No. 22-429

# In The
# Supreme Court of the United States

ACHESON HOTELS, LLC,

*Petitioner,*

v.

DEBORAH LAUFER,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit**

## BRIEF AMICUS CURIAE ON BEHALF OF DRI CENTER FOR LAW AND PUBLIC POLICY IN SUPPORT OF PETITIONER


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## INTEREST OF AMICUS CURIAE[1]

The DRI Center for Law and Public Policy (the "Center") is the public policy and advocacy voice of DRI. DRI is an international organization of approximately 13,000 attorneys who represent businesses and defend parties in civil litigation. The Center addresses issues that are germane to defense attorneys and their clients. The Center participates as an amicus curiae in the Supreme Court, the federal courts of appeals, and state appellate courts, in an ongoing effort to make the civil justice system more fair, more consistent, and more efficient.

DRI members regularly represent businesses operating in the accommodation subsector of the American economy as well as other kinds of businesses subject to Title III of the Americans with Disabilities Act ("ADA"). The relevant statutes and regulations should be consistently interpreted in federal court. The Center and DRI have an interest in ensuring that clients of DRI members are not exposed to needless and costly tester plaintiff ADA litigation. More broadly, the Center and DRI have an interest in ensuring that DRI members and their clients are protected from the probable ripple effects resulting from the unprecedented

[1] All parties received notice and consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

expansion of the law of standing that is the centerpiece of this circuit split.

## INTRODUCTION AND SUMMARY OF ARGUMENT

There is a circuit split on the issue of standing for ADA tester plaintiffs who seek out informational injuries on the internet. This circuit split—where even the aligned courts disagree on the analysis—has great potential to wreak havoc on society, businesses, and courts. The ADA safeguards disabled peoples' fundamental right to be free from discrimination. It should not be used to undermine the standing doctrine and Article III of the United States Constitution.

The First Circuit rejected the well-reasoned decisions of its sister circuits as outlined in the certiorari petition. It also departed from the analysis of the only other circuit that had reached the same conclusion. The First Circuit's decision stands alone. It held that Respondent Deborah Laufer has standing to sue Petitioner Acheson Hotels, LLC for claimed violations of Title III of the ADA. Under the court's analysis, it is irrelevant that Ms. Laufer had no intentions of traveling to Acheson's motel and has no actual use for the information of which she claims to have been unlawfully deprived. It is enough that the ADA and this regulation prohibit disability discrimination, she is disabled, she wants to vindicate rights of disabled

people, and her feelings were hurt by viewing a public website that allegedly violated the ADA.

The First Circuit acknowledges that its conclusion is tenuous. But it uses two bootstraps. First, it relies on an old, distinguishable case that remains good law but which does not apply here. Second, it glosses over the core issue: whether the subject regulation is a procedural right so important that a mere violation of it—without actual harm—is an injury in fact for standing purposes. This regulation requires a place of public accommodation to disclose on all room reservation platforms specific information about physical accessibility features in guest rooms. To find that a bare violation of it confers standing, the lower court was supposed to evaluate how this rule relates to "both history and the judgment of Congress."[2] The court acknowledged the requirement to consider such questions but then it conducted no meaningful analysis. Instead, it simply says the regulation is part of the ADA's objective to outlaw disability discrimination, therefore a violation of it standing alone causes an injury in fact. It cites two cases where this Court has concluded that standalone violations of other rights granted standing to the plaintiffs.[3] Then, without explaining why this

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[2] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

[3] *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20-25, 118 S. Ct. 1777, 141 L. Ed. 2d 10 (1998) (disclosure of information under Federal Election Campaign Act of 1971 about political committee spending which affected the plaintiffs' voting rights); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989) (disclosure of information

administrative regulation resembles the rights at issue in those cases, the court found the same is true here and that a procedural, non-prejudicial violation of the regulation is itself an injury under Article III.[4]

But "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."[5] There must be a particularized and concrete injury.[6] There was no such injury here. The conflict among the circuits on this issue, and the First Circuit's analysis in particular, could have profound implications for the law and for interested industries, businesses, and people.

We are in the information age—the digital era. Is the deprivation of information in today's day and age, in fact, more injurious than it was decades ago when people could not simply "Google it"? When are people injured, or not injured, when they surf the web intentionally seeking out information they know will upset them, desiring to become upset? What is the nature of

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under the Federal Advisory Committee Act which related to the appointment of federal judges which affected the plaintiffs' right to participate "more effectively in the judicial selection process.").

[4] Pet. App. 19a (" . . . she had a right to the information that she alleges Acheson didn't give her. And the statute makes that denial of information discrimination against disabled persons and gives Laufer the right to sue in response. That Laufer had no intent to use the information for anything but a lawsuit doesn't change things—she was still injured in precisely the way the statute was designed to protect.").

[5] *Id.*

[6] *Spokeo*, 578 U.S. at 341.

an informational "injury" when the information is useless to the person seeking it? When do procedural, non-harmful violations of administrative regulations requiring public disclosure of information confer standing?

The law must confront these questions. The way to do so by giving clear guidance. The First Circuit's opinion does not give clear guidance. It does not abide by prior mandates of this Court. It does not answer any broader questions about how to deal with informational injuries in the digital era. Rather, its rendition of the legal standard creates uncertainty and opens the proverbial "floodgates" of litigation by encouraging crusader plaintiffs to sue for ADA violations and by countenancing courts to conclude that plaintiffs were injured, thus expanding the law of standing and the scope of the ADA far beyond this Court's directives.

This circuit split has the potential to harm the American economy and particularly small businesses in the accommodation industry. Such businesses were severely impacted by the COVID-19 pandemic. Small businesses sued for claimed ADA violations experience significant costs, including attorney fees and consequential harm. Businesses will have to fend off litigation brought by plaintiffs who never intended to be patrons, who have zero real-world use for the information, and who have no actual injury. The judicial system will have to adjudicate lawsuits brought by persons who affirmatively seek out harm and deliberately invite "injury" to themselves.

This Court should grant certiorari to resolve the circuit split. It should adopt clear standing rules governing informational injury cases and internet tester plaintiffs. It should correct the court's erroneous conclusion that this Court's precedent in *Havens Realty Corp. v. Coleman* and *TransUnion v. Ramirez* conflict with one another.[7] They do not. Rather than conflicting, they are in harmony, for a simple reason: the plaintiff in *Havens Realty* was a class of one. Ms. Laufer is not. In *Havens Realty*, the plaintiff was the focal point. She was the only person discriminated against and the only person who had standing to redress it. Ms. Laufer is not. Ms. Laufer is merely one of many in an amorphous class of all anonymous, disabled internet users who might have happened to view the challenged website. Those are very different situations.

This Court should adopt a bright line rule and hold that where a plaintiff claims injury under the subject regulation based on information that is missing from a digital reservations platform that was accessible to the public at large (such as Acheson's website), a prerequisite to Article III standing is that the plaintiff actually and in good faith intended to book a guest room when she was deprived of the information, such that the withheld information is directly related to the right to be free from disability discrimination. This rule will harmonize this Court's pre- and post-digital era standing precedent. It will fairly balance the public

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[7] *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205, 210 L. Ed. 2d 568 (2021).

policy underlying the ADA, the interests of disabled people, and the interests of places of public accommodation. It will prevent improper expansion of the standing doctrine. Certiorari should be granted.

## ARGUMENT

### I. This Court should grant certiorari to resolve the circuit split, to correct the First Circuit's erroneous holding, and to prevent unprecedented and improper expansion of the injury-in-fact requirement.

Congress enacted the ADA to outlaw discrimination against disabled people by, among others, places of public accommodation (hotels, motels, boarding houses, etc.). Historically, disabled people with physical and mobility-related disabilities have had trouble reserving hotel rooms due to limited availability of information about physical features in rooms.

To address this problem, 28 CFR § 36.302 was promulgated in 1991. It requires public accommodations to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities unless the public accommodation can demonstrate that making the modifications would fundamentally alter the nature of the goods, services,

facilities, privileges, advantages, or accommodations."[8] Public accommodations offering guest room reservations "by any means" must "[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs[.]"[9]

Ms. Laufer is a self-appointed enforcer of this regulation. The ADA allows private citizens to file lawsuits to redress violations. Ms. Laufer is an advocate for disabled people's rights. She is also a serial litigator, having filed more than 600 ADA lawsuits around the nation. She never intended to stay at Acheson's motel or to travel to Maine. Instead, her objective was to find opportunities to sue. She was intentionally trolling the internet for non-compliant websites—hunting for her next federal court case—when she randomly came to the website in question.

Like before, she was undeterred by the findings of most courts that she does not have standing. She sued, alleging the website failed to identify and describe the accessible features of guest rooms at Acheson's motel. Acheson challenged her standing. The district court found she had no standing. She appealed. In an unprecedented expansion of the standing doctrine and contrary to the well-reasoned decisions of other circuits, the First Circuit reversed and held Ms. Laufer

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[8] 28 CFR § 36.302(a) (2022).

[9] *Id.* § 36.302(e)(1).

has Article III standing to sue for Acheson's claimed violation of the ADA.

To the First Circuit, it is immaterial that the website was accessible by the world at large. It is irrelevant that it was a mere coincidence she viewed it. It makes no difference that she was never going to patronize Acheson's motel and that she has no need for the information of which she claims she was deprived. In the court's view, the mere "injury" resulting from the claimed absence of information on the website combined with Ms. Laufer's assertion of emotional upset is enough. It does not matter that her alleged injuries were self-inflicted. Per the First Circuit, Ms. Laufer sustained a particularized and concrete injury and thus has standing.

The First Circuit acknowledges that this Court's decision in *TransUnion v. Ramirez* is the most current standing authority from this Court. It appears to concede that *TransUnion* dictates a finding of no standing. But the court avoids this by relying on an older, factually distinguishable case (*Havens Realty*) and by assuming without analysis that the regulation is the kind of right which, upon violation, *ipso facto* confers standing even absent any other harm. The First Circuit got it wrong. In this case, getting it wrong has consequences that fundamentally challenge the notion of what Article III standing actually is.

### a. The First Circuit incorrectly held that Ms. Laufer has standing.

All plaintiffs in federal court must have Article III standing. The plaintiff must have suffered an "injury in fact" that is "fairly traceable to the challenged conduct" and which is "likely to be redressed by a favorable judicial decision."[10] "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical."[11]

The First Circuit held that Ms. Laufer was injured and that *Havens Realty* mandates such a conclusion. The First Circuit says *Havens Realty* is "right on the nose for Laufer's case" and broadly controls tester plaintiff situations including digital testers like Ms. Laufer. The First Circuit agrees that Ms. Laufer would lack standing if *TransUnion* controls. But the court says it does not. *Havens Realty* does control. It involved testers, whereas *TransUnion* did not. The only obstacle to complying with *TransUnion*, according to the court, is this Court's holding in *Havens Realty.* Thus, the First Circuit asks this Court to overrule *Havens Realty* so that lower courts can abide by *TransUnion*.[12]

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[10] *Spokeo*, 578 U.S. at 338.

[11] *Id*. at 339 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

[12] *See* Pet. App. 18a ("We can't overrule prior Supreme Court cases—that much the Court has made clear. 'And because overruling Supreme Court precedent is the Court's job, not ours, we must follow [precedent] until the Court specifically tells us not

*Havens Realty* is good law. It should not be overruled. It does not conflict with *TransUnion*. *Havens Realty* involved a class of one. The only person who was discriminated against was the African American tester plaintiff. She was the only one with standing to redress the discrimination. She went to an apartment in person and asked to rent a unit. She was told no. A white tester plaintiff was told the opposite.[13] The African American plaintiff sued under the Fair Housing Act.[14] Despite being a tester who sought out the harm and whose objective was to stop racial discrimination (not to rent an apartment), this Court found that she was injured for standing purposes. It did not matter that she was a tester. It did not matter that her real intent was to expose discrimination. She was concretely injured. It was particularized.

The holding in *Havens Realty* tells us nothing about the right answer in this case. Had Ms. Laufer shown up in Maine at Acheson's motel, bags in hand, asking the front desk clerk for information about accessible room features and been denied such information, she would clearly have standing per *Havens Realty*. That is not this case. A publicly accessible website's generic omission of information about physical accessibility features is vastly different from intentionally lying to and discriminating against a particular person because of disability. The latter is not a mere

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to'—even if we think those older decisions are in tension with newer ones.").

[13] *Id.* at 15a.

[14] 42 U.S.C. § 3604 (2022).

denial of information. If Ms. Laufer had showed up in person and been deprived of information, she would have been the victim of targeted discrimination and the only person with standing to redress it.

But that is not what happened. Ms. Laufer was not targeted. Ms. Laufer and other digital tester plaintiffs who merely view websites and sue are not analogous to in-person testers. Ms. Laufer is one of millions of disabled Americans who could have been viewing that website—all at the same time. The First Circuit effectively held that everyone who qualifies as a disabled person under the ADA and who experiences "feelings of frustration, humiliation, and second-class citizenry" after looking at websites omitting information about guest room features (bathtubs, bed heights, door widths, etc.), have standing. That is completely different from *Havens Realty* where a single person—a class of one—was discriminated against and directly and specifically targeted because of her race.

If Ms. Laufer has standing despite being only one of many unidentifiable, masked plaintiffs, then other similarly situated plaintiffs do too. If the First Circuit's logic holds up, courts could confer mass standing upon groups of internet tester plaintiffs who are all injured at once. What if, on the day Ms. Laufer located the website about Acheson's motel, she emailed a link to the website to hundreds of other disabled individuals who then opened the link and felt similarly to her? Would they all have standing? Under the First Circuit's erroneous holding, they would sustain particularized and

concrete injury. But that cannot be the right answer. Stigmatic injury inflicted by unconstitutional discrimination "accords a basis for standing only to 'those persons who are *personally* denied equal treatment.'"[15]

The same defect applies to the court's conclusion that she was injured even though she never planned to go to Maine and she sought the harm in question—specifically so she could file her next big case. This opens the door for plaintiffs to claim standing even where they absolutely could not need the information or could not patronize the defendant business. This includes if the plaintiff has a mental disability that does not relate to a physical impediment, such that he has no need for information about room accessibility. It also includes plaintiffs who are incarcerated for life, unable to travel, and who view websites from prison. It includes plaintiffs who cannot take international cruises but who nonetheless sue foreign-flagged cruise ships that operate in U.S. waters.[16] It includes plaintiffs suing accommodations on Native American tribal

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[15] *Allen v. Wright*, 468 U.S. 737, 755, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) (emphasis in original) (*citing Heckler v. Mathews*, 465 U.S. 728, 739-40, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984)).

[16] *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 125 S. Ct. 2169, 162 L. Ed. 2d 97 (2005) (reversing the Fifth Circuit's decision and holding that Title III applies to foreign-flag ships operating in U.S. waters, except to the extent that particular application of the statute's requirements invaded a ship's "internal affairs."). DRI Members represent businesses in the cruise ship and maritime industry.

nations.[17] Disabled foreign citizen plaintiffs might have standing.[18]

Had the First Circuit simply followed *TransUnion*, these concerns would have been avoided. *TransUnion* is an informational injury case. A federal statute required the defendant credit reporting agency to disclose certain credit report information to consumers. The plaintiffs alleged the defendant violated the law by not providing the information. This Court held the plaintiffs lacked standing. They did not show how their harm was related to "a harm traditionally recognized as providing a basis for a lawsuit in American courts."[19] All but one left unopened the envelope which they claimed should have contained the information. No one

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[17] *See Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1131, & fn. 11 (11th Cir. 1999) (tribal nations may be sued in federal court for Title III ADA violations if "they consent to it in unequivocal terms" but finding no Congressional intent in the ADA to abrogate their sovereign immunity); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them.").

[18] *Cf. Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 170, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004) ("As a general rule, withholding information under FOIA cannot be predicated on the identity of the requester."); *id.* at 172 (" . . . if the information is subject to disclosure, it belongs to all."); *Doherty v. DOJ*, 596 F. Supp. 423, 428 (S.D.N.Y. 1984) (holding that FOIA rights extend to a resident alien in the U.S. under a fraudulent passport); *see also De Laurentiis v. Haig*, 528 F. Supp. 601 (E.D. Pa. 1981) (denying a foreign citizen residing in the country of citizenship the presumption of FOIA disclosure based on a statutory exemption).

[19] *TransUnion*, 141 S. Ct. at 2213.

asserted that if they had received "the information in the proper format," they would have done something with it beyond filing a federal lawsuit (such as trying to fix their credit files). The risk of future harm, if any, was irrelevant because "the risk of future harm on its own does not support Article III standing."[20] Further, there could be no future injury absent proof of " 'downstream consequences' from failing to receive the required information."[21] Where no one argued the withholding of information made it harder to fix erroneous credit reports, it was not a "downstream consequence." An "asserted informational injury that causes no adverse effects cannot satisfy Article III."[22]

The First Circuit erroneously applied the "adverse effects" requirement. The court presumes the correctness of the court's preferred answer to the question, "what is an adverse effect?" The court concludes that the withheld information is the very "adverse effect" referenced in *TransUnion*. It notes this Court has in certain cases afforded standing where a plaintiff suffers a bare violation of a procedural right without any "additional harm beyond the one Congress has identified."[23] In such a case, a procedural violation causes "an

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[20] *Id.*

[21] *Id.* at 2214 (*citing Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)).

[22] *Id.* (citation omitted).

[23] Pet. App. 24a (*citing Spokeo*, 578 U.S. at 342).

injury in fact because they were denied information the statute gave them the right to."[24]

That's the crux of it. The court concludes a violation of the subject ADA regulation is the kind of procedural violation that falls within the class of rights where information withheld from even those who do not need it (and will not use it) is an injury-in-fact. The court gets there by relying on the obvious: the ADA prohibits disability discrimination and this regulation was promulgated pursuant to the ADA. That's a given. However, the First Circuit does not analyze why this regulation, as applied to Ms. Laufer, is a right that comes with a presumption of injury. The court acknowledges *Spokeo, Inc. v. Robins* requires analysis of "both history and the judgment of Congress" to decide if a violation causes *ipso facto* injury.[25] But instead of such analysis, the court pivots back to *Havens Realty*.

The court's *ipse dixit* is not enough. This Court's decisions where a statutory or procedural right to information caused particularized, concrete injury are entirely distinguishable. In such cases, the right to information directly and materially affected the plaintiffs' fundamental rights. They needed the information for real-life purposes. Here, by contrast, a narrow, ministerial regulation about room reservation-related disclosures is different, especially where Ms. Laufer never

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[24] Pet. App. 16a (*citing Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 449, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989)).

[25] *Spokeo*, 578 U.S. at 340–41.

intended to make a room reservation and was not the target of discrimination. Of course, the right of disabled people to be free from disability discrimination is a fundamental right. But a violation of this regulation does not, all by itself, injure Ms. Laufer's fundamental rights where she was an anonymous internet user who was not the subject of targeted discrimination and did not need the information to begin with. It was only by chance she viewed the website while trying to find ways to injure herself. The withholding of information about door widths, etc., did not adversely affect Ms. Laufer where she has no need for it.

At best, if at all, the regulation and the information required to be provided are tangentially related to her right to be free from disability discrimination. This is not enough to confer standing or to give rise to the presumption of standing created by the First Circuit. Even though the regulation is part of the ADA and it addresses a problem faced by some disabled people, it is not a right the harmless violation of which creates a presumption of standing. A contrary rule would allow a wide array of plaintiffs to argue they have standing whenever any right to information is violated, even if they have no real-world injury and no actual use or need for the information. That is not the law. Certiorari should be granted.

**b. The First Circuit's holding could adversely affect small businesses, domestic and international travel, and federal court judicial economy.**

There are approximately 5 million guest rooms in the United States.[26] Places of public accommodation are part of the accommodation subsector of the accommodation and food services sector. This subsector is a significant part of the American economy. In the first quarter of 2022, 75,972 private establishments were operating in the accommodation subsector.[27] In 2022, this industry employed approximately 1.7 million people in the U.S.[28] The U.S. gross domestic product associated with the accommodation subsector as of January 1, 2022, was more than $162 billion.[29] This is down from $206 billion in 2019, when it outperformed the wider U.S. economy.[30]

The accommodation subsector was heavily impacted by the COVID-19 pandemic. Women- and minority-owned small businesses were disproportionately

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[26] Oxford Economics, *Economic Impact of the US Hotel Industry*.

[27] U.S. Bureau of Labor Statistics, Quarterly Census of Employment and Wages, preliminary 2022 data.

[28] U.S. Bureau of Labor Statistics, Industries at a Glance, Accommodation: NAICS 721 (workforce statistics).

[29] U.S. Bureau of Economic Analysis, Gross Domestic Product: Accommodation (NAICS 721) in the United States.

[30] Deloitte, 2019 US Travel and Hospitality Outlook, at 2, 6–8.

affected.[31] Small businesses in this industry were identified as particularly needing emergency loans from the federal government.[32] Hotel occupancy plummeted to 44% in 2020, far from pre-pandemic rates.[33] Occupancy rates still have not reached pre-pandemic levels.[34]

### i. Harm to businesses caused by unwarranted litigation.

ADA lawsuits have been proliferating for years. In 2016, for example, 6,601 ADA Title III lawsuits were filed in federal court, a 37% increase from 2015.[35] More than 70% of these suits were filed in California, Florida, and New York—states which tend to see larger

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[31] Jennifer F. Helgeson, et al., *Natural hazards compound COVID-19 impacts on small businesses disproportionately for historically underrepresented group operators*, 72 INT. J. OF DISASTER RISK REDUCTION 102845 (Apr. 1, 2022).

[32] Under the CARES Act, businesses in this industry that employed not more than 500 employees per physical location were eligible to receive PPP loans and normal affiliation rules (13 CFR § 121.103 and 13 CFR § 121.301) were suspended, thus allowing affiliated businesses to receive multiple federal loans. P.L. 116-136 Sec. 1102 (Mar. 27, 2020).

[33] Am. Hotel & Lodg. Ass'n, *2022 Midyear State of the Hotel Industry Report*; U.S. Travel Ass'n, *Spending Travel Forecast, Fall 2021*.

[34] *Id*.

[35] Minh Vu, Kristina Launey, and Susan Ryan, *ADA Title III Federal Lawsuit Filings Hit an All Time High*, SEYFARTH (Feb. 17, 2022).

jury verdicts and money judgments.[36] As of mid-year 2022, 4,914 lawsuits alleging ADA Title III claims were filed.[37] The petition outlines the for-profit hustle surrounding tester plaintiffs and lawyers looking to make money by settling ADA cases as quickly as possible.[38] In addition to filing more suits, plaintiffs are trying to broaden the scope of the ADA. Title III ADA lawsuits alleging violations based on websites have surged since 2017 when website accessibility rulemaking was placed on indefinite hold.[39]

The cost of litigating in federal court is high. Many states have enacted sweeping changes to law practice rules, attempting to solve the "access to justice problem" created by the high price of legal services. In many civil cases, defendants do not have the money to hire lawyers. States have enacted laws giving paralegals the right to engage in the limited practice of law.[40] Although total pro bono hours by U.S. lawyers increased during the pandemic, the legal needs of

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[36] *Id.*

[37] Minh Vu, Kristina Launey, and Susan Ryan, *2022 ADA Title III Mid-Year Federal Lawsuit Filings Drop 22% Compared to 2021*, SEYFARTH (July 12, 2022).

[38] Pet. Br. at 5.

[39] *See* Federal Register, *Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions* (Dec. 26, 2017).

[40] *See How States Are Using Limited Licensed Legal Paraprofessionals to Address the Access to Justice Gap*, American Bar Association Standing Committee on Paralegals (Sept. 2, 2022).

persons who depend on pro bono help did too.[41] Legal representation is required, as business entities cannot appear in federal court *pro se*.[42]

It does not strain credulity to believe that a single ADA lawsuit by a faraway tester plaintiff could financially ruin and bankrupt a small business operating a place of public accommodation. All it takes is one judgment, one writ of execution, and one writ of garnishment, to force a sale of property and to seize all money in a bank account. Small businesses face a greater risk of this outcome. An attorney fee award is easily rendered to judgment and writs of execution are available shortly thereafter.[43]

Even with general liability coverage, they still might have to pay out-of-pocket to defend a Title III ADA lawsuit. Courts have found that liability insurance does not cover claims under Title III of the ADA.[44] Commercial general liability insurance policies

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[41] Amanda Robert, *Pro bono work increased during the COVID-19 pandemic, reports show*, American Bar Association (Oct. 29, 2021).

[42] *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201–02, 113 S. Ct. 716, 121 L. Ed. 2d 656 (1993) ("It has been the law for the better part of two centuries, for example, that a corporation may appear in federal courts only through licensed counsel.") (citations omitted)).

[43] *See* FED. R. CIV. P. 54 and 69.

[44] *See*, *e.g.*, *Mark v. Sunshine Plaza, Inc.*, Civil Action No. 16-455, 2016 WL 6876645 at *6 (E.D. La. Nov. 22, 2016) (granting motion for judgment on the pleadings and finding that ADA Title III claim did not allege bodily injury, property damage, or an occurrence).

commonly include "discrimination exclusions" barring coverage for claims arising from unlawful discrimination.[45]

### i. Harm to domestic and international travelers.

A link between a country's incoming business travel and the growth of new and existing industries has been observed.[46] Reduced availability of accommodations could harm domestic and international travel, and in turn, harm the economy.[47] Travelers need accommodations. The American economy needs the innovation associated with international business travelers.

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[45] *See*, *e.g.*, *Burger King Corp. v. Lumbermens Mut. Cas. Co.*, 410 F.Supp.2d 1249, 1258 (S.D. Fla. June 30, 2005) (denying insured's claim for indemnification for settlement of discrimination lawsuit where insurance policy excluded intentional discrimination claims from coverage); *Essex Ins. Co. v. Night & Day Mgmt., LLC*, 536 F.Supp.2d 53, 58 (D. D.C. Feb. 22, 2008) (finding the insurance policy at issue excluded from coverage "[d]iscrimination charges, *of any kind . . .* " (alteration and emphasis in original)).

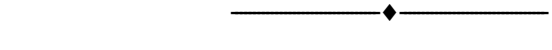
[46] Michele Coscia, Frank M.H. Neffke & Ricardo Hausmann, *Knowledge diffusion in the network of international business travel*, 4 NAT. HUM. BEHAV. 1011–1020 (2020).

[47] *See* Elaine Simon, *Research breaks down COVID-19's impact on hotels, travel plans* (Apr. 24, 2020), (discussing the broad economic impacts on reduced accommodation availability).

### iii. Opening the litigation floodgates and judicial economy.

There are millions of disabled Americans. They are the largest minority group in the country.[48] Around 64 million adults in the United States lived with a disability in 2020.[49] That is approximately 24% of the U.S. population. Under the court's holding, millions of disabled Americans will have standing to sue for ADA-based informational injuries even if they do not need and cannot use the information, and even if their claimed harm is hurt feelings.

If every disabled person in the United States who has the propensity to experience hurt feelings after surfing the web—and who is willing to crusade for justice—has Article III standing, the law of standing will be eviscerated. That is not what this Court's standing precedent says. That is not what the Constitutional Framers intended in drafting Article III. The federal courts should not be "transform[ed]" into a "vehicle for the vindication of value interests of concerned bystanders."[50] Certiorari should be granted.



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[48] Disability Funders Network, *Disability Stats and Facts*.

[49] Centers for Disease Control and Prevention, National Center on Birth Defects and Developmental Disabilities, Division of Human Development and Disability, Data for the United States, District of Columbia, and U.S. Territories for 2020 regarding disability status and types among adults 18 years of age or older; *see also*, Catherine A. Okoro, et al., *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults—United States, 2016*, MMWR MORB. MORTAL. WKLY. REP. 2018; 67:882–88.

[50] *Allen*, 468 U.S. at 756 (*quoting United States v. SCRAP*, 412 U.S. 669, 687, 93 S. Ct. 2405, 37 L. Ed. 2d 254 (1973)).

## CONCLUSION

Certiorari review is needed to create a bright line rule regarding tester plaintiff standing for informational injuries. Ms. Laufer lacks standing, as many courts have correctly held. Where a plaintiff claims informational injury under the subject regulation, and where the plaintiff deliberately sought out the information on an internet reservations website that is accessible to the public at large, a prerequisite to Article III standing should be that the plaintiff actually and in good faith intended to patronize the place of accommodation when she was deprived of information, such that the deprivation directly affects the right to be free from disability discrimination. This rule fairly balances the public policy underlying the ADA, the interests of disabled people, and the interests of places of public accommodation.

Respectfully submitted,

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