

# Supreme Court Hears Oral Argument on Article III Standing of Testers to Bring ADA Website Accessibility Class Actions

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Earlier this week, the Supreme Court heard [Acheson Hotels, LLC v. Laufer](#), a case that we have summarized in prior [blog posts](#). Just months ago, there was doubt whether the Supreme Court would hear the case at all. While the Court granted Acheson Hotels' petition for a writ of certiorari in March 2023, Laufer [urged](#) the Court to dismiss the case for mootness in July 2023 following the voluntary dismissal of her claims. Acheson Hotels [opposed](#) dismissal and urged the Court to hear its challenge to Laufer's constitutional standing. The Supreme Court, in an unsigned, two-sentence [order](#) dated August 10, 2023, denied the request to dismiss the case as moot and stated it would consider mootness at oral argument in addition to the question presented. The parties and other interested non-parties briefed the matter, and the solicitor general was granted permission to participate in oral argument.

## Oral Argument on the Plaintiff's Standing to Bring ADA Website Accessibility Claims

The [question presented](#) for the Court's consideration was as follows:

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?

At oral argument, the Justices first focused on the preliminary question of mootness. The Justices expressed concern that any opinion they might issue would be advisory because the plaintiff had abandoned her claims, the ownership of the hotel had changed, and the website at issue had been modified to comply with governing law. Counsel for Acheson Hotels argued that the controversy was not moot and that the Court should not permit litigants to use voluntary dismissal as a tactic to avoid unfavorable rulings, while counsel for Laufer argued there was no live controversy for the Court's resolution.

Following a discussion of mootness, the Justices devoted their questioning to parsing when a discriminatory informational injury constitutes concrete harm sufficient to confer constitutional standing. Counsel for Acheson Hotels argued that the Court should hold Laufer lacked standing

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because she was a tester who did not have an actual or imminent plan to visit the hotel in person, and thus did not suffer a concrete injury. The Justices questioned whether such a requirement created a circular standing loophole for defendants whereby individuals with disabilities who are deprived of accessibility information could never accrue standing if it was determined they would never be able to visit the location due to its inaccessibility. Acheson Hotels nonetheless took that position that only a website visitor with concrete plans to visit the hotel in person would have constitutional standing.

Counsel for Laufer argued that the case was moot and that the Justices did not need to reach the question of standing. Alternatively, counsel for Laufer argued that, if the Court reached the standing question, it should hold that the dignitary harm from discrimination that was caused by the hotel's failure to provide accessibility information to individuals with disabilities as required by the ADA was sufficiently concrete as to confer standing. This conclusion, she argued, was the application of traditional Article III principles to the digital realm and not a departure from precedent. Laufer argued that a disabled website visitor experiences discrimination via an accessibility barrier regardless of an intent to travel or other underlying motive. Laufer warned that an 'intent to travel' requirement would render it impossible for plaintiffs to have standing and nearly guarantee mootness because the time for travel will elapse before a plaintiff's suit is ever heard.

The solicitor general asked the Court to adopt a rule that, to show a concrete injury for standing, a website visitor must have an actual desire to use the website and travel to the hotel, likened to a patron who drives up to a physical establishment with a genuine desire to enter but is denied access in violation of the ADA. The government's position is that the ADA gives individuals with disabilities a right to information in connection with the equal enjoyment of a hotel's reservation service and, because Laufer did not allege that she would use the service in the future, and thus would not receive any alleged benefit from injunctive relief, she lacks standing.

## **Potential Impact of the Court's Ruling in *Acheson Hotels***

This unsettled area of law has been a driver of class action activity in recent years. The questions raised by this appeal are particularly ripe for resolution due to a growing circuit court split on when a website visitor, especially a website tester, has Article III standing to bring a class action claim under the ADA based on alleged accessibility barriers and what the prevailing standard should be for a website to be deemed sufficiently accessible to satisfy any applicable ADA requirements. In a ruling last year that Acheson Hotels appealed to the Supreme Court, the First Circuit determined that the dignitary harm and stigmatic injuries that Laufer encountered on the hotel website through a denial of information she was entitled to by law was a concrete injury in fact. However, other circuits have reached opposite conclusions on nearly identical alleged facts.

The Supreme Court's ruling could have a significant impact on the ability of serial plaintiffs like Laufer to bring website accessibility class actions and resolve important issues concerning the type of harm necessary to establish standing in ADA website accessibility and other types of consumer class actions.

## **Department of Justice's recent Guidance on Digital and Website Accessibility**

An additional development that colors the backdrop to the *Acheson Hotels* appeal is the Department of Justice's recent indication that it will be providing further guidance on digital and website

accessibility pursuant to the ADA. On August 4, 2023, the Department published its [Notice of Proposed Rulemaking](#) to the Federal Register for website accessibility regulations applicable to state and local governments. For these state and local government websites and mobile apps, the Department has indicated compliance will be assessed according to the Web Content Accessibility Guidelines (WCAG), Version 2.1, Levels A and AA, which is the standard that federal courts and litigants most commonly look to in ADA website accessibility class actions. The Department of Justice's forthcoming rule, and the Supreme Court's decision in *Acheson Hotels* both have the potential to impact the future of website accessibility litigation and the strategies available to potential litigants bringing and defending against these claims.

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National Law Review, Volumess XIII, Number 279

Source URL: <https://www.natlawreview.com/article/supreme-court-hears-oral-argument-article-iii-standing-testers-bring-ada-website>