High-Frequency Litigation: Framing the Narrative of ADA Actions

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A sharp rise in the filing of Americans with Disabilities Act (ADA) Title III actions between 2013 and 2021 has furthered the "for-profit" lore surrounding arguments against the standing of serial litigants. Critics have construed the mere propensity of ADA litigants to settle their lawsuits as the basis for a disingenuous narrative: serial litigants, often referred to as "testers," are litigating spurious claims with the sole intent of financial gain.

In Acheson Hotels, LLC v. Laufer*, the parties presented the Supreme Court with the question of whether an ADA "tester" has standing under Title III to bring an action against a hotel for its website's lack of sufficient accessibility information, even if the tester never intended to become a guest. Stemming from a review of claims asserted in the amicus briefs filed in* Acheson Hotels *and Justice Thomas' concurring opinion, this Comment analyzes and responds to the narrative that serial litigation is a "for-profit" industry propelled by fee-shifting statutes or settlements and dependent on "boilerplate allegations" that lack a proper injury-in-fact. Through an empirical analysis of complaints and the role of settlements in ADA actions, this Comment provides an answer to the myth surrounding serial litigation and assesses the proper intent of its litigants.*

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INTRODUCTION

Beginning in the 1990s, individuals with disabilities, with the help of the United States government, undertook a renewed effort to reform years of undue public tolerance of inaccessibility. The Americans with Disabilities Act of 1990 (ADA)[1] established a method for persons with disabilities to challenge the frequent inaccessibility of public accommodations. The passage of the ADA represented an increased recognition of public accountability as necessary for the furtherance of a society more inclusive of persons with disabilities and ushered in an era of state and local

1. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended as 42 U.S.C. §§ 12101–12213 and 47 U.S.C. § 225).

accessibility reform across the United States.[2] Title III of the ADA ("Title III")

> prohibits discrimination on the basis of disability in the activities of places of public accommodation (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards. 42 U.S.C. 12181–89.[3]

This measure has allowed persons with disabilities to undertake an active approach to rectify violations of the ADA through litigation and eliminate disability discrimination in public accommodations. While the ADA has carved a pathway to equal access for persons with disabilities, it has simultaneously generated a censorious narrative that alleges an intent of private litigants that reaches beyond mere corrective action of public accommodations.

Under the ADA, the term "disability," as applied to an individual, requires and refers to "(a) physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment."[4] Seeking a remedy of injunctive relief, private individuals with disabilities may litigate alleged ADA violations, allowing them to enforce Title III compliance against places of public accommodations.[5] Title III of the ADA defines injunctive relief as

> an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to

2. *See Sharing the Dream: Is the ADA Accommodating All?: The Effects of the ADA*, U.S. COMM'N ON C.R., [hereinafter *Sharing the Dream*] https://www.usccr.gov/files/pubs/ada/ch2.htm [https://perma.cc/RM9E-BFZW].

3. Americans with Disabilities Act Title III Regulations, 28 C.F.R. Part 36 (2012).

4. 42 U.S.C. § 12102. Definition of disability.

5. *See, e.g.*, Rachel Reed, *A Test for the Americans with Disabilities Act*, HARV. L. TODAY (Sept. 25, 2023), https://hls.harvard.edu/today/supreme-court-preview-acheson-hotels-llc-v-laufer/ [perma.cc/97UP-QA2Z].

> the extent required by the Act or this part. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part.[6]

This resolution to litigation allows private individuals to enforce the ADA directly and compel compliance from public businesses. A court hearing a Title III case can additionally award attorneys' fees, litigation expenses, and costs to the prevailing party.[7] Therefore, while plaintiffs cannot directly recover damages under the ADA, their remedies may lie in the enforcement of corrective action and the coverage of the cost of litigation.

Under some state laws, however, private plaintiffs may tack on state-level claims to Title III actions in order to recover compensatory and punitive damages.[8] Statutes such as the Unruh Civil Rights Act[9] in California and the New York State Human Rights Law[10] in New York have carved pathways for plaintiffs to recover compensatory and punitive damages when places of public accommodations discriminate based on a protected class.[11] More specifically, the Unruh Act makes any ADA violation a violation of the Unruh Act.[12] The financial penalties instituted against the defendant thus serve as punishment and deterrence, intending to advance the compliance efforts of places of public accommodations.

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6. 28 CFR § 36.501(b).
7. *See* 28 CFR § 36.505.
8. *See* Evelyn Clark, *Enforcement of the Americans with Disabilities Act: Remedying "Abusive" Litigation While Strengthening Disability Rights*, 26 WASH. & LEE J. C.R. & SOC. JUST. 689, 699 n.59 (2020).
9. Cal. Civ. Code § 51.
10. N.Y. Exec. Law Art. 15.
11. Under Title III of the ADA, places of public accommodations generally refer to "businesses, including nonprofits, that serve the public." *Businesses That Are Open to the Public*, ADA.GOV, https://www.ada.gov/topics/title-iii/ [https://perma.cc/J3FQ-S6MZ]. The New York State Human Rights Law (NYSHRL) lists places of accommodation as including hospitals, hotels, government offices, and restaurants. NYSHRL lists the following as protected characteristics: creed/religion, disability, gender identity or expression, marital status, military status, national origin, race/color, sex, and sexual orientation. *Protections in Places of Public Accommodation under the New York State Human Rights Law*, DIV. HUM. RTS., https://dhr.ny.gov/public-accommodations [https://perma.cc/VT6A-ZTMV].
12. *See* David Raizman, *Another California Appellate Court Holds That ADA Does Not Apply to a Virtual Business's Website*, OGLETREE DEAKINS (Oct. 10, 2023), https://ogletree.com/insights-resources/blog-posts/another-california-appellate-court-holds-that-ada-does-not-apply-to-a-virtual-businesss-website/ [https://perma.cc/4MBF-5CBC].

The sharp rise in ADA action filings across the statute's history may further reflect the viability of private Title III enforcement, with ADA filings increasing 395% between 2005 and 2017[13] and 319% between 2013 and 2022.[14] While no single answer exists for this marked rise in ADA actions, researchers attribute this phenomenon to several factors, including the availability of state-level claims,[15] an increase in the population of persons with disabilities,[16] the aging of public buildings and infrastructure,[17] and the advancement of the internet.[18] This notable growth in filings and the propensity for some litigants to file numerous ADA actions has, in part, given rise to the narrative that Title III litigation is a "for-profit" industry dependent on "boilerplate allegations" that lack a proper harm.[19]

This Comment proceeds in four parts. Part I summarizes the inquiry into critics' perspectives. Part II presents an overview of the findings of a review of Title III cases filed in United States District Courts between January 1, 2019, and December 31, 2019, specifically examining the nature and composition of the complaints filed by high-frequency litigants as well as the relief sought. Part II also lays out the methodology applied to achieve the results of the study, discussing the procedure of determining and limiting the sample. Part III defines the claims that are the

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13. *See Just the Facts: Americans with Disabilities Act*, U.S. CTS. (July 12, 2018), https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act#fig1 [https://perma.cc/5BVR-SMUU] (citing Juan Carlos Gil v. Winn-Dixie Stores, Inc., 242 F. Supp.3d 1315 (S.D. Fla. 2017)) [hereinafter *Just the Facts*].

14. *See* Minh Vu, Kristina Launey & Susan Ryan, *ADA Title III Federal Lawsuits Numbers Are Down but Likely to Rebound in* 2023, SEYFARTH (Feb. 14, 2023), https://www.adatitleiii.com/2023/02/ada-title-iii-federal-lawsuits-numbers-are-down-but-likely-to-rebound-in-2023/ [https://perma.cc/TU6W-34HN].

15. *See Just the Facts*, *supra* note 13 (citing Denise Johnson, *Why Claims Under Americans with Disabilities Act Are Rising*, INS. J. (Oct. 7, 2016), https://www.insurancejournal.com/news/national/2016/10/07/428774.htm [https://perma.cc/JGS7-4LPH]; Anderson Cooper, *60 Minutes: What's a "Drive-By Lawsuit"?* (CBS television broadcast Dec. 4, 2016), https://www.cbsnews.com/news/60-minutes-americans-with-disabilities-act-lawsuits-anderson-cooper/ [https://perma.cc/9AJW-92NB]).

16. *See id.* (citing Moon et al., *Baby Boomers Are Turning Grey*, ABA BUS. L. SECTION (May/June 2010), https://www.americanbar.org/content/dam/aba/publications/blt/2010/05/full-issue-201005.pdf [https://perma.cc/SPU9-X7GU]).

17. *See id.* (citing Ctr. for Indep. of the Disabled, New York et al. v. Metro. Transp. Auth. et al., 2023 WL 5744408 (S.D.N.Y. Sept. 6, 2023)).

18. *See, e.g.*, Gus Alexiou, *Website Accessibility Lawsuits Rising Exponentially in 2023 According to Latest Data*, FORBES (Jun. 20, 2023), https://www.forbes.com/sites/gusalexiou/2023/06/30/website-accessibility-lawsuits-rising-exponentially-in-2023-according-to-latest-data/?sh=7bb4651717fe [https://perma.cc/M5QJ-6HEK].

19. *See infra*, Part I.

focus of the briefs filed in support of Petitioner and Justice Thomas' concurring opinion in *Acheson Hotels*. This Part additionally examines the assumptions underlying the claims of boilerplate allegations and profit motives levied against high-frequency litigants and classifies the relationship between such assumptions and the ensuing narrative.

Stemming from a review of the findings in Part II, Part IV responds to the two assumptions, which are the focus of this Comment. Part IV first addresses the assumption that ADA complaints of high-frequency litigants rely on "boilerplate allegations" that do not present a proper injury-in-fact and, in turn, characterizes the objective of high-frequency litigation by way of an analysis of the complaints of a sample of cases. This Part argues that high-frequency litigants are undertaking the responsibility of enforcing the ADA in a manner that comports with its established purpose in order to rectify the deficiencies in public accommodations that frequently discriminate against people with disabilities and would persist without their intervention. Part IV also provides a response, based on the findings, to the assumption that high-frequency litigants in ADA actions are profit-driven through settlements, state-level compensatory damages, and attorneys' fees. It examines the type of relief sought as well as the frequency of settlements to establish that the pursuit of financial penalties by private litigants can serve as an effective means of punishment and deterrence for businesses that fail to institute equal access to public accommodations for persons with disabilities. Part IV, however, also concludes that portraying private litigants as profit-driven overshadows the efficacy of injunctive relief in remedying ADA violations.

I. THE INQUIRY: A SUMMARY OF CRITICS' PERSPECTIVES

High-frequency litigants are at the center of the narrative that Title III litigation is a "for-profit" industry dependent on "boilerplate allegations," for their unremitting litigation efforts have suggested to some that their purpose for litigating extends beyond the mere remediation of unequal access to public accommodations. Often unfavorably referred to as "serial

litigants" or "vexatious litigants,"[20] high-frequency litigants refer to plaintiffs or attorneys who file a substantial number of ADA actions against various businesses within a narrow time frame. The California Code of Civil Procedure, for example, has codified a "high-frequency litigant" as "[a] plaintiff who has filed [ten] or more complaints alleging a construction-related accessibility violation within the 12-month period immediately preceding the filing of the current complaint alleging a construction-related accessibility violation."[21] While the California Code of Civil Procedure limits its definition of the phenomenon to a "construction-related accessibility violation," as utilized in this Comment, the term encompasses all qualifying Title III violations, including blindness and vision impairment website accessibility and deprivation of information violations. This definition of high-frequency litigants also includes "testers," who are "qualified individuals with disabilities who visit places of public accommodations to determine their compliance with Title III."[22] Tester plaintiffs have historically been associated with Fair Housing Act[23] litigation, but ADA litigants have increasingly asserted their status as testers in their complaints, especially in instances where state law has attempted to quell lawsuits deemed to be "frivolous."[24]

These features of Title III litigation have helped cultivate the theory that high-frequency ADA litigation is a cottage industry

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20. R. Cameron Saenz, *Enforcing the ADA and Stopping Serial Litigants: How the Commercial Real Estate Industry Can Play This Key Role*, 6 TEX. A&M J. PROP. L. 607, 617 (2020) ("The shift of enforcement responsibility to the impacted community through private lawsuits has spawned a judicial crisis: serial litigation of Title III issues."); DMH Stallard, *Serial Litigators—What Can Be Done?*, LEXOLOGY (July 9, 2009) ("For lawyers and their clients, few can cause such disruption as the serial litigator or 'vexatious litigant.'").

21. Cal. Code Civ. Proc. § 425.55.

22. Kelly Johnson, *Testers Standing up for the Title Ill of the ADA*, 59 CASE W. RSRV. L. REV. 683 (2009).

23. 42 U.S.C. §§ 3601–3619; *see, e.g.*, Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 3 (2023) (Thomas, J., concurring) ("The First Circuit reversed, relying primarily on this Court's holding in *Havens Realty Corp. v. Coleman*, 455 U. S. 363 (1982), that a tester had standing to sue under the Fair Housing Act.").

24. *See* Regulated Industries Committee, *CS/CS/CS/HB 727—Accessibility of Places of Public Accommodation*, FLA. SENATE (2017), https://www.flsenate.gov/Committees/billsummaries/2017/html/1674 [https://perma.cc/WL93-EZD8]; *Construction-Related Claims Information for Attorneys*, THE STATE BAR OF CALIF., https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/ADA-Claims-Information [https://perma.cc/W98E-PHF]; *Serial ADA Plaintiff and Lawyer Penalized for Frivolous Lawsuits*, U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM (Aug. 16, 2021), https://instituteforlegalreform.com/blog/serial-ada-plaintiff-and-lawyer-penalized-for-frivolous-lawsuits/ [https://perma.cc/M9UX-RRYN].

supported by false assertions of harm. Critics of high-frequency litigants seemingly struggle to reconcile that such litigants can properly and genuinely assert a demonstrated harm to themselves across the plethora of ADA lawsuits they have filed.[25] This narrative relies on the assumption that litigants are actively seeking out injuries for which they would not have naturally encountered or have tangibly faced.[26] Such an interpretation of high-frequency litigants also furthers the argument that litigants are actively usurping the power of the executive branch when they attempt to enforce the ADA through private litigation[27]—with some critics describing their approach as litigating with frivolity.[28] Further, although the ADA itself does not allow for plaintiffs' recovery of monetary damages, the mere fact that plaintiffs can recover such damages under state laws tacked onto their actions, and the increasing propensity for such cases to settle has brought about the theory that litigants are wholly profit-driven.[29]

This narrative featured prominently in the 2023 Supreme Court case *Acheson Hotels, LLC v. Laufer*.[30] In *Acheson Hotels*, the Court attempted to answer whether an ADA "tester" has standing under Title III to bring an action against a hotel for its website's lack of sufficient accessibility information, even if the tester never intended to become a guest. While the case was ultimately vacated as moot and remanded to the United States Court of Appeals for the First Circuit, the amicus briefs filed in support of Petitioner

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25. *See* Saenz, *supra* note 20, at 617.

26. *See Acheson Hotels*, 601 U.S. at 7 (Thomas, J., concurring) ("Laufer does not even harbor "'some day' intentions" of traveling to Maine to visit the Coast Village Inn." (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992))).

27. *See id.* at 8 (citing Laufer v. Apran, LLC, 29 F.4th 1268, 1291 (11th Cir. 2022) (concurring opinion)) ("[A]s Judge Newsom has explained, '[t]esters exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch,' with none of the corresponding accountability.").

28. *See* Brief Amicus Curiae of Center for Constitutional Responsibility in Support of Petitioner, at 2, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429) [hereinafter Center for Constitutional Responsibility Brief] ("Tester plaintiffs further abuse their enforcement powers when choosing their targets."); Brief of Amici Curiae Restaurant Law Center et al. in Support of Petitioner at 6, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429) [hereinafter Restaurant Law Center Brief].

29. *See* Johnson, *supra* note 15; *Mediation Program Report for 2017-2018 with Preliminary Information for 2019 as of January 21, 2020*, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (Jan. 21, 2020).

30. 601 U.S. 1 (2023).

Acheson Hotels[31] and the concurring opinion of Justice Thomas[32] assert arguments engrained in the narrative that high-frequency litigants like Laufer are monetarily motivated and lack a proper harm.

The briefs submitted in support of Acheson Hotels are specifically rooted in two assumptions, which are the focus of this Comment. First, ADA complaints of high-frequency litigants rely on "boilerplate allegations" that do not present a proper injury-in-fact.[33] Second, high-frequency litigants in ADA actions are profit-driven as a result of settlements, state-level compensatory damages, and attorneys' fees.[34] The authors of these briefs, as well as Justice Thomas, engage with these assumptions to craft the following argument against Respondent Laufer: A tester lacks standing to bring a Title III action against a hotel, of which the tester never intended to avail itself, for the lack of sufficient accessibility information on the hotel's website.

This Comment responds to the narrative furthered by *Acheson Hotels*' amicus briefs and Justice Thomas' concurring opinion through an analysis of complaints and approaches to relief sought in Title III actions. Each year, litigants with disabilities file thousands of Title III actions spanning a wide breadth of violations and businesses.[35] The complaints filed in these actions serve as the first account of the alleged injury to the plaintiff and the specific nature of the ADA violation. These complaints, particularly their framing of alleged violations and harms, reveal the potency of their claims, demonstrating that such claims extend beyond mere "boilerplate allegations." Further, a survey of the outcomes of Title III litigation and the relief sought by litigants enables an empirical analysis of the motivation of high-frequency litigants. This Comment aims to characterize the objective behind

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31. *See* Brief Amicus Curiae on Behalf of DRI Center for Law and Public Policy in Support of Petitioner, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429)[hereinafter DRI Center for Law and Public Policy Brief]; Brief for the Chamber of Commerce of the United States of America et al. as Amici Curiae in Support of Petitioner, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429) [hereinafter Chamber of Commerce Brief].

32. *Acheson Hotels*, 601 U.S. at 5–14 (2023) (Thomas, J., concurring).

33. DRI Center for Law and Public Policy Brief, *supra* note 31, at 4; Brief of Retail Litigation Center, Inc., and National Retail Federation as Amici Curiae Supporting Petitioner at 2, 11, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429) [hereinafter Retail Litigation Center Brief].

34. *See* DRI Center for Law and Public Policy Brief, *supra* note 31, at 20; Chamber of Commerce Brief, *supra* note 31, at 12.

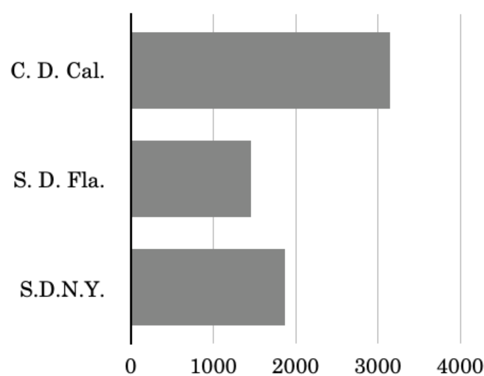
35. SEYFARTH, *supra* note 14.

high-frequency litigation and, in turn, test the assumptions underlying the criticisms of high-frequency litigants through the lens of the arguments Petitioner set forth—and Justice Thomas echoed—in *Acheson Hotels*.

II. OVERVIEW OF FINDINGS

According to a study conducted by Seyfarth Shaw, beginning in 2013 and ending in 2022, between 2013 and 2019, ADA Title III filings across the United States peaked in 2019 at 11,053 in a single year.[36] In 2019, the three courts with the most ADA case filings were the Central District of California (C.D. Cal.), the Southern District of Florida (S.D. Fla.), and the Southern District of New York (S.D.N.Y.), with an average of approximately 2,160 filings per district.[37] The cases filed across these three courts make up approximately 59% of all federal Title III filings.

Figure 1. ADA Cases Filed Between Jan. 1, 2019 & Dec. 31, 2019



A. SCOPE

This Comment confines its scope to a review of a random sample of cases filed by high-frequency litigants in C.D. Cal., S.D. Fla., and S.D.N.Y. Due to the vast number of Title III cases filed annually

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36. *See id.*

37. *See Results for Dockets*, BLOOMBERG L., https://www.bloomberglaw.com/search/results/32caa50b0ad31aac0162a33efe2942d4 (C.D. Cal.); *Results for Dockets*, BLOOMBERG L., https://www.bloomberglaw.com/search/results/d3121607c72aca82b4dac5d6dd158e8e [https://perma.cc/Q33T-B4N4] (S.D. Fla.); *Results for Dockets*, BLOOMBERG L., https://www.bloomberglaw.com/search/results/218a729f231f1078128d8e37d9f41768 [https://perma.cc/ZAA2-LYNY] (S.D.N.Y.).

in United States District Courts, this study limits its review of cases to the three jurisdictions that filed the most cases in 2019 in order to produce an efficient review of data.[38] This study closely reviews five complaints and dockets of three of the most frequent litigants from each United States District Court, totaling a sample of 45 cases. Applying random sampling to the selection of cases allows this Comment to draw conclusions from a broad data sample, notwithstanding the unique factors of each case that may influence the study's outcome.[39] By condensing this sample, this Comment conducts a close reading of each complaint and docket to characterize and contextualize the phenomenon of high-frequency litigation in Title III actions.

To retrieve this data, this Comment utilized Bloomberg Law's case docket database to gather a sample of cases filed in C.D. Cal., S.D. Fla., and S.D.N.Y. between January 1, 2019, and December 31, 2019. This study narrowed the scope of ADA actions filed by implementing Bloomberg Law's Federal Nature of Suit (NOS) feature, which limits the nature of the suits to Title III actions, classified as "Civil Rights: Americans with Disabilities Other." This Comment does not limit the review of cases to a specific Title III violation. This Comment, however, further classifies the sample of Title III cases based on the nature of the alleged Title III violation, which includes blindness and vision impairment website accessibility, physical barriers to access, and information deprivation.

In determining the litigants of focus, this study organized the retrieved data based on the names of the complainants and their respective attorneys and law firms. This study subsequently conducted a count of the number of complaints filed in each district, with 3,152 filed in C.D. Cal., 1,872 in S.D.N.Y., and 1,455 in S.D. Fla. Then, the study limited its review of cases to those filed by the three most frequent litigants in each district court within the 2019 period in order to generate the most accurate representation of a high-frequency litigant relative to the general interpretation of the term. Surveying the data retrieved from

38. Confining this data review to cases filed in 2019 insulates the sample against potential limitations placed on litigation as a result of the COVID-19 pandemic and ensures that the majority of cases have been resolved by the time of this data review. Further, given that Title III litigation peaked in 2019, a review of such data likely ensures a wide variety of case types and litigants.

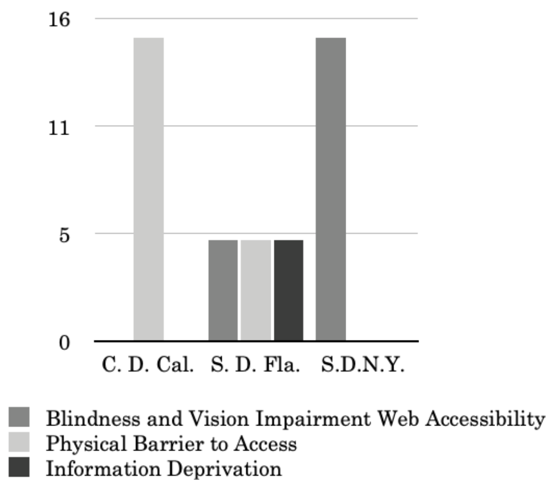
39. *E.g.*, Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213 (2017).

Bloomberg Law, this study determined that in 2019, the litigants under review in this sample encompassed over 13% and 34% of the Title III docket in S.D.N.Y. and C.D. Cal., respectively, whereas the subject litigants in S.D. Fla. covered over 46% of the Title III docket. Each subject litigant, along with their attorneys, filed at least 70 Title III actions during 2019. Such frequency of litigation is consistent with California's numeric classification of a "high-frequency litigant."[40] To further insulate the sample from manipulation by additional variables, this study limits the complaints of high-frequency litigants to complaints filed by the same law firm and attorney(s).

Following the retrieval and organization of this data, this study conducted a close read of each complainant and their respective dockets.

B. NATURE OF VIOLATIONS

Figure 2. Most Common Nature of Actions in ADA Cases Filed Between Jan. 1, 2019 and Dec. 31, 2019



Of the cases in the sample, blindness and vision impairment website accessibility, and physical barriers to access violations are the most frequent. Blindness and vision impairment website accessibility violations refer to actions in which plaintiffs who are legally blind or experience a vision impairment and who require screen-reading software to read website content allege that the

40. Cal. Civ. Pro. Code § 425.55.

information available on the website is incapable of being rendered into text, which is necessary for screen-reading software to function.[41] Their inability to have access to the same information available on the website as an individual without disabilities can classify this failure by the business as an act of unlawful discrimination under 42 U.S.C. § 12182(b)(1)(A)(i)[42] and 42 U.S.C. § 12182(b)(2)(A)(ii)–(iii)[43] of Title III. While a circuit split exists on whether websites qualify as "places of public accommodations" under the ADA,[44] cases are still being filed and resolved under this cause of action in district courts. As Figure 2 demonstrates, blindness and vision impairment website accessibility lawsuits consist of all Title III actions covered in the S.D.N.Y. case sample. However, violations of that nature only comprised 33% of cases covered in the S.D. Fla. sample of cases. The prominence of S.D.N.Y. website accessibility actions relative to S.D. Fla. and C.D. Cal. can be attested to the favorable accessibility laws in New York, which do not limit qualifying websites to a corresponding physical location.[45]

A violation of a physical barrier to access refers to a physical obstruction that makes it difficult or impossible for a plaintiff with

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41. *See* Complaint, Gomez v. Brava Restaurant, No. 1:19-cv-23263 (S.D. Fla. Aug. 05, 2019); Complaint, Reid v. Icebreaker Nature Clothing, Inc., No. 1:19-cv-06545 (S.D.N.Y. July 15, 2019); Complaint, Diaz v. L.T.D. Commodities LLC, No. 1:19-cv-07892 (S.D.N.Y. Aug. 22, 2019).

42. "It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity." 42 U.S.C. § 12182(b)(1)(A)(i).

43. (ii) "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations";
(iii) "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." 42 U.S.C. § 12182(b)(2)(A)(ii)–(iii).

44. *See* Rachel Reed, *A Test for the Americans with Disabilities Act*, HARV. L. TODAY (Sept. 25, 2023), https://hls.harvard.edu/today/supreme-court-preview-acheson-hotels-llc-v-laufer/ [perma.cc/97UP-QA2Z].

45. *See* Gus Alexiou, *New York Led the Way in U.S. Web Accessibility Lawsuits in 2023, Report Shows*, FORBES (Jan. 9, 2024) https://www.forbes.com/sites/gusalexiou/2024/01/09/new-york-led-the-way-in-us-web-accessibility-lawsuits-in-2023-report-shows/ [https://perma.cc/A2KJ-VHZM]; *see* N.Y.C. Administrative Code § 8-107(4)(a).

disabilities to access a business or elements of the business to which a person without disabilities would have access.[46] This violation, like that of blindness and vision impairment website accessibility, fails to provide equal access to its services to persons with disabilities, thus qualifying such violation as an act of discrimination under Title III. As Figure 2 demonstrates, similar to blindness and vision impairment website accessibility violations in S.D.N.Y., physical barriers to access lawsuits consist of all Title III actions covered in the sample of C.D. Cal. cases. However, violations of that nature only comprised 33% of cases covered in the S.D. Fla. sample of cases.

The additional violation covered in the S.D. Fla. sample is a Title III action that alleges a deprivation of information—a type of harm arising out of the lack of accessibility information available for persons with disabilities in the offering of reservation services at places of lodging.[47] Information deprivation can be a violation under Title III, which requires that places of lodging "[m]odify [their] policies, practices, or procedures to ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need [an] accessible room."[48] Further, while there remains a circuit split on whether lack of website accessibility information constitutes harm under Title III and the Supreme Court failed to resolve the question under *Acheson Hotels*, this type of violation remains a frequent allegation of harm among high-frequency litigants in S.D. Fla.[49]

C. FILING STATUS

At issue in *Acheson Hotels* was whether an ADA "tester" has standing under Title III to bring an action against a hotel for its website's lack of accessibility information, even when they do not intend to stay at that hotel. This Comment distinguishes plaintiffs who identify as "testers" in the sample of cases to determine how such status shapes their approach to litigation and the legal theory they present. Figure 3 demonstrates that within the sample of

46. *See* Complaint, Kennedy v. SUNVIRA, INC., No. 0:19-cv-61512 (S.D. Fla. June 18, 2019).
47. *See id.* at 5–6.
48. 28 C.F.R. § 36.302(e)(1).
49. *See supra* note 46.

cases, 33% of litigants assert "tester" status in their complaints. Of such "tester" litigants, all assert their purpose as determining whether places of public accommodations comply with the ADA.[50] Some tester litigants expand on their role in their complaints, with one describing their efforts as a "routine practice," in which the tester

> personally visits the public accommodation; engages all of the barriers to access, or at least of those that Plaintiff is able to access; tests all of those barriers to access to determine whether and the extent to which they are illegal barriers to access; proceeds with legal action to enjoin such discrimination; and subsequently returns to Premises to verify its compliance or non-compliance with the ADA and to otherwise use the public accommodation as members of the able-bodied community are able to do.[51]

While testers vary in their depictions of their efforts, each self-identifying tester acknowledges the habitualness and the procedural nature of their initial interactions with a place of public accommodation in a manner distinct from the traditional encounter of a patron engaging with a business.

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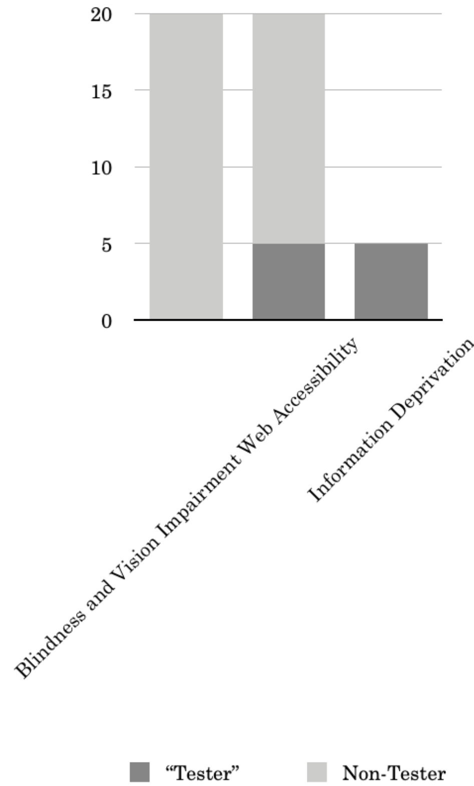
50. *See* Complaint, Cohan v. Countyline Auto Center, Inc., No. 0:19-cv-60277 (S.D. Fla. Jan. 31, 2019); Complaint, Kennedy v. Crystal Hospitality LLC, No. 0:19-cv-60500 (S.D. Fla. Feb. 25, 2019).

51. Complaint at 3, Cohan v. Countyline Auto Center, Inc., No. 0:19-cv-60277 (S.D. Fla. Jan. 31, 2019).

Figure 3. Recognized Status of Plaintiffs



Of the additional cases in the sample, plaintiffs do not adopt a specific term to describe their status or role as litigants in their complaints. Each plaintiff asserted themselves as a patron of the subject defendant's business and expressed their intentions to avail themselves of their goods or services.[52] Although some plaintiffs did not expressly identify themselves as testers, they asserted that part of their purpose was to determine whether the subject business complied with the ADA.[53] This purpose, while similar to that expounded by testers, remains distinct in that it does not acknowledge the habitualness of their litigation. Further, while the expressed purposes of self-identified testers may be partially distinct from other plaintiffs, each plaintiff in the sample

52. *See id.*; Complaint at 7, Kennedy v. Travelkey, LLC, No. 0:19-cv-61466-KMM (S.D. Fla. June 12, 2019).

53. *See* Complaint at 4, Whitaker v. Macys West Stores at 4, Inc. et al, No. 2:19-cv-02862 (C.D. Cal. Apr. 15, 2019).

alleges a disability in compliance with the ADA as determined by their respective district courts.

D. ALLEGATIONS AND CAUSES OF ACTION

Utilizing Adobe Acrobat's compare feature, this Comment determines whether a substantive and quantified difference exists between the complaints filed by high-frequency litigants. This study distilled the presence of immaterial changes such as the defendant's name, business locations, and word choice in reviewing the complaints filed by the litigants in the random sample to reveal that they tailor the complaints to the specific injury experienced by the defendant. The litigants in the sample averaged 11 changes to their factual allegations under Adobe Acrobat's track of changes, all of which were not mere changes to a defendant's name, location descriptions, or minor word choice.[54] In defining changes, Adobe Acrobat classifies document changes based on the insertion, replacement, or deletion of the text. After distilling for the above immaterial changes, this Comment determined the differences across complaints by counting material changes, which included the insertion of a distinct pleading paragraph, the replacement of a barrier to access descriptor, or the addition of a described harm encountered.

Within their complaints, high-frequency litigants displayed consistency in how they described the nature of their disability. In each complaint, plaintiffs utilized identical language and structure in their depictions of their disabilities. Across every complaint in the sample, plaintiffs asserted identical causes of action but tailored the basis of such cause to the unique harm encountered by the public business at issue. Much of their factual allegations also follow a similar structure in that plaintiffs often use exact language in their descriptions of how the ADA applies and how they sought to interact with the business. Even so, they remain partially distinct in their descriptions of how the respective places of public accommodations exercised harm against them and, in turn, violated the ADA.

Reviewing the complaints of each high-frequency litigant in the sample side by side, plaintiffs included an average of

54. Minor word choice encompasses spelling or tense changes in words and the replacement of immaterial words or phrases with synonyms or similar language.

approximately three allegations distinct from those present in their other complaint. The addition of allegations by the plaintiffs ranged from as many as 13 to as few as one.[55] For example, in one complaint, a plaintiff asserted that "the defendants failed to provide accessible door hardware" but omitted the supporting fact in additional complaints despite invoking identical causes of action across each complaint in the sample.[56] While the inclusion of this factual allegation may appear to be a minor change, it is one such instance that is representative of plaintiffs' efforts to tailor their harms to the specific defendant's business. Further, each plaintiff varied widely in detailing the specific harm and nature of the suit—some merely included a single sentence to describe the particular harm encountered and others meticulously documented the specific measurements of the violation.[57] However, three of the nine high-frequency litigants under review in the sample did not include any substantial changes in their claims alleged across their complaints reviewed in this sample, barring minor changes such as names, locations, and the nature of the defendant's business.

E. RELIEF SOUGHT AND OUTCOME

Within their complaints, high-frequency litigants often displayed consistency in the type of relief sought. Under the ADA, each plaintiff requested an injunction requiring defendants to remedy the ADA violations alleged in their complaints. The plaintiffs also requested the payment of attorneys' fees and suit expenses along with a declaratory judgment asserting the defendant's failure to comply with the ADA.[58] The sample of cases filed in C.D. Cal., S.D. Fla., and S.D.N.Y. reveal that plaintiffs sought relief beyond the available remedies under the ADA by tacking California, Florida, and New York statutes onto their claims. Each plaintiff in the C.D. Cal. and S.D.N.Y. samples tacked on state claims, whereas only 33% of plaintiffs in S.D. Fla.

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55. This Comment considers an "allegation" to be a numbered paragraph pled in the complaint.

56. Complaint at 3, Whitaker v. Thomas Hartono et al., No. 2:19-cv-06092 (C.D. Cal. July 12, 2019).

57. *See* Complaint at 8, Cohan v. Countyline Auto Center, Inc., No. 0:19-cv-60277 (S.D. Fla. Jan. 31, 2019) ("Providing sinks and/or countertops that are greater than the 34 inch maximum allowed above the finished floor.").

58. *See, e.g.*, Complaint at 11, Cohan v. Countyline Auto Center, Inc., Docket No. 0:19-cv-60277 (S.D. Fla. Jan. 31, 2019); Complaint at 7, Whitaker v. Thomas Hartono et al, Docket No. 2:19-cv-06092 (C.D. Cal. July 12, 2019).

tacked on claims, likely due to the state's stringent approach to high-frequency litigants.[59] California's Unruh Civil Rights Act, the New York Human Rights Law (NYHRL), and Florida Statute § 760.11(5) ("the Florida Statute") explicitly target discrimination against protected classes in places of public accommodations.[60] Under these acts, plaintiffs can seek punitive and compensatory damages for the pain and suffering they encountered as a result of the discriminatory harm they faced.[61]

Figure 4. Settlement Rates for ADA Cases Filed Between Jan. 1, 2019 and Dec. 31, 2019

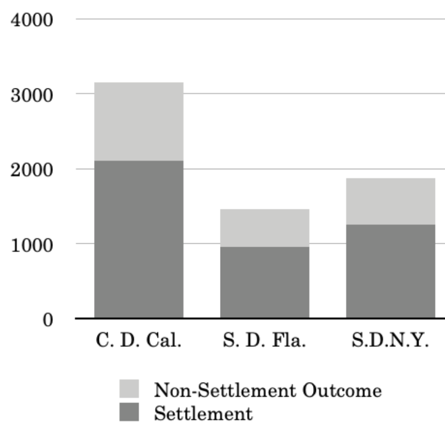
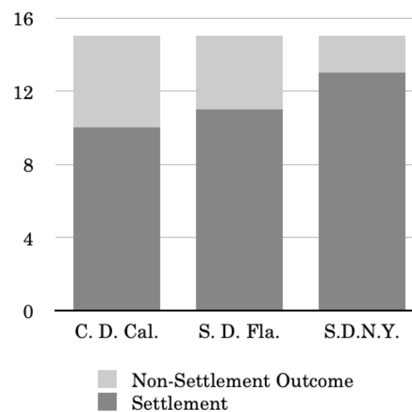
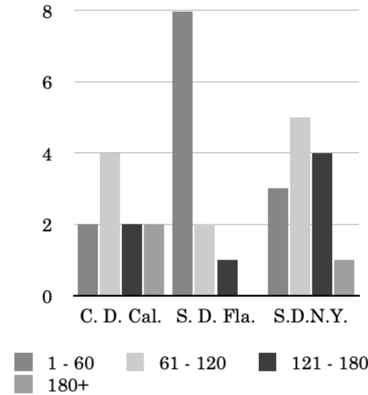


Figure 5. Settlement Rates for Random Sample of ADA Cases Filed Between Jan. 1, 2019 and Dec. 31, 2019



59. *See* FLA. SENATE, *supra* note 24.
60. *See* Cal. Civ. Code § 51; N.Y. Exec. Law Art. 15; Florida Statute § 760.11(5).
61. *See id.*

Figure 6. Days Between Settlements for Random Sample of ADA Cases Field Between Jan. 1, 2019 and Dec. 31, 2019



While the relief sought by most plaintiffs entails injunctive relief and compensatory and punitive damages, a pursuit thought to be burdensome on defendants, most Title III cases result in settlements.[62] Figure 4 demonstrates the settlement rates of cases filed in C.D. Cal., S.D. Fla., and S.D.N.Y. in 2019. Of the cases filed in each district, approximately 67% settled in C.D. Cal., 66% settled in S.D. Fla., and 67% settled in S.D.N.Y. Within the random sample, approximately 67% settled in C.D. Cal., 67% settled in S.D. Fla., and 78% settled in S.D.N.Y. While the frequency of settlement rates in the S.D.N.Y. random sample is significantly higher, such discrepancy may be attested to a tendency for defendants to be more inclined to settle with high-frequency litigants or high-frequency litigants to settle with defendants. Figure 6 distinguishes among the cases and jurisdictions in how quickly the parties within the random sample reached such settlements: Most settlements were settled between 61 and 120 days in C.D. Cal., within 60 days in S.D. Fla., and between 61 and 120 days in S.D.N.Y. Although this Comment's sample review excludes the nature and specifics of the settlements, in the instances where the parties failed to reach a settlement, most cases were either dismissed or granted summary judgment by the judge.

Title III cases in each district court rarely went to trial. During the 2019 calendar year, one case went to trial in S.D. Fla. and

62. *See, e.g.*, Complaint at 11, Cohan v. Countyline Auto Center, Inc., No. 0:19-cv-60277 (S.D. Fla. Jan. 31, 2019); Complaint at 7, Whitaker v. Thomas Hartono et al., No. 2:19-cv-06092 (C.D. Cal. July 12, 2019).

reached a verdict in favor of the plaintiff. In S.D.N.Y.'s lone trial, a verdict was reached in favor of the defendant corporation. On the other hand, 12 cases were tried in C.D. Cal., of which six verdicts were reached in favor of the plaintiffs and six in favor of the defendants.

III. THE ARGUMENT AGAINST HIGH-FREQUENCY LITIGANTS

Arising from a circuit split,[63] *Acheson Hotels* presented the Supreme Court with the question of whether an ADA "tester" has standing under Article III to bring an action against a hotel for its website's lack of sufficient accessibility information, even if the tester never intended to become a guest. The amicus briefs filed in support of Petitioner Acheson Hotels assert that Respondent Laufer cannot establish Article III standing because the alleged harm of a lack of information does not constitute a proper injury-in-fact under Article III. Justice Thomas' concurring opinion echoes this position.[64] Declaring that he would not dismiss the case on grounds of mootness, Justice Thomas contends that Respondent's claim does not establish a violation of a right protected under the ADA, thus barring her claim of standing.[65] The arguments of the amicus briefs and Justice Thomas' concurring opinion are guided by the notion that high-frequency litigants in Title III actions, like that of Respondent, are engaging in a disingenuous litigating practice and a misuse of the judicial system.[66]

Their arguments rely on the assumption that such high-frequency litigants are acting in a manner akin to a cottage industry in which litigants rely on the filing of frivolous Title III actions for the purpose of financial benefit. While the amicus briefs and Justice Thomas' concurring opinion are in direct response to whether a Title III claim of an informational injury by a "tester" suffices as standing under Article III, they apply these criticisms to all high-frequency litigants in Title III actions regardless of the nature of the harm or injury-in-fact alleged.[67] The amicus briefs

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63. *See* Reed, *supra* note 44.

64. *See* Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (Thomas, J., concurring).

65. *See id.* at 6 (Thomas, J., concurring) ("Laufer lacks standing because her claim does not assert a violation of a right under the ADA.").

66. *See id.*; DRI Center for Law and Public Policy Brief, *supra* note 31; Restaurant Law Center Brief, *supra* note 28.

67. *See* Restaurant Law Center Brief, *supra* note 28, at 3.

and Justice Thomas assert two primary assumptions in support of their argument against high-frequency litigants, describing them as (1) reliant on "boilerplate allegations" that do not present a proper injury-in-fact and (2) profit-driven as a result of the financial benefits of settlements, state-level compensatory damages, and attorneys' fees. One amicus brief described the practice of high-frequency litigants, stating, "[t]he scheme is simple: Sue as many businesses as possible using a boilerplate complaint, and hope to extract easy money through settlements or attorneys' fees awards."[68] Describing high-frequency litigants as "serial litigants," the amicus briefs and Justice Thomas craft a narrative of high-frequency litigants that detract from the established purpose of the ADA and portray high-frequency litigation as a purely self-serving practice.

A. BOILERPLATE ALLEGATIONS

Central to the criticism of high-frequency litigants in Title III actions is the assumption that litigants utilize boilerplate allegations across their complaints and thus fail to allege proper and genuine instances of harm by defendants. An amicus brief filed by the Retail Litigation Center, Inc. et al. asserted that "such 'abusive ADA litigation' often relies on 'form complaints containing a multitude of boilerplate allegations,' *Shayler v. 1310 PCH, LLC*, 51 F.4th 1015, 1018 (9th Cir. 2022), to extract settlements or attorneys-fees from as many defendants as possible."[69] Boilerplate language refers to "stock language in a legal document that appears in all instruments of that type."[70] Justice Thomas and the amicus briefs submitted in support of Acheson Hotels contend that high-frequency litigants merely reproduce the exact allegations across their complaints regardless of the opposing party in order to file as many complaints as possible in a limited time. This notion furthers the assumption that the allegations of harm encountered by high-frequency litigants are not genuine despite the plaintiff's disability status or the mere fact that an ADA violation actually exists. By using such claims of boilerplate allegations against high-frequency litigants, those opposed to the

68. Retail Litigation Center Brief, *supra* note 33, at 2.
69. *Id.* at 11.
70. *Boilerplate*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/boilerplate [perma.cc/G3CG-35TK].

practice of high-frequency litigation are able to advance the argument that such lawsuits are frivolous and misuse the judicial system.

Under such theory, one may assume that plaintiffs craft false allegations of harm or, even in instances where a physical barrier to access is present, that they have never attempted to enter the subject premises at issue. This theory serves to raise doubt about the viability of high-frequency litigants' claims. The bare possibility that their allegations are false or severely unsubstantiated fails to comport with the inherent purpose of complaints and the legal rule under which they are subject to review—"enough facts to state a claim to relief that is plausible on its face."[71] Justice Thomas, however, engages with such theory, perceiving the use of such allegations as a threat to the Court and propounding that Laufer presents an action "[w]ithout a violation of her own rights."[72] This interpretation paints high-frequency litigants like Laufer as a hindrance to the judicial system on the characterization that their allegations are boilerplate. Such a statement, however, fails to consider that these litigants may genuinely seek corrective action in compliance with the ADA due to the harm they may face.

These claims of boilerplate allegations rely on the argument that high-frequency litigants and, more specifically, online-based "tester" litigants like Laufer lack standing under Article III. To have standing under Article III, a plaintiff must assert "(1) a concrete and particularized injury; (2) that is traceable to the allegedly unlawful actions of the opposing party; and (3) that is redressable by a favorable judicial decision."[73] Justice Thomas contends that the right to information is not prohibited discrimination under the ADA, for "the ADA provides that '[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . services . . . of any place of public accommodation.'"[74] However, even if such a violation existed under the ADA, Justice Thomas and the amicus briefs argue that such testers fail to establish standing given their lack

71. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

72. Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 9 (2023) (Thomas, J., concurring).

73. Art III, S2, C1, 6.1 Overview of Standing, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artIII-S2-C1-6-1/ALDE_00012992/ (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

74. *Acheson Hotels*, 601 U.S. at 7 (2023) (Thomas, J., concurring).

of intent to visit the subject premises.[75] The DRI Center for Law and Public Policy asserts that "'a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a right and purports to authorize a suit to vindicate it.'[76] There must be a particularized and concrete injury."[77] It is, thus, the position of those in favor of Petitioner that merely testing whether a "place of public accommodation" complies with the ADA without ever engaging or intending to avail oneself of such place does not sufficiently demonstrate concrete harm to oneself under Article III and plaintiffs, therefore, lack standing.

1. *Executive Encroachment*

The ability of litigants to enforce compliance with the ADA has also led those writing in support of Acheson Hotels to allege that such efforts by litigants usurp the power of the executive branch. Article II of the Constitution grants the President the power to "take Care that the Laws be faithfully executed."[78] The amicus briefs and Justice Thomas assert that the practice of high-frequency litigation directly challenges this authority. Under Title III of the ADA, litigants can freely determine which businesses to litigate against and, in turn, compel enforcement through injunctive relief and compensatory and punitive damages. According to those in favor of Acheson Hotels, this calls into question whether high-frequency litigants are wielding inordinate power. Justice Thomas contends that the discretion of "[e]nsuring and monitoring compliance with the law is a function of a Government official, not a private person who does not assert a violation of her own rights."[79] While the ability to freely litigate here confines itself to discriminatory acts prohibited by the ADA and claims "plausible on its face,"[80] critics of high-frequency litigants maintain that such behavior too closely infringes on the authority invested in the executive. The amicus briefs and Justice Thomas are of the view that extending such discretion to high-frequency litigants allows for the violation of the powers vested in

75. *See id.*; DRI Center for Law and Public Policy Brief, *supra* note 31, at 4.
76. DRI Center for Law and Public Policy Brief, *supra* note 31, at 4 (citing Pet. App. 19a).
77. *Id.* (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).
78. U.S. Const. art. II, § 3.
79. *Acheson Hotels*, 601 U.S. 1 (2023) (Thomas, J., concurring).
80. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

the executive and, therefore, threatens the balance of the separation of powers. As discussed below, this view overlooks the government's reliance on private enforcers in response to the government's lack of necessary information and resources.

B. FOR-PROFIT NARRATIVE

While the ADA itself does not allow plaintiffs to recover compensatory or punitive damages, plaintiffs are presented with the opportunity to recover these damages through state statutes that prohibit discrimination in places of public accommodations.[81] As a result, many often purport that the goal of high-frequency litigants is "to extract settlements or attorneys' fees from as many defendants as possible."[82] Utilizing Title III of the ADA and the judicial system—an institution intended to settle disputes and interpret the law—as a means of financial gain would, of course, be a blatant act of misuse. The characterization of high-frequency litigants offered by Justice Thomas and the amicus briefs is that "[a]ggressive efforts to personally impose financial penalties for violations . . . go far beyond the role that Congress envisioned for private plaintiffs under the ADA."[83] This view considers litigants as acting beyond the effort to rectify ADA violations and instead seeking out monetary gain.

Those writing in support of Acheson Hotels present a concern for the threat such high-frequency litigation poses to small businesses. They argue that small business owners may be financially burdened by the monetary penalties imposed on them by the courts on the basis of Title III actions,[84] which, according to the amicus briefs and Justice Thomas, already stems from frivolous grounds. The United States Chamber of Commerce (USCC) argues that "[m]any small business owners lack the time and resources necessary to defend a fact-intensive litigation and, accordingly, quickly pay to settle these cases."[85] The propensity for small business owners to settle their cases seems to intimate, according to the USCC, that such business owners are yielding to

81. *See supra* Part II.E.

82. Retail Litigation Center Brief, *supra* note 33, at 11.

83. *Acheson Hotels*, 601 U.S. at 9 (2023) (Thomas, J., concurring); *see also* DRI Center for Law and Public Policy Brief, *supra* note 31, at 20.

84. Retail Litigation Center Brief, *supra* note 33, at 4.

85. *See, e.g.*, Chamber of Commerce Brief, *supra* note 31, at 12 (citing Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004)).

the influence of high-frequency litigants. This theory reinforces the idea that the unwillingness and inability of small business owners to engage in litigation thus propels and allows high-frequency litigants to sustain the practice of litigating freely under Title III actions.

The criticisms of high-frequency litigants also extend to the attorneys filing the cases since attorneys' fees are recoverable under the ADA.[86] Some in support of Acheson Hotels paint these attorneys as equally complicit in the alleged efforts of high-frequency litigants to cultivate financial gain through the practice. One such amicus brief described the practice of high-frequency litigation as a "for-profit hustle surrounding tester plaintiffs and lawyers looking to make money by settling ADA cases as quickly as possible."[87] Critics of high-frequency litigants seek to extend the condemnation of the perceived ill effects of high-frequency litigants upon the attorneys who support the practice and seemingly cultivate a business out of it. However, it is imperative to note that the amicus briefs filed in support of Acheson Hotels and Justice Thomas' concurring opinion thus portray high-frequency litigants as financially motivated despite demonstrated presences of ADA violations and plaintiffs' statuses as persons with disabilities in their actions.

IV. High-Frequency Litigants Tailor Allegations According to the Harm Encountered and High-Frequency Litigants Can Utilize Remedies to Deter Title III Violations

The enforcement provision of the ADA establishes that private individuals can initiate an action against places of public accommodations for acts of discrimination on the basis of disability.[88] When high-frequency litigants file such actions, they

86. *See* 42 U.S.C. § 12205 (The ADA states that "[i]n any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.").

87. DRI Center for Law and Public Policy Brief, *supra* note 31, at 20.

88. 42 U.S.C. § 12188(a)(1) ("The remedies and procedures . . . provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 12183 of this title.").

are acting within the authority of the enforcement provision to enforce the ADA in a manner that comports with its established purpose and authorization, which is to rectify the deficiencies in public accommodations that discriminate against persons with disabilities.[89] As depicted in Part II of this Comment, high-frequency litigants often assert allegations in their complaints specific to the alleged harm encountered while accounting for the fact that their disabilities remain the same, and thus, the encounter of harm likely remains the same across each complaint. The above findings also depict that while cases are more than likely to settle, the margin of such likelihood and the significant passage of time between settlements bring into question the purported lack of efficacy of such settlements and bolster the significance of deterrence. Such evidenced depictions of high-frequency litigants fall in stark contrast to the notion that these litigants rely on boilerplate allegations to serve a profit-driven interest.

A. TAILORED ALLEGATIONS

To prevail on a case of public discrimination accommodation within the ambit of Title III, a plaintiff must prove that "(1) [they are] disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability."[90] This rule establishes that a litigant must demonstrate a harm specific to the place of public accommodation that is the subject of their lawsuit. Critics of high-frequency litigants in such ADA actions, as depicted in the briefs filed in support of Petitioner in *Acheson Hotels*, often challenge the veracity of their claims due to the vast amounts of cases high-frequency litigants file within a limited period and settle. As discussed above, the briefs filed in support of Petitioner in *Acheson Hotels* and Justice Thomas' concurring opinion echo such assumptions when they argue that these litigants rely on "boilerplate allegations"[91] to assert their claims.

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89. *See Sharing the Dream*, *supra* note 2.

90. Arizona ex rel. Goddard v. Harkins Amusement Enters., Inc., 603 F.3d 666, 670 (9th Cir. 2012).

91. Retail Litigation Center Brief, *supra* note 33, at 11 (quoting Shayler v. 1310 PCH, LLC, 51 F.4th 1015, 1018 (9th Cir. 2022)).

Such theory portrays high-frequency litigants' approach to litigation as a "scheme"[92] bolstered by a plethora of indiscriminate lawsuits. The above findings, however, demonstrate that high-frequency litigants, on average, tailor their allegations of harm to the specific business and harm encountered, thus directly challenging the veracity of such claims.

The litigants covered in this Comment's sample averaged eleven changes to their factual allegations under Adobe Acrobat's track of changes. The text changes tracked were not immaterial changes to the substance of the allegations, such as the defendant's name, location descriptions, or minor word choices. In determining text changes, Adobe Acrobat classifies changes in the document based on the insertion, replacement, or deletion of the text. The frequency of distinction among the factual basis for a cause of action asserted indicated that the basis of such cause was tailored to the unique harm encountered by the public business at issue. While it is true that plaintiffs utilized identical or near-identical statements about their disability and the cause of action asserted, this is not an abnormality and does not indicate a deficiency in their action. A reasonable person can assume that the nature of their disability would not have changed substantially across their complaints, if at all, and that the general harms and disadvantages encountered as a result of their disability status would likely be consistent.

While critics of high-frequency litigants may classify such lawsuits as having "little to no merit,"[93] such characterizations ignore the consistency across litigants' disabilities and the likelihood of uniformity in the type of harm encountered. This narrative thus overlooks the mere fact that the allegations asserted by high-frequency litigants can comply with the elements necessary to prevail on a Title III case[94] and properly establish Article III standing. In order to assert Article III standing, plaintiffs' motivations are "irrelevant to the question of standing"[95]

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92. *Id.* at 2.

93. *Id.* at 11.

94. *See Goddard*, 603 F.3d at 670 ("(1) [they are] disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the plaintiff was denied public accommodations by the defendant because of his disability.").

95. CONG. RSCH. SERV., LSB11110, "TESTER" LAWSUITS UNDER THE AMERICANS WITH DISABILITIES ACT (Jan. 24, 2024).

as long as they can assert "particularized and concrete injury."[96] The actions of high-frequency litigants are often not hindered by such rules, in spite of instances of uniformity in their complaints, for most are still able to assert a proper injury-in-fact bolstered by a tailored factual basis.[97] Centering the mere fact that high-frequency litigants utilize "boilerplate" allegations in criticisms of the practice ignores the fact that harm to persons with disabilities exists in the places of public accommodations at issue and thus serves to distort the private enforcement authority established under the ADA and intended to institute corrective action.

The success of the plaintiff's cases that reached trial in C.D. Cal. further serves as a testament to the viability of the high-frequency litigant's actions. The six verdicts reached in favor of the plaintiffs of the mere 12 cases tried in C.D. Cal. fall counter to the notion that such high-frequency litigants lack a genuine harm. While Title III cases were not often tried across these district courts due to the propensity for settlements, summary judgments, and default judgments, these cases have undergone review by their respective triers of fact to determine that a presence of credibility exists with respect to their claims.

1. *Executive Encroachment*

The assertion that private Title III litigants infringe on the authority of the executive further misconstrues the purpose of extending such enforcement to private citizens. Title III of the ADA explicitly requires places of public accommodations to be in compliance with the accessibility standards established under the ADA.[98] While the claims put forth by the proponents of Acheson Hotels rely on the assertion that such private litigants have not sustained a direct harm, private enforcement has been ingrained in the government's structure since its founding and has served as a means of assistance to the government where a lack of resources and information has hindered action. During the colonial period, lawmakers passed a series of laws that granted private citizens the right to bring an action for various societal harms, including *qui*

96. DRI Center for Law and Public Policy Brief, *supra* note 31, at 4 (citing Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).
97. *See* discussion *supra* Part II.D.
98. *See supra* note 3.

tam statutes challenging acts of fraud against the treasury.[99] The United States government's reliance on such actions has persisted ever since and has become an essential element of enforcement. Further, where the government lacks the necessary resources to enforce the law, the Supreme Court has previously recognized Congress' authority as "to rely in part upon private litigation as a means of securing broad compliance."[100] Such additional enforcement through private actions can combat the oversight of societal harms that may persist due to a lack of government intervention.

B. ENFORCING COMPLIANCE

The mere fact that high-frequency litigants tack on compensatory damages to their actions does not automatically warrant the assumption that their motives are profit-driven. Critics, however, have honed in on this practice to advance the perception that high-frequency litigants engage in a sort of cottage industry, in which they burden small businesses that have no choice but to settle with them.[101] As discussed above, of the Title III cases within the random sample, approximately 67% settled in C.D. Cal., approximately 67% settled in S.D. Fla., and approximately 78% settled in S.D.N.Y. While these numbers may be indicative of a propensity to settle rather than not, they are not explicitly reflective of the narrative that settlements unfairly burden small businesses.

The idea that such businesses are eager to settle due to the burden of the cost of litigating further comes into question when one considers how long it takes to settle such cases with high-frequency litigants. Of the random sample, most settlements in C.D. Cal. and S.D.N.Y. were settled between 61 and 120 days, and most settlements in S.D. Fla. were settled within 60 days. Although these cases were ultimately settled, the timeframe it takes to reach such settlements is, for the most part, not

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99. *See* Jason Rathod & Sandeep Veheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 316 (2016); Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 829 n.8 (2008).

100. Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401 (1968); *see also* Luke P. Norris, *The Promise and Perils of Private Enforcement*, 108 VA. L. REV. 1483, 1504–05 (2022).

101. *See* discussion *supra* Part III.B.

necessarily indicative of a scenario in which businesses or plaintiffs are eager to settle on the count of undue financial burden or financial gain, respectively. Specifically, while most settlements in C.D. Cal. and S.D.N.Y. engaged in a slightly longer litigation process and engaged the likely costly services of an attorney for an extended period, many of their counterparts opted to settle in under 60 days. Rather than pursue litigation due to its costly effects or the small likelihood of success on the merits, the defendants that settle within these shorter timeframes—as opposed to their counterparts who settled past 120 days—may indicate they are well-equipped to bear a financial penalty and rectify the barriers to access present in their places of public accommodations. Meanwhile, defendants and plaintiffs who did not settle until much later may demonstrate a willingness to engage in the litigation process rather than quickly settle, as purported by critics of high-frequency litigants.

While settlements do not equate to an admission of wrongdoing, plaintiffs concomitantly seek injunctive relief to remedy the alleged discrimination, thus allowing conjecture that such remedies are likely negotiated for in the settlements. Although there may be some litigants that bring actions counter to the genuine purpose of the ADA, the mere fact that litigants seek out compensatory damages is not solely for their financial benefit and should not detract from the purpose of correcting discriminatory practices against persons with disabilities. Historically, "the 'punishment' delivered by punitive damages is justified by both deterrent and retributive concerns."[102] Presenting businesses with the prospect of a financial penalty deters the continuance of discrimination against persons with disabilities in places of public accommodations and ensures that defendants fairly compensate plaintiffs for the harm encountered.

The influence over high-frequency litigation stems not only from the litigants themselves but also from the attorneys representing these litigants. While litigants may have encountered genuine harm, there are instances of abuse by attorneys, as evidenced by the suspension of Laufer's attorney in *Acheson Hotels*. Laufer's attorney, Tristan Gillespie, was "suspended from the practice of law for defrauding hotels by lying

102. Benjamin C. Zipursky, *Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("punitive damages . . . are aimed at deterrence and retribution")).

in fee petitions and during settlement negotiations . . . [the United States District Court for the District of Maryland] based the suspension on a report finding that Gillespie demanded $10,000 in attorney's fees per case even though he used 'boilerplate complaints.'"[103] Such misuse of the settlement process by an attorney also unfairly burdens persons with disabilities merely seeking to remedy an ADA violation and thus contributes to the for-profit narrative fostered by critics. It is essential to note, however, that settlements are not the only outcome of such actions, as the failure to reach a settlement is simultaneously indicative of an outcome of a dismissal, summary judgment, default judgment, or trial verdict. The efforts of critics to emphasize settlements as the outcome of high-frequency litigation unfairly detracts from the fact that such litigation is, at its core, a means of corrective action against discrimination on the basis of disability.

CONCLUSION

When high-frequency litigants set out to enforce the ADA, it is an act not only for themselves but also for the larger community of individuals with disabilities, which would be burdened by the plethora of ADA violations that would persist without their efforts. To construe such litigants as engaging in a cottage industry establishes a harmful narrative around ADA litigation. As the findings of this Comment demonstrate, in contrast, high-frequency litigants tailor their allegations of harm according to the specific harm encountered, and the remedies they seek have the effect of deterrence of Title III violations. The experiences and capabilities of high-frequency litigants have also allowed them to effectively support government enforcement where the government may lack the necessary information and resources to advance its enforcement efforts.

Congress passed the ADA with the intention of rectifying discrimination in places of public accommodations for individuals with disabilities. High-frequency litigants often act in accordance with the established goals of the ADA in spite of the frequency with which they file lawsuits. The mere fact that litigants can attest to the presence of an ADA violation demonstrates the presence of

103. Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 2 (2023) (citing Order in *In re* Gillespie, No. 1:21-mc-14 (July 5, 2023), ECF Doc. 14; Report and Recommendation in No. 21-mc-14 (June 30, 2023), ECF Doc. 13 at 5, 26).

harm that impacts not only a single litigant but the entire community of persons with disabilities. Asserting that these litigants serve no purpose beyond financial gain can risk a chilling effect in the effort to remedy ADA violations in places of public accommodations.