CHECKING OUT [OF] *ACHESON HOTELS*

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This brief essay explores a few of the strange features of the Supreme Court's recent case of *Acheson Hotels, LLC v. Laufer*.[1] That case involved a requirement under an Americans with Disabilities Act (ADA) regulation that hotels identify the features of their accommodations to allow individuals with disabilities to assess whether the accommodation would meet their needs. The Court dismissed the appeal of Acheson Hotels on mootness grounds.[2] I briefly explore the peculiar way that the Court made factual findings in its opinion – as it always does, without the benefit of any serious examination of evidence – and then express some reservations about Justice Thomas's so-called "concurrence."

The rule in question was promulgated pursuant to ADA's prohibition of discrimination on the basis of disability in "any place of public accommodation," which includes hotels.[3] The rule in question (the "Reservation Rule") requires places of lodging, "with respect to reservations made by any means," to "[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."[4] Deborah Laufer, who is bound to a wheelchair, was a serial plaintiff.[5] She alleged that Acheson Hotels owned a bed and breakfast in Maine, the Coast Village Inn, the website for which took reservations but failed to provide sufficient information to allow her to assess whether the rooms there met her needs.[6] It appeared to be conceded that she had no actual interest in staying at the Coast Village Inn, and was simply acting as a "tester."[7] Courts have split as to whether

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[1] 144 S. Ct. 18 (2023).

[2] *Id.* at 22.

[3] 42 U.S.C. § 12182(a). The definitions in the previous section include "an inn, hotel, motel, or other place of lodging" whose operations affect commerce as a "place of accommodation," but excepts an establishment in which the proprietor lives, and which has no more than five rooms to rent or hire. 42 U.S.C. § 12181(7)(A).

[4] 28 CFR § 36.302(e)(1)(ii).

[5] *Acheson Hotels*, 144 S. Ct. at 20 ("sued hundreds of hotels").

[6] *Id.* at 23 (Thomas, J., concurring).

[7] *Id.* at 20 (majority opinion) (Laufer "does not focus her efforts on hotels where she has any thought of staying, much less booking a room."); *id.* at 23 (Thomas, J., concurring) ("Laufer initially alleged that she was planning to visit the Coast Village Inn … [b]ut she later disclaimed any intent to travel to Maine (or the Coast Village Inn)").

such testers – mostly Ms. Laufer as it turns out – have standing.[8] The District Court had held that she did not, but the First Circuit reversed.[9]

After the Court granted the petition for writ of certiorari, a district court in the Fourth Circuit suspended one of her attorneys (apparently in a different lawsuit) for improper practices in representing her.[10] Laufer then voluntarily dismissed in the various district courts all of her pending suits with prejudice, including the case whose appeal was before the Court, and filed a suggestion of mootness with the Court.[11] The Court agreed that the case was moot, and vacated the judgment of the First Circuit, remanding with "instructions to dismiss the case as moot."[12]

The Court acknowledged that it did not have to dismiss the case as moot. Because jurisdictional issues can be addressed in any order, and since both standing and mootness are jurisdictional issues, it could have deferred the mootness question and decided it only after determining that Laufer had standing.[13] And that is just what Justice Thomas, who for a variety of reasons thought the standing question the more important one, would have done.[14] Importantly for our purposes, Justice Thomas thought that "the circumstances strongly suggest strategic behavior on Laufer's part."[15]

The Court was not convinced that Laufer had acted strategically.[16] Thus, both the majority and Justice Thomas made factual determinations which they used to support their conclusions about whether the mootness issue should be decided before the standing issue: the majority saw no strategic behavior on Laufer's part; Justice Thomas did. The important thing to note, though, is that each made a *factual* determination about her motivation for the dismissals of her lawsuits in the district courts.

Our system of justice has a method for resolving disputed factual issues: it is called a trial. If, in the district court, there were some question about Laufer's motivation for something – say, whether she was truly interested in visiting the Coast Village Inn, as she initially alleged – she would be deposed and examined. If there were still some dispute, her attorney likely would put her on the stand under oath before the judge and she would

[8] *Id.* at 21 (majority opinion) ("Laufer has singlehandedly generated a circuit split.").

[9] *Id.* at 23 (Thomas, J., concurring).

[10] *Id.* at 21 (majority opinion). Specifically, the District Court for the District of Maryland suspended one of her lawyers for defrauding hotels by lying in fee petitions and during settlement negotiations, demanding $10,000 in fees when the work did not seem to warrant it and funneled money to the father of Laufer's grandchild for non-existent work. *Id.* The suspension order had been vacated by the Fourth Circuit after oral argument but before the Court's opinion. *Id.* at 21 n.1.

[11] *Id.* at 21.

[12] *Id.* at 22.

[13] *Id.* at 22.

[14] Thomas opined that standing was "logically antecedent to whether her later actions mooted the case," and the standing issue "is a recurring question that only this Court can definitively resolve." *Id.* at 23–24 (Thomas, J., concurring).

[15] *Id.* at 24. *See also id.* at 24 ("I would not reward Laufer's transparent tactic for evading our review. . . . [W]e have needlessly invited litigants to follow Laufer's path to manipulate our docket.").

[16] *Id.* at 22 (majority opinion) ("We are not convinced, however, that Laufer abandoned her case in an effort to evade our review.").

be further examined and cross-examined. The judge would determine whether Laufer was a credible witness, and that determination would be given deference on appeal.

Apparently, using this time-honored system to make factual determinations is too inconvenient for the Court. But it does not say that; it simply makes the factual determinations. It does this in other contexts too. The Court has said, for example, that petitioners before it, and appellants before the courts of appeals, must have appellate standing.[17] To meet this bar, an appellant must show that (s)he has suffered an injury traceable to the judgment below.[18] For a defendant, this will mean that an injunction or some similar kind of relief precludes it from engaging in conduct that it would otherwise be able to. In *Camreta v. Greene*,[19] the Court held that one of the appellants no longer had standing because he was no longer employed in the position that he held at the outset of the litigation.[20] But the Court only knew this because the parties had said so in their briefs.[21] What if they hadn't? Or what if only one of them contended that a defendant no longer had the same duties as previously, and thus would have no further interest in reversing or modifying a judgment that constrained him when it was issued, and other parties disagreed with that factual contention. How does the Court resolve that issue?

Although there is nothing in its rules specifically authorizing a delegation to a special master, the Court uses this procedure with some frequency when cases are filed pursuant to its original jurisdiction.[22] There does not seem to be any reason why it could not do so in other contexts when it is forced to make a factual determination. It strikes me as a better way of proceeding than the current system, which appears to be nothing more than the Justices' off-the-cuff – it would be disrespectful to say knee-jerk, right? – reactions to a set of circumstances that may or may not constitute all the facts available.

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As noted, Justice Thomas wrote an opinion labelled "concurring in the judgment."[23] Before addressing the substance of his opinion, we can ask two preliminary questions. First, did his opinion, in fact, concur in the judgment of the Court? Second, did his opinion actually support *vacating* the judgment of the First Circuit (as opposed to reversing that judgment)?

One would have to adopt a very narrow understanding of a "judgment" to conclude that Justice Thomas concurred in the Court's judgment. The Court held: "The judgment

[17] West Virginia v. EPA, 142 S. Ct. 2587, 2606 (2022).

[18] *Id.* The requirement that an appellant show an injury traceable to a *judgment* is one that the Court discards when it wishes. *See, e.g.*, Camreta v. Greene, 563 U.S. 692, 702-03 (2011) (holding that parties who prevailed in the court below can appeal if they claim harm from something in the lower court's opinion).

[19] 563 U.S. 692 (2011).

[20] *Id.* at 710 n.9.

[21] *Id.*

[22] *E.g.*, Mississippi v. Tennessee, 142 S. Ct. 31, 38 (2021) (noting that special master supervised motions practice, discovery, and a five-day evidentiary hearing); Texas v. New Mexico, 344 U.S. 906, 906 (1952) (appointing special master with "authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for.").

[23] Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 22 (Thomas, J., concurring).

is vacated, and the case is remanded to the United States Court of Appeals for the First Circuit with instructions to dismiss the case as moot."[24] Justice Thomas said that "I respectfully concur in the judgment because I would vacate and remand, with instructions to dismiss for lack of standing."[25] To call this a "concurrence" in the Court's judgment means that the specific "instructions" that accompanied the "vacate and remand with instructions" are irrelevant to the judgment. It would be akin to concurring in a judgment that vacated and remanded a lower court judgment for "proceedings consistent with this opinion" while disagreeing with everything in the Court's opinion.[26]

I also doubt that Justice Thomas's opinion actually calls for the vacatur of the First Circuit's judgment. He did not say that he would remand back to the First Circuit for the correct analysis consistent with his opinion. Rather, he said that the First Circuit's ultimate conclusion (that Laufer had standing) was *wrong*; she did not, in fact, have standing according to Justice Thomas. No further analysis was needed. When the Court concludes that the lower court got the *outcome* wrong (and not merely that its analysis was wrong), that conclusion calls for reversing the judgment.[27]

Justice Thomas's analysis of the substantive standing question also had a few pieces missing. Justice Thomas concluded that Laufer did not have standing because she did not assert a violation of "a right under the ADA, much less a violation of her rights."[28] He distinguished an early Fair Housing Act case, *Havens Realty Corp. v. Coleman*,[29] which involved other kinds of "testers" – those who inquired about the availability of housing. In *Havens Realty*, the Court had held that black testers who received false information about the availability of housing because of their race had standing because the Fair Housing Act made it illegal "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."[30] This section, according to the Court in *Havens Realty*, gave persons a "legal right to truthful information,"[31] and those given false information thus had standing.

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

[25] *Id.* at 27 (Thomas, J., concurring).

[26] Justice Jackson also concurred in the judgment. *Id.* at 27 (Jackson, J., concurring). Although she disagreed with the equitable remedy of vacatur under United States v. Munsingwear, Inc., 340 U.S. 36 (1950), she agreed that vacatur was consistent with the Court's established practice. *Id.* at 27.

[27] *See* Chafin v. Chafin, 568 U.S. 165, 177 n.3 (2013). There, the Eleventh Circuit had concluded that an order granting custody to the mother in a dispute governed by the Hague Convention on the Civil Aspects of International Child Abduction was moot because once the child had been taken overseas (to Scotland), a court was powerless to change that status. *Id.* at 171. The Supreme Court disagreed, and stated that a reversal of (as opposed to vacating as moot) the District Court's judgment, which was based on its conclusion that the child's habitual residence was Scotland, could change the prevailing-party analysis that the District Court used to award the mother court costs, fees, and expenses.

[28] *Acheson Hotels*, 144 S. Ct. 18, 25 (Thomas, J., concurring).

[29] 455 U.S. 363 (1982).

[30] 42 U.S.C. § 3604(d).

[31] *Havens Realty*, 455 U.S. at 373. *See also* Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, at 25 (Thomas, J., concurring). Of course, this is not true. Section 3604(d) only gives people the right not to be given false information that housing is *unavailable* for particular reasons (race, sex, etc.). False information that housing *is* available, or false information

Justice Thomas said that the ADA provides "no . . . statutory right to information" analogous to Section 3604(d) of the Fair Housing Act.[32] But Justice Thomas never gave a particularly good explanation as to why the Reservation Rule did not provide that right.

Notably, someone else might have argued that more recent standing cases, requiring a "concrete and particularized" injury in fact, have essentially whittled *Havens Realty* away.[33] But Justice Thomas himself has been surprisingly resistant to this trend. He has particularly favored broad standing for the vindication of private rights, with much deference to Congress in defining those rights and no need to limit standing to those with "concrete and particularized" injuries.[34] He has cited *Havens Realty* as an exemplar of his view.[35] And he distinguishes such private rights from "public rights," based on obligations owed to the community as a whole. For "public rights," a plaintiff's standing does require a "concrete" and "particularized" injury.[36] For Justice Thomas, then, Laufer's standing should have depended solely on whether the ADA (or the Reservation Rule) created a private right (similar to a common-law right) or a public right. He concluded that it did not create a private right because the ADA "prohibits only discrimination based on disability – it does not create a right to information."[37]

But why did the *Reservation Rule* not create such a right? Justice Thomas mentioned one possibility, but only in passing: Congress passed Section 3604(d), whereas the Reservation Rule was just a regulation promulgated by the Department of Justice.[38] But Justice Thomas did not rely on this distinction at all. Indeed, his analysis "assum[ed] a regulation could – and did – create such a right."[39] The rest of his analysis and his conclusion, though, suggest that he viewed it as a "public right" and not a "private right." Why?

One possibility – not discussed at length in Justice Thomas's opinion – is the language of the Reservation Rule. Unlike Section 3604(d), the Reservation Rule did not make it

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that it is unavailable given for some other reason (an agent thinks the customer is not a good prospect or just wants to go home) does not violate the Fair Housing Act.

[32] *Acheson Hotels*, 144 S. Ct. at 25 (Thomas, J., concurring).

[33] TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (holding that individuals who received false information from credit reporting agency that was not promulgated to third parties lacked standing); Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (holding that statutory requirement of reasonable procedures to assure maximum accuracy in consumer reports still required plaintiff to show a "concrete" injury aside from a report with inaccurate information).

[34] *E.g.*, *TransUnion*, 141 S. Ct. at 2214 (Thomas, J., dissenting) (arguing that, in the context of private rights, a violated legal right was an alternative to the "injury in fact" requirement); *Spokeo*, 578 U.S. at 347 (Thomas, J., concurring) ("the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights"); *id.* at 348 ("A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right."). In *Spokeo*, Justice Thomas suggested that one provision of the Fair Credit Reporting Act of 1970 provided a private right to assure reasonable procedures to assure maximum possible accuracy of information concerning the individual about whom the report relates. *Id.* at 349. Precisely why Justice Thomas could not make that determination based on a straightforward reading of the statute, and instead concurred in the Court's judgment to remand the case, is not clear.

[35] *TransUnion*,141 S. Ct. at 2218 (Thomas, J., dissenting); *Spokeo*, 578 U.S. at 348 (Thomas, J., concurring)

[36] *Spokeo*, 578 U.S. at 348 (Thomas, J., concurring).

[37] Acheson Hotels, LLC v. Laufer, 144 S. Ct. at 25 (Thomas, J, concurring).

[38] *Id.* at 26 ("assuming a regulation could – and did – create . . . a right [to accessibility information] . . .").

[39] *Id.*

illegal to communicate something to "any person" (although that surely is its effect). When lower courts applied *Havens Realty* to Section 3604(c) of the Fair Housing Act, which makes it illegal to make any statement "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin,"[40] some courts gave standing to anyone who read a discriminatory advertisement, but others distinguished *Havens Realty* on the ground that Section 3604(c) did not specifically use the phrase "any person" in describing the audience to which the statement could not be made.[41] The difficulty with this distinction, though, is that it is one that Congress or any agency easily could draft around. A rule that requires hotel owners' communications to each disabled individual (even communications that could be read by more than one individual) to include information that would allow that disabled individual to assess the accessibility of a hotel probably circumvents the problem.

After positing that the ADA and/or the Reservation Rule was not the source of any right similar to a common-law right, Justice Thomas easily concluded that Laufer lacked standing. Unlike "private rights," Justice Thomas believes that asserting a "public right" (one owed to the public at large) does require a "concrete and particularized" injury.[42] Laufer had not suffered such an injury because she was a tester and had no intention of traveling to Maine to visit the Coast Village Inn.[43] "Her lack of intent to visit the hotel or even book a hotel room elsewhere in Maine eviscerates any connection to her purported legal interest in the accessibility information required by the Reservation Rule."[44] Laufer was just a private attorney general, monitoring and ensuring compliance with the law just as a government official might.[45]

Of course, Laufer's status as a tester was not much different from the testers in *Havens Realty*, who were described as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."[46] So despite the attention he paid to her "tester" status, the meat of Justice Thomas's analysis was not that she was a tester, but rather his underdeveloped distinction between the FHA and the Reservation Rule.

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[40] 42 U.S.C. § 3604(c).

[41] *Compare* Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898, 904 (2d Cir. 1993) (holding that anyone who reads an advertisement allegedly violating § 3604(c) has standing to sue), *with* Wilson v. Glenwood Intermountain Properties, 98 F.3d 590, 595 (10th Cir. 1996) (holding that cases like *Ragin* take *Havens Realty* "too far" because Section 3604(c) does not use the phrase "any person"). Curiously, when faced with the standing issue raised by *Acheson Hotels*, the Second Circuit held that plaintiffs in Laufer's position did *not* have standing – without ever mentioning *Harry Macklowe*. Harty v. West Point Realty, Inc., 28 F.4th 435, 444 & n.3 (2d Cir. 2022) (affirming dismissal of disabled plaintiff's lawsuit against hotel for website that allegedly failed to meet requirements of Reservation Rule).

[42] Spokeo, Inc. v. Robins, 578 U.S. 330, 348 (2016) (Thomas, J., concurring).

[43] Acheson Hotels, LLC v. Laufer, 144 S. Ct. at 24 (Thomas, J., concurring).

[44] *Id. See also id.* at 26 ("Acheson Hotels' failure to provide accessibility information on its website is nothing to Laufer, because she disclaimed any intent to visit the hotel.").

[45] *Id.* at 26–27.

[46] Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

The first decision of the term is often straightforward, unanimous, and without nuance. For those interested in procedural and jurisdictional twists, though, *Acheson Hotels* presents some fascinating issues to ponder and a fine leadoff hitter for this year's lineup of cases.