

Supreme Court Passes on Important Opportunity to Add Clarity to ADA Public Accommodation Requirements

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The American's with Disabilities Act ("ADA") was signed into law by President George H.W. Bush in 1990 and required, among other important things, that businesses operating a "place of public accommodation" must take steps to ensure that no individual with a disability is "excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services" unless taking such steps would "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden" for the business.¹ The ADA also instructed the Department of Justice ("DOJ") to promulgate regulations detailing how a public accommodation should structure its premises in order to maintain compliance. The DOJ promptly did so, providing clear guidance for how a business must make its physical premises accessible. In order to ensure compliance, the ADA empowered the DOJ to investigate public complaints of possible ADA violations and pursue legal actions against offending organizations. It also created a private enforcement opportunity, where any person with a disability could file their own ADA lawsuit against a non-compliant public accommodation. When legislators created this private enforcement option, they made sure that a successful private plaintiff would not receive any direct monetary compensation, but instead only receive a court order compelling ADA compliance and a judgment against the offending public accommodation for reasonable attorney fees spent to pursue the litigation. A number of private plaintiffs, referred to in the industry as "testers," immediately began to pursue such actions. In a typical scenario, the tester would visit a physical location to determine whether there were any physical obstacles that limited their ability to use or enjoy the location. If a physical obstacle was identified, the tester's attorney would send a letter to the offending company threatening legal action unless the establishment fixed the issue and immediately paid the tester's attorney a set amount of legal fees. If the company did not comply with the demand, the tester would file a lawsuit asking the court to order the company to fix the issue and for reimbursement of the legal fees for bringing the legal action. As the internet became more pervasive, many testers began to argue that company websites were places of public accommodation, even though the DOJ had never issued any regulations detailing how a private company must make its website ADA compliant. These "surf by" lawsuits typically involved a private plaintiff with a visual impairment claiming that an individual organization's website violated the ADA because the website was not fully compatible with available screen reader technology.²

¹ Americans with Disabilities Act of 1990 § 12182 <https://www.ada.gov/law-and-regs/ada/>

² Haleas, C.T. (2019). Don't ask me what to do, just let me sue you: why we need clear guidelines for website accessibility under title III of the Americans with disabilities act. *University of Illinois Journal of Law, Technology, & Policy*, 465–487.

When faced with the threat of litigation by an ADA tester, many companies pay the tester's demanded fee to avoid a costly legal battle. But a growing number of companies are choosing to fight, arguing that the ADA does not apply to websites or that the tester does not have standing to pursue such a lawsuit and is therefore barred from doing so by the U.S. Constitution. These arguments have proved successful in some courts, in some jurisdictions, with a resulting patchwork of inconsistent decisions littered across the United States. These inconsistent rulings have led to one of the worst possible results for a judicial system, where a plaintiff's chance of winning this type of ADA case depends heavily on where the case was filed and which particular judge was assigned to the case.³ In March of 2023, the U.S. Supreme Court finally agreed to review a "surf by" ADA tester case. Legal scholars were hopeful that the court would provide needed clarity and guidelines for future lawsuits in this area, while some disability advocates feared that the Supreme Court might gut the private enforcement option.⁴

The Court decided to hear the appeal in the case of *Acheson Hotels, LLC. v. Deborah Laufer*, where Laufer, a self-described ADA tester, had filed a lawsuit against Acheson Hotels, alleging that its website failed to state whether the hotel had rooms accessible to individuals with disabilities. Importantly, she did not claim that the website itself was inaccessible. Instead, she alleged that Acheson's website failed to describe whether the hotel had rooms that would be accessible for her wheelchair. Laufer centered her claim on a DOJ regulation that required places of public lodging to make information about the hotel's handicap accessibility available on any reservation portal. Laufer and her legal team had filed similar lawsuits hundreds of times against hotels in varying geographic locations, with many hotels agreeing to settle the incident before trial with a cash payment for her alleged attorney fees. In this instance, the hotel chose to fight the claim in court, primarily arguing the case should be dismissed because Laufer was not injured by the lack of information on the hotel's website for a room she had no intention of ever reserving. The district court judge agreed, dismissing the case prior to trial for lack of standing⁵ because there was no imminent or actual injury to support the genuine, live dispute between adverse parties necessary for the court to have jurisdiction over the case. The judge found that Laufer did not suffer an injury because there was no proof that she intended to actually visit the hotel. Instead, she merely visited the website, which contained information about a hotel situated over a thousand miles away, just to see if it complied with the DOJ regulation. Laufer appealed the judge's decision, and the Court of Appeals for the First Circuit reversed, finding that an "informational injury" was sufficient to meet constitutional standing requirements.⁶ The hotel appealed this decision, and the U.S. Supreme Court granted a writ of certiorari to hear the appeal.

The Supreme Court's decision to hear this case was important because it would be the first time the court had decided to consider an ADA tester claim against a website. It also had the potential to settle two very important issues that have sparked conflicting decisions amongst the U.S. Circuit Courts of Appeals. First, whether a tester could pursue a lawsuit alleging an ADA violation even though the tester clearly had no intent to ever visit the public accommodation. Second, whether the ADA could be expanded past claims of physical violations to include "informational injuries" whereby the plaintiff's only injury was that the business did not communicate whether the physical place of business would be accessible for the plaintiff. The first issue garnered the most interest because ADA tester cases have become big business, and there

³ Fichtner, J. & Strader, T. (2024). An analysis of U.S. website accessibility court cases: are standalone websites subject to ADA requirements? *Universal Access in the Information Society*. <https://doi.org/10.1007/s10209-023-01080-0>

⁴ Luterman, S. (2023, Dec. 6). *Disability Advocates breathe a sigh of relief at Supreme Court's Acheson decision*. The 19th. <https://19thnews.org/2023/12/supreme-court-acheson-laufer-decision-disability-advocates-react/>

⁵ *Laufer v. Acheson Hotels, LLC*, Docket no. 2:20-cv-00344-GZS | Casetext Search + Citator

⁶ *Laufer v. Acheson Hotels, LLC*, No. 21-1410 (1st Cir. 2022) :: Justia

are many that feel it is disingenuous to have someone comb the internet looking for violations and then send threatening letters demanding a financial payment for alleged non-compliance. However, the second issue was equally important, because one could reasonably argue that mere informational injuries stretch the ADA far beyond its original intent.

Before the Supreme Court ruled on the appeal, the case took an interesting turn when one of Laufer's attorneys was suspended from the practice of law for defrauding hotels by lying in fee petitions and lying during settlement negotiations.⁷ This suspension proceeding also revealed that Laufer and her attorney had been demanding \$10,000 in attorney fees from the companies she had targeted, with little evidence substantiating that amount of legal work. The proceeding also revealed that money collected from companies that had capitulated to the \$10,000 settlement demand had actually been funneled to one of Laufer's family members.⁸ Once this information was revealed, Laufer voluntarily dismissed the underlying lawsuit against Acheson Hotels and filed "a suggestion of mootness" with the Supreme Court, essentially arguing that the case should be dismissed because there was no longer a case or controversy for the court to decide. Acheson Hotels objected, contending that Ms. Laufer was "abandoning her case to pave the way for Laufer and similar plaintiffs to resume their campaign of extortionate ADA suits against unwitting small businesses without the hindrance of an adverse ruling from this Court."⁹

The Supreme Court heard oral arguments on the dispute, and ultimately issued a brief opinion dismissing the case for mootness because there was no longer any underlying lawsuit to decide. As a result, the Supreme Court did not address either issue. However, Justice Clarence Thomas wrote a separate concurring opinion, arguing that Laufer should not have been able to sidestep the issue of whether she had standing to pursue the case in the first place by now taking steps to moot the case herself. Justice Thomas then went on to explain why, in his opinion, she did not have standing to pursue the claim in the first place.

This no-decision by the Court was very frustrating in that it did not provide guidance on tester standing and the level of injury necessary to bring an ADA accessibility suit. However, the majority opinion did at least acknowledge that the Circuit Court split on the issue of standing was still "very much alive" and implied that the Court might consider the tester issue again in the future. In his concurring opinion, Justice Thomas presented a much sharper opinion of ADA tester cases and concluded that Laufer did not have standing to pursue her claim. He pointed out that Laufer was not asserting a violation of her own rights because of her "lack of intent to visit the hotel or even book a hotel room elsewhere in Maine" and disparaged Laufer's attempt to "cast herself in the role of a private attorney general" attempting to vindicate the public's interest. He then went on to explain the dangers of a private individual usurping the role of a public official while pointing out the reality of Laufer's ploy:

An official could have informed Acheson Hotels that its website failed to comply with the [informational requirement], and Acheson Hotels could have updated its website to explain it had no accessible rooms. Laufer, however, chose to "enforce" each technical violation of the ADA she could uncover with a lawsuit. Because she is a private plaintiff, no discretion was required or exercised. And, of course, Laufer has been willing to forgo her suits if a hotel pays up, even though the ADA provides for no damages for private litigants. Laufer's

⁷ Acheson Hotels, LLC. V. Laufer, 601 U.S. 1, 4 (2023).

⁸ Acheson Hotels, LLC. V. Laufer, 601 U.S. 1 (2023).

⁹ Petitioner's Opposition to Suggestion of Mootness at p. 3, Acheson Hotels, LLC v. Laufer, (22-429), Jul. 28, 2023).

aggressive efforts to personally impose financial penalties for violations of the Reservation Rule go far beyond the role that Congress envisioned for private plaintiffs under the ADA.¹⁰

Finally, Justice Thomas also threw cold water on Laufer’s claim that a failure to indicate on a website whether a hotel has rooms for the disabled constitutes a sufficient injury for an ADA claim. He stated that the “ADA prohibits only discrimination based on disability—it does not create a right to information” and implied that there was an open question as to whether a DOJ regulation could even create such a right.

In total, the Supreme Court’s no-decision in this case means that there is still significant uncertainty surrounding the viability of ADA tester claims. The concurring opinion by Justice Thomas is not controlling, and merely foretells how he would vote in a similar case in the future. For now, decisions on standing will be left at the discretion of specific lower courts and ADA testers will continue to file claims in those jurisdictions that treat tester claims favorably. However, the concurrence by Justice Thomas provides hope to companies willing to spend the time and assets to fight ADA tester claims.

¹⁰ Acheson Hotels, LLC. V. Laufer, 601 U.S. 1 (2023).