## *Article III — Standing — Disability Law —* Acheson Hotels, LLC v. Laufer

Americans with disabilities rely heavily on private enforcement to ensure their access to public accommodations.[1] Recent decisions in various circuit courts have brought into question their ability to do so under Article III of the Constitution.[2] Last Term, in *Acheson Hotels, LLC v. Laufer*,[3] the Supreme Court declined to reach the question of whether "testers" qualify for Article III standing to bring claims against hotels that violate the Americans with Disabilities Act[4] (ADA) and instead vacated the decision below for mootness.[5] This holding maintained the current split-circuit standing regime and left disability testers in an uncertain position.

The Court should have definitively ruled on the merits of the standing question, rather than deciding the case on mootness. By continuing to allow some testers to bring suits under the ADA, the Court in *Laufer* maintained the doctrinal status quo. However, the Court's refusal to reach the merits left disabled testers with a fractured regime that functionally outlaws tester standing in much of the country. Deciding either to validate or invalidate tester standing would have better served the values of judicial economy, allowed parties to engage with political processes, and more clearly defined the imminence requirement of the standing inquiry.

Deborah Laufer resides in Florida and is disabled.[6] She requires a wheelchair or other "assistive device[]" to mobilize "more than a few steps."[7] She has experienced some of the many indignities that are imposed on disabled people, including booking hotels that claim to be accessible but are not.[8] Troublingly, she has also found that many hotels do not even provide information about accessibility on their websites.[9] This phenomenon led her to sue these hotels under the ADA.[10]

Title III of the ADA prohibits discrimination on the basis of disability and defines such discrimination as "a failure to make reasonable modifications in policies, practices, or procedures" in places of public accommodation.[11] Congress intended the Act to remove "societal and

---

[1] *See* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 3–5 (2006).

[2] *See infra* notes 96–97 (collecting cases).

[3] 144 S. Ct. 18 (2023).

[4] 42 U.S.C. §§ 12101–12213; 47 U.S.C. § 225.

[5] *Laufer*, 144 S. Ct. at 22.

[6] Statement Made Pursuant to 28 U.S.C. Section 1746 ¶ 1, Laufer v. Acheson Hotels, LLC, No. 20-cv-00344 (D. Me. May 18, 2021), ECF No. 17 [hereinafter Laufer Affidavit].

[7] *Id.*

[8] *Id.* ¶ 3.

[9] *Id.*

[10] *Id.*

[11] 42 U.S.C. § 12182(b)(2)(A)(ii).

institutional barriers" that preclude disabled people from exercising their right to participate in public life.[12]

As applied to hotels, motels, and inns, the statute is interpreted in a regulation known as the "Reservation Rule."[13] The Reservation Rule requires places of lodging to "[i]dentify and describe accessible features" in "enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets" their needs.[14] If hotels fail to comply, the ADA allows plaintiffs to sue for injunctive relief.[15] These plaintiffs may recover attorney's fees[16] but not damages.[17] Compliance with the rule requires hotels to post basic information about accessibility on the property and can be as simple as a sentence stating that the property is not accessible.[18] This regulation allows disabled people to utilize a public good — a hotel — in the same way as a nondisabled person and removes the added burden of picking up the phone and calling each and every hotel for basic accessibility information.

Ms. Laufer is a self-described "tester" who visits hotel reservation websites to make sure they are in compliance with the ADA.[19] She had been planning a trip with her daughter and grandchild since 2019 to drive from Florida to Maine, then to New York and Colorado.[20] They planned to stop in Maine to meet Ms. Laufer's sister and stay at a bed and breakfast.[21] While planning, Ms. Laufer came across the online reservation service for the Coast Village Inn and Cottages.[22]

Julianna Acheson, of Acheson Hotels, LLC (Acheson), owned the Coast Village Inn and Cottages.[23] When Ms. Laufer visited the Inn's

---

[12] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(2), 122 Stat. 3553, 3553.

[13] 28 C.F.R. § 36.302(e) (2023); *see* Brief for the United States as Amicus Curiae Supporting Neither Party at 3, *Laufer*, 144 S. Ct. 18 (No. 22-429) [hereinafter Brief for the United States].

[14] 28 C.F.R. § 36.302(e)(1)(ii).

[15] 42 U.S.C. § 12188(a)(2).

[16] 42 U.S.C. § 2000a-3(b).

[17] *Cf.* Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576 (2022). While *Cummings* is not an ADA case, the same principle preventing damages from being applied to legislation under the Spending Clause is applicable to ADA cases. *See* Amy Cohen, *The Most Important Decision No One Is Talking About: What* Cummings *Means for the Future of Civil Rights*, MINN. L. REV. DE NOVO BLOG (Feb. 27, 2023), https://minnesotalawreview.org/2023/02/27/the-most-important-decision-no-one-is-talking-about-what-cummings-means-for-the-future-of-civil-rights [https://perma.cc/HP33-N69L].

[18] Section 36.302(e)(1)(ii) requires hotels to post information on their website "in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(1)(ii). The First Circuit declined to decide whether the statement posted to Acheson's website met the standard described in the regulation. Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 278 n.9 (1st Cir. 2022). The hotel at issue in this case now displays text on its website indicating it is not yet ADA-compliant. COAST VILL. INN, https://coastvillageinn.me [https://perma.cc/YK3L-MTC6].

[19] Laufer Affidavit, *supra* note 6, ¶ 3.

[20] *Id.* ¶ 5; Laufer v. Acheson Hotels, LLC, No. 20-cv-00344, 2021 WL 1993555, at *2 (D. Me. May 18, 2021).

[21] *Laufer*, 2021 WL 1993555, at *2.

[22] *See id.*; Complaint ¶¶ 3, 10, *Laufer*, No. 20-cv-00344, ECF No. 1.

[23] Brief for Respondent at 12, *Laufer*, 144 S. Ct. 18 (2023) (No. 22-429).

website, as well as several third-party booking sites, she found that there was no information about ADA accessibility and filed a complaint in the District of Maine.[24] Acheson moved to dismiss based on lack of subject matter jurisdiction, arguing that Ms. Laufer lacked Article III standing to bring the suit.[25]

Judge Singal granted the motion to dismiss.[26] Judge Singal utilized various doctrinal tests to determine whether a plaintiff possesses Article III standing when vindicating a regulatory right like the Reservation Rule under the ADA. He classified the nature of Ms. Laufer's alleged injury as "informational"[27] and applied the tests from *Spokeo, Inc. v. Robins*[28] and *Lujan v. Defenders of Wildlife*,[29] which require an injury in fact that is both concrete and imminent.[30]

Ms. Laufer appealed the dismissal to the First Circuit, which reversed.[31] Writing for the panel, Judge Thompson[32] employed de novo review and viewed the motion to dismiss with "fresh eyes."[33] As applied to uncontested facts, the court found that Ms. Laufer's injury was sufficiently concrete, imminent, particularized, and not mooted by the hotel adding a compliance statement following the suit.[34] The court first determined that it need not decide whether Acheson was required to provide the information that Ms. Laufer sought regarding which rooms were ADA accessible.[35] The court assumed, based on the well-pleaded complaint, that under the ADA, Ms. Laufer was entitled to certain information and that Acheson's online reservation service and third-party booking websites did not contain that information.[36] Next, the court turned to the concreteness inquiry. It categorized Ms. Laufer's lack of information as an "[i]ntangible" injury, akin to the suppression of speech, rather than a "tangible" one, like a broken leg.[37]

---

24 *Laufer*, 2021 WL 1993555, at *2 & n.3.

25 *Id.* at *1, *3.

26 *Id.* at *6.

27 *Id.* at *3.

28 136 S. Ct. 1540 (2016).

29 504 U.S. 555 (1992).

30 *Id.* at 560 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) (citing Allen v. Wright, 468 U.S. 737, 751, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740 n.16 (1972)); *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*, 504 U.S. at 560–61; Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000)); *Laufer*, 2021 WL 1993555, at *4–5.

31 Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 278 (1st Cir. 2022).

32 Judge Thompson was joined by Judge Howard and Judge Kayatta.

33 *Laufer*, 50 F.4th at 265. The court accepted all factual allegations as true in the facial challenge. *Id.*

34 *Id.* at 263, 277–78.

35 *Id.* at 266.

36 *Id.* at 267.

37 *Id.* at 267–68 (quoting Amrhein v. eClinical Works, LLC, 954 F.3d 328, 330, 331 (1st Cir. 2020); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1548 (2016)) (citing Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982)).

Turning to *Havens Realty Corp. v. Coleman*,[38] *FEC v. Akins*,[39] and *Public Citizen v. DOJ*,[40] the court found that "the denial of information to a member of a protected class alone can suffice to make an injury in fact."[41] Thus, being a self-identified tester alone did not defeat the standing inquiry, and the court disposed of Acheson's contention that Ms. Laufer's lack of intent to do anything with the information gained from "testing" defeated the concreteness requirement.[42]

The court then addressed Acheson's argument that the Supreme Court implicitly overruled *Havens Realty* in *TransUnion LLC v. Ramirez*.[43] The court refused to accept that dicta about informational injuries in *TransUnion* implicitly overruled years of settled law.[44] Even under *TransUnion*, the First Circuit found that Ms. Laufer's injury sufficiently identified "downstream consequences" and "adverse effects" in the form of dignitary harm.[45] The court found that Ms. Laufer's feelings of "humiliation and frustration"[46] at finding herself treated as a second-class citizen when she visited the website constituted the same stigmatic injury against which the ADA was meant to protect.[47]

Next, the court found the injury to be particularized as Ms. Laufer is herself disabled.[48] Thus, the harm to her was distinct from the harm to a nondisabled customer deprived of the same information.[49] The court also found the source of the harm to originate from visiting the online reservation system, rather than physically traveling to a hotel.[50] Since Ms. Laufer regularly checks websites of the hotels she sues for compliance, the court found her injury to be imminent.[51]

Finally, the court found that the case was not moot even though Acheson had updated its website to include the message that the Inn is "not equipped at this time to provide ADA compliant lodging."[52] The court found this update unpersuasive, as the third-party websites that host booking information for the Coast Village Inn continued to lack the required information.[53] In sum, the First Circuit found Ms. Laufer

---

[38] 455 U.S. 363 (1982).
[39] 524 U.S. 11 (1998).
[40] 491 U.S. 440 (1989).
[41] *Laufer*, 50 F.4th at 270.
[42] *Id.* at 271.
[43] 141 S. Ct. 2190 (2021).
[44] *Laufer*, 50 F.4th at 271.
[45] *Id.* at 275 (quoting *TransUnion*, 141 S. Ct. at 2214).
[46] Laufer Affidavit, *supra* note 6, ¶ 7.
[47] *Laufer*, 50 F.4th at 274 (quoting Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring)).
[48] *Id.* at 276.
[49] *Id.*
[50] *See id.* at 277.
[51] *Id.*
[52] Brief for the United States, *supra* note 13, at 30; *Laufer*, 50 F.4th at 277–78.
[53] *Laufer*, 50 F.4th at 278.

to possess standing; it reversed and remanded the case for further proceedings.[54]

Acheson responded by filing a petition for writ of certiorari to the Supreme Court, which Ms. Laufer supported.[55] The Court granted the writ,[56] and then the case ran into some issues.

Ms. Laufer's attorney in separate ADA cases was investigated and recommended to be sanctioned by the Maryland Bar.[57] The disciplinary panel found that Mr. Gillespie inflated the hours he spent on hundreds of ADA tester cases and requested an unreasonable $10,000 in attorneys' fees to settle each complaint.[58] Another of Ms. Laufer's attorneys, who filed her initial *Laufer* complaint, was suspended from the practice of law due to unrelated work.[59]

Following Mr. Gillespie's sanction, Ms. Laufer filed a suggestion of mootness. In the suggestion, Ms. Laufer stated that her focus was always on disability rights and she did not want her lawyer's sanctions to detract from this mission.[60] She decided to dismiss her claim with prejudice, as well as the other various cases she had proceeding around the country.[61] Despite no longer owning the hotel at issue in the litigation, Ms. Acheson opposed the suggestion of mootness.[62] Ms. Acheson stated that she wished to remain the petitioner as she had since purchased another hotel in Maine[63] and would suffer under the First Circuit precedent.[64] In Acheson's reply brief, future lawsuits from other ADA tester plaintiffs were considered inevitable,[65] while simply adding the required information to the website was not.

The Court ultimately vacated the case as moot and did not reach the question of Article III standing.[66] Writing for a unanimous Court, Justice Barrett indicated that the Court retained discretion to decide the case on either mootness or standing grounds.[67] However, she conceded

---

[54] *Id.* at 278–79.

[55] Petition for a Writ of Certiorari, *Laufer*, 144 S. Ct. 18 (No. 22-429); Brief in Opposition at 6, *Laufer*, 144 S. Ct. 18 (No. 22-429). Ms. Laufer, like many plaintiffs in ADA cases seeking certiorari, was not represented by a self-identified disability cause lawyer. She was represented at this stage of the litigation by Thomas B. Bacon, whose professional presence does not publicly identify him as a disability cause lawyer. *See generally* Michael Ashley Stein et al., *Cause Lawyering for People with Disabilities*, 123 HARV. L. REV. 1658 (2010) (book review).

[56] Acheson Hotels, LLC v. Laufer, 143 S. Ct. 1053 (2023) (mem.).

[57] Report and Recommendation at 31, *In re* Gillespie, No. 21-mc-14 (D. Md. July 5, 2023), ECF No. 13.

[58] *Id.* at 5.

[59] Suggestion of Mootness at 4 n.1, *Laufer*, 144 S. Ct. 18 (No. 22-429).

[60] *Id.* at 4.

[61] *Id.* at 4–5.

[62] Petitioner's Opposition to Suggestion of Mootness at 11, *Laufer*, 144 S. Ct. 18 (No. 22-429).

[63] *See id.*; *About the Owner!*, 1802 HOUSE BED & BREAKFAST INN, https://1802house.com/about-the-inn [https://perma.cc/68EW-EU3X].

[64] Petitioner's Opposition to Suggestion of Mootness, *supra* note 62, at 11.

[65] Reply Brief of Petitioner at 24, *Laufer*, 144 S. Ct. 18 (No. 22-429).

[66] *Laufer*, 144 S. Ct. at 22.

[67] *Id.* at 21.

the unusual posture that led to the suggestion of mootness and accepted Ms. Laufer's dismissal as being tied to issues with her attorney.[68] She ended the opinion by emphasizing that in the future, the Court "might exercise [its] discretion differently."[69]

Justice Thomas concurred in the judgment.[70] Writing separately, he suggested that the Court should have resolved the standing question before it and found Ms. Laufer to lack standing.[71] He considered her voluntary dismissal to be a "transparent tactic for evading . . . review" that came at a great cost to Acheson, who had briefed the matter to completion without an answer.[72] Turning to the ADA, he found no right to information in the text.[73] Rather, he found a prohibition of discrimination that was fundamentally dissimilar from the right to information found in the Fair Housing Act in *Havens Realty*.[74] He also decried Ms. Laufer's self-appointment as a "private attorney general."[75]

Justice Jackson also concurred in the judgment.[76] Writing separately, she raised questions relating to the *Munsingwear*[77] doctrine — in which the correct disposition for certain moot cases is "to reverse or vacate the judgment below and remand with a direction to dismiss"[78] — that the Court utilized to vacate the First Circuit's decision.[79] This doctrine was ostensibly developed to ensure that parties are not bound by precedent that — through the "happenstance" of mootness — is not fully appealed.[80] It was historically applied rarely, as an "equitable, discretionary, fact-bound" tool, but has become more popular in recent years.[81] Agreeing that the case was properly resolved on mootness grounds, Justice Jackson argued that a distinct doctrinal analysis was required to determine whether vacatur under *Munsingwear* was appropriate, rather than a reflexive application.[82]

The Court's decision to begin with mootness before standing is detrimental to judicial economy, the political process, and the rights of disabled testers. A definitive resolution, either in favor of or against tester standing, would have constituted a more efficient disposition of the case than its disposition on mootness grounds. Had the Court validated

---

[68] *Id.* at 21–22.
[69] *Id.* at 22.
[70] *Id.* (Thomas, J., concurring in the judgment).
[71] *Id.*
[72] *Id.* at 24.
[73] *Id.* at 25.
[74] *Id.* at 25–26.
[75] *Id.* at 26.
[76] *Id.* at 27 (Jackson, J., concurring in the judgment).
[77] United States v. Munsingwear, Inc., 340 U.S. 36 (1950).
[78] *Id.* at 39.
[79] *Laufer*, 144 S. Ct. at 27 (Jackson, J., concurring in the judgment).
[80] *See* Lisa A. Tucker & Michael Risch, *Canceling Appellate Precedent*, 76 FLA. L. REV. 175, 176, 184 (2024) (quoting *Munsingwear*, 340 U.S. at 40).
[81] *Id.* at 176.
[82] *Laufer*, 144 S. Ct. at 29 (Jackson, J., concurring in the judgment).

tester standing, it would have clarified that private enforcement is a critical instrument in effectuating the ADA. Had the Court invalidated tester standing, it would have allowed the political process to move forward and forced the Court to provide clarity as to the meaning of "imminence" for future plaintiffs. Allowing some jurisdictions to maintain tester standing is consistent with an expansive standing doctrine. However, this holding allows large parts of the country to continue denying standing for private enforcement and leaves the entire country without clarity as to the state of the law.

The Court had discretion and a factual basis in this case to decide the standing question, rather than disposing with the case on mootness grounds. The Court affirmed its discretion to determine on which justiciability grounds to resolve the case throughout the litigation.[83] Acheson argued that the standing question logically preceded the mootness question, as a "case or controversy" must be first established in order to be mooted.[84] The Court rejected this argument. At oral argument, Chief Justice Roberts stated: "[W]e certainly have the authority under our precedent to decide, if you have two jurisdictional issues, which one to do first."[85] In his concurrence, Justice Thomas displayed a clear appetite for resolving the standing question.[86] Justice Barrett closed her opinion with the admonition that "[w]e emphasize . . . that we might exercise our discretion differently in a future case."[87]

In some ways, the Court's decision to allow the continuation of testers in certain jurisdictions follows its consistent Article III standing doctrine. Last Term, *303 Creative LLC v. Elenis*[88] was widely perceived by the public as a manipulation of standing doctrine for political ends.[89] Yet despite perceptions of politicized changes, the doctrine has been

---

[83] *Id.* at 21 (majority opinion); *id.* at 23 (Thomas, J., concurring in the judgment).

[84] Petitioner's Opposition to Suggestion of Mootness, *supra* note 62, at 4–5; *see also* Transcript of Oral Argument at 8, *Laufer*, 144 S. Ct. 18 (No. 22-429), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-429_4315.pdf [https://perma.cc/KRY3-WD57] ("I think that the first question the Court should decide in the case is whether there is a case or controversy in the first place.").

[85] Transcript of Oral Argument, *supra* note 84, at 12.

[86] *See Laufer*, 144 S. Ct. at 23 (Thomas, J., concurring in the judgment) (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999)).

[87] *Id.* at 22 (majority opinion).

[88] 143 S. Ct. 2298 (2023).

[89] *See, e.g.*, Laura K. Chapin, Opinion, 303 Creative*: A Fake Case with Real Consequences*, COLO. NEWSLINE (July 3, 2023, 1:29 PM), https://coloradonewsline.com/2023/07/03/303-creative-a-fake-case-with-real-consequence [https://perma.cc/BKA6-KQ3F]; Melissa Gira Grant, *The Supreme Court Doesn't Care that the Gay Wedding Website Case Is Based on Fiction*, NEW REPUBLIC (June 30, 2023), https://newrepublic.com/article/174048/supreme-court-doesnt-care-gay-wedding-website-case-based-fiction [https://perma.cc/UV8J-RSBY]; Sarah Lipton-Lubet, *The Supreme Court's Conservatives Can't Stop Falling for Phony Plaintiffs*, SLATE (Oct. 3, 2023, 9:00 AM), https://slate.com/news-and-politics/2023/10/supreme-courts-conservative-plaintiffs-alito.html [https://perma.cc/5HA4-K5HP].

largely stable.[90] While *303 Creative* was seen as an expansion of standing doctrine that favored conservative plaintiffs, Professor Richard Re convincingly argues that its holding was not dissimilar from previous standing cases applauded by liberals for allowing pre-enforcement review.[91] This Term, *FDA v. Alliance for Hippocratic Medicine*[92] demonstrated the seriousness with which the Court prioritizes doctrinal consistency in rejecting standing arguments that the Court considers to be too fringe. This Term's standing cases, *Acheson* and *Alliance for Hippocratic Medicine*, continue to demonstrate that plaintiffs' access to judicial review remains largely consistent across ideological lines. The Court's substantive standing doctrine continues to allow plaintiffs on both sides of the aisle to have their day in court.

Choosing to exercise discretion and leave the standing question unresolved came at a clear cost to judicial economy. As argued by Acheson and acknowledged by Justice Thomas, both sides had spent significant resources to brief fully the merits of the standing question.[93] The Court hears fewer arguments on the merits than ever,[94] and abandoning the opportunity to resolve a circuit split has an outsized impact on an already shrinking docket. In its brief, Acheson decried a potential mootness outcome as "extraordinarily unfair" to the hotel, a small business, who would remain at risk of being sued again in the future.[95]

Had the Court decided in favor of or against tester standing, it would have ended the circuit split, given advocates the ability to move forward within the political process, and forced itself to give an intelligible interpretation of the imminence requirement. Instead, disabled plaintiffs remain in limbo given the fragmented state of the law throughout the country and are prohibited from utilizing private enforcement in the Second, Fifth, and Tenth Circuits.[96] The Court's deferral of the question of tester standing did allow ADA testers to continue to operate in the Fourth Circuit.[97] Some advocates celebrated the continuation of this limited jurisdictional allowance.[98] While the *Laufer* holding did allow

---

[90] *See* Richard M. Re, *Does the Discourse on* 303 Creative *Portend a Standing Realignment?*, 99 NOTRE DAME L. REV. REFLECTION 67, 71–72, 83, 88 (2023).

[91] *Id.* at 67–72, 72 n.22. Professor Re cites cases like *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), in which the Court found a union to have standing to sue over a labor law prior to the elections governed by the law at issue. *Id.* at 292–93, 299, 301.

[92] 144 S. Ct. 1540 (2024).

[93] *See* Petitioner's Opposition to Suggestion of Mootness, *supra* note 62, at 3; *Laufer*, 144 S. Ct. at 24 (Thomas, J., concurring in the judgment).

[94] *See* Michael Heise et al., *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567 (2020).

[95] Petitioner's Opposition to Suggestion of Mootness, *supra* note 62, at 1, 3.

[96] *See* Harty v. W. Point Realty, Inc., 28 F.4th 435, 440 (2d Cir. 2022); Laufer v. Mann Hosp. L.L.C., 996 F.3d 269, 272 (5th Cir. 2021); Laufer v. Looper, 22 F.4th 871, 877 (10th Cir. 2022).

[97] *See* Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 174 (4th Cir. 2023).

[98] *See* Sara Luterman, *Disability Advocates Breathe a Sigh of Relief at Supreme Court's* Acheson *Decision*, THE 19TH (Dec. 6, 2023, 4:36 PM), https://19thnews.org/2023/12/supreme-court-acheson-laufer-decision-disability-advocates-react [https://perma.cc/6WAP-2U4G].

some testing to continue, it left the Reservation Rule functionally toothless in large swaths of the country.

Professor Samuel Bagenstos lays bare the bind in which civil rights testers and their attorneys are currently caught.[99] Given the systemic underenforcement of the ADA, testers like Ms. Laufer have no issue finding *hundreds* of businesses out of compliance with the law.[100] Public interest groups lack the resources to pursue day-to-day violations of the law, focusing instead on high-profile cases.[101] Private plaintiffs are thus the driving force in enforcing public accommodations law.[102] Validating their standing would allow them to continue pursuing private enforcement across the country.

However, testers who wish to pursue private enforcement must now contend with both geographic limitations and a threat of future disenfranchisement from the Court. Justice Barrett ended her short opinion not only by highlighting the Court's discretion to choose between standing and mootness, but also by putting Ms. Laufer on notice: "We emphasize, however, that we might exercise our discretion differently in a future case."[103] This statement equally serves as the Court's warning to ADA testers whom it suspects of gaming the system, echoing Acheson's argument that dismissing the case for mootness would encourage gamesmanship from plaintiffs who file massive amounts of civil litigation to enforce the ADA.[104] Justice Thomas appeared particularly sympathetic to this argument and wrote in his concurrence that "the circumstances strongly suggest strategic behavior on Laufer's part."[105]

An outright denial of tester standing would have allowed disabled plaintiffs to close the door on relief from the courts and move on to engagement with the democratic process. Examples of potential political remedies include applying more pressure to federal agencies and state attorneys general with more reliable standing to bring more cases, as they would become the primary enforcers of the Reservation Rule and state analogues thereto.[106] Other political remedies could include lobbying Congress and state legislatures for more funding for agencies to more stringently enforce the Rule and state antidiscrimination laws. Private enforcement may in fact be inferior to public or nonprofit en-

---

[99] *See* Bagenstos, *supra* note 1, at 2–3 (describing ADA limitations for serial testers).

[100] *Id.* at 4, 9–10.

[101] *Id.* at 14 n.56, 35 n.154.

[102] *Id.* at 10, 14 n.56.

[103] *Laufer*, 144 S. Ct. at 22.

[104] Petitioner's Opposition to Suggestion of Mootness, *supra* note 62, at 5–10.

[105] *Laufer*, 144 S. Ct. at 24 (Thomas, J., concurring in the judgment).

[106] *See, e.g.*, Press Release, U.S. Att'y's Off., Dist. of Colo., Marriott International Agrees to Address Barriers to Making Reservations for Accessible Rooms at Marriott-Branded Hotels (June 4, 2024), https://www.justice.gov/usao-co/pr/marriott-international-agrees-address-barriers-making-reservations-accessible-rooms [https://perma.cc/8PLC-PCH7]; *Public Accommodations Laws: 50-State Survey*, JUSTIA, https://www.justia.com/civil-rights/public-accommodations-laws-50-state-survey [https://perma.cc/R7JR-86VH].

forcement for a plethora of reasons.[107] For instance, placing the burden of private enforcement on disabled plaintiffs to litigate for their rights may be less efficient than expecting agencies to enforce their own rules.[108] However, the status of tester standing remaining suspended in judicial purgatory postpones this important debate to some unknown future date.

In order to invalidate tester standing, the Court would have had to articulate some grounds upon which to do so. Even the most earnest tester, who brings a case in the "correct" circuit, may not incur the "correct" level of injury to obtain standing in a future case. The hypotheticals posed by the Justices at oral argument proved that line drawing in the "imminence" inquiry is exceedingly difficult to parse. Would a plaintiff attesting that "[she] may someday visit this hotel"[109] be enough to constitute injury in fact? What about a plaintiff that states that she "does intend to visit the hotel, period?"[110] Is "someday" the magic word that constitutes the Achilles heel of a complaint?[111] Is "concrete travel" the golden fleece?[112] Expecting tester plaintiffs to follow this unintelligible state of the law, which the Justices at oral argument were themselves unable to clarify, leaves testers in an impossible position.

By punting the question of tester standing to future litigation, the Court leaves its disability standing jurisprudence in an unclear state. The testers who choose to shoulder the burden of private enforcement are left with geographic and jurisprudential uncertainty that makes their statutory rights even more difficult to vindicate. The lack of clear direction from the Court prevents the democratic process from moving forward to address the root problem of businesses violating the rights of disabled Americans, and the imminence requirement remains unintelligible.

While *Laufer* appears on first glance to be a short, procedural decision, it represents a wasted opportunity to clarify the Court's disability standing jurisprudence.

---

[107] *See* Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1487, 1531 (2022) (describing reasons that private enforcement can be harmful, including its encouragement of "legal vigilantism" when weaponized, *id.* at 1487, for example, against abortion providers in Texas via S.B. 8, *id.* n.10).

[108] *See id.* at 1503.

[109] Transcript of Oral Argument, *supra* note 84, at 24 (statement of Gorsuch, J.).

[110] *Id.* at 23 (statement of Gorsuch, J.).

[111] *Id.* at 24 (statement of Gorsuch, J.).

[112] *Id* (statement of Gorsuch, J.).