No. 22-429

In the Supreme Court of the United States

ACHESON HOTELS, LLC,
Petitioner,
v.
DEBORAH LAUFER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL RESPONSIBILITY IN SUPPORT OF PETITIONER

Karen R. Harned
Executive Director
CENTER FOR CONSTITUTIONAL RESPONSIBILITY
4532 Cherry Hill Road, No. 538
Arlington, VA 22207

Drew F. Waldbeser
Adeline Kenerly Lambert
LEHOTSKY KELLER LLP
3280 Peachtree Road NE
Atlanta, GA 30305

Steven P. Lehotsky
Counsel of Record
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lehotskykeller.com

Andrew B. Davis
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Center for Constitutional Responsibility.[1] The Center is a nonprofit organization that is dedicated to preserving the separation of powers and the accountability of the political branches at all levels of government in the United States. In particular, the Center is concerned with the increasingly common delegation to unaccountable private parties of the executive's exclusive power to enforce public laws to politically unaccountable private parties. This delegation—which deputizes the plaintiffs' bar and private citizens to act as roving, unaccountable "private attorneys general"—is a threat to democratic accountability and the cohesiveness of our union. Laws, especially on contentious topics, should be enforced by government officials that answer to the Constitution and the people. The Center aims to prevent the unwise and unconstitutional delegation of sovereign enforcement authority.

SUMMARY OF ARGUMENT

I. The power to enforce public rights is vested exclusively in the Executive Branch. Yet ADA tester plaintiffs sue allegedly noncompliant businesses simply to enforce the law—not to redress personal injuries. The circuit split over whether those plaintiffs have Article III standing accordingly also presents important Article II questions, making this Court's review all the more needed.

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[1] Pursuant to this Court's Rule 37.2(a), *amicus* provided timely notice of intent to file this brief to counsel of record for the parties, and all parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, and its counsel made such a monetary contribution.

A. Article II vests "the executive Power" in the "President of the United States," U.S. CONST. art. II, § 1, and charges the President to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3. At core, these provisions ensure that the President and his subordinates—and no one else—wield the executive power to execute federal law. That power includes the discretion to decide whether and when to bring suit in court to enforce federal law.

Private plaintiffs may, of course, sue to vindicate their own private rights, even when doing so may have the indirect effect of enforcing federal law. But a private citizen has no ability to act as a private attorney general. When private plaintiffs do so, they violate Article II because law enforcement is a power reserved exclusively for the Executive Branch.

B. The circuit split over whether tester plaintiffs have standing to sue directly implicates these Article II principles. After all, standing helps keep the hermetic seal between the Executive and the Judicial Branches by delimiting the judicial power to concrete cases and controversies involving plaintiffs with individualized injuries that a court may redress.

Six circuits have held that an ADA tester plaintiff does not have standing to sue a place of public accommodation if she has no intent to visit that place, because then her only basis for suit is to enforce the law. But in the First and Eleventh Circuits, she has standing. Merely alleging a statutory violation—and perhaps some "stigma" associated with that violation—is enough.

That rule permits ADA tester plaintiffs to exercise core executive power in violation of Article II. Just like the Attorney General, these plaintiffs sue to enforce general compliance with the law. They exercise sole and exclusive discretion over who to sue. They decide how many suits to

file. They decide when to settle. And they do all of this without any Executive Branch oversight.

II. If the circuit split stands, the many practical problems with private law enforcement will only grow.

ADA testers possess all the power and discretion of federal law enforcement officers, but without any of the accountability and legal strictures. They and their counsel have a personal financial incentive to file as many cases as possible because of fee-shifting provisions. And nothing stops them from choosing defendants for improper purposes. For example, their lawyers can target small businesses because those business are more likely to settle, or target minority-owned businesses for discriminatory reasons. It is no wonder, then, that the lawyers representing ADA testers are responsible for huge amounts of frivolous lawsuits.

Absent review by this Court, legislatures will be emboldened to double down on these private enforcement regimes, and plaintiffs will inevitably push the bounds of existing private rights of action. Already, numerous federal and state laws raise Article II concerns by delegating enforcement to private individuals who may have little to no actual injury, including the Medicare Secondary Payer Act, environmental laws with private citizen suit provisions, and recent state bounty hunter laws. This Court should grant review before these Article II problems worsen.

ARGUMENT

I. THE COURT SHOULD REVIEW THIS CASE BECAUSE THE CIRCUIT SPLIT PRESENTS SIGNIFICANT ARTICLE II PROBLEMS.

When addressing the outer bounds of Article III, this Court has repeatedly noted that an expansive view of standing may raise serious Article II concerns. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765,

778 n.8 (2000); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting); *see also id.* at 197 (Kennedy, J., concurring). Most recently, this Court cautioned that "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021).

The circuit split below presents these exact concerns. ADA tester plaintiffs like Laufer are self-described "private attorney general[s]." *Laufer v. Arpan LLC*, 29 F.4th 1268, 1290 (11th Cir. 2022) (Newsom, J., concurring). They repeatedly sue places of public accommodation for alleged ADA violations, even though they never intend to visit those places. Rather, they search out noncompliant companies for the sole purpose of forcing them to comply with the law. The two courts of appeals—including the First Circuit below—that have held these plaintiffs have standing to sue accordingly walk headlong into serious Article II problems. This Article II overlay on an entrenched Article III split provides even more reason for this Court to step into the breach.

A. Article II bars private citizens from exercising unsupervised executive power.

Three constitutional provisions work in concert to protect the separation of powers and ensure that only the President has the power—and responsibility—to direct the actions of those exercising executive authority.

The Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. This Clause prohibits the vesting of the executive power in anyone else or any other branch of government, because "all" of the executive

power resides with the President. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). The proposition that the Congress could "vest [the executive power] in any other person" has long been "utterly inadmissible." *Martin v. Hunter's Lessee*, 14 U.S. 304, 329-30 (1816) (Story, J.).

The Take Care Clause—which states that the President "shall take Care that the Laws be faithfully executed"—serves a similar function. U.S. CONST. art. II, § 3. That Clause necessarily gives the President, as "the chief constitutional officer of the Executive Branch," "supervisory . . . responsibilit[y]" over those who execute the law. *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). If the President were deprived of the "general administrative control of those executing the laws," it would be "impossible" for him "to take care that the laws be faithfully executed." *Myers v. United States*, 272 U.S. 52, 117, 163-64 (1926); *see also* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 63 (2d ed. 1868) ("[W]here a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred.").

Finally, the Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . which shall be established by Law." U.S. CONST. art. II, § 2. The Clause also states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* A person is an officer under the Appointments Clause if they hold a "continuing" office established by law and wield "significant authority." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508,

511-12 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

Together, these clauses ensure that the power to enforce federal law—and accountability for enforcement decisions—rests solely with the Executive Branch. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (The Executive Branch's obligation to "take Care that the Laws be faithfully executed" is its "most important constitutional duty." (citation omitted)). That power includes, at its core, the "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (explaining decision to "refus[e] to institute proceedings" is part of the Executive Branch's Article II powers).

"Civil enforcement decisions"—that is, decisions to bring suit in federal court for civil violations of federal law—likewise fall within the Executive Branch's exclusive power. *In re Aiken County*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.). When the United States decides whether to bring a civil suit to enforce "general compliance" with federal law, it exercises a quintessential Executive Branch function. *TransUnion*, 141 S. Ct. at 2207. That is why the Federal Election Commission cannot be part of the legislative branch—it wields "enforcement power, exemplified by its discretionary power to seek judicial relief." *Buckley*, 424 U.S. at 138.

None of this, of course, prohibits private citizens with a private cause of action from suing to redress concrete and solely personalized injuries caused by violations of federal law. But it does limit them to redressing only "[i]ndividual rights," not "public rights." *Lujan*, 504 U.S. at 578. A private individual who has personally been injured (say, because she was fired due to a disability) may file suit to redress that injury (seeking, for example,

reinstatement and backpay) provided she has a cause of action. *See id.* at 577-78. That kind of suit incidentally advances the public interest in rooting out disability discrimination, but the primary result is the redress of the plaintiff's personal, specific injuries. *See Arpan*, 29 F.4th at 1291 (Newsom, J., concurring).

Suits that advance "the *public* interest," by contrast, are "the function of Congress and the Chief Executive." *Lujan*, 504 U.S. at 576. If private citizens share the power to advance "the undifferentiated public interest in . . . compliance with the law," they usurp "the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Id.* at 577 (quoting U.S. CONST. art. II, § 3). Accordingly, when "*unharmed* plaintiffs . . . sue defendants" merely because they "violate[d] federal law," they "infringe on the Executive Branch's Article II authority." *TransUnion*, 141 S. Ct. at 2207. The same is true when a plaintiff is minimally harmed yet seeks a remedy that accrues to the public: In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, Justice Kennedy wrote that it raised serious Article II concerns for individuals with Article III standing to seek relief in the form of a civil fine payable to the United States Treasury. 528 U.S. at 197 (Kennedy, J., concurring).

B. By holding that ADA tester plaintiffs have Article III standing, two courts of appeals currently allow private citizens to exercise executive power.

The need for this court to resolve the circuit split over Article III standing for ADA tester plaintiffs is accentuated because one side of the split arguably violates Article II.

In six circuits, ADA tester plaintiffs do not have standing to advance general, public interests. These courts of

appeals have held that there is no Article III injury-in-fact if a plaintiff does not intend to patronize the defendant business, reasoning that missing accessibility information does not impose "adverse effects" on the plaintiff. *Laufer v. Looper*, 22 F.4th 871, 881 (10th Cir. 2022); *Laufer v. Mann Hosp., L.L.C.*, 996 F.3d 269, 272-73 (5th Cir. 2021). Ultimately, the plaintiff's only real interest is trying to "hold [the business] accountable for legal infractions." *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (quoting *TransUnion*, 141 S. Ct. at 2205). And that cannot support Article III standing. *Id.*; *see also Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 835 (7th Cir. 2019). A contrary holding, moreover, would "allow any aggrieved person to challenge any allegedly deficient website belonging to anyone in the country." *Griffin v. Dep't of Lab. Fed. Credit Union*, 912 F.3d 649, 657 (4th Cir. 2019). That "theory of encounter standing" would "deputize . . . eight million [blind] Americans" to enforce the ADA. *Brintley v. Aeroquip Credit Union*, 936 F.3d 489, 494 (6th Cir. 2019).

But two circuits have blessed that kind of deputization. In the First Circuit's view, the ADA "permit[s] private individuals to bring enforcement actions in federal court" whenever "a public accommodation violates the ADA," even if the plaintiff did not intend "to use the [website] information for anything." *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 265, 271 (1st Cir. 2022). Similarly, the Eleventh Circuit has held that a bare "violation of an antidiscrimination law" is not enough injury for standing, but "emotional injury" from the illegal discrimination *is* enough. *Arpan*, 29 F.4th at 1274.

That rule means these tester suits "may satisfy all Article III requirements but nonetheless constitute an impermissible exercise of 'executive Power' in violation of Article II." *Id.* at 1284 (Newsom, J., concurring). After all,

"[s]tanding doctrine helps ensure that private parties do not exercise the 'discretionary power' that inevitably accompanies the authority to see that federal law or an area of federal law is obeyed." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 827-28 (2009). One of the reasons that "*unharmed* plaintiffs [may not] sue defendants who violate federal law" is because that "not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion*, 141 S. Ct. at 2207; *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) ("Article III standing . . . ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed.").

Litigation to enforce "general compliance" with the law is an exclusive executive power. *TransUnion*, 141 S. Ct. at 2207. Yet these tester plaintiffs, including Laufer herself, freely admit that they "seek[] to advance the rights of disabled people generally." *Arpan*, 29 F.4th at 1284 (Newsom, J., concurring). There is no meaningful difference in the way tester plaintiffs and the Attorney General may enforce the statute. Like the Department of Justice, ADA testers wield the power of discretionary enforcement. 42 U.S.C. § 12188; *see also Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 44 (2d Cir. 2002). They decide, for instance, "how aggressively to pursue legal actions," and whether and when to settle. *TransUnion*, 141 S. Ct. at 2207. Testers choose whether to "bring one lawsuit, or a dozen, or hundreds." *Arpan*, 29 F.4th at 1295 (Newsom, J., concurring). And testers can and do exercise discretion over the kind of ADA violations to prioritize. Some, like Laufer, focus solely on "online reservation cases." *See id.* Another group

brings internet screen reader claims. *See, e.g.*, *Brintley*, 936 F.3d at 491; *Carello*, 930 F.3d at 832; *Griffin*, 912 F.3d at 652. Others focus on architectural barriers. *See, e.g.*, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1326 (11th Cir. 2013).

Also like the Attorney General, ADA testers do not litigate to redress their own injuries. Rather, they seek injunctive relief forcing the defendant to comply with the ADA so that anyone who in fact plans to patronize the defendant's business—*i.e.*, not the plaintiff—will be able to view an ADA-compliant website. That is precisely the kind of "legal action[] [brought] on behalf of the community" that is "at its core, . . . 'executive power.'" *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1134 (11th Cir. 2021) (Newsom, J., concurring).

To be clear, the Executive Branch does not exercise any meaningful supervision over these suits.[2] Most courts have held that tester plaintiffs do not need to seek preclearance or a right-to-sue letter before filing. *See, e.g.*, *McInerney v. Rensselaer Polytechnic Inst.*, 505 F.3d 135, 138 (2d Cir. 2007). The Attorney General has the theoretical power to intervene in private ADA suits, *see* 28 C.F.R. § 36.501, but that does not translate to meaningful accountability. The United States cannot intervene as of right. *See id.* (explaining that the court has discretion to grant or deny the application). And in the rare cases where

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[2] That is especially problematic because ADA testers arguably qualify as "Officers of the United States." U.S. CONST. art II, § 2. They undeniably exercise significant authority—the power to "conduct[] civil litigation" for the purpose of "vindicating public rights." *Buckley*, 424 U.S. at 140. And because testers may fill their role as long as they wish (often to the tune of hundreds of lawsuits), they arguably hold a continuing position, too. *See Laufer*, 29 F.4th at 1295 (Newsom, J., concurring).

the Attorney General does intervene, the private plaintiff continues litigating her claim in parallel. *See, e.g.*, *Reg'l Econ. Cmty. Action Program*, 294 F.3d at 44.

In short, ADA tester plaintiffs appear to exercise power reserved by the Constitution exclusively for the Executive Branch. And unless this Court grants review, the apparent Article II violations will continue.

II. This Court's Review is Needed to Prevent the Rapidly Growing Problems with Private Parties Wielding Executive Power.

Without this Court's intervention, a large part of the country will remain subject to a cottage industry of abusive ADA tester suits that harm businesses. Worse, lingering uncertainty about the scope of Article III will allow abuses of similar statutes and encourage legislatures to create new private rights of action that are more akin to bounty hunter regimes than traditional causes of action.

1. Enforcement authority, when entrusted to private individuals without oversight, tends to lead to "vexatious and abusive litigation" across the board. *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), 2003 WL 899100, at *23 (Brief of the United States Solicitor General). Unsurprisingly, then, ADA tester plaintiffs are responsible for a deluge of abusive litigation that preys on businesses. *See Shayler v. 1310 PCH, LLC*, 51 F.4th 1015, 1017 (9th Cir. 2022). As the Ninth Circuit has explained:

> The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through conciliation and voluntary compliance, a lawsuit is filed . . . . Faced with the specter of costly litigation and a potentially fatal judgment against them, most

businesses quickly settle the matter.

Id. at 1017-18 (citation omitted).

Tester plaintiffs have filed hundreds, sometimes thousands, of these harassing lawsuits. *See Arpan*, 29 F.4th at 1290 (recognizing plaintiff has filed over 600 suits since 2018); *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1226 (11th Cir. 2021) (over 250 lawsuits); *Houston*, 733 F.3d at 1326 (over 270 lawsuits); *Cohan v. Lakhani* Hosp., Inc., No. 21 CV 5812, 2022 WL 797037, at *3 (N.D. Ill. Mar. 16, 2022) (over 2,300 lawsuits). And there is no incentive for attorneys themselves to stop this abuse because ADA plaintiffs may recover attorneys' fees (and costs), but only *after* filing suit. 42 U.S.C. § 2000a-3(a)-(b); *see also Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 605 (2001).

If the Executive Branch were to engage in this behavior, it could be held publicly to account. But private litigants are subject to none of the structural, "legal," or "practical checks that constrain public enforcement agencies." *Arpan*, 29 F.4th at 1295 (Newsom, J., concurring) (internal quotation marks omitted) (quoting Grove, *supra*, at 837); *see also Nike, Inc.*, 539 U.S. at 680 (Breyer, J., dissenting from the denial of certiorari) (similar). Indeed, there is nothing stopping ADA testers from selecting their targets for improper reasons, like the resources the defendant has available to fight the allegation, whether the defendant is a competitor to a friend's or family member's business, or even the defendant's owner's race or religion.

Absent this Court's intervention, this abusive litigation will continue unabated and could even grow worse in significant portions of the country.

2. Abusive ADA litigation, however, is just the tip of the iceberg. Unless this Court intervenes to give Article III its proper, limited scope, other federal private rights of action will continue to be abused, and both Congress

and state legislatures will have every incentive to delegate even more enforcement power to private individuals.

Multiple federal statutes already deputize uninjured private citizens to enforce federal law, predictably resulting in harassing litigation. The Medicare Secondary Payer Act, for example, has a private cause of action detached from injury to the plaintiff that allows a plaintiff to obtain a bounty for recovering money owed to Medicare. *See* 42 U.S.C. § 1395y(b)(3)(A). This has produced "abusive litigation" that has "drawn intense criticism from many a federal judge." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 871, 878 (7th Cir. 2021). So too the Clean Air Act and Clean Water Act authorize private plaintiffs through citizen suits to effectively act as bounty hunters by seeking "civil fines payable to the [federal] treasury" and by "profit[ing] from litigation [targeting corporations] by obtaining attorneys' fees or settlements that can be used to finance subsequent litigation." Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39, 47-50 (2001). As Justice Scalia noted, this has the potential to divert public remedies into private gain. *Laidlaw*, 528 U.S. at 210 (Scalia, J., dissenting).

And there is a growing and disturbing trend of state legislatures creating private rights of action that turn private citizens into bounty hunters seeking out legal violations for pecuniary or other gain. *E.g.*, CAL. BUS. & PROF. CODE § 22949.64; TEX. HEALTH & SAFETY CODE ANN. § 171.208(a). These laws not only raise the same legal and political accountability problems as the ADA, but, because they intentionally pit one group of citizens against another on extraordinarily contentious issues, dramatically heighten the risk of "unrestrained factionalism" that our Founders worried would "do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S. 724, 736

(1974); *see also* THE FEDERALIST No. 51, at 349 (James Madison) (noting that the best security of liberty is a system where "each" branch "may be a check on the other").

This Court's resolution of the ADA tester standing issue presented here would be far from a panacea, but it would help stem some of the worst abuses of existing private rights of action and discourage both Congress and state legislators from enacting new laws empowering individuals to police their fellow citizens.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Karen R. Harned
Executive Director
CENTER FOR CONSTITUTIONAL RESPONSIBILITY
4532 Cherry Hill Road, No. 538
Arlington, VA 22207

Drew F. Waldbeser
Adeline Kenerly Lambert
LEHOTSKY KELLER LLP
3280 Peachtree Road NE
Atlanta, GA 30305

Steven P. Lehotsky
Counsel of Record
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
(512) 693-8350
steve@lehotskykeller.com

Andrew B. Davis
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

Counsel for Amicus Curiae

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