No. 22-429

In The

Supreme Court of the United States

ACHESON HOTELS, LLC,

Petitioner,

v.

DEBORAH LAUFER,

Respondent.

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

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BRIEF OF ATLANTIC LEGAL FOUNDATION & DRI CENTER FOR LAW AND PUBLIC POLICY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

The DRI Center for Law and Public Policy is the public policy think tank and advocacy voice of DRI, a nonprofit organization composed of approximately 14,000 attorneys who represent businesses in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation of the role of defense lawyers in the civil justice system; and anticipating

[1] No counsel for a party authored this brief in whole or part, and no party or counsel other than *amici curiae* and their counsel made a monetary contribution intended to fund preparation or submission of this brief.

and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. The Center participates as *amicus curiae* in this Court, federal courts of appeals, and state appellate courts in an ongoing effort to promote fairness, consistency, and efficiency in the civil justice system. *See* dri.org.

* * *

Amici curiae have a direct interest in the question presented—whether a self-appointed "tester" who trolls the Internet for small hotels whose websites allegedly lack adequate accessibility information has Article III standing to pursue litigation under the Americans with Disabilities Act (ADA) for disability-based discrimination. This issue implicates ALF's mission of advocating for civil justice and free enterprise, and the professional interests of DRI's members, who advise and represent many businesses subject to the ADA.

Even beyond the ADA and serial testers such as the litigious Respondent here, the Article III standing issue necessarily implicates the cottage industry of filing Internet-based "informational injury" suits. Unlike traditional failure-to-warn litigation for personal injury or wrongful death, the potential gravamina of informational injury claims against virtually any business that has a website are as expansive as the World Wide Web. *Amici* have an interest in quashing frivolous or meritless litigation calculated by contingency-fee lawyers to exact costly

and unwarranted settlements from unsuspecting businesses that lack the resources to litigate. Such suits abuse, rather than promote, the nation's civil justice system.

SUMMARY OF ARGUMENT

This case presents a fundamental question implicating the separation of powers and federal judicial authority: When does a plaintiff suffer a "cognizable intangible injury" by being denied information required to be disclosed by federal law? Relatedly, it also asks a groundbreaking question affecting the next frontier of online enforcement of constitutional and federal statutory rights: When are informational injuries on the Internet justiciable under Article III of the Constitution?

1. Article III "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citing U.S. Const., Art. III, § 2, cl. 1). "For there to be a case or controversy under Article III, the plaintiff must have a 'personal stake' in the case—in other words, standing." *Id.* (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

To have standing, all plaintiffs must have suffered a particularized, concrete injury. *Id.*; *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 337-38 (2016). Some injuries are well-accepted as particularized and concrete, such as "[p]hysical or monetary" harms. *Id.*

But a bare violation of federal law, divorced from any separate harm, is only sometimes—not always—enough to confer standing. This Court "reject[s] the proposition 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.'" *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo*, 578 U.S. at 341). Simply put, "[a]n injury in law is not an injury in fact." *TransUnion*, 141 S. Ct. at 2205.

To be "concrete" and thus justiciable in federal court, intangible injuries must have "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 578 U.S. at 341. In other words, there must be "a close historical or common-law analogue." *TransUnion*, 141 S. Ct. at 2204.

TransUnion observes that intangible harms remedied at common law include "reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.* Without a historical, common-law remedy for the claimed intangible harm, the plaintiff lacks standing to sue in federal court. *Id.*

Standing—and the concrete harm requirement—are "essential to the Constitution's separation of powers." *Id*. at 2207. Standing "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen*

v. Wright, 468 U.S. 737, 750 (1984). Standing requirements are "'founded in concern about the proper—and properly limited—role of the courts in a democratic society.'" *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). They are "fundamental limits on federal judicial power in our system of government." *Id.*

These separation of powers principles dictate that Congress is powerless to enlarge the constitutional meaning of an Article III injury. Congress cannot authorize lawsuits seeking to remedy intangible harms unless such harms are particularized and concrete. "[E]ven though 'Congress may elevate harms that exist in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'" *TransUnion*, 141 S. Ct. at 2205 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)).

And this Court—not Congress—has the final say on whether alleged harm is constitutionally sufficient. "Congress's creation of a statutory prohibition or obligation and a cause of action does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III any more than . . . Congress's enactment of a law regulating speech relieves courts of their

responsibility to independently decide whether the law violates the First Amendment." *Id.*

In short, all plaintiffs must have a constitutionally sufficient answer when asked, "'What's it to you?'" *Id.* (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 882 (1983)).

2. Respondent claims to have suffered an informational injury by being deprived of information required to be disclosed by a federal regulation pertaining to hotel reservations that was promulgated under the ADA. It 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." 28 C.F.R. § 36.302(e)(1)(ii).

Respondent concedes that she never needed the information required to be disclosed by this regulation, as she was not trying to reserve a hotel room. Rather, she wanted to find her next federal court case. She was searching the Internet for websites which (she hoped) violated the regulation at issue. It was merely randomly that she found Petitioner's website while trying to "injure" herself.

She had no need for the information to begin with; thus withholding it was not a particularized injury.

3. Nor is Respondent's alleged intangible harm concrete. Before the enactment of the ADA, which authorized promulgation of the regulation at issue, American and English common law afforded no remedy for disabled individuals who were denied specific information about guest rooms in places of public accommodation. The regulation at issue has no historical equivalent to the precedents cited in *TransUnion* for intangible harms remedied at common law, such as invasions of privacy, reputational harms, intrusions upon seclusion, etc. As in *TransUnion*, "'the mere existence of inaccurate information'" has 'no historical or common-law analog.'" 141 S. Ct. at 2209 (quoting *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339, 344–45 (D.C. Cir. 2018)).

The First Circuit nonetheless concluded that Petitioner's alleged withholding of this information from Respondent was itself unlawful discrimination. According to the First Circuit, unlawful discrimination coupled with allegations of stigmatization and emotional distress (as Respondent claims here) are enough to show a concrete injury.

But the ADA does not afford private enforcement plaintiffs any damages remedy for emotional distress. Respondent's only remedies are injunctive relief and attorney fees. *See* 42 U.S.C. § 12188(a)(1) (Availability

of remedies and procedures). Because Congress has determined not to remedy this type of injury under the ADA, it would contravene separation of powers to use it to afford Respondent Article III standing.

Additionally, the "stigmatic injury, or denigration, suffered by all members" of a protected group because of unlawful discrimination does not afford standing—instead, to be actually injured, plaintiffs still must be "'personally denied equal treatment' by the challenged discriminatory conduct." *Allen*, 468 U.S. at 755 (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)). That is the rule even though "this sort of noneconomic injury is one of the most serious consequences of discriminat[ion]." *Id.* Conferring standing on Respondent would violate the separation of powers for the same reasons as in *TransUnion*.

4. Any conclusion to the contrary would have dangerous implications for the future—a future where many federal statutes requiring disclosures of information in tandem with private rights of action could be enforced by plaintiffs asserting Internet-based injury.

For example, this case arises under the ADA—and a critical question about whether and how the ADA applies on the Internet remains starkly unresolved: Are Internet-only business or government websites places of public accommodation that must be accessible to people with disabilities? If they are—and

if tester plaintiffs like Respondent have standing—will the ADA-based serial litigation plaguing physical businesses take over the digital realm?

And even though this case arises under the ADA, its ramifications would be much broader if Respondent is afforded standing. Federal statutory rights are already being exercised, violated, and enforced on the Internet, and that will only continue as more facets of society move online. Major industries have been successfully sued by private plaintiffs alleging online discriminatory practices in violation of federal law. And more plaintiffs are asserting harm by acts occurring on the Internet and other digital platforms—like the plaintiffs in cases recently decided by this Court who alleged online businesses were liable for terrorist attacks ostensibly done because of computer algorithms delivering radicalizing content.

So too are more plaintiffs asserting intangible, informational harms, including claims under the Fair and Accurate Credit Transaction Act, where plaintiffs allege "injury" after receiving credit card receipts with too many credit card numbers printed on them. Such cases rest on allegations of presumptive intangible harm—with no use, dissemination, or injury apart from the receipt itself bearing too much information.

The near future will likely see a nationwide consumer data privacy law with a private right of action. It is anticipated that the statute will require

online disclosures of information about "cookies" and data tracking—rights that can be easily violated without causing any separate, actual injury. A consumer data privacy statute could become the next hotbed of private enforcement litigation by uninjured privacy crusaders analogous to Respondent. And if Respondent has standing here, then such plaintiffs will cite this case to argue the same.

ARGUMENT

Conferring Article III Standing On "Informational Injury" Plaintiffs Who Troll the Internet For Technical Violations of Federal Law But Suffer No Actual Harm Would Establish a Dangerous Precedent Leading To a Flood of Unwarranted Litigation

A. All plaintiffs must have suffered particularized and concrete harm as a prerequisite to standing

Article III of the Constitution defines and limits the federal judicial power. Only certain "Cases" and "Controversies" are justiciable in federal court. U.S. Const., Art. III, § 2, cl. 1.

One of these constitutional requirements is that all plaintiffs have standing, *i.e.*, suffered an "injury in fact" that is "fairly traceable to the challenged conduct" and which is "likely to be redressed by a favorable judicial decision." *Spokeo,* 578 U.S. at 341.

An "injury in fact" is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent"—not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *see also Spokeo*, 578 U.S. at 339.

In *TransUnion*, this Court defined the meaning of "concrete harm" in the context of intangible, informational injury. The Court articulated when the deprivation of information required to be disclosed by federal law is itself an actual injury as contemplated by Article III. In deciding this question, the Court acknowledged that Congress can create rights that do not otherwise exist and that infringement of such rights can be enough of an injury to confer standing to sue in federal court. *See TransUnion*, 141 S. Ct. at 2204-05. Even so, the Court made clear that standing is allowed *only where*, unlike here, the injury is both "particularized" and "concrete." *Id.* at 2200.

Certain injuries like physical or monetary injuries are plainly concrete harms. Intangible harms—like reputational injuries—also can be concrete harms, but only sometimes. *Id*. at 2204-05. Deciding whether intangible injuries are "concrete" requires examining the "important roles" of "both history and the judgment of Congress," because the origins of the case-or-controversy standing requirement are "grounded in historical practice." *Spokeo*, 578 U.S. at 340-341.

For a mere violation of a law requiring disclosure of information to be justiciable without proof of

independent harm, the alleged injury must have a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit in American courts. *TransUnion*, 141 S. Ct. at 2204. Mere violations of federal statutes creating informational rights cause "cognizable intangible harm" only where there is "a close historical or common-law analogue." *Id.*

For example, in *TransUnion*, the Court observed that intangible harms with analogous remedies at common law include "reputational harms, disclosure of private information, and intrusion upon seclusion." *Id.* If there is no historical common-law remedy, there is no "concrete harm" from merely being deprived of information. *Id.*

B. The "concrete harm" requirement is grounded in separation of powers

"The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" *TransUnion*, 141 S. Ct. at 2203; *id.* at 2207 ("The concrete-harm requirement is essential to the Constitution's separation of powers . . . ."). The concrete harm requirement "ensures that federal courts decide only 'the rights of individuals,' *Marbury v. Madison*, 5 U.S. 137 (1803), and that federal courts exercise 'their proper function in a limited and separated government.'" *Id.* (quoting John Roberts, *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1224 (1993)).

Congress has the power to create new statutory rights that may give rise to standing and are

enforceable in federal courts—including laws mandating disclosure of information—but Congress cannot enlarge the meaning of actual injury. This Court, not Congress, decides whether a statute confers a right sufficient for standing. *Id.* at 2205 ("'we cannot treat an injury as 'concrete' for Article III purposes based only on Congress's say-so.'") (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999, n. 2 (11th Cir. 2020)).

Congress has no "lawmaking power to transform something that is not remotely harmful into something that is." *Id.* (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018)). This is why modern, prevailing—even moral—views of what "is" intangible injury likewise are not enough to allow Congress to redefine the meaning of "injury" as contemplated by Article III.

It is immaterial that "Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court" would "think that a person is harmed" by the mere fact of being falsely dubbed a terrorist in a credit report. *TransUnion*, 141 S. Ct. at 2204 (Thomas, J., dissenting). But that is not enough to confer Article III standing. *See id.* at 2213 ("In sum, the 6,332 class members whose internal TransUnion credit files were not disseminated to third-party businesses did not suffer a concrete harm.").

This Court held in *TransUnion* that exercising standing over uninjured plaintiffs undermines federal judicial authority and violates the separation of

powers and Article III. *See id. at* 2207 ("A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority."). For the same reason federal courts could not hear the claims of the class-action plaintiffs in *TransUnion* who suffered no concrete harm, it would likewise violate the separation of powers to entertain lawsuits filed by ADA tester plaintiffs like the Respondent here.

C. Respondent's allegation that she felt stigmatized by the withholding of information she did not need is far from enough to afford Article III standing

Respondent's asserted basis for standing—her claimed stigmatization and emotional distress from viewing Petitioner's website—is not actionable by ADA Title III private-action plaintiffs like her. *See* 42 U.S.C. § 12188(a)(1); *see also Allen*, 468 U.S. at 755 (unlawful discrimination in violation of a federal law does not afford universal standing to all stigmatized persons within protected class—rather, the injury "accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct.") (quoting *Heckler v. Mathews*, 465 U.S. 728, 740 (1984)).

The First Circuit held that Respondent's emotional injury—the allegation that she felt stigmatized by unlawful discrimination—is enough to conclude that she was constitutionally injured and has standing. In

so doing, the court of appeals relied almost exclusively on distinguishable precedent. It also conflated the required common-law analogs with its own (substantively irrelevant) modern views about unlawful discrimination. This is the wrong analysis. Applying the correct standard as required by *TransUnion*, Respondent suffered no cognizable injury and lacks Article III standing.

1. No particularized injury

"For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Spokeo,* 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560, n. 1). Respondent concedes she never needed the information whose absence she claims was the cause of her supposed injury. She was not trying to reserve a room. Rather, she was trying to find websites missing the public disclosures required by the hotel room regulation, 28 C.F.R. § 36.302(e)(1)(ii). The withholding of information about guest rooms therefore was not particularized to her.

2. No concrete harm

A "bare procedural violation" is actionable only with attendant "concrete harm.'" *TransUnion,* 141 S. Ct. at 2214. "[I]f there were no concrete-harm requirement, the requirement of a particularized injury would do little or nothing to constrain Congress from freely creating causes of action for vast classes of unharmed plaintiffs to sue any defendants who violate any federal law." *Id*. at 2206, n.2.

To conclude that a violation of the regulation presumptively injured Respondent, the First Circuit should have analyzed "both history and the judgment of Congress" and asked whether Respondent's alleged harm has "a close historical or common-law analogue." *Id.* at 2204. It never did that analysis.

a. No historical basis

Respondent's alleged intangible harm has no "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo,* 578 U.S. at 340-41. As such, her "injury" is not concrete.

But according to the First Circuit, because the ADA prohibits disability discrimination and this ministerial regulation about hotel room accessibility features was promulgated under the ADA, a violation of it is tantamount to discrimination. The First Circuit erroneously equated denying Respondent information—with intentionally discriminating against her because of her disability. The court of appeals was mistaken that a bare violation of the regulation, coupled with Respondent's allegation that she suffered stigmatization as a result, means that Respondent was concretely injured and has standing.

That the regulation implements the ADA, and that its goal is to facilitate access to public accommodations by people who are disabled, does not in turn mean that there is a historical precedent for remedying this harm. There is none. For centuries, the common law did not protect the rights of people with disabilities.

That is why the ADA was enacted. Even still, people with disabilities asserting private claims under Title III (like Respondent) cannot recover for emotional distress. *See* 42 U.S.C. § 12188(a)(1). Injunctive relief and attorney fees are their sole remedy. *Id.* Thus, not only is there a lack of historical support, there also is no statutory remedy under the ADA for Respondent's claimed harm.

b. *Havens Realty* is inapplicable

The First Circuit relied almost exclusively on *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) to find that Respondent has standing. The court of appeals explicitly conceded that Respondent lacks standing if *TransUnion* controls. Pet. App. at 18a-19a. It essentially asked this Court to overrule *Havens Realty* so that lower courts can follow *TransUnion*. *Id.*

Havens Realty does not conflict with *TransUnion*. *Havens Realty* involved a class of one. The only person who was discriminated against was the in-person, African American tester plaintiff who alleged racial discrimination in violation of the Fair Housing Act.

The holding in *Havens Realty* is not controlling here because Respondent would presumably have standing had she traveled to Maine and shown up at the motel, bags in hand, asking the front desk clerk for information about accessible room features and been denied such information. In that event, she would have been analogous to the tester plaintiff in *Havens Realty*, and to the *TransUnion* plaintiffs whose

incorrect credit report information was disclosed to third parties thus personally affecting them.

In both cases, the plaintiffs had constitutionally sufficient answers to the question: "What's it to you?" Respondent does not have such an answer. She was not targeted or discriminated against by the Petitioner. She is not a class of one. Instead, she was an anonymous Internet user. Petitioner's website was identical for all online visitors. Millions of disabled Americans could have viewed the website simultaneously and all been "injured" at once.

Digital tester plaintiffs who view websites and sue are not analogous to in-person testers such as the plaintiff in *Havens Realty*. A generic omission of information about physical accessibility features of guest rooms on publicly accessible websites is not analogous to discriminating against someone, in person, because of their disability. The latter is not a mere denial of information—it is a situation where someone is "personally denied equal treatment." *Allen*, 468 U.S. at 755. That is not what happened to Respondent. *Havens Realty* is inapplicable.

3. Emotional distress is insufficient

The First Circuit relied on modern views abhorring disability discrimination. It also deemed legitimate the stigmatization which disabled individuals regularly suffer—and have suffered for centuries when the law failed to help them. These concerns are a given, but they do not substitute for the required historical, common-law support when deciding

whether a plaintiff like Respondent has standing. Modern views about what is "injury" do not make these kinds of intangible harms justiciable.

It is immaterial that "Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court" might "think that a [disabled] person is harmed" by being denied guest room-related information which he or she does not actually need. *TransUnion*, 141 S. Ct. at 2224-25 (Thomas, J., dissenting). That is not enough to confer standing.

It would be an unconstitutional exercise of judicial power to vest Respondent with standing. Doing so would give her an open door to federal courts by claiming a "harm" that not only lacks historical common-law support, but also lacks an existing remedy under the current comprehensive statutory protections of the ADA. *See* 42 U.S.C. § 12188(a)(1); *Allen*, 468 U.S. at 740 ("stigmatic injury, or denigration, suffered by all members of a racial group" due to racial discrimination is insufficient to afford standing to stigmatized persons); *cf. Cummings v. Premier Rehab Keller, PLLC*, 142 S. Ct. 1562, 1577 (2022) (Kavanaugh, J., concurring) (compensatory damages for emotional distress are unrecoverable as a remedy for specified civil rights statutes with implied private rights of action; the separation of powers "counsels against judicially authorizing compensatory damages for emotional distress" in such cases).

D. Conferring standing based on mere violations of informational laws would lead to novel and unwarranted litigation

Respondent claims injury by being deprived of information on the Internet. Yet when the regulation at issue was promulgated in 1991, the drafters did not know about the future ways individuals would use the Internet to access information in the 21st Century. The same can be said for many existing federal laws that guarantee individual rights.

But when are informational injuries on the Internet justiciable under Article III?

This case goes to the heart of that question and thus transcends the ADA. It is an issue that has vast implications. The question of the circumstances under which online acts cause "cognizable intangible harm" is a pivotal one considering rapidly emerging issues surrounding online enforcement of individual rights, "digital discrimination" against protected classes, and data privacy.

If online tester plaintiffs like Respondent have standing to challenge informational injuries on the Internet arising from missing disclosures of meaningless information required to be given to the public at large—then so do future plaintiffs who will claim they were deprived of (perhaps innocuous, unnecessary) information that they were entitled to receive online. It will not matter if the withholding of information, to them, was harmless. And it will not matter the kind of right is at issue.

The same applies to online tester plaintiffs who patrol the Internet for missing disclosures of information required by law to be digitally published—they will rely on this case to argue for "concrete harm" as well, making the same self-created harm argument as Respondent. Or they may argue for new injuries that are now unknown but will surface as new technologies create new ways for laws to be broken—and enforced—in the digital realm. If Respondent has standing, this case will be a harbinger for serial private enforcement litigation in many areas of federal law.

1. Along with the ADA, numerous federal statutes containing private enforcement rights require informational disclosures

Many federal laws with private rights of action mandate public disclosures of information on a wide range of subject areas affecting various industries.

Along with the ADA regulation at issue, examples include environmental laws requiring disclosure of

data on pollution,[2] securities laws,[3] laws on interstate land sales,[4] truth in lending laws,[5] and freedom of information laws.[6] All such statutes, and many more in the U.S. Code, require informational disclosures to be made to the public (or certain members of the public) and simultaneously afford a private right of action to aggrieved individuals.

While these laws do not yet have extensive precedent involving tester plaintiffs or abusive private enforcement, other statutes do—including laws requiring information unique to specific types of individuals to be disclosed to them. *TransUnion* and *Spokeo* were filed under the Federal Credit Reporting Act, an example of one such statute.

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[2] 42 U.S.C. § 7604 (Clean Air Act authorizes citizens to enforce compliance with emission standards or limitations and orders issued by the EPA Administrator or a State); *see also Utah Physicians For a Healthy Environment v. Diesel Power Gear, LLC*, 21 F.4th 1229 (10th Cir. 2021) (affirming in part and reversing in part judgment under the Clean Air Act in private enforcement action under § 7604).

[3] 17 C.F.R. § 230.481 (information required in prospectuses of publicly traded companies selling federally regulated securities).

[4] 15 U.S.C. § 1707 (Interstate Land Sales Act).

[5] 15 U.S.C. § 1601, as amended (Truth in Lending Act).

[6] 5 U.S.C. § 552 (Freedom of Information Act).

Another example is the Fair and Accurate Credit Transaction Act (FACTA). Plaintiffs have claimed that information printed on credit card receipts violates 15 U.S.C. § 1681c(g)(1), which prohibits any person who "accepts credit cards or debit cards for the transaction of business" from "print[ing] more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." There is a circuit split over whether such plaintiffs have standing for such bare procedural violations.[7]

2. Private suits alleging "digital" injuries could skyrocket in the near future

Current circuit splits, recent cases involving Internet-based injuries, and recent federal agency guidance on how statutory rights apply online, all suggest that private enforcement actions seeking to enforce "online" rights will be a main focus of the plaintiffs' bar. A holding here that Respondent has standing would ignite such litigation.

The ADA is the source of Respondent's claimed harm—yet circuits remain starkly divided on whether

[7] *See Thomas v. Toms King (Ohio)*, LLC, 997 F.3d 629 (6th Cir. 2021) (no standing); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) (en banc) (no standing); *Kamal v. J. Crew Group, Inc.*, 918 F.3d 102 (3d Cir. 2019) (no standing); *Noble v. Nev. Checker Cab Corp.*, 726 F. App'x 582 (9th Cir. 2018) (no standing); *Katz v. Donna Karan Co. Store, LLC*, 872 F.3d 114 (2d Cir. 2017) (no standing); *cf. Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1066 (D.C. Cir. 2019) (standing).

online-only businesses lacking physical storefronts are "places of public accommodation" under the ADA that must provide "reasonable accommodations" to disabled people for rights and privileges of society.[8] If digital platforms are indeed places of public accommodation, the ADA-based for-profit hustle dominating the physical world could easily permeate the digital one. But this question remains unresolved.

Efforts to remedy online deprivations of federal rights go beyond the ADA as shown by recent cases which, though not specifically addressing the issue of standing, exemplify digital-injury claims that courts will commonly see. For example, in *National Fair Housing Alliance v. Facebook*, the plaintiffs successfully sued Facebook for online housing discrimination after allegedly uncovering discriminatory advertising practices. *See Nat'l Fair Hous. All. v. Facebook, Inc.*, No. 1:18-cv-02689 (S.D.N.Y. Feb. 6, 2019).

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[8] The First and Seventh Circuits have found that an "electronic space" (a website) can itself be a place of public accommodation. *See Doe v. Mut. of Omaha Ins. Co.,* 179 F.3d 557, 559 (7th Cir. 1999). The Third, Sixth, Ninth, and Eleventh Circuits have held that places of public accommodation are limited to "physical places," *Parker v. Metro Life Ins. Co.,* 121 F.3d 1006, 1010-11 (6th Cir. 1997), but that goods and services provided by a public accommodation—including those provided through a public accommodation's website—might fall within the ADA's protections if they have a sufficient nexus to the public accommodation's physical location. *See, e.g., Weyer v. Twentieth Century Fox Film Corp.,* 198 F.3d 1104, 1114 (9th Cir. 2000).

The plaintiffs alleged that Facebook allowed advertisers to exclude certain protected classes from seeing housing-related advertisements. Facebook moved to dismiss, arguing that the Communications Decency Act immunized it from the Fair Housing Act. The motion was denied. Soon after, the case resolved via a court-approved consent decree prohibiting discrimination, requiring compliance with advertising laws, and imposing other requirements for hiring, promotion, retention, training, and reporting.

Another private enforcement action about online rights, which suggests an increase in digital-harm litigation, is *National Association of the Deaf v. Harvard University*, 377 F. Supp. 3d 49 (D. Mass. 2019), where the plaintiff filed a putative class action under the ADA and Section 504 of the Rehabilitation Act of 1973, which vests individuals who are disabled with a private right of action to seek to enjoin discrimination in programs and activities receiving federal financial assistance. *See* 29 U.S.C. § 794.

The plaintiff claimed Harvard failed "to provide timely, accurate captioning of the audio and audiovisual content that Harvard makes available online to the general public for free." *National Ass'n of the Deaf*, 377 F. Supp. at 53. Dispositive relief was denied because, per the district court, if the plaintiffs could prove what they had alleged, they could prevail on their Section 504 claims. *Id.* at 61-63. The case then settled in a consent decree which required

Harvard to revamp and strengthen its digital accessibility policy.[9]

Other developments in the law have removed longstanding roadblocks—and paved the way—for online tester plaintiffs by removing the previous threat of criminal prosecution for online tester activities. For example, the Computer Fraud and Abuse Act (CFAA) purports to criminalize violations of a website's terms of service. *See* 18 U.S.C. § 1030. It has been interpreted as criminalizing online activity such as beneficial research and journalism. But this Court held otherwise in *Van Buren v. United States,* 141 S. Ct. 1648 (2021), concluding "this provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them." *Id.* at 1652.

A growth in claims alleging harm from online algorithms and "big data" aggregation is also likely. This court's recent opinions issued in May 2023 in *Twitter, Inc. v. Taamneh*, No. 21–1496 (May 18, 2023) and *Gonzalez v. Google*, No. 21–1333 (May 18, 2023) (per curiam) involved online injuries allegedly caused by computer algorithms. The plaintiffs in both cases claimed that certain Internet users were radicalized by targeted, user-specific, custom-tailored content,

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[9] *See* https://accessibility.huit.harvard.edu/settlement-caption-requirements.

intentionally driven by complicated computer algorithms. Those algorithms, by design, route content to people whom the algorithms "think" want to see such content. The plaintiffs claimed the defendant online businesses were the true cause of their harm—not the acts carried out in real life, in the physical world, by the hands and minds of faraway, brainwashed foreign terrorists. *Id.*

The extent to which lawsuits alleging liability for use of online personal data and information will increase is unknown—but new federal agency and executive branch guidance spotlighting informational rights exercised online suggests that is what's to come.

The Department of Health, the Federal Communications Commission, the Equal Employment Opportunity Commission, the Federal Trade Commission, and the White House have issued guidance and exercised regulatory authority stating that federal statutory rights apply—and will be enforced—on the Internet as in the physical realm.[10]

Congress is pushing hard for a comprehensive federal data privacy law. The holding here could dramatically affect the future viability of such legislation—because siding with Respondent means, by extension, approving of standing for tester

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[10] *See, e.g.*, U.S. Dept. of Health and Human Services, Office for Civil Rights, *Guidance on Nondiscrimination in Telehealth: Federal Protections to Ensure Accessibility to People with Disabilities and Limited English Proficient Persons*, July 29, 2022.

plaintiffs in data-privacy lawsuits alleging intangible harms arising from missing disclosures or uses of information, and doing so without concrete harm.

The American Data Privacy and Protection Act was the first comprehensive consumer privacy bill to pass through committees in July 2022, but action was incomplete when the session adjourned.[11] A major point of contention is the private right of action. Opponents argue that it will be abused and that frivolous class action lawsuits filed by plaintiffs claiming technical violations of privacy rules—without alleging any independent harm—could overburden the federal judicial system.

3. The "slippery slope" is real

Setting a precedent that a website lacking required public disclosures causes a particularized, concrete injury to an individual (much less a self-appointed serial tester such as Respondent) by withholding information that such individual never needed in the first place, would make it much easier for plaintiffs to claim intangible injury based on other types of alleged, Internet-based informational harm.

The ADA already is a breeding ground for tester plaintiffs and questionable standing rulings. If the circuit split is resolved declaring every website offering goods or services to the public at large to be a

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[11] *See* American Data Privacy and Protection Act, H.R. 8152, 117th Cong., available at https://tinyurl.com/yur7c6jv.

place of public accommodation under the ADA—then tester plaintiffs will have a field day.

There is only a limited supply of businesses with physical locations subject to the ADA. But there is no end to the supply of websites and online businesses. New ones go up as old ones come down. The supply is endless—and it includes government websites. The potential for litigation is nearly infinite.

If Respondent's intangible injury is cognizable under Article III, then so are the informational "injuries" sustained by plaintiffs who receive receipts with excessive credit card numbers printed on them. Nothing will stop enterprising class-action lawyers from extrapolating and applying the same litigation model used in ADA cases to the myriad federal laws requiring informational disclosures and granting private rights of action.

Proposed nationwide consumer data privacy legislation includes private enforcement rights combined with mandatory informational disclosures of procedural information (such as requiring websites to disclose the use of "cookies" that track browsing patterns). If Respondent has standing here, then so would privacy activists and uninjured plaintiffs who claim intangible harm from undisclosed cookies and data trackers. Every small business with a website which cannot afford compliance certificates, or IT staff to provide the state-of-the-art compliance protocols, could face digital vigilante justice done to advocate for marginalized groups.

Given this Court's recent holding in *Van Buren v. U.S.*, 141 S. Ct. at 1652, that the Computer Fraud and Abuse Act (CFAA) does not criminalize mere violations of website terms and services, it stands to reason large swaths of digital testers are now on the hunt for websites violating federal law—something they avoided a few years ago. *See, e.g.,* Annie Lee, *Algorithmic Auditing and Competition Under the CFAA: The Revocation Paradigm of Interpreting Access and Authorization*, 33 Berkeley Tech. L.J. 1307, 1309-10 (2018) (observing, pre-*Van Buren*, that online testers faced "the threat of litigation and prosecution because their need for information from online platforms clashes with the CFAA's prohibition on unauthorized access to a computer or website").

And, in many cases, it will be a close call as to whether alleged intangible injury is, in fact, constitutionally injurious given that there are historical analogs for many intangible harms including privacy infringements. *See TransUnion*, 141 S. Ct. at 2200.[12] These nuanced issues and cases should be resolved on the merits and in the future—not swept away in a sea change effected by this case.

CONCLUSION

Respondent lacks Article III standing. This Court should reverse the First Circuit. Doing so will curtail erosion of Article III standing and protect U.S.

[12] *See also, e.g.,* Wilson C. Freeman, Cong. Rsch. Serv., LSB10303, *Enforcing Federal Privacy Law-Constitutional Limitations on Private Rights of Action* (2019).

businesses and the economy from the harm resulting from widespread, frivolous "enforcement" of federal laws that confer private rights of action.

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