No. _____

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

PETITION FOR A WRIT OF CERTIORARI

SALLY A. MORRIS
Six City Center, Suite 300
Portland, ME 04101
(207) 558-6161 ext. 1001
smorris@morrisemploymentlaw.com

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

QUESTION PRESENTED

Does a self-appointed Americans with Disabilities Act "tester" have Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation?

CORPORATE DISCLOSURE STATEMENT

Petitioner, Acheson Hotels, LLC, has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in Petitioner.

STATEMENT OF RELATED CASES

Laufer v. Acheson Hotels, LLC, No. 21-1410 (1st Cir.)

Laufer v. Acheson Hotels, LLC, No. 20-cv-00344-GZA (D. Me.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Acheson Hotels, LLC petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the First Circuit (Pet. App. 1a-35a) is reported at 50 F.4th 259. The decision of the district court (Pet. App. 36a-51a) is reported at 2021 WL 1993555.

JURISDICTION

The judgment of the First Circuit was entered on October 5, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 12182(b)(1)(A)(ii) provides in relevant part:

> It shall be discriminatory to afford an individual … on the basis of a disability or disabilities of such individual … with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

42 U.S.C. § 12182(b)(2)(A)(ii) provides in relevant part:

> [D]iscrimination includes … a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services,

> facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

28 C.F.R. § 36.302(e)(1)(ii) provides in relevant part:

> A public accommodation that owns, leases (or leases to), or operates a place of lodging shall, with respect to reservations made by any means, including by telephone, in-person, or through a third party - … [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.

INTRODUCTION

This case presents an ideal vehicle to resolve an entrenched circuit conflict on a question of great jurisprudential and practical importance: whether a self-appointed "tester" has Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information, even if she lacks any intention of visiting that place of public accommodation.

The Americans with Disabilities Act ("ADA") requires places of public accommodation to make "reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges,

advantages, or accommodations to individuals with disabilities." 42 U.S.C. § 12182(b)(2)(A)(ii). The Attorney General has promulgated an implementing regulation requiring hotel owners and operators to "[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." 28 C.F.R. § 36.302(e)(1)(ii).

The Attorney General has authority to investigate alleged violations, undertake compliance reviews, and file suit to enforce the ADA and its implementing regulations. *See* 42 U.S.C. § 12188(b); 28 C.F.R. §§ 36.502, 36.503. But Respondent Deborah Laufer does not think the Attorney General is aggressive enough in enforcing those regulations, so she has decided to take matters into her own hands.

Laufer has filed over 600 federal lawsuits against hotel owners and operators, alleging that their websites are insufficiently clear about whether the hotels are accessible to persons with disabilities. Laufer does not intend to stay at any of these hotels. Instead, she is a self-appointed ADA "tester." As she put it in her declaration below: "As a tester, I visit hotel online reservation services to ascertain whether they are in compliance with the Americans With Disabilities Act. In the event that they are not, I request that a law suit be filed to bring the website into compliance with the ADA so that I and other disabled persons can use it." D. Ct. Dkt. #17, ¶ 3.

Invariably, Laufer's lawsuits seek injunctions

directing the defendants to comply with the law, as well as awards of attorney's fees. Laufer's lawsuits typically target small hotels and bed-and-breakfasts. For these small businesses, the cost of litigating an ADA case—plus a potential fee award—could push them into bankruptcy. So most of Laufer's defendants are forced to settle.

But sometimes they fight. Several of Laufer's suits, and similar suits by other "testers," have reached the courts of appeals—yielding a sharp circuit split over whether Article III permits ADA "testers" to enforce federal law at places of public accommodations they never intend to visit.

This case originated as one of seven lawsuits that Laufer filed in the District of Maine on September 24, 2020. Laufer sued petitioner Acheson Hotels, LLC, alleging that the website of the Coast Village Inn and Cottages contained insufficient information on disability accommodations. A five-minute telephone call to Coast Village could have answered all of Laufer's accessibility questions. But Laufer did not actually want or need this information—the purpose of visiting the website was to lay the groundwork for a lawsuit.

The district court dismissed the suit for lack of Article III standing. It reached the common-sense conclusion that Laufer was not injured by the absence of information on the website of a hotel that she never plans to visit. Pet. App. 50a-51a.

But the First Circuit reversed. It concluded that the denial of accessibility information was an actionable Article III injury—and "[t]hat Laufer had no intent to

use the information for anything but a lawsuit doesn't change things." Pet. App. 19a. The court further held that "Laufer's feelings of frustration, humiliation, and second-class citizenry" are "'downstream consequences' and 'adverse effects' of the informational injury she experienced." Pet. App. 26a.

In reaching that conclusion, the First Circuit expressly noted that it was taking sides in a circuit split. Pet. App. 2a & n.1. It observed that three courts of appeals had rejected "tester" standing on identical facts, *see Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443-44 (2d Cir. 2022); *Laufer v. Looper*, 22 F.4th 871, 879-81 (10th Cir. 2022); *Laufer v. Mann Hosp. LLC*, 996 F.3d 269, 273 (5th Cir. 2021), while the Eleventh Circuit held that Laufer's allegations, if true, *would* establish standing. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1273-75 (11th Cir. 2022).

This case meets all the Court's criteria for certiorari. First, it presents the clearest circuit split the Court will ever see. Courts have divided on whether *the exact same litigant* has standing to bring virtually identical complaints.

Second, this case has immense practical importance. Laufer is one of numerous "testers" who have collectively brought thousands of lawsuits under the ADA. A cottage industry has arisen in which uninjured plaintiffs lob ADA lawsuits of questionable merit, while using the threat of attorney's fees to extract settlement payments. These lawsuits have burdened small businesses, clogged the judicial system, and undermined the Executive Branch's exclusive authority to enforce federal law.

Third, this case presents an issue only this Court can resolve. This case is difficult for lower courts because they must reconcile older Supreme Court case law taking a more lenient view of standing, *see Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), with this Court's more recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Indeed, the First Circuit noted that its ruling was in significant tension with *TransUnion*, but nonetheless deemed *Havens Realty* to be the on-point binding precedent. As Judge Jordan similarly concluded, "*Havens Realty* may be inconsistent (in whole or in part) with current standing jurisprudence," but "[f]or now, though, it remains binding precedent that governs here." *Arpan*, 29 F.4th at 1276 (Jordan, J., concurring). By contrast, the Second, Fifth, and Tenth Circuits have held that *TransUnion*, not *Havens Realty*, is the more pertinent precedent. This Court's review is warranted because only this Court can provide guidance on what its own precedents mean. As Judge Newsom put it: "I suspect that the law concerning 'stigmatic injury' will remain deeply unsettled until the Supreme Court steps in to provide additional guidance." *Id.* at 1287 (Newsom, J., concurring).

Finally, the Court should grant certiorari because the First Circuit's decision is wrong. Laufer's abstract desire to ensure compliance with federal law does not give her Article III standing. To the extent *Havens Realty* survives *TransUnion*, it is readily distinguishable. In *Havens Realty*, the plaintiff was personally denied information on the basis of her race, and this Court found standing based on its view that

the Fair Housing Act expressly guaranteed a personal right to accurate information. Here, no one denied Laufer any information for any discriminatory reason; Laufer simply surfed the Internet and found a publicly available website which, she felt, contained insufficient information. Finding standing on these facts would be an extreme overreading of *Havens Realty*.

The Court should grant certiorari and reverse the First Circuit.

STATEMENT OF THE CASE

I. Statutory Background

The Americans with Disabilities Act (ADA) states that "[i]t shall be discriminatory to afford an individual … on the basis of a disability … with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals. 42 U.S.C. § 12182(b)(1)(A)(ii). The ADA further provides that "discrimination includes" "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations." *Id.* § 12182(b)(2)(A)(ii).

The Attorney General has statutory authority to issue regulations "to carry out the provisions" of the ADA. *Id.* § 12186(b). Exercising that authority, the Attorney General has promulgated a regulation

requiring hotel owners and operators to, "with respect to reservations made by any means, including by telephone, in-person, or through a third party - … [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." 28 C.F.R. § 36.302(e)(1)(ii) (the "Reservations Rule").

The ADA includes a private cause of action, 42 U.S.C. § 12188(a)(1). The Attorney General's regulations similarly permit an action for injunctive relief by "[a]ny person who is being subjected to discrimination on the basis of disability" in violation of the ADA or its implementing regulations. 28 C.F.R. § 36.501(a). Prevailing parties under the ADA may obtain attorney's fees. 42 U.S.C. § 12205; 28 C.F.R. § 36.505.

II. Proceedings below.

Respondent Deborah Laufer is a Florida resident who uses a wheelchair and qualifies as disabled under the ADA. Pet. App. 2a-3a. She is also "a self-proclaimed ADA 'tester.'" Pet. App. 6a. She searches the Internet for websites of hotels that do not, in her view, provide sufficient information as to whether rooms are ADA accessible. When she finds such a website, she sues the hotel, seeking an injunction and attorney's fees. Since 2018, Laufer has filed over 600 such lawsuits.

Laufer's targets generally are small businesses—

either independent hotels or franchisees. Given COVID's devastating effects on the tourism industry, many of these businesses lack the resources to proceed and face a potential award of attorney's fees. Hence, Laufer's suits often quickly settle.

In the cases that have proceeded, judges have expressed dismay over the weakness of Laufer's allegations. As one court put it, "Plaintiff's approach to this ADA litigation appears to prioritize systematic, prolific filings over quality and depth of legal argument, churning out hundreds of near-identical lawsuits using cookie-cutter language irrespective of where the particular hotels are located, or any other party or jurisdiction-specific details." *Laufer v. Naranda Hotels, LLC*, No. CV-20-2136, 2020 WL 7384726, at *9 (D. Md. Dec. 16, 2020). That court opined that "it does not serve the interests of justice to continue spending significant Court resources on these cases if Plaintiff lacks standing, lacks credibility, and is not operating in good faith." *Id.* Other courts have remarked on the serial misconduct of Laufer's attorneys. *See, e.g.*, *Laufer v. Alamac Inc.*, No. 20-cv-02206, 2021 WL 1966574, at *2 n.2 (D.D.C. May 17, 2021) ("Plaintiff's counsel has repeatedly ignored the Court's orders, the Local Civil Rules, and the Federal Rules of Civil Procedure."), *aff'd*, No. 21-7056, 2021 WL 4765435 (D.C. Cir. Sept. 10, 2021); *Laufer v. Jaral Riverhead Corp.*, No. 20-CV-02680, 2021 WL 9182913, at *6 (E.D.N.Y. July 27, 2021) (noting that Laufer's counsel submitted untimely filing and "future failures to comply with the Court's directives may lead to the rejection of Plaintiff's filings and/or other potential sanctions.").

On September 24, 2020, Laufer's litigation campaign reached Maine. Laufer filed seven ADA suits in the District of Maine, one of which was against Petitioner Acheson Hotels, LLC, the owner and operator of the Coast Village Inn and Cottages in Wells, Maine.[1] Pet. App. 39a. Laufer alleged that she visited the online reservation for Coast Village, but it failed to provide sufficient information as to whether Coast Village was ADA-accessible. Pet. App. 39a-40a. She made similar allegations regarding Coast Village's listing on third party booking sites like www.expedia.com. Pet. App. 41a n.3. Based on these allegations, she alleged that Acheson Hotels violated the Reservations Rule. Pet. App. 42a. She did not allege that Coast Village had any physical barriers that violated the ADA. Pet. App. 42a.

If Laufer had actually been interested in whether Coast Village is ADA-accessible, she could have placed a five minute phone call or sent an email. She would have learned that Coast Village lacks the capabilities to

---

[1] While the case was pending on appeal, Acheson Hotels, LLC transferred its interest in Coast Village to a different legal entity, 876 Post LLC. Under the Federal Rules, Acheson Hotels, LLC is the appropriate party to prosecute this petition for certiorari. *See* Fed. R. Civ. P. 25(c) (if an interest is transferred during litigation, action continues against original party absent contrary court order); 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1958, Westlaw (3d ed. database updated Apr. 2022) ("The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred."). If Laufer obtains an injunction, it would bind the successor entity. *See, e.g.*, *Nat. Res. Def. Council, Inc. v. Texaco Refin. & Mktg., Inc.*, 2 F.3d 493, 506 (3d Cir. 1993).

provide ADA compliant lodging,[2] but that all guests have direct entrance into their cottages and some rooms have easy entry showers. Pet. App. 40a n.2. But Laufer had no intention of visiting Coast Village and therefore had no reason to care whether Coast Village was ADA-accessible. Her sole purpose of visiting the website was to sue.

Acheson Hotels moved to dismiss for lack of standing. In response, Laufer submitted a declaration averring that she is an ADA "tester." D. Ct. Dkt. #17, ¶ 3. She explained: "As a tester, I visit hotel online reservation services to ascertain whether they are in compliance with the Americans With Disabilities Act. In the event that they are not, I request that a law suit be filed to bring the website into compliance with the ADA so that I and other disabled persons can use it." *Id.* She stated that she hoped to travel to Maine in the future, although she did express any intention to visit Coast Village. *Id.* ¶ 5. She represented that because Coast Village's online reservation system allegedly "failed to comply with the requirements set forth in 28 C.F.R. Section 36.302(e)," she "suffered humiliation and frustration at being treated like a second class citizen, being denied equal access and benefits to the goods, facilities, accommodations and services." *Id.* ¶¶ 6-7.

The district court dismissed "due to Plaintiff's lack of any plausible injury that is concrete and imminent."

---

[2] This does not mean that Coast Village violates the ADA. The ADA requires removal of architectural barriers only "where such removal is readily achievable." 42 U.S.C. § 12182(b)(2)(A)(iv).

Pet. App. 42a. The court acknowledged that this Court had "recognized informational injuries as a basis for standing previously," but concluded that "finding standing based solely on Plaintiff's status as an e-tester who sustained an informational injury while generally conducting online research of lodging options would require an expansion" of this Court's holdings. Pet. App. 43a-44a. As the court explained, "Plaintiff lacked any intention to actually access Defendant's place of public accommodation when she visited the [online reservation system]." Pet. App. 46a. The court also observed that Coast Village's website had later been edited to clarify that there was no ADA-compliant lodging, and that Laufer "cannot claim a concrete informational injury based on the failure of an [online reservation system] to allow her to book an accessible room that apparently does not exist." Pet. App. 48a.

The court further concluded that Laufer faced no imminent injury that would justify injunctive relief. It declined to find that Laufer "is imminently about to embark on a trip from Florida to Maine." Pet. App. 49a. Taking "judicial notice of Laufer's many similar cases filed in courts around the country," the court found it "implausible that Laufer's wanderlust will translate into an imminent need to book accommodations in Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Maine, Massachusetts, Maryland, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, and Wisconsin." Pet. App. 49a.

On appeal, Laufer disclaimed any intent to travel to Maine. Pet. App. 11a n.3. But she nonetheless insisted

that she had standing to sue Acheson Hotels. The First Circuit agreed she had standing, and reversed the district court's dismissal.

The First Circuit framed the question as follows: "In the age of websites, that means a disabled person can comb the web looking for non-compliant websites, even if she has no plans whatsoever to actually book a room at the hotel. Thus, the information could be viewed as irrelevant to her -- except to whether the website is complying with the law. Has she suffered a concrete and particularized injury in fact to have standing to sue in federal court?" Pet. App. 2a. The court noted that the "Article III standing question" had "divided the circuit courts," with the Eleventh Circuit finding standing, and the Second, Fifth, and Tenth Circuits finding no standing in published decisions. Pet. App. 2a & n.1.

The court began by rejecting Acheson Hotels' argument that, on the merits, the Reservations Rule did not require disability accessibility information to be on Coast Village's website. Pet. App. 9a. In the court's view, the "plaintiff's ultimate recovery" was "of no moment" for purposes of determining standing. Pet. App. 9a-10a.

Next, the First Circuit held it was bound by *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), to find standing. In *Havens Realty*, a White plaintiff was told there were vacancies in an apartment complex, while a Black plaintiff was told there were no vacancies. The Black plaintiff brought suit under a provision of the Fair Housing Act barring race-based misrepresentations about the availability of housing.

Id. at 373. This Court held that the Black plaintiff had standing to bring a Fair Housing Act claim, even though she had no intention of renting an apartment. *Id.* at 373-74. It explained that a "tester who has been the object of a misrepresentation" had standing to enforce the prohibition on "discriminatory representations." *Id.* In the First Circuit's view, *Havens Realty* was "right on the nose for Laufer's case": just as the *Havens Realty* plaintiff could sue despite her lack of interest in renting the apartment, Laufer could sue despite her lack of interest in going to the hotel. Pet. App. 14a-15a. The First Circuit relied on other cases in which "informational injury" has been deemed an injury sufficient to confer standing. Pet. App. 15a-16a.

The Court rejected Acheson Hotels' argument that *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), changed the analysis. *TransUnion* stated that when there were "no downstream consequences from failing to receive the required information," an "asserted informational injury that causes no adverse effects cannot satisfy Article III." *Id.* at 2214 (internal quotation marks omitted). No matter, said the First Circuit—*Havens Realty* had not been formally overruled, so the court felt bound to follow it even if it was "in tension with newer" case law. Pet. App. 18a-19a.

The First Circuit rejected all of Acheson Hotels' efforts to distinguish *Havens Realty*. Acheson Hotels argued that the *Havens Realty* plaintiff had encountered personal discrimination; that the representations in *Havens Realty* had some relevance

to the plaintiff; and that, unlike in *Havens Realty*, Laufer was not prevented from renting a room. Pet. App. 20a-22a. The First Circuit held that none of these distinctions mattered: *Havens Realty* authorized standing based on "informational injury," full stop. *Id.*

The court then explained that it did not find its "sibling circuits' explanations of why Laufer doesn't have standing … persuasive." Pet. App. 22a. The court walked through out-of-circuit cases which had held that Laufer or similarly situated "testers" lacked standing to sue over the websites of hotels they did not intend to visit. Pet. App. 22a-24a. The court stated: "We understand that our sibling circuits thought *Havens Realty* doesn't decide this case. But we respectfully disagree." Pet. App. 24a.

The court further held that Laufer had suffered a concrete injury in the form of alleged "'frustration and humiliation' when Acheson's reservation portals didn't give her adequate information about whether she could take advantage of the accommodations." Pet. App. 26a. The court noted the Eleventh Circuit's conclusion that such harm was "sufficient stigmatic injury to give rise to Article III standing." *Id.* The court did not "decide that exact issue here," instead concluding that "Laufer's feelings of frustration, humiliation, and second-class citizenry are indeed 'downstream consequences' and 'adverse effects' of the informational injury she experienced." *Id.*

The court then held that Laufer's harm was sufficiently particularized under Article III. In the court's view, the injury was particularized because Laufer, personally, visited the website and failed to

receive the necessary information. Pet. App. 27a-29a. The court held that Laufer was not complaining of a "generalized grievance" because she "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." Pet. App. 28a-29a.

The panel majority[3] then held that Laufer had standing to seek an injunction because she sufficiently alleged imminent harm. Pet. App. 29a-30a. In the court's view, because Laufer had allegedly "schedule[d] herself to review the website again," she alleged an imminent injury. Pet. App. 31a. The court rejected Acheson Hotels' argument that the case was moot because the website had been updated to include ADA compliance information, finding that third party websites like Hotels.com had not made those updates. Pet. App. 32a-34a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE SQUARELY DIVIDED.

The Court should grant certiorari because there is a circuit split on the question presented. In the decision below, the First Circuit found that Laufer has standing. The Eleventh Circuit has found that, if Laufer can

---

[3] One panel member, Judge Howard, was "doubtful" that the complaint sufficiently alleged standing to pursue injunctive relief. Pet. App. 32a n.8.

prove her allegations of emotional injury, she has standing. By contrast, the Second, Fifth, and Tenth Circuits have held that Laufer and similarly situated "testers" lack standing. Moreover, in the related context of visually impaired "testers" who search for websites that are not ADA-compliant, the Fourth, Sixth, and Seventh Circuits have rejected claims of standing. This unusually sharp and wide-ranging split calls for this Court's intervention.

A. The First and Eleventh Circuits have found standing—but on different theories.

As explained above, the **First Circuit** held that Laufer had standing because of the alleged "informational injury" she sustained from the absence of accessibility information on Coast Village's website.

The **Eleventh Circuit** has also found that Laufer's allegations, if true, would establish standing, but it relied on a different theory from the First Circuit. In *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022), the court reversed the dismissal of Laufer's suit concerning the online reservation system of the America's Best Value Inn in Marianna, Georgia. The court concluded that it was bound by precedent to find that "Laufer ha[d] alleged a concrete intangible injury." *Id.* at 1273. It acknowledged that "Laufer's alleged injury—her inability to access certain information on a hotel's website and her resulting emotional disquiet—bears no 'close relationship' to any traditional common-law cause of action." *Id.* at 1272. Yet, in the court's view, circuit precedent constrained it to hold that "the emotional injury that results from illegal

discrimination" is a "concrete stigmatic injury." *Id.* at 1274. The court added, however, that while "Laufer's allegations of frustration and humiliation are *facially* sufficient to demonstrate stigmatic-injury standing," she must still show, "as a *factual* matter," that "she suffered the requisite frustration and humiliation as a result of viewing the Value Inn's websites." *Id.* at 1275 (emphases in original).

This ruling diverges from the First Circuit's ruling, both in its doctrinal basis and in its practical impact. Doctrinally, the Eleventh Circuit held that Laufer's alleged *emotional* injury gave rise to standing—parting ways from the First Circuit's decision, which focused on the *informational* injury. Practically, the Eleventh Circuit's decision requires the plaintiff to prove that she in fact sustained the alleged emotional injury—a more difficult burden than in the First Circuit, where the plaintiff must simply show they were deprived of their purported right to accessibility information.

All three panel members filed concurring opinions. Judge Ed Carnes wrote separately to emphasize that the district court has a duty to make factual findings as to whether Laufer in fact suffered the alleged emotional injuries. He observed that "a district court is not bound to accept as true a party or other witness' testimony even if it is unrefuted." 29 F.4th at 1298 (Carnes, J., concurring). "Were it otherwise, a plaintiff in this kind of case could always establish injury by testifying that she suffered in ways that only she could possibly know or have witnessed. The injury *in fact* requirement of standing is not that much of a pushover." *Id.* at 1299.

By contrast, Judge Jordan's concurrence endorsed the reasoning that the First Circuit adopted below—that Laufer's purported "informational injury" gave rise to standing under *Havens Realty*. *Id.* at 1276 (Jordan, J., concurring). Judge Jordan acknowledged that "[t]here are times when newer Supreme Court cases, because of their reasoning and language, make older cases look as though they are on the brink of extinction," and stated that "*Havens Realty* may be inconsistent (in whole or in part) with current standing jurisprudence." *Id.* at 1275-76. Still, in Judge Jordan's view, *Havens Realty* "remains binding precedent [which] governs here." *Id.* at 1276.

Judge Jordan conducted a close analysis of *Havens Realty* and explained why, in his view, it required finding standing. *Id.* at 1277-82. He then explained why *Havens Realty* "may be inconsistent with today's Article III standing doctrine." *Id.* at 1283. "*Havens Realty* rested in part on the notion that injury in fact can exist simply by virtue of the violation of a statutory right." *Id.* Yet in both *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *TransUnion*, "the violation of a statutory right does not automatically establish a cognizable injury under Article III." 29 F.4th at 1283 (Jordan, J., concurring)

Judge Newsom's lengthy concurrence similarly expressed difficulty fitting this Court's standing cases together. He had "no idea" how "stigmatic injuries resulting from discrimination in violation of federal statutes" fit into this Court's standing framework. *Id.* at 1286 (Newsom, J., concurring). Judge Newsom also expressed confusion as to "what exactly counts as a

concrete stigmatic injury." *Id.* Judge Newsom "suspect[ed] that the law concerning 'stigmatic injury' will remain deeply unsettled until the Supreme Court steps in to provide additional guidance." *Id.* at 1287. Judge Newsom also stated that he found this Court's Article III standing doctrine "puzzling" and suggested that Laufer's litigation program may run afoul of Article II. *Id.* at 1287-97.

B. The Second, Fifth, and Tenth Circuits have rejected standing.

The First Circuit's decision conflicts with published decisions from three other circuits.

In *Laufer v. Mann Hospitality, LLC*, 996 F.3d 269 (5th Cir. 2021), the **Fifth Circuit** held that Laufer lacked standing to pursue her ADA claim concerning the online reservation system of the Sunset Inn in Caldwell, Texas. The court explained that Laufer "visited the [online reservation system] to see if the motel complied with the law, and nothing more. Such allegations do not show enough of a concrete interest in Mann's accommodations to confer standing." *Id.* at 272. The court rejected Laufer's allegation that she suffered "informational injury," holding that she did not adequately allege "that the information had some relevant to *her*." *Id.* at 273 (quotation marks omitted). The court distinguished *Havens Realty* on the ground that the false information there had "'some relevance' to the tester," whereas the missing information on the hotel's website had no relevance to Laufer. *Id.*

In *Laufer v. Looper*, 22 F.4th 871 (10th Cir. 2022), the **Tenth Circuit** concluded that Laufer lacked

standing to pursue her ADA claim concerning the online reservation system of the Elk Run Inn in Craig, Colorado. The Tenth Circuit reasoned that "she has no concrete plans to visit Craig, Colorado, or to book a room at the Elk Run Inn," she "has not alleged any concrete harm resulting from the Loopers' alleged violation of the [Online Reservation System] Regulation." *Id.* at 878. The court rejected Laufer's argument that her legal right to accurate information was infringed, explaining that the "violation of a legal entitlement alone is insufficient … to establish that Ms. Laufer suffered a concrete injury." *Id.* The court distinguished *Havens Realty* by explaining that the plaintiff there was "given false information because of her race," whereas "[a]ll individuals, whether or not disabled, had access to the same information" on Elk Run's website. *Id.* at 879. The court further rejected Laufer's "informational harm theory of injury in fact," explaining that, unlike in cases recognizing that theory, she failed to show that the information would be of any use to her. *Id.* at 880.

In *Harty v. West Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 2022), the **Second Circuit** held that a different ADA "tester," Owen Harty, lacked standing to bring an ADA claim regarding the online reservation system of the Holiday Express in West Point, New York. As the court explained, Harty's "review of West Point Realty'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." *Id.* at 443. "Because Harty asserted no plans to visit West Point or the surrounding area, he cannot allege that his

ability to travel was hampered by West Point Realty's website in a way that caused him concrete harm." *Id.* The court rejected Harty's allegation of informational injury, explaining that Harty had not shown he had an "interest in using the information … beyond bringing [his] lawsuit." *Id.* at 444 (quoting *Looper*, 22 F.4th at 881) (alteration in original)). The Second Circuit subsequently applied *Harty* to affirm the dismissal of yet another one of Laufer's lawsuits for lack of standing. *Laufer v. Ganesha Hospitality LLC*, No. 21-995, 2022 WL 2444747 (2d Cir. July 5, 2022).[4]

C. The Fourth, Sixth, and Seventh Circuits have held that visually impaired ADA "testers" lack standing.

Three other circuits have rejected claims of standing in a closely similar factual context. In all three cases, visually impaired "testers" sued credit unions, alleging that their websites violated the ADA because they were not usable for people with visual impairments.[5] However, in all three cases, the plaintiffs had no intention of using the credit unions' services—indeed, it was legally impossible for them to

---

[4] The D.C. Circuit has also held that Laufer lacks standing, albeit in an unpublished and unreasoned opinion. *See Laufer v. Alamac Inc.*, No. 21-7056, 2021 WL 4765435, at *1 (D.C. Cir. Sept. 10, 2021).

[5] Visually impaired persons often access the Internet by using "screen readers," which read aloud what is on the screen. In all three cases, the plaintiffs alleged that the websites were not compatible with screen readers.

do so, because only members could use the credit unions' services and the plaintiffs were ineligible to become members. In opinions by Judge Wilkinson, then-Judge Barrett, and Judge Sutton, all three courts held that the plaintiffs lacked standing. Those courts reasoned that a plaintiff who will not become a member of a credit union lacks standing to challenge whether the credit union's website complies with the ADA. That decisions are irreconcilable with the decision below, which held that Laufer could challenge Coast Village's website under ADA despite having no intention to visit Coast Village.

In *Griffin v. Department of Labor Federal Credit Union*, 912 F.3d 649 (4th Cir. 2019), the **Fourth Circuit** rejected the plaintiff's claim of "dignitary harm" because it was impossible for him to avail himself of the credit union's services. *Id.* at 654. It likewise rejected the plaintiff's claim of "informational harm" because "[i]nability to obtain information is sufficiently concrete to constitute injury in fact only when the information has some relevance to the litigant." *Id.* The plaintiff's inability to use the credit union "severs any connection between the Credit Union and Griffin that could plausibly serve to particularize his alleged injury." *Id.* at 655.

Similarly, in *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830 (7th Cir. 2019), the **Seventh Circuit** held that "in the absence of any personal impact on Carello, his alleged injury is necessarily abstract, amounting to mere indignation that the Credit Union is violating the ADA." *Id.* at 834. It further held that the injury was not particularized because "there is no

connection between Carello and the Credit Union that distinguishes him from anyone else who is ineligible for membership and offended by the Credit Union's failure to comply with the ADA." *Id.*

Finally, in *Brintley v. Aeroquip Credit Union*, 936 F.3d 489 (6th Cir. 2019), the **Sixth Circuit** held that the plaintiff lacked standing to challenge the adequacy of two credit unions' websites because "[s]he has not conveyed any intent to join either credit union." *Id.* at 493. "And just as a sighted individual with no inclination to join a union could not raise, say, an Age Discrimination in Employment Act claim about a credit union's hypothetical age-based membership policies, so she cannot bring an ADA claim." *Id.*

The Sixth Circuit rejected the plaintiff's claim of informational injury because she failed to "allege some real interest in the information." *Id.* The court also rejected the plaintiff's claim of dignitary injury: "The internet is a vast and often unpleasant place. It contains plenty that may offend, and those who set out looking for dignitary slights won't be disappointed. But merely browsing the web, without more, isn't enough to satisfy Article III." *Id.* at 494. It explained: "If we adopted Brintley's theory of encounter standing, we'd deputize her to sue not just these credit unions but many of the some 5,600 others in the United States as well. … Never mind how geographically remote. Never mind how attenuated their relationship. And if we credit Brintley's statistics on visual impairment, we'd permit eight million other Americans to do the same." *Id.*

Remarkably, the Sixth Circuit's *reductio ad*

absurdum is now First Circuit law. According to the First Circuit, browsing the web, without more, *is* enough to satisfy Article III. And the First Circuit's decision unapologetically *does* deputize Laufer, and all other Americans who use wheelchairs, to sue all allegedly non-compliant hotels in the United States.

* * *

To wrap up: the First and Eleventh Circuits have upheld ADA "tester" standing, but based on different rationales; the Second, Fifth, and Tenth Circuits (plus the D.C. Circuit in an unpublished decision) have rejected ADA "tester" standing on identical facts; and the Fourth, Sixth, and Seventh Circuits have rejected ADA "tester" standing on closely similar facts. This entrenched circuit split on a frequently recurring question calls for Supreme Court review.

II. THIS CASE IS JURISPRUDENTIALLY AND PRACTICALLY IMPORTANT.

In addition to the circuit split, this case warrants review because of the great significance of the question presented.

From a jurisprudential perspective, this case implicates important and unsettled questions concerning the allocation of enforcement responsibility between citizens and government. Judge Newsom's thoughtful concurrence in *Arpan* addresses some of the difficult open issues. What is "stigmatic injury's place—and by extension, the place of constitutional rights more generally—in the *Spokeo-TransUnion* schema"? 29 F.4th at 1286 (Newsom, J., concurring). Should "*statutory* stigmatic injuries" be distinguished

from "*constitutional* stigmatic injuries"? *Id.* Moreover, "what exactly counts as a concrete stigmatic injury"? *Id.* "Is *any* discrimination, however the courts might independently define it, enough"? *Id.* Or must there be "additional, downstream effects"? *Id.* at 1287 (Newsom, J., concurring).

These questions can only be answered by this Court. Judges have repeatedly noted the tension between *Havens Realty* and modern standing cases like *TransUnion*. *Havens Realty* relied on the principle that "the actual or threatened injury required by Art. III may exist solely by virtue of statues creating legal rights, the invasion of which creates standing." 455 U.S. at 373 (quotation marks and alteration omitted). Yet *TransUnion* appeared to repudiate that reasoning. 141 S. Ct. at 2205 ("[U]nder Article III, 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."). Both the First Circuit and the concurring Eleventh Circuit judges noted the difficulty of reconciling the two opinions. Pet. App. 18a-19a; *Arpan*, 29 F.4th at 1276-77 (Jordan, J., concurring); *id.* at 1283-84 (Newsom, J., concurring). Lower courts must faithfully apply all of these precedents as best they can. Only this Court, however, can explain how they fit together.

The practical stakes of this case are also high. Serial ADA "tester" litigation has become a cottage industry. As one court has put it: "By and large, ADA cases are brought by a small number of disabled individuals, known as 'testers,' who along with their

attorneys scour a given district for non-compliant businesses to sue. Once the suit is filed, the business has little choice but settle and pay attorneys' fees to avoid even higher fees when the plaintiff inevitably prevails on the merits." *Caplan v. All American Auto Collision, Inc.*, No. 18-61120-CIV, 2019 WL 13084767, at *2 (S.D. Fla. Sept. 16, 2019) (internal citation omitted), *aff'd*, 36 F.4th 1083 (11th Cir. 2022).

ADA "testers" exist in many forms. Laufer is not the only "tester" who sues hotels over allegedly non-compliant reservation websites; she competes with multiple other "testers" in this space. *See, e.g.*, *Harty*, 28 F. 4th at 444 & n.3; *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1226 (11th Cir. 2021). As explained above, visually impaired "testers" bring lawsuits based on allegedly non-compliant websites. Other "testers" sue brick-and-mortar businesses that allegedly have architectural accessibility barriers, despite having no desire to enter the businesses. *See, e.g.*, *Suárez-Torres v. Panaderia Y Reposteria España, Inc.*, 988 F.3d 542 (1st Cir. 2021); *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752 (6th Cir. 2019).

Courts have repeatedly and harshly criticized this litigation strategy. It clogs the courts with lawsuits and diverts focus from the claims of plaintiffs who were actually harmed. Moreover, it allows plaintiffs' lawyers to use the threat of an attorney's fees application to extort settlement payments from small businesses—even when the underlying suit is meritless. As the Ninth Circuit very recently explained, "the ability to recover attorney's fees has given rise to a wave of 'get-money quick' lawsuits brought by a small number of

professional, serial plaintiffs." *Shayler v. 1310 PCH, LLC*, No. 21-56130, -- F.4th --, 2022 WL 13743415, at *2 (9th Cir. Oct. 24, 2022). "The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through conciliation and voluntary compliance, a lawsuit is filed .... Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter." *Id.* (quoting *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) (ellipsis in original)). Many other courts have expressed similar views. *See, e.g.*, *Brown v. McKinley Mall, LLC*, No. 15-CV-1044, 2018 WL 2289823, at *3 (W.D.N.Y. May 17, 2018) ("Many Courts have criticized serial litigators like Plaintiff and abuse of the ADA's attorney's fees provisions, which encourage plaintiffs and their lawyers to prioritize extracting large cash settlements from defendants over redressing accessibility issues for disabled members of the public." (internal quotation marks and alterations omitted)); *Taylor v. 312 Grand St. LLC*, No. 15 Civ. 5410, 2016 WL 1122027, at *5 (E.D.N.Y. Mar. 22, 2016) (noting that "the abuse of the ADA as a means of obtaining awards of attorney's fees has long been the subject of national coverage").

"Tester" litigation also undermines the Executive Branch's authority to decide when to enforce—and not to enforce—the law. "[T]he choice of how to prioritize and how aggressively to pursue legal actions against

defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys). Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *TransUnion*, 141 S. Ct. at 2207. Yet that is exactly what Laufer and other "testers" seek to do: pursue the public interest to enforce hotels' general compliance with the law. *See Arpan*, 29 F.4th at 1291 (Newsom, J., concurring) ("Testers exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch.").

It is easy to see why a regulator, accountable to the people, might not want to sue a small business like Acheson Hotels. Many small businesses might not be aware of their obligation to put specific accessibility information on their website (if that obligation even exists). There is no need to sue them when a simple phone call or email to those small businesses would solve the problem. This conciliatory solution ensures that disabled people get the information they need, while saving resources of regulators, small businesses, and courts.

Moreover, it is far from clear that "tester" litigation ultimately benefits people with disabilities. The proliferation of such suits causes judges to be instinctively skeptical of ADA lawsuits and to question the motives of the plaintiffs and their lawyers. Inevitably, that skepticism will carry over to meritorious ADA suits brought by plaintiffs who were actually harmed by ADA violations.

These consequences do not dissuade lawyers who represent "testers" like Laufer. Instead, they pursue only the parochial interest of extracting as many settlements and fee awards for their clients as possible. It is precisely for this reason that Article III permits plaintiffs to litigate only when they have a personal stake, while reserving the general role of enforcing the law to the Executive Branch. *See Arpan*, 29 F.4th at 1296 (Newsom, J., concurring) ("By making enforcement decisions that are not only different from those that Executive Branch officials might make but are also unchecked by the sorts of political and legal constraints that bind government enforcers, private parties may actually exacerbate the risk of arbitrary power.").

By adopting its extraordinarily lenient view of standing, the First Circuit's decision will facilitate abusive ADA litigation while undermining the Executive Branch. Given these harmful consequences, this case cries out for Supreme Court review.

III. THE FIRST CIRCUIT'S DECISION IS WRONG.

The First Circuit erred in holding that Laufer has standing to bring this suit.

TransUnion dictates the outcome of this case. Under *TransUnion*, a plaintiff must demonstrate a "concrete harm" to establish Article III standing. 141 S. Ct. at 2205. Laufer is not concretely harmed when a hotel website fails to disclose information she does not need and will never use.

Laufer does not allege she sustained a traditional

tangible injury, such as physical or monetary injury. Instead, she alleges an intangible injury. But intangible injuries satisfy Article III's concreteness requirement only when they bear "a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *Id.* at 2204.

Laufer's injuries do not pass muster under that standard. Her alleged informational injury is not cognizable because an "asserted informational injury that causes no adverse effects cannot satisfy Article III." *Id.* at 2214 (quotation marks omitted). Her alleged emotional injury is not cognizable because it "bears no 'close relationship' to any traditional common-law cause of action." *Arpan*, 29 F.4th at 1272. "[N]either intentional nor negligent infliction of emotional distress is a sufficiently close analogue," given that intentional infliction of emotional distress requires "'extreme and outrageous'" conduct, while negligence infliction of emotional distress requires physical contact or danger. *Id.* at 1272-73.

Laufer certainly did not encounter *imminent* concrete harm. The First Circuit reasoned that she faced imminent harm because she asserted she would return to the website. Pet. App. 30a-31a. But no common-law tradition suggests that Laufer faces concrete harm via her pledge to revisit Coast Village's website in order to manufacture standing for an injunction.

Laufer's injury is also not particularized. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Spokeo*, 578 U.S. at 339 (internal quotation marks omitted). Coast Village's

website did not affect Laufer in "a personal and individual way." *Id.* (quotation marks omitted). It affected her in exactly the same way as it would affect anyone else who happened to come across Coast Village's website while surfing the Internet.

Neither the First nor Eleventh Circuit explained how their rulings could be reconciled with *Spokeo* and *TransUnion*. Instead they concluded that *Havens Realty* dictated ruling in Laufer's favor.

It does not. To the extent *Havens Realty* remains good law post-*TransUnion*, it is readily distinguishable from this case. In *Havens Realty*, the plaintiff was personally the subject of racial discrimination. That plaintiff sued under a statute specifically granting her a remedy for being the victim of a racially-motivated misrepresentation. That reasoning does not carry over to this case, where Laufer was not the victim of any discrimination and merely found a website that failed to disclose information she did not need.

The Court should reverse the First Circuit's misguided decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SALLY A. MORRIS
Six City Center, Suite 300
Portland, ME 04101
(207) 558-6161 Ext 1001
smorris@morrisemploymentlaw.com

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

APPENDIX

TABLE OF CONTENTS

Appendix A

United States Court of Appeals
For the First Circuit

No. 21-1410

DEBORAH LAUFER,

Plaintiff, Appellant,

v.

ACHESON HOTELS, LLC,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE

[Hon. George Z. Singal, U.S. District Judge]

Before

Kayatta, Howard, and Thompson,

Circuit Judges.

October 5, 2022

OPINION

THOMPSON, Circuit Judge. We're asked today to weigh in for the first time on an Article III standing question that has divided the circuit courts. Certain regulations under the Americans with Disabilities Act ("ADA") require places of public lodging to make information about the hotel's accessibility available on any reservation portal to those with disabilities. In the age of websites, that means a disabled person can comb the web looking for non-compliant websites, even if she has no plans whatsoever to actually book a room at the hotel. Thus, the information could be viewed as irrelevant to her -- except to whether the website is complying with the law. Has she suffered a concrete and particularized injury in fact to have standing to sue in federal court? Contrary to the district court's thinking, we think the answer is yes.[1] We further conclude that Laufer has standing to pursue injunctive relief and that the case is not moot. So we reverse.

I.

A.

Deborah Laufer is disabled. She can't walk more than a few steps without assistance and instead uses a

---

[1] By our count of the precedential opinions, three of our sibling circuit courts have said no, and one has said yes. *See Laufer v. Arpan LLC*, 29 F.4th 1268, 1273-74 (11th Cir. 2022) (standing); *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) (no standing); *Laufer v. Looper*, 22 F.4th 871, 879–81, 883 (10th Cir. 2022) (same); *Laufer v. Mann Hosp. L.L.C.*, 996 F.3d 269, 273 (5th Cir. 2021) (same). One other has said no in a non-precedential judgment without analysis. *See Laufer v. Alamac Inc.*, No. 21-7056, 2021 WL 4765435, at *1 (D.C. Cir. Sept. 10, 2021).

wheelchair or a cane to move around. She also has limited use of her hands and is vision impaired. Among other requirements to accommodate her disabilities, she needs special accessible parking and has to use passageways wide enough and properly graded for her wheelchair. Certain surfaces also need to be lowered so she can reach them, pipes under a sink need to be wrapped so she doesn't scrape her legs on them, and bathrooms need grab bars so she can transfer from her wheelchair.

Defendant Acheson Hotels, LLC, operates The Coast Village Inn and Cottages in a small town on Maine's southern coast. It accepts reservations for the Inn on its own and other travel-related websites. When Laufer first visited Acheson's website, she found that it didn't identify accessible rooms, didn't provide an option for booking an accessible room, and didn't give her sufficient information to determine whether the rooms and features of the Inn were accessible to her. She also says she faced the same dearth of information when she visited the Inn's reservation service through thirteen other third-party websites, including Expedia.com, Hotels.com, and Booking.com. And she alleges that she plans to revisit these websites "[i]n the near future" to see if they still lack this information she needs.

B.

That brings us to the next piece of the story: the statutory background that brings color to Laufer's claim. Congress enacted the ADA recognizing that "many people with physical or mental disabilities have been precluded from [participating in all aspects of

society] because of discrimination," 42 U.S.C. § 12101(a)(1), and that those with disabilities, "as a group, occupy an inferior status in our society," *id.* § 12101(a)(6). Congress found that "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." *Id.* § 12101(a)(5); *see also Tennessee v. Lane*, 541 U.S. 509, 536–37 (2004) (Ginsburg, J., concurring) (describing the congressional impetus of the ADA); *Cushing v. Packard*, 30 F.4th 27, 59 (1st Cir. 2022) (Thompson, J., dissenting) (same).

Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation."42 U.S.C. § 12182(a). Specifically, the ADA makes it discriminatory to provide disabled individuals with an "opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation" unequal to those without disabilities. *Id.* § 12182(b)(1)(A)(ii). And it defines discrimination to include the "failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities." *Id.* § 12182(b)(2)(A)(ii). Laufer qualifies as disabled within the meaning of the ADA.

The ADA also delegates to the Attorney General the authority to promulgate regulations to carry out § 12182. *Id.* § 12186(b). One of those regulations pertains to hotel reservations.[2] 28 C.F.R. § 36.302(e). The regulation provides that a "public accommodation" operating a "place of lodging" must "with respect to reservations made by any means . . . [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." *Id.* § 36.302(e)(1)(ii).

The Department of Justice's guidance on these regulations says that "basic nondiscrimination principles mandate that individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms." 28 C.F.R. pt. 36, app. A (2010), *Guidance on Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and Commercial Facilities* ("*DOJ Guidance*"). The Reservation Rule, DOJ says, "is essential to ensure that individuals with disabilities receive the information they need to benefit from the services offered by the place of lodging." *Id.* And although "a reservations system is not intended to be an accessibility survey," public accommodations still must provide some detail -- "enough detail" -- to allow

---

[2] Acheson does not argue that this regulation exceeds the authority granted to the Attorney General under § 12186(b).

individuals with disabilities to know what services they can enjoy. *Id.*

When a public accommodation violates the ADA and discriminates against a disabled person, the ADA and the regulations promulgated under it permit private individuals to bring enforcement actions in federal court. 42 U.S.C. § 12188(a); 28 C.F.R. § 36.501.

C.

And that's what Laufer did. Availing herself of that procedure, Laufer sued Acheson in the District of Maine. Which she's familiar doing: Laufer is a self-proclaimed ADA "tester" and advocate for disabled persons and has filed hundreds of other ADA-related suits in federal courts from coast to coast. Against Acheson, she brought a single claim for violation of 42 U.S.C. § 12181 and 28 C.F.R. § 36.302(e) (the Reservation Rule) and sought declaratory and injunctive relief, as well as attorney's fees and costs.

Responding, Acheson moved to dismiss. Pointing to Laufer's hundreds of other ADA suits around the country, Acheson said that Laufer had no real intention of booking a room at its Inn. So, Acheson said, Laufer lacks Article III standing to bring her suit, and the court accordingly lacks subject-matter jurisdiction over the case. Laufer opposed the motion and amended her complaint to detail her plans to visit Maine. The district court took Acheson's side and dismissed the case for lack of standing. Laufer timely appealed.

II.

Acheson moved under Rule 12(b)(1). *See* Fed. R. Civ. P. 12(b)(1). There are two species of 12(b)(1)

attacks on subject-matter jurisdiction: facial and factual challenges. *See Torres-Negrón v. J & N Recs., LLC*, 504 F.3d 151, 162 (1st Cir. 2007). When the attack is facial, the relevant facts are the well-pleaded allegations in the complaint, which the court must take as true. *Toddle Inn Franchising, LLC v. KPJ Assocs., LLC*, 8 F.4th 56, 61 n.5 (1st Cir. 2021). If the attack is factual, then the court "need not accept the plaintiff's allegations as true but can 'weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Id.* (quoting *Torres-Negrón*, 504 F.3d at 163).

The challenge here was only facial, so we, too, take the complaint's well-pleaded allegations as true when analyzing our jurisdiction. *See id.* Our review of the allegations mirrors the plausibility standard for Rule 12(b)(6) motions. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016). At the end of the day, then, our question is whether the plaintiff's complaint -- taking as true all of Laufer's factual allegations, drawing all inferences in her favor, but discarding legal conclusions and threadbare recitations of the elements, *see Zell v. Ricci*, 957 F.3d 1, 7 (1st Cir. 2020) -- contains enough factual heft to demonstrate that the court has subject-matter jurisdiction, *see Katz v. Pershing, LLC*, 672 F.3d 64, 70 (1st Cir. 2012). We review the district court's decision de novo, meaning we look at things with fresh eyes and without any deference to the able district judge's analysis. *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 330 (1st Cir. 2020).

III.

A.

Article III of the Constitution gives the federal courts the power to hear only "Cases" and "Controversies." U.S. Const. art. III, § 2. That constitutional limitation means courts can resolve only "genuine, live dispute[s] between adverse parties." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020). Out of that general rule has emerged the multi-faceted doctrine of standing, *see id.*, a doctrine simple to describe but often tricky to apply.

To have standing, a plaintiff has to show three things: that she "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). We're focused on the first part here -- injury in fact. An injury in fact, as we use that term of art, means "the invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Amrhein*, 954 F.3d at 330 (cleaned up) (quoting *Spokeo*, 578 U.S. at 339). (What that all means we'll get into more detail on later.)

Standing doctrine serves many purposes. "It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). It also ensures the federal courts aren't morphed into "no more than a vehicle for the

vindication of the value interests of concerned bystanders." *Id.* (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). And it reflects separation-of-powers principles that the courts shouldn't be used to "usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

Article III standing operates as a limit on federal courts' jurisdiction. *Id.* And because it is jurisdictional, it cannot be waived or forfeited and can be raised at any time, by anyone. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). When it is raised, the burden of showing standing rests on the party invoking the court's jurisdiction. *Id.* Meeting that burden is mission critical for their case -- no standing, no jurisdiction, and the case must be dismissed.

B.

Acheson first asserts that the Reservation Rule did not require it to reveal all the information Laufer wants, and so she suffered no injury via a violation of the rule. But we don't have to untangle Acheson's argument on the merits of Laufer's claim to determine her standing.

Standing is, "[i]n essence," a question of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). "[S]tanding in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Hochendoner*, 823 F.3d at 734 (quoting *Warth*, 422 U.S. at 500); *see Fed. Election*

Comm'n v. Cruz, 142 S. Ct. 1638, 1647 (2022). In other words, that a plaintiff's ultimate recovery "may be uncertain or even unlikely . . . is of no moment" to us now. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019); *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) ("one must not confuse weakness on the merits with absence of Article III standing" (cleaned up)). At this point, our only question is, putting the merits aside, whether Laufer plausibly alleges she was injured under her theory of the underlying legal claim. *See Hochendoner*, 823 F.3d at 734; *see also Cruz*, 142 S. Ct. at 1647– 48 ("For standing purposes, we accept as valid the merits of appellees' legal claims.").

Nor is Laufer's claim "so implausible that it is insufficient to preserve jurisdiction." *See Chafin v. Chafin*, 568 U.S. 165, 174 (2013). Though Acheson thinks Laufer could've just picked up the phone to ask for the information and that this was supposed to be an interactive process, the regulations clearly provide that hotels' reservation portals still must provide some detail – "enough detail" -- to allow individuals with disabilities to know what services they can enjoy. 28 C.F.R. § 36.302(e); *DOJ Guidance*, 28 C.F.R. pt. 36, app. A (2010). Which Laufer alleges Acheson's portals didn't do.

So for our standing analysis, we assume, in line with Laufer's theory, that the Reservation Rule requires Acheson to give her certain information. And we further assume, as she alleges in her complaint, that Acheson's website and other third-party reservation services didn't provide that information.

C.

That brings us to our next question: Is Acheson's failure to provide that information a sufficiently concrete injury to Laufer to give her standing?

Acheson thinks not. It says Laufer never had any intention of traveling to Maine or booking a room at its Inn.[3] Instead, Laufer was just sitting on her computer hunting websites for ADA non-compliance from over a thousand miles away in her Florida home. Whatever information she was denied, then, she never needed. And, its argument goes, that destroys her standing -- it makes her risk of harm counterfactual since "there was no prospect that she would have tried to exercise" her statutory rights to information about accommodations at the Inn she never wanted to go to. So, Acheson says, her injury is not concrete enough -- to be concrete enough, Laufer would need to allege that her informational drought harmed her in some way.

1.

First we zoom out to take a broader look at what makes an injury concrete.

Concrete injuries must be "'*de facto*'; that is, [they] must actually exist." *Spokeo*, 578 U.S. at 340. Although easier to recognize, the injury doesn't have to be "tangible," *id.*, "like a picked pocket or a broken leg," to be concrete, *Amrhein*, 954 F.3d at 330. Intangible injuries -- like "the suppression of free speech or

---

[3] Side note: We mentioned a few pages back that Laufer amended her complaint to allege her intent to travel to Maine. But she now on appeal disclaims any such intent.

religious exercise" or the invasion of common-law rights "actionable without wallet injury" -- can also be concrete. *Id.* at 331; *see Spokeo*, 578 U.S. at 340; *Valley Forge Christian Coll.*, 454 U.S. at 486 (noneconomic injuries can count just as much as economic ones, and collecting cases).

Because they're less obvious, intangible injuries can raise more of a question on whether there's an Article III case or controversy. *See Amrhein*, 954 F.3d at 331. In determining whether an intangible harm rises to the level of a concrete injury, the Supreme Court has told us that "both history" (particularly "whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts") and "the judgment of Congress play important roles." *Spokeo*, 578 U.S. at 340-41. "Congress," the Court has intangible harms that meet said, "is well positioned to identify minimum Article III requirements," *id.* at 341, and "may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (quoting *Spokeo*, 578 U.S. at 341). Yet still, not even Congress can "spin a 'bare procedural violation, divorced from any concrete harm' into an 'injury-in-fact,'" *Amrhein*, 954 F.3d at 331 (quoting *Spokeo*, 578 U.S. at 341) -- though the violation of some procedural rights Congress grants can, without any additional harm, be concrete enough, *Spokeo*, 578 U.S. at 342. In all, this just means that we judges must still "independently decide whether a plaintiff has suffered a concrete harm under Article III," even if Congress adamantly says they do. *TransUnion*, 141 S. Ct. at 2205.

2.

Our bearings set, back to Laufer's case. Does Laufer's self-admitted status as a tester -- that she had no intent to do anything but test the website's ADA compliance -- mean she hasn't suffered an injury?

Acheson seems to accept that tester status alone doesn't defeat standing -- a party can set out to determine whether public accommodations are complying with a statute. That concession makes sense. We said just a year ago that a plaintiff's status as a tester does not destroy her standing. *See Suárez-Torres v. Panaderia Y Reposteria España, Inc.*, 988 F.3d 542, 550–51 (1st Cir. 2021). That is, a plaintiff's deliberate choice to see if accommodations are obeying a statute doesn't mean that her injury in fact is any less real or concrete. *Id.* And *Suárez* broke no new ground -- the Supreme Court reached the same result forty years ago. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982).

But in somewhat of a twist on that proposition, Acheson further posits that a lack of intent to do anything with the information -- like a tester does -- makes the information not relevant, and the injury accordingly not concrete for standing. To solve that puzzle, we start by turning back to one of the Supreme Court's earlier tester cases, *Havens Realty*.

a.

Havens Realty involved racial steering. One Black plaintiff asked Havens Realty on multiple occasions whether it had any units open to rent in its two apartment complexes. *Id.* at 368. She was told no,

but a white plaintiff who went to test that out was given the opposite answer -- there were vacancies. *Id.* So they sued under section 804 of Fair Housing Act of 1968, 42 U.S.C. § 3604, which prohibited falsely representing the unavailability of a dwelling "because of race, color, religion, sex, or national origin." *Havens Realty*, 455 U.S. at 373.

Importantly, this Black plaintiff was a tester, too - ¬she had no intent of ever renting an apartment from the defendant and went posing as a renter only to figure out if the defendant was violating the law. *Id.* Yet the Supreme Court said that she still had standing. *Id.* at 374. Because she was the object of the misrepresentation and "suffered injury in precisely the form the statute was intended to guard against," the Black tester plaintiff had standing. *Id.* at 373–74. "That the tester may have approached the real estate agent fully expecting that [s]he would receive false information, and without any intention of buying or renting a home" was neither here nor there, our judicial superiors said -- it "does not negate the simple fact of injury within the meaning of [the statute]." *Id.* at 374; *see also Cruz*, 142 S. Ct. at 1647 (noting that the Court has long held that an injury is an injury "even if [it] could be described in some sense as willingly incurred," citing *Havens Realty*); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (a Black plaintiff's choice to board a segregated "bus for the purpose of instituting this litigation is not significant" to the standing inquiry).

Havens Realty appears right on the nose for Laufer's case -- both to her status as a tester and the injury she suffered. The Reservation Rule requires that places of lodging make available -- in their accommodation

descriptions on their reservations services -- information about the accessible features in their hotels and guest rooms. 28 C.F.R. § 36.302(e)(1)(ii). The purpose of this requirement is "to reasonably permit [Laufer] to assess independently whether a given hotel . . . meets . . . her accessibility needs." *See id.* And that is precisely what Laufer was doing. Just as in *Havens Realty*, there is no carveout that the information need only be turned over if the person trying to make a reservation actually wants to make a reservation. *Compare id.* § 36.302(e), *with Havens Realty*, 455 U.S. at 373–74 (noting that § 804(d) gave "all 'persons' a legal right to truthful information about available housing" and did not impose any "bona fide offer" requirement). So 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 information to which she has a legal entitlement. Just 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. *See* 455 U.S. at 373–74.

Adding on, the Supreme Court has repeatedly said that denial of information to which plaintiffs have a legal right can be a concrete injury in fact. *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20–21 (1998); *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 449–50 (1989); *see also Spokeo*, 578 U.S. at 342 (noting that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," citing *Akins* and *Public Citizen*). *Akins* was a suit where a group of voters sought (among other things) information

about a list of donors to a political organization they said was subject to public-disclosure requirements under elections laws. 524 U.S. at 15, 21. Noting that "[t]here [wa]s no reason to doubt [the voters'] claim that the information would help them . . . evaluate candidates for public office," the Court said that they suffered an injury in fact because they "fail[ed] to obtain information which," at least under their view of the law, "must be publicly disclosed pursuant to a statute." *Id.* at 21. Similarly, *Public Citizen* was a suit by advocacy groups to obtain information they asserted was subject to public disclosure under the Federal Advisory Committee Act. 491 U.S. at 447–48. The Court said that the groups suffered an injury in fact because they were denied information the statute gave them the right to. *Id.* at 449. As the Court put it: "Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." *Id.*; *accord Maloney v. Murphy*, 984 F.3d 50, 60 (D.C. Cir. 2020) (holding that a FOIA "requester's circumstances -- why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose -- are irrelevant to his standing" (quoting *Zivotofsky v. Sec'y of State*, 444 F.3d 614, 617 (D.C. Cir. 2006))).

So to sum it up so far: *Havens Realty*, *Akins*, and *Public Citizen* make clear that a denial of information that a plaintiff is statutorily entitled to have can make for a concrete injury in fact. And *Havens Realty* and *Public Citizen* tell us that the denial of information to a member of a protected class alone can suffice to make an injury in fact -- that person's intended use of the information is not relevant.

b.

Were that the whole landscape, this case would prove quite simple. But there's a wrinkle. Acheson jumps all over three lines in a Supreme Court decision from last year, *TransUnion*, which Acheson says marked a sea change in the law of informational standing that casts doubt on *Havens Realty's* application to this case.

TransUnion involved a class action brought by consumers against a credit-reporting agency under the Fair Credit Reporting Act. 141 S. Ct. at 2200. Part of the claim was that the credit- reporting agency didn't provide information in the format required by the FCRA. *See id.* at 2214. The Court addressed the plaintiffs' standing, drawing on the Court's explanation of intangible injuries in *Spokeo*. (Recall that *Spokeo* teaches that Congress's judgment is important to finding intangible-but-nonetheless- concrete harms, but its judgment is not the end all be all since there must still be a concrete injury accompanying a bare procedural violation -- though the Court did caveat that the violation of *some* statutory procedural rights could pose a concrete injury even without additional harm. *See* 578 U.S. at 340–42.) An amicus threw in the argument that the plaintiffs had standing for an informational injury, citing to *Akins* and *Public Citizen*. 141 S. Ct. at 2214. Which the Court rejected, saying *Akins* and *Public Citizen* didn't "control" because the plaintiffs weren't denied any information; rather, they received it in the wrong format. *Id.* But -- and here's where it gets important for us -- the Court added a "[m]oreover": It said the plaintiffs "identified no 'downstream consequences' from failing to receive the required information" and that "'[a]n asserted informational

injury that causes no adverse effects cannot satisfy Article III.'" *Id.* (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)).

With that "moreover" morsel in mind, Acheson presses that *Havens Realty* and *Public Citizen* don't survive *Spokeo* and TransUnion. And to be sure, it has some support behind it from our sibling circuits who have addressed suits like this one since *TransUnion*. *See Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 444 (2d Cir. 2022) (concluding an ADA-Reservation-Rule tester plaintiff can't show a concrete injury from the denial of information without also showing downstream consequences post-TransUnion); *Laufer v. Looper*, 22 F.4th 871, 879–81, 883 (10th Cir. 2022) (same); *see also Laufer v. Mann Hosp. L.L.C.*, 996 F.3d 269, 273 (5th Cir. 2021) (concluding Laufer had no standing because she couldn't show the information she was denied had "some relevance" to her).

Here's the issue: 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 to" -- even if we think those older decisions are in tension with newer ones. *See United States v. Morosco*, 822 F.3d 1, 7 (1st Cir. 2016); *see also Scheiber v. Dolby Lab'ys, Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002) (Posner, J.) ("[W]e have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems.").

As we said before, we think Havens Realty shows the clear path here -- it is so similar to Laufer's case as

to render any distinction insufficiently material. We're thus bound by that decision unless the Supreme Court tells us that *TransUnion* overruled it.[4] Under Laufer's theory, 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.

---

[4] True, we're "bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . a dictum is of recent vintage and not enfeebled by any subsequent statement." *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991); *see United States v. Báez-Martínez*, 950 F.3d 119, 132 (1st Cir. 2020). But when later dictum might call into question a prior holding, we're still bound by the Court's earlier holding, not its dictum. *See Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 50 & n.5 (1st Cir. 2015). And TransUnion's downstream-consequences-needed-for-informational-injury proviso certainly looks like dictum given that the Court concluded the plaintiffs didn't allege they hadn't received any required information. *See* 141 S. Ct. at 2214. Moreover, we've called "suspect" arguments that the Supreme Court implicitly overruled one of its prior decisions. *See United States v. Symonevich*, 688 F.3d 12, 19 n.4 (1st Cir. 2012). And we think it suspect, too, that the Court would overrule *Havens Realty* implicitly, in dictum, and with only three sentences of explanation. *Cf. In re Sealed Case*, 151 F.3d 1059, 1064 (D.C. Cir. 1998) ("[I]t is rather implausible that the Supreme Court, in dicta -- not to mention in a footnote -- meant to overrule sub silentio the holdings in" prior cases.).

c.

i.

Acheson's various attempts to distinguish *Havens Realty* don't change our view that it governs here.

Acheson says that the denial of information here wasn't in itself discriminatory, but the lies to the plaintiff in *Havens Realty* were. Yes, the misinformation in *Havens Realty* certainly looks like it was borne out of racial animus. Yet still, Acheson's distinction is hard to square up. The regulations here specifically make the denial of accessibility information actionable discrimination against disabled persons, *see* 28 C.F.R. § 36.501; *DOJ Guidance*, 28 C.F.R. pt. 36, app. A (2010) (noting the Reservation Rule is borne out of "basic nondiscrimination principles") -- just as the statute made the denial of information in *Havens Realty* actionable racial discrimination.

Next, echoing our colleagues in the Fifth Circuit, Acheson claims that the misrepresentation in *Havens Realty* had "some relevance" to the tester plaintiff, but the information Laufer wanted here didn't since she never wanted to book a room at the Inn. *See Mann Hosp.*, 996 F.3d at 273. But 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. *See* 455 U.S. at 373–74. And she had standing. *Id.* Same goes here. *See also Laufer v. Arpan LLC*, 29 F.4th 1268, 1281 (11th Cir. 2022) (Jordan,

J., concurring) (explaining why this distinction doesn't work).[5]

Further, Acheson posits that Laufer wasn't injured in the way the statute was designed to protect since she wasn't prevented from reserving a room. Au contraire: The regulation was not designed only to make sure that a disabled person could book a room -- the Reservation Rule's requirements are meant to ensure that disabled persons can "assess independently whether a given hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(1)(ii). The rule recognizes that the public information on accessibility features is necessary to make sure disabled persons are "able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms." *DOJ Guidance*, 28 C.F.R. pt. 36, app. A (2010). Denying Laufer the same "efficiency, immediacy, and convenience" as those not requiring accommodations is

---

[5] Similarly, the credit-union cases relied on by Acheson are inapposite. Those cases concluded an ADA tester had no standing to sue for credit-union websites' failure to have information in a format accessible to disabled persons where there was a legal bar to the plaintiff joining the credit union. *See, e.g.*, *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 834 (7th Cir. 2019) (Barrett, J.); *Griffin v. Dep't of Lab. Fed. Credit Union*, 912 F.3d 649, 654 (4th Cir. 2019). There are no legal bars to Laufer's booking a room at the Inn. *See also Carello*, 930 F.3d at 834 (Barrett, J.) (making clear the holding was "no broader" than one about plaintiffs who are "*legally barred*" from using the defendant's services (emphasis in original)). Additionally, *Carello* affirmed the proposition that in "informational injury" cases (which, according to that court, "typically" but do not exclusively involve "sunshine law[s]"), "a plaintiff 'need not allege any *additional* harm beyond' [her] failure to receive information that the law renders subject to disclosure." 930 F.3d at 835 (quoting *Spokeo*, 578 U.S. at 341).

exactly the discrimination the regulations are trying to stamp out.

ii.

Nor, with respect, do we find our sibling circuits' explanations of why Laufer doesn't have standing under *Havens Realty*, or *Public Citizen*, persuasive.

The Second Circuit recently said a Reservation-Rule tester plaintiff had no concrete injury because he couldn't "show . . . an 'interest in using the information beyond bringing his lawsuit.'" *Harty*, 28 F.4th at 444 (cleaned up, then a new alteration added) (quoting *Looper*, 22 F.4th at 881); *see also Laufer v. Ganesha Hosp. LLC*, No. 21-995, 2022 WL 2444747, at *2 (2d Cir. July 5, 2022) (summary order) (applying Harty to a suit brought by Laufer in Connecticut). So *Havens Realty* didn't help the plaintiff, the court said, because it shows testers can have standing only when they suffer some actual injury. *Harty*, 28 F.4th at 444. But that distinction really doesn't do anything. No one disputes that being a tester alone doesn't give you standing -¬the question is whether the test left her with some injury. And our judicial neighbors did not explain why the ADA tester plaintiff didn't suffer an injury but the Black tester plaintiff in *Havens Realty* did, even though her only "interest in using the information" was testing compliance and bringing her lawsuit -¬just as with an ADA-Reservation-Rule tester.

The Tenth Circuit suggested there lies some distinction in the fact that *Havens Realty* involved a misrepresentation, but the ADA-Reservation-Rule cases involve a lack of any representation. *See Looper*, 22 F.4th at 879. Yet that seems a distinction without a

difference. In 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. *Havens Realty*, 455 U.S. at 373; *see also Arpan*, 29 F.4th at 1282 (Jordan, J., concurring).

The Tenth Circuit also thought that *Akins* and *Public Citizen* made clear years ago that there needed to be a downstream consequence from the denial of information. *See Looper*, 22 F.4th at 881. True, the Court in both cases described what the plaintiffs wanted to do with the information they sought. *See Akins*, 524 U.S. at 21 (noting the plaintiffs wanted to use the information "to evaluate candidates for public office" and "the role that [the organization]'s financial assistance might play in a specific election"); *Pub. Citizen*, 491 U.S. at 449 (noting the plaintiff wanted to "monitor [the organization's] workings and participate more effectively in the judicial selection process"). But, for one thing, that doesn't show why *Havens Realty* wouldn't still apply and give standing, since the Black tester plaintiff there wanted the information only to test the defendant's compliance with the law. *See* 455 U.S. at 373–74. And, for another, it's hard to square with the Court's clear statement in *Public Citizen* that the Court's "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records." 491 U.S. at 449; *see also Maloney*, 984 F.3d at 60 (the D.C. Circuit holding that a FOIA "requester's circumstances -- why he wants the information, what he plans to do with it, what harm he suffered from the failure to disclose -- are irrelevant to his standing" (quoting *Zivotofsky*, 444 F.3d at 617)). That the

plaintiff had a reason it wanted the information then seems more a matter of factual context than a legal rule. Moreover, the Court recently reaffirmed that "the violation of a procedural right granted by statute can be sufficient in some circumstances" such that plaintiffs "need not allege any *additional* harm beyond the one Congress has identified," specifically citing *Akins* and *Public Citizen*. *Spokeo*, 578 U.S. at 342. And when giving its parenthetical explanations of *Akins* and *Public Citizen*, the Court did not mention any of the "downstream effects" the plaintiffs in those cases may have suffered from the denial of information or their purpose for the information -- just that they were denied information a statute gave them the right to have. *See id.*

We understand that our sibling circuits thought *Havens Realty* doesn't decide this case. But we respectfully disagree. None has convincingly explained why Havens Realty can't illuminate the path to decision.[6]

---

[6] Reinforcing our view that *Havens Realty* can be relied on here is that other cases exist where the Court compared the ADA with the FHA or Title VII (two other of the nation's most important antidiscrimination regimes) to guide a decision under one of those statutory schemes. *See, e.g.*, *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (looking to the definition of "handicap" in the Fair Housing Amendments Act and its interpretation by other courts for guidance in interpreting the "ADA's definition of disability"); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Servs.*, 532 U.S. 598, 610 (2001) (in a case brought under both the ADA and the Fair Housing Amendments Act, interpreting in parallel the definition of "prevailing party" in the attorney fees provisions of both statutes); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 357 (2013) (in a Title VII case, contrasting the direct

d.

What's more, Laufer suffered a concrete injury in fact even if *TransUnion* ushered in a new era of informational injury. *TransUnion* says that informational injuries need to "cause[] . . . adverse effects" to satisfy Article III. 141 S. Ct. at 2214 (quoting *Trichell*, 964 F.3d at 1004). One could read the informational injury to the Black tester plaintiff in *Havens Realty* as doing so: She was discriminated against in violation of the law. Dignitary harm or stigmatic injuries caused by discrimination have long been held a concrete injury in fact, even without informational injury. *See Heckler v. Mathews*, 465 U.S. 728, 738- 40 (1984); *see also Allen*, 468 U.S. at 755 (individuals personally denied equal treatment under the law can have standing); *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 833-34 (7th Cir. 2019) (Barrett, J.) ("There is no doubt that dignitary harm is cognizable; stigmatic injury is 'one of the most serious consequences' of discrimination." (citation omitted)). "[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 noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler*, 465 U.S. at 739–40 (citation omitted). Indeed, *TransUnion* itself cited *Allen* and "discriminatory treatment" as an example of "concrete, *de facto* injuries that were

---

discussion of workplace retaliation in the ADA with the absence of similar "clear textual terms" in Title VII).

previously inadequate at law" that "Congress may 'elevate to the status of legally cognizable injuries.'" 141 S. Ct. at 2204–05 (quoting *Spokeo*, 578 U.S. at 341).

Laufer alleges she suffered "frustration and humiliation" when Acheson's reservation portals didn't give her adequate information about whether she could take advantage of the accommodations. Without that information, Laufer is put on unequal footing to experience the world in the same way as those who do not have disabilities. She alleges that the "discriminatory conditions" on Acheson's website contribute to her "sense of segregation and isolation" and deprive her of "full and equal enjoyment of the goods, services, facilities, and/or accommodations available to the general public." Avoiding that was part of the point of the ADA -- the Act "is a measure expected to advance equal-citizenship stature for persons with disabilities" by aiming to "guarantee a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities." *Lane*, 541 U.S. at 536 (Ginsburg, J., concurring) (cleaned up). In a similar case, the Eleventh Circuit found that this harm alleged by Laufer was sufficient stigmatic injury to give rise to Article III standing. *Arpan*, 29 F.4th at 1274. We need not decide that exact issue here. Rather, we find that Laufer's feelings of frustration, humiliation, and second-class citizenry are indeed "downstream consequences" and "adverse effects" of the informational injury she experienced. *See TransUnion*, 141 S. Ct. at 2214. So even if post-*TransUnion* a plaintiff in the same shoes as the Black tester plaintiff in *Havens Realty* must show some "additional harm" from the denial of information to

demonstrate a concrete injury, Laufer still meets that newly set bar.

D.

Pulling out all the stops, Acheson also contends that Laufer's injury is not particularized. On top of being concrete, the plaintiff's injury must be particularized to show injury in fact. *Amrhein*, 954 F.3d at 330–31. Particularized means that the injury must "affect the plaintiff in a personal and individual way." *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992)). In other words, the injury has to be "personal," "distinct," and "not undifferentiated." *Id.* (cleaned up and citations omitted). In contrast, "[i]njuries that are too 'widely shared' or are 'comparable to the common concern for obedience to the law'" may not be particularized. *Lyman v. Baker*, 954 F.3d 351, 361 (1st Cir. 2020) (quoting *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 390 (1st Cir. 2000)). The particularization requirement "reflects the commonsense notion that the party asserting standing . . . must allege that he, himself, is among the persons injured by th[e defendant's] conduct." *Hochendoner*, 823 F.3d at 731–32. That way we ensure the issue is sharpened "in a concrete factual context" with parties with "a direct stake in the outcome." *Id.* (citations omitted).

Under any reading of *Havens Realty* or *TransUnion*, Laufer's injury is particularized. As a pure informational injury, Laufer was not given information she personally had a right to under the ADA and its regulations, causing her precisely the type of harm

Congress and the regulation sought to curb -- the unequal ability to know what accommodations a person with disabilities can take advantage of. *See Havens Realty*, 455 U.S. at 374 (the Black tester plaintiff had standing because she "alleged injury to *her* statutorily created right to truthful housing information" (emphasis added)). And she alleges that she personally suffered the loss of dignity in feeling less than equal, enduring humiliation, frustration, and embarrassment. *See Heckler*, 465 U.S. at 739–40; *cf. Allen*, 468 U.S. at 755–56 (dignitary harm from discrimination wasn't concrete because the discrimination wasn't personally experienced); *Carello*, 930 F.3d at 834 (concreteness and particularity are "two sides of the same coin" for dignitary harms since discrimination that doesn't impact the plaintiff isn't concrete and also doesn't affect the plaintiff in an individual way). Those harms affected her "in a personal and individual way." Lujan, 504 U.S. at 560 n.1.

Further, contrary to Acheson's suggestions, Laufer's claim is not a generalized grievance based on her desire that Acheson follow the law. For starters, the Court's generalized-grievance cases typically focus on allegedly unlawful conduct by the government, *id.* at 576, and are driven, at least in part, by separation-of-powers concerns with the courts supervising the co-equal branches' activities, *see id.* at 577. But even more, *Lujan* also recognized that "[n]othing in [it] contradicts the principle that 'the injury required by Art. III may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing,"'" even though the right is widely shared. *Id.* at 578 (cleaned up with new alterations added) (quoting *Warth*, 422 U.S. at 500).

Nothing in the ADA or its regulations "abandon[s] the requirement that the party seeking review must [her]self have suffered an injury." *See id.* (quoting *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972)). As we've already explained, the ADA and its regulations offer a route to those themselves suffering an injury by being discriminated against on the basis of their disability. It does not permit anybody to sue just because she saw an ADA violation. *See* 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.501(a). Which shows the differentiation of the injury: 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.

IV.

Onward we go to the next step of the standing analysis -- Laufer's standing to seek injunctive relief.[7]

The party seeking review has to show they have standing for each form of relief they seek. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000). For Laufer's claim for injunctive relief, demonstrating her "past exposure to illegal conduct" -- here, her pre-suit encounters with Acheson's reservation system on its and third parties' websites -¬isn't "in itself" sufficient to show standing absent

---

[7] To be clear, Laufer's complaint seeks only declaratory and injunctive relief, as well as attorney's fees and costs. It does not seek damages for past violations. Damages are not an available remedy for private suits under Title III of the ADA. *See* 42 U.S.C. § 12188(a)(1); 28 C.F.R. § 36.501(a); *see also G. v. Fay Sch.*, 931 F.3d 1, 9 (1st Cir. 2019).

"continuing, present adverse effects." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). Standing for injunctive relief depends on "whether [s]he [i]s likely to suffer future injury," *id.* at 105 -- that is, "a sufficient likelihood that she will again be wronged in a similar way," *Gray v. Cummings*, 917 F.3d 1, 19 (1st Cir. 2019) (quoting *Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992)).

That proviso is sometimes referred to as "imminence." *See, e.g.*, *Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997). Though a "somewhat elastic concept," imminence shouldn't be stretched too far -- it "ensure[s] that the alleged injury is not too speculative for Article III purposes." *Lujan*, 504 U.S. at 564 n.2. At bottom, it requires that the injury not be "conjectural" or "hypothetical" or simply "possible." *See Clapper*, 568 U.S. at 412, 416, 420. For an injury to be imminent enough to provide standing, it must be "certainly impending." *Id.* at 416.

Describing the imminence of a future harm, our judicial higher-ups have said that a plaintiff's proclaimed "'intent' to return to the places they had visited before -- where they will presumably, this time, be [injured again] -- is simply not enough." *Lujan*, 504 U.S. at 564. For example, plaintiffs' averred intent to visit Egypt and Sri Lanka at some unspecified point "[i]n the future" was insufficient to show an imminent injury. *See id.* at 563–64. "Such 'some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not

support a finding of the 'actual or imminent' injury." *Id.* at 564.

Here, though, Laufer's plans to revisit the websites are far from those "some day intentions" found insufficient in *Lujan* -- she's alleged her "concrete plans" to go back to the websites in the near future. As an ADA tester, Laufer says she has a sophisticated system to continue monitoring the non-compliant websites she finds. She visits the website multiple times before filing her complaints, and then schedules herself to review the website again after the complaint is filed. And she says she will revisit Acheson's online reservation system "[i]n the near future" to test its ADA compliance. So, far from a mere possibility that someday Laufer will eventually head overseas to Sri Lanka or Egypt to see an endangered species that'll be forced into extinction, she has given her "description of [her] concrete plans" to re-visit the websites, easily accessible from her home, in the near future. *See Lujan*, 504 U.S. at 563–64; *cf. Carney*, 141 S. Ct. at 501–03 (plaintiff's assertion that he "would apply" for the job, "without any actual past injury, without reference to an anticipated timeframe, . . . and without any other supporting evidence" was not sufficient in a "highly fact-specific case"); *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) (an assertion that the plaintiff "wants to go" to the area affected is too "vague"). Take all of that, too, with the fact that Laufer is a self-proclaimed ADA tester who makes it her vocation to test websites for ADA compliance. *See Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1340 (11th Cir. 2013) (considering that "ADA testing appears to be [the plaintiff's] avocation or at least what he does on a daily

basis"). Also, importantly, Laufer asserts in her reply brief that while Acheson has made its website ADA-compliant, Acheson hasn't persuaded the third-party reservation services to do the same (a point we return to in section V). Her likelihood of future injury is far from conjectural or hypothetical; it's sufficiently imminent.[8]

V.

Swinging its final punch, Acheson tucks in a quick suggestion that the case may also be moot. It says that because its website now shows that the Inn has no ADA-compliant lodging, Laufer can't contend that she'll suffer the same injury again.

Mootness is another part of the Article III case-or-controversy schema. Because we "decide only *live* controversies that will have a real effect on real parties in interest," we don't decide cases where the parties' dispute has since been resolved. *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 8 (1st Cir. 2021); *see Chafin*, 568 U.S. at 172. Since mootness goes to our Article III jurisdiction, we have to cross-check for it throughout the litigation: "'It is not enough that a dispute was very much alive when suit was filed'; the parties must 'continue'" -- even on appeal -- "'to have a personal stake' in the ultimate disposition of the lawsuit." *Chafin*, 568 U.S. at 172 (cleaned up) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)).

---

[8] Judge Howard agrees that the complaint adequately alleges standing for declaratory relief, but he is doubtful that it sufficiently alleges standing to pursue injunctive relief.

Yet getting a case declared moot is a "demanding standard" -- one met only when "'it is impossible for a court to grant any effectual relief whatever' to [the plaintiff] assuming it prevails." *Mission Prod. Holdings*, 139 S. Ct. at 1660 (quoting Chafin, 568 U.S. at 172). The "heavy burden" of meeting that demanding standard falls on the party asserting mootness; so here, Acheson. *Bos. Bit Labs*, 11 F.4th at 8. Acheson hasn't met it.

Laufer's alleged violations are not just about what was (or more aptly, wasn't) on Acheson's own website. Laufer also alleged that Acheson violated the Reservation Rule via the booking portals on third-party booking websites, like Hotels.com. And as noted earlier, she avers that although Acheson's own website made changes, it hasn't gotten the third parties to update their websites.

Again, to assess mootness, we need not decide whether Acheson can be held liable for those third-party websites' non-compliance. That a plaintiff's ultimate recovery "may be uncertain or even unlikely . . . is of no moment" to the mootness inquiry. Mission Prod. Holdings, 139 S. Ct. at 1660. Instead, we assume the claim's legal validity to determine whether it is nonetheless moot. *See Town of Portsmouth v. Lewis*, 813 F.3d 54, 61 (1st Cir. 2016); *see also Mission Prod. Holdings*, 139 S. Ct. at 1660.

And, for the record, nothing seems "so implausible," *Chafin*, 568 U.S. at 174, or "wholly insubstantial and frivolous" about Laufer's claim based on the third-party websites, *see Town of Portsmouth*, 813 F.3d at 61.

Acheson hasn't suggested that the third-party websites have been updated, and the regulations provide that the public accommodation's obligations extend to "reservations made by any means, including . . . through a third party." 28 C.F.R. § 36.302(e)(1); *see DOJ Guidance*, 28 C.F.R. pt. 36, app. A (2010) (rejecting hotels' notice-and-comment arguments that "they are unable to control the actions of unrelated parties" and stating that hotels "that use third-party reservations services . . . must provide these third-party services with information concerning the accessible features of the hotel and the accessible rooms"). Nor has Acheson represented that it made that information available to all of the thirteen third-party booking websites that Laufer alleges were non-compliant, but they just haven't put the info online. *Cf. DOJ Guidance*, 28 C.F.R. pt. 36, app. A (2010) (providing that if the hotel makes the information about accessibility available to the third-party booking website but the third-party doesn't give the information out, the hotel "will not be responsible"). So there's still a live claim to decide.[9]

* * *

For all these reasons, the district court has Article III jurisdiction over this case (at least for now). The

---

[9] Given our conclusion, we need not decide at this point whether the changes to Acheson's own website in response to this litigation would be sufficient to moot the case in the absence of the allegations concerning unremediated third-party websites. *See Friends of the Earth*, 528 U.S. at 189 ("[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (citation and internal quotation marks omitted)).

judgment of the district court is therefore ***reversed***, and the case is ***remanded*** for further proceedings. Costs to appellant.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DEBORAH LAUFER,

Plaintiff,

v.

ACHESON HOTELS, LLC,

Defendant.

Docket No. 2:20-cv-00344-GZS

ORDER OF DISMISSAL

Before the Court is Defendant Acheson Hotels, LLC's Motion to Dismiss (ECF No. 9) and the related Request for Judicial Notice (ECF No. 10). Via these filings, Defendant asks the Court to find that Plaintiff lacks standing to pursue her claim under Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12181-12189. For reasons explained herein, the Court GRANTS both Motions.

I. LEGAL STANDARD

Defendant's Motion invokes Federal Rule of Civil Procedure 12(b)(1), which requires dismissal of claims over which this Court lacks subject matter jurisdiction. A federal court is obligated to ensure the existence of subject matter jurisdiction before considering the

merits of any complaint. *See, e.g.*, *United States v. University of Mass., Worcester*, 812 F.3d 35, 44 (1st Cir. 2016). Plaintiffs generally bear the burden of demonstrating subject matter jurisdiction. *See, e.g.*, *Aversa v. United States*, 99 F.3d 1200, 1209-10 (1st Cir. 1996). Faced with a motion to dismiss based on lack of jurisdiction, the Court applies the same "plausibility standard applicable under Rule 12(b)(6)" to the operative complaint. *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 730 (1st Cir. 2016). However, the Court may also consider additional materials submitted by either side that allow it to resolve the jurisdictional challenge. *See Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363-64 (1st Cir. 2001) (noting that "plaintiff's well-pleaded factual allegations . . . [may be] augmented by an explanatory affidavit or other repository of uncontested facts").

In accordance with Article III of the Constitution, federal courts may only decide cases that "embody a genuine, live dispute between adverse parties." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (explaining that this requirement "prevent[s] the federal courts from issuing advisory opinions"). The doctrine of standing implements this requirement by imposing three key requirements on a plaintiff: "(1) . . . an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). "The plaintiff bears the burden of establishing these elements and must plead sufficient factual matter to plausibly demonstrate

standing to bring the action." *Perez-Kudzma v. United States*, 940 F.3d 142, 145 (1st Cir. 2019) (internal citations and quotation marks omitted); *see also Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 796 (2021) ("The doctrine of standing generally assesses whether [a plaintiff's personal] interest exists at the outset.")

As to injury in fact, the "first and foremost of standing's three elements," the Supreme Court has explained that "Congress cannot erase [the injury-in-fact requirement] by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1547-48 (internal quotation marks omitted). Thus, even when a plaintiff bases her case on the violation of a federal statute, "[t]o 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.'" *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560); *see also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020) ("This Court has rejected the argument that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." (internal quotation marks omitted)).

II. FACTUAL BACKGROUND

Plaintiff Deborah Laufer is a resident of Florida. She "is unable to engage in the major life activity of walking more than a few steps" and uses a wheelchair, cane or other support to ambulate. (Am. Compl. (ECF

No. 13), PageID # 120.)[1] She also has "limited use of her hands," which impacts her ability to grasp objects. (*Id.*) Laufer is "also vision impaired." (*Id.*) Outside her home, she "primarily rel[ies] on a wheelchair" and uses an accessible vehicle with a ramp. Laufer is a self-proclaimed "advocate" for "similarly situated disabled persons." (*Id.*, PageID #s 120-21.) Her advocacy focuses on working as "a 'tester' for the purpose of asserting her civil rights and monitoring, ensuring, and determining whether places of public accommodation and their websites are in compliance with the ADA." (*Id.* at 121.) More specifically and as it relates to this case, Laufer tests online reservation systems ("ORS") of hotels and lodging establishments to ensure that these systems comply with ADA regulations regarding making reservations for accessible guest rooms. *See* 28 C.F.R. § 36.302(e)(1).

Defendant Acheson Hotels, LLC ("Acheson") owns and operates the Coast Village Inn and Cottages ("Coast Village Inn"), located in Wells, Maine. By operating this lodging establishment, Acheson is subject to the various regulations that seek to ensure places of public accommodation are accessible to disabled persons. Prior to September 24, 2020, Laufer visited the ORS for the Coast Village Inn multiple times "for the purpose of reviewing and assessing the accessible features at the Property and ascertain[ing] whether they meet the requirements of 28 C.F.R. § 36.302(e) and her

[1] Via its 2/9/21 Endorsement Order (ECF No. 14), the Court notified the parties that it would use the Amended Complaint (ECF No. 13) as the operative pleading for purposes of the then-pending Motion to Dismiss unless Defendant withdrew the Motion.

accessibility needs." (Am. Compl., PageID #s 124 & 127.) Since 2019, Laufer has been planning a trip to Maine. (Laufer Decl. (ECF No. 17), PageID # 171.) Specifically, Laufer has planned to drive from Florida to Maine and then to Colorado with her grandchild "meandering all throughout the states in which she passes [with] stop[s] at tourist attractions, points of interest, educational and historic sites." (Am. Compl., PageID # 123.) While in Maine, Laufer has planned to "meet with her sister and look for a bed and breakfast to possibly buy and run." (*Id.*) While Laufer "initially planned to travel during the Summer of 2020, [she] now awaits the passing of the Covid crisis and, once it subsides, she will take her trip." (*Id.*, PageID # 124.)

Prior to September 24, 2020, when Laufer visited www.thecoastvillageinn.com, the ORS "failed to identify accessible rooms, failed to provide an option for booking an accessible room, and did not provide sufficient information as to whether the rooms or features at the hotel are accessible."[2] (*Id.*) Laufer asserts that the failure to include this accessibility information deprives her of "the ability to make a meaningful choice." (Laufer

[2] Having visited www.thecoastvillageinn.com in connection with reviewing the pending Motion, the Court notes that the website has a banner that states: "Please note: Unfortunately, we do not have the capabilities to provide ADA compliant lodging. We apologize for the inconvenience!" However, the website also explains that the Inn has "no shared hallways" and that "every guest has a direct entrance from his/her car into their cottage or room." The room description portion of this ORS contains pictures of the rooms and notes that some rooms have "updated bathrooms" with an "easy entry shower." *See* www.thecoastvillageinn.com (last visited 5/13/21).

Decl., PageID # 171.) She further asserts that the conditions she encountered when visiting the ORS from her home caused her to suffer "humiliation and frustration at being treated like a second class citizen, being denied equal access and benefits to . . . accommodations and services."[3] (*Id.*, PageID # 172.)

In other similar cases filed in this District[4] and federal courts in various other states, Laufer claims to have documented similar problems with the ORS of other lodging establishments. In total, she has filed over 650 similar cases involving non-compliant ORS. (*See* Def. Ex. 1 (ECF No. 10-1).) Laufer "maintains a system

---

[3] Laufer encountered similar problems when she visited various alternative ORS for the Coast Village Inn including at www.emea.littlehotelier.com, www.expedia.com, www.hotels.com, www.booking.com, www.orbitz.com, www.priceline.com, www.agoda.com, www.trip.com, www.cheaptickets.com, www.travelocity.com, www.hotelplanner.com, and www.vacation.hotwire.com. Am. Compl., PageID #s 125-26. For purposes of the present motion, the Court does not consider or address whether Defendant can be liable for the accessibility information found on each of these third-party ORS. *But see*, *e.g.*, *Laufer v. Patel*, No. 1:20-cv-00631-RP, 2021 WL 796163, at *4 (W.D. Tex. Mar. 2, 2021) (noting that "most courts in the Fifth Circuit that have considered whether an e-tester had standing to sue about third-party hotel booking websites have concluded that the e-tester lacked standing").

[4] *See*, *e.g.*, *Laufer v. Whitman Family LLC*, D. Me. Docket No. 1:20-cv-00340-GZS, *Laufer v. MHMP Inc.*, D. Me. Docket No. 1:20-cv-00341-GZS, *Laufer v. Migis Hotel Group LLC*, D. Me. Docket No. 20-cv-00342-GZS, , *Laufer v. Inn at St. John*, D. Me. Docket No. 2:20-cv-00346-GZS, *Laufer v. Giri Hotels LLC*, D. Me. Docket No. 2:20-cv-00345-GZS, *Laufer v. Mar-Lyn In Maine, LLC*, D. Me. Docket No. 2:21-cv-00007-GZS.

to ensure that she revisits the online reservation system of every hotel she sues." (Am. Compl., PageID # 127.)

In this case, Laufer ultimately seeks a declaratory judgment, an injunction requiring Defendant to bring its ORS into compliance with 28 C.F.R. § 36.302(e)(1), as well as attorney's fees and costs.

III. DISCUSSION

Defendant's Motion urges the Court to dismiss this action due to Plaintiff's lack of standing; more specifically, due to Plaintiff's lack of any plausible injury that is concrete and imminent. (*See* Def. Mot. (ECF No. 9), PageID # 33.) At the outset, it is important to note that Laufer is only alleging a violation of the ADA's "Reservations Rule"[5] found in 28 C.F.R. § 36.302(e)(1). She does not allege that Defendant's establishment has physical barriers that violate applicable ADA building standards, nor does she allege that the ORS itself is inaccessible. Thus, her claimed injury is an informational injury, which Plaintiff insists is sufficient to satisfy the injury-in-fact requirement. (See Pl. Response (ECF No. 16), PageID #s 145-51.) On the record presented, the Court disagrees.

---

[5] *See, e.g.*, *Arroyo v. JWMFE Anaheim, LLC*, No. 8:21-cv-00014-CJC-KES, 2121 WL 936018, *1 (C.D. Cal. Feb. 16, 2021) (referring to 28 C.F.R. § 36.302(e) as "the ADA's Reservation Rule"); *Love v. Wildcats Owner LLC*, No. 4:20-cv-08913-DMR, 2021 WL 1253739, at *3 (N.D. Cal. Apr. 5, 2021) (detailing the requirements of 28 C.F.R. § 36.302(e) and referring to these requirements as the "Reservations Rule").

The Supreme Court has recognized informational injuries as a basis for standing previously. First, in *Havens Realty Corp v. Coleman*, 455 U.S. 363 (1982), the Supreme Court held that a tester had standing to sue under the Fair Housing Act when he was denied "truthful information concerning the availability of housing." *Id.* at 373. Then, in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), the Court found that an advocacy group suing for information under the Federal Advisory Committee Act could establish standing by showing "that they sought and were denied" information subject to disclosure under this statute. *Id.* at 449. Almost a decade later, in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), the Supreme Court found that voters had standing under the Federal Election Campaign Act to obtain information subject to disclosure under that Act. *See id.* at 21. In considering these Supreme Court precedents, the First Circuit has explained that all "relied on Congress's power to identify 'previously inadequate' intangible injuries and protect them with 'procedural right[s]' whose infraction 'constitute[s] injury in fact' without proof of 'any *additional* harm beyond the one Congress has identified.'" *Amrhein v. eClinical Works, LLC*, 954 F.3d 328, 333 (1st Cir. 2020) (quoting *Spokeo*, 136 S. Ct. at 1549). However, in the same decision, the First Circuit acknowledged, "[t]here are limits; even Congress can't spin a 'bare procedural violation, divorced from any concrete harm' into an 'injury-in-fact.'" *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549).

Plaintiff asserts that by seeking to vindicate the Reservations Rule, she "falls squarely within the

holding of *Havens Realty* and its progeny." (Pl. Response (ECF No. 16), PageID # 158.) However, in the Court's assessment, finding standing based solely on Plaintiff's status as an e-tester who sustained an informational injury while generally conducting online research of lodging options would require an expansion of the holdings of *Havens Realty*, *Akins*, and *Public Citizen* into the ADA context. *See, e.g.*, *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 835 (7th Cir. 2019) (Barrett, J.) (declining to hold that standing under the ADA can be based on informational injury theory where plaintiff was seeking "accessibility accommodations, not disclosure"). Most recently, the First Circuit has held that "status as testers does not defeat standing" under the ADA. *Suárez-Torres v. Panaderia y Reposteria Espana, Inc.*, 988 F.3d 542, 551 (1st Cir. 2021). However, the corollary to this holding is that status as a tester likewise does not necessarily confer standing. Thus, the Court concludes that Plaintiff must establish that her informational injury is, in fact, both concrete and imminent. For the reasons that follow, the Court ultimately concludes that Plaintiff does not meet either of these requirements.

A. Plaintiff's Injury is Not Concrete.

"Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549. Thus, the Court must consider "(1) whether the statutory provisions at issue were established to protect [Plaintiff's] concrete interests (as opposed to purely procedural rights), and if so, (2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such

interests." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017) (considering the concreteness requirement of standing on remand), *cert. denied*, 138 S. Ct. 931 (2018).

> In relevant part, Title III of the ADA provides:
>
> > No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). This prohibition on discrimination may be enforced by "any person who is being subjected to discrimination on the basis of disability." 42 U.S.C. § 12188 (a)(1).

As to the first prong of concreteness, the just-quoted ADA provisions were established to protect the concrete interests of disabled persons in accessing places of public accommodation. Here, Plaintiff claims discrimination only in the ORS, not in the actual concrete place of public accommodation.[6] Thus, in some

[6] The extent to which websites should be viewed as covered by Title III of the ADA is an emerging area of dispute. *Compare Gil v. Winn-Dixie Stores, Inc.*, 993 F.3d 1266, 1277 (11th Cir. 2021) (holding that "websites are not a place of public accommodation under Title III of the ADA"), *with Robles v. Domino's Pizza, LLC*, 913 F.3d 898, 905–06 (9th Cir.) (holding that "the ADA applies to Domino's website and app, which connect customers to the goods and services of Domino's physical restaurants"), *cert. denied*, 140 S. Ct. 122 (2019).

ways Plaintiff's claim could be characterized as "procedural" to the extent that her chief complaint is that she cannot research and reserve accessible accommodations using the same procedure that is set up for non-accessible accommodations. Nonetheless, the Court assumes without deciding that Plaintiff is adequately invoking protection of her concrete interests under the ADA to "full and equal enjoyment" of Defendant's accommodations. 42 U.S.C. § 12182(a).

Turning to the second prong of concreteness, the Court must consider the actual harm caused by the alleged violations. Here, the Court concludes that the violations alleged do not amount to a harm or a material risk of harm to Plaintiff's concrete interests in accessing Defendant's place of public accommodation. The reason for this conclusion is two-fold. First, Plaintiff lacked any intention to actually access Defendant's place of public accommodation when she visited the ORS. While Plaintiff maintains that any disabled person who visits an ORS and concludes that the ORS violates the ADA's Reservations Rule should have standing to sue the lodging establishment regardless of their intention to make a reservation and visit the establishment, multiple courts have now rejected this view. *See, e.g.*, *Laufer v. Mann Hosp., L.L.C.*, No. 20-50858, 2021 WL 1657460, at *2 (5th Cir. Apr. 28, 2021) ("[Laufer] visited the ORS to see if the motel complied with the law, and nothing more. Such allegations do not show enough of a concrete interest in Mann's accommodations to confer standing."); *Laufer v. Looper*, No. 1:20-cv-02475-NYW, 2021 WL 330566, at *5 (D. Colo. Jan. 11, 2021) ("[W]ithholding of information itself does not constitute a concrete injury—

the information must have some relevance to the litigant.") (citing *Griffin v. Department of Labor Fed. Credit Union*, 912 F.3d 649, 654 (4th Cir. 2019)); *Laufer v. Naranda Hotels, LLC*, No. CV SAG-20-1974, 2020 WL 7384726, at *4 (D. Md. Dec. 16, 2020) ("Pure testers, by definition, have no desire to actually use the room reservation website, and the information required by § 36.302(e)(1) has no specific relevance to them beyond their generalized desire to find ADA violations and file lawsuits."); *Laufer v. Dove Hess Holdings, LLC*, No. 5:20-cv-00379BKS-ML, 2020 WL 7974268, at *15 (N.D.N.Y. Nov. 18, 2020) ("[T]o allege an injury-in-fact for standing purposes, a plaintiff challenging a website's ADA violations must demonstrate that she had a purpose for using the website that the complained-of ADA violations frustrated, such that any injury is concrete and particularized to the plaintiff.") In short, to plausibly allege concrete harm based on a violation of the Reservations Rule, a plaintiff must have a genuine plan to make a reservation.

Second, as it turns out in this particular case, Plaintiff's inability to reserve an accessible room via the ORS reflects the reality of Defendant's place of public accommodation. While Plaintiff's Amended Complaint contains a rote recitation that Defendant's ORS "failed to provide an option for booking an accessible room" and "did not provide sufficient information as to whether the rooms or features at the hotel are accessible," this alleged failure reflects the apparent reality that there is no "ADA compliant lodging" at this facility. *See* supra note 2 (describing Defendant's website). While recognizing that this reality may give rise to another

type of ADA claim, the Court concludes that Plaintiff cannot claim a concrete informational injury based on the failure of an ORS to allow her to book an accessible room that apparently does not exist. *Accord Carello*, 930 F.3d at 833 (holding that "plaintiff who is *legally barred* from using a credit union's services cannot demonstrate an injury that is either concrete or particularized" based on the credit union maintaining an inaccessible website); *Griffin*, 912 F.3d at 657 (same).

B. Plaintiff's Injury is Not Imminent.

"[T]o create standing, a threatened injury must be 'imminent' or 'actual' when the plaintiffs filed their complaint." *Amrhein*, 954 F.3d at 332 (citations omitted). Here, taking judicial notice of the state of the COVID-19 pandemic and the travel restrictions then in place, the Court is hard pressed to see how Plaintiff faced an imminent injury in the fall of 2020.[7] However, the Court acknowledges that the state of the pandemic and the facts alleged in the operative pleading have changed in the intervening months. In her Amended Complaint (ECF No. 13) and Declaration (ECF No. 17), Laufer avers that she has been planning a cross-country road trip since 2019 and that the trip will commence once the pandemic abates. It is certainly plausible that Laufer (and many other individuals) will resume traveling as the pandemic abates. However, on the

[7] In its Motion, Defendant correctly describes the initial version of Plaintiff's Complaint (ECF No. 1) as lacking allegations of "any direct contact with Coast Village Inn," any previous travel to any part of Maine or "any plans to travel to Maine in the future." Def. Mot., PageID # 33.

record presented, the Court declines to find that Laufer, who apparently has not made a single reservation, is imminently about to embark on a trip from Florida to Maine. *See, e.g.*, *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 73 (1st Cir. 2003) (affirming dismissal of Title III claim based on ripeness and prudential standing upon finding plaintiff's "claimed injury may never come to pass"). Moreover, taking judicial notice of Laufer's many similar cases filed in courts around the country, the Court finds it implausible that Laufer's wanderlust will translate into an imminent need to book accommodations in Colorado, Connecticut, District of Columbia, Florida, Georgia, Illinois, Indiana, Maine, Massachusetts, Maryland, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, and Wisconsin.[8] (*See* Def. Ex. 1 (ECF No.10-1), PageID#s 41-78.)

In this case, the nature of the injunctive relief sought by Plaintiff requires that she show that she "faces a 'real and immediate threat' of future injury." *Carello*, 930 F.3d at 835 (quoting *City of Los Angeles v.*

---

[8] The Court notes that other district courts have similarly found Laufer's recent proffers of longstanding, imminent plans for an extended road trip insufficient to create standing. *See, e.g.*, *Laufer v. Naranda Hotels, LLC*, Nos. 8:20- cv-1974-SAG & 1:20-cv-2136-SAG, 2020 WL 7384726, at *5 (D. Md. Dec. 16, 2020) ("Plaintiff's proffered travel plans, and the injuries she claims to have suffered as a result, still fall short of establishing her standing to sue."); *Laufer v. Galtesvar OM, LLC*, No. 1:20-cv-00588-RP, 2020 WL 7416940, at *7-*8 (W.D. Tex. Nov. 23, 2020) (declining to consider Laufer's affidavit, filed in response to motion to dismiss, as establishing an intent to visit Carrizo Springs, Texas as of the date she filed her complaint), *report and recommendation adopted* 2020 WL 7416195 (W.D. Tex. Dec. 15, 2020), *aff'd* No. 20-51018, 2021 WL 1726110 (5th Cir. Apr. 30, 2021).

Lyons, 461 U.S. 95, 105 (1983)). With no immediate plan to travel to Wells, Maine and with Defendant's website currently reflecting the limitations of their available lodging options, the Court readily concludes that Plaintiff cannot allege an immediate future injury from this particular Defendant's ORS. *See Lujan*, 504 U.S. at 564 ("'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.'") (quoting *Lyons*, 461 U.S. at 102).

Thus, the Court ultimately concludes that Laufer has not asserted a plausible injury that is concrete and imminent as it relates to this Defendant. The Court certainly recognizes that the issue of Laufer's standing to pursue such ADA claims based on her documented violations of the Reservations Rule has divided the federal courts.[9] However, on the record presented, the

---

[9] *Compare, e.g.*, *Laufer. v. Lilly Pond LLC C Series*, No. 3:20-cv-617-wmc, 2020 WL 7768011, at *5 (W.D. Wis. Dec. 30. 2020) (finding standing but certifying the issue for interlocutory appeal), *Laufer v. Surf Hotel Investments*, LLC, Docket No. 1:20-cv-5364, 2021 WL 809732, at *2 (N.D. Ill. March 3, 2021) (finding standing and collecting cases similarly finding), *Laufer v. Drashti Batavia LLC*, No. 1:20-cv-407-LJV-MJR (W.D.N.Y. March 22, 2021) (slip opinion filed as ECF No. 23-1); *Laufer v. Jamestown Hotel LLC*, No. 1:20-cv-367-LJV-MJR (W.D.N.Y. March 22, 2021) (slip opinion filed as ECF No. 23-2), *with Laufer v. Mann Hosp., L.L.C.*, No. 20-50858, 2021 WL 1657460 (5th Cir. Apr. 28, 2021) (affirming dismissal based on lack of injury in fact); *Laufer v. Looper*, No. 1:20-cv-02475- NYW, 2021 WL 330566 (D. Colo. Jan 11, 2021) (dismissing for lack of standing); *Laufer v. Naranda Hotels, LLC*, Nos. 8:20-cv-1974-SAG & 1:20-cv-2136-SAG, 2020 WL 7384726 (D. Md. Dec 16, 2020) (finding that Laufer "lacks standing, lacks credibility and is not operating in good faith"); *Laufer v. Dove Hess Holdings, LLC*, No.

Court concludes that Laufer has only plausibly alleged a "a bare procedural violation" of 28 C.F.R. § 36.302(e)(1) as it relates to this Defendant. *Spokeo*, 136 S. Ct. at 1549. Laufer's work to ensure that accessibility information is in fact accessible to those planning a trip to Maine is undeniably admirable. But, such an interest does not amount to an injury that confers constitutional standing and, thus, does not give rise to a live case or controversy over which this Court has jurisdiction.

IV. CONCLUSION

For the reasons just stated, the Court hereby GRANTS Defendant's Motion to Dismiss (ECF No. 9) and Request for Judicial Notice (ECF No. 10).

SO ORDERED.

/s/ George Z. Singal
United States District Judge

Dated this 18th day of May, 2021.

5:20-cv-00379-BKS-ML, 2020 WL 7974268, at *15 (N.D.N.Y. Nov. 18, 2020), *motion to certify appeal denied*, 2021 WL 365881 (N.D.N.Y. Feb. 3, 2021).