United States Supreme Court Hears ADA Tester Case

On Wednesday October 4th, the United States Supreme Court heard oral arguments in *Acheson Hotels, LLC v. Laufer*.[1] The long awaited "ADA tester case" was expected to resolve the outstanding question that arises from the Americans with Disabilities Act of 1990 (ADA)[2] and 28 C.F.R. § 36.302 (otherwise referred to as the "ADA Reservation Rule").[3] Instead, the Court appears geared up to dispose of the case of grounds of mootness, thus extending the current state of confusion regarding ADA compliance.

Laufer's Suit Against Acheson

Respondent Deborah Laufer is a Florida resident who is a wheelchair user and is considered disabled pursuant to the ADA.[4] Laufer, a self-proclaimed ADA "tester", "searches the Internet for websites of hotels that do not, in her view, provide sufficient information as to whether rooms are ADA accessible. When she finds such a website, she sues the hotel, seeking an injunction and attorney's fees. Since 2018, Laufer has filed over 600 such lawsuits."[5]

On September 24, 2020, Laufer filed suit in federal court against seven entities in Maine for their alleged inaccessibility.[6] At the time of filing, one of the entities which Laufer sued, Acheson Hotels, LLC, owned and operated Coast Village Inn and Cottages in Wells, Maine.[7] Laufer contended that she visited the online reservation portal for Coast Village Inn and Cottages, and that Coast Village failed to provide sufficient information as to whether it was

[1] *Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023).
[2] 42 U.S.C. § 12182(b)(2)(A)(ii).
[3] 28 C.F.R. § 36.302. The "Reservation Rule" requires that hotels allow individuals with disabilities to make reservations in the same manner as able-bodied peers, as well as requiring that hotels provide descriptions of the accessibility features of the rooms so as to allow potential bookers the opportunity to know if the room would meet their accessibility needs.
[4] Petition for Writ of Certiorari, *Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023) (No. 21-1410), at 8.
[5] *Id.*
[6] *Id.*, at 10.
[7] *Id.* (note omitted).

accessible pursuant to the ADA on its website and similar third-party platforms where reservations were made.[8] Laufer filed suit pursuant to an alleged violation of the Reservations Rule.[9]

Acheson moved to dismiss the case for a lack of standing.[10] Acheson asserted that Laufer maintained no standing on the basis that she encountered no concrete injury for which either existing regulatory structures or the ADA permitted redress. In response, Laufer indicated that she considered herself to be a self-appointed ADA tester and therefore maintained standing.[11] Laufer asserted that standing was afforded to her due to Acheson's lack of web compliance (thus conferring standing upon her pursuant to Article III of the Constitution).[12] Laufer further provided that while she did not have concrete plans to visit Maine, she sustained an injury in the form "humiliation and frustration at being treated like a second class citizen, being denied equal access and benefits to the goods, facilities, accommodations and services."[13] Jurists differ on their receptiveness to this argument, which has led to the current circuit split over whether this particular type of injury under the conditions asserted are sufficient to maintain standing in a federal lawsuit. The tension between the existing Article III requirements for standing and the relative unease amongst these jurists to entertain the number of lawsuits filed by serial litigants for which there may be no actual injury sustained necessitated the Supreme Court to entertain the question:

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[8] *Id.*
[9] *Supra* note 3.
[10] *See* U.S. CONST. art. III.
[11] Affidavit of Plaintiff re: Response to Motion to Dismiss for Lack of Jurisdiction, at ¶ 3, *Laufer v. Acheson Hotels, LLC*, No. 2:20-cv-00344-GZS (D. Me. 2021) "As a tester, I visit hotel online reservation services to ascertain whether they are in compliance with the Americans With Disabilities Act. In the event that they are not, I request that a law suit be filed to bring the website into compliance with the ADA so that I and other disabled persons can use it."
[12] *Id.*, at ¶¶ 6-7.
[13] *Id.* at ¶ 7.

> Does a self-appointed Americans with Disabilities Act "tester" have Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation?[14]

Respondent and Similarly Situated Serial Litigants

At the heart of the standing question lies the concern over permitting "testers" to assert otherwise valid legal claims against entities for which they sustain no actual injury. Some litigants, such as Laufer, have been accused of making a job out of the ADA testing process and have been accused of targeting defendants for the sole purpose of forcing compliance and settlement from companies that may not have the means to defend against such an accessibility claim. Litigants who have been known to bring hundreds of cases against entities for which they have no other intention than to bring suit have earned some ADA "testers" to refer to them as "serial litigants". These particular litigants have generated unfavorable sentiments toward potential claimants who bring forth discrimination claims pursuant to 28 C.F.R. § 36.302.[15] Jurists, defendants, and some plaintiffs have expressed concern with the precedent established by affording "self-appointed testers" standing to bring claims against entities for which they have no interest in engaging with, as it could undermine the credibility of defendants who suffered particularized harm in similar circumstances.

In particular, defendants have begun to challenge the standing of those "self-appointed testers", such as Laufer, to bring suit against parties for alleged injuries sustained due to discrimination on the web. The principle understanding of the argument against serial litigants is that they sustain no actualized injury, but instead engage in quasi-malicious litigation without any intention to engage with the entity in a manner outside the test for which they perform.

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[14] *Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023), *cert. granted* (U.S. Mar. 27, 2023) (No. 22-429).
[15] *Supra* note 3.

Though much of the recent litigation to this effect concerns the inaccessibility of web-related content (and/or the failure in providing information related to the accessibility aspects of a location in the physical realm), some recent litigation appears to focus solely on the implications of an inaccessible webpage.[16]

To such end, the expansion of ADA "tester" litigation has demonstrated the pervasive nature of serial litigants in the judicial system and has raised questions as to the sincerity of the claims asserted. Serial litigants, and the counsel that represent them, overrepresent the parties who appear in such accessibility suits, and rightfully concern the jurists who hear these cases. The U.S. Chamber of Commerce Institute for Legal Reform found that between 2009 and 2021, 18 plaintiff firms filed nearly half (44%) of all ADA case filings.[17] "Since January 1, 2013, five tester plaintiffs have filed more than 1,000 ADA lawsuits and another 12 have filed more than 500."[18] The sheer number of suits filed by these litigants, defendants argue, undermine the credibility of the plaintiffs that their particularized injury of humiliation is an appropriate vehicle for affording standing in these ADA related matters.

Procedural History

District Court

On May 18th, 2021, the United States District Court for the District of Maine dismissed Laufer's claim.[19] The court found that Laufer's admission that she never had a concrete intent to visit the Defendant's property undermined the assertion that the Plaintiff sustained a concrete

[16] The existing debate over the ADA standing question is of much consequence to the growing amount of litigation brought under Title II and Title III of the ADA concerning web accessibility claims. To better understand the tension between the standing question and the circuit split over the legality of applying a web accessibility standard pursuant to the ADA see *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 122 (2019).
[17] MARK A. PERRY AND BRIAN G. LIEGEL, PRESERVING PROTECTIONS: CURBING ADA LITIGATION ABUSE, 10 (U.S. Chamber of Commerce Institute for Legal Reform 2023).
[18] Brief for Chamber of Commerce of the U.S., et al. as Amici Curiae Supporting Petitioner in *Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023) (No. 22-429), at 8 (citation omitted).
[19] *Laufer v. Acheson Hotels, LLC*, No. 2:20-cv-00344-GZS, 2021 U.S. Dist. LEXIS 93703 (D. Me. May 18, 2021).

and imminent injury.[20] While Laufer asserted that the lack of information provided relating to accessible aspects of the property proved to be an accessibility barrier, she failed to claim that the reservation system was inaccessible itself. Thus, Laufer was found to have failed to satisfy the injury-in-fact requirement of Article III.[21]

First Circuit

Laufer appealed the finding to the United States Court of Appeals for the First Circuit.[22] The First Circuit reversed the District Courts decision. The First Circuit held that Laufer, as a disabled individual, maintained standing pursuant to 42 U.S.C.S. § 12181 and 28 C.F.R. § 36.302(e), despite not intending to book a room. The court adopted an understanding that Laufer sustained a concrete and particularized injury in the form of humiliation and that such an injury afforded Laufer standing to pursue injunctive relief as a remedy consistent with the eligible remedies under the aforementioned authorities. The ruling to this effect furthered a circuit split that arose in other jurisdictions (many from cases brought by Laufer).

The First Circuit also addressed part of the mootness claim that appeared to have supplanted the standing question as the basis for resolution at the Supreme Court's oral arguments. The court found that although the entity which maintained the website owned by Acheson Hotels at the time of the alleged discriminatory action had been remediated to reflect the information that had been claimed to have been absent (and the fact that Acheson Hotels, LLC no longer maintained an interest in the website), the claim was not moot as third-party reservation platforms had not made such a remediation.

Supreme Court

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[20] *Id.*, at *7.
[21] *Id.*
[22] *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259 (1st Cir. 2022).

On March 27, 2023, the Supreme Court granted cert. to Acheson Hotel's petition.[23] The petition for cert on the question of testers, in a rare move, was jointly brought to the court by both parties for judgement. On July 26th, 2023, Laufer asked that her case be dismissed with prejudice, with Acheson Hotels opposing dismissal. Laufer's request emanated after her abandonment of her claim against Acheson Hotels due to mootness. Laufer stated that at this point no live controversy remains, as Acheson Hotels has remediated its website, and that the information is now available to her.[24] It is also apparent that the discipline of Laufer's attorney by a federal court in Maryland played an important role in her decision to abandon her claims against Acheson.[25] The Supreme Court denied Laufer's motion to dismiss the case on grounds of mootness on August 10th.[26] Oral arguments were then heard on October 4th.

The Court's Expected Trajectory

While the Court rejected Laufer's suggestion of mootness as a mechanism to dispose of the case prior to arguments, the Court appeared to be ready to dispose of the case on mootness grounds. Nearly all of the justices posed questions to the attorneys that centered upon the idea that a case such as this must be resolved on mootness grounds as opposed to standing (with Chief Justice Roberts appearing to serve as the only justice to suggest that resolution of the question would be within the domain of the court's discretion).[27] As Justice Alito suggested, it appears as though the case is "dead as a doornail" and that the avenue of disposition most favorable to existing jurisprudence (under Munsingwear vacatur)[28] would be to moot out the case and wait for

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[23] *Supra* note 14.
[24] Suggestion of Mootness for by Respondent in *Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023) (No. 22-429).
[25] *Id.*, at 3.
[26] Unsigned order denying Respondent's suggestion of mootness, *Acheson Hotels, LLC v. Laufer*, 143 S. Ct. 1053 (2023) (No. 22-429) (Aug. 10, 2023).
[27] See Amy Howe, *Justices consider civil rights tester's right to sue*, SCOTUSblog *(Oct. 4, 2023, 4:35 PM)*, https://www.scotusblog.com/2023/10/justices-consider-civil-rights-testers-right-to-sue/
[28] *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

a new case addressing the issue.[29] Still, concern remains that the persuasive nature of the lower court ruling, if the case is indeed mooted out, would prolong the existing circuit split over the tester question and require a new case to come before the court.

Prior to the mootness argument, this case was thought to have been a pivotal decision wherein the court would address both the standing question of testers and to potentially allude to the resolution other ADA related issues that are plaguing the U.S. economy. In particular, legal scholars were looking towards *Acheson Hotels* to set the tone for potential litigation on web accessibility related matters that have caused a split amongst circuits and have espoused a litigation regime that is costing American businesses billions of dollars annually.[30] Until such time that the court may entertain the standing question in a new case, the circuit splits appear to be likely to persist.

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[29] *Supra* note 27.

[30] *See U.S. Businesses Potentially Spent Billions on Legal Fees for Inaccessible Websites in 2020*, BUREAU OF INTERNET ACCESSIBILITY BLOG – DIGITAL ACCESSIBILITY (Jan. 7, 2021), https://www.boia.org/blog/did-u-s-businesses-spend-billions-on-legal-fees-for-inaccessible-websites-in-2020.