

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

NATIONAL ASSOCIATION OF THE DEAF,  
on behalf of its members, C. WAYNE DORE,  
CHRISTY SMITH, LEE NETTLES, and  
DIANE NETTLES, on behalf of themselves  
and a proposed class of similarly situated  
persons defined below,

Plaintiffs,

v.

HARVARD UNIVERSITY, and the  
PRESIDENT AND FELLOWS OF  
HARVARD COLLEGE,

Defendants.

Civil Action No. 15-30023-MGM

**DEFENDANT PRESIDENT AND FELLOWS OF HARVARD COLLEGE'S ANSWER  
TO PLAINTIFFS' CLASS ACTION COMPLAINT FOR DECLARATORY AND  
INJUNCTIVE RELIEF**

Defendant President and Fellows of Harvard College ("Harvard") hereby files this Answer to Plaintiffs' Putative "Class Action" Complaint for Declaratory and Injunctive Relief ("Complaint"). Harvard files this Answer without waiving, and while expressly reserving, all rights that Harvard has to file dispositive motions. Harvard denies all allegations in the Complaint except as expressly admitted herein.

**"INTRODUCTION"**

1. Harvard admits that audio and video content is publicly available on its websites. All other allegations in Paragraph 1 are denied. By way of further answer, Harvard states that while Plaintiffs prominently reference Massive Open Online Courses ("MOOCs"), Harvard's MOOCs are, in fact, already captioned. This case is not about the MOOCs. Rather, Plaintiffs

seek to transform almost every aspect of Harvard's online presence, hoping to impose a massive and unreasonable burden that far exceeds what is necessary to satisfy the law. Plaintiffs are asking the Court to ensure that any instance of audio or video content posted by anyone Plaintiffs can connect to Harvard, however tangentially (or content that is otherwise hosted on Harvard's systems), is either captioned or removed from view. This would fundamentally change Harvard's longstanding practice allowing its scholars to make direct, unfettered use of the Internet to communicate their ideas. Neither Title III of the Americans with Disabilities Act ("ADA") nor section 504 of the Rehabilitation Act of 1973 authorizes the relief that Plaintiffs seek. The ADA and the Rehabilitation Act do not require Harvard to effect far-reaching, unduly burdensome, and costly modifications to online content—much of which: (i) was not created by Harvard; (ii) was not "posted" by Harvard; and (iii) is not even under Harvard's "control"—without any demonstration of why those modifications are necessary or how they are reasonable. Those modifications would fundamentally alter the nature of Harvard's online presence and its approach to online scholarly and other communication. Although Plaintiffs make it appear as if the relief they seek applies only to online courses hosted by Harvard, the reality is that the accommodation they wish to impose stretches far more expansively.

2. The allegations in Paragraph 2 contain conclusions of law to which no response is required. To the extent that a response is required, Harvard denies the allegations. By way of further answer, Harvard states that Plaintiffs' description of "Harvard's online content" is inaccurate and incomplete. Although Harvard hosts platforms to which online content may be uploaded, in many instances it does not create or control the online content to which Plaintiffs refer.

3. In response to Paragraph 3, Harvard states that the PDF document entitled “Guidelines for Using Social Media,” located at [http://provost.harvard.edu/files/provost/files/social\\_media\\_guidelines\\_vers\\_2\\_0\\_eff\\_081814.pdf](http://provost.harvard.edu/files/provost/files/social_media_guidelines_vers_2_0_eff_081814.pdf), speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard denies the allegations in Paragraph 3.

4. In response to Paragraph 4, Harvard admits that Plaintiffs purport to bring a claim against Harvard under section 504 of the Rehabilitation Act. Harvard also admits that it receives federal financial assistance. Harvard further states that the text of 29 U.S.C. § 794(b) speaks for itself and therefore no response is necessary. All other allegations in Paragraph 4 are denied.

5. In response to Paragraph 5, Harvard admits that Plaintiffs purport to bring a claim against Harvard under Title III of the ADA. Harvard further states that the text of 42 U.S.C. § 12181(7)(J) speaks for itself and therefore no response is necessary. All other allegations in Paragraph 5 are denied.

6. The allegations in Paragraph 6 contain conclusions of law to which no response is required. To the extent a response is required, Harvard admits that it receives federal financial assistance and that some portions of its physical campus are places of public accommodation, but denies the remainder of the allegations in Paragraph 6.

7. In response to Paragraph 7, Harvard states that the written testimony of Eve L. Hill before the Senate Committee on Health, Education, Labor & Pensions on May 14, 2013, speaks for itself and therefore no response is necessary. The remainder of the allegations in Paragraph 7 contains conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 7.

8. Harvard denies the allegations in Paragraph 8.

9. The allegations in Paragraph 9 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 9.

10. Harvard admits that Plaintiffs are purportedly seeking injunctive and declaratory relief in their Complaint. The remainder of the allegations in Paragraph 10 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 10.

**“JURISDICTION AND VENUE”**

11. The allegations in Paragraph 11 contain conclusions of law to which no response is required.

12. The allegations in Paragraph 12 contain conclusions of law to which no response is required.

13. The allegations in Paragraph 13 contain conclusions of law to which no response is required.

**“PARTIES”**

14. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 14 and therefore denies them.

15. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 15 and therefore denies them.

16. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 16 and therefore denies them.

17. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 17 and therefore denies them.

18. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 18 and therefore denies them.

19. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 19 and therefore denies them.

20. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 20 and therefore denies them.

21. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 21 and therefore denies them.

22. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 22 and therefore denies them.

23. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 23 and therefore denies them.

24. In response to Paragraph 24, Harvard admits that Harvard University is the oldest institution of higher education in the United States, but denies the remainder of the allegations in Paragraph 24. By way of further answer, Harvard states that “Harvard University” is not the legal name of the defendant. The defendant’s legal name is “President and Fellows of Harvard College.”

25. Harvard denies the allegations in Paragraph 25. By way of further answer, Harvard states that its legal name is “President and Fellows of Harvard College.”

26. The allegations in Paragraph 26 contain conclusions of law to which no response is required. To the extent a response is required, Harvard admits that it receives federal financial assistance, but denies the remainder of the allegations in Paragraph 26.

27. The allegations in Paragraph 27 contain conclusions of law to which no response is required. To the extent a response is required, Harvard admits that it is an “undergraduate” and “postgraduate” private institution of higher education, and that some portions of its physical campus are places of public accommodation under the ADA. Harvard denies the remainder of the allegations in Paragraph 27.

**“FACTS APPLICABLE TO ALL CLAIMS”**

**I. “Harvard’s Online Content.”**

28. In response to the allegations in Paragraph 28, Harvard admits that it creates and produces online content that is publicly available, and that it hosts other content that Harvard does not create or produce. Harvard denies Plaintiffs’ definition of “Harvard Platforms,” as it does not accurately describe Harvard’s online presence. Harvard further states that its Online Learning website speaks for itself and therefore no response is necessary. By way of further answer, Harvard states that it maintains servers and web interfaces through which online content is made available to the general public but it does not necessarily create, control, or administer that content. In addition, certain online content that Harvard produces is presented on platforms that Harvard does not control, maintain or administer. Harvard therefore denies that it “controls, maintains and/or administers webpages, websites and other Internet locations (‘Harvard Platforms’) on which online content is made available to the general public.” Harvard further denies these allegations because the terms “controls, maintains, and/or administers” are ambiguous and subject to multiple interpretations.

29. In response to the allegations in Paragraph 29, Harvard denies Plaintiffs’ definition of “Harvard Platforms,” as it does not accurately describe Harvard’s online presence.

a. Harvard denies the allegations in subparagraph 29(a).

- b. Harvard denies the allegations in subparagraph 29(b).
- c. Harvard denies the allegations in subparagraph 29(c).
- d. In response to subparagraph 29(d), Harvard admits that it maintains the Harvard@Home website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the Harvard@Home website. To the extent that there are any remaining allegations as part of subparagraph 29(d), they are denied.
- e. In response to subparagraph 29(e), Harvard admits that it maintains the Harvard Extension School's website, including the Open Learning Initiative website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the websites for Harvard Extension School and the Open Learning Initiative. To the extent that there are any remaining allegations as part of subparagraph 29(e), they are denied.
- f. In response to subparagraph 29(f), Harvard admits that it maintains the Peabody Museum of Archaeology and Ethnology's website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the Peabody Museum of Archaeology and Ethnology's website. To the extent that there are any remaining allegations as part of subparagraph 29(f), they are denied.

g. In response to subparagraph 29(g), Harvard admits that it maintains the Harvard Museum of Natural History's website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the Harvard Museum of Natural History's website. To the extent that there are any remaining allegations as part of subparagraph 29(g), they are denied.

h. In response to subparagraph 29(h), Harvard admits that it maintains the Chandra X-Ray Observatory's website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the Chandra X-Ray Observatory's website. To the extent that there are any remaining allegations as part of subparagraph 29(h), they are denied.

i. Harvard denies the allegations in subparagraph 29(i).

j. In response to subparagraph 29(j), Harvard admits that it maintains the Institute of Politics John F. Kennedy Jr. Forum's website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the Institute of Politics John F. Kennedy Jr. Forum's website. To the extent that there are any remaining allegations as part of subparagraph 29(j), they are denied.

k. In response to subparagraph 29(k), Harvard admits that it maintains the Harvard Life Sciences Outreach Program's website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the Harvard



Life Sciences Outreach Program's website. To the extent that there are any remaining allegations as part of subparagraph 29(k), they are denied.

l. In response to subparagraph 29(l), Harvard admits that it maintains the Woodberry Poetry Room's website. By way of further answer, Harvard states that it does not necessarily create, control, maintain, or administer the audio or video content on the Woodberry Poetry Room's website. To the extent that there are any remaining allegations as part of subparagraph 29(l), they are denied.

m. Harvard denies the allegations in subparagraph 29(m). By way of further answer, Harvard states that, while it uses the edX platform to present "HarvardX" courses, it does not control, maintain, or administer the edX website.

30. In response to the allegations in Paragraph 30, Harvard states that the public comments speak for themselves and therefore no response is necessary.

31. In responding to the allegations of Paragraph 31, Harvard admits that some online content hosted on systems owned or controlled by Harvard is not captioned. Harvard further admits that some online content posted by members of the Harvard community to systems owned or controlled by others is not captioned. Harvard denies the remainder of the allegations in Paragraph 31.

32. Harvard denies the allegations in Paragraph 32.

33. Harvard denies the allegations in Paragraph 33.

34. Harvard denies the allegations in Paragraph 34.

35. Harvard denies the allegations in Paragraph 35.

36. Harvard denies the allegations in Paragraph 36.

37. Harvard denies the allegations in Paragraph 37.

38. Harvard denies the allegations in Paragraph 38.

39. Harvard denies the allegations in Paragraph 39.

40. Harvard denies the allegations in Paragraph 40.

**A. “Harvard on YouTube”**

41. In response to the allegations in Paragraph 41, Harvard states that the YouTube channels speak for themselves and therefore no response is necessary. By way of further answer, Harvard states that it does not create or control the vast majority of YouTube content that references, mentions, or discusses Harvard, including content posted to many YouTube channels that use the name “Harvard.” Harvard denies the remainder of the allegations in Paragraph 41.

42. In response to the allegations in Paragraph 42, Harvard states the allegation that “[d]eaf and hard of hearing persons, however, are denied the benefit of many of these videos” contains a legal conclusion to which no response is required. To the extent that a response is required, Harvard denies the allegation. In response to the remainder of the allegations in Paragraph 42, Harvard states that the YouTube videos speak for themselves and thus no response is necessary.

**B. “Harvard on iTunes U”**

43. In response to the allegations in Paragraph 43, Harvard states that the iTunes U website speaks for itself and therefore no response is necessary. Harvard admits that at least some of the content available on iTunes U lacks captions but otherwise lacks knowledge and information sufficient to form a belief as to the truth of the allegations and therefore denies them.

**C. “Harvard on SoundCloud”**

44. In response to the allegations in Paragraph 44, Harvard states that the SoundCloud website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that at least some of the audio content on SoundCloud may be used for educational purposes but otherwise lacks knowledge and information sufficient to form a belief as to the truth of the allegations and therefore denies them.

45. In response to the allegations in Paragraph 45, Harvard states that the SoundCloud website speaks for itself and therefore no response is necessary.

46. In response to the allegations in Paragraph 46, Harvard states that the SoundCloud website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that at least some of the content on SoundCloud lacks accompanying transcription but otherwise lacks knowledge and information sufficient to form a belief as to the truth of the allegations and therefore denies them.

**D. “Harvard@Home”**

47. In response to the allegations in Paragraph 47, Harvard states that the Harvard@Home website speaks for itself and therefore no response is necessary.

48. In response to the allegations in Paragraph 48, Harvard states that the Harvard@Home website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that the Harvard@Home website contains at least some uncaptioned videos but denies the remainder of the allegations in Paragraph 48.

**E. “Additional Harvard Online Content”**

49. In response to the allegations in Paragraph 49, Harvard admits that the Harvard Extension School’s “Open Learning Initiative” offers free courses online. Harvard states that the

remainder of the allegations rely on statements made on the Harvard Extension School's website, and that those statements speak for themselves and thus no response is necessary. To the extent that a response is required, Harvard admits that at least some of the audio and video content available on the Open Learning Initiative's website is not captioned or transcribed but otherwise denies the remainder of the allegations in Paragraph 49.

50. In response to the allegations in Paragraph 50, without confirming or denying that Harvard "posted" the video and audio content generally described in the allegations, Harvard admits that the Peabody Museum of Archaeology and Ethnology hosts a website on which certain video content is embedded. Harvard also admits that at least some of the audio content on the Peabody Museum of Archaeology and Ethnology's website is not transcribed but otherwise denies the remainder of the allegations in Paragraph 50.

51. In response to the allegations in Paragraph 51, Harvard states that the Museum of Natural History's website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that at least some of the videos on the Museum of Natural History's website are not captioned but otherwise denies the remainder of the allegations in Paragraph 51.

52. In response to the allegations in Paragraph 52, Harvard lacks knowledge and information sufficient to form a belief as to the first sentence of Paragraph 52. Harvard further avers that that the Chandra X-Ray Observatory's website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that at least some of the videos on the Chandra X-Ray Observatory's website are not captioned and at least some of the audio content is not transcribed but otherwise denies the remainder of the allegations in Paragraph 52.

53. Harvard denies the allegations in Paragraph 53.

54. In response to the allegations in Paragraph 54, Harvard states that the Institute of Politics John F. Kennedy Jr. Forum's website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that at least some of the video content on the Institute of Politics John F. Kennedy Jr. Forum's website is not captioned but otherwise denies the remainder of the allegations in Paragraph 54.

55. In response to the allegations in Paragraph 55, Harvard states that the Life Sciences Outreach Program's website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that at least some of the video content on the Life Sciences Outreach Program's website is not captioned but otherwise denies the remainder of the allegations in Paragraph 55.

56. In response to the allegations in Paragraph 56, Harvard states that the Woodberry Poetry Room's website speaks for itself and therefore no response is necessary. To the extent that a response is required, Harvard admits that at least some of the audio content on the Woodberry Poetry Room's website lacks transcription, but otherwise denies the remainder of the allegations in Paragraph 56.

**F. "edX / HarvardX"**

57. In response to the allegations in Paragraph 57, Harvard admits that the edX learning platform is a product of edX, Inc., a non-profit corporation founded by Harvard and the Massachusetts Institute of Technology. Harvard further states that the edX website and the Harvard "Frequently Asked Questions: Free Courses" page speak for themselves and therefore no response is necessary.

58. In response to the allegations in Paragraph 58, Harvard admits that it uses the edX platform to present “HarvardX” courses. Harvard further states that the “Harvard at a Glance” webpage speaks for itself and therefore no response is necessary.

59. In response to the allegations in Paragraph 59, Harvard states that the edX web page relating to HarvardX speaks for itself and therefore no response is necessary.

60. Harvard denies the allegations in Paragraph 60. By way of further answer, Harvard states that its practice is to provide accompanying rolling transcripts and/or captioning for all Harvard-produced videos that it embeds into the HarvardX courses presented on the edX platform.

**II. “Harm to the Plaintiffs.”**

61. The allegations in Paragraph 61 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 61.

62. The allegations in Paragraph 62 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 62.

63. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 63, and therefore denies them. The allegations in Paragraph 63 also contain conclusions of law to which no response is required. To the extent that a response is required, the allegations are denied.

64. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 64 and therefore denies them.

65. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 65, and therefore denies them.

66. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 66, and therefore denies them. The allegations in Paragraph 66 also contain conclusions of law to which no response is required. To the extent that a response is required, the allegations are denied.

67. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 67, and therefore denies them.

68. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 68, and therefore denies them.

69. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 69, and therefore denies them. The allegations in Paragraph 69 also contain conclusions of law to which no response is required. To the extent that a response is required, the allegations are denied.

70. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 70, and therefore denies them.

71. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 71, and therefore denies them.

72. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 72, and therefore denies them. The allegations in Paragraph 72 also contain conclusions of law to which no response is required. To the extent that a response is required, the allegations are denied.

73. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 73, and therefore denies them.

74. Harvard lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 74, and therefore denies them.

75. The allegations in Paragraph 75 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 75.

**III. “Prior Notice to Harvard”**

76. The allegations in Paragraph 76 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 76.

77. In response to Paragraph 77, Harvard states that the “Dear Colleague Letter” speaks for itself and therefore no response is necessary. Harvard admits that the U.S. Department of Education and the U.S. Department of Justice are federal agencies with oversight over the Americans with Disabilities Act and the Rehabilitation Act. Harvard denies that the “Dear Colleague Letter” carries the force of law or accurately interprets or describes the state of existing law.

78. In response to Paragraph 78, Harvard states that the “FAQ” document accompanying the Dear Colleague Letter speaks for itself and therefore no response is necessary. Harvard denies that the “FAQ” document carries the force of law or accurately interprets or describes the state of existing law.

79. In response to Paragraph 79, Harvard states that the “FAQ” document accompanying the Dear Colleague Letter speaks for itself and therefore no response is necessary. Harvard denies that the “FAQ” document carries the force of law or accurately interprets or describes the state of existing law.



80. In response to Paragraph 80, Harvard admits that it has been contacted by Plaintiff National Association of the Deaf regarding its captioning practices. Harvard denies the remainder of the allegations in Paragraph 80.

81. The allegations in Paragraph 81 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 81.

**“CLASS ACTION ALLEGATIONS”**

82. Harvard admits that Plaintiffs bring this action on behalf of themselves and seek to bring it on behalf of a putative class. Harvard denies the remainder of the allegations in Paragraph 82.

83. The allegations in Paragraph 83 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 83.

84. The allegations in Paragraph 84, including the allegations in sub-paragraphs (a) through (i), contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 84.

85. The allegations in Paragraph 85 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 85.

86. The allegations in Paragraph 86 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 86.

87. The allegations in Paragraph 87 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 87.

**“FIRST CLAIM FOR RELIEF”**

**“Section 504 of the Rehabilitation Act of 1973, 29 U.S. C. § 794 *et seq.*”**

88. Harvard repeats and reasserts its responses to Paragraphs 1–87 above.

89. In response to Paragraph 89, Harvard states that the text of 29 U.S.C. § 794(a) speaks for itself and therefore no response is necessary.

90. The allegations in Paragraph 90 contain conclusions of law to which no response is required. To the extent a response is required, Harvard admits that it receives federal financial assistance, but denies the remainder of the allegations in Paragraph 90.

91. In response to Paragraph 91, Harvard states that the text of 29 U.S.C. § 794(b) and 34 C.F.R. § 104.3(k) speaks for itself and therefore no response is necessary. The remainder of the allegations in Paragraph 91 contain conclusions of law to which no response is required. To the extent a response is required, Harvard admits that it operates a “college, university or other postsecondary institution,” but denies the remainder of the allegations in Paragraph 91.

92. The allegations in Paragraph 92 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 92.

93. The allegations in Paragraph 93 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 93.

94. The allegations in Paragraph 94 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 94.

95. The allegations in Paragraph 95 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 95.

**“SECOND CLAIM FOR RELIEF”**

**“Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12181 *et seq.*”**

96. Harvard repeats and reasserts its responses to Paragraphs 1–95 above.

97. In response to Paragraph 97, Harvard states that the text of 42 U.S.C. § 12181 and 28 C.F.R. § 36.201(a) speaks for itself and therefore no response is necessary.

98. The allegations in Paragraph 98 contain conclusions of law to which no response is required. To the extent a response is required, Harvard admits that some portions of its physical campus are places of public accommodation, but denies the remainder of the allegations in Paragraph 98.

99. The allegations in Paragraph 99 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 99.

100. The allegations in Paragraph 100 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 100.

101. The allegations in Paragraph 101 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 101.

102. The allegations in Paragraph 102 contain conclusions of law to which no response is required. To the extent a response is required, Harvard denies the allegations in Paragraph 102.

**ANSWER TO “PRAYER FOR RELIEF”**

Harvard denies each and every averment contained in the “Prayer for Relief,” including Paragraphs 1 through 4 therein.

**ADDITIONAL AND AFFIRMATIVE DEFENSES**

Without alleging or admitting that it carries the burden of proof or persuasion for any of these defenses, Harvard alleges as follows:

**FIRST ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Failure to State a Claim)**

The Complaint does not state a claim against Harvard for which relief can be granted.

**SECOND ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Communications Decency Act Immunity)**

Harvard is not the “publisher” or “speaker” of the online audio and video content it hosts because it is a “provider . . . of an interactive computer service” pursuant to the Communications Decency Act, 47 U.S.C. § 230(c).

**THIRD ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Primary Jurisdiction)**

Plaintiffs’ claims are presently precluded by the doctrine of primary jurisdiction. The U.S. Department of Justice (DOJ) has announced that it will promulgate web accessibility standards under Title III of the ADA, including whether and when online audio or video must be captioned. That rulemaking lies at the heart of the task assigned to the agency by Congress, will require agency expertise to unravel intricate, technical facts, and would materially aid the Court. Because the merits of Plaintiffs’ claims will be greatly affected by what DOJ promulgates, their claims cannot be heard until DOJ’s rulemaking is complete.

**FOURTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Legitimate Nondiscriminatory Reasons)**

Plaintiffs’ claims must fail because Harvard has legitimate nondiscriminatory reasons for its online practices. Harvard’s longstanding pedagogical goals and academic freedom require the unrestricted and efficient communication of novel ideas and groundbreaking scholarship.

**FIFTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Substantial Compliance)**

Harvard's online audio and video content substantially complies with Title III of the ADA and section 504 of the Rehabilitation Act and their supporting regulations as currently in force.

**SIXTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Auxiliary Aids and Services)**

Harvard provides reasonable accommodations and appropriate auxiliary aids and services upon receiving a bona fide request from a student, faculty member, or employee who is deaf or hard of hearing.

**SEVENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Fundamental Alteration of Activities)**

Plaintiffs demand a sweeping remedy that would fundamentally alter the nature of the services Harvard provides.

**EIGHTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Undue Burden or Hardship)**

Plaintiffs' requested remedy—preemptive captioning of all online audio and video content posted by anyone Plaintiffs can connect to Harvard, however tangentially (or content that is otherwise hosted on Harvard's servers)—is not reasonable and would impose an undue burden and hardship on Harvard. Indeed, such a requirement would impose an overwhelming burden not only for every school in the United States, but also for all other recipients of federal funds and public accommodations.

**NINTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Impossibility)**

Plaintiffs' sweeping demand for blanket captioning of all online audio and video content posted by anyone Plaintiffs can connect to Harvard, however tangentially (or content that is otherwise hosted on Harvard's servers), is impossible to meet for two reasons. First, Harvard does not control, and is therefore unable to caption, much of the content in question. Second, the enormous breadth of this demand makes it impossible for Harvard to provide accurate captioning in a timely manner at a reasonable cost.

**TENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Lack of Control)**

Harvard neither creates nor controls the majority of the content posted on the websites identified by Plaintiffs. Neither the ADA nor the Rehabilitation Act requires Harvard to serve effectively as a content monitor, proactively censoring audio and video content that has yet to acquire the captioning Plaintiffs demand.

**ELEVENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(No Duty to Modify)**

Plaintiffs' claims fail because the remedy they demand is not a reasonable modification of the service Harvard provides through the online audio and video content available on the websites identified by Plaintiffs.

**TWELFTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Inventory)**

The remedy demanded by Plaintiffs would unreasonably require Harvard to create a separate, captioned inventory of all of the online audio and video content available on the websites identified by Plaintiffs, regardless of whether that content is actually used.

**THIRTEENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Unreasonable and Untailored Requested Accommodations)**

Plaintiffs' demand would deprive Harvard of the flexibility to determine, on an individual basis, whether captioning of online audio or video is a reasonable accommodation for a disabled student.

**FOURTEENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Violation of the First Amendment)**

Plaintiffs' demand would result in an unconstitutional abridgment on the speech of Harvard and members of its community, including students, faculty, and other employees.

**FIFTEENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(No Injunctive Relief)**

Plaintiffs have failed to demonstrate that a remedy in equity is warranted, that the grant of injunctive relief would be equitable, or that the balance of hardships tips in their favor.

**SIXTEENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Attorneys' Fees)**

Plaintiffs are not entitled to attorneys' fees because they have failed to satisfy the standards for obtaining such fees.

**SEVENTEENTH ADDITIONAL AND AFFIRMATIVE DEFENSE**

**(Additional Affirmative Defenses)**

Harvard reserves the right to assert any additional or different defenses and affirmative defenses in response to the Complaint based on information or knowledge obtained in discovery or investigation.

**PRAYER FOR RELIEF**

WHEREFORE, Harvard respectfully requests judgment as follows:

1. That judgment on the Complaint, and each and every claim for relief therein, be entered in favor of Harvard and against Plaintiffs;
2. That Harvard's costs and expenses of suit herein, including reasonable attorneys' fees, be recovered;
3. That Harvard be awarded such other relief as this Court deems just and proper.



Dated: December 9, 2016

Respectfully submitted,

/s/ Roberto M. Braceras  
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**CERTIFICATE OF SERVICE**

I, Roberto M. Braceras, certify that this document filed through the ECF system will be served on December 9, 2016 electronically to the registered participants as identified in the Notice of Electronic Filing (NEF) and by first-class mail, postage prepaid on those identified as non-registered participants.

/s/ Roberto M. Braceras