



# Digital Accessibility Legal Updates 2020

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April 16, 2020

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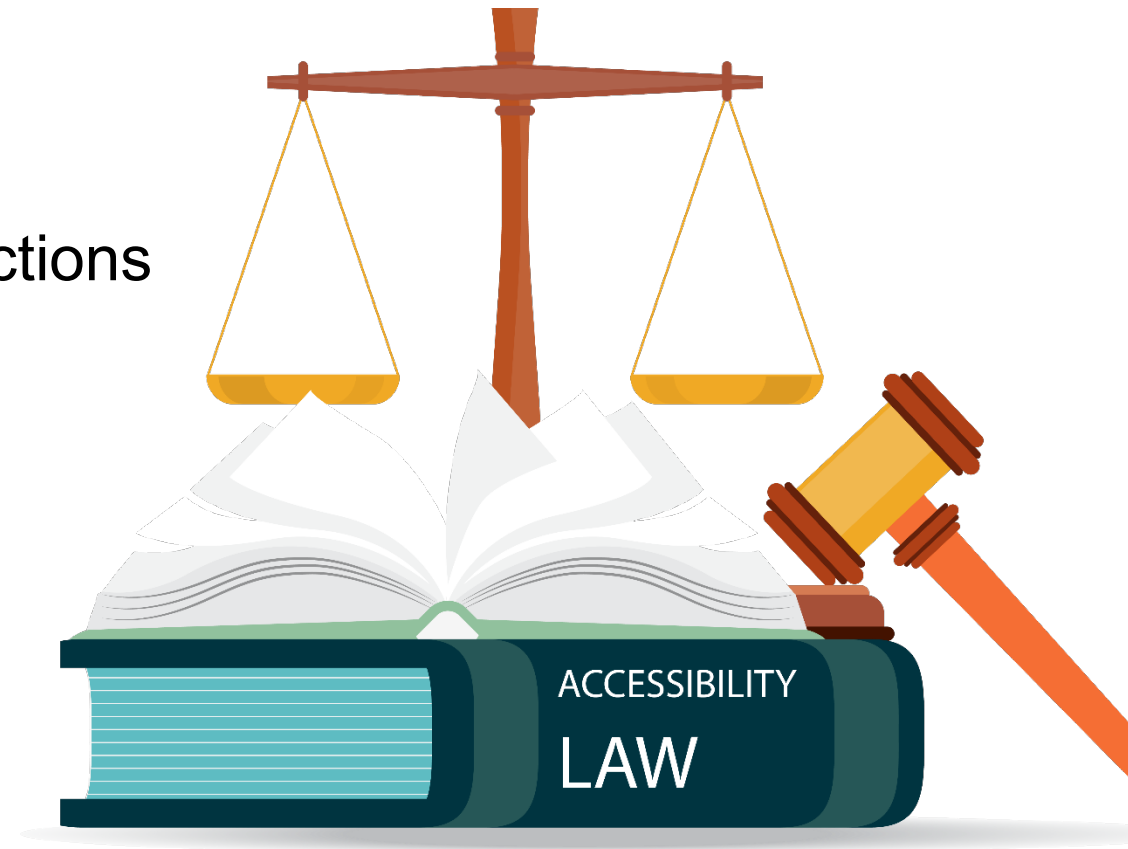
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# Agenda

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- Legal Overview
- What is an accessible website?
- ADA Title III Website Lawsuit Data
- Key Lawsuits and Settlements
- Strategies for Avoiding & Defending Legal Actions
- Typical Roadmap to Accessibility



# Legal Overview: What Statutes May Require Accessible Technology

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- **ADA Title II:** State & Local Governmental Entities
- **ADA Title III:** Public Accommodations
- **Section 504 Rehabilitation Act:** Recipients of Federal Funding
- **Section 508 Rehabilitation Act:** Technology sold to federal agencies may need to be Section 508 compliant under contract.
- **State Non-discrimination Laws:** Public Accommodations
- **Air Carrier Access Act:** Requires primary websites of airline carriers to conform to WCAG 2.0 AA.
- **ACA Section 1557, Medicare Regulations:** Healthcare

# Legal Overview: Remedies

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Law	Coverage	Relief Available
ADA Title III	Public Accommodations	<u>Private action</u> : Injunctive relief; attorneys' fees; costs  <u>DOJ action</u> : Injunctive relief, civil penalties, damages for aggrieved persons
Section 504 Rehab Act	Recipients of Federal Funding	Injunctive relief, attorneys' fees, costs, damages
State/Local Non-discrimination Laws	Public Accommodations	Injunctive relief; attorneys' fees; costs; damages (CA: statutory damages)

# Legal Overview: ADA Title III Requirements

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- Equal access
- Effective communication
  - “auxiliary aids and services”
    - “accessible electronic information technology”
  - undue burden & fundamental alteration exceptions
- Accessible physical facilities
- Reasonable modifications to policies & procedures

*Title III uniquely requires affirmative steps  
to ensure access for the disabled*

# Legal Overview: ADA Title III Requirements

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A Public Accommodation is:

- Private
- Affects commerce
- Falls within at least one of the following 12 categories:
  - 1) Places of lodging (e.g., inns, hotels, motels)
  - 2) Establishments serving food or drink (e.g., restaurants and bars);
  - 3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert halls, stadiums);
  - 4) Places of public gathering (e.g., auditoriums, convention centers, lecture halls);
  - 5) Sales or rental establishments (e.g., bakeries, grocery stores, hardware stores, shopping centers);
  - 6) Service establishments (e.g., laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, offices of accountants or lawyers, pharmacies, insurance offices, professional offices of health care providers, hospitals);
  - 7) Public transportation terminals, depots, or stations (not including facilities relating to air transportation);
  - 8) Places of public display or collection (e.g., museums, libraries, galleries);
  - 9) Places of recreation (e.g., parks, zoos, amusement parks);
  - 10) Places of education (e.g., nursery schools, elementary, secondary, undergraduate, or postgraduate private schools);
  - 11) Social service center establishments (e.g., day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies); and
  - 12) Places of exercise or recreation (e.g., gymnasiums, health spas, bowling alleys, golf courses).
- *Must it be a physical place?*

# What is an “accessible” website?

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- One that can be used by people with various types of disabilities
- **Blind:** Screen reader compatibility
  - alternative text for images
  - properly labeled form fields
  - proper use of headings
  - keyboard-only access
  - audio descriptions for videos
- **Low Vision:** Color contrast, text resizing
- **Deaf or Hard of Hearing:** Captions for audio content
- **Mobility:** Keyboard-only access; ability to slow down or turn off time outs
- **Epilepsy:** No flashing content
- **Color Blind:** Color not used as sole method of conveying information



# Web Content Accessibility Guidelines (WCAG)

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- Published by private group of experts, W3C
  - Adopted WCAG 2.1 AA in June 2018
    - Adds 17 Success Criteria to WCAG 2.0
    - Mobile Apps, Low Vision, Cognitive Impairments
- Not a legal standard under Title III of the ADA



# Legal Overview: Obama DOJ Position

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**2010-2016:** 2010 ANPRM pending

- “Equivalent” alternative means of accessing goods & services on website (e.g. 24-hour staffed phone service for all information and services available on website) is acceptable
- Public comment requested about:
  - How much time businesses should have to comply
  - Impact of requirement to caption all videos
  - What standard should be adopted as definition of accessible

# Legal Overview: Obama DOJ Position

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**2010-2016:** Still no proposed regulation, DOJ pressured public accommodations to make websites and/or mobile apps conform to WCAG 2.0 AA

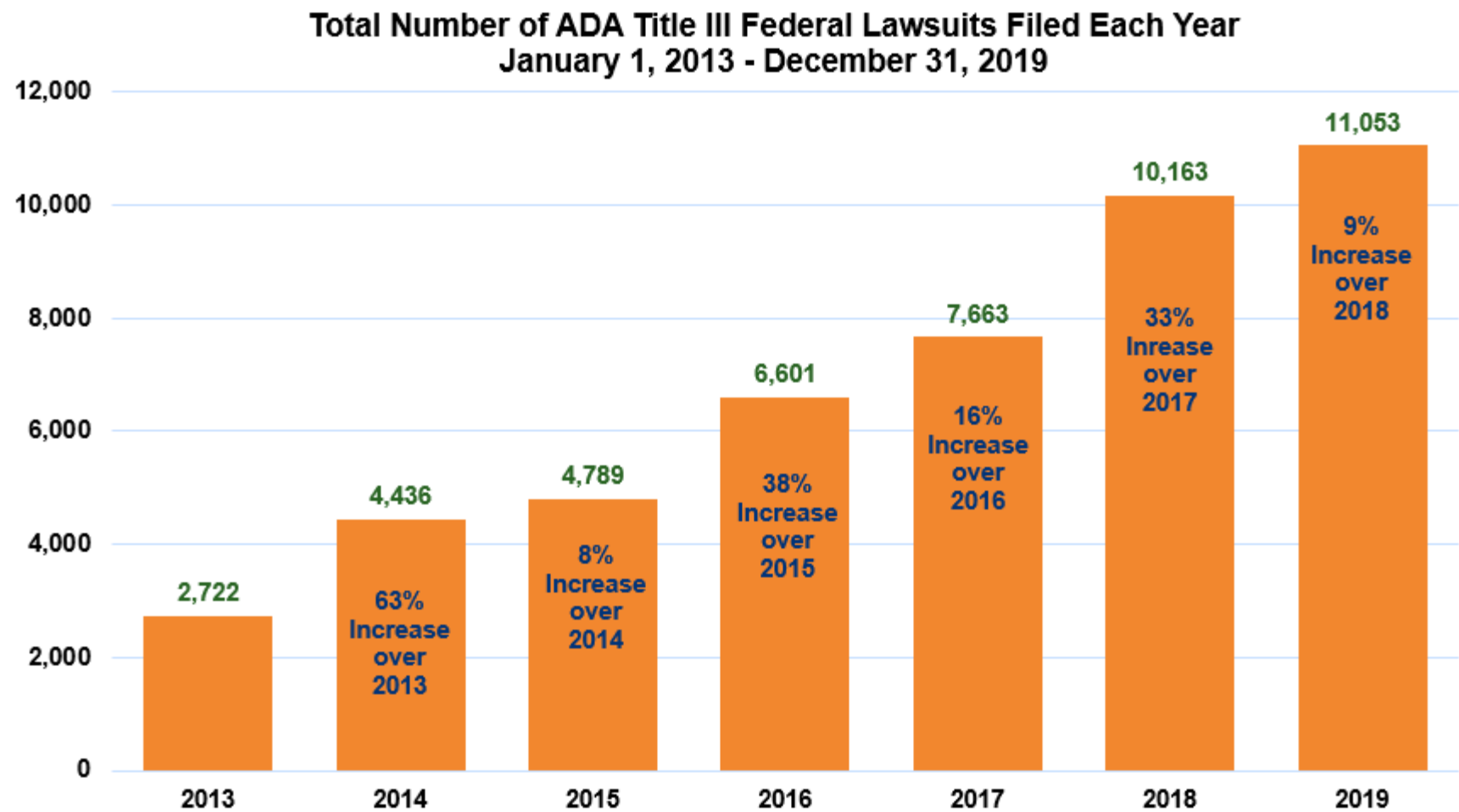
- Peapod (settlement agreement)
- H&R Block (lawsuit/consent decree)
- Hilton Worldwide (lawsuit/consent decree)
- Quick Trip (settlement agreement)
- Museum of Crime & Punishment (settlement agreement)
- edX (settlement agreement)
- Louisiana Tech University (settlement agreement)
- Florida State (settlement agreement)
- Law School Admissions Council (settlement agreement)
- Carnival Cruise Lines (settlement agreement)
- Greyhound (consent decree)

# Legal Overview: Trump DOJ Position

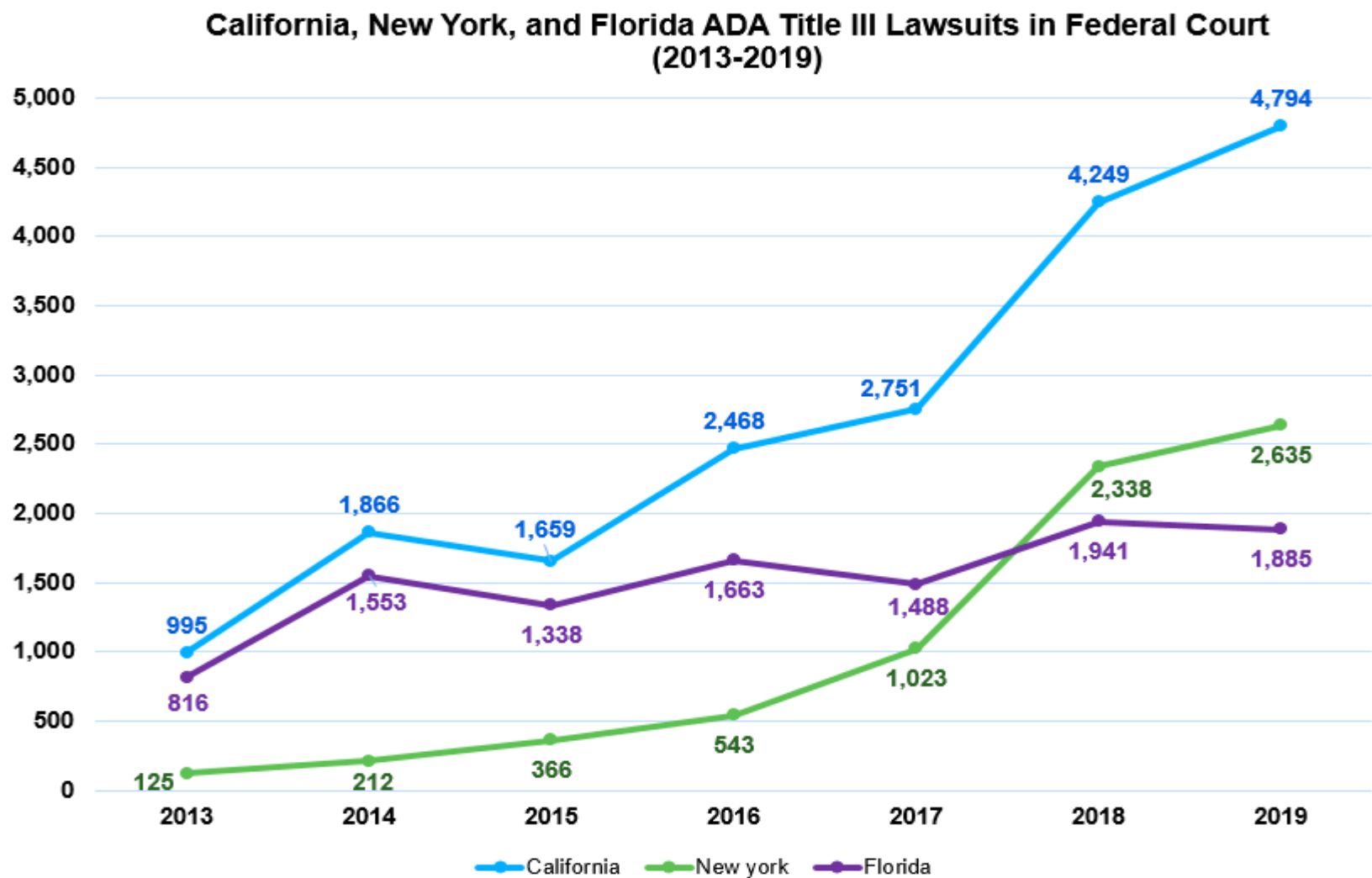
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- 2017: Withdrew website accessibility rulemaking begun in 2010
- 2018:
  - Declined invitation to weigh in *Robles v. Yum! Brands* (Pizza Hut) MTD
  - Response to congressional letter:
    - ADA covers websites
    - There is “flexibility” in how to comply

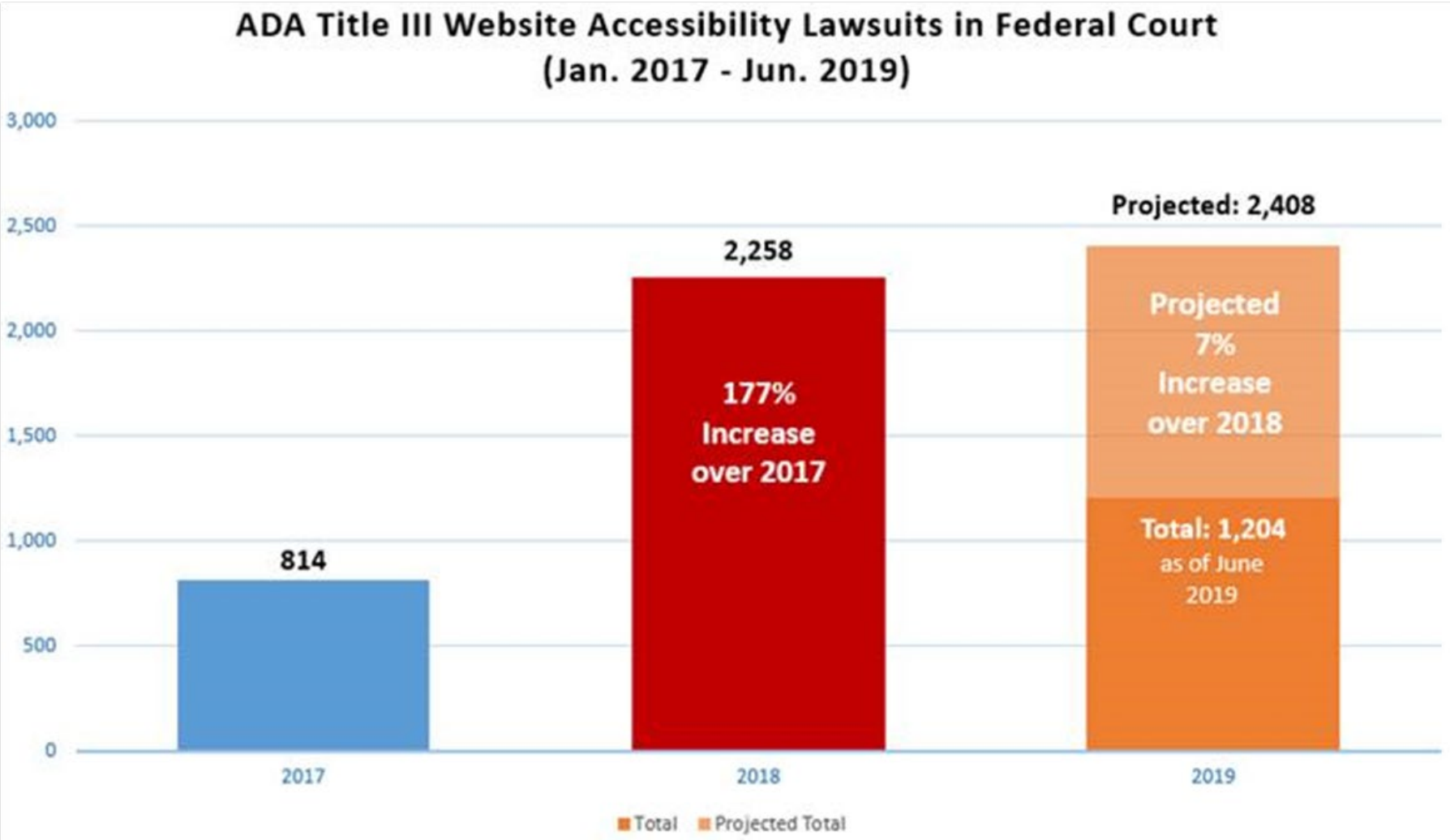
# ADA Title III Accessibility Lawsuit Numbers (All Bases)



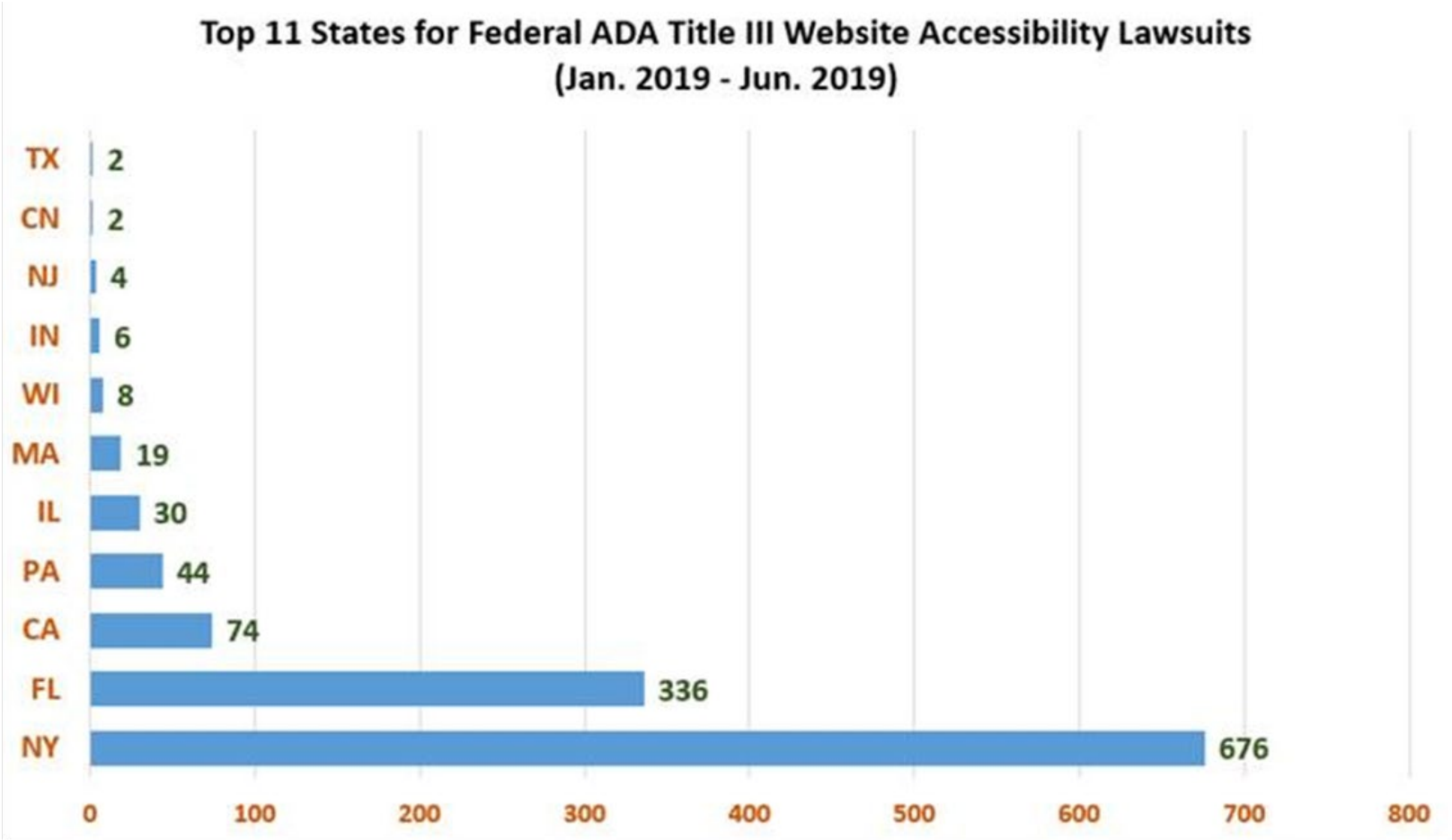
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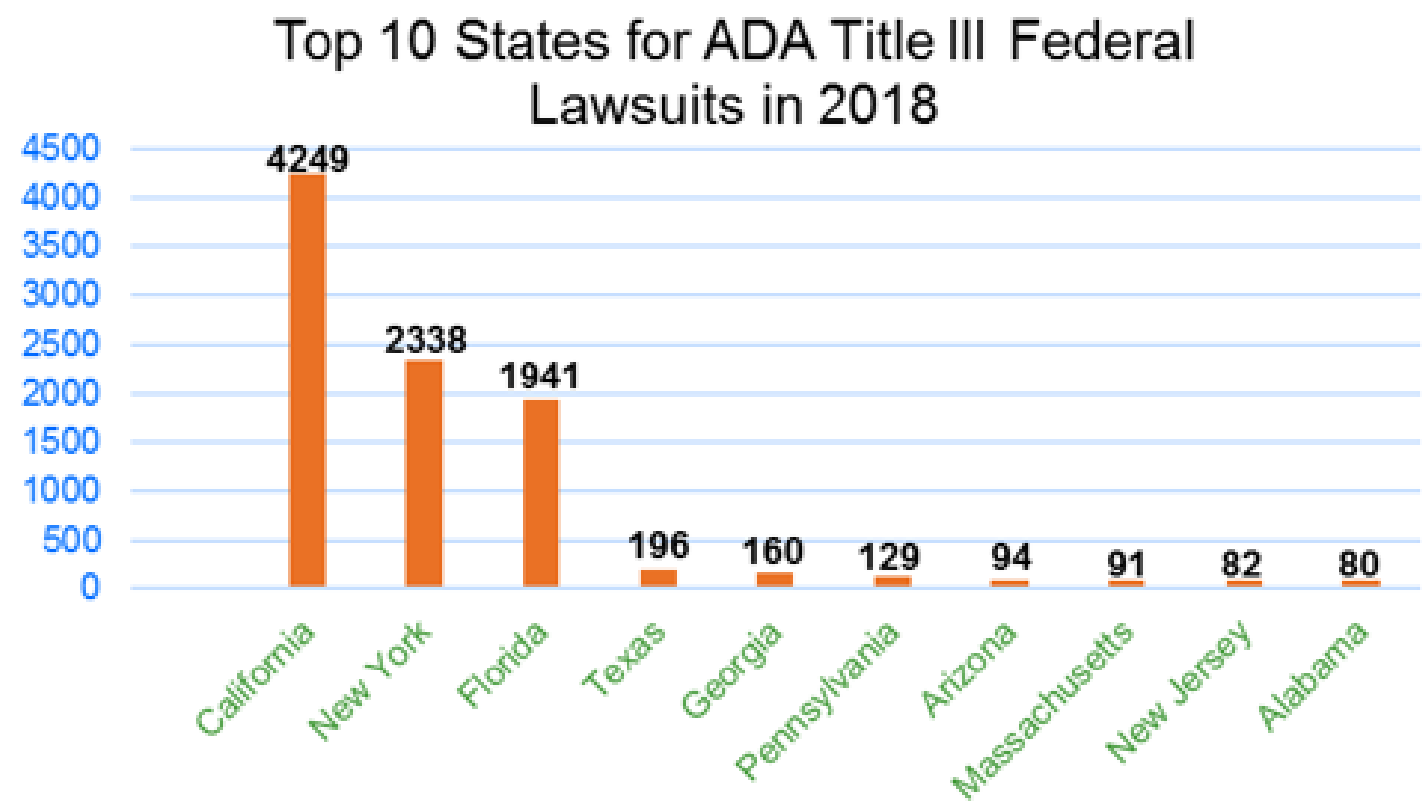
# ADA Title III Website Accessibility Lawsuit Numbers



# ADA Title III Web Accessibility Lawsuits by State



# ADA Title III Lawsuits by State



[Graph: Top 10 States for ADA Title III Federal Lawsuits in 2018: CA 4249, NY 2338, FL 1941, TX 196, GA 160, PA 129, AZ 94, MA 91, NJ 82, AL 80.]



# Title III Website Litigation: Key Cases & Themes

- Pro-defendant MTD decisions
  - Usually lack of federal jurisdiction, personal jurisdiction, or poorly drafted complaints
  - Substantive arguments (e.g. ADA does not cover websites) usually unsuccessful
  - Due process and primary jurisdiction defenses universally rejected
- Pro-plaintiff decisions
  - More wins for plaintiffs than defendants on early dispositive motions
- 9th and 11th Circuit Courts of Appeals have decided substantive issues
- 4th and 7th Circuits have considered standing issues
- Telephonic access as alternate effective communication remains issue of fact
- Other issues:
  - Separate but equal
  - Employment



# Title III Website Litigation: Key Cases & Themes

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## *The US Supreme Court Denies Domino's Pizza's Request for Relief & Clarity*

### ***Robles v. Dominos Pizza LLC (9th Cir. 2019)***

- Federal trial court granted early dispositive motion on due process and primary jurisdiction grounds
- 9th Circuit reversed & remanded, finding:
  - ADA applies to websites & mobile apps that have nexus to physical place
  - Rejected due process/primary jurisdiction arguments - Domino's had notice of the general requirements under ADA Title III
  - Telephone service as an alternative could not be decided on motion to dismiss
- Domino's appealed to US Supreme Court, USSC declined to review (October 7, 2019)

# Title III Website Litigation: Key Cases & Themes

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## *A Few Courts Have Made Decisions on the Merits*

- ***Gil v. Winn Dixie (SDFL 2017)*** (appeal pending since 2017)
  - Bench trial verdict for plaintiff
  - 3-year injunction:
    - Accessible website by 12/1/17(WCAG 2.0 AA)
    - Annual training for employees on website accessibility
    - Require third party content to be accessible
    - Adopt web accessibility policy by 12/1/17
    - Fees/costs totaling \$105,271 awarded to plaintiff
- ***Gomez v. GNC (SDFL 2018)***
  - Summary judgment for plaintiff on merits after expert reports submitted
  - Inaccessible website violates ADA
  - No injunction issued; parties agreed to stay case pending Winn Dixie appeal

# Title III Website Litigation: California / Unruh Act

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## ***A Few Courts Have Made Decisions on the Merits***

- ***Davis v. BMI/BND Travelware (CA State court 2016)***
  - Summary judgment against retailer granted
  - Inaccessible website discriminates against blind customer under Unruh Act
- ***Thurston v. Midvale Corp d/b/a Whisper Lounge (CA State court 2018, aff'd 9/3/2019)***
  - Appeals Court affirmed summary judgment against restaurant on grounds inaccessible website discriminates against blind customer under Unruh Act
  - Ordered restaurant
    - Conform website with the WCAG Level 2.0 AA (Ct. App. found this not overbroad or uncertain)
    - Pay \$4,000 statutory damages
  - App. Ct. held:
    - websites with physical nexus are subject to ADA Title III
    - third party content: “appellant offers no legal support for its theory that it cannot be liable for ADA discrimination if hires someone else to do the discrimination.”
    - telephone and email not alternate effective communication because only available during restaurant hours of operation

# Title III Website Litigation: Other Recent Highlights

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***Some courts say websites are not places of public accommodation***

- ***Zaid v. Smart Financial (SDTX 2019) & Strojnik v. Landry's (SDTX 2019)***
  - “a website is not a place of public accommodation”
  - Citing 5th Cir. decision in *McGee v. Coca Cola* where a vending machine was held not to be a place of public accommodation.
- ***Carroll v. Northwest Federal Credit Union (EDVA 2018)***
  - Website is not a public accommodation
  - Citing to 4th Cir. decision in *Noah v. AOL Time Warner* (chat rooms and other online services are not a place of public accommodation under Title II of the Civil Rights Act which has the same definition of “place of public accommodation” as the ADA)

***Don't forget, others disagree...***

# Title III Website Litigation: Physical Nexus

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- ***Haynes v. Dunkin Donuts* (11<sup>th</sup> Cir. 2018)**
  - 11<sup>th</sup> Circuit reversed district court dismissal of case on physical nexus grounds
  - Plaintiff sufficiently alleged that the barriers on the website prevented him from accessing the services available in a physical store
- ***Mahoney v. Bitrex* (ED Penn. 2020)**
  - motion to dismiss granted granted for failure to state a claim because no physical nexus

# Title III Website Litigation: Standing

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- ***Griffin v. Dept. of Labor Credit Union* (4<sup>th</sup> Cir. 2019)**
  - 4<sup>th</sup> Circuit affirmed district court dismissal for lack of standing.
  - Plaintiff had not suffered an injury in fact and was not facing an imminent injury in the future.
    - “Inability to obtain information is sufficiently concrete to constitute injury in fact only when the information has some relevance to the litigant.” The fact that the plaintiff could never be a member of the credit union whose membership was limited to current and former employees of the Department of Labor and their immediate families and households made the information on the website not relevant to him.
    - Injury not “particularized”: while everyone in the U.S. may have access to a particular allegedly inaccessible website, a plaintiff must demonstrate some connection between him/her and the business to establish standing to sue.
    - Plaintiff faced no “imminent” harm resulting from not being able to access the website for information because he could never be a member of the credit union in the first place.
- ***Carroll v. Northwest Federal Credit Union* (4<sup>th</sup> Cir. 2019)**
  - 4<sup>th</sup> Circuit affirmed district court’s dismissal of lawsuit on same grounds – plaintiff could never join the credit union he sued

# Title III Website Litigation: Mootness

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## *A few “we fixed it!” (or not) mootness cases*

- ***Diaz v. Kroger* (SDNY 2019)**
  - Lawsuit dismissed as moot based on declaration Kroger submitted stating all barriers raised in complaint were fixed, it ensured no additional barriers existed, and was committed to access going forward
- ***Haynes v. Hooters* (11<sup>th</sup> Cir. 2018)**
  - Case dismissed by district court based on prior settlement with another plaintiff; reversed by 11th Circuit
  - Hooters was only in process of making website accessible so case was not moot
  - Relief Plaintiff requested not covered by prior agreement, including request for order directing Hooters to “continually update and maintain” website in accessible manner
  - Plaintiff was not a party to prior agreement and could not enforce it

→ ***Mootness determinations are highly fact-specific***



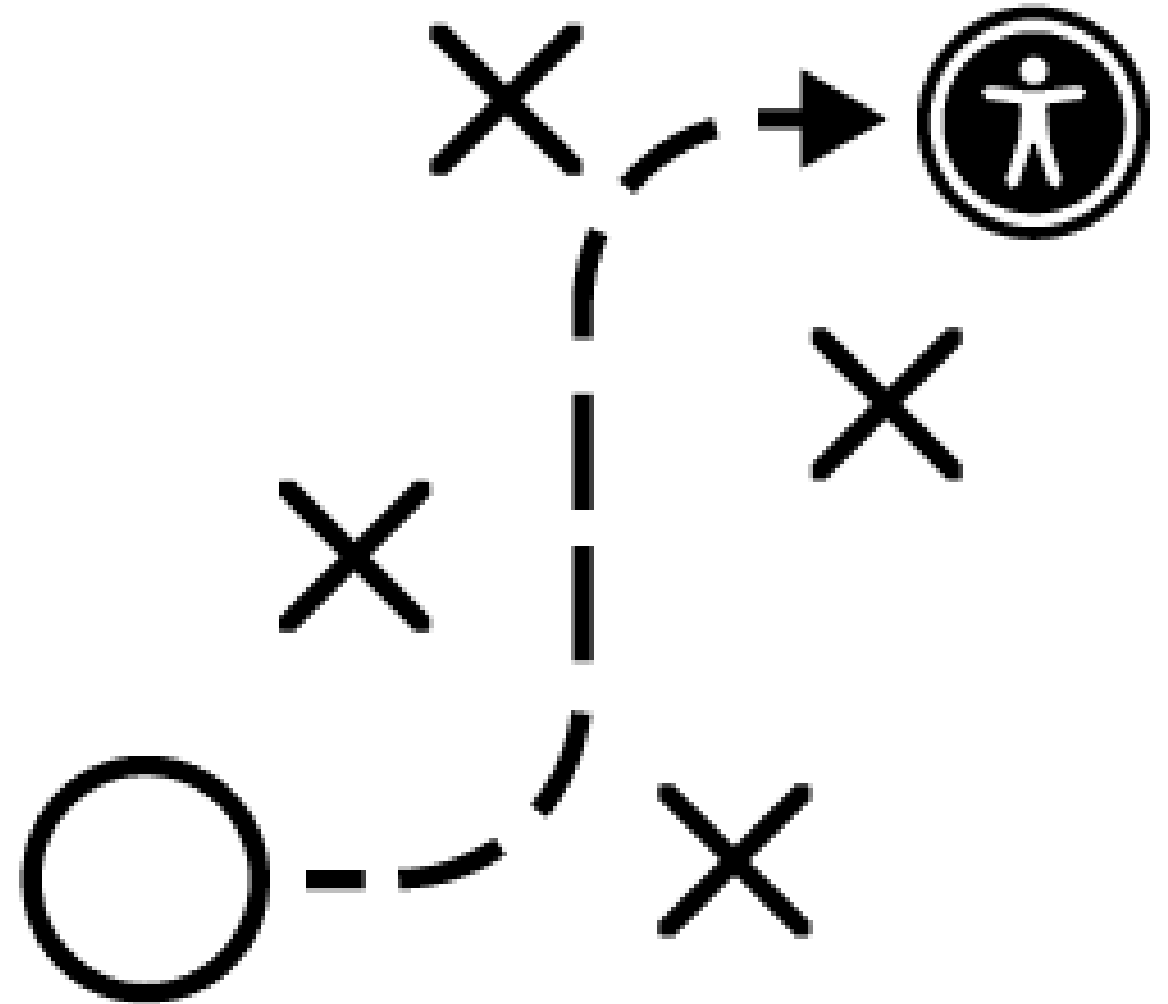
# Title III Website Litigation: University Captioning Cases

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- ***NAD v. Harvard U. (D. Mass. 2019)***
  - Harvard not responsible for accessibility of content third parties posted on its website (video captioning)
  - Motion for preliminary approval of class settlement and consent decree approved December 2019
- ***NAD v. MIT (D. Mass. 2020)***
  - Motion for preliminary approval of class settlement and consent decree approved March 2020
- *Cases began in 2015 on behalf of a class of deaf and hard of hearing individuals*
- *Alleged violation of the Rehabilitation Act and Title III of the ADA due to lack of close captioning or unintelligible captioning of videos or audio tracks made publicly available by the Universities*

# Strategies for Avoiding/Defending Litigation

- Create and maintain website/mobile apps
- 24/7 telephone line
- Accessibility Statement, Policy, Procedure
- Training
- Vendor Contracts
- Third party content
- Consent decree?



# Typical Roadmap to Accessibility (Pt. 1)

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- Get help
  - qualified accessibility counsel
  - qualified digital accessibility expert
  - Privilege issues
  - Manual & automated testing
- Train
  - website team
  - content providers
  - IT
  - marketing
  - customer service



# Typical Roadmap to Accessibility (Pt. 2)

- Make accessibility improvements to website/mobile app
  - WCAG 2.0/2/1 AA conformance
  - Prioritize
- Periodically re-audit website/mobile app
- Mechanism to receive and act upon accessibility user feedback



# Questions?

