Standing at a Crossroads:
An Analysis of the Circuit Split Over ADA Tester Standing

Introduction

Congress enacted the Americans with Disabilities Act (ADA) in 1990 to ensure that "people with disabilities can fully participate in all aspects of life."[1] One of those aspects that able-bodied people often take for granted is the simple act of browsing the internet in search of a suitable hotel to book for a trip. The Center for Disease Control and Prevention (CDC) reported that around sixty-one million adults in the United States are living with a disability as of 2023.[2] That means that one in four adults may need information about the accessibility features that a hotel offers before they can make the decision to stay there.[3] Unfortunately, many hoteliers do not build their websites with accessibility in mind, and therefore many hotel websites lack this legally required information.[4] This not only deprives the individual of the ability to make an informed choice about where to stay, but it also sends the message that individuals with disabilities are not valued or welcomed in the establishment.[5]

Title III of the ADA bars any place of public accommodation from discriminating against an individual on the basis of disability.[6] Public accommodations are defined broadly as being any

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[1] *Businesses That Are Open to the Public*, ADA.GOV, https://www.ada.gov/topics/title-iii/ [https://perma.cc/M5QU-BL9Y] (last visited Nov 12, 2023).
[2] CENTER FOR DISEASE CONTROL AND PREVENTION, *Disability Impacts All of Us*, https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html [https://perma.cc/K22X-XGNN] (last visited Nov. 12, 2023).
[3] *See id.*
[4] *See* MOBILITY MOJO, *Global Hotel Accessibility: Insights 2020*, at 5 (Oct. 2021) https://skift.com/wp-content/uploads/2021/10/Global-Hotel-Accessibility-Insights-2020-Report-Mobility-Mojo-3.pdf [https://perma.cc/Y4JP-X57Q] (among the hotels surveyed, 99% have accessible bedrooms but do not provide enough detailed information for someone with a disability to determine whether it suits their needs).
[5] *See generally* Kristen L. Popham, Elizabeth F. Emens & Jasmine E. Harris, *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 HRLR ONLINE 1 (2023), for a discussion of the harm associated with systemic noncompliance with the Reservation Rule, including administrative burdens, feelings of isolation and exclusion, and a loss of autonomy, security, and dignity of the disabled person.
[6] 42 U.S.C. § 12182(a).

facility operated by a private entity that affects commerce.[7] Title III provides a right of action for the Attorney General, and also authorizes disabled individuals, who have been subjected to discrimination or reasonably believe that they are going to be subjected to discrimination, with a private right of action to enforce the statute.[8]

In 2010, the ADA was amended to include several new requirements that expanded protections beyond the physical premises, one of which is referred to as the "Reservation Rule."[9] The Reservation Rule mandates, among other things, that hotels "identify 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."[10] This regulation correlated with the rise of digital accessibility lawsuits where ADA testers scour the internet in search of hotel websites that do not comply with the Reservation Rule, and then sue hotels that do not adequately share how accessible their rooms are.[11] In 2020, Deborah Laufer, a disabled Florida resident with multiple sclerosis, did just that and filed a lawsuit against Acheson Hotels, LLC, a hotel operator based in Maine, alleging that its website provided insufficient information about the hotel's accessibility

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[7]U.S.C § 12181(7). Places of public accommodation include a wide range of entities such as hotels, restaurants, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, amusement parks, private schools, and day care centers. *Id.* While the statute is silent as to whether websites qualify as places of public accommodations, the Department of Justice has taken the position that Title III applies to all public-facing websites provided by places of public accommodation. *See Title III of the Americans with Disabilities Act and Website Compliance*, ABA (Feb. 22, 2022), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2022/february-2022/title-iii-americans-disabilities-act-website-compliance/ [https://perma.cc/C2UW-LY9Z]; *see also* Ryan C. Brunner, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171 (2017).

[8]42 U.S.C. § 12188(a)(1).

[9]*Accessible Lodging*, ADA NATIONAL NETWORK (2017) https://adata.org/sites/adata.org/files/files/Accessible_Lodging_final2017.pdf [https://perma.cc/9G6G-RDET].

[10]28 C.F.R. § 36.302(e)(1)(ii). The Rule also requires hotels to deliver accessible rooms in the same manner and during the same hours as inaccessible rooms; hold accessible rooms for individuals with disabilities; remove an accessible room from inventory as soon as it has been reserved; and guarantee that the customer receives the specific accessible room he or she reserved. 28 C.F.R. § 36.302(e)(i), (iii), (iv), (v).

[11]Ian Millhiser, *A Supreme Court case about hotel websites could blow up much of civil rights law*, VOX (Sept. 25, 2023, 7:00 AM), https://www.vox.com/scotus/2023/9/25/23875036/supreme-court-acheson-hotels-deborah-laufer-testers-disabilities-hotel-website [https://perma.cc/ASP7-QQQJ].

features in violation of the Reservation Rule.[12] The problem is that Ms. Laufer, like many other testers, did not visit the hotel nor did she have any plans to do so at the time she sued the hotelier.[13]

The primary question this Note seeks to address is whether self-appointed ADA "testers" have standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if they lack any intention of visiting that place of public accommodation. This Note will argue that ADA testers *should* have standing on the basis of having suffered an informational and/or stigmatic injury. Part I will provide background information on civil rights testers in general and ADA testers in particular. Part II will outline the federal standing doctrine and discuss the current circuit split over the issue of ADA tester standing. This Note will conclude by presenting potential consequences with curtailing tester standing.

I. ADA Testers: Saviors or Scammers?

A. Background

Test case litigation "refers to the legal strategy in which an organization sponsors a plaintiff with a pre-existing case or creates the case itself in order to challenge an existing law and set a precedent for the future."[14] A civil rights "tester" is a person who voluntarily subjects themselves to discrimination taking place in areas such as housing, employment, or public accommodations, in order to challenge the practice in court.[15] One of the most famous, and perhaps most shameful, civil rights test cases in American history is *Plessy v. Ferguson*.[16] In this case, Homer. A. Plessy, a thirty-four year old racially mixed shoemaker, was chosen by a New Orleans civil rights

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[12]Shruti Rajkumar, *Hotel Website's Supreme Court Case Could Shake Up How Disability Law Is Enforced*, HUFFPOST (Oct 4, 2023, 5:45 AM), https://www.huffpost.com/entry/scotus-oral-arguments-ada-tester-case_n_651cc585e4b0d2f61f601483 [https://perma.cc/GW3D-2FUV].
[13]*Id.*
[14]C. Matthew Hill, *"We Live Not On What We Have": Reflections on the Birth of the Civil Rights Test Case Strategy and its Lessons for Today's Same-Sex Marriage Litigation Campaign*, 19 NAT'L BLACK L.J. 175 (2007).
[15]Millhiser, *supra* note 11.
[16]Plessy v. Ferguson, 163 U.S. 537 (1896).

organization to test the constitutionality of Louisiana's separate-car statute which required separate but equal railroad accommodations for Black and white passengers.[17] Plessy, who was one-eighth Black and appeared white, was particularly selected to highlight the arbitrariness of racial laws.[18] In 1892, Plessy, solely for the purpose for sparking litigation, purchased a ticket on the East Louisiana Railway, boarded a train car reserved for whites only, and was subsequently arrested for violating the statute.[19] Four years later, the Supreme Court, by a 7-1 vote, ruled against *Plessy* and upheld state racial segregation laws under the separate but equal doctrine.[20] While this case was deemed a failure, the test case strategy has lived on and become a common tool in the enforcement of civil rights statutes.[21]

In the present context, ADA "testers" are individuals with disabilities who routinely visit places of public accommodations to uncover facilities in violation of Title III.[22] Unlike the typical tester who is sponsored by a civil rights organization, ADA testers are often "self-appointed" — investigating discrimination at their own behest.[23] Testers will travel far and near to facilities looking for the presence of accommodations such as "ramps for wheelchairs, Braille on elevator doors, and handicapped-accessible restrooms and hotel rooms."[24] Some testers need not travel at all to find discrimination; instead, armed with just their computer or cellphone, they search the internet to discover websites or mobile applications that are not accessible.[25]

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[17]JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 104 (2004).
[18]*Id.* at 110.
[19]*Id*. at 104.
[20]*Plessy*, 163 U.S. at 544.
[21]*Plessy* was overturned in 1954 by another renowned test case. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).
[22]Kelly Johnson, *Testers Standing up for the Title III of the ADA*, 59 CASE W. RSRV. L. REV. 683, 693 (2009)
[23]Paige Sutherland, Meghna Chakrabarti & Tim Skoog, *Disability rights enforcement could be weakened in latest SCOTUS case*, WBUR (Oct. 3, 2023), https://www.wbur.org/onpoint/2023/10/03/disability-rights-enforcement-could-be-weakened-in-latest-scotus-case [https://perma.cc/R6YT-MM92].
[24]Johnson, *supra* note 22, at 694.
[25]Randy Pavlicko, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation after COVID-19*, 69 CLEV. ST. L. REV. 953, 968 (2021). *See* Jonathan Lazar, J. Bern Jordan & Brian Wentz, *Incorporating Tools*

Due to the private enforcement mechanism embedded in the ADA, if the tester encounters any virtual or physical barriers to access, they can pursue legal action against the business and seek relief in court.[26] However, remedies under Title III are limited to injunctive relief and attorneys' fees.[27] Because plaintiffs have no right to compensatory damages, there is little incentive for the ordinary disabled person who has experienced discrimination to file suit against a place of public accommodation, which can be a long, stressful, and costly ordeal.[28] Thus, testers are crucial in ensuring businesses comply with the ADA.[29]

B. Criticism of ADA Testers

Despite this seemingly noble cause, ADA testers have been villainized by the media and accused of abusing the legal system. The podcast, *This American Life*, produced an episode entitled "Crybabies," which consisted of a third act, "The Squeaky Wheelchair Gets the Grease" where ADA tester litigation was labeled as a "crybaby cottage industry."[30] Further, the article, "Robbing Beyoncé Blind: The ADA litigation monster continues to run amok," criticizes serial ADA testers for filing extortionate lawsuits against businesses for personal gain rather than ADA compliance.[31] This criticism correlates with the sharp increase in the number of ADA Title III

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and Technical Guidelines into the Web Accessibility Legal Framework for ADA Tittle III Public Accommodations, 68 LOY. L. REV. 305, 308 (2022) (noting that "usability testing," where people with disabilities engage in tasks on the website to identify barriers, is one standard evaluation method used to determine if a website is accessible).

[26] *Id.*

[27] 42 U.S.C. § 12188(a)(2).

[28] Sutherland, *supra* note 23. *See* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2374–75 (2021) (arguing that "a small number of expert plaintiffs and plaintiffs' lawyers is likely the best way to enforce the ADA's public accommodations title in the absence of significant government enforcement" due to the poor physical and emotional outcomes associated with litigation).

[29] *See* Leslie Lee, *Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine is Not the Right Solution to Abusive ADA Litigation*, 19 VA. J. SOC. POL'Y & L. 319, 322 (2011) ("Like [Fair Housing Act] testers and equal employment testers, ADA testers who act as private attorneys general perform a service for the community that would otherwise go unperformed.").

[30] Ira Glass, *This American Life: Crybabies*, WBEZ (Sept. 24, 2010), https://www.thisamericanlife.org/415/crybabies [https://perma.cc/2EQK-A2PU].

[31] Mark Pulliam, *Robbing Beyoncé Blind: The ADA litigation monster continues to run amok*, CITY JOURNAL (Jan. 10, 2019), https://www.city-journal.org/article/robbing-beyonce-blind [https://perma.cc/5BJK-R85V]. The author states that "[g]iven the lack of any fixed legal standard for 'web accessibility,' almost any grievance involving the technical features of a website is litigable. . . . The principal requirement: a defendant with deep pockets. With 22

lawsuits filed in federal court in recent years.[32] For instance, in 2013, there were only 2,722 Title III federal lawsuits nationwide, compared to 11,452 in 2021.[33] In 2022, plaintiffs filed 8,694 Title III federal lawsuits, which although a decrease from 2021, is still a 319% increase from 2013.[34] It is not surprising that many of the states that allow for monetary damages under their own anti-discrimination statutes, like California, Florida, and New York, experience higher rates of ADA lawsuits.[35]

Another source of skepticism results from the fact that, "[m]any of these cases are being prosecuted by a small number of disabled individuals (and their attorneys) who file hundreds, sometimes thousands, of lawsuits against businesses alleging violations of the ADA," earning them the derogatory nickname of "serial plaintiffs."[36] For example, a small legal practice in Philadelphia filed over one hundred ADA suits on behalf of just two disabled individuals, and racked up thousands of dollars in attorneys' fees.[37] Likewise, Deborah Laufer, the plaintiff in the ADA tester standing case recently decided by the Supreme Court, has received backlash for filing hundreds of website accessibility lawsuits throughout the country without ever having left the comfort of her

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Grammy awards to her credit, the phenomenally successful Beyoncé qualifies." *Id.* The author goes on to say that the lawsuit against Beyonce brought about by a visually-impaired tester, who was unable to buy an embroidered hoodie on Beyonce.com without the assistance of a sighted companion, "smacks of cynical opportunism." *Id.*

[32] 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/#:~:text=ADA%20Title%20III%20case%20filings,from%204%25%20to%2063%25 [https://perma.cc/4DCT-HY8A].

[33] *Id.*

[34] *Id.* (noting that federal website accessibility lawsuits accounted for 37% of the 8,694 ADA Title III lawsuits filed in federal court in 2022).

[35] *Id.*; Evelyn Clark, *Enforcement of the Americans with Disabilities Act: Remedying "Abusive" Litigation While Strengthening Disability Rights*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 689, 699 (2020).

[36] Linda H. Wade & Timothy J. Inacio, *A Man in a Wheelchair and His Lawyer Go Into a Bar: Serial ADA Litigation is No Joke*, 25 TAQ 31, 33 (2006). *See* Sarah E. Zehentner, *The Rise of ADA Title III: How Congress and the Department of Justice Can Solve Predatory Litigation*, BROOKLYN L. REV. 701, 711 (2021) ("Within eighteen months one plaintiff filed more than 150 lawsuits, and that same plaintiff's attorney said 90 percent of his business is from the same twelve disabled clients.").

[37] Walter Olson, *The ADA shakedown Racket*, THE CITY JOURNAL (2004), https://www.city-journal.org/article/the-ada-shakedown-racket [https://perma.cc/6M3G-ZYNV].

home.[38] Moreover, repeat litigants have been called out for filing "boilerplate" complaints, some of which contain identical typos and spelling errors, further hurting the credibility of the cause.[39]

Opponents have also accused ADA testers of disproportionately harming small businesses.[40] Small businesses are especially vulnerable to Title III lawsuits for a number of reasons. First, small businesses are likely to operate in older buildings and facilities.[41] Second, small businesses are less likely to be aware that their facilities do not conform with the ADA's extensive and technical requirements which can be difficult to understand on top of the state and local building and accessibility codes.[42] Finally, since the cost of fighting the litigation is typically four to five times their average annual income,[43] small business "are often compelled to settle because they cannot afford the litigation cost involved in proving whether an action is readily achievable."[44] Hence, small businesses are typically unsophisticated, averse to litigation, and

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[38]Nicholas Walker, *Do Individuals Who Have No Intent to Use Your Business's Services Have Standing to Sue Your Company for Potential ADA Accessibility and Accommodations Violations?—The U.S. Supreme Court To Weigh In*, JD SUPRA (Apr. 13, 2023), https://www.jdsupra.com/legalnews/do-individuals-who-have-no-intent-to-2552411/ [https://perma.cc/7LQS-4U82].

[39]The Editorial Board, *The ADA Lawsuit Mill Reaches the Supreme Court*, WALL STREET J. (Oct. 2, 2023, 6:28PM), https://www.wsj.com/articles/deborah-laufer-acheson-hotels-supreme-court-ada-lawsuit-61b07190 [https://perma.cc/HU24-LFWM].

[40]*How Small Businesses are Targeted with Abusive ADA Lawsuits*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM, (Oct. 12, 2022), https://instituteforlegalreform.com/blog/small-businesses-targeted-with-ada-lawsuits/ [https://perma.cc/U4RY-U7DV]. *See* John W. Egan and Minh N. Vu, *New York Lawmakers Plan to Address Website Accessibility*, SEYFARTH (May 20, 2019), https://www.adatitleiii.com/2019/05/new-york-lawmakers-plan-to-address-website-accessibility/ [https://perma.cc/XT5F-J78P] (New York State Senator Diane Savino referred to ADA testers' attorneys who are initiating these lawsuits as "ambulance-chaser[s]" who are "exploiting loopholes in the law" and described Title III cases as having the potential to "bankrupt a small business."). *See also* Phoebe Joseph, *An Argument for Sanctions against Serial ADA Plaintiffs*, 29 U. FLA. J. L. & PUB. POL'Y 193, 208 (2019) (arguing that "[t]he effect of serial ADA litigation on small business owners is incredibly harmful and, over the long haul could stifle the creation of small business, thereby potentially affecting the economy.").

[41]Joseph Chandlee, *ADA Regulatory Compliance: How the Americans With Disabilities Act Affects Small Business*, 7 U. BALT. J. LAND & DEV. 37, 45 (2018).

[42]*Id.*

[43]Ken Barnes, *The ADA Lawsuit Contagion Sweeping U.S. States*, FORBES (Dec. 22, 2016, 11:05 AM), https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states/?sh=27f9b4334ee6 [https://perma.cc/L5DC-BRVT] (referring to abusive lawsuits under the ADA as an "infectious disease" that has spread across the country plaguing small businesses).

[44]Chandlee, *supra* note 41, at 45.

unable to afford a lawyer, making them easy Title III targets.[45] Scott Faden, an attorney who has represented businesses facing Title III suits, called this scheme "the best shakedown in law."[46]

C. Standing Up for ADA Testers

While there have been some serial ADA testers with ill intentions who attempt to exploit the ADA, they are the exception not the norm. Albert Dytch, a wheelchair bound seventy-one year old man with muscular dystrophy who has filed more than 180 ADA lawsuits in California, shed light on the motivations of a "serial plaintiff" in an interview with The New York Times.[47] The magazine reported that:

> Early on, he began to feel that filing these cases helped him find the agency he had lost as his illness progressed. The more limited his mobility became, the more of the world had become closed to him. Restaurants and shops he once frequented and enjoyed were no longer places he could go with ease or at all. He felt he was fighting not just against the difficulties, barriers[,] and humiliations he routinely faces as a disabled person trying to go about his life, but on behalf of a larger community.[48]

Dytch did admit that "If there weren't some money involved, I probably wouldn't do it," due to the time and energy it takes to bring suits, but his main goal is to bring about greater accessibility.[49] When asked by The Miami Herald about why she brings these cases, Ms. Laufer expressed similar sentiment, stating, "I was getting slapped in the face every time I tried to book a room or do something. If I'm in position to be able to do something, I'm going to do something."[50]

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[45]Mark Pulliam, *The ADA Litigation Monster*, CITY J. (2017), https://www.city-journal.org/article/the-ada-litigation-monster [https://perma.cc/J7NN-5VRL].
[46]Melanie Payne, *Are ADA lawsuit plaintiffs hucksters or heroes?*, NEWS-PRESS (Mar. 30, 2017, 11:05 AM), https://www.news-press.com/story/news/investigations/melanie-payne/2017/03/30/ada-driveby-lawsuits-activism-scam-melanie-payne/99143134/ [https://perma.cc/VBE7-QDES].
[47]Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits*, N.Y. TIMES MAGAZINE (July 21, 2021), https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html [https://perma.cc/X2UJ-2M7R].
[48]*Id.*
[49]*Id.*
[50]Sarah Luterman, *Could This Supreme Court Case Gut the Americans With Disabilities Act?*, TRUTHOUT (Oct. 2, 2023), https://truthout.org/articles/could-this-supreme-court-case-gut-the-americans-with-disabilities-act/ [https://perma.cc/AP2G-APFP].

It is also important to acknowledge that a large percentage of accessibility lawsuits are initiated by the same counsel, not because the attorney and plaintiff are opportunistic and exploitative, but because "under the current remedial scheme" which limits prevailing plaintiffs to injunctive relief and attorneys' fees, "serial litigation may be the only cost-effective way for private counsel to bring suit."[51] The irony is that these limitations put in place to curb abusive litigation, are viewed by many as encouraging it.[52] Amy B. Vandeveld, an attorney and member of the disabled community, put the issue into perspective when raised the question: "What difference does it make whether one person with a disability files 300 lawsuits or whether 300 different people with disabilities file one suit apiece? The barriers are the same. The damages are the same."[53]

The adverse financial impact that ADA testers inflict on small businesses is also overexaggerated. For example, most cases that have come into federal court are against large business enterprises like Ramada or McDonalds.[54] Additionally, the "readily achievable" language in the ADA, which means "easily accomplishable and able to be carried out without much difficulty or expense" was intentionally included to limit the burdens that could be placed on small businesses.[55] While businesses may incur extensive legal fees fighting accessibility challenges, and some may ultimately close, the threat of litigation by testers is often the only thing forcing businesses to comply with the ADA.[56] Instead of spending their energy tarnishing the reputations of ADA testers, small and large business owners alike should familiarize themselves with Title III,

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[51]Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 15 (2006) (explaining that due to the high complex nature of the ADA's rules governing physical accessibility, lawyers experience a high fixed cost in learning and internalizing those rules to the extent necessary to make a profit).
[52]*See id.* at 35.
[53]Carri Becker, *Private Enforcement of the Americans With Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L. J. 93, 109 (2006).
[54]Johnson, *supra* note 22, at 719.
[55]42 U.S.C. § 12181(9).
[56]Johnson, *supra* note 22, at 718.

a task which they've had over thirty years to do, and ensure their facilities and websites are accessible for everyone.

In sum, ADA testers, even those that file hundreds of lawsuits, are not the money-hungry predators they have been made out to be. They serve an important role in the enforcement of the ADA.[57] The story does not end here, though. Testers who are able to withstand the surplus of negative public scrutiny face a procedural obstacle to exercising their private right of action: proving that they have sufficient standing to initiate the litigation.

II. Analysis of ADA Tester Standing

A. Constitutional and Prudential Requirements for Standing

Not just anyone can bring a lawsuit in court; a person must have legal "standing" to do so.[58] Standing has been described by the Supreme Court as "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[59] In *Lujan v. Defenders of Wildlife*,[60] the Supreme Court set forth three factors that a plaintiff must meet to satisfy Article III's standing requirements.[61] First, a plaintiff must show that she has suffered an "injury in fact" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical."[62] Second, "there must be a causal connection between the injury and the conduct complained of," meaning the injury is fairly traceable to the challenged action of the defendant.[63]

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[57]*See* Lucy Trieshmann, *Hotel Accessibility Reaches the Supreme Court*, ACLU (Aug. 14, 2023), https://www.aclu.org/news/disability-rights/hotel-accessibility-reaches-the-supreme-court [https://perma.cc/5E2Q-PD75].
[58]U.S. CONST. art. III, § 1.
[59]Sierra Club v. Morton, 405 U.S. 727, 731 (1972). *See* Antonin Scalia, T*he Doctrine of Standing As An Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) ("In more pedestrian terms, [standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'").
[60]Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[61]*Id.* at 560–61.
[62]*Id.* at 560.
[63]*Id.*

Third, it must be "likely," as opposed to "merely speculative," that the injury will be "redressed by a favorable decision."[64]

In addition to the constitutional requirements described above, "judges have imposed additional standing requirements to avoid questions of broad social significance that do not vindicate any individual rights and to limit judicial access to plaintiffs who are best suited to litigate a claim."[65] These limitations are rooted in the prudential standing doctrine.[66] One common prudential requirement is that the injury may not be a "generalized grievance," meaning it cannot be one that is shared widely by a large class of citizens.[67] Another prudential requirement is that a plaintiff must assert his or her own legal rights and interest, not the rights and interests of third parties.[68] However, a litigant may bring an action on behalf of a third party where the litigant has a "close" relationship with the third party, and there is "some hindrance to the third party's ability to protect his or her own interests."[69] Finally, there is a prudential requirement that a plaintiff's grievance fall within the "zone of interests" protected or regulated by the law invoked.[70]

Beyond the zone of interest test, and the prohibitions against generalized grievances and third-party standing, the Court has further complicated matters for litigants seeking injunctive relief. In *City of Los Angeles v. Lyons,*[71] the plaintiff sued the City and four of its police officers after he was placed in a chokehold and rendered unconscious during a traffic stop despite

[64]*Id.* at 561.
[65]Daniel M. Tardiff, *Knocking on the Courtroom Door: Finally an Answer From Within for Employment Testers*, 32 LOY. U. CHI. L.J. 909, 930 (2001).
[66]*See generally* S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L. Q. 95 (2014) for a discussion on prudential standing and its shortcomings.
[67]Warth v. Seldin, 422 U.S. 490, 499 (1975).
[68]*Id.*
[69]Powers v. Ohio, 499 U.S. 400, 411 (1991).
[70]Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970).
[71]City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

presenting no threat.[72] The plaintiff sought injunctive relief to bar the use of chokeholds except when reasonably necessary.[73] The Court of Appeals held that the plaintiff had standing to seek injunctive relief against the use of the chokeholds.[74] The Supreme Court reversed the judgement on the grounds that "[past] exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present, adverse effects."[75] The Court reasoned that the plaintiff could not establish "a real and immediate threat" that he would be stopped by the police in the near future and be subjected to an illegal chokehold.[76] Thus, "absent a sufficient likelihood that he will again be wronged in a similar way," the Court held that the plaintiff was not entitled to an injunction.[77] Because ADA testers are limited to injunctive relief under Title III of the ADA, the *Lyons* decision has been interpreted to mean that "testers will lack standing if they do not subject themselves to the harm again or make plans to subject themselves to the harm again."[78]

B. The Rise and Potential Fall of Statutory Rights-Based Standing for Testers

Havens Realty Corporation v. Coleman,[79] decided by the Supreme Court in 1982, is a seminal case in civil rights tester standing jurisprudence. *Havens Realty* involved two tester plaintiffs, Sylvia Coleman and R. Kent Willis, who were employed by HOME, a nonprofit fair housing organization, to pose as renters and determine whether Havens Realty engaged in the real estate practice of racial steering.[80] Coleman, who is Black, and Willis, who is white, each

[72]*Id.* at 97. The dissents description of the incident is more graphic, revealing that "[w]hen Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released." *Id.* at 115 (J. Marshall, dissenting).
[73]*Lyons*, 461 U.S. at 98.
[74]*Id.* at 99.
[75]*Id.* at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495–496 (1974)).
[76]*Lyons*, 461 U.S. at 105.
[77]*Id.* at 111.
[78]Johnson, *supra* note 22, at 696.
[79]Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).
[80]*Id.* at 368.

contacted Havens regarding the availability of apartments in a predominately white complex, and Coleman was told that there were no apartments available whereas Willis was told that there were vacancies.[81] The tester plaintiffs and HOME filed suit, alleging that Havens' practices violated the Fair Housing Act and deprived them of the benefits of living in an integrated community free of housing discrimination.[82] Coleman alleged that the "misinformation given to her by Havens concerning the availability of apartments . . . had caused her 'specific injury.'"[83] The District Court dismissed the claims of Coleman, Willis and HOME for lack of standing.[84] The Court of Appeals reversed, holding that Coleman and Willis had standing to sue as testers and as individuals.[85] The Supreme Court granted certiorari.[86]

In addressing the question of tester standing, the Supreme Court looked at the plain language of Section 804(d) of the Fair Housing Act, which makes it unlawful "to represent to any person because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," and found that it established an enforceable right to truthful information concerning the availability of housing.[87] Therefore, a tester who had received false housing information suffered a harm sufficiently concrete to qualify as an injury in fact under the Act's provisions.[88] Notably, "[t]hat the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d)."[89] The Court concluded that Coleman, the Black tester, had standing to sue for monetary damages and injunctive

[81] *Id.*
[82] *Id.* at 369.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 370.
[86] *Id.*
[87] *Id.* at 373.
[88] *Id.* at 373–74.
[89] *Id.* 374.

relief because she had suffered an injury to her statutorily created right to truthful housing information.[90] However, the Court held that Willis, the white tester, did not have standing to sue in his capacity as a tester because, unlike Coleman, he received accurate information regarding the availability of housing, and was not a victim of discriminatory misrepresentation.[91] *Havens Realty* is significant because the Court recognized that a tester plaintiff's subjective motivations or intent are irrelevant where there is an invasion of a statutorily created right to information.[92]

The Supreme Court's more recent decision in *TransUnion, LLC v. Ramirez*,[93] severely threatens the tester standing precedent established in *Havens Realty*. In *TransUnion*, the Court was tasked with determining whether 8,185 class members had standing to sue TransUnion for its alleged violation of its obligations under the Fair Credit Reporting Act to use reasonable procedures in internally maintaining credit files, and provide consumers with their credit information.[94] Building off the standing framework in *Spokeo v. Robins*,[95] the Court emphasized that "an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely* harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court."[96] This is contrary the decision in *Havens Realty*, which provided for standing based on a statutory violation without a showing of any independent injury in fact.[97]

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[90] *Id.*
[91] *Id.* at 375. *But see* Paul A. LeBel, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013, 1020 (identifying the flaws in the Court's analysis of the white tester's standing and arguing that the white tester should have been awarded standing).
[92] *Havens Realty*, 455 U.S. at 374.
[93] TransUnion, LLC v. Ramirez, 141 S. Ct. 2190 (2021).
[94] *Id.* at 2207.
[95] Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (established the principle that "Article III standing requires a concrete injury even in the context of a statutory violation."). *See* James Hannaway, *Standing on Shaky Ground: How Circuit Courts Reconcile Legal Rights and Injuries in Fact After Spoke v. Robins*, 87 GEO. WASH. L. REV. 706 (2019) (analyzing standing doctrine pre- and post-*Spokeo*).
[96] *TransUnion*, 141 S. Ct. at 2205.
[97] *See* Catherine Cole, *A Standoff: Havens Realty v. Coleman Tester Standing and TransUnion v. Ramirez in the Circuit Courts*, 45 HARVARD J. OF L. & PUB. POL. 1033, 1042 (2022) (explaining how the decisions in *Havens Realty* and *TransUnion* are incompatible with each other).

Accordingly, the Court held that the 1,853 class members whose credit reports were distributed to third party creditors containing OFAC alerts that labeled them as potential terrorists, drug traffickers, or serious criminals, suffered a concrete injury in fact under Article III.[98] The remaining 6,332 class members did not suffer a concrete harm because, although their credit files were maintained by TransUnion and contained misleading OFAC alerts, their credit information was never disseminated to any potential creditors during the relevant time period.[99] In other words, "even though the Fair Credit Reporting Act created a right and that right was infringed, that was not sufficient for standing."[100] Moreover, the Court found their argument about the risk of future harm unpersuasive.[101]

The class members also argued that TransUnion's mailings of their credit files were formatted incorrectly, which deprived them of their right to receive information in the format required by the statute.[102] However, the Court contended that without a showing that the plaintiffs suffered "adverse effects" or other "downstream consequences" from the denial of access to information, a mere alleged "informational injury" is not enough to constitute a concrete harm.[103] Thus, the Court held that none of the 8,185 members other than the named plaintiff Ramirez satisfied the Article III requirements for the disclosure claim and the summary-of-rights claim.[104]

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[98] *TransUnion*, 141 S. Ct. at 2209.
[99] *Id.* at 2210.
[100] Erwin Chemerinsky & Jess H. Choper, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y. UNIV. L. REV. ONLINE 269, 281 (2021).
[101] *TransUnion*, 141 S. Ct. at 2212.
[102] *Id.* at 2213.
[103] *Id.* at 2214. *See* Bradford C. Mank, *Did the Supreme Court in TransUnion v. Ramirez Transform the Article III Standing Injury in Fact Test?: The Circuit Split Over ADA Tester Standing and Broader Theoretical Considerations*, 57 U.C. DAVIS L. REV. 1131, 1157 (2023) (explaining that "[b]y restricting the authority of Congress to establish statutory rights, including informational rights, unless a plaintiff can prove they suffered an actual real world harm, the *TransUnion* decision arguably restricted Article III standing rights more so than the *Spokeo* decision.").
[104] *TransUnion*, 141 S. Ct. at 2214.

Although *TransUnion* did not involve any civil rights testers, it is consequential because it limited standing to sue to enforce a statutory right based on "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[105] Under this inquiry, legal injury alone is insufficient to support standing.[106] It must also be accompanied by a concrete injury analogous to common law harm.[107] Federal courts have taken different approaches towards *TransUnion's* theory of standing, with some using it to deny standing to ADA testers despite their statutory right to ADA complaint accessibility information regarding a hotel's disability accommodations.[108] The lack of consensus has contributed to a major circuit split that has little hope of being resolved without Supreme Court intervention.

C. The Circuit Split

As previously mentioned, federal courts are split on the issue of ADA tester standing, specifically whether such testers, who have no intention to visit the non-compliant hotel, have demonstrated a sufficient injury to satisfy Article III. Deborah Laufer, a disabled advocate, and self-proclaimed ADA tester, is a common thread among the conflict, having filed over 600 lawsuits across the United States, with her most recent lawsuit reaching the Supreme Court.[109] The Second,

[105]*Id.* (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).
[106]*TransUnion*, 141 S. Ct. at 2221 (Thomas, J. dissenting).
[107]*Id.* at 2204 (a concrete injury includes tangible harms such as physical harms or monetary harms, or intangible harms such as reputational harms, disclosure of private information, and intrusion upon seclusion). *See* Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 52 (2022) (highlighting that "limiting Congress to harm that resemble harms at common law constrains congressional response to problems vaster and more complicated than eighteenth and nineteenth-century lawyers could possibly have envisioned.").
[108]Sylvia E. Simson and Michael E. Mirdamadi, *Federal Court Standing in a Post-TransUnion World*, NYS BAR ASS'N (May 30, 2023), https://nysba.org/federal-court-standing-in-a-post-transunion-world/#_ednref27 [https://perma.cc/SS2H-W3DB].
[109]Luterman, *supra* note 50.

Fifth, and Tenth Circuits have held that Laufer lacks standing; the First, Fourth, and Eleventh Circuits have held that she has standing.[110]

The Fifth Circuit held that Laufer failed to show the necessary concrete interest to support standing.[111] The Fifth Circuit based its argument on the fact that Laufer lacked definite plans to travel to Texas and book a room at the defendant's motel, so, in the Court's eyes, the accessibility information did not have any relevance to her, and therefore her inability to obtain that information on the defendant's website did not constitute an injury in fact.[112] In making this argument, the Fifth Circuit attempted to distinguish Laufer from the tester in *Havens Realty*, where "the information had some relevance to [her]."[113] The Tenth Circuit held that Laufer lacked standing on similar grounds, stating that "a violation of a legal entitlement alone is insufficient under *Spokeo* and *TransUnion* to establish that [she] suffered a concrete injury."[114] Thus, even though the Reservation Rule may have provided Laufer with a regulatory right to the information, because she had no interest in using the information to actually book a room at the Inn, she did not suffer an injury in fact.[115]

Harty v. West Point Realty[116] is the controlling decision in the Second Circuit regarding tester standing. The plaintiff, Owen Harty, is an ADA tester who, like Laufer, visits and monitors

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[110]Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 21 (2023) (noting that Laufer "has singlehandedly generated a circuit split.").
[111]Laufer v. Mann Hospitality, L.L.C., 996 F.3d 269, 272 (5th Cir. 2021).
[112]*Id.* at 273.
[113]*Id.* The First Circuit disputed this distinction, stating that "the only relevance the misrepresentation had to the Black tester plaintiff in *Havens Realty* was to help her figure out if the defendant was breaking the law by engaging in racial steering," and since that tester had standing, Laufer should, by that logic, also have standing. *See* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 272 (1st Cir. 2022).
[114]Laufer v. Looper, 22 F.4th 871, 878 (10th Cir. 2022).
[115]*Id.* at 881. The Tenth Circuit also argued that Laufer's alleged injury is distinct from the injury in *Havens Realty*, because the tester in that case was given false information due to her race, whereas Laufer was simply denied information. *Id.* at 879. While the Tenth Circuit's decision left the door to tester standing open narrowly, the First Circuit was unconvinced by this argument, calling it a "distinction without a difference" and noting that "[i]n either case, in order to shine a light on unlawful discrimination, the law conferred on the plaintiff 'a legal right to truthful information' about an accommodation." *See Laufer*, 50 F.4th at 273.
[116]Harty v. West Point Realty, 28 F.4th 435 (2d Cir. 2022).

hotel websites to determine whether they comply with the Reservation Rule.[117] After discovering that West Point Realty, Inc.'s website lacked the necessary accessibility information, he sued.[118] The Second Circuit, relying on *TransUnion*, held that Harty lacked standing because his review of the defendant's website "was done in his capacity as a 'tester' of ADA compliance, not as a prospective traveler seeking a wheelchair accessible hotel in West Point."[119] As such, Harty could not show any downstream consequences beyond the alleged statutory violation necessary to have an Article III injury in fact.[120] Unlike the Fifth and Tenth Circuits, the Second Circuit did not bother to distinguish *Harty* from *Havens Realty*; instead it relegated the seminal case to a single footnote and downplayed its significance.[121] A few months after this decision, the Second Circuit dismissed Laufer's case for the same reasons.[122]

The First Circuit deviated from that of the Second, Fifth, and Tenth Circuits, in holding that Laufer did suffer a concrete harm under Article III.[123] In reaching that conclusion, the First Circuit acknowledged *TransUnion's* rejection of statutory-rights based standing, but decided that *Havens Realty* ultimately governs this case unless and until the Supreme Court declares that *TransUnion* overrules it.[124] The First Circuit maintained that "if the Black tester plaintiff had standing in *Havens Realty* where the statute gave her a right to truthful information, which she was denied, then *Havens Realty* would mean that Laufer, too, has standing because she was denied

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[117] *Id.* at 439
[118] *Id.* at 440.
[119] *Id.* at 443.
[120] *Id.* at 444.
[121] *Id.*
[122] *See* Laufer v. Ganesha Hosp. LLC, No. 21-995, 2022 U.S. App. LEXIS 18437, at *5 (2d Cir. July 5, 2022) (holding that informational harm without any downstream effects does not establish standing).
[123] Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 268 (1st Cir. 2022).
[124] *Id.* at 270. Even if *Havens Realty* were to be overruled, the First Circuit argued that Laufer's feelings of frustration, humiliation, and second-class citizenry from the denial of accessibility information on Acheson's reservation system qualified as adverse effects necessary to give rise to an informational injury under *TransUnion's* heightened injury in fact standard. *Id.* at 274.

information to which she has a legal entitlement."[125] Further, "[j]ust as the Black tester plaintiff's lack of intent to rent an apartment in *Havens Realty* 'd[id] not negate the simple fact of injury,' neither does Laufer's lack of intent to book a room at Acheson's Inn negate her standing."[126] In response to Acheson's suggestion that Laufer's claim constitutes a generalized grievance, the First Circuit stated "Laufer is a person with disabilities – not just any one of the hundreds of millions of Americans with a laptop – and personally suffered the denial of information the law entitles her, as a person with disabilities, to have."[127] The First Circuit also found that Laufer had standing to seek injunctive relief because her likelihood of future injury is sufficiently imminent due to her systematic plans to revisit the websites to check for compliance, as part of her tester duties, where she would inevitably face the same informational harm.[128]

The Fourth Circuit similarly held that Laufer's informational injury accorded her Article III standing to sue the hotelier whether or not she had definite and credible plans to travel and book a hotel room.[129] The Fourth Circuit stated that "[i]t matters not that Laufer is a tester who may have visited Naranda's hotel reservation websites to look for ADA violations . . . without any plan or need to book a hotel room," because nothing in the Reservation Rule or elsewhere in the ADA "expressly requires an intention to book a hotel room to prove a discriminatory failure to provide accessibility information."[130] In addition to *Havens Realty*, the Fourth Circuit, like the First Circuit, cited *Public Citizens v. U.S. Department of Justice*[131] and *Federal Election Commission v.*

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[125]*Id.* at 269.
[126]*Id.* (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982)).
[127]*Laufer*, 50 F.4th at 276.
[128]*Id.* at 277.
[129]Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 162 (4th Cir. 2023).
[130]*Id.*
[131]Public Citizens v. U.S. Dep't of Justice, 491 U.S. 440, 449 (1989) (holding that failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue.").

Akins[132] to support its assertion that Laufer need not show a use for the information being sought to establish an injury in fact.[133] Regarding whether Laufer satisfied the requirement for injunctive relief, the Fourth Circuit agreed with the First Circuit that Laufer's intention to return to Naranda's hotel reservation websites posed a real or immediate threat that she would be wronged again.[134]

Instead of awarding Laufer standing due to an informational injury, the Eleventh Circuit took a different route in holding that her personal feelings of frustration, humiliation, and isolation that stemmed from the hotel's procedural failure demonstrated stigmatic injury standing.[135] A "stigmatic injury" can been defined as a "form of treatment that 'marks' the plaintiff in some way as defective, low, or unworthy of respect."[136] Stigmatic harm has been recognized in multiple decisions dating back to 1984 in *Heckler v. Matthews*,[137] where the Supreme Court declared that, "[d]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious injuries to those persons who are personally denied equal treatment."[138] A few months later, in *Allen v. Wright*,[139] the Court reiterated that for a stigmatic injury to be judicially cognizable the plaintiffs must have been "personally subject to discriminatory treatment."[140] The Eleventh Circuit, going off one of its own prior ADA cases,

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[132]FEC v. Akins, 524 U.S. 11, 21 (1998) (holding that Congress, by statute, could create a right to information and that the denial of such information constitutes an injury in fact permitting standing even where the injury is widely shared in society).
[133]*Laufer*, 60 F.4th at 172 (noting that "although the plaintiffs in *Public Citizens* and *Akins* thereafter asserted uses for the information they sought, those asserted uses were not a factor in the . . . Article III standing analyses.").
[134]*Id.* at 168.
[135]Laufer v. Arpan LLC, 29 F.4th 1268, 1275 (11th Cir. 2022).
[136]Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1569 (2016).
[137]Heckler v. Matthews, 465 U.S. 728, (1984)
[138]*Id.* at 739–40 (internal citations omitted). Here, the Court found that the plaintiff had standing to challenge a federal law that provided greater pension benefits to female government employees than male employees because he was personally injured by the unequal treatment. *Id.* at 740.
[139]*See* Allen v. Wright, 468 U.S. 737 (1984).
[140]*Id.* at 757 n.22 (citing Matthews, 465 U.S. at 739–40). The Court found that the plaintiffs abstract harm from the IRS unconstitutionally granting tax exemptions to racially discriminatory private schools was incapable of

Sierra v. City of Hallandale Beach,[141] believed this theory of standing was consistent with modern standing jurisprudence, stating "[e]ven if it's clear after *TransUnion* that a violation of an antidiscrimination law is not alone sufficient to constitute a concrete injury, we think that the emotional injury that results from illegal discrimination is."[142] However, a defect in this decision is that it has nothing to do with Laufer's status as a tester, leaving the pure information injury tester standing pathway under *Havens Realty* in a state of limbo.[143]

The aforementioned cases demonstrate the seemingly irreconcilable tension between *Havens Realty* and *TransUnion*. The Circuits that denied Laufer standing were forced to invent legally weak distinctions with *Havens Realty* to justify their holdings. On the other hand, the Circuits that granted Laufer standing did so under the belief that *Havens Realty* took priority over *TransUnion*, or by sidestepping *Havens Realty* all together. So long as both remain good law, this confusion will persist, and testers will be encouraged to forum shop.

D. *Acheson Hotels, LLC v. Laufer*: the Circuit Split Persists

The Supreme Court granted review of the First Circuit's case in March of 2023 to provide some much-needed guidance.[144] However, in July of 2023, Laufer's legal team petitioned the Court to dismiss the case as moot because of disciplinary action against her former lawyer, Tristan Gillespie.[145] The Court declined to dismiss the case, but questions of mootness persisted at the October 2023 oral argument, with a large portion of the discussion focused on whether the Court

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conferring standing because all members of the racial group allegedly discriminated against could claim this type of injury regardless of the where the school was located. *Allen*, 468 U.S. at 756.

[141]Sierra v. City of Hallandale Beach, 996 F.3d 1110 (11th Cir. 2021).

[142]*Laufer*, 29 F.4th at 1274.

[143]Cole, *supra* note 97, at 1041.

[144] Amy Howe, *Court takes up civil rights "tester" case*, SCOTUSBLOG (Mar. 27, 2023, 10:52 AM), https://www.scotusblog.com/2023/03/court-takes-up-civil-rights-tester-case/ [https://perma.cc/6B74-NG8W].

[145]Suggestion of Mootness at 4, Acheson Hotels, LLC v. Laufer, No. 22-429 (2023). Gillespie received a six month suspension for, among other infractions, allegedly exaggerating the numbers of hours he worked on tester complaints, allowing him to pocket thousands of dollars in legal fees that he did not deserve. *See in re Gillespie*, 2023 U.S. Dist. LEXIS 136952, D. Md. (June 30, 2023).

should decide the tester standing issue at all.[146] For instance, Justice Kagan said it felt "unjudicial" to consider a case that was "dead as a doornail."[147] In the latter half of the argument, the Court battled with the novel problem of translating traditional in-person discrimination to the digital realm, and the importance of the tester's intent to travel or make a reservation in determining an injury sufficient to establish standing.[148]

Two months later, to the dismay of hotel website operators and relief of disability advocates, the Supreme Court unanimously held that Laufer's case against Acheson was moot.[149] While the circuit split persists, Justice Thomas's concurring opinion hinted to what the Supreme Court may have decided had they chosen to address the issue of Laufer's standing.[150] He concluded that "Laufer lacks standing because, her claim does not assert a violation of a right under the ADA, much less a violation of her rights."[151] In coming to that decision, Justice Thomas did not attempt to overrule *Havens Realty*; instead he claimed that *Havens Realty* has no bearing on Laufer's standing as a tester because, unlike the Fair Housing Act which created a legal right to truthful information, the ADA provides no such right to information.[152] Even if the Reservation Rule did create an entitlement to accessibility information, Justice Thomas, consistent with the Second, Fifth, and Tenth Circuits, opined that Laufer's rights were not violated because she did not intend to visit the hotel, so the information was essentially useless to her.[153]

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[146]Transcript of Oral Argument at 4–23, Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18 (2023) (No. 22-429).
[147]*Id*. at 18.
[148]*Id.* at 85. Justice Sotomayor articulated this issue when she asked whether there is a meaningful distinction between the work of civil rights activists in the 1960s who conducted sit-ins at lunch counters to see whether they would be served with no intent to actually order food or eat and Laufer's actions of visiting hotel websites to see if it had the required accessibility information with no intent to book a reservation. *Id.* at 27.
[149]Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 22 (2023).
[150]*Id.* at 22 (Thomas, J. concurring).
[151]*Id.* at 25.
[152]*Id.* at 25–26.
[153]*Id.* at 26. This argument is flawed because it ignores the fact that the Black tester in *Havens Realty* also did not have any intent to use the information beyond bringing a lawsuit.

Justice Thomas's stance, and his underlying disdain toward private citizens who attempt to enforce the ADA is unsurprising given his discouraging track record regarding disability rights.[154] For instance, in the revolutionary *Olmstead v. L.C.*[155] ruling which found that the unjustified institutionalization of persons with mental disabilities is a form of unlawful discrimination under Title II of the ADA, he wrote the dissenting opinion [156] In addition to Justice Thomas, Justice Brett Kavanaugh, Justice Neil Gorsuch, and Justice Amy Coney Barrett – all three of President Trump's nominees – have demonstrated hostility to disability rights throughout their careers and on the bench.[157] While significant attention has been paid to Trump's Supreme Court appointments, Barbara Hoffman points out in her article "Disabling Disability Rights," that "[Trump's] appointment of more than one-quarter of federal trial and appellate judges," many of whom are pro-employer, pro-business, and anti-regulation, "may be similarly catastrophic to the millions of Americans with disabilities." [158]

Due to the hostile trend toward disability justice at the federal level, the work of testers like Laufer is more important than ever to enforce disability law and push back against the slow but steady erosion of the ADA. However, based on Justice Thomas's concurring opinion and the overall conservative climate of the judiciary, the next time the issue of ADA tester standing reaches the Supreme Court, it is unlikely to find that an ADA tester plaintiff has standing without a showing

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[154]*Id.* at 27.
[155]Olmstead v. L.C., 527 U.S. 581 (1999).
[156]*Id.* at 596. *See id.* at 621 (Thomas, J. dissenting) (arguing that the definition of "discrimination" should not be expanded to encompass the institutional isolation of persons with disabilities).
[157]*See* Eric Garcia, *How this Supreme Court is setting back disability rights – without even trying*, MSNBC (July 5, 2022, 6:00 AM), https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-s-hostility-disability-rights-discouraging-n1296795 [https://perma.cc/U7DY-YJJP].
[158]*See* Barbara Hoffman, *Disabling Disability Rights*, 15 NE. UNIV. L. REV. 241, 251 (2023). Hoffman focuses on five trends among decisions that have undermined the rights of disabled individuals: (1) using selective narratives to justify abandoning precedents; (2) failing to defer to federal civil rights regulations; (3) elevating religious liberty over disability rights; (4) relying on narrow forms of textualism to weaken disability rights; and (5) limiting damages for disability-based discrimination. *Id.* at 255–56.

of an intent to travel, despite the First and Fourth Circuits compelling arguments in favor of standing based solely on the violation of their statutory right to information.[159] Preserving Congress's authority to confer informational standing in this context would require the Court to interpret *TransUnion's* holding very narrowly, and not focus on its extended analysis of what is concrete harm.[160] It is improbable that the Court take this approach due to its well-known preference for public over private enforcement and concern over the separation of powers.[161]

Although the informational injury pathway to tester standing is doubtful, the Court should at the very least acknowledge that a tester has standing based on stigmatic harm resulting from unequal treatment and discrimination. The absence of accessibility information on hotel websites causes an injury to a disabled person's dignity because it "underscores that you are excluded from a hotel's potential clientele, you are not someone who uses or could use their services, and [the hotelier] did not even considered that you might be."[162] Laufer and other ADA testers are personally denied equal treatment when they encounter an online reservation system that omits accessibility-related information, and therefore the resulting emotional distress they experience can be considered a concrete stigmatic injury.[163] It does not matter that the information has no practical value to testers at the time because the feelings of humiliation and frustration that stem from the discriminatory conditions are just as palpable.[164] This theory of standing, while not without its flaws, is compatible with *TransUnion* because, as discerned by the Eleventh Circuit, an

[159] *See supra* notes 123–34 and accompany text.
[160] Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 371 (2022) ("The central holding is exceedingly narrow: Congress cannot authorize people to sue to collect damages against a credit company on the sole ground that it has produced, and is holding, a credit report that contains inaccurate information about them. Viewed most sympathetically, the Court's holding is that Congress cannot conjure an injury out of nothing.").
[161] *See* Beske *supra* note 105, at 43–45.
[162] Brief of Disability Antidiscrimination Law Scholars as *Amici Curiae* in Support of Respondent at 23, Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18 (2023) (No. 22-429).
[163] *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1274 (11th Cir. 2022).
[164] *See id.* at 1275.

"emotional injury caused by discrimination is a concrete harm that 'exist[s] in the real world.'"[165] Notably, the Court could endorse this theory of standing without overturning *Havens Realty*,[166] which none of the Justices have indicated they want to do.[167]

III. Conclusion

The issue of whether testers without intent to travel have standing to sue hotels for failing to disclose accessibility information on their websites is still very much alive.[168] This Note argued that ADA testers should have standing under an informational injury and/or stigmatic injury rationale. However, given the trend of recent Supreme Court cases like *Spokeo* and *TransUnion*, ADA tester standing, and the practice of civil rights testing as a whole, is endangered.[169] While no one can say for sure what direction the Court will go with tester standing, few things are certain. First, denying standing except where the tester visited the website with intent to arrange for future travel would severely limit the ability of testers to file lawsuits against hotels in blatant violation of the Reservation Rule.[170] Second, this would have the effect of undermining congressional intent to deter and remedy discrimination through private individuals.[171] Most importantly, curtailing tester standing will result in less enforcement of the ADA and greater inaccessibility in travel and other areas of life.[172] Thus, testers like Ms. Laufer should be protected not prohibited.

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[165]*Id.* at 1274 (quoting TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021)).
[166]Cole, *supra* note 97, at 1049.
[167]Ian Millhiser, *The Supreme Court argues about how to make a terrible civil rights case go away*, VOX (Oct. 4, 2023, 2:00 PM), https://www.vox.com/scotus/2023/10/4/23903182/supreme-court-testers-acheson-hotels-deborah-laufer-disability-ada [https://perma.cc/K27S-DRC7].
[168]*See* David Raizman & Zachary V. Zagger, *Supreme Court Says Case Over ADA 'Tester" Standing Is Moot, But Issue Is Still Alive*, OGLETREE DEAKINS (Dec. 5, 2023).
[169]*See* Sutherland, *supra* note 23
[170]Mark Sherman, *LISTEN: Supreme Court hears case that could make it harder to sue hotels over disability access*, PBS (Oct. 4, 2023, 9:41 AM), https://www.pbs.org/newshour/nation/listen-live-supreme-court-hears-case-that-could-make-it-harder-to-sue-hotels-over-disability-access [https://perma.cc/94ZK-SAE5].
[171]Johnson, *supra* note 22, at 703.
[172]Shruti Rajkumar, *Supreme Court Throws Out Case That Could Have Altered Enforcement of Disability Law*, HUFFPOST (Dec. 5, 2023, 10:40 PM), https://www.huffpost.com/entry/supreme-court-dismisses-hotel-website-disability-case_n_656fc54de4b0f96b99d8f9a3 [https://perma.cc/6YBQ-WYJ8].