



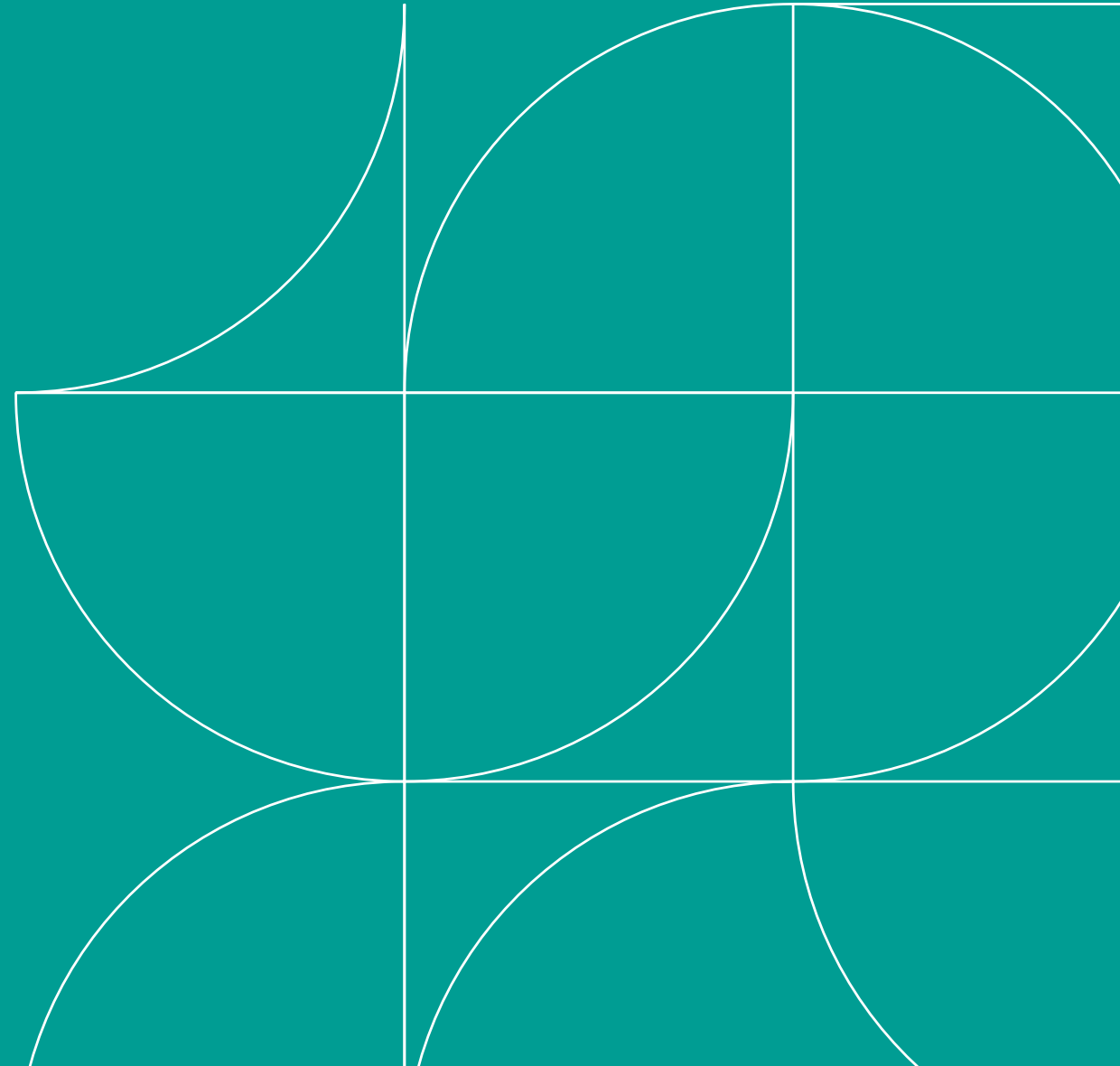
Litigating ADA Title III Claims:

A New Administration,
Website/Mobile Apps, COVID-19
Issues

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Agenda

- 01** Overview of the ADA Title III requirements
- 02** National Lawsuit Numbers and Hotspots
- 03** New Administration
- 04** COVID-19
- 05** Hotel Reservations
- 06** Websites, Mobile Apps and Kiosks



ADA Title III Background and Litigation Trends

ADA Background

- The Americans with Disabilities Act (ADA) is a federal civil rights law that prohibits discrimination against individuals with disabilities.
- Signed into law by President George H.W. Bush on 7/26/90.
- Covers five key areas:
 - Employment (Title I)
 - State and Local Government Activities (Title II)
 - Public Transportation (Title II)
 - **Public Accommodations (Title III)**
 - Telecommunications (Title IV)

***** Today's focus = Title III**

ADA Background

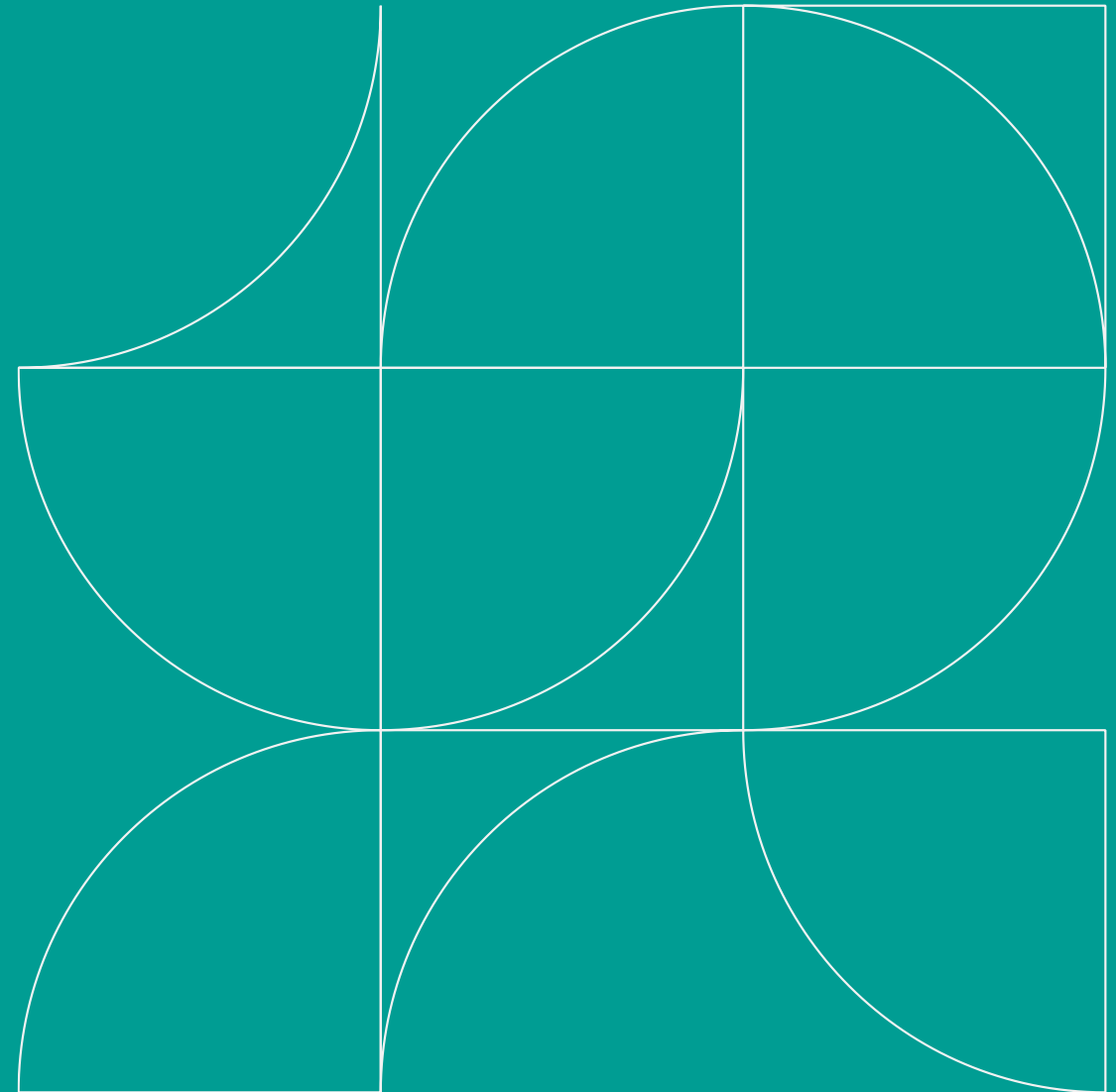
- Under Title III of the ADA, public accommodations must:
 - have facilities that are accessible to individuals with disabilities (*i.e.*, members of the public) and maintain them;
 - make reasonable modifications to policies, practices, and procedures when necessary to ensure that individuals with disabilities have equal access to public accommodations' goods, services, facilities, privileges, advantages, and accommodations; and
 - ensure effective communication with individuals with disabilities by providing them auxiliary aids and services at no additional charge.
- Remedies:
 - Private party: Injunctive relief, attorneys' fees & costs (possible damages/penalties under state corollary laws)
 - DOJ Action: Penalties \$96,384.00 for a first violation and \$192,768 for a subsequent violation; injunctive relief, damages

Background & Overview of ADA Title III Requirements

A Public Accommodation is:

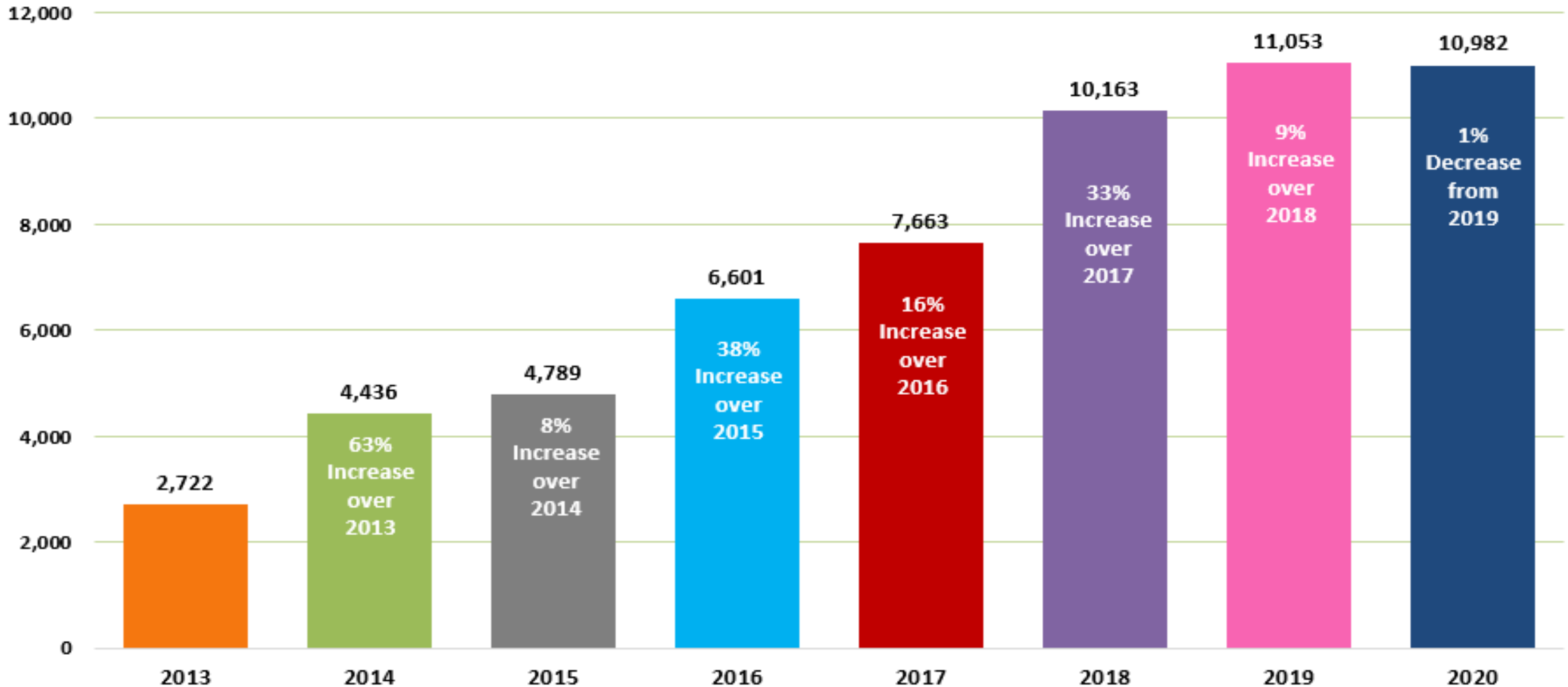
- Private
- Affects commerce
- Falls within at least one of the following 12 categories:
 - 1) Places of lodging (e.g., inns, hotels, motels)
 - 2) Establishments serving food or drink (e.g., restaurants and bars);
 - 3) Places of exhibition or entertainment (e.g., motion picture houses, theaters, concert 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?*

National Lawsuit Numbers & Hotspots



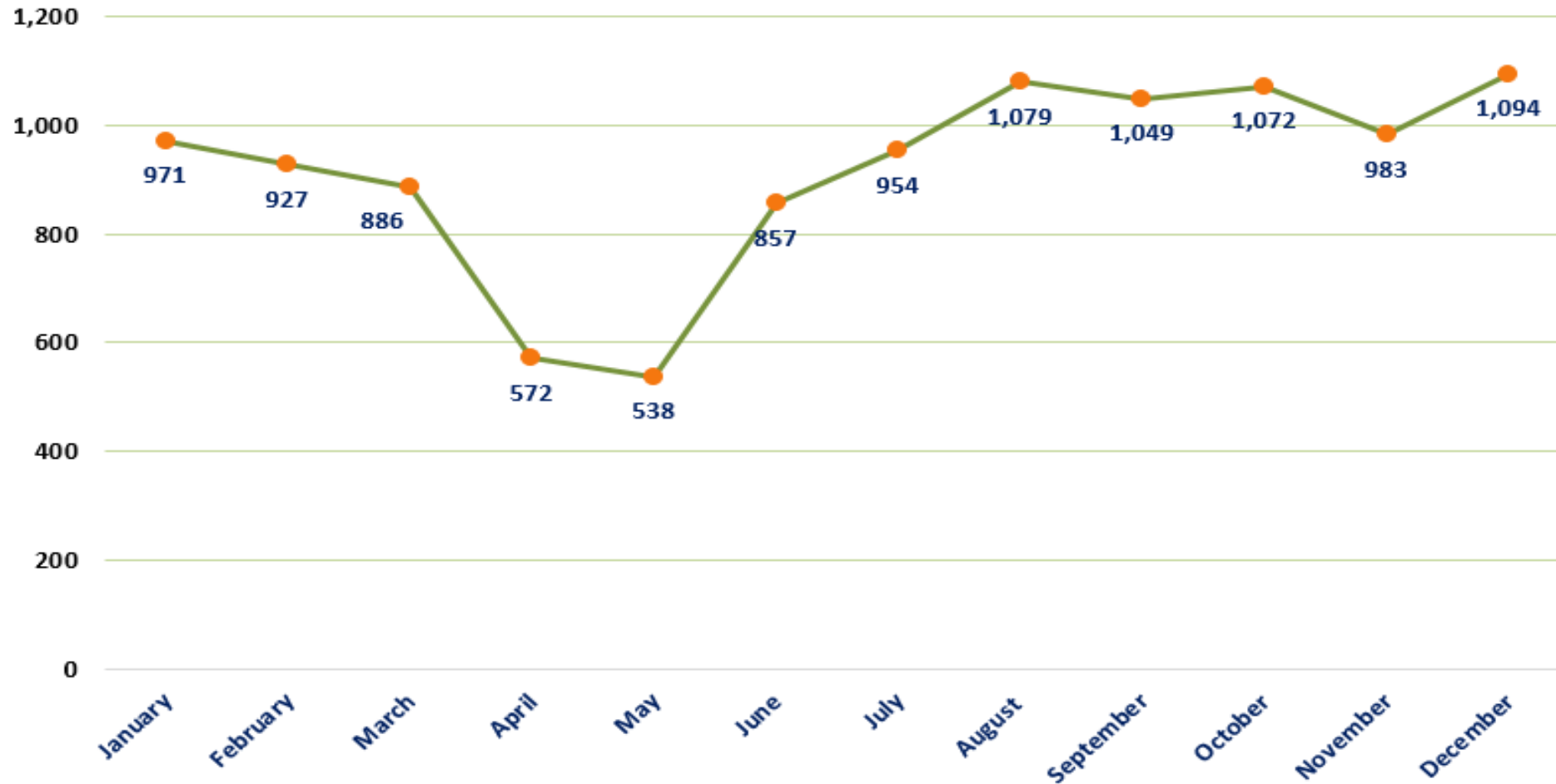
ADA Title III Accessibility Lawsuit Numbers (All Bases)

Total Number of ADA Title III Federal Lawsuits Filed Each Year
January 1, 2013 - December 31, 2020



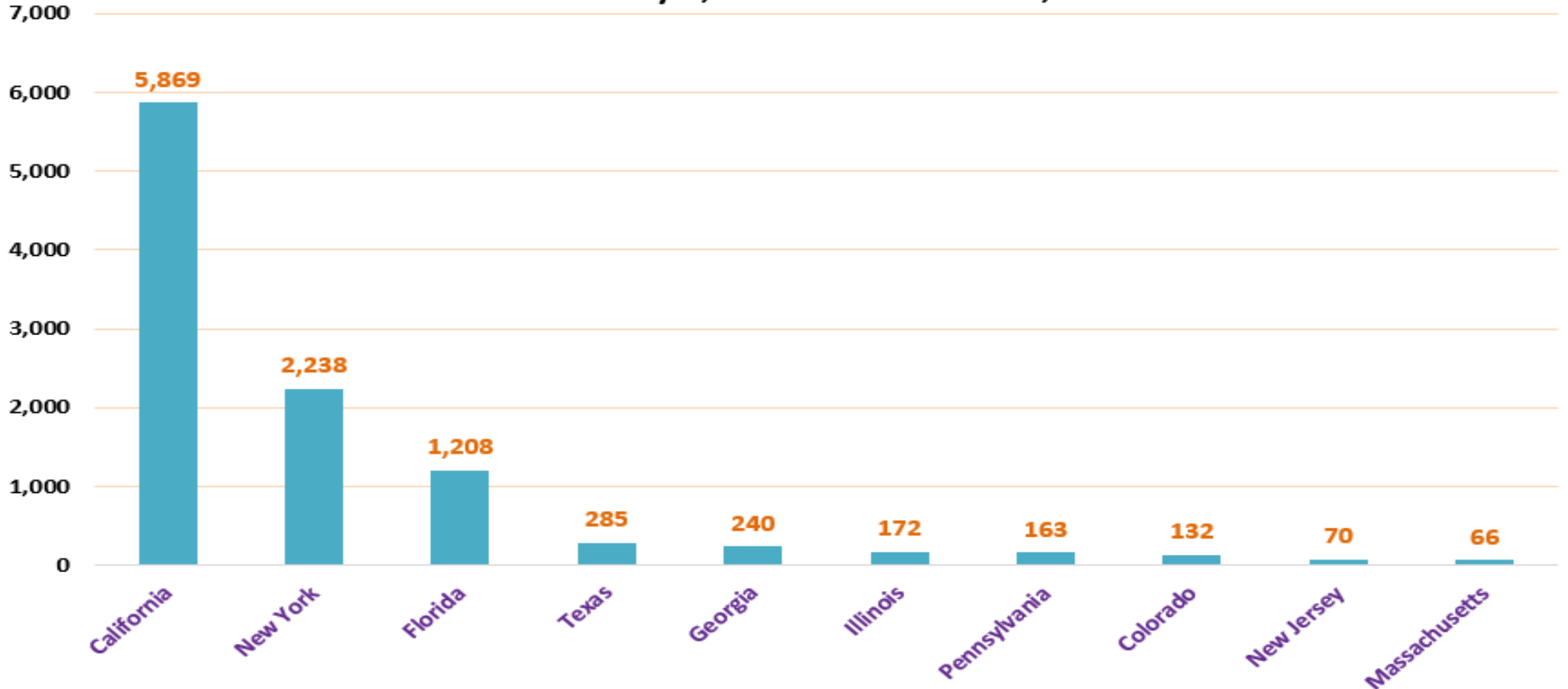
ADA Title III Accessibility Lawsuits in 2020 (All Bases): Monthly Filings

Total Number of Federal ADA Title III Lawsuits Filed Per Month
January 1, 2020 - December 31, 2020

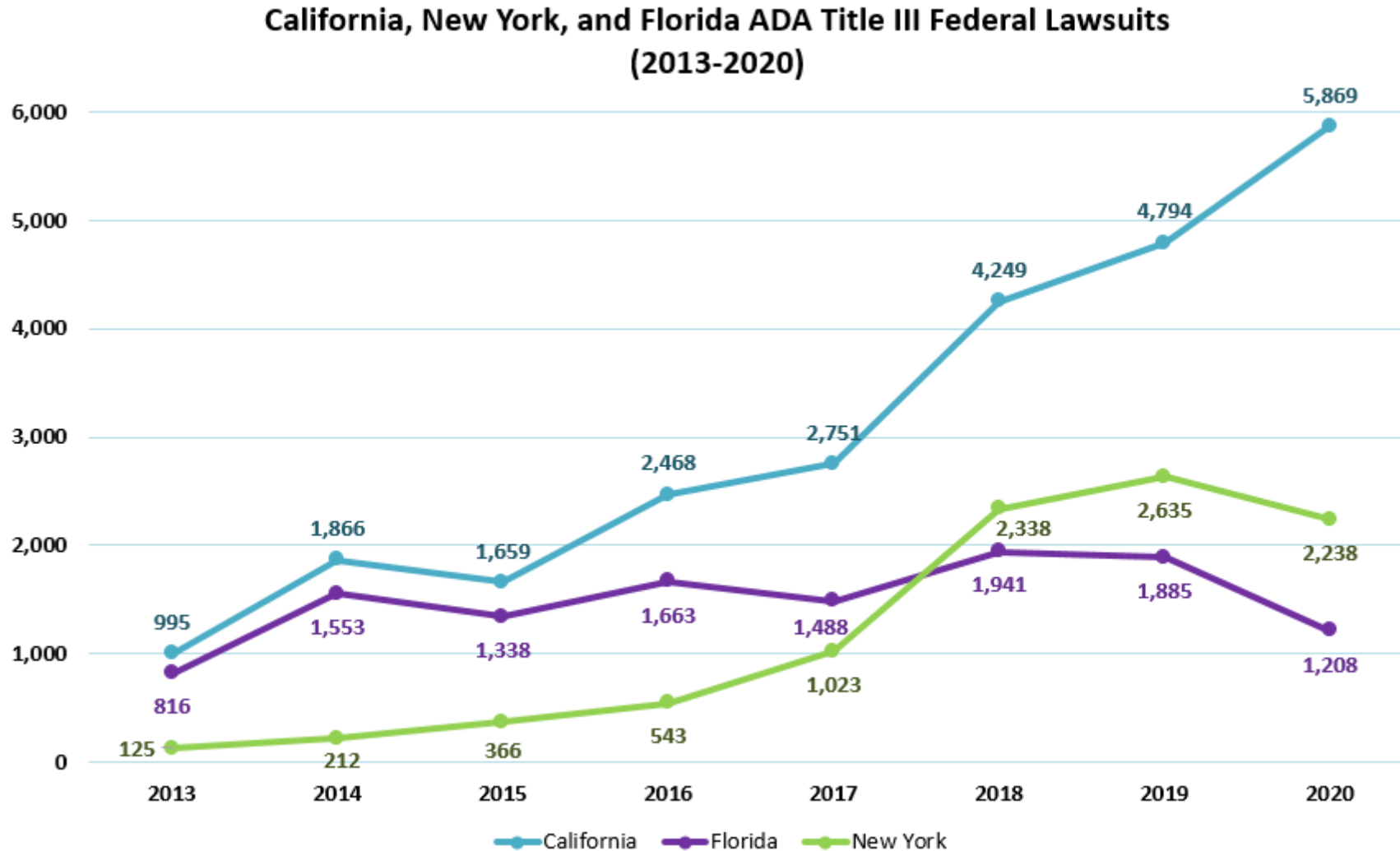


ADA Title III Accessibility Lawsuit Numbers (All Bases)

Top 10 States with Federal ADA Title III Lawsuits Filed
January 1, 2020 - December 31, 2020

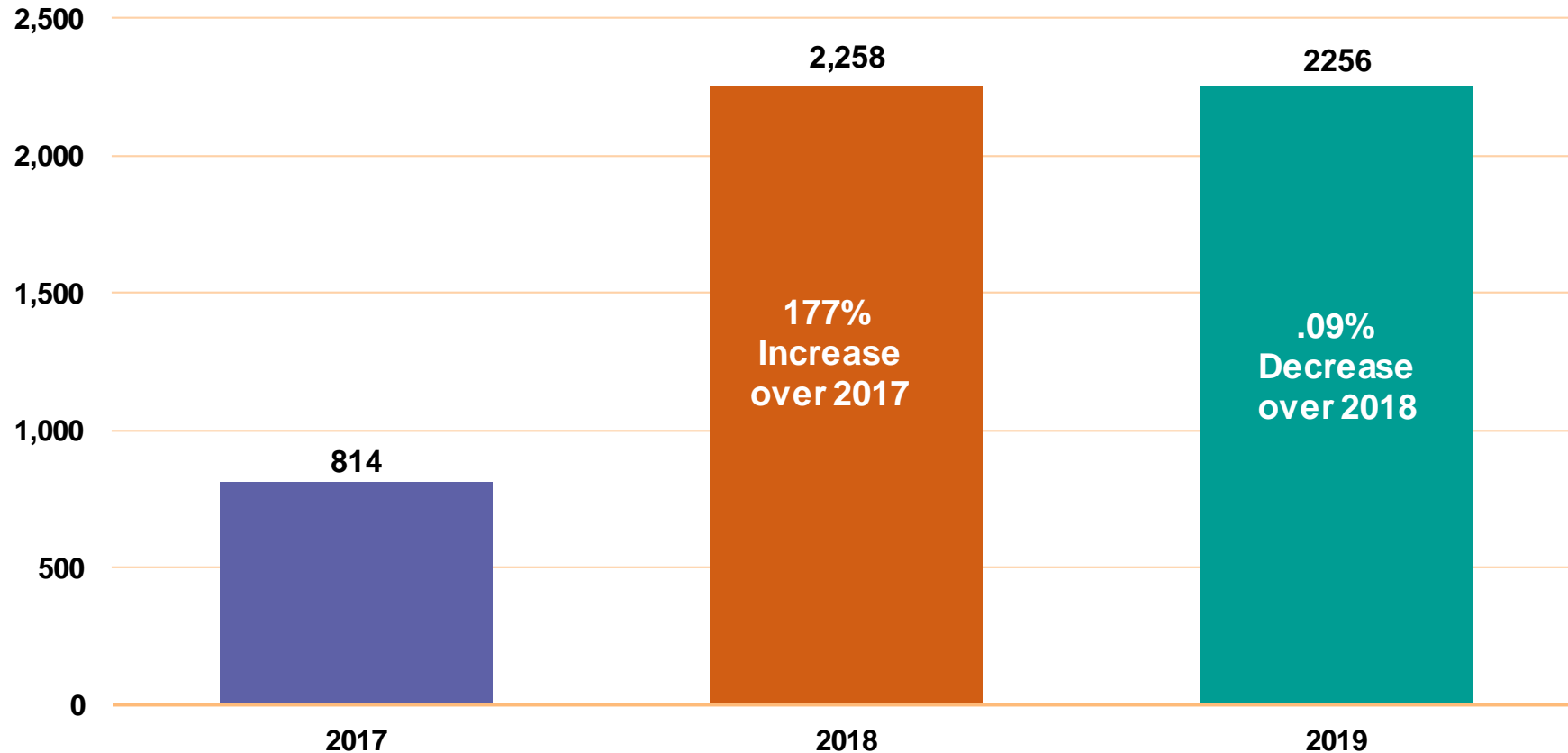


Hot Jurisdictions: ADA Title III Lawsuits (All Bases)



ADA Title III Website Accessibility Lawsuit Numbers

ADA Title III Website Accessibility Lawsuits in Federal Court
(Jan. 2017 - Dec. 2019)



ADA Title III Enforcement in the Biden Administration



- Nominee Kristen Clarke for head of Civil Rights Division
- Pattern & practice cases
- Demands for remediation, damages and monitoring
- Website accessibility cases

ADA Title III Website Access Under Obama DOJ



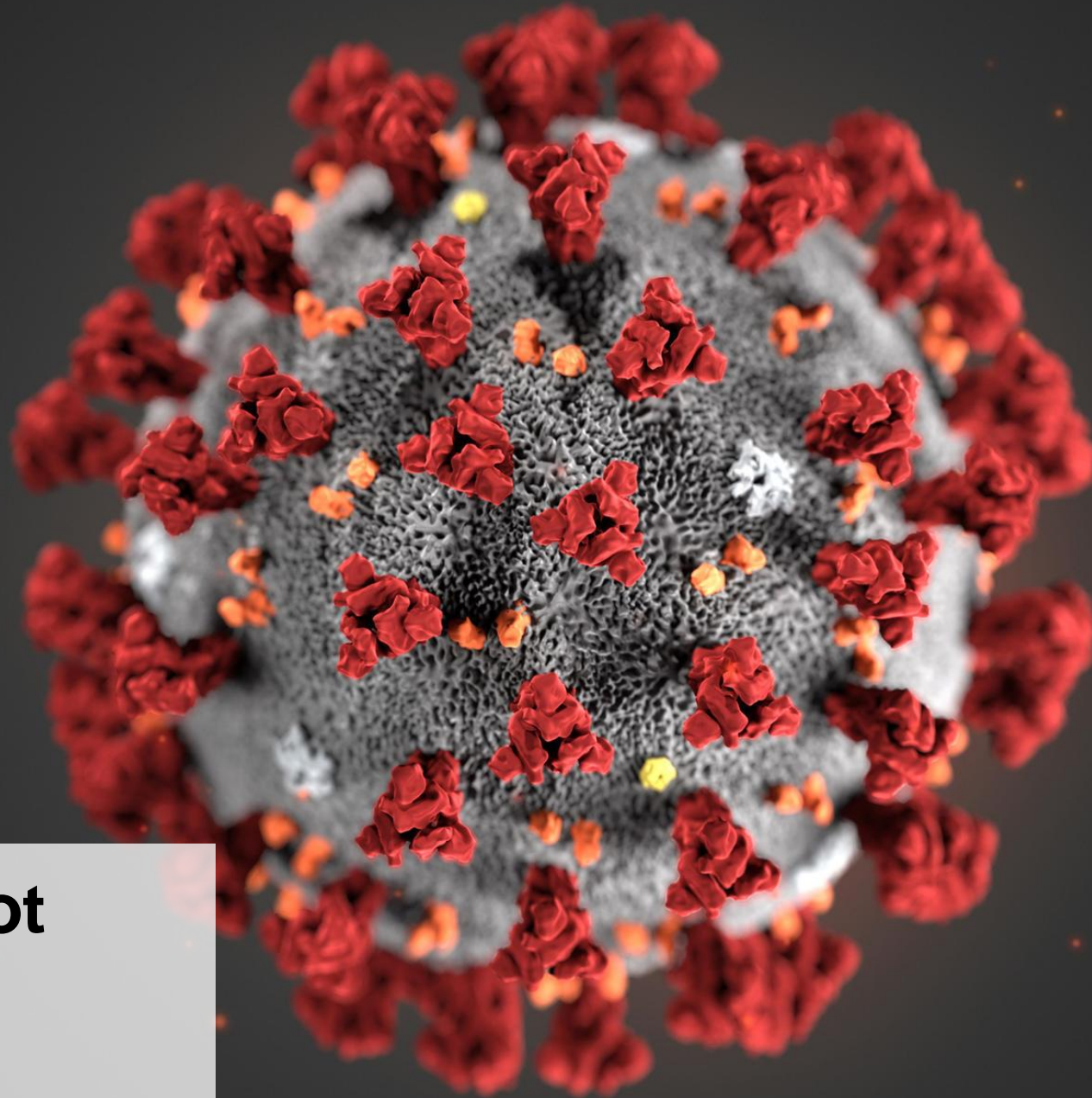
2010-2016: 2010 ANPRM

- “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

ADA Title III Website Accessibility Under Trump DOJ



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



Accessibility Hot Topics in the Pandemic

Hot Topics in the Pandemic

– Effective communication and facemasks

- Lip reading
- American sign language (ASL)

– Reasonable modifications of policies and practices

– Telehealth

- Accuracy of communication
- Medical terminology
- Timeliness of services



Hot Topics in the Pandemic (Cont.)

– e-Commerce: Website and Mobile App Accessibility

- Digital alternative to in-store experience

– Curbside Pick-up

- Accessible parking spaces might be used as space for takeout pick up, instead of use by customers with disabilities who need to park.
- Valet parking may be discontinued to reduce spread of virus, but can result in elimination of van-accessible parking if valet is the only van-accessible parking option at the property.



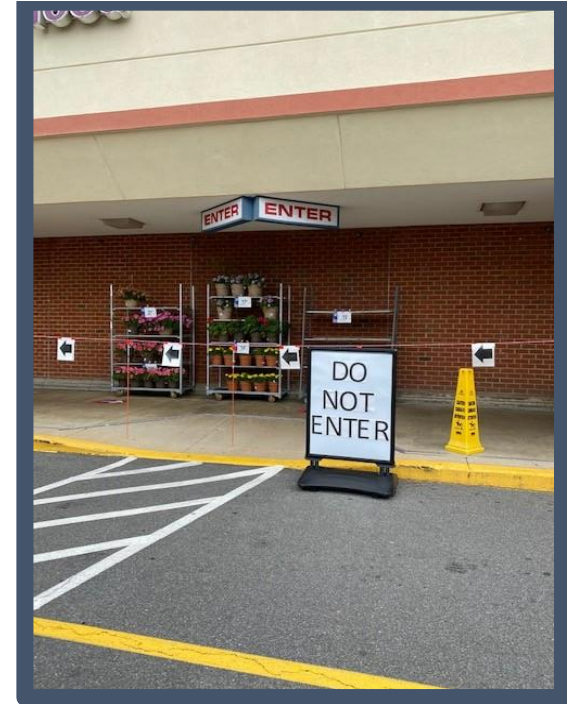
Hot Topics in the Pandemic (Cont.)

– Accessibility Considerations for New Equipment to Promote Public Health

- Hand sanitizer stations
- No-touch operability of equipment
- Kiosks

– Measures to Promote Social Distancing

- Obligation to maintain accessible features
- Accessible route requirements
- Accessible seating



ADA Mask “Objector” Cases

- Customers claim they can’t wear mask because of a disability
- Background and common themes



I am ***exempt*** from ALL REGULATION mandating face mask usage in public. Wearing a face mask poses a health risk to me.

Under the ADA and HIPAA, I am NOT required to disclose my medical condition to anyone.

Department of Justice ADA Violation information line: **800-514-0301**

Organizations and businesses can be fined up to **\$75,000** for the first ADA violation and **\$150,000** for any subsequent violation

ATTN GOVERNMENT AGENTS

PLEASE PROVIDE LAWFUL AND NECESSARY CONSIDERATION TO AID THE BEARER IN THE UNIMPEDED EXERCISE OF CONSTITUTIONALLY PROTECTED RIGHTS. THANK YOU FOR YOUR UNDERSTANDING AND ASSISTANCE.

ADA Not A Negligence Statute



- ***Lewis v. Walmart Corp., 2020 WL 6750168 (N.D. Ill. Nov. 17, 2020)*** (MTD granted)
 - Plaintiffs asserted ADA claims for being denied entrance to Walmart, Walgreens and Dollar General retail stores in Chicago for refusing to wear a facemask on the basis of disability, despite local COVID ordinance with disability exception
 - Plaintiffs lacked standing based on failure to allege future injury
 - No intentional discrimination because “[i]solated acts of negligence do not come within the ambit of discrimination against disabled persons proscribed by the ADA”

No To Preliminary Injunctions



- ***Pletcher v. Giant Eagle*, 2020 WL 6263916 (W.D. Pa. Oct. 23, 2020)**
 - Plaintiff ejected from Giant Eagle grocery store and arrested for disorderly conduct for refusing to wear a face mask or covering
 - No preliminary injunction issued because plaintiff not likely to succeed on the merits of his prima facie disability discrimination claim - insufficient evidence that disability prevented plaintiff from wearing face mask or face shield as permitted by COVID ordinance
 - Court did not reach legitimate safety requirement and direct threat defenses
- ***Reinoehl v. Whitmer*, 2021 WL 320727 (W.D. Mich. Jan. 22, 2021)** (no allegation denied entry into a public accommodation on the basis of disability)

Failure to State a Claim



- **Failure to plead a covered disability and/or one that would have prevented plaintiff (often pro se) from wearing a facemask**
 - *Jeffries v. Foodland Grocery*, Case No. 1:20-cv-00304-JMS-WRP (D. Haw. Jan. 26, 2021)
 - *Cangelosi v. Sizzling Caesars LLC*, 2021 WL 291263 (E.D. La. Jan. 28, 2021)
 - *Davidzon v. SF Markets, LLC*, 2021 WL 492035 (E.D. Cal. Feb. 10, 2021) (findings and recommendations)

Reservations Website Lawsuits



- 28 CFR 36.302(e) requires hotels to describe accessibility features of their hotels
- Potter Handy firm has filed over 450 lawsuits on behalf of more than seven plaintiffs alleging that CA hotels are not providing enough information
- First five decisions pro-hotel



Websites, Mobile Apps, and Kiosks

Legal Overview: What Statutes May Require Accessible Technology

- **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

What is an “accessible” website?

- 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)

- 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

Title III Website Litigation:
**Key Cases
& Themes**



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)

Martinez v. Kydia Inc. (CA Super. 2019)

- State trial court disagrees with Ninth Circuit and holds that the ADA does not require a website to belong to a business with a physical place where customers go

Title III Website Litigation:
Key Cases
Merits Decisions



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
 - GNC bankruptcy

Title III Website Litigation:
Key Cases
Merits Decisions



- ***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
- ***Davis v. BMI/BND Travelware (CA State court 2016)***
 - Summary judgment against retailer granted
 - Inaccessible website discriminates against blind customer under Unruh Act

Title III Website Litigation:
Key Cases
Injunctive Relief



Not on the Merits, But Informative on Injunctive Relief

- **Wright v Thread Experiment (SD Indiana January 22, 2021):**
 - Motion for default judgment granted.
 - Found allegations sufficient to state a claim against web-only business.
 - Followed 7th Circuit guidance in finding Title III applies to websites without a nexus to physical space.
 - Ordered defendant to bring website into compliance “with ADA and implementing regulations” within 90 days; failure to achieve full compliance within 90 days will result in permanent shutdown of the offending website.
 - Denied Plaintiff’s request that (1) Defendant must comply with WCAG; (2) Plaintiff may monitor D’s compliance (and get costs for that); (3) Defendant must retain ADASure, and 4) Defendant must adopt any policies/practices that go beyond compliance with ADA.

Title III Website Litigation:
Key Cases
Secondary Sites



DOT v. Scandinavian Airline System

- Department of Transportation regulations under the Air Carrier Access Act (ACAA) required airlines to bring their websites into compliance with WCAG 2.0 Level AA by 2016.
- Rather than make its website accessible, SAS built a secondary “assistive” site that met WCAG 2.0 guidelines.
- DOT brought an action against SAS, challenging the use of a second website.
- SAS ultimately agreed to make its primary website accessible and to pay a fine of up to \$200,000.
- Separate but equal prohibited by ACAA (and not a good idea regardless)
 - Separate is never equal
 - Increased costs from maintaining multiple sites
 - Forgotten “separate” sites fall out of accessibility
 - Good design is accessible
- Take care with “widget” or “overlay” products.

Title III Website Litigation:
Key Cases
Physical Nexus



- ***Haynes v. Dunkin Donuts* (11th Cir. 2018)**
 - 11th 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 for failure to state a claim because no physical nexus
- ***Martinez v. San Diego County Credit Union* (Ca. Ct. App. 4th Dist. 2020)**
 - Second CA Appeals Court to hold (in addition to ***Thurston v. Midvale***, above) that websites with a nexus to a physical place of business where customers go are covered by Title III of the Americans with Disabilities Act (ADA) (trial court did not think so and had dismissed the case on that basis).

Title III Website Litigation:
Key Cases
Mootness



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 (11th 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:
Key Cases
Mootness &
Standing



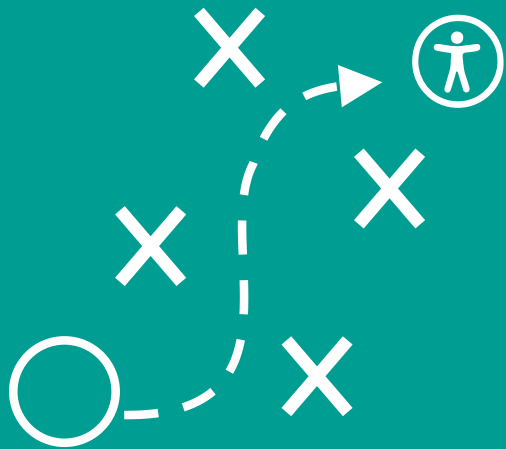
- ***Walters v. Simply Skinny Ties, LLC* (NDNY Dec. 9, 2020)**
 - Mootness motion to dismiss denied. Court found an ongoing factual dispute over whether (1) Defendant’s contention that it had “made all reasonable modifications to the website” and “remedied all the ADA violations and ensured no additional barriers to accessing the website exist” in fact did remedy the alleged violation and (2) whether violations are likely to recur.
- ***Rizzi v. Hilton* (EDNY Aug. 2020):** Plaintiff claimed the barriers prevented him from making a reservation. The Court ruled:
 - (1) Plaintiff lacked standing because his allegations (and declaration) did not sufficiently explain how the alleged barriers on the websites impacted him personally.
 - (2) ADA claim moot because Hilton submitted a declaration from reputable consultant Kathy Wahlbin, which Plaintiff did not contradict, that a blind person can use a screen reader to find a hotel and make a reservation on the website.

Title III Website Litigation:
Key Cases
Standing



- ***Griffin v. Dept. of Labor Credit Union* (4th Cir. 2019)**
 - 4th Circuit affirmed district court dismissal for lack of standing.
 - No injury in fact nor future imminent injury.
 - “Inability to obtain information is sufficiently concrete to constitute injury in fact only when the information has some relevance to the litigant.”
 - Credit union’s membership limited to current and former employees and families of the DOL. Plaintiff could not be a member and information on the website not relevant to him.
 - Injury not “particularized”: while everyone in the U.S. may have access to an 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.
- ***Carroll v. Northwest Federal Credit Union* (4th Cir. 2019)**
 - 4th Circuit affirmed district court’s dismissal of lawsuit on same grounds – plaintiff could never join the credit union he sued

Strategies for Avoiding/Defending Website Litigation



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



Additional Resources :

ADA Title III Blog

<https://www.adatitleiii.com/>

ADA Title III & Public Access Team

<https://www.seyfarth.com/services/practices/advisory/ada-title-iii-and-public-access.html>

COVID-19 Resource Center

www.seyfarth.com/returntobusiness



Questions?

Thank you!