

ADA “Tester” Standing Case Evades US Supreme Court Review—For Now

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As the United States Supreme Court was on the cusp of resolving a circuit split concerning the propriety of “tester” standing under Title III of the Americans with Disabilities Act (ADA), the Respondent, a self-avowed ADA tester who was responsible for creating the circuit split by filing lawsuits in numerous jurisdictions—voluntarily dismissed the case on appeal from the U.S. District Court for the District of Maine.

As we discussed in an [earlier post](#), the case, [Acheson Hotels, LLC v. Laufer](#), raised the question of whether a disabled “tester” who had no intention to visit a place of public accommodation had Article III standing to challenge its failure to provide information regarding physical accessibility of its premises (a hotel) on its website.

Having heard oral argument on the merits of the appeal, the Supreme Court was confronted with a different question than it had anticipated answering: whether Respondent’s dismissal of the district court case rendered the appeal moot. Writing for the majority, Justice Barrett declined to address the case on its merits and remanded the case back to the First Circuit with instructions to dismiss the case. But the Court emphasized that it “might exercise [its] discretion differently in a different case” if the issue continued to evade review.

Although the majority avoided any discussion of the case’s merits, in a concurring opinion, Justice Thomas provided insight regarding how the Court may address the standing issue in the future. Justice Thomas focused on whether Respondent had the capacity to bring “hundreds of lawsuits against hotels she has no intention of visiting.” His concurring opinion emphasized that the Court’s task is to determine the rights of individuals whose rights have been violated in some way. In Justice Thomas’s view, however, the Respondent lacked “standing because her claim does not assert a violation of a right under the ADA, much less a violation of her rights.”

To arrive at this conclusion, Justice Thomas considered the Supreme Court's previous decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), where the Court determined that tester standing exists under the Fair Housing Act (FHA). Justice Thomas reasoned that the FHA is fundamentally different than the ADA insofar as the FHA expressly creates "a legal right to truthful information about housing." In contrast, according to Justice Thomas, the ADA "prohibits only discrimination based on disability—it does not create a right to information."

The First Circuit had arrived at the opposite conclusion based on the Attorney General's "Reservation Rule," which provides that hotel operators must "[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service 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" in order to comply with the ADA. However, in Justice Thomas' view, the Reservation Rule is not tantamount to a statutory right to information—rendering the Court's reasoning in *Havens* inapplicable to Respondent's case.

Justice Thomas observed that because Respondent had no intention to visit the hotel properties herself, she suffered no injury to the extent Acheson's website failed to describe the hotel's accessible features. Instead, Respondent merely "cast herself in the role of a private attorney general, surfing the web to ensure hotels' compliance with the Reservation Rule." According to Justice Thomas, enforcement of the Reservation Rule is within the purview of the Executive Branch, not private plaintiffs like Respondent.

Although Justice Thomas did not speak for the Court, he was the only justice to opine on whether ADA testers have standing to sue. Justice Thomas' analysis provides a roadmap for the Court to follow if a majority of the Justices seek to distinguish a future ADA tester case from *Havens* when one inevitably reaches the Court.

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