

**White Paper: Survey of U.S. Disability Law Regulation of AI-Powered  
Assistive Technology Vendors**

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## Introduction

From Google searches and social media feeds to autonomous vehicles, e-commerce, medicine, finance, criminal justice, and climate modeling, artificial intelligence (“AI”) has an ever-growing impact on our day-to-day lives. Artificial intelligence is a computer-based technology that can perform tasks typically associated with human intelligence, such as finding patterns, learning, problem solving, making predictions, and planning.<sup>2</sup>

One area AI has the potential to impact is assistive technology for people with disabilities.<sup>3</sup> Assistive technologies that use AI are often in the natural language processing and computer vision categories of AI. They include:

- **Speech recognition** powered by artificial intelligence is generally called automatic speech recognition (ASR). ASR can recognize and translate human speech into text, such as the auto-captions on YouTube and Zoom.<sup>4</sup>
- **Speech production** can take text and utilize an algorithm to mimic a human voice and produce speech, such as smart assistants like Alexa or Google Home.
- **Image recognition** can identify people, objects, places, and writing in an image.<sup>5</sup>

Each of these categories of AI are tools, like other assistive technologies, used to improve the accessibility of technology for people who are blind or visually impaired, deaf or hard of hearing, or DeafBlind.

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<sup>2</sup> IBM, *What is Artificial Intelligence (AI)?*, <https://www.ibm.com/cloud/learn/what-is-artificial-intelligence> (last visited May 18, 2022).

<sup>3</sup> Though they are beyond the scope of this paper, other applications of artificial intelligence can have significant discriminatory impacts on people with disabilities, such as the use of discriminatory hiring algorithms in employment contexts. DOJ, *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, <https://beta.ada.gov/ai-guidance/> (last visited May 16, 2022).

<sup>4</sup> Google, *Use Automatic Captioning*, <https://support.google.com/youtube/answer/6373554?hl=en> (last visited May 18, 2022); Zoom, *Managing Closed Captioning and Live Transcription*, <https://support.zoom.us/hc/en-us/articles/207279736-Closed-Captioning> (last visited May 18, 2022).

<sup>5</sup> Viso.ai, *Image Recognition: The Basics and Use Cases (2022 Guide)*, <https://viso.ai/computer-vision/image-recognition/> (last visited May 18, 2022).

This paper considers a threshold legal question: whether the current legal frameworks in the United States provide an adequate basis to ensure that vendors selling AI tools for accessibility purposes are held responsible when those tools are not up to the task.

This issue is important for three reasons: (1) quality is key for accessibility, (2) AI is not a silver bullet for compliance, and (3) our pandemic-induced virtual world forces individuals with disabilities to use AI-powered assistive technologies more than ever before.

First, when AI-based assistive technologies do not meet quality thresholds it results in an experience that discriminates against individuals with disabilities because it is not functionally equivalent to the experiences of other people. Haben Girma, an American disability rights advocate and the first Deafblind graduate of Harvard Law School, provided examples of the barriers this type of assistive technology creates for individuals with disabilities. The auto-captions on sites like YouTube and Zoom caption her name as “happen grandma”.<sup>6</sup> A deaf person relying on auto-captions misses out on “key terms [and] important details” that a hearing person would not miss out on.<sup>7</sup>

Second, AI in its current state is not a silver bullet for companies to comply with accessibility requirements under United States laws. Website overlays claim that with one line of code they can make their customers’ website(s) accessible.<sup>8</sup> But Girma found that the website of an overlay company, accessiBe, is itself not accessible, so “how can [she] trust them to make other websites accessible?”<sup>9</sup> She warns to “[b]eware of companies claiming to use AI solutions to make websites accessible. AI is a tool, and right now it’s extremely limited in what it can do for accessibility.”<sup>10</sup>

Third, in our pandemic-induced virtual world,<sup>11</sup> the ability of AI tools to sufficiently facilitate accessibility is more important than ever. Quality issues limit

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<sup>6</sup> Haben Girma, *Avoid AccessiBe & Other Companies Claiming Quick & Easy AI Accessibility*, YouTube (May 5, 2021) <https://www.youtube.com/watch?v=R12Z1Sp-u4U>.

<sup>7</sup> *Id.*

<sup>8</sup> Overlay Fact Sheet, *Overlay Fact Sheet*, <https://overlayfactsheet.com/> (last visited May 12, 2022).

<sup>9</sup> Haben Girma, *Avoid AccessiBe & Other Companies Claiming Quick & Easy AI Accessibility*, YouTube (May 5, 2021) <https://www.youtube.com/watch?v=R12Z1Sp-u4U>.

<sup>10</sup> *Id.*

<sup>11</sup> Blake E. Reid, Christian Vogler & Zainab Alkebsi, *Telehealth and Telework Accessibility in a Pandemic-Induced Virtual World*, U. Colo. L. Rev. Forum (Nov. 9, 2020),

people with disabilities' access to work, education, shopping, socialization, entertainment, and healthcare experiences. The limitations of AI tools can create barriers to accessibility for the millions of Americans who are deaf, hard of hearing, blind, visually impaired, or DeafBlind.<sup>12</sup>

This white paper provides a representative, non-exhaustive<sup>13</sup> survey of the application of federal and state disability rights laws, consumer protection law, and associated regulations to AI-based assistive technology. It illustrates that the current U.S. legal framework typically does not provide direct regulatory oversight of vendors of AI-powered assistive technologies, instead regulating their use only indirectly via their customers, who use AI-powered tools in contexts more typically regulated by disability law. The paper closes with a brief recommendation for a legal framework to directly regulate these vendors.

### **Survey of U.S. Law**

The paper's core analysis proceeds with two questions. First, does legislation or its regulations broach at all or with any specificity the use of AI to facilitate accessibility? Second, does legislation or its regulations ever regulate the AI vendor directly?

First, the paper analyzes Section 508 of the Rehabilitation Act of 1973 ("Rehab Act") as a leading example of the problem that manifests itself in the other laws surveyed. The paper then considers in turn:

- Title I of The Americans with Disabilities Act of 1990 ("ADA"), which bars discrimination in employment;
- Title II of the ADA, Section 504 of the Rehab Act, and the Individuals with Disabilities Education Act ("IDEA"), which govern accessibility in the provision of government services;
- Sections 225 and 713 of the Communications Act of 1934 and provisions of the Twenty-First Century Communications and Video

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<https://lawreview.colorado.edu/digital/telehealth-and-telework-accessibility-in-a-pandemic-induced-virtual-world/>.

<sup>12</sup> *Blindness Statistics*, Nat'l Fed'n of the Blind, <https://nfb.org/resources/blindness-statistics> (last visited May 12, 2022); *Deaf Employment Reports*, Gallaudet Univ., <https://www.gallaudet.edu/office-of-international-affairs/demographics/deaf-employment-reports/> (last visited May 12, 2022).

<sup>13</sup> This paper does not analyze all laws that touch on accessibility and technology. For example, the name of the Assistive Technology Act of 1998 suggests that it might regulate vendors of AI-powered assistive technology, but its goal is the provision of assistive technologies.

Accessibility Act of 2010 (“CVAA”), which govern the accessibility of various communications and video programming services;

- Representative state laws, including California’s Unruh Civil Rights Act (“Unruh Act”) and California’s Disabled Persons Act (“CDPA”); and
- Section 5 of the Federal Trade Commission Act (“Section 5”), the primary general-purpose consumer-protection law.

This survey demonstrates that there is no direct regulation of vendors of AI-powered assistive technologies. These laws apply to employers, state and local governments, federal agencies, the provision and procurement of public services, websites and other providers of public accommodations, and providers of telecommunications, but none of them apply to vendors of AI-powered assistive technologies directly. This pattern plays out in every statute surveyed: the best the current regulatory scheme provides for is indirect regulation of AI-powered assistive technology vendors through regulation of their customers.

### **I. Section 508 of the Rehabilitation Act of 1973**

Section 508 of the Rehabilitation Act of 1973 is an information and communication technology law that regulates procurement by the federal government.<sup>14</sup> The federal government must ensure everything it procures is accessible to individuals with disabilities. It is one of the most direct regulations of a broad range of activities involving a broad range of technology that might include AI.

However, Section 508 only regulates the procurement of the technology, not the vendor of the technology directly. At best, Section 508 indirectly regulates vendors of AI-powered assistive technologies by preventing them from selling their product to the federal government if they are not accessible. Section 508 never regulates the AI vendor directly. This pattern repeats throughout the rest of this survey.

### **II. The Americans with Disabilities Act of 1990**

This paper analyzes Title I to Title IV of the ADA in conjunction with other statutes that cover the same entities and/or employ the same mechanics as a Title of the ADA.<sup>15</sup> The scope of the ADA is broad. In the ADA, Congress found that “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access

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<sup>14</sup> 29 U.S.C. § 794d

<sup>15</sup> Title V covers miscellaneous provisions that are not relevant to this survey.

to public services.”<sup>16</sup> As such the ADA covers employment, public services, public accommodations, telecommunications, and miscellaneous issues. The statute’s normative underpinning is that the United States must “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for” individuals with disabilities.<sup>17</sup>

### III. ADA Title I—Employment

Title I of the ADA implicates the possibility of the use of unsuitable AI-based tools in employment context. Title I prohibits employers with fifteen or more employees from discrimination against a person based on their disability, with or without reasonable accommodation, who can perform the essential functions of an employment position.<sup>18</sup> The scope of Title I covers job application procedures, employee hiring, employee advancement, employee termination, employee compensation, and job training.<sup>19</sup> Title I also lists possible defenses, an exemption for people with disabilities who illegally use drugs and alcohol and a requirement that employers post notices that describe Title I in an accessible format, tells the Equal Employment Opportunity Commission (“EEOC”) to promulgate regulations on a deadline, and outlines the EEOC’s enforcement authority.<sup>20</sup> Likewise, the EEOC regulations for Title I of the ADA define the scope of Title I beyond what is listed in the statute, provide special exemptions for religious entities, outline permitted medical examinations and inquiries of employees by employers, prohibit retaliation and coercion, list the legitimate nondiscriminatory reason defense for a disparate treatment case and the job related business necessity defense for a disparate impact case, and offer interpretive guidance to all subsections in Title I.<sup>21</sup>

A recent DOJ report, *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, acknowledged the increasing use of algorithms in hiring decisions which can “result in unlawful discrimination against certain groups of applicants, including people with disabilities.”<sup>22</sup> The covered entities—employers, not vendors—“who choos[e] to use a hiring technology must ensure that its use

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<sup>16</sup> 42 U.S.C. § 12101(a)(3).

<sup>17</sup> 42 U.S.C. § 12101(a)(7).

<sup>18</sup> 29 C.F.R. § 1630.2(j)(1).

<sup>19</sup> 42 U.S.C. § 12112(a).

<sup>20</sup> 42 U.S.C. § 12117.

<sup>21</sup> 29 C.F.R. § 1630.1

<sup>22</sup> DOJ, *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring*, <https://beta.ada.gov/ai-guidance/> (last visited May 16, 2022).

does not cause unlawful discrimination on the basis of disability.”<sup>23</sup> The report also outlines when an employer’s use of AI-powered hiring technologies might violate the ADA, how employers can avoid disability discrimination when they use these technologies, and provides examples of reasonable accommodations employers can provide for applicants with disabilities.<sup>24</sup>

Title I and its regulations broach the issue of AI used to facilitate accessibility only indirectly. A Title I action could be brought against an employer that utilizes an AI-powered assistive technology that does not provide reasonable accommodations in their job application, employee hiring, employee advancement, employee termination, employee compensation, and job training capacities. However, Title I and its regulations never regulate the AI vendor directly. A review of Title I caselaw did not reveal a single case in which an AI product or vendor was discussed in a Title I claim. At best, Title I could regulate an AI vendor’s customers, who could put pressure on a vendor to change their product to comply with reasonable accommodation standards.

#### **IV. ADA Title II, Section 504, and IEPs in IDEA—Public Services**

Several laws governing the accessibility of government services likewise implicate the possibility of problematic AI-based tools used for accessibility. Title II of the ADA regulates public services provided by a public entity.<sup>25</sup> Public entities are defined as state and local governments and their instrumentalities.<sup>26</sup> Part A of Title II prohibits public entities from discriminating against a person with a disability.<sup>27</sup> It also prohibits public entities from excluding a person with a disability from participation in or denying their benefits of services, programs, or activities of a public entity.<sup>28</sup>

Similarly, Section 504 of the Rehabilitation Act prohibits public and private entities that receive funding from the federal government or its instrumentalities from excluding qualified individuals with disabilities or denying them an equal opportunity to receive program benefits and services.<sup>29</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 42 U.S.C. § 12131.

<sup>26</sup> *Id.*

<sup>27</sup> 42 U.S.C. §§ 12132; Title II Part B carves out exceptions for public transportation, *See* 42 U.S.C. §§ 12141-50.

<sup>28</sup> 42 U.S.C. § 12134.

<sup>29</sup> 29 U.S.C. § 794.

Though more specific in scope, IDEA’s Individualized Education Programs (IEPs) require public school districts to develop partnerships between parents and educators to craft plans for public school children in need of special education.<sup>30</sup> This written education plan is tailored to each child and is designed to meet the child’s educational needs.<sup>31</sup>

As with Title I—Title II, Section 504, IDEA, and their regulations broach the issue of AI used to facilitate accessibility only indirectly. Title II, Section 504, IDEA, and their regulations never regulate the AI vendor directly.

## V. ADA Title III—Public Accommodations

The ADA’s coverage of websites implicates the possibility of problematic AI-based web technology. Title III of the ADA regulates public accommodations and services operated by private entities, including the accessibility of websites and applications.<sup>32</sup> Public accommodations are all places aside from private homes and the government.<sup>33</sup> There is a circuit split as to whether websites and applications are “public accommodations” under Title III.

*Increase in Litigation and Circuit Split.* Because of this broad construction of public accommodations and services, some courts have interpreted Title III to include websites and applications.<sup>34</sup> The DOJ initiated but has yet to complete a rulemaking in which it provides requirements for websites to comply with Title III.<sup>35</sup> In 2017, the DOJ issued a Notice of Withdrawal for this and other rulemakings related to Title II and Title III of the ADA.<sup>36</sup>

Since the decision in *Robles v. Domino’s Pizza, LLC.*, 913 F.3d 898 (9th Cir. 2019), which held that Title III of the ADA applies to Domino’s websites and

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<sup>30</sup> 20 U.S.C. § 1400.

<sup>31</sup> 20 U.S.C. § 1414.

<sup>32</sup> 42 U.S.C. §§ 12181 et seq.

<sup>33</sup> *Id.*; Private entities that are considered public accommodations include places of lodging, establishments serving food or drink, places of exhibition entertainment, places of public gathering, sales, retail, and rental establishments, businesses where people can run errands, stations used for specified public transportation, places of public display or collection, places of recreation, places of education, social service centers, and places to exercise or recreate.

<sup>34</sup> *Robles v. Domino’s Pizza, LLC.*, 913 F.3d 898 (9th Cir. 2019)

<sup>35</sup> Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460 (Jul. 26, 2010).

<sup>36</sup> Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 82 Fed. Reg. 60932 (Dec. 26, 2017).

applications, Title III website and application accessibility lawsuits have increased from 2,314 in 2018 to 4,195 in 2021.<sup>37</sup>

There is a circuit split among federal courts. The First, Second, and Seventh Circuits have held that “public accommodation” under Title III includes websites and applications.<sup>38</sup> The Third, Sixth, and Ninth Circuits require a nexus between the website or application and a physical location for the website and application to fall under “public accommodation” under Title III.<sup>39</sup> The Eleventh Circuit’s recent decision which held that Title III is limited to actual, physical places and does not cover websites was vacated as moot.<sup>40</sup>

*Website Overlays and Settlement Terms.* Some of the Title III suits target website accessibility overlays whose vendors claim the overlay is “smart” or “AI-powered”. These vendors include accessiBe, UserWay, AudioEye, EqualWeb, and User1st. It is unknown to what extent the tools provided by these companies actually use AI technology.

Nevertheless, there are five recent cases whose parties included business customers of accessiBe and AudioEye.<sup>41</sup> Both accessiBe and AudioEye claim that

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<sup>37</sup> UsableNet, *2021 Mid Year Report ADA Digital Accessibility Lawsuits*, (Jun. 2021), [https://f.hubspotusercontent30.net/hubfs/3280432/Remediated%20-%202021%20MidYear UsableNet WebAccessibilityLawsuit Report FINAL 06292021%20\(5\).pdf](https://f.hubspotusercontent30.net/hubfs/3280432/Remediated%20-%202021%20MidYear%20UsableNet%20WebAccessibilityLawsuit%20Report%20FINAL%2006292021%20(5).pdf).

<sup>38</sup> See *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 19 (1st Cir. 1994) (holding that public accommodations under Title III are not limited to actual physical structures); *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 576 (D. Vt. 2015) (holding that a digital library’s website and applications are places of public accommodations under Title III); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed’n of Grain Millers, AFL-CIO-CLC*, 268 F.3d 456, 459 (7th Cir. 2001) (holding that a public accommodation can be non-physical, including the Internet).

<sup>39</sup> *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) (holding that without a nexus to a physical office a website is not a public accommodation under Title III); *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1010 (6th Cir. 1997) (holding that without a nexus to a physical office, services offered are not a public accommodation under Title III); *Robles v. Domino’s Pizza, LLC.*, 913 F.3d 898 (9th Cir. 2019) (holding that Title III applies to Domino’s websites and applications due to the nexus between Domino’s website, applications, and physical restaurants).

<sup>40</sup> *Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266 (11th Cir. 2021); *Gil v. Winn-Dixie Stores, Inc.*, 21 F.4th 775 (Mem), 29 Fla. L. Weekly Fed. C 682 (11th Cir. 2021).

<sup>41</sup> *Murphy v. Eyebobs*, 2021 U.S. Dist. LEXIS 192676, 2021 WL 4594679 (W.D. Pa. 2021); *LightHouse et al. v. ADP, Inc. et al.*, No. 4:20-cv-09020-HSG (N.D. Cal.); *Klaus et al v Upright Technologies*, No. 2:20-CV-00191, (W.D. Pa. 2020); *Douglass v. Masterbuilt*

they can make any website comply with certain accessibility laws and guidelines using AI technology.<sup>42</sup> However, October 2021 saw settlements from one accessiBe and one AudioEye customer, and the details of both settlements are publicly available.

Judge Richard Lanzillo included details of the settlement terms in his opinion for *Murphy v. Eyebobs*.<sup>43</sup> The settlement acknowledges that Eyebobs' complete reliance on accessiBe's product to ensure its website is accessible is insufficient to comply with Title III.<sup>44</sup> Both parties agreed that Eyebobs will fulfill its accessibility requirements under Title III when its website complies with WCAG 2.1 Level AA requirements and Eyebobs makes several changes to its policy, procedure, and personnel.<sup>45</sup>

Disability Rights Advocates published the *LightHouse et al. v. ADP, Inc. et al.*, No. 4:20-cv-09020-HSG (N.D. Cal.) settlement agreement and complaint.<sup>46</sup> The settlement explicitly states that “[f]or the purpose of this Agreement, ‘overlay’ solutions such as those currently provided by companies such as AudioEye and

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*Manufacturing, LLC*, No. 2:20-cv-01539, 2020 WL 8839710 (W.D. Pa. 2020); *Fischler et al v. Dorai Home*, No. 1:21-cv-02665, 2021 WL 1919980 (E.D.N.Y. 2021).

<sup>42</sup> accessiBe, *Artificial Intelligence: Automated Accessibility Compliance*, <https://accessibe.com/product/artificial-intelligence> (advertising “[i]n up to 48 hours, your website is accessible and compliant” with WCAG 2.1, ADA Title III, Section 8, and EAA/EN 301549); AudioEye, *Compliance Overview*, <https://www.audioeye.com/compliance> (advertising that they can “help you achieve rapid, sustainable website compliance with ADA, WCAG, AODA, Section 508, and California digital accessibility standards”).

<sup>43</sup> *Murphy v. Eyebobs*, 2021 U.S. Dist. LEXIS 192676, 2021 WL 4594679 (W.D. Pa. 2021).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; These changes include requirements that (1) Eyebobs appoint employees to an Accessibility Coordination Team, (2) Eyebobs complete an accessibility audit of its website and digital properties, (3) Eyebobs adopt an Accessibility Policy Statement, (4) Eyebobs implement an Accessibility Strategy, (5) Eyebobs provides accessibility training, and (6) Eyebobs retains an Accessibility Consultant to “(a) assist Eyebobs to conduct an Accessibility Audit of the Website; (b) advise Eyebobs’ on how to make the Website Accessible; (c) verify that the Website is Accessible by the end of the Agreement Term; (d) ensure any New Websites and Mobile Apps, and any Subsequently Acquired Websites and Mobile Apps, are Accessible; and (e) ensure any Third Party Content that may be required to be Accessible is Accessible.” This is supplemented by provisions for monitoring Eyebobs’ compliance with the requirements of the settlement, annual reporting, and a dispute resolution procedure.

<sup>46</sup> Settlement Agreement, *LightHouse et al. v. ADP, Inc. et al.*, No. 4:20-cv-09020-HSG (N.D. Cal.).

AccessiBe will not suffice to achieve Accessibility.”<sup>47</sup> Much like Eyebobs, this settlement requires ADP to fulfill its accessibility requirements under Title III by complying with WCAG 2.1 Level AA requirements and changes to its policy, procedure, and personnel.<sup>48</sup>

Meanwhile, accessiBe customers Upright Technologies, Masterbuilt Manufacturing, and Dorai Home are facing ongoing lawsuits for using accessiBe’s inaccessible “accessible” website overlay.<sup>49</sup> accessiBe’s questionable practices culminated in an open letter signed by over 400 individuals and organizations urging website owners to stop using accessibility overlays for their websites.<sup>50</sup>

Despite the increasing focus of ostensibly AI-based tools, Title III and its regulations broach the issue of AI used to facilitate accessibility only indirectly. This suitability of AI-based tools is broached only through their use by their vendors’ customers, while no liability is imposed directly on the vendors themselves. The customers, not the vendors, are required to take remedial steps when they do not comply with Title III.

## **VI. ADA Title IV, Section 713, Section 225 and the Twenty-First Century Communications and Video Accessibility Act of 2010 (CVAA)—Telecommunications**

Telecommunications law, which focuses in significant part on the use of captions for communications and video programming technology, implicates the use of AI-based technologies to automatically generate captions. Section 713 of the Communications Act, added by the Telecommunications Act of 1996 delegates authority to the FCC to ensure that “video programming . . . is fully accessible through the provision of closed captions.”<sup>51</sup> In 2010, the CVAA established the FCC’s authority to “require the provision of closed captioning on video

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; ADP must work with a Web Accessibility Expert to identify and address barriers to accessibility in its website and mobile applications and updates its policies and procedures accordingly. The settlement includes deadlines for specific features or functions to be accessible on its website and mobile applications. ADP must provide customer service training to its employees and agents. ADP must also provide LightHouse with quarterly updates and submit reports if it cannot meet its deadlines.

<sup>49</sup> *Klaus et al v Upright Technologies*, No. 2:20-CV-00191, (W.D. Pa. 2020); *Douglass v. Masterbuilt Manufacturing, LLC*, No. 2:20-cv-01539, 2020 WL 8839710 (W.D. Pa. 2020); *Fischler et al v. Dorai Home*, No. 1:21-cv-02665, 2021 WL 1919980 (E.D.N.Y. 2021).

<sup>50</sup> Overlay Fact Sheet, *Overlay Fact Sheet*, <https://overlayfactsheet.com/#statement-from-sponsors-and-signatories-to-this-fact-sheet> (last visited May 12, 2022).

<sup>51</sup> 47 U.S.C. § 613(b)(1).

programming delivered using Internet Protocol that was published or exhibited on television with captions.”<sup>52</sup>

Quality issues have long persisted with closed captions of live programming.<sup>53</sup> However, live captioning has seen an “unchecked proliferation of untested [automatic speech recognition (ASR)] technologies” among broadcast and television networks and online.<sup>54</sup> The FCC’s “best practices” methodology for caption quality is not tailored to the proliferation of ASR, and the Commission’s rules do not regulate ASR vendors directly.<sup>55</sup>

Title IV amended Title II of the Communications Act of 1934 by adding Section 225 (“Section 225”). Section 225 is an accessibility-centric provision that regulates a type of accessibility technology, telecommunications relay services (“TRS”). TRS services enable people with hearing or speech disabilities to place and receive phone calls.<sup>56</sup> TRS includes the internet protocol captioned telephone service, video relay service, captioned telephone services, text-to-voice, and speech-to-speech, among others.<sup>57</sup> A subset of TRS, Internet Protocol Captioned Telephone Service (“IP CTS”), is “used by persons with hearing loss who can speak and have some residual hearing.”<sup>58</sup>

In 2020 the FCC certified the first IP CTS captioning service to exclusively utilize ASR.<sup>59</sup> To date, there are four IP CTS providers conditionally certified to provide IP CTS services with ASR.<sup>60</sup>

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<sup>52</sup> See 47 U.S.C. § 613(c)(2)(A).

<sup>53</sup> Petition for Declaratory Ruling and/or Rulemaking of TDI at 2-3, GC Docket No. 05-1231 (Jul. 31, 2019), <https://www.fcc.gov/ecfs/filing/10801131063733>.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> See *id.* at iv.

<sup>56</sup> FCC, *Telecommunications Relay Services*, <https://www.fcc.gov/consumers/guides/telecommunications-relay-service-trs> (last visited May 12, 2022).

<sup>57</sup> *Id.*

<sup>58</sup> FCC, *Internet Protocol Captioned Telephone Service (IP CTS)*, <https://www.fcc.gov/ipcts> (last visited May 12, 2022).

<sup>59</sup> FCC, *FCC Grants Conditional, First-Ever Certification For IP Captioned Telephone Service Using Only Automatic Speech Recognition*, <https://docs.fcc.gov/public/attachments/DOC-364163A1.pdf> (last visited May 17, 2022).

<sup>60</sup> FCC, *Memorandum Opinion and Order*, <https://docs.fcc.gov/public/attachments/DA-20-485A1.pdf>; FCC, *Memorandum Opinion and Order*, <https://docs.fcc.gov/public/attachments/DA-20-587A1.pdf>; FCC, *Memorandum Opinion and Order*, <https://docs.fcc.gov/public/attachments/DA-21-419A1.pdf>; FCC, *Order*, <https://docs.fcc.gov/public/attachments/DA-21-1080A1.pdf>.

While the FCC has authority to certify, suspend, or revoke the certification of an IP CTS vendor, at least some ASR-based IP CTS providers do not use their own ASR technology. Certification petitions often mention speech-to-text vendors and ASR vendors that the IP CTS providers contract, although the names of the vendors are redacted or unspecified.<sup>61</sup> As such, the FCC’s authority under Section 225 is effectively to regulate customers of AI vendors—i.e., IP CTS providers—rather than the vendors directly.

Section 713, Section 225, and their regulations indirectly broach the issue of AI used to facilitate accessibility. With the prevalence of ASR captioning systems, the FCC thus can indirectly broach the use of AI to facilitate accessibility. But this is still not a direct regulation of vendors of AI-powered assistive technology, unless a relay or video provider develops ASR technology it uses in-house.

## VII. State Disability Statutes

In addition to the ADA, some state laws complement and build upon the requirements in the ADA. This paper focuses on examples from California law because California accounts for 42% of ADA litigation nationwide and has a large technology industry.<sup>62</sup>

The California Unruh Act was originally passed in the 1950s as an antidiscrimination statute that covered California businesses.<sup>63</sup> Protected classes “are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”<sup>64</sup> The Unruh Act has since been amended several times, including a 1987 amendment that broadened its scope to prevent discrimination against blind or otherwise physically disabled individuals.<sup>65</sup> In 1992 the law was expanded to all individuals with disabilities and was amended to incorporate ADA standards.<sup>66</sup>

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<sup>61</sup> *Memorandum Opinion and Order*, <https://docs.fcc.gov/public/attachments/DA-20-485A1.pdf>; FCC, *Memorandum Opinion and Order*, <https://docs.fcc.gov/public/attachments/DA-20-587A1.pdf>; FCC, *Memorandum Opinion and Order*, <https://docs.fcc.gov/public/attachments/DA-21-419A1.pdf>; FCC, *Order*, <https://docs.fcc.gov/public/attachments/DA-21-1080A1.pdf>.

<sup>62</sup> Tom McNichol, *Targeting ADA Violators*, Cal. Lawyer (Jan. 2012) <http://www.callawyer.com/Clstory.cfm?eid=919801>.

<sup>63</sup> Cal. Civ. Code §§ 51, 52.

<sup>64</sup> Cal. Civ. Code § 51(b).

<sup>65</sup> Cal. Civ. Code § 51.

<sup>66</sup> Cal. Civ. Code § 51(f).

Based on the plain language of the statute an ADA violation is a *per se* violation of the Unruh Act.<sup>67</sup>

Likewise the California Disabled Persons Act (CDPA) asserts that individuals with disabilities or medical conditions have the right “to the full and free use of the streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians’ offices, public facilities, and other public places”.<sup>68</sup> As with the Unruh Act, an ADA violation is a *per se* violation of the CDPA.<sup>69</sup>

Like Title III of the ADA, the Unruh Act and CDPA at most indirectly regulate vendors of AI-powered assistive technology. Like Title III, the Unruh Act covers public accommodations in Title III,<sup>70</sup> and the CDPA covers some public services in Title II.<sup>71</sup> To the extent that Title II and Title III indirectly regulate these vendors, so do the Unruh Act and CDPA. There is no obvious direct regulation of AI-powered assistive technologies under the Unruh Act and CDPA.

### **VIII. Consumer Protection Law: Section 5 of the Federal Trade Commission Act and FTC Regulations**

Although the United States has no federal statute that explicitly regulates AI, the FTC issued guidelines in 2021, 2020, and 2016 for businesses that utilize AI.<sup>72</sup> However, none of these guidelines address AI when it is used as an assistive technology.

The FTC filed an Advance Notice of Proposed Rulemaking (“ANPRM”) on December 10, 2021. In the ANPRM, the FTC stated it “is considering initiating a

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<sup>67</sup> Cal. Civ. Code § 51(f); *Lentini v. Cal. Ctr. for the Arts*, 370 F.3d 837, 847 (9th Cir. Cal. 2004) (holding that “no showing of intentional discrimination is required where the Unruh Act violation is premised on an ADA violation” based on the plain meaning canon of interpretation); *Munson v. Del Taco, Inc.*, 46 Cal.4th 661, 208 P.3d 623, 94 Cal. Rptr. 3d 685 (2009) (upholding the rule from *Lentini*).

<sup>68</sup> Cal. Civ. Code § 54(a).

<sup>69</sup> Cal. Civ. Code § 54(c).

<sup>70</sup> Cal. Civ. Code § 51(f).

<sup>71</sup> Cal. Civ. Code § 54(a).

<sup>72</sup> FTC, *Aiming for Truth, Fairness, and Equity in Your Company’s Use of AI*, (Apr. 19, 2021) <https://www.ftc.gov/business-guidance/blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai>; FTC, *Using Artificial Intelligence and Algorithms*, (Apr. 8, 2020) <https://www.ftc.gov/business-guidance/blog/2020/04/using-artificial-intelligence-algorithms>; FTC, *Big Data: A Tool for Inclusion or Exclusion? Understanding the Issues (FTC Report)*, (Jan. 2016) <https://www.ftc.gov/reports/big-data-tool-inclusion-or-exclusion-understanding-issues-ftc-report>.

rulemaking under section 18 of the FTC Act to . . .ensure that algorithmic decision-making does not result in unlawful discrimination.”<sup>73</sup> How the FTC will define “unlawful discrimination”, and whether that definition might include AI designed to facilitate accessibility remains to be seen. As it stands, however, the FTC seems to be targeting the discriminatory *use* of AI-based tools, rather than regulating their vendors directly.

The rise of web overlays in ADA litigation presents a potential area of focus for the FTC. As discussed *supra*, Plaintiff Anthony Murphy, a blind user, sued Eyebobs.<sup>74</sup> Eyebobs’ website is inaccessible to blind people. Eyebobs outsourced their accessibility obligations to accessiBe, a vendor that “claims that it can automatically bring a website into compliance with” the ADA, the Unruh Act, Section 508 and WCAG Level AA.<sup>75</sup> It displays an accessibility button in the bottom left corner of the website that allows users to set “Accessibility Adjustments” for various types of accessibility issues and AI.<sup>76</sup> However, the two settlements discussed *supra* suggest that accessiBe’s products do not facilitate compliance with the ADA or meet WCAG 2.1 Level AA standards.<sup>77</sup>

Marketing claims like those at issue in *Murphy* could be considered a deceptive representation or practice in or affecting commerce in violation of Section 5 of the FTC Act. Assertions that a vendor can enable websites to comply with various laws arguably misleads its customers, its customers’ interpretations that these assertions are accurate arguably could be treated as reasonable under the circumstances—at least prior to the development of relevant case law establishing the problems with such assertions—and misleading assertions that a vendor can enable a website to comply with various laws arguably are material. As such, this is one instance in which the vendor of AI-powered assistive technology could be regulated by a federal agency.

However, the application of Section 5 still does not facilitate direct oversight of the substantive accessibility shortcomings of notionally AI-based overlay tools. Instead, it is solely based on a company misstating or exaggerating the capabilities of its products. Though deceptive marketing of AI-based tools is a problem onto

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<sup>73</sup> Notice, Fed. Trade Comm’n, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=3084-AB69> (emphasis added).

<sup>74</sup> *Murphy*, 2021 WL 4594679 (complaint for declaratory and injunctive relief).

<sup>75</sup> *Id.* at 30.

<sup>76</sup> *E.g.*, accessiBe, *accessiBe Comprehensive Demo with Company CEO*, YouTube (Jun. 2, 2021) <https://www.youtube.com/watch?v=UTPUCIT83M4>.

<sup>77</sup> *Murphy*, 2021 WL 4594679; *LightHouse et al.*, No. 4:20-cv-09020-HSG.

itself, FTC action against these vendors is not clearly poised to address overlay tools' actual suitability for use—nor is it clear that it is even possible to develop AI-based overlay tools suitable for accessibility contexts.<sup>78</sup>

### **Conclusion and Recommendations**

This paper establishes that vendors of AI-powered assistive technology typically are not directly regulated under U.S. legal frameworks. Current U.S. legal frameworks typically regulate vendors only indirectly by assuming that regulated entities will have enough market power to pressure vendors to comply with regulatory requirements.

A full-fledged regulatory framework to regulate AI-based tool vendors directly to ensure their suitability for accessibility applications is beyond the scope of this paper. Nevertheless, it is clear that quality is key to AI-powered assistive technologies. Legislation or regulation could take steps to define quality standards for various AI-powered assistive technologies to ensure that products are functionally equivalent, exercise jurisdiction over AI vendors by certifying and regularly examining AI vendors according to the quality standards, and ensuring that quality standards are probative of the tools' suitability for usage in real-world scenarios.

There is ample potential to facilitate and improve accessibility through AI-powered assistive technologies. But U.S. law must take greater steps to oversee the vendors of these technologies and ensure that these technologies are suitable for their intended purpose, rather than assume that regulated entities will have enough market power to pressure vendors to comply with regulatory requirements.

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<sup>78</sup> See Overlay Fact Sheet, *Overlay Fact Sheet*, <https://overlayfactsheet.com/> (last visited May 12, 2022).