience,” and consistent with the DOJ’s position in recent cases and settlements. *Gutsy*, 2022 U.S. Dist. LEXIS 214830, at *19–20.

LendSmart can respond by pointing to the non-binding nature of this guideline. Specifically, it can follow the Court of Appeals of California and argue that the fact that the DOJ has opted not to issue any formal rule that binds the agency indicates it was unwilling to make policy demanding website accessibility from private entities. *Martinez v. Cotton Wash, Inc.*, 81 Cal. App. 5th 1026, 1049 (Cal. Ct. App. 2022) (evaluating a state claim under California’s Unruh Act based on an alleged violation of the ADA). Despite their prolonged awareness of the courts’ confusion on this issue, both Congress and the DOJ have been silent. Accordingly, this silence should be interpreted as a tacit rejection of imposing Title III obligations on standalone websites. *Id.*

D. Parties Can Also Make Policy Arguments.

Lastly, the parties can make policy arguments to strengthen their positions on the meaning of the statute. Levinson can argue that the growing prevalence of internet business mandates that the ADA cover standalone websites. *See Mejico v. Alba Web Designs, LLC*, 515 F. Supp. 3d 424, 435 (W.D. Va. 2021). To exclude standalone websites from Title III would be to exempt a large number of purely internet businesses from providing accessibility to customers for no good policy reason.

In contrast, LendSmart can argue that judges should not make policy in the ADA context by adopting an expansive reading of Title III. Without more detailed legislation or regulation giving clear accessibility standards for websites operated by private entities, courts are not equipped to decide what accessibility features are feasible and desirable. *See Winegard*, 556 F. Supp. 3d at 182–83. Further, the lack of a formal compliance standard from the DOJ also indicates its non-committal attitude to enforcing website accessibility, suggesting that the time has not yet come to include websites under Title III.

II. Whether the ADA Prohibits Lenders from Imposing a Higher Loan Interest Rate Based on a Borrower’s Disability

After debating the definition of “public accommodation,” competitors will argue whether the ADA covers discrimination in the terms of a credit product. No circuit court has specifically considered whether the ADA applies to credit discrimination, and very few state cases have addressed this issue specifically. Competitors must again look to precedents in the insurance context for the general scope of Title III.

Most circuits have held that the ADA regulates only *access* to goods and services offered by a public accommodation, rather than the *content* of those goods and services. However, the First and Second Circuits left this question open in the insurance policy context, potentially allowing Title III to cover the insurance underwriting process. Plaintiff and Defendant will first debate whether the access versus content standard should be upheld in the credit discrimination context, and

then dispute whether discrimination in credit terms pertains to the actual content of the loan service.

A. The Access Versus Content Distinction Is Widely Adopted.

Many cases above also considered whether Title III of the ADA covers the actual content of those services offered by public accommodations. This body of case law originated from the health insurance context, with many circuits holding that insurance caps that limit the benefits eligible to those who suffer from certain diseases limit the *content* of the service provided, and are therefore beyond the scope of Title III.

The Third, Fifth, Sixth, Seventh, and Ninth Circuits have all embraced a distinction between access and content: while the ADA regulates access to goods and services provided by public accommodations, it does not regulate the content of the goods or services provided. In *Parker v. Metro. Life Ins. Co.*, the Sixth Circuit held that “Title III does not govern the content of a long-term disability policy offered by an employer.” 121 F.3d 1006, 1012 (6th Cir. 1997) (en banc). The court based this holding on the DOJ’s interpretation of the ADA: the ADA’s “public accommodation” requirement 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.” *Id.* To illustrate this principle, the court explained that a bookstore “must make its facilities and sales operations accessible to individuals with disabilities, but is not required to stock Brailled or large print books.” *Id.*

The Seventh Circuit in *Doe v. Mut. of Omaha Ins. Co.* also held that Title III does not regulate the content of an insurance policy. 179 F.3d 557, 564 (7th Cir. 1999). In that case, Mutual of Omaha appealed a judgment that the AIDS caps in two of its health insurance policies violated the public accommodations provision of the ADA. *Id.* The first policy limited lifetime benefits for AIDS or AIDS-related conditions to \$25,000, the other limited them to \$100,000. For other conditions, the limit to both policies was \$1 million. *Id.* at 558. Even though the defendant admitted that it could not “show that its AIDS Caps [were] or ever ha[d] been consistent with sound actuarial principles, actual or reasonably anticipated experience, bona fide risk classification, or state law,” Judge Posner held that Title III does not require a seller to “alter his product to make it equally valuable to the disabled and to the nondisabled.” *Id.* Such a modification would be a “fundamental alteration” to the nature of the insurance policy, and judges are not equipped to decide on such a change. *Id.* at 560.

Additionally, the Third Circuit and Ninth Circuit also held that the content of an insurance policy is not regulated by Title III of the ADA. *See Ford v. Schering-Plough Corp.*, 145 F.3d 601, 613 (3d Cir. 1998) (“An insurance office must be physically accessible to the disabled but need not provide insurance that treats the

disabled equally with the non-disabled.”); *Weyer v. Twentieth Cent. Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (quoting *Ford*, 145 F.3d at 613). The Fifth Circuit in *McNeil v. Time Ins. Co.* similarly read the statute to not regulate the content of goods and services, including insurance policies. 205 F.3d 179, 186. (5th Cir. 2000) (“Title III does not . . . regulate the content of goods and services that are offered. We reach this conclusion based on the language in the statute and on a practical application of that language.”).

B. Plaintiff Can Still Argue Against the Access Versus Content Distinction.

Levinson can challenge the access versus content framework by referring to the First and Second Circuit cases, which adopted a less restrictive interpretation of the scope of Title III.

In *Carparts*, the First Circuit did not explicitly decide whether the ADA regulates the *content* of the goods and services offered by a public accommodation, or merely governs an individual’s *access* to them, as this was not an issue for which the plaintiffs sought appellate review. *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that a “public accommodation” need not have “physical structures for persons to enter”). Nevertheless, the court noted that “one could spend some time arguing about whether [Title III] is intended merely to provide access to whatever product or service this subject entity may offer, or is intended in addition to shape and control which products and services may be offered,” and that “there may be areas in which a sharp distinction between these two concepts is illusory.” *Id.*

In its reasoning, the court observed that there is no evidence in the legislative history that explicitly precludes “an extension of the statute to the substance of what is being offered.” *Id.* at 20. In the insurance context specifically, the court pointed to the “safe harbor” provision in the ADA, which shields entities that underwrite insurance policies according to state laws from ADA liability. *Id.*; *see also* 42 U.S.C. § 12201(c)(1) (asserting that Titles I through III “shall not be construed to prohibit or restrict an insurer . . . from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law”). The incorporation of such a provision suggests that the design of insurance policies may otherwise be regulated by the ADA. *See Carparts*, 37 F.3d at 20.

Despite this observation, whether the ADA prevents an insurer from offering different benefits for people with mental and physical disabilities remains an open question in the First Circuit, and district courts have been divided on the issue. *Compare Ross v. Hartford Life & Accident Ins. Co.*, No. 14-12748-GAO, 2015 U.S. Dist. LEXIS 129309, at *6 (D. Mass. Sep. 25, 2015) (finding that the ADA does not mandate that insurers provide the same levels of benefits to people with mental and physical

disabilities), *with Fletcher v. Tufts Univ.*, 367 F. Supp. 2d 99, 111 (D. Mass. 2005) (allowing the plaintiff to challenge under Title III his insurance plan, which limited coverage for mental illnesses but not for physical illnesses).

The Second Circuit precedent *Pallozzi v. Allstate Life Ins. Co.* also lends credence to Levinson's case. In that case, the plaintiffs sued an insurance company that refused to issue a policy based on one plaintiff's mental health diagnoses. 198 F.3d 28, 30 (2d Cir. 1999). The Second Circuit rejected the general distinction between access and content, holding that Title III regulates beyond "physical access" and applies to the insurance underwriting process. *Id.* at 32. The court explained that Title III's mandate that disabled people be afforded "full and equal enjoyment of the goods, [and] services . . . of any place of public accommodation." *Id.* at 32 (emphasis added). Insurance policies being the most "conspicuous" goods offered by an insurance company, the statutory language suggests that the ADA was meant to guarantee customers more than mere physical access to the insurance company. *Id.*

Like the First Circuit noted in *Carparts*, the Second Circuit also found this interpretation to be reinforced by the "safe harbor" provision which limits the ADA's regulation of insurance policies to some extent, exempting companies which properly set policies based on underwriting risks, classifying risks, or administering such risks in compliance with state laws. *See Pallozzi*, 198 F.3d at 33. Finding that the statutory text unambiguously covers insurance underwriting, the court did not feel the need to consider either legislative history or the DOJ's interpretive guidelines. *Id.*

Lastly, the dissent written by Judge Evans in the Seventh Circuit in *Mutual of Omaha* can also be useful. Judge Evans contested the majority opinion by drawing a distinction between requiring a bookstore to stock brailled books and disallowing an insurance policy that discriminates against certain disabled populations. 179 F.3d at 565 (Evans, J., dissenting). Analogizing the two situations, in his words, "misses the mark." *Id.* The better analogy, according to Judge Evans, would be that of a camera store which is open to disabled customers, but refuses to sell them anything but inferior cameras. *Id.* "[W]e are not being asked to force a restaurant to alter its menu to accommodate disabled diners; we are being asked to stop a restaurant that is offering to its nondisabled diners a menu containing a variety of entrees while offering a menu with only limited selections to its disabled patrons." *Id.*

Additionally, Judge Evans addressed worries about judicial overreach into the insurance underwriting practice. The "safe harbor" provision in 42 U.S.C. § 12201(c)(1) would still allow Mutual of Omaha to treat the insured people with AIDS differently than those without AIDS if the discrimination were consistent with Illinois law or could be justified by actuarial principles or claims experience. *Id.*

In the present case, Levinson can argue that Judge Evans' examples are analogous to allowing a disabled person to apply for a loan but offering them loans

only on inferior terms. Rather than requiring LendSmart to fundamentally alter its practice, he only asks the court to decide it illegal for a lender to discriminate against people with disabilities by refusing to grant them the same terms it would grant to people without a disability. Fulfilling ADA's mandate of guaranteeing "full and equal enjoyment" of goods and services necessarily touches upon some content of those services, 42 U.S.C. § 12182(a), so the access versus content distinction is but an arbitrary way to limit the reach of the ADA.

Levinson can utilize these and other arguments to argue against the access versus content distinction. Because most circuits agree on this distinction, it will be harder for Levinson to prevail on this ground. Following from that, LendSmart's practice of offering disparate credit terms based on disability should fall within the scope of Title III.

C. The Parties Will Then Debate Whether Imposing High Interest Rates Pertains to *Accessing* the Loan Service or the *Content* of that Service.

If Levinson successfully argues against the access versus content distinction, the terms of a loan fall within the scope of Title III. If he did not prevail in the previous step, he will argue that imposing a higher interest rate on loans to people with disabilities is in fact denying *access* to the lending service and therefore should be covered by Title III. LendSmart, on the other hand, will contend that imposing a higher interest rate on loans to people with disabilities is part of the *content* of its lending service and beyond the scope of Title III.

On the face of it, Defendant's position is stronger because it did not deny Levinson *any* loan. It provided Levinson with the loan in the amount he desired, albeit with a higher interest rate. Defendant might have made the loan considerably less desirable to Levinson, but Levinson was not denied access to the lending service as a whole because of his disability.

It is helpful for LendSmart to analogize the present case to the insurance cases. In *Weyer*, for example, the Ninth Circuit found that a group disability insurance policy with terms capping the benefits to people with mental illnesses to twenty-four months spoke to the *content* of services beyond the regulatory scope of Title III. 198 F.3d at 1115. This cap on benefits, like the higher interest rate on the loan, made the service less desirable, but did not deny access to the lending service as a whole. In fact, in *Webster Bank v. Oakley*, the Supreme Court of Connecticut specifically applied the access versus 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).

However, Levinson can argue that by making the loan interest rate prohibitively high, Defendant was in effect denying him access to the loan services it offered altogether. To support this argument, Levinson can again cite *Carparts*, where the First Circuit observed that the distinction between access and content is not always clear. 37 F.3d at 19 (“[T]here may be areas in which a sharp distinction between these two concepts is illusory.”) The present case is a situation where access and content blend into each other, as the service is only accessible if Levinson agrees to near exorbitant terms.

In addition, Levinson may raise the fact that other fair lending laws do not cover discrimination in non-mortgage credit lending on the basis of disability. The primary fair lending law, the Equal Credit Opportunity Act, does not list disability as one of the protected attributes that lenders are prohibited from considering. *See* 15 U.S.C. § 1691(a); *see also* 12 C.F.R. 1002.1(b). Although the Fair Housing Act has disability as a protected attribute, it only covers credit lending in relation to housing, leaving other transactions unprotected. *See* 42 U.S.C. § 3604(a). Levinson could argue that in order to give disabled people the relief they need, the ADA should be interpreted to fill that void.

CONCLUSION

Plaintiff and Defendant will each have several arguments to make for both issues in this problem. They will first discuss whether a standalone website qualifies as a “public accommodation” under Title III of the ADA. They will debate the meaning of “public accommodation” using textual arguments, statutory purpose, and relevant DOJ guidance. Following this discussion, the parties will turn to the question of Title III’s applicability to credit discrimination based on disability. Both parties will debate whether, in addition to demanding equal access to goods and services provided by a “public accommodation,” Title III generally applies to terms and content of the services. LendSmart will then characterize the higher interest rate as part of the content of credit lending service, which is outside the scope of Title III. Levinson, on the other hand, will characterize the same conduct as in effect denying access to the core service provided by a credit lending company, indicating Title III should apply regardless of whether it generally covers the content of services.