No. 22-429

IN THE
Supreme Court of the United States

ACHESON HOTELS, LLC,
Petitioner,

v.

DEBORAH LAUFER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITIONER'S OPPOSITION TO SUGGESTION OF MOOTNESS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

"[P]ostcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye." *Knox v. SEIU*, 567 U.S. 298, 307 (2012). That is especially true here, where Laufer's litigation program was recently revealed to have been an unethical extortionate scheme, and the unapologetic purpose of Laufer's effort to moot this case is to ensure that she or similar plaintiffs can continue pursuing similar schemes.

The Court should deny Laufer's request for this case to be dismissed based on her "suggestion of mootness" and should instead decide the Article III standing issue on which it granted certiorari. At a minimum, the Court should defer consideration of the "suggestion of mootness" until Acheson has had the opportunity to file its reply brief and be heard at oral argument. Permitting Laufer to pull the plug on the case at this point would be a disaster for the rule of law and would be extraordinarily unfair to Acheson.

BACKGROUND

Laufer has sued hundreds of hotels alleging that their websites provide insufficient information about accessibility for persons with disabilities. Laufer does not intend to visit these hotels and sues them merely to extract a settlement and attorney's fees. This Court granted certiorari to resolve whether Laufer has Article III standing to bring these suits.

On July 5, 2023, the District of Maryland issued a sanctions order exposing that Thomas Bacon, who until this week was Laufer's counsel of record in this Court, engaged in a remarkable fraud against the American

judicial system. *See* Report and Recommendation, *In re Gillespie*, Case No. 21-mc-14 (D. Md. June 30, 2023), ECF No. 13; Order, *In re Gillespie*, Case No. 21-mc-14 (D. Md. July 5, 2023), ECF No. 14. The subject of the sanctions order was Tristan Gillespie, Bacon's local counsel in the District of Maryland, but the order made clear that Bacon perpetrated the fraud: according to the report, the "single greatest mitigating factor is that Gillespie appears to have acted largely at the direction of his boss, Thomas B. Bacon, and that he has since cut ties with Bacon." Report and Recommendation at 30-31. The sanctions order reveals, among other things, that Laufer's lawyers defrauded scores of hotels by lying to them during settlement negotiations; defrauded scores of courts by lying in fee petitions; and funneled hundreds of thousands of dollars to an "investigator" who did virtually no work and who happens to be the father of Laufer's granddaughter. *Id.* at 23, 24, 28.

In response to these revelations, Laufer has hatched an audacious plan. Laufer has decided to abandon her case against Acheson in an effort to persuade this Court not to decide the question on which it granted certiorari: whether Laufer had standing to bring her suit. She has therefore purported to file a "notice of voluntary dismissal" in the district court, despite the district court's stay of the case, and has now filed a "suggestion of mootness" urging the Court to vacate the First Circuit's judgment without deciding the question presented.

ARGUMENT

The parties agree that notwithstanding Laufer's eleventh-hour effort to abandon this case, the Court continues to have jurisdiction to decide the Article III standing issue on which it granted certiorari. The Court should exercise that jurisdiction and decide the question presented.

Laufer is 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. The Court should not reward Laufer's effort to insulate lower-court rulings upholding "tester" standing from Supreme Court review.

Moreover, rewarding Laufer's strategy would be extraordinarily unfair to Acheson. Acheson is a small business that has expended significant time and money fighting to vindicate its position that Laufer's lawsuits are unconstitutional. If the Court dismisses the case, Acheson faces the risk of being sued again. The Court should not pull the rug out from under Acheson when it is on the cusp of its day in this Court.

I. The parties agree that this Court still has jurisdiction to decide the question presented.

Although the parties disagree on the proper disposition of this case, they agree that the Court has jurisdiction to decide the question presented.

First, Laufer concedes, and Acheson agrees, that "Laufer's notice of voluntary dismissal in the district

court does not of its own force terminate proceedings in this Court." Suggestion of Mootness at 7. In Acheson's view, the notice of voluntary dismissal is ineffective in the district court, given that the district court stayed the case pending resolution of the Supreme Court case.[1] But even assuming the notice of voluntary dismissal is effective in the district court, it does not terminate proceedings in this Court. This Court's rules prescribe only two ways of terminating a proceeding in this Court: (1) filing an agreement signed by all the parties and (2) filing a motion to dismiss. S. Ct. R. 21.2(b), 46.

Second, Laufer concedes, and Acheson agrees, that "[b]ecause the standing issue presented by Acheson's petition for a writ of certiorari and the mootness issue raised in this filing are both governed by the jurisdictional limitations of Article III of the Constitution, this Court has discretion to resolve either issue first." Suggestion of Mootness at 9. Indeed, the Article III standing question—whether Laufer had standing on the day this suit was filed—is logically antecedent to Laufer's mootness argument—whether,

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[1] Resisting this point, Laufer cites *Merit Insurance Co. v. Leatherby Insurance Co.*, 581 F.2d 137 (7th Cir. 1978), and *Hamilton v. Shearson-Lehman American Express, Inc.*, 813 F.2d 1532 (9th Cir. 1987), for the proposition that a plaintiff may voluntarily dismiss a case under Rule 41 while a stay is in place. Those cases, however, address whether a motion to compel arbitration is sufficiently similar to an answer to avoid application to Rule 41. Neither the reasoning nor the posture of those cases is relevant to this one.

assuming she initially had standing, the case became moot by virtue of her last-minute abandonment.

As such, as Laufer rightly concedes, whether to decide the question presented is a matter of discretion. *See* Suggestion of Mootness 9 (arguing that "the Court should not exercise its discretion to address the standing issue").

Moreover, the parties remain at loggerheads as to the question presented: whether Laufer has standing to bring her suit. Laufer is *not* abandoning her previously held position that she has Article III standing and that, but for her intentional abandonment of her claims, the case is not moot. Suggestion of Mootness at 10. She confirms she intends to file her merits brief as scheduled. *Id.* at 3. As such, the Court need not be concerned that it will be deprived of full adversarial presentation of the issues.

II. The Court should exercise its discretion to decide the question presented.

The Court should exercise its discretion to decide the Article III standing issue because refusing to do so would allow Laufer and similar plaintiffs to resume their extortionate scheme and would cause a miscarriage of justice for Acheson.

A. The Court should not permit Laufer to carry out her strategic plan of ducking a Supreme Court ruling for purposes of ensuring that "tester" plaintiffs can continue extracting settlements from small businesses.

If the Court vacates the First Circuit's decision as Laufer requests, its reasoning would be undisturbed, so it would remain persuasive authority within the First Circuit. Meanwhile, Fourth and Eleventh Circuit decisions upholding "tester" standing would remain *binding* circuit precedent. As such, Laufer or similar plaintiffs will continue extracting extortionate settlements from hotels while stripping the hotels of any meaningful opportunity for appellate review.

Begin with what will happen within the First Circuit. If the Court dismisses this case as Laufer requests, it will vacate the First Circuit's decision, but that decision will not disappear: it will remain persuasive authority and a clear signal to district courts that the First Circuit believes Laufer and similar plaintiffs have Article III standing.

And if *that* happens, hotels within the First Circuit face the clear and present danger of being slammed with ADA lawsuits by "tester" plaintiffs demanding a quick $10,000 settlement. *See* Report and Recommendation at 5 (noting that Laufer's counsel uniformly demanded payments of $10,000 to settle his cases).

First, hotels face the risk of lawsuits from Laufer herself. While Laufer's declaration[2] states that she has decided to "dismiss this and my other lawsuits," Suggestion of Mootness App'x 4a ¶ 17, it contains no assurances that she will cease her litigation campaign going forward. Even if she did make that promise, the Court should be skeptical, particularly given that the impetus of her effort to moot this case was the revelation that her litigation campaign was a staggering fraud. *See West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022) ("[V]oluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (internal quotation marks omitted)).

But let us say that Laufer does stop filing lawsuits. The inevitable outcome is that some other plaintiff will step into her shoes. Laufer expresses concern that the allegations against Gillespie may detract from "everything she has sought to achieve for persons with disabilities like herself," and that a decision will affect "disabled persons other than respondent." Suggestion of Mootness at 4, 10. Translation: she wants another "tester" plaintiff to bring the same lawsuits without the hindrance of a ruling from this Court that she lacks standing.

Remember that Laufer's position in this case—the position the First Circuit endorsed—is that *every*

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[2] Laufer's declaration violates this Court's rules. Under Rule 32.3, Laufer was required to obtain advance permission for a lodging before submitting her declaration to the Court.

disabled person in America with accessibility needs has standing to sue a hotel merely by visiting its website. That means *millions* of potential plaintiffs. Bacon will have no difficulty recruiting a new plaintiff. And even if Bacon's disciplinary proceedings finally catch up to him, *see* Report and Recommendation at 31 n.13, another lawyer will pick up the slack. Indeed, there are already other plaintiffs and lawyers pursuing essentially identical lawsuits. *See, e.g.*, *Harty v. W. Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 2022); *see also* Br. of Chamber of Commerce in Support of Petitioner at 6-10.

Think of how matters will stand from a hotel's perspective if a plaintiff sues it under the ADA and demands $10,000 to go away. First, the plaintiff will cite the First Circuit's decision finding that Laufer has standing as persuasive authority that the case should proceed. If the district court follows the First Circuit's decision, then the hotel would have to litigate the case all the way to judgment, lose, and then appeal to get an appellate hearing on whether the plaintiff has standing—which would cost much more than $10,000.

But even if the hotel *wants* to stand on principle and litigate the case, it would be pointless. Why? Because the hotel will know that if it takes the case up to the First Circuit or this Court and is on the verge of victory, the plaintiff will abandon her case to avoid an adverse ruling. And the hotel will have no recourse; this Court's decision in this case will set the precedent that it is perfectly fine for the plaintiff to abandon her case at the last minute to avoid an adverse ruling.

The situation would be even worse in the Fourth and Eleventh Circuits. The "tester" plaintiff will be able to rely on *binding* precedent within those circuits holding that they have standing. *See Laufer v. Naranda Hotels, LLC*, 60 F.4th 156 (4th Cir. 2023); *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022). Even if the Court vacates the First Circuit's decision, this Court lacks jurisdiction to vacate those precedential decisions.

Indeed, Laufer appears to have gone out of her way to ensure that those decisions *remain* binding circuit precedent, notwithstanding her purported abandonment of her claims. In *Naranda*, the Fourth Circuit ruled in Laufer's favor on February 15, 2023. It subsequently stayed petitions for rehearing on March 1, 2023. On July 21, 2023, Laufer and Naranda filed a joint motion to dismiss the appeal. Notably, however, the parties did *not* seek rehearing of the panel decision for purposes of vacating it. Consistent with the parties' request, on July 26, 2023, the Fourth Circuit dismissed the appeal while stating that "[t]he parties' voluntary dismissal leaves the court's decision in *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156 (4th Cir. 2023) undisturbed." Order at 2 n.*, *Laufer v. Naranda Hotels, LLC*, No. 20-2348 (4th Cir. July 26, 2023), ECF No. 80.

In *Arpan*, the Eleventh Circuit ruled in Laufer's favor on March 29, 2022, and denied rehearing en banc on April 12, 2023. Although the Eleventh Circuit stayed the issuance of its mandate, it later vacated that stay order on May 15, 2023. The time to file a petition for certiorari from the *Arpan* decision expired on July

11, 2023. Only *after* obtaining positive assurance that no petition was filed—and that this Court would hence be unable to vacate *Arpan*—did Laufer file her "suggestion of mootness" in this Court.[3]

With the Fourth and Eleventh Circuit opinions as binding precedent, hotels in those circuits would continue to be targets of litigation with no recourse—forever. If they are sued by a web-surfing plaintiff, district courts will be compelled to hold they have standing. The hotels will be unable to challenge that ruling unless they litigate their case to judgment, lose, appeal, lose based on binding circuit precedent, and then file a petition for rehearing en banc or a petition for certiorari. If a hotel ever tries to do that, the plaintiff will abandon her claim, just as Laufer seeks to do here, and sue ten more hotels.

Even if those circuits find some way to de-publish their opinions in view of Laufer's flip-flop, the unanimous panel decisions will be persuasive authority, just as the First Circuit's decision will be. It will be open season on small businesses in those circuits, and the plaintiffs bringing those suits will never face the bright lights of Supreme Court review.

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[3] Laufer did move the Eleventh Circuit to dismiss *Arpan* as moot on July 24, 2023. Laufer's filing appears purely optical. Rehearing was denied long ago. The appeal is over. Laufer does not ask the Eleventh Circuit to recall its mandate for purposes of vacating the panel opinion. *Arpan* is, and will remain, binding circuit precedent.

B. Dismissing this case without deciding the question presented would result in a miscarriage of justice to Acheson.

In addition to paving the way for Laufer and similar plaintiffs to continue bringing extortionate lawsuits against small businesses nationwide, dismissing this case would result in a miscarriage of justice to Acheson itself.

If the Court dismisses this case without deciding the question presented, Acheson and its owner face the prospect of additional "tester" litigation. Even assuming that Laufer's dismissal with prejudice forecloses future litigation against Acheson over Coast Village's website, Acheson is not out of the woods. Julianna Acheson, the entrepreneur who owns and operates Acheson Hotels LLC, owns the 1802 House Bed & Breakfast in Kennebunkport, Maine. The 1802 House's website does include accessibility information, but a plaintiff could allege that third-party websites contain insufficient accessibility information—a theory that the First Circuit held was sufficient to establish standing. Pet. App. 32a. In addition, Acheson Hotels LLC, the petitioner in this case, is presently attempting to purchase a new hotel in Maine which could be the target of future lawsuits. It would be the height of unfairness if a plaintiff could take advantage of Laufer's tactics in Acheson's own case to extract a future settlement from Acheson.

Julianna Acheson has earned her day in court. Despite her business being devastated by COVID, she refused to capitulate to Laufer's settlement demands.

She has expended time and money fighting Laufer's pathological lawsuit all the way up to the Supreme Court. She is on the verge of protecting her business from future, similar lawsuits. The Court should decide the question it has already agreed to decide rather than condemning her to defeat without a hearing.

C. Laufer has offered no sound reason for this Court to dismiss the case without deciding the question presented.

Against all this, Laufer's arguments for dismissal are remarkably weak.

First, Laufer expresses concern that her lawyers' fraudulent scheme will "distract" the Court. Suggestion of Mootness at 4, 7. It would be perverse if a litigant could avoid an adverse ruling because her own lawyer's fraudulent conduct may prove a "distraction." Acheson is confident that this Court will be able to put aside any "distractions" in resolving this case.

Second, Laufer cites prior cases in which this Court vacated lower-court decisions upon litigants' abandonment of their claims. Suggestion of Mootness at 8, 9. But Laufer identifies no case remotely like this one, which the very question presented was whether "tester" plaintiffs could pursue serial litigation campaigns against hundreds of defendants, and the plaintiff sought to moot the case to ensure that those serial litigation campaigns could continue.

Third, Laufer expresses a desire to conserve judicial resources. Suggestion of Mootness at 10.

Having filed several hundred lawsuits, Laufer's sudden desire to conserve judicial resources is not credible. Far more judicial resources will be wasted if Laufer ducks this Court's review, leading to hundreds more "tester" suits being brought.

Fourth, Laufer notes that Acheson has argued that this case is moot for an unrelated reason (with which Laufer disagrees). Suggestion of Mootness at 10. Acheson's brief, however, makes clear that this is an alternative argument that the Court should reach only if it rejects Acheson's primary argument that Laufer lacked standing on the day this complaint was filed. Pet. Br. 51.

CONCLUSION

The Court should decide the Article III question on which it granted certiorari.

Respectfully submitted,

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