STANDING AT THE CROSSROADS: AN ANALYSIS OF THE CIRCUIT SPLIT OVER ADA TESTER STANDING

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"Disability only becomes a tragedy when society fails to provide the things we need to lead our lives—job opportunities or barrier-free buildings, for example. It is not a tragedy to me that I'm living in a wheelchair."

– Judy Heumann[1]

ABSTRACT

This Article analyzes the circuit split concerning whether self-appointed testers without intent to travel or book a reservation have Article III standing to sue hotels for failing to disclose accessibility information on their websites in violation of an Americans with Disabilities Act ("ADA") regulation. This Article ultimately argues that these testers should have standing under an informational injury and/or stigmatic injury rationale. However, negative perceptions of ADA testers coupled with the Supreme Court's recent standing decisions have put the private enforcement of the ADA and other disability rights statutes in jeopardy. In hopes of preserving the ability of testers to bring suit against hotels and other public accommodations in online spaces, this Article also proposes various solutions that address concerns over abusive accessibility litigation without eradicating tester standing entirely.

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[1] Joseph Shapiro, *Activist Judy Heumann Led a Reimagining of What It Means to be Disabled*, NPR (Mar. 4, 2023, 9:20 PM), https://www.npr.org/2023/03/04/1161169017/disability-activist-judy-heumann-dead-75 [https://perma.cc/LP2C-728R].

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INTRODUCTION

Congress enacted the Americans with Disabilities Act ("ADA") in 1990 to ensure that "people with disabilities can fully participate in all aspects of life."[2] One of those aspects that able-bodied people often take for granted is the simple act of browsing the internet in search of a suitable hotel to book for a trip. As of 2024, the Centers for Disease Control and Prevention ("CDC") reports that over seventy million adults in the United States are living with a disability.[3] That means that one in four American adults may need information about a hotel's accessibility features before deciding whether to stay there.[4] Unfortunately, many hoteliers[5] do not design their websites with accessibility in mind and, as a result, many reservation websites lack this legally required information.[6] This not only deprives individuals of the ability to make an informed choice about where to stay, but it also sends a message that people with disabilities are neither valued nor welcomed by the establishment.[7]

Title III of the ADA bars any place of public accommodation from discriminating against an individual on the basis of disability.[8] Public accommodations are defined broadly as being any facility operated by a private entity that affects commerce.[9] Title III provides two rights of action

[2] *Businesses That Are Open to the Public*, ADA.GOV, https://www.ada.gov/topics/title-iii (last visited Nov. 15, 2023) [https://perma.cc/M5QU-BL9Y].

[3] *CDC Data Shows Over 70 Million U.S. Adults Reported Having a Disability*, CDC (July 16, 2024), https://www.cdc.gov/media/releases/2024/s0716-Adult-disability.html [https://perma.cc/FLX9-VE2R].

[4] *See id.*

[5] The term "hoteliers" is used throughout this Article to refer to individuals or companies that own, operate, or manage hotels.

[6] *See* MOBILITY MOJO, *Global Hotel Accessibility: Insights 2020 Report*, https://skift.com/wp-content/uploads/2021/10/Global-Hotel-Accessibility-Insights-2020-Report-Mobility-Mojo-3.pdf (last visited Oct. 23, 2024) [https://perma.cc/KAJ6-JK4A] (among the hotels surveyed, ninety-nine percent have accessible bedrooms but do not provide enough detailed information for someone with a disability to determine whether it suits their needs).

[7] See generally Kristen L. Popham, Elizabeth F. Emens & Jasmine E. Harris, *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 COLUM. HUM. RTS. L. REV. F. 1 (2023), for a discussion of the harm associated with systemic noncompliance with the Reservation Rule, such as administrative burdens, feelings of isolation and exclusion, and a loss of autonomy, security, and dignity of the disabled person.

[8] 42 U.S.C. § 12182(a).

[9] U.S.C § 12181(7). Places of public accommodation include a wide range of entities such as hotels, restaurants, theaters, doctors' offices, pharmacies, retail stores, museums, libraries, amusement parks, private schools, and day care centers. *Id.* While the statute is silent as to whether websites qualify as places of public accommodations, the United States Department of Justice has taken the position that Title III applies to all public-facing websites provided by places of public accommodation. *See Title III of the Americans with Disabilities Act and Website Compliance*, ABA (Feb. 20, 2022), https://www.americanbar.org/groups/gpsolo/resources/ereport/archive/title-iii-americans-disabilities-act-website-compliance [https://perma.cc/C2UW-LY9Z]; *see also* Ryan C. Brunner, *Websites as Facilities Under ADA Title III*, 15 DUKE L. & TECH. REV. 171 (2017).

to enforce its provisions: one to the Attorney General, and one to disabled individuals who have been subjected, or reasonably believe they will be subjected, to discrimination.[10]

In 2010, Congress amended the ADA to include several new requirements that expanded protections beyond the physical premises, one of which is referred to as the "Reservation Rule."[11] The Reservation Rule mandates, among other things, that hoteliers "identify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs."[12] This regulation correlates with the rise of digital accessibility lawsuits where disabled people, acting as ADA "testers," scour the internet in search of hotel websites that do not comply with the Reservation Rule, and then sue hotels that do not adequately share how accessible their rooms are.[13] In 2020, Deborah Laufer, a disabled Florida resident with multiple sclerosis,[14] did just that and filed a lawsuit against Acheson Hotels, a hotel operator based in Maine, alleging that its website provided insufficient information about the hotel's accessibility features in violation of the Reservation Rule.[15] The problem is that Laufer, like many other testers, did not visit the hotel nor did she have any plans to do so at the time she sued the hotelier.[16]

The primary question this Article seeks to address is whether ADA "testers" have standing to challenge a place of public accommodation's

[10] 42 U.S.C. § 12188(a)(1).

[11] *Accessible Lodging*, ADA NATIONAL NETWORK, https://adata.org/factsheet/accessible-lodging (last updated 2017) [https://perma.cc/744Y-WLZN]. *See generally* April J. Anderson, *"Tester" Lawsuits Under the Americans with Disabilities Act*, CONG. RSCH. SERV. (Jan. 24, 2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11110#:~:text=The%20rule%20seeks%20to%20ensure,other%20features%20of%20the%20hotel.

[12] 28 C.F.R. § 36.302(e)(1)(ii). The Rule also requires hotels to deliver accessible rooms in the same manner and during the same hours as inaccessible rooms; hold accessible rooms for individuals with disabilities; remove an accessible room from inventory as soon as it has been reserved; and guarantee that the customer receives the specific accessible room they reserved. 28 C.F.R. § 36.302(e)(i), (iii), (iv), (v).

[13] Ian Millhiser, *A Supreme Court Case About Hotel Websites Could Blow Up Much of Civil Rights Law*, VOX (Sept. 25, 2023, 7:00 AM), https://www.vox.com/scotus/2023/9/25/23875036/supreme-court-acheson-hotels-deborah-laufer-testers-disabilities-hotel-website [https://perma.cc/ASP7-QQQJ].

[14] Ann E. Marimow, *High Court to Weigh Whether Disability Activists Can Sue Hotels After Online Searches*, WASH. POST (Oct. 3, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/10/03/disability-access-hotels-supreme-court-ada [https://perma.cc/7NV4-XSA9] (reporting that Laufer "no longer takes more than a few steps without a walker, has limited vision and often uses a wheelchair.").

[15] Shruti Rajkumar, *Hotel Website's Supreme Court Case Could Shake Up How Disability Law Is Enforced*, HUFFPOST (Oct. 4, 2023, 5:45 AM), https://www.huffpost.com/entry/scotus-oral-arguments-ada-tester-case_n_651cc585e4b0d2f61f601483 [https://perma.cc/GW3D-2FUV].

[16] *Id*.

failure to provide disability accessibility information on its website, even if the ADA testers lack any intention of visiting that place of public accommodation. This Article argues that ADA testers *should* have standing based on suffering an informational and/or stigmatic injury. Part I provides background information on civil rights testers in general and ADA testers in particular, including the often unwarranted criticism that these testers have received. Part II outlines the federal standing doctrine and discusses the current circuit split over the issue of ADA tester standing. This Article also presents arguments in support of tester standing and reviews the potential consequences of curtailing tester standing. Finally, Part III proposes various solutions to reduce the threat of predatory litigation without further incapacitating the already weak and underenforced Title III of the ADA.

I. ADA TESTERS: SAVIORS OR SCAMMERS?

A. Background

Test case litigation "refers to the legal strategy in which an organization sponsors a plaintiff with a pre-existing case or creates the case itself in order to challenge an existing law and set a precedent for the future."[17] A civil rights "tester" is a person who voluntarily subjects themselves to discrimination taking place in areas such as housing, employment, or public accommodations, in order to challenge the invidious practice in court.[18] One of the most famous, and perhaps most shameful, civil rights test cases in American history is *Plessy v. Ferguson*.[19] In this case, Homer A. Plessy, a thirty-four-year-old biracial shoemaker, was chosen by a New Orleans civil rights organization to test the constitutionality of Louisiana's separate-car statute, which mandated separate but equal railroad accommodations for Black and white passengers.[20] Plessy, who was one-eighth Black and appeared white, was specifically chosen to highlight the arbitrariness of racial laws.[21] In 1892, with the sole intent of sparking litigation, Plessy purchased a ticket on the East Louisiana Railway, boarded a train car reserved for white passengers, and was subsequently arrested for violating the statute.[22] Four years later, the United States Supreme Court, by a 7-1 decision, ruled against Plessy and upheld the state's racial segregation laws under the separate but

[17] C. Matthew Hill, *"We Live Not On What We Have": Reflections on the Birth of the Civil Rights Test Case Strategy and its Lessons for Today's Same-Sex Marriage Litigation Campaign*, 19 NAT'L BLACK L.J. 175 (2007).

[18] Millhiser, *supra* note 13.

[19] Plessy v. Ferguson, 163 U.S. 537 (1896).

[20] JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 104 (2004).

[21] *Id.* at 110.

[22] *Id*. at 104.

equal doctrine, effectively legitimizing de jure segregation.[23] While this case was deemed a colossal failure, the test case strategy has lived on and become a common tool for challenging discriminatory laws and conduct.[24]

In the present context, ADA "testers" are individuals with disabilities who routinely visit places of public accommodation to identify facilities in violation of Title III.[25] Unlike typical testers, who are sponsored by civil rights organizations, ADA testers are often "self-appointed"—investigating discrimination on their own initiative.[26] Testers will travel far and near to facilities, looking for the absence of accommodations such as "ramps for wheelchairs, Braille on elevators and doors, and [accessible] restrooms and hotel rooms."[27] Some testers need not travel at all to find discrimination; instead, armed with just their computer or cellphone, they search the internet to discover websites or mobile applications that are inaccessible or lack important accessibility information.[28]

Due to the private enforcement mechanism embedded in the ADA, if a tester encounters any virtual or physical barriers to access, they can pursue legal action against the business and seek relief in court.[29] However, remedies under Title III are limited to injunctive relief and attorneys' fees.[30]

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[23] *Plessy*, 163 U.S. at 544 (finding that laws requiring the separation of the two races "do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.").

[24] *See* Komal S. Patel, Note, *Testing the Limits of the First Amendment: How Online Civil Rights Testing is Protected Speech* Activity, 118 COLUM. L. REV. 1473, 1482 (2018). *Plessy* was overturned in 1954 by another renowned test case. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

[25] Kelly Johnson, *Testers Standing up for the Title III of the ADA*, 59 CASE W. RESERVE L. REV. 683, 693 (2009).

[26] Paige Sutherland, Meghna Chakrabarti & Tim Skoog, *Disability Rights Enforcement Could Be Weakened In Latest SCOTUS Case*, WBUR (Oct. 3, 2023), https://www.wbur.org/onpoint/2023/10/03/disability-rights-enforcement-could-be-weakened-in-latest-scotus-case [https://perma.cc/R6YT-MM92].

[27] Johnson, *supra* note 25, at 694.

[28] Randy Pavlicko, *The Future of the Americans With Disabilities Act: Website Accessibility Litigation After COVID-19*, 69 CLEV. ST. L. REV. 953, 968 (2021). *See* Jonathan Lazar, J. Bern Jordan & Brian Wentz, *Incorporating Tools and Technical Guidelines into the Web Accessibility Legal Framework for ADA Title III Public Accommodations*, 68 LOY. L. REV. 305, 308 (2022) (noting that "usability testing," where people with disabilities engage in tasks on the website to identify barriers, is one standard evaluation method used to determine if a website is accessible).

[29] Johnson, *supra* note 25, at 694. This private enforcement mechanism is important because the Department of Justice "is flooded with other responsibilities, and [suing non-compliant businesses] is not a priority for them." Julia Métraux, *Disability "Testers" Keep Businesses Accessible. Will SCOTUS Ban Them?*, MOTHER JONES (July 26, 2023), https://www.motherjones.com/criminal-justice/2023/07/disability-testers-keep-businesses-accessible-will-scotus-ban-them [https://perma.cc/V2PE-95GX].

[30] 42 U.S.C. § 12188(a)(2) (providing that "injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities," as well as "the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods," where appropriate).

Since plaintiffs generally cannot recover monetary damages, a disabled traveler with imminent travel plans who encounters a noncompliant hotel reservation website has little incentive to sue; moreover, no court-ordered injunction would take effect in time to provide the necessary information to book a reservation.[31] Further, filing suit against a public accommodation can be a long, stressful, and costly ordeal.[32] Thus, under the ADA's current remedial scheme, testers are crucial because they are better equipped to handle the stressors of litigation and can sue to secure compliance with the ADA, namely the Reservation Rule, "before disabled individuals need the service, rather than after—when funerals have been missed, showers withheld, and physical pain endured."[33]

B. Criticism of ADA Testers

Despite this noble cause, ADA testers have been vilified by the media and accused of abusing the legal system.[34] The podcast, *This American Life*, produced an episode entitled "Crybabies," which included a third act, "The Squeaky Wheelchair Gets the Grease," where ADA tester litigation was labeled as a "crybaby cottage industry."[35] Further, the article, "Robbing Beyoncé Blind: The ADA Litigation Monster Continues to Run Amok," criticizes ADA testers for filing extortionate lawsuits against businesses for

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[31] *See* Millhiser, *supra* note 13 (stating that the ADA's remedial structure "basically guarantee[s] that either the [Reservation Rule] will not be enforced at all, or, at least, that it will be enforced largely through lawsuits filed by lawyers willing to act—shall we say, 'creatively'—to ensure that they get paid.").

[32] Sutherland, Chakrabarti & Skoog, *supra* note 26. *See* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2374-75 (2021) (arguing that "a small number of expert plaintiffs and plaintiffs' lawyers is likely the best way to enforce the ADA's public accommodations title in the absence of significant government enforcement" due to the poor physical and emotional outcomes associated with litigation).

[33] Popham, Emens & Harris, *supra* note 7, at 49. *See* Leslie Lee, *Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine is Not the Right Solution to Abusive ADA Litigation*, 19 VA. J. SOC. POL'Y & L. 319, 322 (2011) ("Like [Fair Housing Act] testers and equal employment testers, ADA testers who act as private attorneys general perform a service for the community that would otherwise go unperformed."). *See also* Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure it Reflects*, 63 EMORY L.J. 59, 118 (2013) (arguing that "because most discrimination suits by private parties are litigated so badly, tester suits may be more valuable than previously recognized, because the average lawyering quality will be stronger.").

[34] *See e.g.,* Katie LaGrone, *Crippled Florida businesses Seek Help over Serial Americans with Disabilities Act Suers*, ABC ACTION NEWS (Nov. 21, 2016, 10:37 PM), https://www.abcactionnews.com/longform/crippled-florida-businesses-seek-help-over-serial-americans-with-disabilities-act-suers [https://perma.cc/K2PU-KZ86]; Howard Gorrell, *Maryland Small Businesses Must Watch Out for ADA Virtual-By Lawsuits*, MARYLANDREPORTER.COM (July 22, 2021), https://marylandreporter.com/2021/07/22/maryland-small-businesses-must-watch-out-for-ada-virtual-by-lawsuits [https://perma.cc/X4N9-W4GG].

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

personal gain rather than ADA compliance.[36] This criticism may stem from the sharp increase in the number of ADA Title III lawsuits filed in federal court in recent years.[37] For instance, in 2013, there were only 2,722 Title III federal lawsuits nationwide, compared to 11,452 in 2021.[38] Then, in 2022, plaintiffs filed 8,694 Title III federal lawsuits which, although a decrease from 2021's statistics, was still a 319 percent increase from 2013.[39] It is not surprising that many of the states that allow for monetary damages under their own anti-discrimination statutes, like California, Florida, and New York, experience higher rates of ADA lawsuits.[40]

Another source of skepticism results from the fact that "[m]any of these cases are being prosecuted by a small number of disabled individuals (and their attorneys) who file hundreds, sometimes thousands, of lawsuits against businesses alleging violations of the ADA," earning them the derogatory nickname of "serial plaintiffs."[41] For example, a small legal practice in Philadelphia filed over one hundred ADA suits on behalf of just two disabled individuals and racked up thousands of dollars in attorneys' fees.[42] Likewise, Deborah Laufer, the plaintiff in the ADA tester standing case recently before

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[36] Mark Pulliam, *Robbing Beyoncé Blind: The ADA Litigation Monster Continues to Run Amok*, CITY J. (Jan. 10, 2019), https://www.city-journal.org/article/robbing-beyonce-blind [https://perma.cc/5BJK-R85V]. As if the title was not telling enough, the author claims that "[g]iven the lack of any fixed legal standard for 'web accessibility,' almost any grievance involving the technical features of a website is litigable. . . . The principal requirement: a defendant with deep pockets," and "[w]ith 22 Grammy awards to her credit, the phenomenally successful Beyoncé qualifies." *Id.* The author goes on to say that the lawsuit against Beyonce brought about by a visually-impaired tester, who was unable to buy an embroidered hoodie on Beyonce.com without the assistance of a sighted companion, "smacks of cynical opportunism." *Id.*

[37] Minh Vu, Kristina Launey, & Susan Ryan, *ADA Title III Federal Lawsuits Numbers Are Down but Likely to Rebound in 2023*, SEYFARTH (Feb. 14, 2023), https://www.adatitleiii.com/2023/02/ada-title-iii-federal-lawsuits-numbers-are-down-but-likely-to-rebound-in-2023 [https://perma.cc/4DCT-HY8A].

[38] *Id.*

[39] *Id.* (stating that federal website accessibility lawsuits accounted for thirty-seven percent of the 8,694 ADA Title III lawsuits filed in federal court in 2022).

[40] Evelyn Clark, *Enforcement of the Americans with Disabilities Act: Remedying "Abusive" Litigation While*

Strengthening Disability Rights, 26 WASH. & LEE J. C. R. & SOC. JUST. 689, 699 (2020).

[41] Linda H. Wade & Timothy J. Inacio, *A Man in a Wheelchair and His Lawyer Go Into a Bar: Serial ADA Litigation is No Joke*, 25 TRIAL ADVOC. Q. 31, 33 (2006). *See* Sarah E. Zehentner, *The Rise of ADA Title III: How Congress and the Department of Justice Can Solve Predatory Litigation*, 86 BROOK. L. REV. 701, 711 (2021) ("Within eighteen months one plaintiff filed more than 150 lawsuits, and that same plaintiff's attorney said 90 percent of his business is from the same twelve disabled clients."); Elizabeth A. Harris, *Galleries from A to Z Sued Over Websites the Blind Can't Use*, N.Y. TIMES (Feb. 18, 2019), https://www.nytimes.com/2019/02/18/arts/design/blind-lawsuits-art-galleries.html [https://perma.cc/W9XP-RRYC] (providing an example of a "drive-by lawsuit[]" where a blind ADA tester sued ten art galleries in New York City for accessibility violations starting with the letter A, and then moved on to galleries starting with the letter B, and so on and so forth, up to the letter H, with another tester doing the same for the remainder of the alphabet).

[42] Walter Olson, *The ADA Shakedown Racket*, CITY J. (2004), https://www.city-journal.org/article/the-ada-shakedown-racket [https://perma.cc/J448-F8BC].

the Supreme Court, has received backlash for filing hundreds of website accessibility lawsuits throughout the country without ever leaving the comfort of her home.[43] Moreover, repeat litigants have been criticized for filing "boilerplate" complaints, some of which contain identical typos and spelling errors, further undermining the credibility of the cause.[44]

Opponents have also accused ADA testers of disproportionately harming small businesses.[45] Small businesses are especially vulnerable to Title III lawsuits for several reasons. First, small businesses are likely to operate in older buildings and facilities.[46] Second, small businesses are less likely to be aware that their facilities do not comply with the ADA's extensive and technical requirements, which can be difficult to navigate alongside the state and local building and accessibility codes.[47] Finally, since the cost of fighting the litigation is typically four to five times their average annual income,[48] small businesses "are often compelled to settle because they cannot afford the litigation cost involved in" fighting the lawsuit.[49] In short, small

[43] Nicholas Walker & Nikki Howell, *Do Individuals Who Have No Intent to Use Your Business's Services Have Standing to Sue Your Company for Potential ADA Accessibility and Accommodations Violations?—The U.S. Supreme Court To Weigh In*, FOX ROTHSCHILD (Apr. 13, 2023), https://employmentclassactions.foxrothschild.com/2023/04/do-individuals-who-have-no-intent-to-use-your-businesss-services-have-standing-to-sue-your-company-for-potential-ada-accessibility-and-accommodations-violations-the-u-s-supreme-cour [https://perma.cc/HLL6-JU2A]. *See* Marimow, *supra* note 14 (noting that in an interview Laufer sorrowfully said, "I got into this to help people, not to become a villain.").

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

[45] *How Small Businesses are Targeted with Abusive ADA Lawsuits,* U.S. CHAMBER OF COM. (Oct. 12, 2022), https://instituteforlegalreform.com/blog/small-businesses-targeted-with-ada-lawsuits/ [https://perma.cc/7666-B5D4]. *See* John W. Egan & Minh N. Vu, *New York Lawmakers Plan To Address Website Accessibility*, SEYFARTH SHAW (May 20, 2019), https://www.adatitleiii.com/2019/05/new-york-lawmakers-plan-to-address-website-accessibility (explaining that New York State Senator Diane Savino referred to ADA testers' attorneys who are initiating these lawsuits as "ambulance-chaser[s]" who are "exploiting loopholes in the law" and described Title III cases as having the potential to "bankrupt a small business.") [https://perma.cc/E2EX-PMJ7]. *See also* Phoebe Joseph, *An Argument for Sanctions Against Serial ADA Plaintiffs*, 29 U. FLA. J.L. & PUB. POL'Y193, 208 (2019) (arguing that "[t]he effect of serial ADA litigation on small business owners is incredibly harmful and, over the long haul could stifle the creation of small business, thereby potentially affecting the economy").

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

[47] *Id.*

[48] Ken Barnes, *The ADA Lawsuit Contagion Sweeping U.S. States*, FORBES (Dec. 22, 2016, 11:05 AM), https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-s-states [https://perma.cc/H66T-2UVY] (referring to abusive lawsuits under the ADA as an "infectious disease" that has spread across the country plaguing small businesses).

[49] Chandlee, *supra* note 46, at 45. *See* Molski v. Mandarin Touch Rest., 385 F. Supp. 2d 1042 (C.D. Cal. 2005) (citing Rodriguez v. Investco, L.L.C., 305 F. Supp. 2d 1278, 1281 (M.D. Fla. 2004)) ("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

businesses are typically unsophisticated, averse to litigation, and unable to afford a lawyer, making them easy targets of Title III lawsuits.[50] Scott Faden, an attorney who has regularly represented businesses facing Title III suits, called this scheme "the best shakedown in law."[51]

C. Standing Up for ADA Testers

While there have been some serial ADA testers with ill intentions who attempt to exploit the system for monetary gain, they are the exception, not the norm. Albert Dytch, a seventy-one-year-old man with muscular dystrophy who uses a wheelchair and has filed more than one-hundred-and-eighty ADA lawsuits in California, shed light on the motivations of a "serial plaintiff" in an interview with *The New York Times*.[52] The magazine reported that:

> Early on, he began to feel that filing these cases helped him find the agency he had lost as his illness progressed. The more limited his mobility became, the more of the world had become closed to him. Restaurants and shops he once frequented and enjoyed were no longer places he could go with ease or at all. He felt he was fighting not just against the difficulties, barriers, and humiliations he routinely faces as a disabled person trying to go about his life, but on behalf of a larger community.53

When bringing these lawsuits, Dytch, like many other testers, cites violations under both the ADA and his state's anti-discrimination law which allows for monetary damages.[54] Dytch admitted that "[i]f there weren't some money involved, I probably wouldn't do it," due to the time and energy it takes to engage in litigation and the expenses associated with his disability, but his main goal is to engender greater accessibility.[55] When asked by *The Miami Herald* about why she engages in ADA testing, Laufer expressed a similar sentiment, stating, "I was getting slapped in the face every time I tried to book

informing a business of the violations, and attempting to remedy the matter through 'conciliation and voluntary compliance,' a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.").

[50] Mark Pulliam, *The ADA Litigation Monster*, CITY J. (2017), https://www.city-journal.org/article/the-ada-litigation-monster [https://perma.cc/9NYU-D2NH].

[51] Melanie Payne, *Are ADA Lawsuit Plaintiffs Hucksters or Heroes?*, NEWS-PRESS (Apr. 3, 2017, 10:11 AM), https://www.news-press.com/story/news/investigations/melanie-payne/2017/03/30/ada-driveby-lawsuits-activism-scam-melanie-payne/99143134 [https://perma.cc/GK3H-FM9L].

[52] Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits*, N.Y. TIMES MAG. (Jun. 15, 2023), https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html [https://perma.cc/X2UJ-2M7R].

[53] *Id.*

[54] *Id.*

[55] *Id.*

a room or do something. If I'm in position to be able to do something, I'm going to do something."[56]

It is also important to acknowledge that a large percentage of accessibility lawsuits are initiated by the same counsel, not because the attorney and plaintiff are opportunistic and exploitative but because "under the current remedial scheme," which limits prevailing plaintiffs to injunctive relief and attorneys' fees, "serial litigation may be the only cost-effective way for private counsel to bring suit."[57] The irony is that these limitations, put in place to curb abusive litigation, are viewed by many as encouraging it.[58] Amy B. Vandeveld, an attorney and member of the disabled community, put the issue into perspective when she raised the question: "What difference does it make whether one person with a disability files 300 lawsuits or whether 300 different people with disabilities file one suit apiece? The barriers are the same. The damages are the same."[59]

The adverse financial impact that ADA testers inflict on small businesses is also overexaggerated.[60] For example, most cases that have come into federal court are against large business enterprises like Ramada hotels or McDonald's restaurants.[61] Additionally, the "readily achievable" language in the ADA—which means "easily accomplishable and able to be carried out without much difficulty or expense"—was intentionally included to limit the burdens that could be placed on small businesses.[62] While small businesses may incur extensive legal fees fighting accessibility challenges, and some may even be forced to close, the threat of litigation by testers is often the only thing compelling businesses of all sizes to comply with the ADA.[63] Rather than focusing their efforts on tarnishing the reputation of ADA testers, small and large business owners alike should familiarize themselves with Title III—a task which they have had over thirty years to complete—and ensure that their facilities and websites are accessible to all.

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[56] Sarah Luterman, *Could This Supreme Court Case Gut the Americans With Disabilities Act?*, TRUTHOUT (Oct. 2, 2023), https://truthout.org/articles/could-this-supreme-court-case-gut-the-americans-with-disabilities-act [https://perma.cc/AP2G-APFP].

[57] Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 15 (2006) (explaining that due to the complex nature of the ADA's rules governing physical accessibility, lawyers experience a high fixed cost in learning and internalizing those rules to the extent necessary to make a profit).

[58] *Id.* at 35.

[59] Carri Becker, *Private Enforcement of the Americans With Disabilities Act via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L. J. 93, 109 (2006).

[60] *See* Amanda Morris, *Why Disabled People Struggle to Book Hotels*, WASH. POST (Oct. 9, 2023, 6:30 AM), https://www.washingtonpost.com/wellness/2023/10/09/ada-hotels-disability-testers [https://perma.cc/V8W9-6JMW] ("[O]verall, a relatively small percentage of businesses get sued.").

[61] Johnson, *supra* note 25, at 719.

[62] 42 U.S.C. § 12181(9).

[63] Johnson, *supra* note 25, at 719.

In sum, ADA testers, even those who file hundreds of lawsuits, are not the money-hungry predators they have been made out to be. They serve an important role in the enforcement of the ADA.[64] The story does not end there, though. Testers who are able to withstand the surplus of negative public scrutiny still face a significant procedural obstacle to exercising their private right of action: proving that they have sufficient standing to initiate the litigation.

II. ANALYSIS OF ADA TESTER STANDING

A. Constitutional and Prudential Requirements for Standing

Not everyone can bring a lawsuit in court; a person must have legal standing to do so.[65] Standing has been described by the United States Supreme Court as "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."[66] In *Lujan v. Defenders of Wildlife*,[67] the Supreme Court set forth three factors that a plaintiff must meet to satisfy Article III's standing requirements.[68] First, a plaintiff must show that they have suffered an "injury in fact" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical."[69] Second, "there must be a causal connection between the injury and the conduct complained of," meaning the injury is fairly traceable to the challenged action of the defendant.[70] Third, it must be "likely," as opposed to "merely speculative," that the injury will be "redressed by a favorable decision."[71]

In addition to the constitutional requirements described above, "judges have imposed extra standing requirements to avoid questions of broad social significance that do not vindicate any individual rights and to limit judicial

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[64] *See generally* Lucy Trieshmann, *Hotel Accessibility Reaches the Supreme Court*, ACLU (Aug. 14, 2023), https://www.aclu.org/news/disability-rights/hotel-accessibility-reaches-the-supreme-court [https://perma.cc/5E2Q-PD75].

[65] U.S. CONST. art. III, § 1. Although the text of the Constitution does not expressly state the term "standing," modern standing doctrine can be traced back to the early 1920s. *See* Fairchild v. Hughes, 258 U.S. 126 (1922); Massachusetts v. Mellon, 262 U.S. 447 (1923).

[66] Sierra Club v. Morton, 405 U.S. 727, 731 (1972). *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) ("In more pedestrian terms, [standing] is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'").

[67] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[68] *Id.* at 560-61; U.S. CONST. art. III, § 1.

[69] *Id.* at 560. The primary issue driving the ADA tester standing circuit split is whether this "injury in fact" element is met.

[70] *Id.*

[71] *Id.* at 561.

access to plaintiffs who are best suited to litigate a claim."[72] These limitations are rooted in the prudential standing doctrine.[73] One common prudential requirement is that the injury may not be a "generalized grievance," meaning it cannot be one that is shared widely by a large class of citizens.[74] Another prudential requirement is that a plaintiff must assert their own legal rights and interests, not the rights and interests of third parties.[75] However, a litigant may bring an action on behalf of a third party where the litigant has a "close" relationship with the third party, and there is "some hindrance to the third party's ability to protect his or her own interests."[76] Finally, there is a prudential requirement that a plaintiff's grievance fall within the "zone of interests" protected or regulated by the law invoked.[77]

Beyond the zone of interest test, and the prohibitions against generalized grievances and third-party standing, the Court has further complicated matters for litigants seeking injunctive relief, as illustrated in *City of Los Angeles v. Lyons*.[78] This case arose when a Black plaintiff sued the city and four of its police officers after the officers placed him in a chokehold and rendered him unconscious during a traffic stop, despite him posing no threat or offering any resistance.[79] The plaintiff sought injunctive relief to bar the use of chokeholds by the police except when reasonably necessary.[80] The Court of Appeals held that the plaintiff had standing to seek injunctive relief against the use of the chokeholds.[81] The Supreme Court reversed the judgment on the grounds that "[past] exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present, adverse effects."[82] The Court reasoned that the plaintiff could not establish "a real and immediate threat" that he would be stopped by the police in the near future

[72] Daniel M. Tardiff, *Knocking on the Courtroom Door: Finally an Answer From Within for Employment Testers*, 32 LOY. U. CHI. L.J. 909, 930 (2001).

[73] See generally S. Todd Brown, *The Story of Prudential Standing*, 42 HASTINGS CONST. L.Q. 95 (2014), for a discussion on prudential standing and its shortcomings.

[74] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[75] *Id.*

[76] Powers v. Ohio, 499 U.S. 400, 411 (1991).

[77] Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 153 (1970). *See* Micah J. Revell, *Prudential Standing, the Zone of Interests, and the New Jurisprudent of Jurisdiction*, 63 EMORY L.J. 221, 235 (2013) (explaining the inception of the zone of interest test and arguing that it should be categorized as a prudential doctrine, not a jurisdictional limitation).

[78] *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

[79] *Id.* at 97. The dissent's description of the incident is more graphic, revealing that "[w]hen Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released." *Id.* at 115 (Marshall, J., dissenting).

[80] *Lyons*, 461 U.S. at 98.

[81] *Id.* at 99.

[82] *Id.* at 102 (quoting O'Shea v. Littleton, 414 U.S. 488, 495-496 (1974)).

and be subjected to an illegal chokehold.[83] Thus, "absent a sufficient likelihood that he will again be wronged in a similar way," the Court held that the plaintiff was not entitled to an injunction.[84] Because ADA testers are limited to injunctive relief under Title III of the ADA, the *Lyons* decision has been interpreted to mean that "testers will lack standing if they do not subject themselves to the harm again or make plans to subject themselves to the harm again."[85]

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

Havens Realty Corporation v. Coleman,[86] decided by the Supreme Court in 1982, is a seminal case in civil rights tester standing jurisprudence. This case involved two tester plaintiffs, Sylvia Coleman and R. Kent Willis, who were employed by HOME, a nonprofit fair housing organization, to pose as renters and determine whether Havens Realty engaged in the unlawful real estate practice of racial steering.[87] Coleman, who is Black, and Willis, who is white, each contacted Havens Realty regarding the availability of apartments in a predominately white complex, and Coleman was told that there were no apartments available whereas Willis was told that there were vacancies.[88] The tester plaintiffs and HOME filed suit, alleging that Havens Realty's practices violated the Fair Housing Act of 1968[89] and deprived them of the benefits of living in an integrated community free of housing discrimination.[90] Coleman alleged that the "misinformation given to her by Havens Realty concerning the availability of apartments . . . had caused her 'specific injury.'"[91] The District Court dismissed the claims of Coleman,

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[83] *Lyons*, 461 U.S. at 105.

[84] *Id.* at 111. It is beyond the scope of this Article to debate the merits of this decision, but see ERWIN CHEMERINSKY, CLOSING THE COURT HOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 95-114 (2017), for a discussion on why *Lyons* was wrong on multiple levels, and other restrictions the courts have since imposed on standing that make it more difficult for people to challenge unconstitutional government action.

[85] Johnson, *supra* note 25, at 696. *See* Brandon Murrill, Note, *The Business of Suing: Determining When a Professional Plaintiff Should Have Standing to Bring a Private Enforcement Action*, 52 WM. & MARY L. REV. 261, 285 (2010) (stating that one way courts deter testers from bringing suits is by "narrow[ing] the definition of the injury so that, in order to create an injury, professional plaintiffs must visit the establishment they intend to sue multiple times, adding additional cost to their efforts.").

[86] Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

[87] *Id.* at 368. Racial steering is a "practice by which real estate brokers and agents preserve and encourage patterns of racial segregation . . . by steering members of racial and ethnic groups to buildings occupied primarily by members of [the same] racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups." *Id.* at 366 n.1.

[88] *Id.* at 368.

[89] 42 U.S.C. § 3604.

[90] *Havens Realty*, 455 U.S at 369.

[91] *Id.*

Willis, and HOME for lack of standing.[92] The Court of Appeals reversed, holding that Coleman and Willis had standing to sue as testers and as individuals.[93] The Supreme Court granted certiorari.[94]

In addressing the question of tester standing, the Supreme Court looked at the plain language of section 804(d) of the Fair Housing Act,[95] which makes it unlawful "to represent to any person because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," and found that it established an enforceable right to truthful information concerning the availability of housing.[96] Therefore, a tester who received false housing information suffered a harm sufficiently concrete to qualify as an injury in fact under the Act's provisions.[97] Notably, "[t]hat the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of section 804(d)."[98]

The Court concluded that Coleman, the Black tester, had standing to sue for monetary damages and injunctive relief because she had suffered an injury to her statutorily created right to truthful housing information.[99] However, the Court held that Willis, the white tester, did not have standing to sue in his capacity as a tester because, unlike Coleman, he received accurate information regarding the availability of housing and was not a victim of discriminatory misrepresentation.[100] *Havens Realty* is significant because the Court recognized that a tester plaintiff's subjective motivations or intent are irrelevant where there is an invasion of a statutorily created right to information.[101] Some circuit courts have applied this reasoning to accessibility cases brought by ADA testers.[102]

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92 *Id.*

93 *Id.* at 370.

94 *Id.*

95 42 U.S.C. § 3604(d).

96 *Havens Realty*, 455 U.S at 373.

97 *Id.* at 373-74.

98 *Id.* 374.

99 *Id.* "This is the quintessential informational injury—the plaintiff experienced no harm except for the denial of information." *See* Henry E. Hudson, Christopher M. Keegan, & P. Thomas DiStanislao, *Standing in a Post-Spokeo Environment*, 30 REGENT U. L. REV. 11, 30 (2017).

100 *Havens Realty*, 455 U.S. at 375. *But see* Paul A. LeBel, *Standing After Havens Realty: A Critique and an Alternative Framework for Analysis*, 1982 DUKE L.J. 1013, 1020 (identifying the flaws in the Court's analysis of the white tester's standing and arguing that the white tester should have been awarded standing).

101 *Havens Realty*, 455 U.S. at 374.

102 For example, in 2013, the Eleventh Circuit analogized *Havens Realty* to a case in which an ADA tester sued a grocery store for alleged architectural barriers in violation of Title III of the ADA. *See* Houston v. Marrod Supermarkets, Inc., 733 F.3d 1323, 1332 (11th Cir. 2013). The court noted that the

The Supreme Court's more recent decision in *TransUnion, LLC v. Ramirez*,[103] severely threatens the tester standing precedent established in *Havens Realty*. In *TransUnion*, the Court was tasked with determining whether 8,185 class members had standing to sue TransUnion for its alleged violation of its obligations under the Fair Credit Reporting Act to use reasonable procedures in internally maintaining credit files and provide consumers with their credit information.[104] Building off the stricter standing framework set forth in *Spokeo v. Robins*,[105] the Court emphasized that "an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court."[106] This is in stark contrast to the decision in *Havens Realty*, which provided for standing based on a statutory violation without a showing of any independent injury in fact.[107]

Accordingly, the Court held that the 1,853 class members whose credit reports were distributed to third-party creditors containing OFAC alerts that labeled them as potential terrorists, drug traffickers, or serious criminals suffered a concrete injury in fact under Article III.[108] The remaining 6,332 class members did not suffer a concrete harm because, although their credit files were maintained by TransUnion and contained misleading OFAC alerts, their credit information was never disseminated to any potential creditors during the relevant time period.[109] In other words, "even though the Fair Credit Reporting Act created a right and that right was infringed, that was not

language in Title III shared similarities to the language in § 804(d) of the FHA, the statutory provision at issue in *Havens Realty*. *Id.* at 1332-33. Further, like § 804(d), the court found that the protections in Title III were not limited to "bona fide customers," and instead applied broadly to all disabled individuals regardless of their motive for visiting the facility. *Id.* at 1333. Therefore, the court, consistent with the ruling in *Havens Realty,* held that "the alleged violations of [the plaintiff's] statutory rights under Title III may constitute an injury in fact, even though he is a mere tester of ADA compliance." *Id.* at 1334. Other circuits have rejected this reasoning in more recent cases, holding that tester motive alone without intent to travel or book a hotel room does preclude standing for a claim under the Reservation Rule. *See infra* notes 121-36 and accompanying text.

103 TransUnion, LLC v. Ramirez, 594 U.S. 413 (2021).

104 *Id.* at 429.

105 Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) (establishing the principle that "Article III standing requires a concrete injury even in the context of a statutory violation."). *See* James Hannaway, *Standing on Shaky Ground: How Circuit Courts Reconcile Legal Rights and Injuries in Fact After Spoke v. Robins*, 87 GEO. WASH. L. REV. 706 (2019) (analyzing standing doctrine pre- and post-*Spokeo*).

106 *TransUnion*, 594 U.S. at 425-426.

107 *See* Catherine Cole, *A Standoff: Havens Realty v. Coleman Tester Standing and TransUnion v. Ramirez in the Circuit Courts*, 45 HARVARD J. OF L. & PUB. POL'Y 1033, 1042 (2022) (explaining how *Havens Realty* and *TransUnion* are incompatible with each other).

108 *TransUnion*, 594 U.S. at 432.

109 *Id.* at 434.

sufficient for standing."[110] Moreover, the Court found their argument about the risk of future harm unpersuasive.[111]

The class members also argued that TransUnion's mailings of their credit files were formatted incorrectly, and deprived them of their right to receive information in the format required by the statute.[112] However, the Court contended that a mere alleged "informational injury" is not enough to constitute a concrete harm without a showing that the plaintiffs suffered "adverse effects" or other "downstream consequences" from the denial of access to information.[113] Thus, under this new requirement the Court held that none of the 8,185 members other than the named plaintiff Ramirez satisfied the Article III requirements for the disclosure claim and the summary-of-rights claim.[114]

Although *TransUnion* did not involve any civil rights testers, it is consequential because it limited standing to sue to enforce a statutory right based on "whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts."[115] Under this inquiry, legal injury alone is insufficient to support standing.[116] It must also be accompanied by a concrete injury analogous to common law harm.[117] Federal courts have taken different approaches towards *TransUnion's* theory of standing, with some using it to deny standing to ADA testers despite their statutory right to ADA-compliant accessibility information regarding a hotel's disability accommodations.[118]

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110 Erwin Chemerinsky & Jess H. Choper, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. 269, 281 (2021).

111 *TransUnion*, 594 U.S. at 438.

112 *Id.* at 439-440.

113 *Id.* at 441. *See* Bradford Mank, *Did the Supreme Court in TransUnion v. Ramirez Transform the Article III Standing Injury in Fact Test?: The Circuit Split Over ADA Tester Standing and Broader Theoretical Considerations*, 57 U.C. DAVIS L. REV. 1131, 1157 (2023) (arguing that "[b]y restricting the authority of Congress to establish statutory rights, including informational rights, unless a plaintiff can prove they suffered an actual, real-world harm, the *TransUnion* decision arguably restricted Article III standing rights more so than the *Spokeo* decision.").

114 *TransUnion*, 594 U.S. at 441.

115 *Id.* at 441 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

116 *Id.* at 453-454 (Thomas, J., dissenting).

117 *Id.* at 424-425 (explaining that a concrete injury includes tangible harms such as physical harms or monetary harms, or intangible harms such as reputational harms, disclosure of private information, and intrusion upon seclusion). *See* Elizabeth Earle Beske, *The Court and the Private Plaintiff*, 58 WAKE FOREST L. REV. 1, 52 (2022) (highlighting that "limiting Congress to harm that resemble harms at common law constrains congressional response to problems vaster and more complicated than eighteenth and nineteenth-century lawyers could possibly have envisioned.").

118 Sylvia E. Simson and Michael E. Mirdamadi, *Federal Court Standing in a Post-TransUnion World*, NYSBA (May 30, 2023), https://nysba.org/federal-court-standing-in-a-post-transunion-world/#_ednref27 [https://perma.cc/SS2H-W3DB].

The lack of consensus has contributed to a circuit split that has little hope of being resolved without Supreme Court intervention.

C. The Circuit Split

As previously mentioned, federal courts are split on the issue of ADA tester standing, specifically whether such testers, who have no intention to visit the non-compliant hotel, have demonstrated a sufficient injury to satisfy Article III. Deborah Laufer, a disabled advocate, and self-proclaimed ADA tester, is at the center of this debate, having filed over 600 lawsuits against businesses across the United States, with her most recent lawsuit reaching the Supreme Court.[119] The Second, Fifth, and Tenth Circuits have ruled that Laufer lacks standing, while the First, Fourth, and Eleventh Circuits have found that she has standing.[120] Each of these rulings will be addressed in turn.

i. Circuits Against ADA Tester Standing

To begin, the Fifth Circuit held that Laufer failed to show the necessary concrete interest to support standing.[121] The Fifth Circuit based its argument on the fact that Laufer lacked definite plans to travel to Texas and book a room at the defendant's motel, so, in the court's eyes, the accessibility information did not have any relevance to her.[122] Therefore, the court concluded that her inability to obtain that information on the defendant's website did not constitute an injury in fact.[123] In making this determination, the Fifth Circuit sought to distinguish this case from *Havens Realty*, where "the information had some relevance to the tester."[124]

The Tenth Circuit held that Laufer lacked standing on similar grounds, stating that "a violation of a legal entitlement alone is insufficient under *Spokeo* and *TransUnion* to establish that [she] suffered a concrete injury."[125] Accordingly, although the Reservation Rule may have provided Laufer with a regulatory right to the information, the court found that because she had no interest in using the information to actually book a room at the Inn, she did

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119 Luterman, *supra* note 56.

120 Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 3-5 (2023) (noting that Laufer "has singlehandedly generated a circuit split").

121 Laufer v. Mann Hospitality, L.L.C., 996 F.3d 269, 272 (5th Cir. 2021).

122 *Id.*

123 *Id.*

124 *Id.* The First Circuit disputed this distinction, stating that "the only relevance the misrepresentation had to the Black tester plaintiff in *Havens Realty* was to help her figure out if the defendant was breaking the law by engaging in racial steering," and since that tester had standing, Laufer should, by that logic, also have standing. *See* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 272 (1st Cir. 2022).

125 Laufer v. Looper, 22 F.4th 871, 878 (10th Cir. 2022).

not suffer an injury in fact.[126] The Tenth Circuit also argued that Laufer's alleged injury was distinct from the injury in *Havens Realty* because the tester in *Havens Realty* was given false information due to her race, whereas Laufer was simply denied information, irrespective of her disability.[127] Following this reasoning, a plaintiff with a personal injury could still have standing "if a public accommodation facility harms them or a defendant lies to the plaintiff for discriminatory reasons prohibited by statute."[128] Thus, the Tenth Circuit foreclosed tester standing based solely on an informational injury, but left the door open in narrow instances where the tester is treated differently because of their protected status.[129]

Harty v. West Point Realty[130] is the controlling decision in the Second Circuit regarding tester standing. The plaintiff, Owen Harty, is an ADA tester who, like Laufer, monitors hotel websites to determine whether they comply with the Reservation Rule.[131] After discovering that West Point Realty, Inc.'s website lacked the necessary accessibility information, he brought suit.[132] The Second Circuit, relying on *TransUnion*, held that Harty lacked standing because his review of the defendant's website "was done in his capacity as a 'tester' of ADA compliance, not as a prospective traveler seeking a wheelchair accessible hotel in West Point."[133] As such, Harty failed to show any downstream consequences beyond the alleged statutory violation, which are necessary to establish an Article III injury in fact.[134] Unlike the Fifth and Tenth Circuits, the Second Circuit did not bother to distinguish *Harty* from *Havens Realty*; instead, it relegated the seminal case to a single footnote and downplayed its significance.[135] A few months after this decision, the Second Circuit dismissed Laufer's case for the same reasons.[136]

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126 *Id.* at 881.

127 *Id.* at 879. The First Circuit was unconvinced by this argument, calling it a "distinction without a difference" and noted that "[i]n either case, in order to shine a light on unlawful discrimination, the law conferred on the plaintiff 'a legal right to truthful information' about an accommodation." *See Acheson Hotels*, 50 F.4th at 273. Therefore, the presence of racial animus was not dispositive in *Havens Realty,* and it should not affect the court's decision in regard to ADA tester standing. *See* Cole, *supra* note 107, at 1037.

128 Mank, *supra* note 113, at 1178.

129 *See* Cole *supra* note 107, at 1040.

130 Harty v. West Point Realty, 28 F.4th 435 (2d Cir. 2022).

131 *Id.* at 439

132 *Id.* at 440.

133 *Id.* at 443.

134 *Id.* at 444.

135 *Id.* at 444 n.3.

136 *See* Laufer v. Ganesha Hosp. LLC, No. 21-995, 2022 U.S. App. LEXIS 18437, at *5 (2d Cir. July 5, 2022) (holding that informational harm without any downstream effects does not establish standing).

ii. Circuits in Favor of ADA Tester Standing

The First Circuit deviated from the Second, Fifth, and Tenth Circuits, in holding that Laufer did suffer a concrete harm under Article III.[137] In reaching this conclusion, the First Circuit acknowledged *TransUnion*'s rejection of statutory-rights-based standing but decided that *Havens Realty* ultimately governs this case, unless and until the Supreme Court explicitly declares that *TransUnion* overrules it.[138] The First Circuit maintained that "if the Black tester plaintiff had standing in *Havens Realty* where the statute gave her a right to truthful information, which she was denied, then *Havens Realty* would mean that Laufer, too, has standing because she was denied information to which she has a legal entitlement."[139] Further, "[j]ust as the Black tester plaintiff's lack of intent to rent an apartment in *Havens Realty* 'd[id] not negate the simple fact of injury,' neither does Laufer's lack of intent to book a room at Acheson's Inn negate her standing."[140] In response to Acheson's argument that Laufer's claim constitutes a generalized grievance, the First Circuit emphasized that "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."[141] The First Circuit also found that Laufer had standing to seek injunctive relief because her likelihood of future injury was sufficiently imminent, given her systematic plans to revisit the websites to check for compliance as part of her tester duties, where she would inevitably face the same informational harm.[142]

The Fourth Circuit similarly held that Laufer's informational injury accorded her Article III standing to sue the hotel, regardless of whether or not she had definite and credible plans to travel and book a hotel room.[143] The Fourth Circuit stated that "[i]t matters not that Laufer is a tester who may have visited Naranda's hotel reservation websites to look for ADA violations . . . without any plan or need to book a hotel room," because nothing in the Reservation Rule or elsewhere in the ADA "expressly requires an intention to book a hotel room to prove a discriminatory failure to provide accessibility

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137 Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 268 (1st Cir. 2022).

138 *Id.* at 270. Even if *Havens Realty* were to be overruled, the First Circuit argued that Laufer's feelings of frustration, humiliation, and second-class citizenry from the denial of accessibility information on Acheson Hotel's reservation system qualified as adverse effects necessary to give rise to an informational injury under *TransUnion*'s heightened injury in fact standard. *Id.* at 274.

139 *Id.* at 269.

140 *Id.* (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982)).

141 *Laufer*, 50 F.4th at 276.

142 *Id.* at 277.

143 Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 162 (4th Cir. 2023).

information."[144] In addition to *Havens Realty*, the Fourth Circuit, like the First Circuit, cited *Public Citizens v. United States Department of Justice*[145] and *Federal Election Commission v. Akins*[146] to support its position that Laufer need not show a use for the information being sought to establish an injury in fact.[147] Regarding whether Laufer satisfied the requirement for injunctive relief, the Fourth Circuit agreed with the First Circuit that Laufer's intention to return to Naranda's hotel reservation websites posed a real or immediate threat that she would be wronged again.[148]

Instead of awarding Laufer standing based on an informational injury, the Eleventh Circuit took a different approach, holding that her personal feelings of "frustration and humiliation," and "sense of isolation and segregation" that stemmed from the hotel's procedural failure demonstrated stigmatic injury standing.[149] A "stigmatic injury" is defined as a "form of treatment that 'marks' the plaintiff in some way as defective, low, or unworthy of respect."[150] Stigmatic harm has been recognized in multiple decisions dating back to 1984 in *Heckler v. Matthews*,[151] where the Supreme Court declared that "[d]iscrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause serious injuries to those persons who are personally denied equal treatment."[152] A few months later, in *Allen v. Wright*,[153] the Court reiterated that for a stigmatic injury to be judicially cognizable,

144 *Id.*

145 Pub. Citizens v. U.S. Dep't of Just., 491 U.S. 440, 449 (1989) (holding that failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue").

146 FEC v. Akins, 524 U.S. 11, 21 (1998) (holding that Congress, by statute, could create a right to truthful information and that the denial of such information constitutes an injury in fact permitting standing even where the injury is widely shared in society).

147 *Laufer v. Naranda* , 60 F.4th at 172 (noting that "although the plaintiffs in *Public Citizens* and *Akins* thereafter asserted uses for the information they sought, those asserted uses were not a factor in the . . . Article III standing analyses").

148 *Id.* at 168.

149 Laufer v. Arpan LLC, 29 F.4th 1268, 1274-75 (11th Cir. 2022). *See* Julian Gregorio, *Standing and Originalism After Laufer v. Arpan, 29 F.4th 1268*, 37 NOTRE DAME J.L. ETHICS & PUB. POL'Y 724, 726 (2023).

150 Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555, 1569 (2016). *See* Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 447-58 (2007) (explaining the nature of stigma and the process in which it develops, as well as the harms that stigmatized individuals experience).

151 Heckler v. Matthews, 465 U.S. 728 (1984).

152 *Id.* at 739-40 (internal citations omitted). Here, the Court found that the plaintiff had standing to challenge a federal law that provided greater pension benefits to female government employees than male employees because he was personally injured by the unequal treatment. *Id.* at 740.

153 *See* Allen v. Wright, 468 U.S. 737 (1984).

plaintiffs must have been "personally subject to discriminatory treatment."[154] The Eleventh Circuit, drawing on its prior ADA case, *Sierra v. City of Hallandale Beach*,[155] believed that this theory of standing was consistent with modern standing jurisprudence, stating that "[e]ven if it's clear after *TransUnion* that a violation of an antidiscrimination law is not alone sufficient to constitute a concrete injury, we think that the emotional injury that results from illegal discrimination is."[156] However, a flaw in the Eleventh Circuit's decision is that it does not address Laufer's status as a tester, leaving the question of standing for a pure informational injury tester in limbo.[157]

The aforementioned cases highlight the seemingly irreconcilable tension between *Havens Realty* and *TransUnion*.[158] The circuits that denied Laufer standing were compelled to create tenuous distinctions from *Havens Realty* to justify their rulings. On the other hand, the circuits that granted Laufer standing did so based on the belief that *Havens Realty* took priority over *TransUnion*, or by sidestepping *Havens Realty* altogether and relying on other precedent. As long as both cases remain good law, this confusion will persist, and testers will be encouraged to forum shop, bringing about more contempt[159]

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[154] *Id.* at 757 n.22 (citing *Matthews*, 465 U.S. at 739-40). The Court found that the plaintiffs' abstract harm from the IRS unconstitutionally granting tax exemptions to racially discriminatory private schools was incapable of conferring standing because all members of the racial group allegedly discriminated against could claim this type of injury regardless of where the school was located. *Id.* at 756. The Court emphasized its concern when it stated that extending standing to the plaintiffs could allow, "[a] Black person in Hawaii [to] challenge the grant of a tax exemption to a racially discriminatory school in Maine." *Id.*

[155] Sierra v. City of Hallandale Beach, 996 F.3d 1110 (11th Cir. 2021). The Court held that the deaf plaintiff sufficiently alleged a stigmatic injury and had standing to bring his claim under Title II of the ADA and the Rehabilitation Act because he "was personally and directly subjected to discriminatory treatment when [the city] published videos on its website," that he watched but could not hear and therefore understand due to the absence of closed captioning. *Id.* at 1114-15. In *Laufer v. Arpan*, the Eleventh Circuit acknowledged that this broad reading of *Sierra* would likely violate *TransUnion* because it would "equate statutory violations with concrete injuries." *Laufer v. Arpan*, 29 F.4th at 1273. Yet, the narrower reading of *Sierra*, which based standing on emotional harm rather than statutory interest, could survive *TransUnion*, and is applicable here due to the feelings of humiliation and frustration that Laufer alleged. *Id.* at 1274.

[156] *Id.*

[157] Cole, *supra* note 107, at 1041. In attempting to apply the old with the new, the Judge stated "[o]ne possible way out is to read *Havens Realty* as a case in which the deprivation of information also resulted in stigmatic harm, and that such harm is the downstream consequence of informational injury." *See Laufer v. Arpan*, 29 F.4th at 1283 (Jordan, J., concurring). While that recharacterization was not problematic for Laufer, it could present problems for other testers who sue solely to challenge a statutory violation on behalf of the broader disabled community, not because of their negative emotional response from that violation. *See* Cole, *supra* note 107, at 1050.

[158] Cole, *supra* note 107, at 1034.

[159] *See Location, Location, Location: New Website Accessibility Decision May Encourage Forum Shopping*, OGLETREE DEAKINS (Nov. 10, 2017), https://ogletree.com/insights-resources/blog-

D. The Supreme Court's Ruling, or Lack Thereof

The Supreme Court granted review of the First Circuit's case in March of 2023 to provide some much-needed guidance in *Acheson Hotels, LLC v. Laufer*.[160] However, in July of 2023, Laufer's legal team petitioned the Court to dismiss the case as moot because of disciplinary action against her former lawyer, Tristan Gillespie.[161] The Court declined to dismiss the case, but questions of mootness continued at the October 2023 oral argument, as a large portion of the discussion focused on whether the Court should decide the tester standing issue at all given the overriding circumstances of the disciplinary action.[162] For instance, Justice Kagan said it felt "unjudicial" to consider a case that was "dead as a doornail,"[163] and emphasized that the case was "dead, dead, dead in all the ways that something can be dead."[164] Additionally, Justice Roberts voiced his concern that dismissing the case would encourage future plaintiffs to manipulate the Court's jurisdiction by "mooting out" their case when faced with a potential adverse ruling.[165] In the latter half of the argument, the Court grappled with the novel problem of translating traditional in-person discrimination to the digital realm and the importance of the tester's intent to travel or make a reservation in determining an injury sufficient to establish standing.[166]

Two months later, to the dismay of hotel website operators and the relief of disability advocates, the Supreme Court unanimously held that Laufer's case against Acheson Hotels was moot and vacated the First Circuit's decision.[167] While the issue of tester standing remains unresolved, Justice

posts/location-location-location-new-website-accessibility-decision-may-encourage-forum-shopping [https://perma.cc/T3WR-3899].

160 Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023). *See* Amy Howe, *Court Takes Up Civil Rights "Tester" Case*, SCOTUSBLOG (Mar. 27, 2023, 10:52 AM), https://www.scotusblog.com/2023/03/court-takes-up-civil-rights-tester-case [https://perma.cc/6B74-NG8W].

161 Suggestion of Mootness at 4, Acheson Hotels, LLC v. Laufer, No. 22-429 (2023). Gillespie received a six month suspension for, among other infractions, inflating the numbers of hours he worked on tester complaints, allowing him to pocket thousands of dollars in legal fees that he did not deserve. *See In re Gillespie*, 2023 U.S. App. LEXIS 30235 (4th Cir. 2023).

162 *See* Transcript of Oral Argument at 4-23, Acheson Hotels, LLC v. Laufer, No. 22-429 (U.S. Oct. 4, 2023).

163 *Id*. at 18.

164 *Id.* at 19-20 (Justice Kagan's reasoning was that at the time of the oral argument the hotel was owned by another party, the hotel's website was now in compliance, and the plaintiff had dropped the case).

165 *Id.* at 12.

166 *Id.* at 85. Justice Sotomayor articulated this issue when she asked whether there is a meaningful distinction between the work of civil rights activists in the 1960s who conducted sit-ins at lunch counters to see whether they would be served with no intent to actually order food and Laufer's actions of visiting hotel websites to see if it had the required accessibility information with no intent to book a reservation. *Id.* at 27.

167 *Acheson Hotels*, 601 U.S. at 5.

Thomas's concurring opinion hinted at what the Supreme Court may have decided had they chosen to address the issue of Laufer's standing.[168] Justice Thomas concluded that "Laufer lacks standing because her claim does not assert a violation of a right under the ADA, much less a violation of her rights."[169] In coming to that decision, Justice Thomas did not attempt to overrule *Havens Realty*; instead, he claimed that *Havens Realty* had no bearing on Laufer's standing as a tester because, unlike the Fair Housing Act, which created a legal right to truthful information, the ADA provides no such right to information.[170] Even if the Reservation Rule did create an entitlement to accessibility information, Justice Thomas, consistent with the Second, Fifth, and Tenth Circuits, opined that Laufer's rights were not violated because she had no intention of visiting the hotel, rendering the information irrelevant to her.[171]

E. Judicial Opposition to Disability Rights

Justice Thomas's stance on tester standing, along with his apparent disapproval toward private citizens who attempt to enforce the ADA, is unsurprising given his discouraging track record regarding disability rights.[172] For instance, in the landmark decision by the Supreme Court in *Olmstead v. L.C.*[173]—which ruled that the unjustified institutionalization of persons with mental disabilities constitutes unlawful discrimination under Title II of the ADA—Justice Thomas notably authored the dissenting opinion.[174] In his dissent, Justice Thomas argued that the definition of "discrimination" should not be expanded to encompass the institutional isolation of persons with disabilities.[175] Had Justice Thomas's argument prevailed, it may still be legal to segregate disabled people from society and deprive them of their dignity and humanity.[176]

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168 *Id.* at 7 (Thomas, J., concurring).

169 *Id.* at 11.

170 *Id.* at 11-12.

171 *Id.* at 12. This argument is flawed because it ignores the fact that the Black tester in *Havens Realty* also did not have any intent to use the information beyond bringing a lawsuit.

172 *Cf. id.* at 14 ("Ensuring and monitoring compliance with the law is a function of a Government official, not a private person who does not assert a violation of her own rights.").

173 Olmstead v. L.C. by Zimring, 527 U.S. 581 (1999).

174 *Id.* at 596. (Thomas, J., dissenting).

175 *Id.* at 621.

176 *See* Timmy Broderick, *Supreme Court Outlawed Segregation of Disabled People 25 Years Ago. But change has come slowly*, STAT (June 21, 2024), https://www.statnews.com/2024/06/21/supreme-court-olmstead-decision-segregation-disabled-people [https://perma.cc/CS55-8AFK] (noting that some experts refer to *Olmstead* "as the *Brown v. Board of Education* for people with disabilities because of its dramatic expansion of civil rights in the face of forced segregation and a rejection of 'separate but equal' institutions").

Justice Thomas is not the only member of the Supreme Court who poses a threat to the ADA and other safeguards intended to protect people with disabilities from discrimination. Justice Brett Kavanaugh, Justice Neil Gorsuch, and Justice Amy Coney Barrett—all three of President Donald Trump's nominees—have also demonstrated hostility to disability rights throughout their careers and on the bench.[177] For example, in 2007 when Justice Kavanaugh was a circuit judge on the United States Court of Appeals, District of Columbia, he rid intellectually disabled patients of the right to make medical decisions for themselves.[178] Additionally, in 2014, Justice Gorsuch, then a Tenth Circuit Judge, ruled that the denial of the plaintiff's request for a leave of absence beyond the six months provided by the defendant's leave policy to receive treatment for cancer did not violate the Rehabilitation Act.[179] Last but not least, Justice Barrett joined an opinion during her time as a Seventh Circuit Judge which held that Wisconsin's public school open-enrollment program, which permits schools to refuse to transfer disabled students who need special education services, did not violate the ADA or Rehabilitation Act.[180]

While significant attention has been paid to President Trump's Supreme Court appointments, Barbara Hoffman points out in her enlightening article, "Disabling Disability Rights," that "[President Trump's] appointment of more than one-quarter of federal trial and appellate judges may be similarly catastrophic to the millions of Americans with disabilities."[181] The transformation of the federal circuit courts is particularly concerning because

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177 *See* Eric Garcia, *How This Supreme Court Is Setting Back Disability Rights – Without Even Trying*, MSNBC (July 5, 2022, 6:00 AM), https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-s-hostility-disability-rights-discouraging-n1296795 [https://perma.cc/U7DY-YJJP]. *See also* Ian Millhiser, *The Post-Legal Supreme Court*, VOX (July 9, 2022, 8:00 AM), https://www.vox.com/23180634/supreme-court-rule-of-law-abortion-voting-rights-guns-epa [https://perma.cc/AX7Q-FWN2] (arguing that the Supreme Court, "is no longer deciding many major cases in a way that is recognizably 'legal'").

178 *See* Doe ex rel. Tarlow v. District of Columbia, 489 F.3d 376, 382 (D.C. Cir. 2007) ("[A]ccepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions—with harmful or even deadly consequences to intellectually disabled persons."). *See also* Tammy Duckworth, *Brett Kavanaugh Would Put Businesses Ahead of Americans with Disabilities on the Supreme Court*, TIME (Sept. 5, 2018, 2:36 PM), https://time.com/5387681/brett-kavanaugh-disabled-rights-supreme-court [https://perma.cc/BXX2-ETWH].

179 Hwang v. Kansas State Univ., 753 F.3d 1159, 1161 (10th Cir. 2014) ("It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions—and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation.").

180 *See* Parent v. Taylor, 914 F.3d 467, 472 (7th Cir. 2019).

181 *See* Barbara Hoffman, *Disabling Disability Rights*, 15 N.E. L. REV. 241, 251 (2023). Hoffman focuses on five trends among decisions that have undermined the rights of disabled individuals: (1) using selective narratives to justify abandoning precedents; (2) failing to defer to federal civil rights regulations; (3) elevating religious liberty over disability rights; (4) relying on narrow forms of textualism to weaken disability rights; and (5) limiting damages for disability-based discrimination. *Id.* at 255-56.

these judges have lifetime tenures and hear tens of thousands of cases annually, whereas the Supreme Court only hears around eighty cases a year.[182] Accordingly, the majority of cases impacting the lives of disabled individuals are decided by federal appellate judges, many of whom are now pro-employer, pro-business, and anti-regulation.[183] Given the hostile trend toward disability justice at the federal level, the work of ADA testers is more important than ever in enforcing disability rights and resisting the slow but steady erosion of the ADA.[184]

F. The Future of Tester Standing

The First and Fourth Circuits provided compelling arguments in favor of tester standing founded solely on the violation of their right to information granted to them by the Reservation Rule.[185] However, based on Justice Thomas's concurring opinion in *Acheson Hotels, LLC v. Laufer*,[186] and the overall conservative climate of the federal judiciary, the next time the issue of ADA tester standing reaches the highest court, it is unlikely that the Supreme Court will find that an ADA tester has standing without the plaintiff alleging any downstream consequences—i.e., specific and definite plans to visit the place of public accommodation.[187] Preserving Congress' authority to confer standing based on an informational injury in this context would require the Court to interpret *TransUnion*'s holding very narrowly and not focus on its extended analysis of what is concrete harm.[188] Given the Court's

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[182] Priyanka Boghani & James O'Donnell, *How McConnell's Bid to Reshape the Federal Judiciary Extends Beyond the Supreme Court*, FRONTLINE (Oct. 31, 2023), https://www.pbs.org/wgbh/frontline/article/how-mcconnell-and-the-senate-helped-trump-set-records-in-appointing-judges [https://perma.cc/5W92-4C8L].

[183] *See id.;* Hoffman, *supra* note 181, at 283.

[184] *See* Eve Hill, *Fiddling While Rome Burns: Celebrating the Birth of the ADA Whole the Supreme Court Erodes Its Protections*, BROWN, GOLDSTEIN & LEVY (July 26, 2022), https://browngold.com/blog/supreme-court-erodes-ada-protections [https://perma.cc/2VZR-LMYS]. *See generally* Jasmine E. Harris, Karen M. Tani & Shira Waskschlag, *The Disability Docket*, 72 AM. UNIV. L. REV. 1710 (2023).

[185] *See supra* notes 137-48 and accompanying text.

[186] Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 11 (2023) (Thomas, J., concurring).

[187] *See* Heather Elliott, *Congress's Inability to Solve Standing Problems*, 91 B.U. L. REV. 159, 171 (2011) (shedding light on common criticisms of standing doctrine, one being that it "is so malleable that courts have unseemly opportunities to implement their policy preferences under the guise of jurisdictional dismissal").

[188] Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 371 (2022) ("The central holding is exceedingly narrow: Congress cannot authorize people to sue to collect damages against a credit company on the sole ground that it has produced, and is holding, a credit report that contains inaccurate information about them," however, "[v]iewed most sympathetically, the Court's holding is that Congress cannot conjure an injury out of nothing."). *See* Brief of Public Citizen as Amici Curiae Supporting Respondent at 3, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (arguing that "*TransUnion* held only that plaintiffs who were *not* denied information, but who complained about the *manner* in which

preference for public over private enforcement and its concern with maintaining the separation of powers, this approach seems improbable.[189]

Although the informational injury pathway to tester standing is doubtful, the Supreme Court should at the very least recognize that a tester has standing based on stigmatic harm resulting from unequal treatment and discrimination.[190] Some do not consider the lack of accessibility information on reservation websites to be a big deal and argue that disabled travelers could just make a quick "five-minute telephone call" to the hotel to clear up whether they offer certain accessibility features.[191] No harm, no foul, right? Wrong. Interviews with disabled individuals revealed that searching for accessibility information is often a lengthy and burdensome ordeal, with many travelers making "numerous phone calls prior to their stay, only to be denied the accessible rooms they were promised" upon arrival.[192] Appallingly, out of the 212 survey responses, 209 reported a negative experience seeking an accessible hotel reservation.[193] In addition to losing time and energy, which is already scarce for those living with serious disabilities, these phone calls and other interpersonal interactions that come about from Reservation Rule noncompliance also expose disabled travelers to the rejection and antagonistic attitudes of hotel staff, further reinforcing feelings of isolation and exclusion.[194]

The absence of accessibility information on hotel websites similarly inflicts stigmatic harm on testers because it "underscores that [they] are excluded from a hotel's potential clientele, [they] are not someone who uses or could use their services, and [the hotelier] did not even consider[] that [they] might be."[195] Unlike the plaintiffs in *Allen v. Wright*, Laufer and other ADA testers are not merely "concerned bystanders" attempting to vindicate

information was presented to them without identifying how the formatting errors harmed them, had failed to demonstrate an injury in fact").

189 *See* Beske, *supra* note 117, at 43-45.

190 *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1274-75 (11th Cir. 2022). *See also* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 274 (1st Cir. 2022) (quoting Tennessee v. Lane, 541 U.S. 509, 536 (2004)), *vacated as moot*, 601 U.S. 1 (2023) (expressing support for the stigmatic harm theory of standing because the ADA "'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'").

191 *See* Petition for Writ of Certiorari at *4, Acheson Hotels, LLC v. Laufer, 50 F.4th 249 (1st Cir. 2022), *petition for cert. filed*, 2022 WL 16838117 (U.S. Nov. 4, 2022) (No. 22-429).

192 Popham, Emens & Harris *supra* note 7, at 55. One disabled traveler stated that "[i]t's really frustrating to spend hours on the phone explaining what you need and being assured that [the hotel] can accommodate you and then after hours of travel which is exhausting when you're physically challenged being told the room doesn't exist . . . ." *Id.* at 31-32.

193 *Id.* at 34.

194 *Id.* at 59.

195 Brief Disability Antidiscrimination Law Scholars as Amici Curiae Supporting Respondent at *23, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023).

value interests;[196] they are personally denied equal treatment when they view and interact with an online reservation system that omits accessibility-related information.[197] Therefore, the resulting emotional distress they experience qualifies as a concrete stigmatic injury.[198] It is irrelevant that the information has no practical value to testers at the time, because the feelings of inferiority and frustration caused by the discriminatory conditions are just as palpable regardless of whether the testers have imminent and definite travel plans.[199] This theory of standing is consistent with *TransUnion* because, as discerned by the Eleventh Circuit, an "emotional injury caused by discrimination is a concrete harm that 'exist[s] in the real world.'"[200] Notably, the Court could endorse this theory of standing without overturning *Havens Realty's* core holding,[201] which the Justices have indicated they want to uphold.[202]

While no one can predict with certainty which direction the Supreme Court will go with tester standing, a few things are clear. First, limiting standing to cases where the tester visited the website with the intent to arrange for future travel would severely limit the ability of testers to file lawsuits against hotels in blatant violation of the Reservation Rule.[203] Second, denying standing would undermine Congress's intent to deter and remedy discrimination through private individuals.[204] Lastly, and most importantly, curtailing tester standing in this fashion would lead to reduced enforcement

196 *See* Allen v. Wright, 468 U.S. 737, 756 (1984) (likening the plaintiffs, parents of Black public school children across the nation, to bystanders witnessing discriminatory government action as opposed to direct victims of discrimination).

197 *See Laufer v. Arpan*, 29 F.4th at 1274.

198 *Id. But see* Ashlyn Dewberry, *Testing the Limits of Virtual Compliance: Website Accessibility, "Tester" Plaintiffs, and Article III Standing Under the ADA*, 58 GA. L. REV. 935, 972-73 (2024) (arguing that Laufer's emotional harm is more of an abstract stigmatic injury because she did not intend to use the information to reserve a hotel room).

199 *See Laufer v. Arpan*, 29 F.4th at 1275. *See also* Marimow, *supra* note 14 (responding to the omission of accessibility information on reservation websites, Laufer said, "[i]t didn't matter how much money I had; they didn't value me as a person, as a customer. It's very hurtful, insulting and humiliating to be treated like less than a person.").

200 *Laufer v. Arpan*, 29 F.4th at 1274 (quoting TransUnion, LLC v. Ramirez, 594 U.S. 413, 426 (2021)).

201 Cole, *supra* note 107, at 1049.

202 Ian Millhiser, *The Supreme Court Argues About How to Make a Terrible Civil Rights Case Go Away*, VOX (Oct. 4, 2023, 2:00 PM), https://www.vox.com/scotus/2023/10/4/23903182/supreme-court-testers-acheson-hotels-deborah-laufer-disability-ada [https://perma.cc/K27S-DRC7].

203 Mark Sherman, *LISTEN: Supreme Court Hears Case That Could Make It Harder to Sue Hotels Over Disability Access*, PBS (Oct. 4, 2023, 9:41 AM), https://www.pbs.org/newshour/nation/listen-live-supreme-court-hears-case-that-could-make-it-harder-to-sue-hotels-over-disability-access [https://perma.cc/94ZK-SAE5]. Since the Supreme Court's decision, or lack thereof, in *Acheson Hotels*, courts have already begun to adopt Justice Thomas's restrictive view of ADA standing. *See e.g.*, Mullen v. Ashirward Hosp., LLC, No. 2:23-cv-01277, 2024 U.S. Dist. LEXIS 37996, at *29 (W.D. Pa. Mar. 5, 2024).

204 Johnson, *supra* note 25, at 703.

of the ADA and result in greater inaccessibility in travel and other areas of life.[205]

III. POSSIBLE SOLUTIONS

It has been argued that federal courts should not take a lenient approach to tester standing in website accessibility cases because it facilitates serial litigation which burdens both small businesses and the administration of the judiciary.[206] However, it is possible to restrict frivolous and abusive ADA litigation without foreclosing all avenues for tester standing. This final section proposes various solutions, such as implementing a notice-and-cure period,[207] mandating judicial approval of settlements,[208] and setting limits on the recovery of monetary damages at the state level or heightening pleading requirements.[209] This section also examines the ethical safeguards already in place that curb predatory accessibility lawsuits.[210]

A. Notice-and-Cure Period

There is currently no pre-suit notice requirement under Title III of the ADA.[211] Hollywood actor and filmmaker Clint Eastwood was one of the first to urge Congress to amend the ADA to add a notice-and-cure period after the hotel he owned was sued by a disabled woman in 2000, with her lawyer seeking a whopping $577,000 in attorney's fees.[212] Congress has made multiple attempts throughout the years to add this notice-and-cure period by proposing notification bills, but they have all been unsuccessful.[213] For instance, H.R. 620, known as the "ADA Education and Reform Act of 2017,"

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[205] Shruti Rajkumar, *Supreme Court Throws Out Case That Could Have Altered Enforcement Of Disability Law*, HUFFPOST (Dec. 5, 2023, 10:40 PM), https://www.huffpost.com/entry/supreme-court-dismisses-hotel-website-disability-case_n_656fc54de4b0f96b99d8f9a3 [https://perma.cc/5Q6F-GSLK]. *See* Sherman, *supra* note 203 (noting that there is no federal agency dedicated to enforcing the ADA, so without testers and the looming threat of litigation hotels and other places public accommodation have no incentive to make their facilities or websites accessible).

[206] *See* Saxon S. Kagume, *Virtually Inaccessible: Resolving ADA Title III Standing in Click-and-Mortar Cases*, 72 EMORY L.J. 675 (2023).

[207] *See* discussion *infra* Section III.A.

[208] *See* discussion *infra* Section III.B.

[209] *See* discussion *infra* Section III.C.

[210] *See* discussion *infra* Section III.D.

[211] Brook M. Nixon, *ADA Title III: Accommodating Disabilities or Encouraging Lawsuits?*, 78 THE ALA. LAW. 4, 270 (2017).

[212] *The Good, The Bad and The ADA*, CBS NEWS (May 18, 2000, 10:30 AM), https://www.cbsnews.com/news/the-good-the-bad-and-the-ada (noting that Eastwood criticized the ADA's remedial scheme, stating, "[t]hese lawyers wind up driving off in a Mercedes and the disabled person ends up driving off in a wheelchair") [https://perma.cc/7XVB-63PK].

[213] Lee, *supra* note 33, at 353.

was introduced to reduce the frequency of drive-by lawsuits.[214] Before an ADA complaint could be filed, H.R. 620 required that potential plaintiffs give the business a written notice of the alleged accessibility barrier and the business would have sixty days to respond with a description of how it proposed to remove the barrier.[215] Businesses would also have an additional 120 days to remove or make "substantial progress" in removing the barriers to access.[216] Based on this, people with disabilities would have to wait 180 days, or around six months, to enforce their civil rights.[217] H.R. 620 passed narrowly in the House of Representatives in February of 2018 but died in the Senate.[218] More recently, the ADA Compliance for Customer Entry to Stores and Services (ACCESS) Act, was introduced in the House by Republican Representative Ken Calvert.[219] The language of the ACCESS Act is virtually identical to that of H.R. 620.[220]

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[214] H.R. 620, 115th Cong. (2018), https://www.congress.gov/bill/115th-congress/house-bill/620/text (last visited Feb. 3, 2024). The text of HR 620 provides the following:

> (B) BARRIERS TO ACCESS TO EXISTING PUBLIC ACCOMMODATIONS.—A civil action under section 302 or 303 based on the failure to remove an architectural barrier to access into an existing public accommodation may not be commenced by a person aggrieved by such failure unless —
>
> (i) that person has provided to the owner or operator of the accommodation a written notice specific enough to allow such owner or operator to identify the barrier; and
>
> (ii) (I) during the period beginning on the date the notice is received and ending 60 days after that date, the owner or operator fails to provide to that person a written description outlining improvements that will be made to remove the barrier; or
>
> (II) if the owner or operator provides the written description under subclause (I), the owner or operator fails to remove the barrier or, in the case of a barrier, the removal of which requires additional time as a result of circumstances beyond the control of the owner or operator, fails to make substantial progress in removing the barrier during the period beginning on the date the description is provided and ending 60 days after that date.

Id.

[215] *Id.*

[216] *Id.* The bill does not define "substantial progress" which is problematic.

[217] Robyn Powell, *The Americans With Disabilities Act Is Under Attack in Congress*, REWIRE NEWS GROUP (May 30, 2017, 9:47 AM), https://rewirenewsgroup.com/2017/05/30/americans-disabilities-act-attack-congress [https://perma.cc/HXY6-UV9M].

[218] H.R. 620., *supra* note 193. Senator Tammy Duckworth of Illinois, who also happens to be a disabled combat veteran, was a vocal critic of HR 620, and led a coalition of 43 senators to stop the passage of the bill. *See* Press Release, Office of Senator Tammy Duckworth, Duckworth & Senate Democrats Vow to Defeat House GOP-Led Effort to Curtail Civil Rights of Americans with Disabilities, (Mar. 29, 2018) (on file with author), https://www.duckworth.senate.gov/news/press-releases/duckworth-and-senate-democrats-vow-to-defeat-house-gop-led-effort-to-curtail-civil-rights-of-americans-with-disabilities [https://perma.cc/AS3Z-2HBG].

[219] H.R. 241, 118th Cong. (2023), https://www.congress.gov/bill/118th-congress/house-bill/241/text (last visited Feb. 4, 2024).

[220] *Id.*

Proponents of imposing a notice-and-cure period argue that it "gives many businesses the opportunity to redirect money that would be spent in litigation toward correcting the accessibility issues identified," thereby strengthening the ADA.[221] However, disability rights advocates counter that "by eviscerating the threat of a lawsuit, [notice-and-cure legislation] is effectively authorizing businesses to remain inaccessible in violation of a federal law until someone complains about it," which undermines the very core of the ADA.[222] Critics also state that such bills unfairly shift the burden of compliance from businesses to the victims of discrimination.[223]

For a notice-and-cure bill to effectively deter predatory litigation while also minimizing the burden on disabled individuals, "the notice should only require 'sufficient enough detail' for the business owner to identify the barrier or violation."[224] Congress should also limit the cure period to no more than thirty days, with extensions granted based on the appropriate amount of time it would take for the business to fully eliminate the architectural or virtual barrier.[225] Even with these necessary adjustments, there will likely still be increased under-enforcement of Title III because, given its remedial limitations, suing without notice is often the only way plaintiffs' counsel can recover their fees and make a living.[226] Accordingly, if and when Congress revisits amending the ADA to require a notice-and-cure period, it should also revise the attorney's fee-shifting provision "to provide attorney's fees for pre-suit acts like providing notification of violations."[227]

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221 Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address The Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J. L. & PUB. POL'Y 71 (2016).

222 Shailin Thomas, *The Accessibility Police: How the ADA Education and Reform Act Hinders ADA Enforcement and Burdens Americans with Disabilities*, BILL OF HEALTH (Feb. 26, 2018), https://blog.petrieflom.law.harvard.edu/2018/02/26/the-accessibility-police-how-the-ada-education-and-reform-act-hinders-ada-enforcement-and-burdens-americans-with-disabilities. *See* Katherine Pearson, *A Response to Drive-By Lawsuits*, EQUAL RTS. CTR. (May 3, 2017), https://equalrightscenter.org/response-drive-lawsuits [https://perma.cc/PA2G-F4KA] ("Notice that makes it more difficult for people with disabilities to assert their right to access is not the answer. It would only make it easier for companies to ignore the law.").

223 *See Overview of Concerns With H.R. 620, the ADA Education and Reform Act of 2017, and Similar Bills*, DREDF, https://dredf.org/hr620/overview-of-concerns-with-h-r-620 [https://perma.cc/3N96-RYBQ] (last visited Feb. 3, 2024). H.R. 620 would have required a person encountering an access barrier to send written notice specifying in detail the circumstances under which access was denied, the property address, whether a request for assistance was made, and whether the barrier is permanent or temporary. *Id*.

224 Clark, *supra* note 40, at 739.

225 *Id.* at 740.

226 *See* Bagenstos, *supra* note 57, at 17.

227 Lee, *supra* note 33, at 354 (proposing that "[t]he combination of a fee-shifting revision and a notification requirement would both prevent professional plaintiffs from dominating the courts, while also encouraging plaintiffs to act as private attorney generals by compensating attorneys for pre-suit notification").

B. Court Approval of Settlements

Another issue contributing to predatory ADA litigation is that serial plaintiffs are able to seek out-of-court settlements from noncompliant businesses without requiring them to fix accessibility issues.[228] To resolve this problem and increase transparency, Congress could amend the ADA to mandate judicial approval of out-of-court settlements.[229] This is not a novel proposal, as courts are already authorized to independently review settlements in various contexts, including but not limited to settlements involving a party who is a minor, settlements of disputed claims between creditors and debtors in bankruptcy proceedings, and settlements of class actions.[230] "The rationale for judicial review in these areas is that the parties to the settlement do not adequately represent the interests at stake."[231]

ADA lawsuits, especially those involving testers, function similarly to class actions.[232] As class representatives in class actions represent the interests of all similarly situated class members, ADA plaintiffs represent the interests of all individuals with disabilities.[233] Moreover, the parties negotiating the settlement in an ADA lawsuit cannot always be trusted to represent all the relevant interests at stake as the prospect of large attorney's fees may tempt plaintiffs' counsel to prioritize personal gain over achieving results, such as the removal of accessibility barriers or the modification of a website to include necessary accessibility information.[234] Thus, the high potential for conflicts of interest inherent in the ADA's remedial structure warrants the use of a judicial review mechanism analogous to Federal Rules

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228 *"Tester" Lawsuits Under the Americans with Disabilities Act*, CONG. RSCH. SERV. (Jan. 24, 2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11110 [https://perma.cc/8C45-XUKT]. *See* Amy Shipley, *Florida Leads Nation In Alleged 'Controversial' Disability (ADA) Lawsuits*, ABILITY CHICAGO INFO BLOG (Jan. 14, 2014) https://abilitychicagoinfo.blogspot.com/2014/01/florida-leads-nation-in-alleged.html [https://perma.cc/FBX7-3TH3] (noting that disability lawsuits in the Southern District of Florida, where more than one of five such claims occur, "often end in hasty settlements that ensure attorneys get paid and make the lawsuits disappear—but fail to correct the violations they are supposed to address").

229 Clark, *supra* note 40, at 737.

230 Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 56 (1999).

231 *Id.*

232 *See* Clark, *supra* note 40, at 738.

233 *Id.*

234 *See* Bagenstos, *supra* note 57, at 32

of Civil Procedure (FRCP) 23(e),[235] which regulates the settlements of class action suits.[236]

C. *Restrict State Law Incentives to Sue*

As reiterated throughout this Article, remedies under Title III of the ADA's private cause of action are limited to injunctive relief and attorney's fees.[237] However, confusion often arises because some states have anti-discrimination laws in place that allow plaintiffs to collect monetary damages.[238] For instance, in California, the Unruh Civil Rights Act[239] enables plaintiffs to recover statutory damages of at least $4,000 per violation.[240] "This provides a huge incentive to bring suits against even the most minor of infractions because of the guaranteed compensation if judgment is ruled in the plaintiff's favor."[241] It follows that Title III lawsuits, frivolous or legitimate, are more prevalent in California and other states such as New York[242] and Florida[243] with disability laws that provide for monetary damages.[244]

Instead of barring test case litigation entirely, to address this issue, state legislatures could enact statutory measures that limit the amount of compensatory and punitive damages recoverable by plaintiffs in an accessibility lawsuit.[245] This will ensure that testers' main motivation behind

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235 Under FED. R. CIV. P. 23(e)(2), the court may approve a settlement "only after a hearing and only on finding that it is fair, reasonable, and adequate."

236 *See* Clark, *supra* note 40, at 738 ("By treating ADA settlements similarly to class action suits, courts can act as a safeguard to ensure proposed ADA settlements (1) are not a windfall for abusive litigants, (2) fix the litigated barrier, and (3) promote the interests of the ADA.").

237 *See supra* notes 29-30, 57 and accompanying text.

238 *See, e.g.*, 43 PA. CONS. STAT. § 959 (2020).

239 CAL. CIV. CODE § 52(a) (2015).

240 Stuart Tubis, *California Unruh Civil Rights Act Law Basics*, JEFFER MANGELS BUFFER & MITCHELL (Apr. 11, 2023), https://ada.jmbm.com/california-unruh-civil-rights-act-law-basics [https://perma.cc/Y92P-E259].

241 Chandlee, *supra* note 46, at 52. *See* Arthur Gaus, *ADA Lawsuits in California: A Gold Rush for Serial Filers*, U.S. CHAMBER OF COM. (July 25, 2023) https://instituteforlegalreform.com/blog/ada-lawsuits-in-california-a-gold-rush-for-serial-filers (stating that "the ADA and Unruh Act in California have created a gold rush of purportedly disabled individuals 'encountering barriers' at businesses up and down the state and rushing to file lawsuits in California District Courts, knowing that the cost of litigation will likely exceed a quick settlement demand") [https://perma.cc/GP5L-AM5U].

242 N.Y. Exec. Law § 297(9) provides that parties aggrieved by an unlawful discriminatory practice may recover damages and other such remedies as appropriate.

243 FLA. STAT. § 760.11(5) (2019) allows prevailing plaintiffs to recover compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries, and punitive damages not to exceed $100,000.

244 *See* Zehentner, *supra* note 41, at 711.

245 W. McDonald Plosser, *Sky's The Limit? A 50-State Survey of Damages Caps and the Collateral Source Rul*e, PRO TE SOLUTIO (Dec. 4, 2018), https://protesolutio.com/2018/12/04/skys-the-limit-a-50-state-survey-of-damage-caps-and-the-collateral-source-rule [https://perma.cc/C97Q-9UK5].

bringing these types of suits is accessibility not profit.[246] However, reducing the amount of money that states can award in additional recovery, thereby confining relief to injunctions, will have the added effect of making it so testers remain the primary tool for ADA enforcement.[247]

Alternatively, to limit predatory ADA litigation without disincentivizing disabled non-testers who experience accessibility barriers from taking legal action, Congress and state legislatures could impose heightened pleading requirements.[248] The California Legislature, which implemented heightened pleading requirements with respect to Unruh Act construction-related accessibility claims in 2013, provides a useful template.[249] Under California's special pleading rules, a complaint must "be verified by the plaintiff"[250] and include: (1) a "plain language explanation of the specific access barrier or barriers the individual encounters"; (2) the "way in which the barrier denied the individual full and equal use or access, or [the way] in which it deterred the individual, on each particular occasion"; and (3) the "date or dates of each particular occasion on which the claimant encountered the access barrier, or on which he or she was deterred."[251] When the complaint is filed by a "high-frequency litigant,"[252] even harsher procedural requirements apply, including disclosure of the following: (1) that the plaintiff is a high-frequency litigant; (2) the number of complaints the plaintiff has filed in the prior 12 months; (3) the reason the plaintiff was in "the geographic area of the defendant's business"; and (4) why the plaintiff "desired to access the defendant's business."[253]

Other state legislatures should follow California's lead and enact similar pleading requirements, with heavier burdens on high-frequency litigants, applicable to both construction- and digital-related accessibility

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246 *See Lawsuits Over Disabled Americans' Access to Websites Have Surged*, THE ECONOMIST (Aug. 31, 2023), https://www.economist.com/united-states/2023/08/31/lawsuits-over-disabled-americans-access-to-websites-have-surged [https://perma.cc/Q8RT-5PYW].

247 *See* Millhiser, *supra* note 13 (arguing that "Congress could fix this imbalance by allowing injured plaintiffs to seek money damages").

248 MARK A. PERRY & BRIAN G. LIEGEL, PRESERVING PROTECTIONS: CURBING ADA LITIGATION ABUSE (2023), https://instituteforlegalreform.com/wp-content/uploads/2023/06/Preserving-Protections-WP-WEB.pdf [https://perma.cc/7M7J-DY9C].

249 CAL. CIV. PROC. CODE § 425.50 (2013).

250 *Id.* § 425.50(b).

251 *Id.* § 425.50(a).

252 A "high-frequency litigant" is defined as a "plaintiff who has filed ten or more complaints alleging a construction-related accessibility violation within the 12-month period immediately preceding the filing of the current complaint alleging a construction-related accessibility violation. *Id.* § 425.55(b)(1).

253 *Id.* §425.50(a)(4). High-frequency litigants must also pay an additional $1,000 filing fee in state court. CAL. GOV'T CODE § 70616.5 (2015).

claims.[254] Since "creative plaintiffs are able to evade the heightened standards by bootstrapping a[] [state] claim to a federal ADA claim, taking advantage of the lower pleading standards that come with it," Congress must pursue parallel pleading reforms to bring about any real change.[255] That said, lawmakers should be mindful of imposing stringent limitations on civil rights remedies, as it can generate a vicious and self-perpetuating cycle of abuse.[256]

D. Rule 11 and ABA Sanctions

While it is easy to point the finger at disabled plaintiffs for bringing frivolous accessibility lawsuits and clogging the judicial system, in reality "[l]azy attorneys are at the root of most of these 'lack of standing' ADA tester cases."[257] *Dominguez v. Banana Republic, LLC*,[258] a case where the clothing store was accused of violating Title III for failing to stock Braille gift cards, is one such example of lazy lawyering gone awry.[259] In the opinion, the district court judge exposed the attorney for responding to arguments never made by its opponent and wrongly referring to the defendant as a "food establishment," in the Plaintiff's opposition.[260] To make matters worse, on appeal the Second Circuit found that the complaint included language almost identical to other complaints—even containing the same typos—and made the same vague and conclusory assertions insufficient to establish standing for prospective relief.[261] Consequently, this mistake-ridden "copy-and-paste litigation" was dismissed with disgrace.[262]

Rather than deprive testers and other individuals with disabilities of standing to bring suit, attention should be focused on reprimanding these few bad attorneys who take shortcuts and make a mockery of the legal

254 *See* U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM, *supra* note 248, at 29. *See also* Mark S. Sidoti & Daniel S. Weinberger, *Do Self-Appointed 'Tester' Plaintiffs Have Standing to Sue Under the ADA*, N.Y. L.J. (May 2025) (proposing that "[a]t a minimum, the court may require ADA plaintiffs to affirmatively plead factual allegations in sufficient detail to raise a plausible inference that they suffered real dignitary or other harm as a result of a business' noncompliant website.").

255 *See* Schutza v. Alessio Leasing, Inc., No. 18cv2154-LAB (AGS), 2019 U.S. Dist. LEXIS 60152, 1, 10 (S.D. Cal. 2019).

256 *See* Bagenstos, *supra* note 57, at 3 (warning that "[c]oncerns with abusive litigation motivates the adoption of limitations on remedies; those limitations lead plaintiffs' lawyers to engage in litigation conduct that appears even more abusive; the newly energized perception of abuse motivates adoption of even more limitations; and so on").

257 Sheri Byrne-Haber, *Who tests the ADA testers?*, SHERI BRYNE-HABER'S BLOG (July 9, 2021), https://sheribyrnehaber.medium.com/who-tests-the-ada-testers-dcb9db8d3749 [https://perma.cc/C2MJ-GCJV].

258 Dominguez v. Banana Republic, LLC, 613 F.Supp.3d 759 (N.Y.S.D. 2020).

259 *Id.* at 763.

260 *Id.* at 775 ("Although it features the fruit in its name, Banana Republic does not sell bananas.").

261 Calcano v. Swarovski N. Am. Ltd., 36 F.4th 68, 77 (2d Cir. 2022).

262 *Dominguez*, 613 F. Supp.3d. at 775.

profession.[263] Many are unaware of the tools already in place to discourage the use of abusive, dilatory, or vexatious tactics.[264] Notably, Rule 11 of the FRCP[265] requires attorneys to conduct a reasonable inquiry that:

> (1) [The filing] is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> (2) [T]he claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> (3) [T]he factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) [T]he denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information.[266]

Courts have the authority to sanction any attorney, law firm, or party that violates the standards in Rule 11.[267] Fee-based sanctions are most common, but courts can also impose "public reprimands, reporting attorneys to the correct disciplinary committee, striking or dismissal of pleadings, awards of attorney's fees," and other creative sanctions to dissuade improper conduct.[268]

The Model Rules of Professional Conduct are another powerful but often overlooked mechanism to combat abusive ADA litigation.[269] Under Rule 3.1, "[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous . . . ."[270] Also relevant, Rule 4.4 prohibits attorneys from using "means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods obtaining evidence that violates the legal rights of such a person" in representing a client.[271] The number of frivolous ADA lawsuits would decrease drastically if the legal community, as a self-regulating profession, consistently enforced these rules against attorneys who file boilerplate complaints devoid of legal merit.[272]

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263 Powell, *supra* note 217.

264 Joseph, *supra* note 45, at 204.

265 FED. R. CIV. P. 11.

266 FED. R. CIV. P. 11(b).

267 FED. R. CIV. P. 11(c).

268 Joseph, *supra* note 45, at 201.

269 *See infra* notes 272-279 and accompanying text.

270 MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N, DISCUSSION DRAFT 2024).

271 *Id.* r. 4.4.

272 Lee, *supra* note 33, at 360.

Additionally, lawyers who exaggerate and misrepresent the amount of work they perform to opposing counsel during settlement negotiations or when petitioning for attorneys' fees can be disciplined under Rule 4.1, which prohibits attorneys from knowingly "mak[ing] a false statement of material fact or law to a third person,"[273] and Rule 3.3, which imposes a duty of candor toward the tribunal.[274] It should be noted that Laufer's former counsel, Tristan Gillespie, was sanctioned for habitually violating the Maryland version of those rules, though it was after he had already tarnished the integrity of hundreds of ADA tester cases.[275] Finally, an attorney who selfishly exploits the ADA for the sole purpose of gaining attorney's fees or monetary settlements without ensuring the accessibility barrier is fixed could also be disciplined under Rule 8.4(d) which considers it professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."[276] These ABA sanctions and Rule 11 should be used to address ADA litigation abuse, not the standing doctrine.[277]

CONCLUSION

The issue of whether testers without intent to travel have standing to sue hotels for failing to disclose accessibility information on their websites remains unresolved, therefore endangering ADA tester standing and the fundamental practice of civil rights testing as a whole.[278] Advocating for ADA tester standing is challenging because the most active testers, like Laufer, are often portrayed as unsympathetic or predatory characters.[279] This Article aims to dispel some of the negative misconceptions about ADA testers and argues that they should have standing under an informational injury and/or stigmatic injury rationale.[280] However, in light of recent

273 MODEL RULES OF PRO, CONDUCT r. 4.1 (AM. BAR ASS'N, DISCUSSION DRAFT 2024).

274 *Id.* r. 3.3.

275 *See In re Gillespie*, 2023 U.S. App. (finding, also, that he violated his duty to keep clients reasonably informed about the scope of the fee agreements and the direction of the litigation).

276 MODEL RULES OF PRO. CONDUCT r. 8.4(d) (AM. BAR ASS'N, DISCUSSION DRAFT 2024); Clark, *supra* note 40, at 741-42.

277 *See* Lee, *supra* note 33, at 360.

278 *See* David Raizman & Zachary Zagger, *Supreme Court Says Case Over ADA 'Tester" Standing Is Moot, But Issue Is Still Alive*, OGLETREE DEAKINS (Dec. 5, 2023); Sutherland, Chakrabarti & Skoog, *supra* note 26 (voicing concern that "the court will stop acknowledging dignitary harms that result from unequal treatment and discrimination as a type of harm that conveys standing" which would make it harder for testers to challenge racial discrimination, religious discrimination, sexual orientation discrimination, and the like).

279 *See* Colten H. Erickson, Comment, *Disabled Litigants' Standing Issue: Ensuring Rhode Island Standing Doctrine is Accessible to ADA Tester Litigants*, 27 ROGER WILLIAMS U. L. REV, 475, 503 (2022).

280 *See* discussion *supra* Section II.E.

Supreme Court cases like *Spokeo* and *TransUnion*, the former seems far-fetched, and the latter remains debatable.[281]

Rather than closing the courthouse door on all digital accessibility claims brought by testers, Congress and state legislatures can adopt the solutions proposed in this Article to curb abusive ADA litigation and alleviate the burden on small businesses.[282] It is also important to remember the institutional safeguards already in place to deter frivolous practices, such as Rule 11 and ABA sanctions.[283] Over four decades have passed since *Havens Realty* was decided, and while standing doctrine has evolved significantly, testers are just as imperative to the enforcement of civil rights—especially Title III of the ADA—as they were back then and must be protected, not prohibited.

[281] This proposition is further supported by the history of Article III standing determinations which "ha[ve] operated to give greater credence to interests of privilege than to outsider claims of disadvantage," as evidenced by the court's pattern of subjecting minorities and other historically victimized groups, like the disabled, to harsher injury requirements with little rhyme or reason. *See* Gene R. Nichol, Jr., *Standing for Privilege: the Failure of Injury Analysis*, 82 B.U. L. Rev., 301, 304, 333 (2002).

[282] *See* discussion *supra* Section III.A, B, C.

[283] *See* discussion *supra* Section III.D.