



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



ADA Title III Disability Access Updates:

Hot Issues and Litigation Trends

Minh N. Vu

Kristina Launey

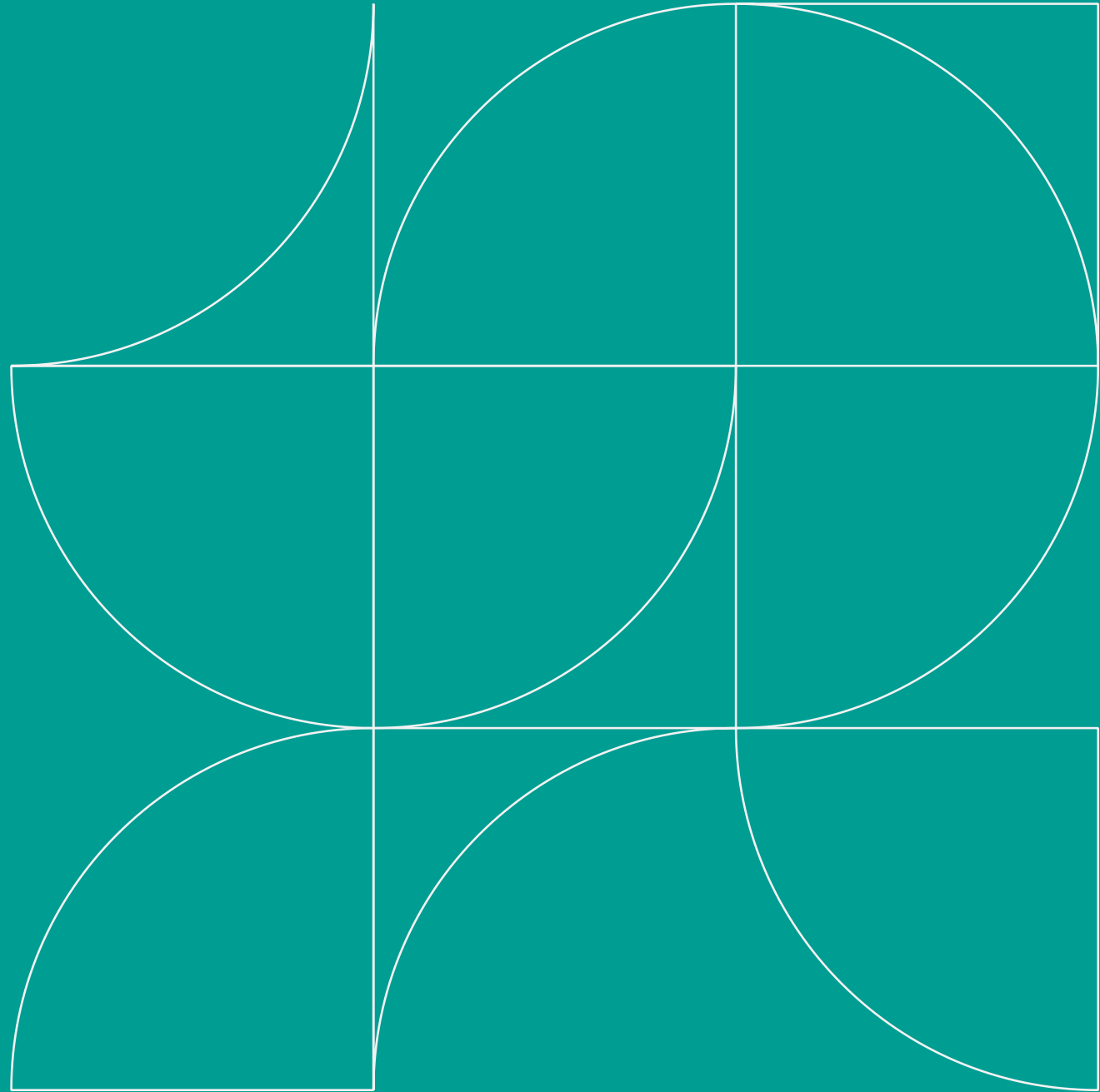
John W. Egan

April 2022

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).

©2022 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Speakers



Minh Vu
WASHINGTON, DC
mvu@seyfarth.com



Kristina M. Launey
SACRAMENTO
klauney@seyfarth.com

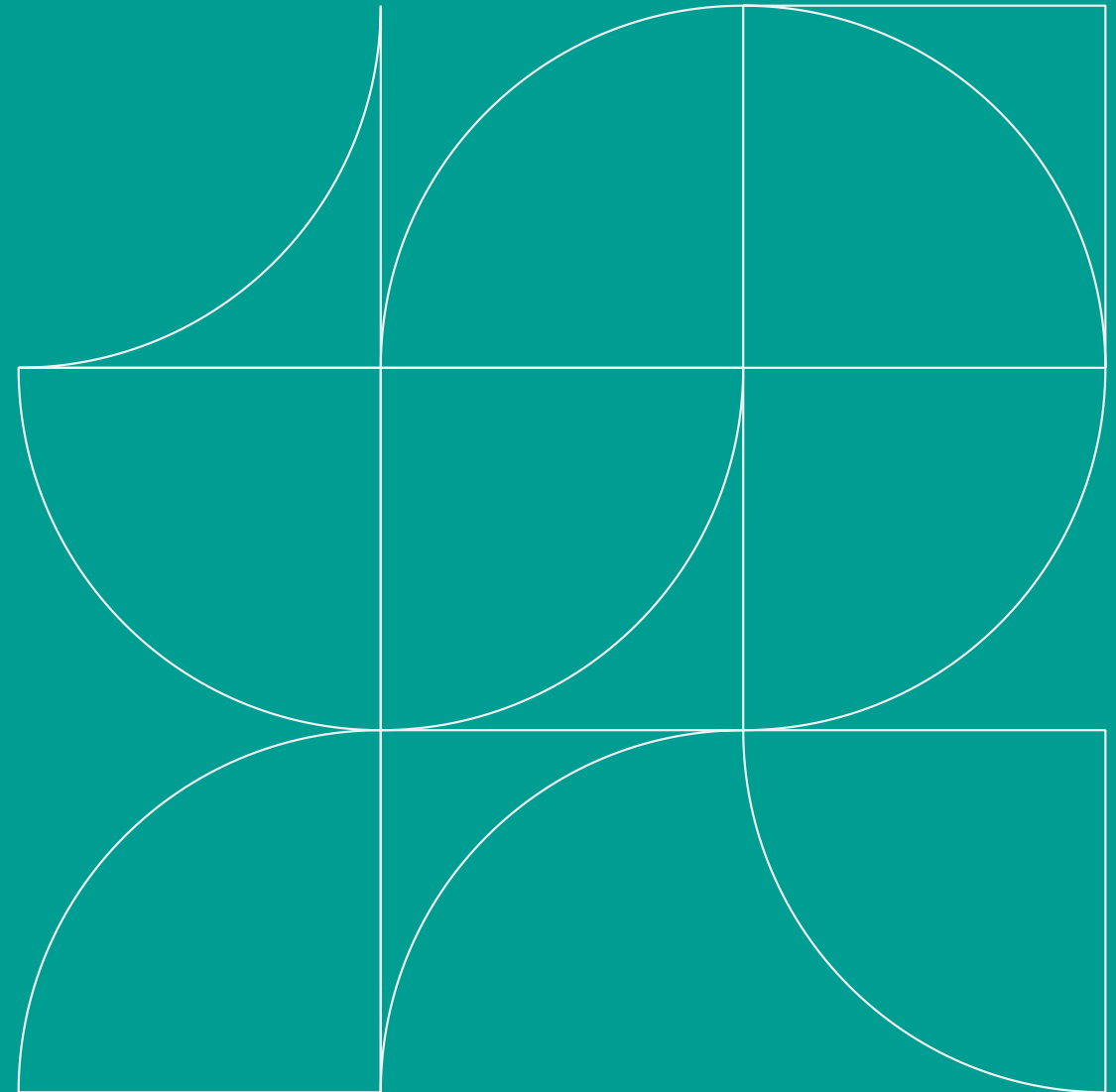


John Egan
NEW YORK
jegan@seyfarth.com

Agenda

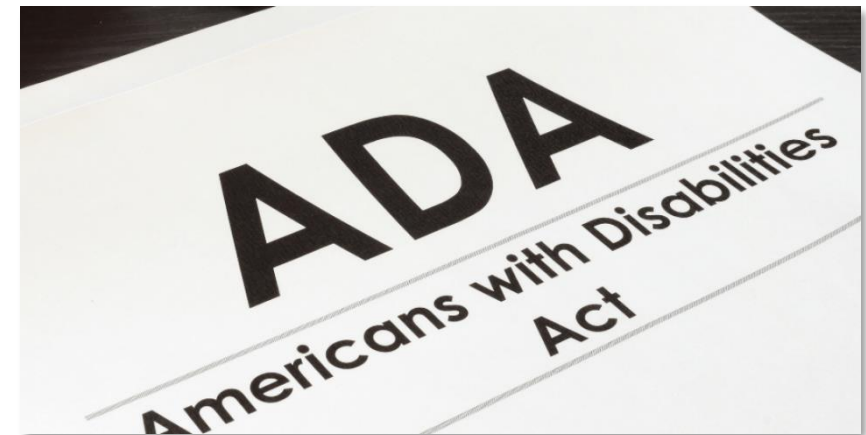
- 01** Overview of ADA Title III Requirements
- 02** National Lawsuit Numbers and Hotspots
- 03** The Biden Administration DOJ
- 04** Hotel Reservations Websites: Lawsuit Update
- 05** Hot Litigation Topics
- 06** Risk Mitigation Strategies

Overview of ADA Title III Requirements



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 (Cont.)

- 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 of \$97,523 for a first violation and \$195,047 for a subsequent violation; injunctive relief, damages

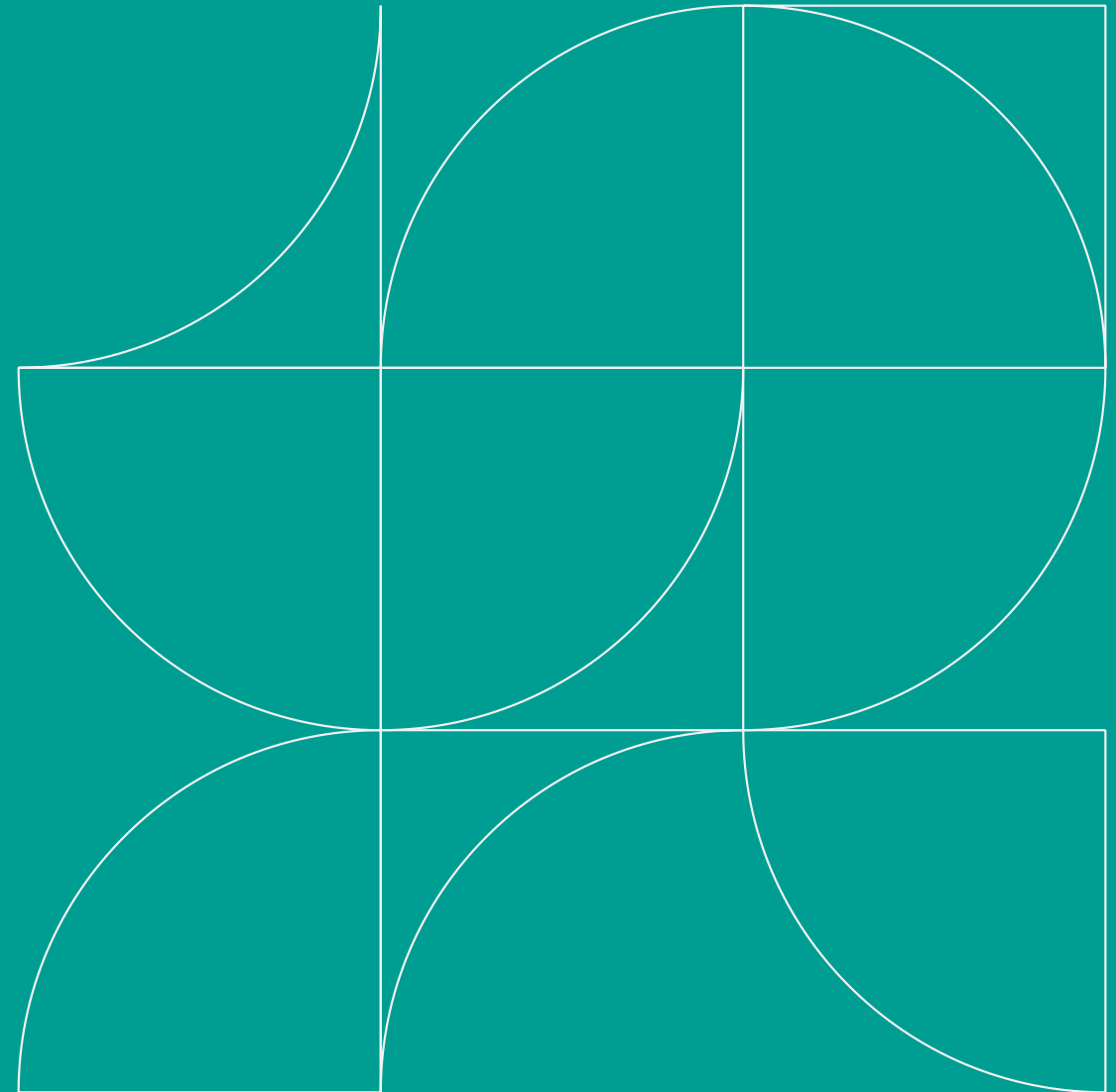


Overview of ADA Title III Requirements

A public accommodation is:

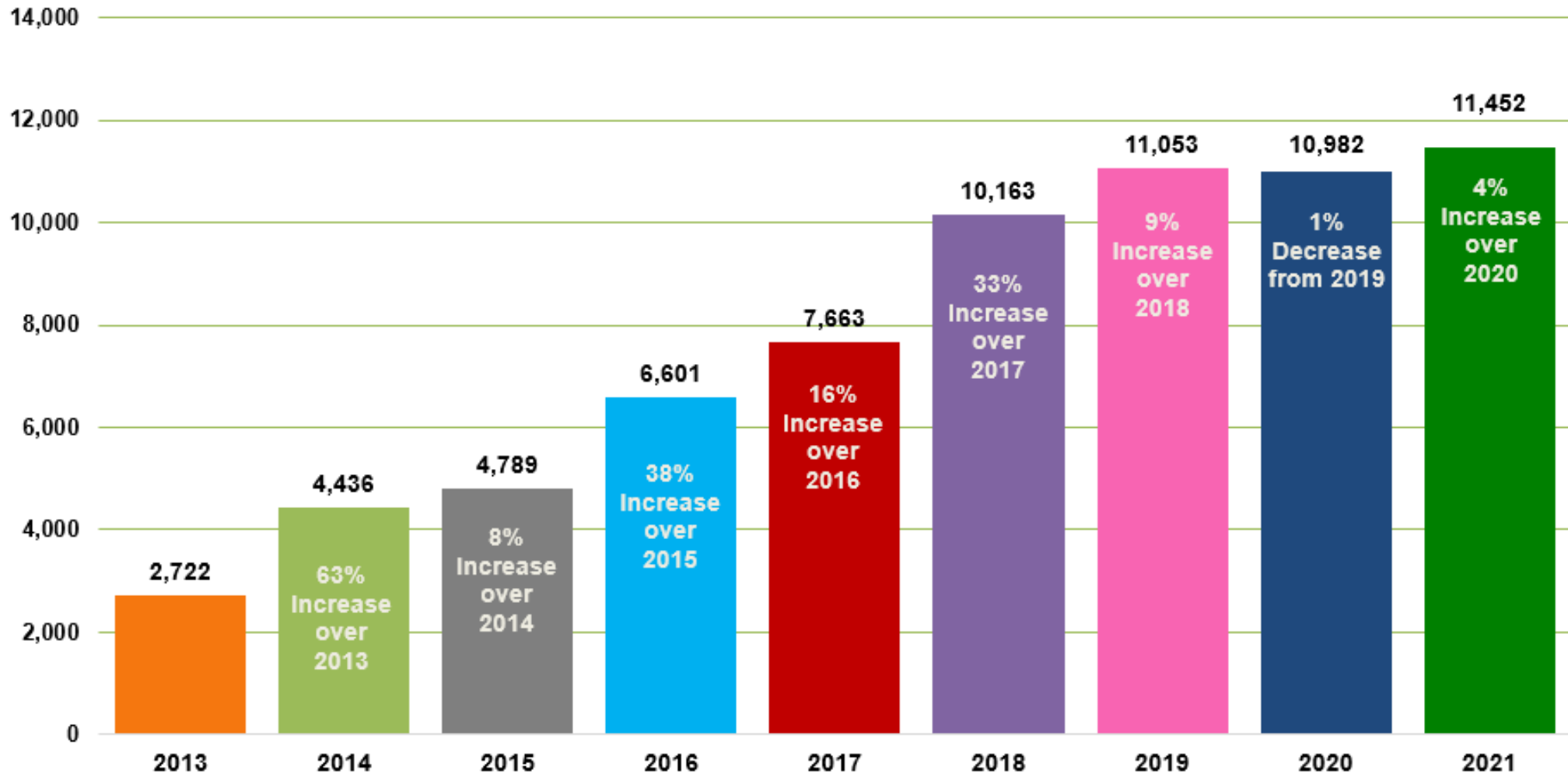
- Private business
- Affects commerce
- Falls within at least one of the following 12 categories:
 1. Places of lodging (e.g., inns, hotels, motels)
 2. Establishments serving food or drink (e.g., restaurants and bars);
 3. Places of exhibition or entertainment (e.g., motion picture houses, theaters,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

National Lawsuit Numbers and Hotspots



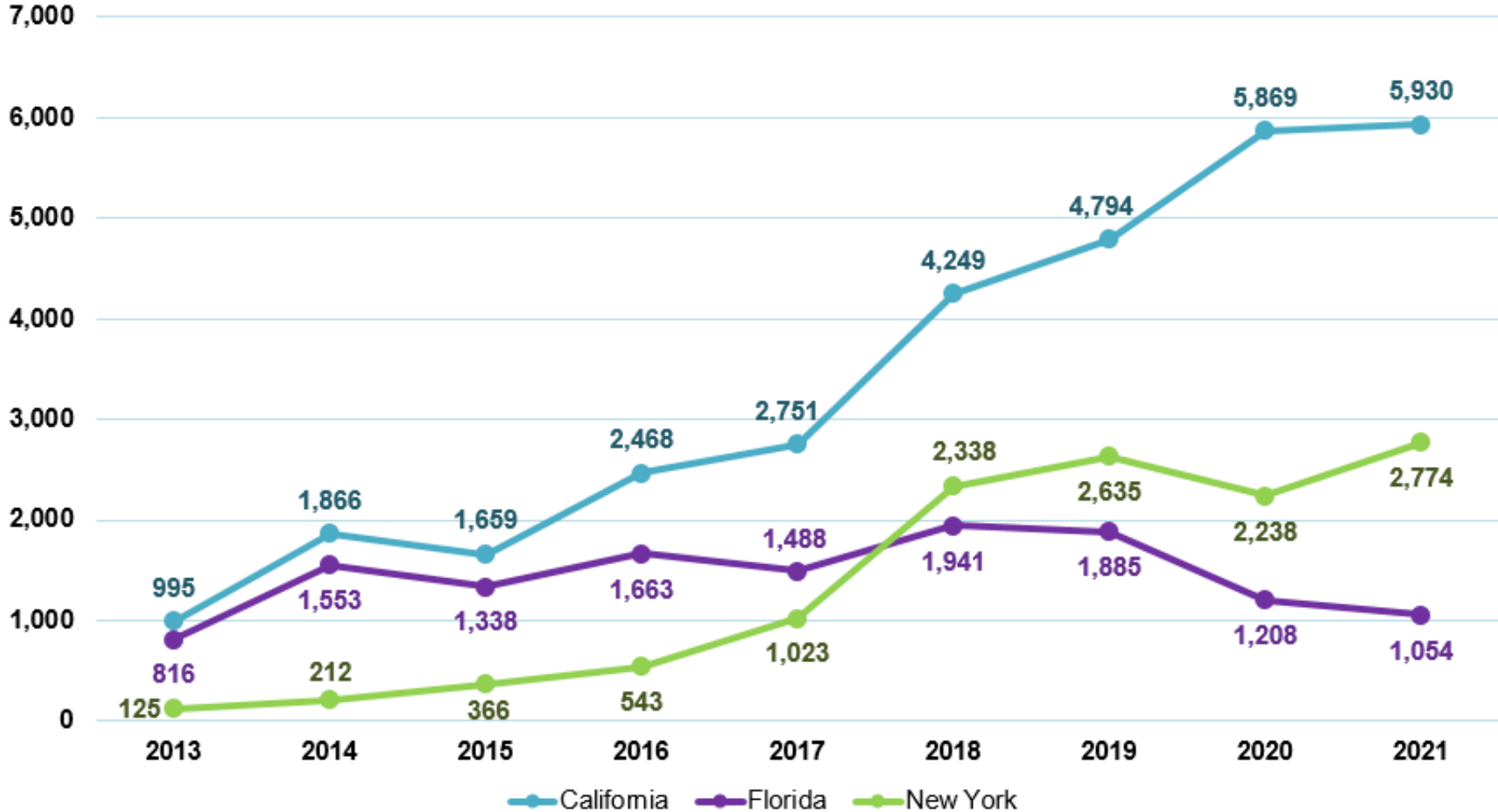
ADA Title III Federal Lawsuits (All Bases) 2013-2021

Total Number of ADA Title III Federal Lawsuits Filed Each Year
January 1, 2013 - December 31, 2021

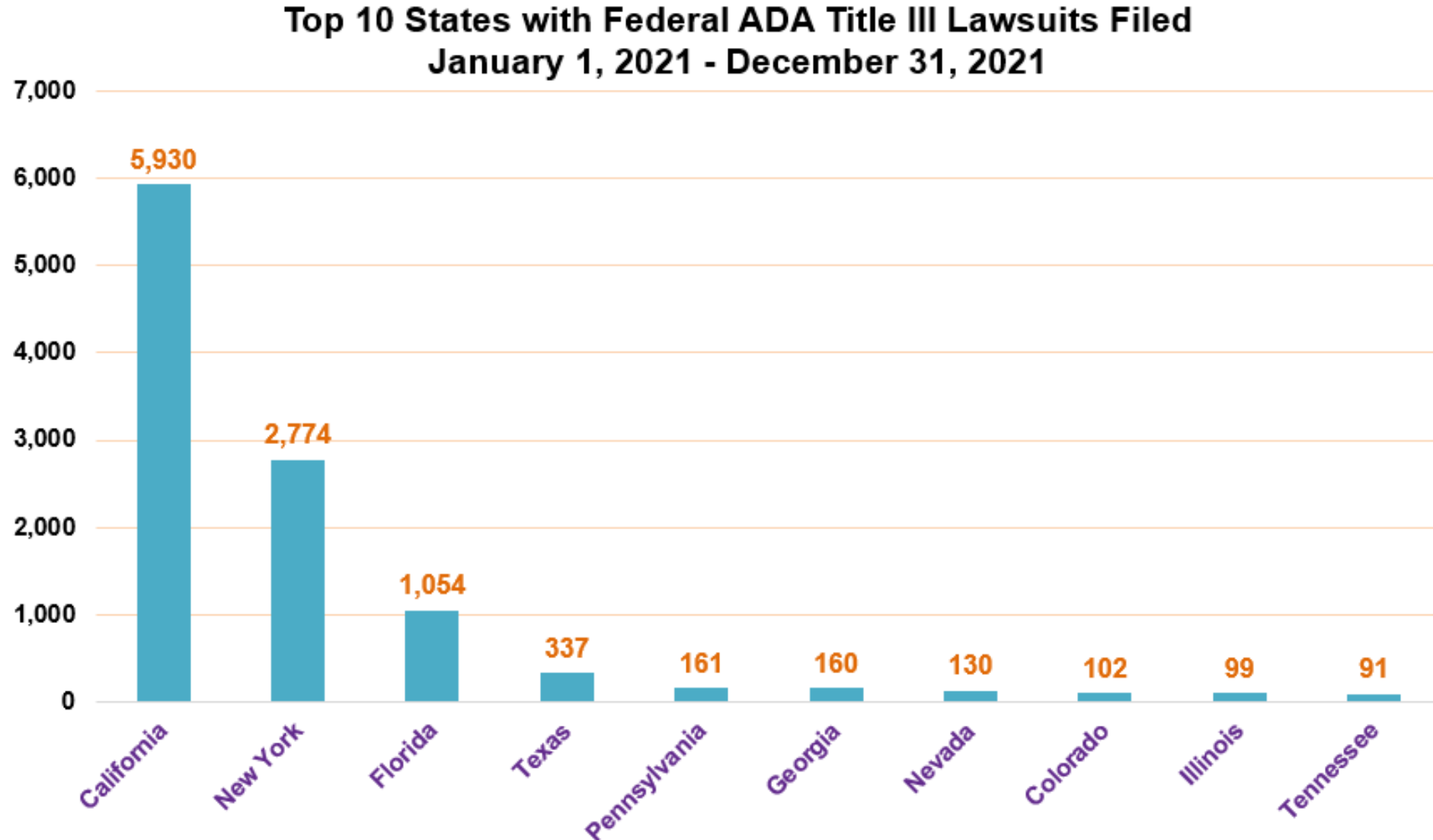


ADA Title III Federal Lawsuits – Hot Jurisdictions (All Bases) 2013-2021

California, New York, and Florida ADA Title III Federal Lawsuits
(2013-2021)

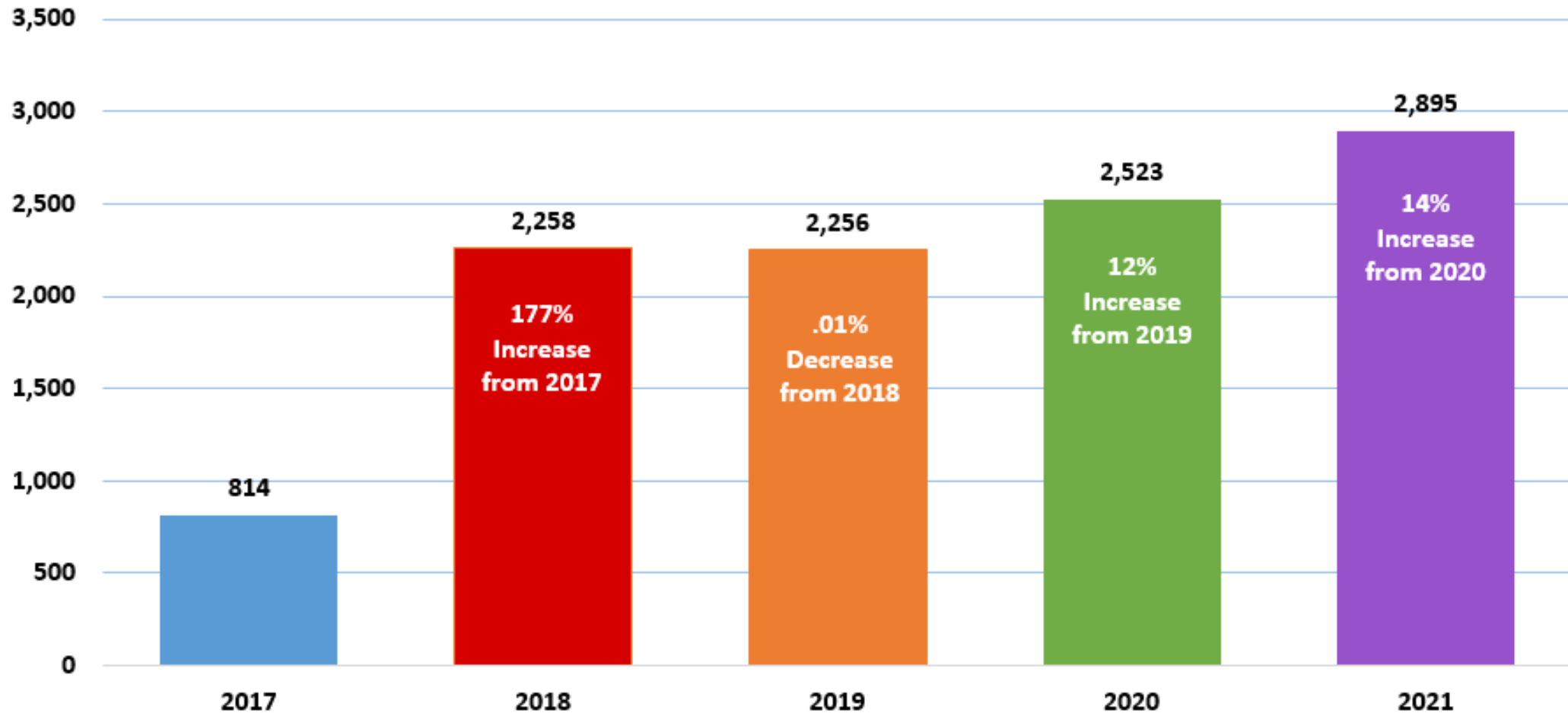


Top 10 States with Federal ADA Title III Lawsuits Filed in 2021 (All Bases)

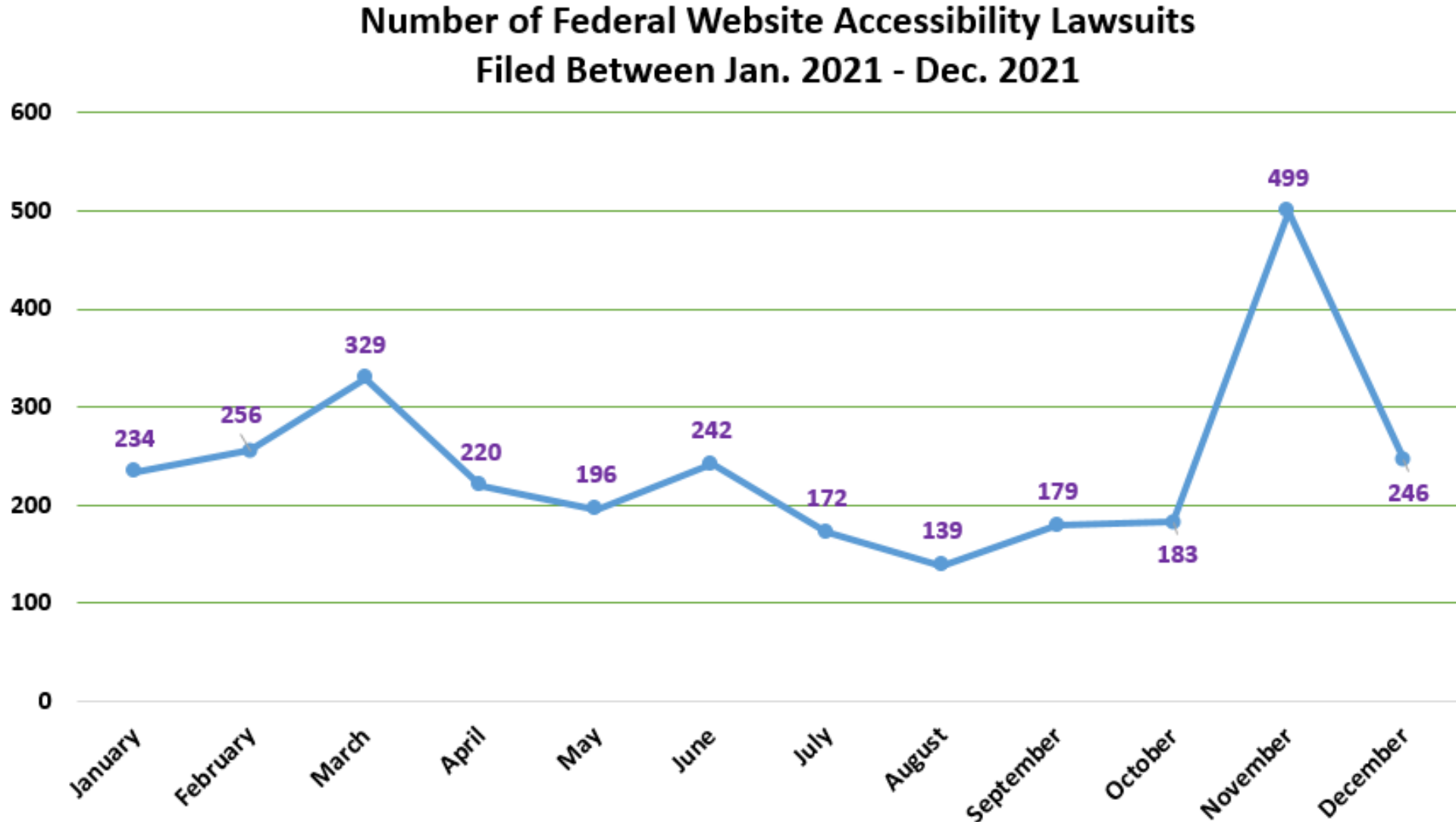


ADA Title III Website Accessibility Lawsuit Numbers

ADA Title III Website Accessibility Lawsuits in Federal Court
2017-2021

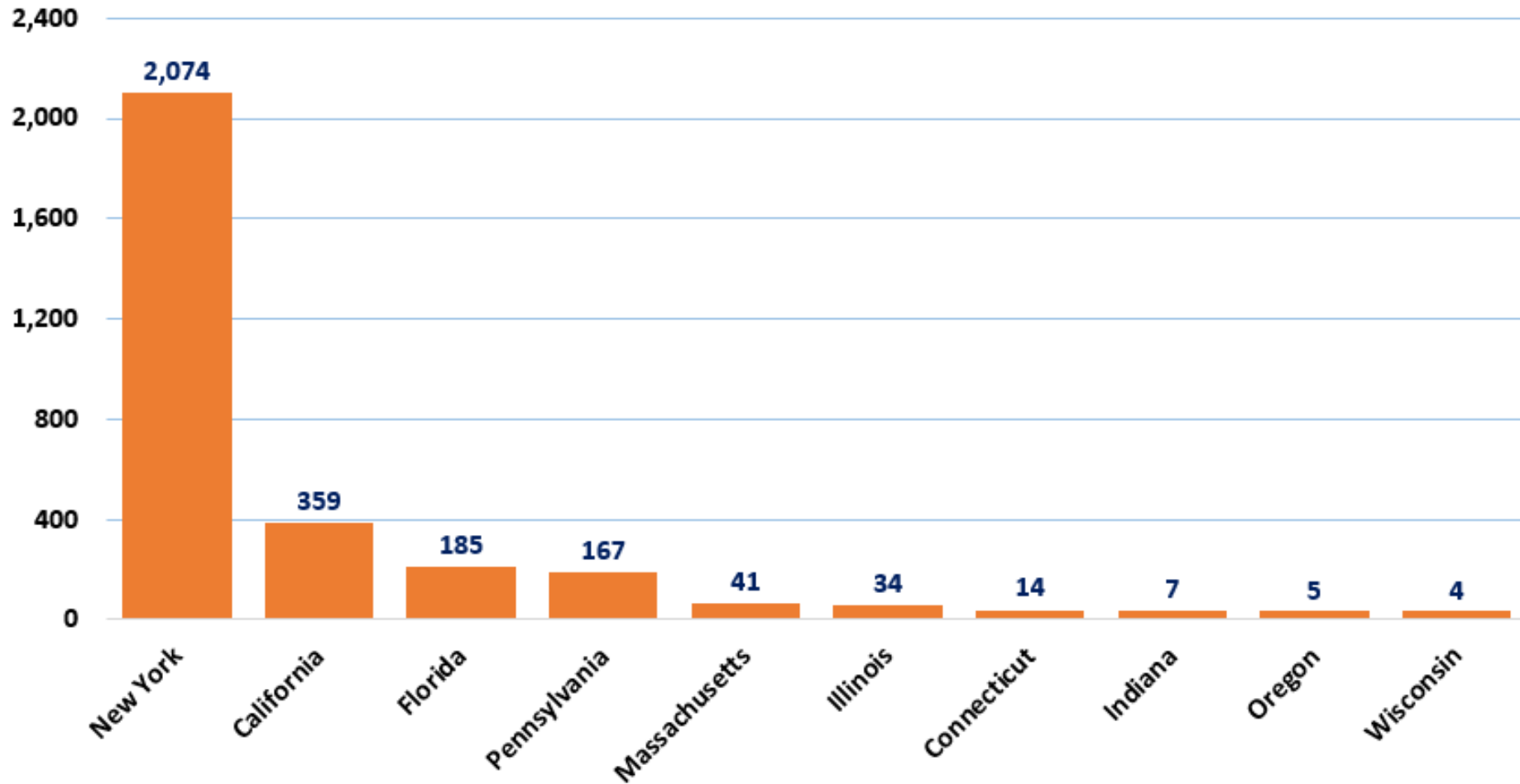


ADA Title III Website Accessibility Lawsuit Numbers

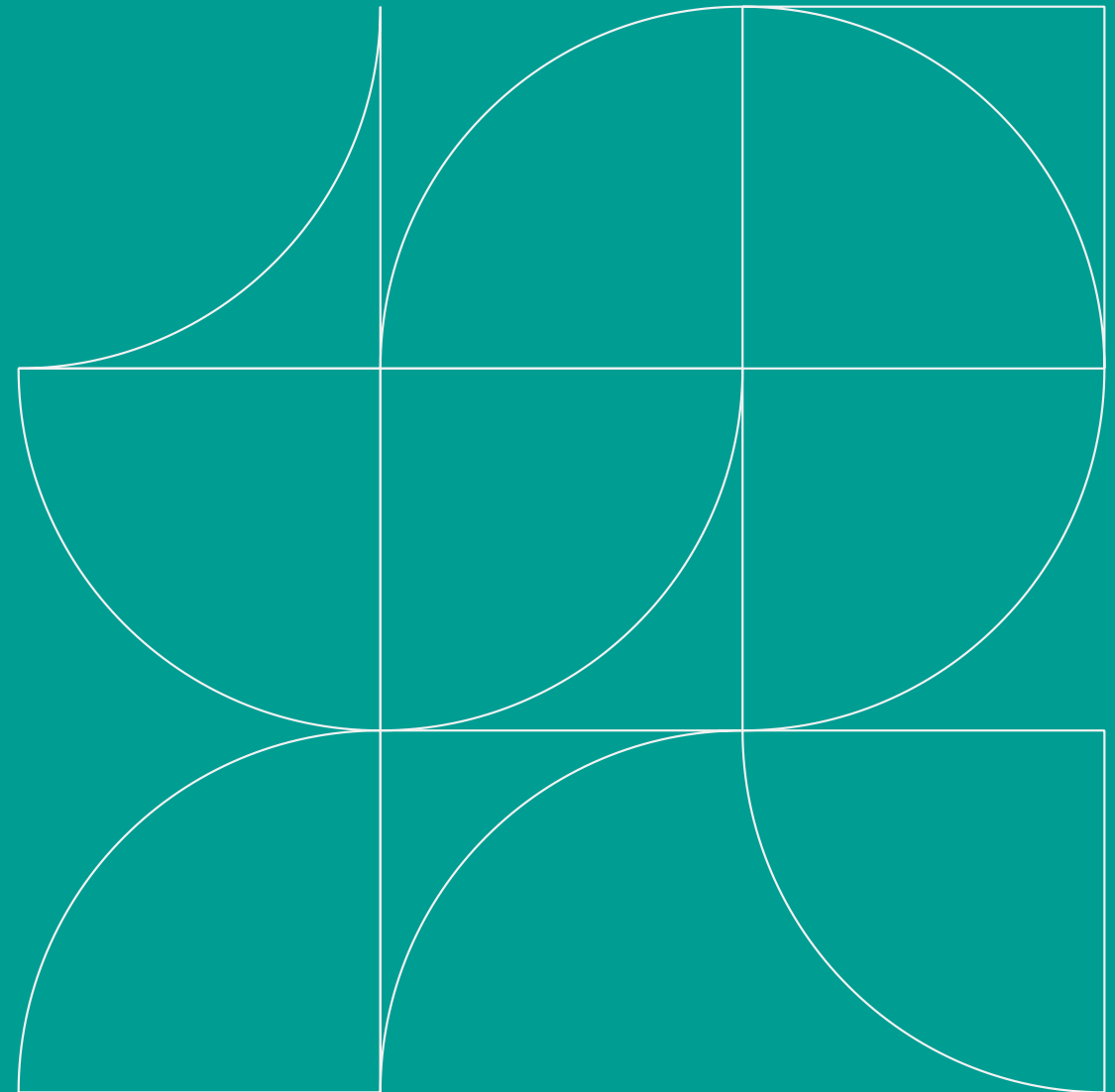


ADA Title III Website Accessibility Lawsuit Numbers

Top 10 States for ADA Title III Website Accessibility Federal
Lawsuits Jan. 2021 - Dec. 2021



The Biden Administration DOJ



ADA Title III Enforcement in the Biden Administration



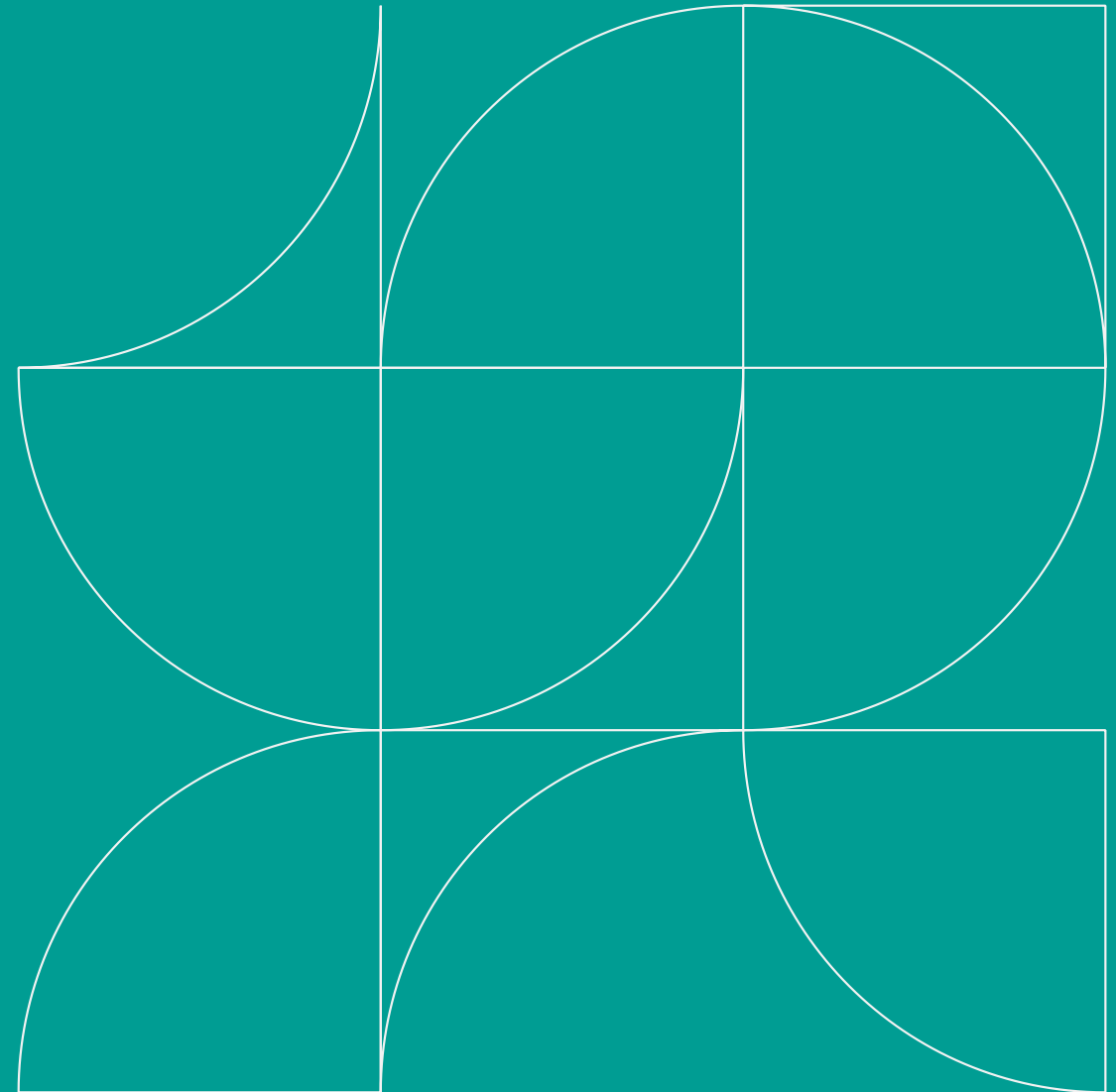
- Kristen Clarke heads the Civil Rights Division
- Pattern & practice cases
- Statements of Interest filed about bed height, kiosks, plasma donation, TX anti-mask executive order in 2021
- Consent Decrees addressing the accessibility of COVID-19 vaccination web portals using WCAG 2.1. AA (RiteAid, Hy-Vee, Kroger, CVS)
- Aggressive enforcement position in litigation against several outpatient surgery eye centers

ADA Title III Enforcement in the Biden Administration (Cont.)



- Website Accessibility Guidance
 - Issued March 18, 2022
 - Possible response to Feb. 28, 2022 letter by 181 advocacy groups to DOJ asking for “enforceable online accessibility standards by the end of the current Administration”
 - “Longstanding” interpretation that ADA applies to internet
 - States that covered entities have “flexibility” in how to apply, without elaboration
 - References Consent Decrees incorporating WCAG 2.0 AA

Hotel Reservations Websites: Lawsuit Update

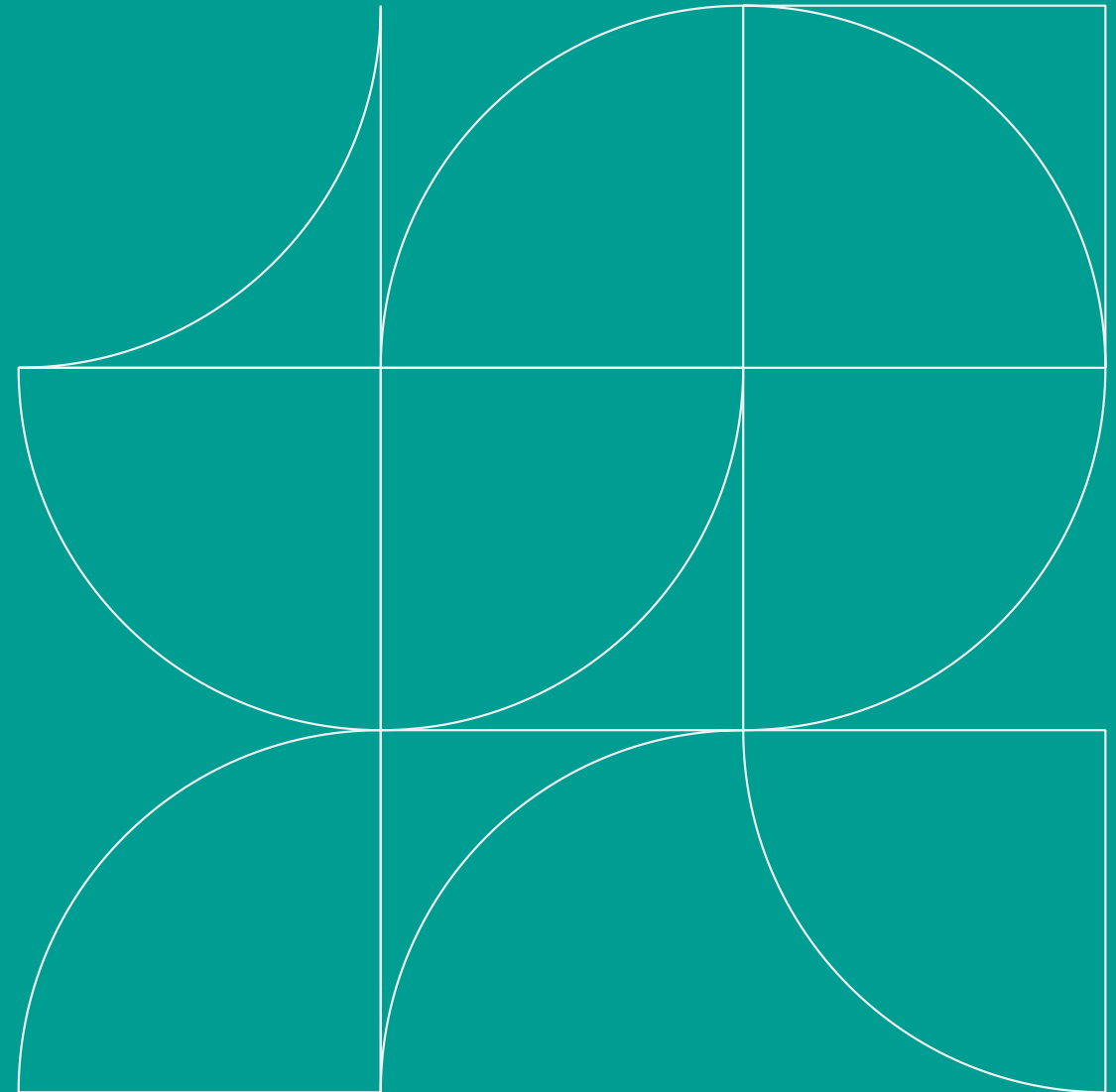


Hotel Reservations Websites



- 28 CFR 36.302(e) requires hotels to describe accessibility features of their hotels
- Potter Handy firm aka Center for Disability Access filed over 550 lawsuits on behalf of more than 7 plaintiffs alleging that CA hotels are not providing enough information.
- More than 80 federal decisions dismissing cases; a handful of cases allowed to move forward:
 - 5 cases appealed to the Ninth Circuit (1 voluntarily dismissed, 4 pending)
 - Amicus filed by American Hotel and Lodging Association
 - Oral argument held in 2 cases in February 14, 2022
 - Most cases stayed pending appeals

Hot Litigation Topics



COVID-19 Issues

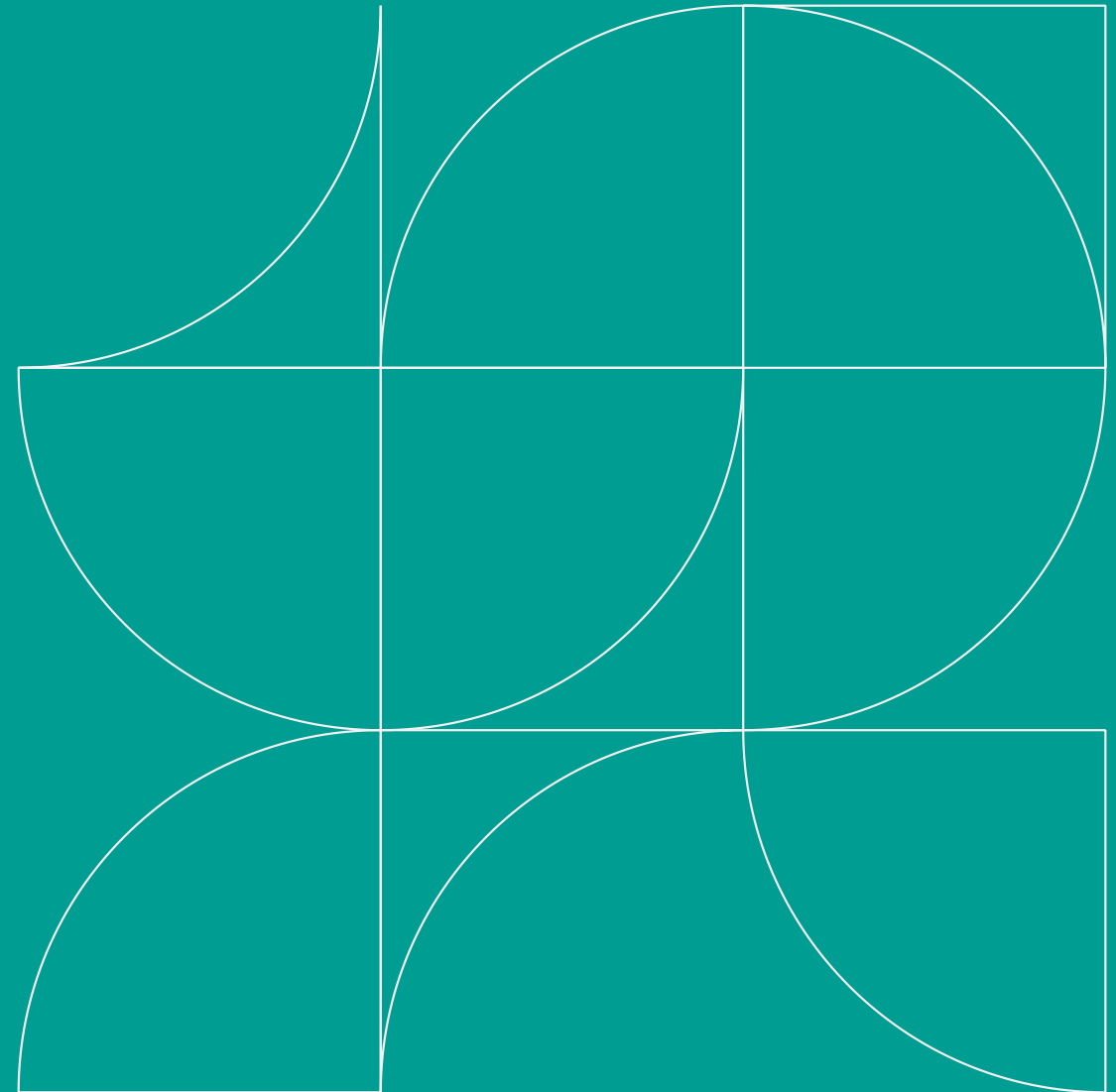
- DOJ Guidance saying “long COVID” can be a disability
- Sidewalk dining physical access issues
- Limiting service to drive-thru only
 - Lawsuits by the blind who don’t drive
 - ***Szwanek v. Jack in the Box* (9th Cir. Nov. 3, 2021)**: Restaurant policy not discriminatory because it does not impact blind people differently or in a greater manner than non-disabled who lack access to motor vehicles.
 - ***Magee v. McDonald’s* (N.D. Illinois Oct. 5, 2021)** holds McDonald’s does not operate the franchised restaurant and refusal to serve any pedestrian customers at drive-thru not discriminatory.

Mask Lawsuits



- Relatively few lawsuits
- Many pro se
- Handful of plaintiff's firms
- Most cases dismissed or settled.
- In cases where there is likely to be a legitimate disability and person is excluded due to refusal to provide exemption, motions to dismiss have been denied.

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 Assistance
- **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:** Health Care

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 but a de facto standard

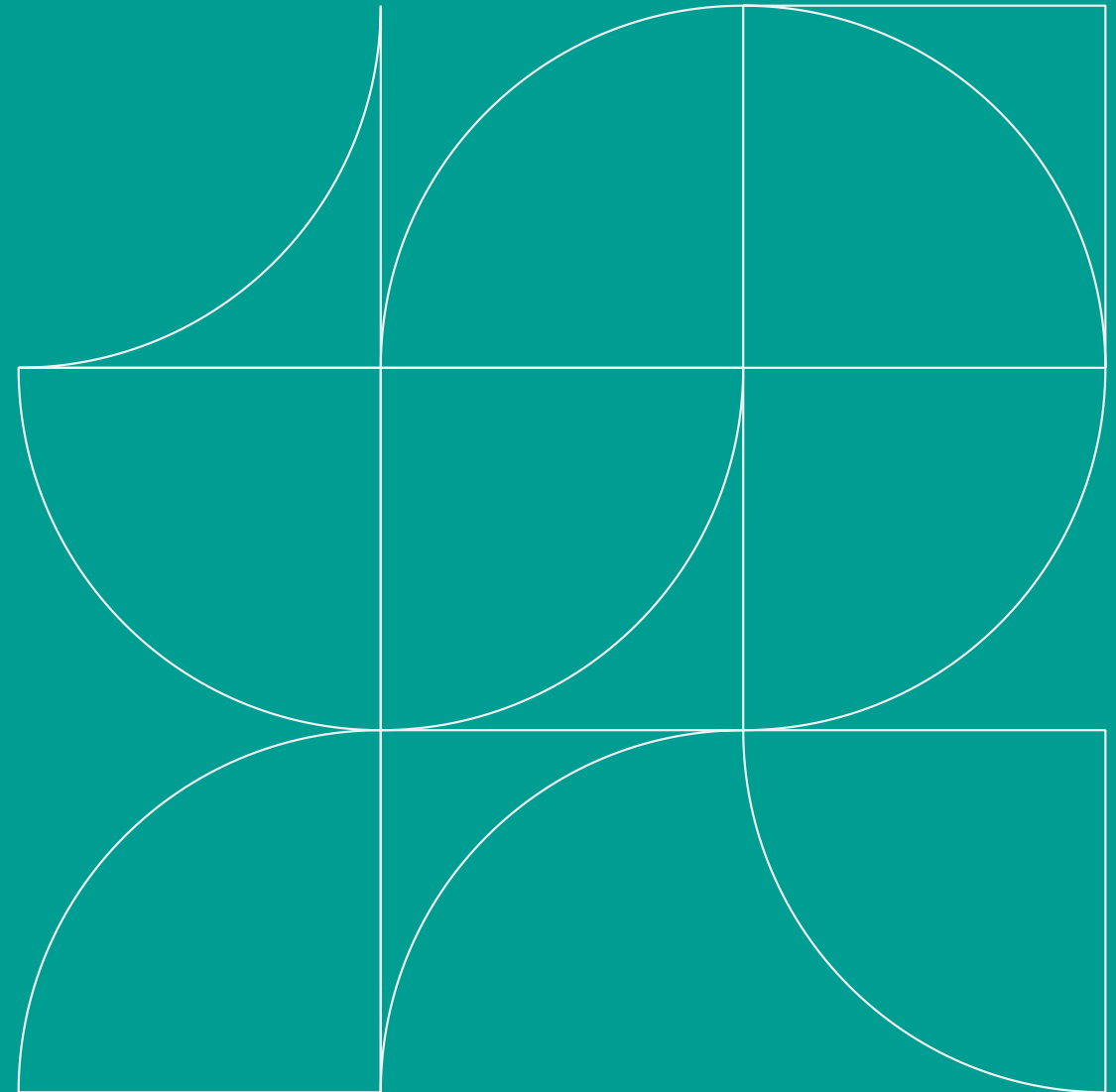
Will we ever see website accessibility regulations?

2010-2016: 2010 ANPRM pending

2017: DOJ Withdrew ANPRM

2022: Advocacy groups ask DOJ to issue regulation by end of Biden administration

Key Cases & Themes



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



- Federal Courts disagree on whether web-only businesses are covered public accommodations.
- Prior settlement promising to make website accessible is not a bar to subsequent suit.
- Being in the process of making your website accessible usually does not moot case, but having completed the task might.
- If the plaintiff can't ever use the services of the business whose website is inaccessible, case may be dismissed for lack of standing.
- Only a handful of cases have been litigated to judgment.

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



Robles v. Domino's Pizza LLC (9th Cir. 2019)

- Lawsuit alleges website and mobile app not accessible to the blind.
- Federal trial court granted early dispositive motion on due process and primary jurisdiction grounds.
- 9th Circuit reversed & remanded, finding:
 - ADA applies to websites and 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; declined to review (October 7, 2019).
- On remand, partial summary judgment granted. Judge found that website is not fully accessible to plaintiff because future order can't be placed using a screen reader.
- Case going to trial.

Title III Website Litigation:
Key Cases
Merits Decisions



Few Courts Have Made Decisions on the Merits

Gil v. Winn Dixie (11th Cir. 2021)

- Bench trial verdict for plaintiff
 - 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
- Reversed by 11th Circuit
 - Website not a public accommodation
 - Website barriers must prevent access to a good or service at the store to be actionable
- In response to Petition for Rehearing, 11th Cir. vacates both the appeal and the judgment as moot because the injunction had expired pending appeal.

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 they are only available during restaurant hours of operation.

Title III Website Litigation:
Key Cases
Merits Decisions



Thurston v. Omni Hotels (CA State court, aff'd 9/9/21)

- Blind plaintiff alleged hotel website not accessible, in violation of Unruh Act
- At trial, court instructed jury to determine if plaintiff “attempted to use [the hotel’s] website for the purpose of making a hotel reservation (or to ascertain the hotel’s prices and accommodations for the purpose of considering whether to make a reservation).”
- The jury found no intent, resulting in a verdict for the hotel.
- Appeals Court affirmed, finding that intent must be proven.

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 dicta 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:
Are websites covered by the ADA?



11th Cir.: No, but a business with a website with barriers that prevents access to place of public accommodation violates the ADA.

- ***Haynes v. Dunkin Donuts (11th Cir. 2018)***: 11th Circuit reversed district court dismissal of case because plaintiff sufficiently alleged that the barriers on the website prevented him from accessing the services available in a physical store.

9th Circuit: No if they do not have a nexus to a physical place of public accommodation. Yes if they do.

- ***Earl v. Ebay***: Web only business not covered.
- ***Cullen v. Netflix***: Web only business not covered.
- ***Robles v. Dominos***: Website allowing orders to be placed for pick up at brick & mortar business is covered.

Title III Website Litigation:
**Are websites
covered by the
ADA?**



3d Circuit: Has not considered a website case but has held that a public accommodation must be a physical place.

- ***Mahoney v. Bitrex* (EDPA. 2020):** Motion to dismiss granted for failure to state a claim because no physical nexus.

1st Circuit: Has not considered a website case but has held that a public accommodation does not have to be a physical place.

- ***Carparts v. Automotive Wholesaler's Association of New England, Inc.* (1994).**

Title III Website Litigation:
**Are websites
covered by the
ADA?**



New York District Court Split:

- **Recent EDNY Cases Holding that Websites are not a Place of Public Accommodation**
 - ***Winegard v. Newsday* (EDNY Aug. 2021) (Komitee, J.)** (Title III of the ADA only covers the goods and services of a physical place of public accommodation, and the website is not a physical place)
 - ***Suris v. Gannett*, (EDNY July 14, 2021) (Cogan, J.)** (newspaper publication not included in any of the categories of an ADA “place of public accommodation”)
 - EDNY web access case filings **decreased 43% between Q3 and Q4** of 2021

- **SDNY Decisions Holding Website is a Place of Public Accommodation**
 - **See e.g., *Andrews v. Blick Art Materials* (SDNY Aug. 1, 2017 (Weinstein, J.) and *Del-Orden v. Bonobos, Inc.* (SDNY Dec. 20, 2017) (Engelmayer, J.)**
 - In Q4 of 2021, **89% of web access cases** filed in NY venued in plaintiff-friendly SDNY

- WDNY Decision Holding Website is a Place of Public Accommodation
 - ***Panarra v. HTC Corporation*** (WDNY April 15, 2022) (Geraci, F.)
 - Web only video game subscription service is covered by the ADA
 - Plaintiff alleges the web-based service is not accessible there is no captioning for VR content (i.e. the games themselves).

- **2nd Circuit Has Not Squarely Addressed**
 - ***Palozzi v. Allstate Life Ins.* (2nd Cir. Jan. 13, 2000)** (ADA applies to terms of insurance policy purchased at insurance office because “insurance office” listed as “place of public accommodation” under Title III)

Title III Website Litigation:
Are websites covered by the ADA?



California state courts: Depends on the judge.

- ***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.
- ***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*) 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).
- ***Martinez v. Diamond Hill Vineyards (Ca. Ct. App. 2d Dist. 2022)***: Court of Appeals holds having an inaccessible website may be considered intentional discrimination under Unruh Act.

Title III Website Litigation:

Can you moot a website accessibility lawsuit if you've started fixing or fixed the website?



Diaz v. Kroger (SDNY 2019)

- ADA claim 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.

Langer v. BR Guest (CD Cal. 2021)

- ADA claim moot where defendant removed videos without closed captioning and added closed captioning to remaining videos.

Langer v. Russell Motorsports (EDCA Apr. 13, 2022)

- ADA claim moot where Defendant captioned or removed videos, and represented that defendant had no intention to remove existing captions.

Rizzi v. Hilton (EDNY Aug. 2020):

- ADA claim moot because Hilton submitted a declaration from reputable consultant, 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:
**Can you moot a
website
accessibility
lawsuit if you've
started fixing or
fixed the
website?**



Paguada v. Yieldstreet (SDNY 2021)

- Lawsuit not moot where there were conflicting declarations submitted about whether there were still barriers on the website.

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.

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 the process of making website accessible, so case was not moot.

Quezada v. U.S. Wings (SDNY Dec. 7, 2021)

- Denying mootness motion based principally on declaration submitted by consultant that installed accessibility "widget" on defendant's website; question of fact over digital barriers requires discovery.

Title III Website Litigation:
**Key Cases on
Standing**



Recent Federal Appellate Decisions

- ***Harty v. West Point Realty* (2nd Cir. Mar. 18, 2022)**
 - Case about allegedly deficient information on website
 - Court holds that inability to obtain information from the website alone not sufficient for standing
 - Must allege “*downstream consequences from failing to receive the required information In other words, [plaintiff must show] interest in using the information . . . beyond bringing [his] lawsuit.*”
- ***Laufer v. Arpan* (11th Cir. Mar. 29, 2022)**
 - “*humiliat[ion], embarrass[ment], and frustrat[ion]*” resulting from not being able get information from website is a concrete and particularized injury sufficient to establish standing

Title III Website Litigation:
**Key Cases on
Standing**



Hotel Reservation Mootness/Standing Cases

***Laufer v. Looper* (10th Cir. Jan. 5, 2022)**

- no standing for website reservation ADA claim where there were no concrete plans to visit the town in which the inn was located, or to book a room there

***Laufer v. Laxmi & Sons, LLC* (NDNY June 14, 2021)**

- following evidentiary hearing, dismissing 17 hotel website reservation cases because plaintiff solely functioning as “tester” was insufficient for standing

***Langer v. Music City Hotel LP* (NDCA Dec. 15, 2021)**

- voluntary modification of accessibility information mooted federal claim

***Whitaker v. Montes* (NDCA Nov. 3, 2021)**

- “[a]lthough websites can easily be changed, it still took time, effort, and money for the Hotel to make that change, and now that the website information is up, there is little incentive for the Hotel to take it down.”

Title III Website Litigation:
**Key Cases on
Standing**



Credit Union Cases

***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.
 - 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.

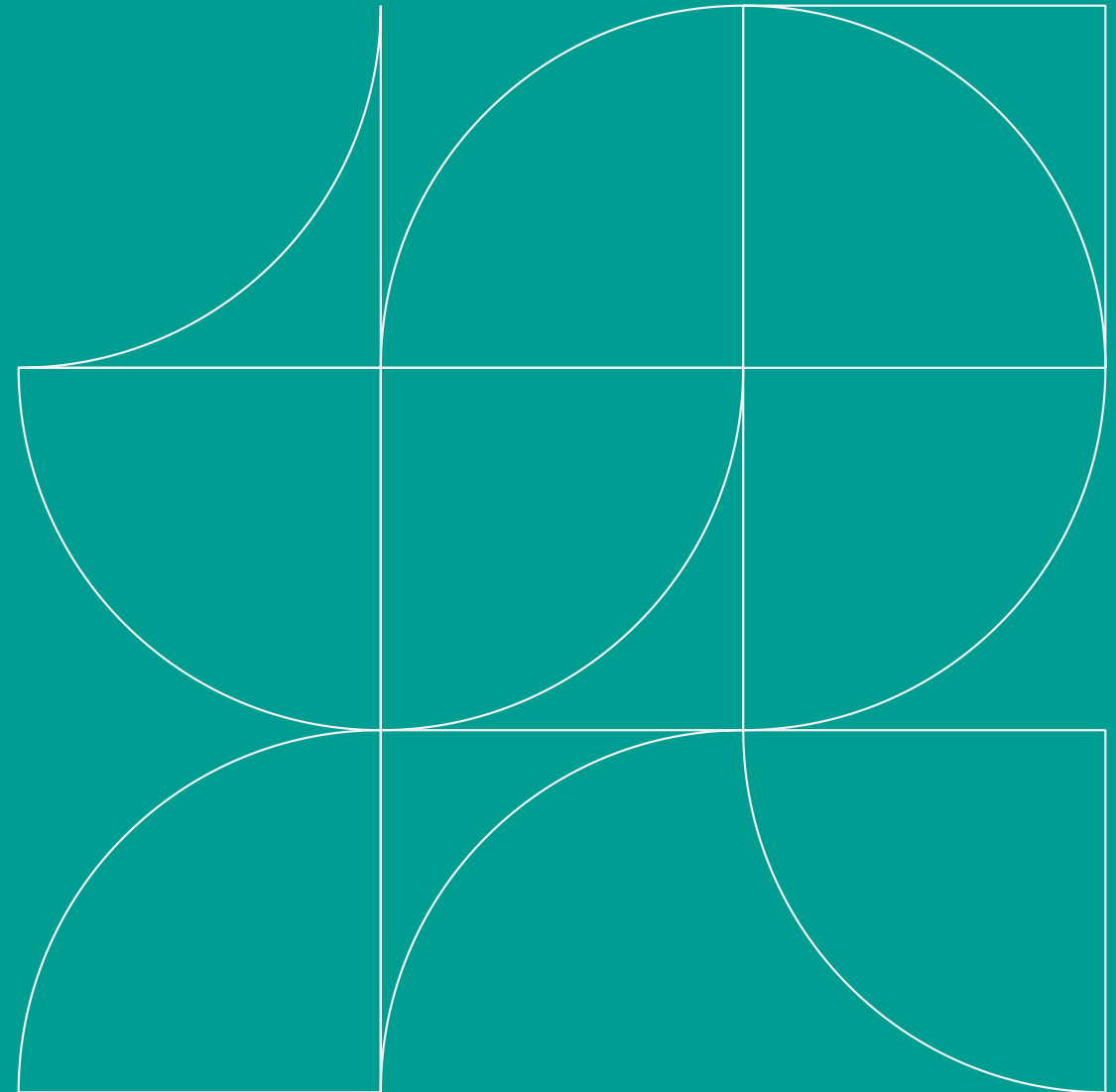
***Carroll v. Northwest Federal Credit Union* (4th Cir. 2019)**

- 4th Circuit affirmed district court’s dismissal of lawsuit on the same grounds – plaintiff could never join the credit union he sued.

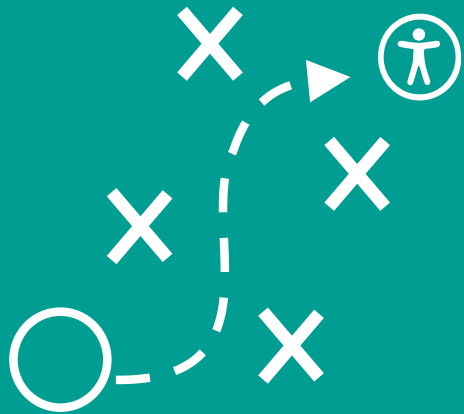
Kiosk Litigation

- **DOJ Statement of Interest**
 - lawsuit about inaccessible self-check-in kiosks at diagnostic labs
 - employee assistance for inaccessible kiosks does not satisfy the ADA because of lengthy wait and loss of priority in line
 - case going to trial November 2022
- ***NFB v. Walmart*, D.Md. Case. No. RDB-18-3301**
 - inaccessible self-check-out devices do not violate the ADA because Walmart employees provided assistance

Risk Mitigation Strategies



Strategies for Avoiding/Defending Website Litigation



- Create and maintain website/mobile apps
- Accessibility Statement
- Training
- Vendor contracts
- Third party content
- 24/7 telephone line



Questions?

Thank you!