

This transcript is a version of the episode.

Imani: Hello, fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire News Group podcast hosted by the legal journalism team that stans Black women lawyers. I'm Rewire News Group's editor at large and Black woman lawyer Imani Gandy.

Jess: And I'm Jess Pieklo, Rewire News Group's executive editor. Rewire News Group is the one and only home for expert repro journalism that inspires you to stan Black women lawyers, and the Boom! Lawyered podcast is part of that mission.

So a big thanks to our subscribers and a welcome to our new listeners. So, the theme for this season is Who Gets to be a Person? We talked about that with respect to trans people last week, and this week we're going to talk about people with disabilities, the Americans with Disabilities Act, and how the Supreme Court that could, but probably won't, but maybe, but could still interfere with the ability of people to become civil rights testers there.

Imani: Okay. So first off, we should probably tell our listeners what a civil rights tester is, because you know, because you used to do this kind of stuff back when you worked in housing discrimination law, right?

Jess: Right. We talked about it a little bit in our preview episode of the Supreme Court term and for this case. So when I worked as a lawyer in Minnesota, we would send testers out to see if landlords were turning away families under Section 8 housing, that was public housing assistance for folks in the state. And in Minnesota, family status is a protected status under state law.

You can't discriminate against someone for having kids. And these testers were literally people who would just go out and like, you know, try to rent an apartment and say they had a family and see if the landlord would give them a run around. Sending people out to test whether or not landlords were breaking the law was one of the ways that we could tell if that was going on.

We were gathering evidence to eventually bring a lawsuit if that was the case.

Imani: And that's what this case is about. Except instead of renters trying to get housing, we're talking about people with disabilities trying to rent hotel rooms. The case is called Acheson v. Laufer, and it's about a civil rights tester out of Florida named Deborah Laufer. And she reviews hotel websites looking for violations of the Americans with Disabilities Act in particular.

In particular, Deborah Laufer was checking out hotel websites looking for violation of something called the reservation rule. So, Jess, I'm going to throw this to you. What does the ADA require? What does the Americans with Disabilities Act require?

Jess: Sure. The ADA requires places of public accommodations, like hotels, for example, to meet, quote unquote, reasonable modifications to ensure equal access to goods, services, facilities, privileges, advantages, or accommodations for those with disabilities.

And that makes sense, right? Some of these buildings, for example, are old historic hotels. You need the ability to make reasonable modifications that respect what is going on in the business and also allows folks with disabilities to have access and enjoy the same kind of accommodations that you and I, as people without those kinds of disabilities, Imani, get to enjoy.

Imani: Wonderful. Lovely. So what the heck is the reservation rule exactly? Is it a statute or is it maybe possibly your favorite thing, an administrative regulation?

Jess: I'm literally like curling up in excitement because I get to talk about admin law a little bit. Just a little bit. It's an, it's an admin regulation. And, you know, listeners, Imani, anybody in the Boom! Lawyered fam how much I love admin law.

So there's this regulation that helps enforce the ADA called the reservation rule. And it says that with respect to reservations made by any means. So phone, internet, any means, a place of lodging must identify and describe accessible features in the hotels and guest rooms offered through its reservation service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets their accessibility needs.

Imani: And that makes perfect sense, right? People with disabilities need to be able to assess whether or not a hotel is going to meet their needs rather than just hoping that hotels will meet their accessibility needs and hoping that hotels are just going to go ahead and comply with the ADA.

Jess: Right. And I mean, we so rarely talk about the reasonableness within the law, but here it really is also an acknowledgment that there's not a one size fits all for accessibility either.

Right? It does allow the person with disabilities to assess for themselves whether or not a space is going to work. So anyway, one of the hotels that Laufler reviews was a hotel in Maine that used to be owned by a group called Acheson Hotels. Their hotel website didn't have the requisite information. So Laufer sued.

Imani: Okay, wait, wait, wait. You said that the hotel used to be owned by Acheson Hotels. Yes. And that's kind of important because the fact that it's not anymore owned by Acheson Hotels, coupled with the fact that the plaintiff, Deborah Laufer, in this lawsuit dismissed the case with prejudice, meaning she's not going to bring this lawsuit against this particular defendant again. That means that this case no longer needs to be in court.

Right? Like Acheson Hotels is no longer involved. The plaintiff is no longer involved. What the fuck, man? I really have questions. And the main question is, what the fuck, man? Like, we talk

a lot about standing, but we don't often talk about standing's friend, standing's, like, first cousin, which is mootness.

Say hello to my little friend.

Jess: That's all I can hear. As soon as you said standing's friend mootness, That's exactly where I went. I'm broken.

Imani: That's why I did that. So a case is moot when there's no dispute anymore, right? Federal courts can only hear live disputes. Right? There needs to be what we call in civil procedure a case or controversy.

Don't make that face when I say civil procedure. Okay. So if there's no case or controversy, then there's no live dispute for the court to adjudicate. And courts are not in the business of rendering advisory opinions.

Jess: Well, I mean, sure. Yeah. Unless your name is Lorie Smith and you might possibly, hypothetically, theoretically, one day in the future, get into the business of designing websites for weddings and then be forced to design a website for a same sex couple.

But I digress. And honestly, I have to protest because I thought we had a deal. We're friends. And you told me there was going to be no more civil procedure.

Imani: Okay, Wait, wait, wait. I never said that. I never said there would be no civil procedure. You just rolled up on me demanding that there be no civil procedure and sort of waving a knife around in my face.

And I was like, Whoa, whoa, whoa. Step back, lady, you know? But I never actually agreed that there would be no more civil procedure, because just like you love admin law, I love civ pro. I love this stuff.

Jess: I would like to lodge an objection.

Imani: Your objection is noted and overruled.

Jess: Dammit.

Imani: Let's do this. We should one day do an episode just as a law and order episode.

Jess: I love it. I love evidence so much that it's like I would nerd all the way out.

Imani: And I was frickin' terrible in evidence. Like, all those hearsay exceptions. Oh, my God.

Jess: Dying declarations.

Imani: Oh, I love a dying declaration, though.

Jess: I mean, come on. Admissions against interest, so.

Imani: Right. That's going to be on our upcoming podcast. Just hearsay chat with Jess and Imani.

Jess: Back to the matter at hand.

Imani: When you first talked about this case, we were concerned that the Supreme Court would actually issue a ruling on whether or not Deborah Laufer had standing to file this lawsuit. We talked about that in our SCOTUS preview episode.

And so here's where it gets weird. A ruling on standing is normally a procedural ruling, right? It's the thing you look at first before you move on to the merits of the case. The meat of the case. But because the issue in this case is whether or not a civil rights tester like Debra Laufer can file lawsuits against hotels that she never intends to visit, but which are violating the reservation rule.

Right? That's the issue in this case. Does she have standing? That's a merit based inquiry in this case, right? Like, normally it's a procedural issue. But here it's kind of a merit based inquiry. Right?

Jess: Look, I don't know what I did to you, but we should talk about it off this podcast because this is breaking my brain.

All right. If there is no dispute, Imani, why would the Court even have to make a ruling on standing? Like, there's literally nobody here, No one's home.

Imani: Well, exactly. You may say you don't like it, but you certainly understand civ pro, because that's exactly what Sotomayor said during oral arguments earlier this month. That's exactly what she said.

She specifically said that she was unaware of any case that decided standing first instead of mootness, right. Because if there's no live dispute, for example, because the person at the center of the standing inquiry dropped the lawsuit like Deborah Laufer did, then there's no reason for the court to make a ruling on the standing issue. Right? There's no I keep saying this.

There is no live dispute. Right. Deborah dropped the case. Acheson Hotels sold the hotel in question. The case is moot. Throw it out of court.

Jess: I'm speechless. I'm speechless. This is. It's. The lawyers were already bad, but, man, the fucking worst. Okay. Acheson's lawyer conceded that the case is moot, but still wanted a procedural ruling saying that there was never a lawsuit in the first place.

Right? Like my head hurts right now. Acheson still wants SCOTUS to rule on the standing issue in order to discourage the strategy of filing a bunch of lawsuits, settling most of them, and then abandoning a suit as long as it looks like it might create bad precedent. And I get it. Okay, fine. That's what you want to do.

But go find another fucking case because this one doesn't actually exist anymore.

Imani: Right, exactly. And no matter how hard he tried to argue around it, Acheson Hotels lawyer, A guy by the name of Adam Unikowsky, which sidebar, he has a really good substack that talks about legal issues just from a very laser focused law point of view.

It kind of does the both sides stuff like he did a really good article on the Kacsmark decision in the mife case, and he was like, 'Well, I don't know, we could really criticize Kacsmark because of his background, you know, heading up, you know, White Supremacists R Us. We really should just take a look at what he says in the opinion.'

And then he went on to describe it pretty well. So shout out to Adam Unikowsky. But also, buddy, get off the fence, right? But Unikowsky couldn't get past the fact that the court would be issuing an advisory opinion in a case where both the plaintiff and the defendant no longer have any stake. He couldn't get around that.

He tried and he did a good job, but he couldn't get around it.

Jess: Yeah, the man was like a dog with a bone during oral arguments. He kept arguing, or urging the justices to prioritize the standing issue over muteness. And I get it. I mean, I guess if I was him, that's what I would be doing too.

Even though it's breaking my entire brain, Imani, and, like, possibly the rule of law. If the Court rules in Acheson Hotel's favor, it would make future civil rights testers think twice about how they're going about testing those laws. Like, that's a chilling effect.

Imani: A decision in Acheson Hotels' favor would potentially hinder future lawsuits by plaintiffs like Laufer against other hotels, whether it's Acheson Hotels, Holiday Inn, or whatever.

And there is some good news that came out of the argument, really good news, actually, given this court's disdain for civil rights. But the Court seemed unanimous in not wanting to overturn a seminal case regarding civil rights testing. And that case is called *Havens Realty v. Coleman*.

Jess: What? I'm sorry, what I could not possibly have heard you correctly there. The Court found legal precedent, particularly related to civil rights that it didn't want to overturn? I am honestly shooketh to my core.

Imani: Shooketh! Well, believe it or not, it's true. In Havens Realty versus Coleman, a civil rights organization, was deploying test plaintiffs to evaluate potential discrimination in apartment buildings, kind of similar to what you were doing, except in this case it was just blatant racism rather than discrimination against family status.

Two testers were sent to this hotel, to this apartment building. One tester was white, another tester was Black. The white tester received an apartment offer. The Black tester basically received false information about how there were no vacancies in the apartment building. Right? And so the issue became in that case, whether or not the plaintiff must have been directly harmed by the defendant in order for a federal case to have standing to be filed.

And in that case, obviously, there was direct harm. Due to the unequal treatment of these testers based on race that constitutes racial discrimination. And the Black tester had standing. So the big discussion during oral arguments in the Laufer case centered around making sure that the type of civil rights testing that went on in the Havens case could still go on.

The reason that sort of testing is different than the kind Laufer did is because this Black civil rights tester, you know, went to the apartment building and was told to their face, no, we don't like Black people here. Whereas Deborah Laufer is just sort of sitting behind a screen and checking out accessibility in for hotel websites.

And the issue is, is her connection to the harm close enough to warrant having standing? But also in the Havens case, and obviously in this case, testers are crucial for exposing prejudice. Right? So in the Havens case, most prospective tenants aren't going to turn down an apartment and then go pursue legal action. Discrimination can be really hard to prove, even if it's suspected. The Black person going in knows that they're being discriminated against, but they're just trying to rent an apartment. Trying to rent an apartment. And we'd make them file lawsuits every time?

Jess: And we'd see that all the time, back when I was doing housing law, too, right? People were just trying to get housing. The last thing they want to do then is go through and file a housing complaint. And you know that really discourages landlords from ever doing the right thing, either, if they know that there is really soft enforcement possibilities.

The difference, according to both Acheson and the DOJ, is that those testers actually interacted with the discriminator. And this seems to be a really important point, right? The difference between just kind of cruisin' a website and using that to file a lawsuit and actually taking the next step forward, which would have been something along the lines of making a reservation and checking it out, for example, or saying I did not make a reservation specifically because it did not meet these meet these needs.

It seems to be like they're asking for one step further, you know, and like I said, with my housing work, we sent people to places we suspected of discriminating and testing them. But here Acheson and the DOJ are arguing that Laufer never intended to go to the hotel. So she didn't

really suffer any harm at all. That kind of transitive harm that testers take for prospective tenants, prospective, you know, hotel guests, that kind of thing. So there's no injury. And that's why she lacked standing, is this lack of intent to visit the hotel in question.

Imani: Absolutely. And like you said, this was really key in the oral arguments, right. Emphasizing that Laufer had no concrete plans to visit the hotel and suggested that she was just acting as a tester with a history of filing ADA lawsuits, some of which she was just trying to settle.

Others she would just dismiss as soon as it looked like it was going to go higher up. Essentially, the arguments are centered around the fact that she's not the right kind of tester. She's not the proper kind of tester. And they argued that this reservation rule that mandates accessibility information disclosure was designed to facilitate accessibility for individuals with disabilities who were actively planning to reserve rooms.

Like they had to have been—and actually, Laufer herself, one of the things you led with that she was planning on going on a road trip. And so there was a discussion about whether or not a plan to go on a road trip was enough or whether cruising a website was enough that she actually had to make the reservation.

All of these things were at issue. But, you know, as we discussed in our preview episode, it shouldn't take a person with disabilities being shut out of a hotel experience first before they can file a lawsuit. If a hotel is inaccessible, then it's going to be a long time before someone actually visits the hotel, suffers the indignity of having the space be inaccessible, and then deciding to sue and all this time, hotels like Acheson are in violation of the ADA.

Jess: Right. I mean, it does seem in some ways to be a distinction without a difference here. Right? Like I, I mean, if Laufer would have made the reservation, is that enough or would the Court have said, okay, fine, you made the reservation, but you still weren't really going to go because you didn't rent the car or whatever?

That's one of the things, you know, that's swimming around in my head,

Imani: And the other thing, another thing that's going to be swimming around in your head and swimming around in my head right now is the fact that the ADA was sort of poorly drafted. I mean, it's definitely, it's a great law. It's a great law.

Passed in 1990, did a lot for people with disabilities, but it has some gaps in it, right? There are some loopholes that allow businesses and public accommodations to not actually comply with the spirit or the letter of the law.

Jess: I mean, look, I love the ADA, but if you're telling me that the Congress of these United States wrote a bill with some problems and have also not taken it upon themselves to give it an update to meet 2023 standards? Well, Imani, you don't say.

Imani: And listen, the fact that you can't get money damages on these sorts of claims means there's very little incentive for lawyers to take on these cases. And that's the nugget that's in the ADA, is that you can only get an injunction. Lawyers aren't in the habit of taking on cases where the only relief is an injunction, particularly lawyers that do personal injury stuff or civil rights cases where they're working on contingency.

They're trying to get money damages. If they get you a money damages award, they take a third of it. That's how they make their money. I mean, and that's a fair way to make money. And if you if you look at this case, one of the things that you're going to you're going to find out and I'm going to tell you right now, you don't need to go and find it out because I'm right here on the horn telling you that it a himself, one of her lawyers, the man by the name of Tristan Gillespie one of the lawyers in Maryland, got his license to practice suspended due to his strategy when challenging hotels who violated this reservation rule. What he would do is he would bring multiple lawsuits against multiple hotels, alleging basically the same claims. Claims against hotels who refuse to update their websites to be ADA compliant. And he was getting a ridiculous amount of money for what amounted to not that much work when it comes to determining how much of the costs of a litigation the opposing side should pay right.

So there are some laws that say if you win the lawsuit, the other side has to pay your fees. And in that process involves filing what's called a memorandum of costs. And you filed this memorandum, of course. And the other side takes a look at it and essentially audits it and says, oh, you spent X amount of thousand dollars on discovery. We're not paying that. We're only paying this much. And so what they looked at is Tristan Gillespie's hours, his billable hours with respect to filing these complaints. And so that they were you know, he said he was spending five and 6 hours drafting a complaint. Well, he wasn't.

You're just copying and pasting, right?

Jess: I keep talking about the housing law stuff, but it's relevant. We would call these turn in burn lawsuits. Right? Like we'd see folks do this. They do it in construction litigation too. And I mean, honestly, look, a lot of legal practice is copy paste, right?

You copy paste a lot. Lawyers don't talk enough about how much they plagiarize themselves and other people when they're doing their work. But it's really totally true. The difference is you don't bill for five hours what took you five minutes to put together. And that's what was going on.

Imani: But in this case, it's like, if there's no incentive for attorneys to take cases because the only remedy is an injunction and they're not going to make money to cover their costs of filing these lawsuits.

And then where are disabled people supposed to turn for lawyers who are going to help them file cases about violations of the ADA?

Jess: And injunctions, for listeners, if you don't know, are basically an order for the court that's like, hey, knock it off right like that. So that it tells the offending party like stop doing what you're doing and it there's an enforcement mechanism if they continue to do it but nowhere along the lines is there an ability for an attorney to actually make a substantive living doing that kind of work, which I think, you know, put that back on Congress. People with disabilities deserve to have avenues where their representation can be meaningful.

Imani: Absolutely. So while I generally don't advocate for inflating your billable hours, I kind of understand why this attorney did it. And frankly, like, I worked in corporate law, I worked at big law, they were billing my ass out like \$550 an hour. I had to do six minute—do you remember six minute intervals?

Jess: Oh, I still am haunted by six minute timesheets.

Imani: It's like, you know, you sit there like, well, I was on the phone for 4 minutes and then I went to the bathroom for two. So we're just going to call that a full 6 minutes. The fuckery that goes on with billable hours is ridiculous. So whatever. I'm not really that outraged that this attorney in Maryland inflated his bills in service of helping people with disabilities access hotels. Look, I'm just not that outraged about it.

Jess: I mean. Exactly. It's not like he's out there representing Chevron or anything.

Imani: What's going to happen here? What's going to happen? My reading of the oral argument is that these justices are not interested in overturning the *Havens Realty v. Coleman* case. They're not willing to say no civil rights testing whatsoever.

And most of them couldn't get past the fact that there is no party before the Court that has any interest in the outcome, any stake in the case. You need parties that care to have an outcome in the case before the Court's going to rule. In that case, like, am I going crazy pills here?

Jess: No, you're not. The Court needs to kick this case on mootness grounds like it hopefully, probably will. But, like, it needs to. If it doesn't, then there is fuckery afoot, like there is an actual agenda happening because as you said, you need people who care. There are no live dispute here. The case is moot, for fuck's sake. The hotel in question, as we've said, isn't even owned by Acheson anymore.

Laufer dropped the case. Nobody's home. Go back, like, bar's closed, you know.

Imani: Good game, everyone. Everyone, grab some orange slices. Let's get the hell off the fucking field.

Jess: Seriously, Park's closed, folks like.

Imani: So you don't think, then, that the court is going to touch the standing issue?

Jess: Ugh. Well, here's the thing, okay? Because we've got our friend Johnny Roberts and this man, this fucking guy. He was definitely playing footsie with the idea of allowing a decision about standing to come before deciding the case was moot, arguing that it might make sense to decide whether a person could bring a case before deciding if there was even a case. Oh, and I just need to like, side rant here because John Roberts has, you know, he gets let off the hook for so many things.

But this man has spent an entire career trying to limit who can bring lawsuits in federal court, particularly around civil rights cases. And this is just like a meatball for him. So no wonder he would love to do it because it would be a way to effectively cut out the ability of folks to do significant testing in and enforcement actions in civil rights cases, while also giving himself that like, you know, paneer of anti-racism or anti bigotry or whatever, that he's really like come to come to—ooh, yeah, I'm mad. Sorry. Yeah.

Imani: You're so mad that you just said paneer instead of veneer. Paneer's Indian cheese.

Jess: Leave the cheese alone, Jess. I mean veneer. Truly, though, this man is a menace when it comes to, like, diabolical ways of cutting folks out of remedying their rights. And that's one of the things that really makes me nervous about it, you know?

So hopefully, because it seemed like the other justices didn't want to touch it, he can sort of be like on an island by himself out there. I almost made a really inappropriate reference there. And I'm just going to—

Imani: Or, maybe Elena Kagan can corral him in.

Jess: Oh, I mean, you're right. You know, she is the John Roberts whisperer. And she was there, like, serving a very important purpose. This is what she had to say about it. And Kagan, like, thank you, because truly, you're probably going to save a thousand gray hairs for me this term. This is what she had to say: When you look at a case that's as dead as a doornail several times over, and I can't do the accent, but I hear Elena Kagan's deep Brooklyn voice in my head.

Imani: That crispy Jewish, Brooklyn, sort of like, yeah, I hear it.

Jess: But it's the dead as a doornail. The case has been dismissed by the plaintiff. The defendant is totally different. The defendant's website, everybody agrees, is now in compliance with the ADA. So this is, like, dead, dead, dead in all the ways that something can be dead. That's gruesome.

Imani: It's real dead.

Jess: So dead. And to use that case as the vehicle for deciding an important issue, an important issue that is probably going to need to be decided at some point, but surely could

come up in a live case. I guess it just doesn't seem like something that a court should be anxious to do. Stares directly at John Roberts fucking legacy, is what Elena Kagan just did there.

Imani: Well, I mean, there you have it. Right from Kagan's mouth to the FedSoc Six's ears.

Jess: I mean, I hope so. And here's like, I can't even believe. Hold on to your butt, Imani, I'm actually going to say something kind of nice about Sam Alito.

Imani: Oh, my God.

Jess: It wasn't just Kagan. Here's what Alito had to say about it. The case before us is dead as a doornail and is not going to arise again between the parties. He's even mad in this case. When is he not sneering?

Imani: He's mad that the case is dead, so he can't kneecap people with disabilities and tell them to go fuck off. You can't go hang out in hotel rooms. I mean, it's just like he's such—I mean, Clown Show Sam says it's dead. Then the case is freakin' dead, right?

Jess: Right. And this is where we are re-upping our request for our visuals team for a sideshow visual with Sam Alito's face on it. Please give us that. Give us.

Imani: If you are listening. Cage, please report to us. We need a sideshow, Bob. Sam Alito, mash up. Cage, please report to us. Our graphics team is amazing, but so Jess, when is the Court going, when are we going to get a ruling on this case?

Jess: I mean, the good news is, we have enough time to get a drink, right? This is one of the cases that we flagged as a really big deal for the term because it is. So much is on the line in terms of really undercutting not just the Americans with Disabilities Act, but the ability to enforce civil rights statutes in general. So I anticipate this is still a summer case, even though they could literally issue an opinion next week that says, y'all go home, there's nothing to see here anymore. Like it's done. But probably we're looking at the summer, particularly given the fact that, you know, at least the chief justice seemed pretty cool with the idea of really doing that.

And who knows who he gets, you know, on his side. They're like, what's Brad McBeer going to do in this case? I don't know.

Imani: He's going to say dumb stuff is what he's going to do. What are the questions he asked, the oral arguments to the government lawyer, was you agree that there can be a cause of action without standing? And do you agree that there could be standing without a cause of action? Yes. Okay, good. That's all he had to say. What kind of question is that? He's like, I really do feel like and you said this before, that he's trying to play smart because he's actually the dumbest person on the bench. And he knows it.

Jess: Yeah. No, he knows that he absolutely failed up spectacularly in life. And it's his greatest insecurity to be surrounded by some folks with actual smarts.

Imani: Yeah. I mean, Sam Alito may be evil, but he's a smart guy.

Jess: Yeah. I mean, that's the thing

Imani: The beer chugging dipshit. Anyway, if you'd like to talk about any of this stuff, about this case, about chugging beers, you can find me on X.com at @angryblacklady. You can find Jess on X.com at @hegemommy. We're both on Bluesky, and follow @RewireNewsGroup on Instagram, on Twitter, on Bluesky, on Threads, on Netscape do Microsoft Word do Geocities.

Jess: Hit us up on MySpace.

Imani: Follow us on YouTube. Because although we had to cancel our last livestream, we are going to have a livestream. So you want to get those notifications, sign up for the YouTube guys and what else are we going to do Jess?

Jess: We're going to see you on the tube, folks.

Imani: We're going to see you on the tubes, folks.