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 *AMICI CURIAE* RESTAURANT LAW CENTER, AMERICAN HOTEL & LODGING ASSOCIATION, NFIB SMALL BUSINESS LEGAL CENTER, RHODE ISLAND HOSPITALITY ASSOCIATION, PUERTO RICO RESTAURANT ASSOCIATION/ ASOCIACIÓN DE RESTAURANTES DE PUERTO RICO, NEW HAMPSHIRE LODGING & RESTAURANT ASSOCIATION, MASSACHUSETTS RESTAURANT ASSOCIATION, AND HOSPITALITYMAINE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food-service industry in the courts. This labor-intensive industry is comprised of over one million restaurants and other food-service outlets employing nearly 16 million people—approximately 10 percent of the U.S. workforce. Restaurants and other food-service providers are the second largest private sector employers in the United States. In addition, the Law Center represents the interests of its state affiliates, many of which have both food-service establishments and hotels as members. For example, two co-*amici*, Rhode Island Hospitality Association and New Hampshire Lodging & Restaurant Association, are a good example of the more than half of state affiliates that speak on behalf of both industries and whose members are jointly represented by the Law Center. Through *amicus* participation, the Law Center provides courts with perspectives on legal issues that have the potential to adversely affect its members.

The American Hotel & Lodging Association is the largest hotel association in the U.S. representing all

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[1] All parties received timely notice of the intent to file and have consented to the filing of this brief by providing written consent. Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from the *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

segments of the industry nationwide. It has over 30,000 members, including the ten largest hotel companies in the U.S.

The NFIB Small Business Legal Center is the voice for small business in the nation's courts and the legal resource for small business owners nationwide.

The Rhode Island Hospitality Association represents over 800 foodservice, hotels, vendors, and hospitality members in the state of Rhode Island.

The Puerto Rico Restaurant Association/Asociación de Restaurantes de Puerto Rico is committed to the growth of the restaurant industry in Puerto Rico. It is a professional organization working to protect and empower prepared food vendors.

The New Hampshire Lodging & Restaurant Association represents approximately 3,500 foodservice, hotel, and hospitality members in the state of New Hampshire.

The Massachusetts Restaurant Association has 1,800 members that represent about 5,500 locations across Massachusetts, including about 40 hotel-specific members.

HospitalityMaine is Maine's only non-profit trade group representing the hospitality industry and has over 1,000 members.

SUMMARY OF ARGUMENT

This Court should grant the Petition to resolve the clear circuit split it identifies. Until then, in the six circuits in which the issue is unresolved, *Amici*'s thousands of members in the lodging industry must continue their expensive and wasteful "tester" standing motion practice. In those circuits that recognize "tester" standing (currently two), *Amici*'s lodging industry members must litigate whether their reservation information is sufficient for hypothetical patrons with hypothetical accessibility needs—the type of abstract disputation that Article III's standing requirement sensibly prohibits. And *Amici*'s thousands of food-service industry members will remain vulnerable to "tester" lawsuits challenging website and other accessibility issues by those having no real plans to patronize their businesses.

This Court may resolve the circuit split without disturbing prior precedent, contrary to the First Circuit's suggestion below. Laufer is not suing under a sunshine law, does not need the information that is the subject of her lawsuit, was not the victim of intentional discrimination, and did not suffer the concrete and particularized injury of making an unsuccessful request for information. She thus is fundamentally different from the plaintiffs in the three key precedents in this area.

ARGUMENT

I. RESOLVING THE ISSUE PRESENTED IS VERY IMPORTANT TO *AMICI*.

A. The hotel and lodging industry is negatively impacted by the lack of clarity presented by the circuit split.

The Petition sets forth the importance of this issue to the hotel and lodging industry as a whole. The *Amici* agree with Petitioner and believe that the instant case is the perfect vehicle for this Court to resolve an important conflict between the circuit courts regarding Article III "tester" standing as it relates to alleged violations of Title III of the Americans with Disabilities Act ("ADA"). The *Amici* represent thousands of hotels and places of lodging that are squarely affected by the regulation involved, 28 C.F.R. § 36.302(e)(1)(ii) (the "Reservation Rule") and would benefit greatly by knowing one way or the other whether a self-proclaimed "tester" has standing to commence a lawsuit alleging non-compliance with the Reservation Rule. Specifically, the Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have yet to opine on this issue. Accordingly, hundreds of *Amici* members are open to "tester" lawsuits of this nature where they will be forced to decide between making a settlement payment or paying the litigation costs associated with challenging "tester" standing. Indeed, many members of the *Amici* are small hotels and bed-and-breakfasts with limited resources, and they cannot take on the defense costs and the risk of a fee award to a plaintiff. *Amici* represent all states of the First Circuit and, given the

direct circuit split identified in the Petition, would especially benefit from resolution of this issue.

Consider the circuits where this issue has been resolved. For example, the Second, Fifth, and Tenth Circuits have rejected "tester" standing in cases alleging violations of the Reservation Rule. This clarity is extremely beneficial to the *Amici* members in those jurisdictions because it is known that a dispositive motion challenging "tester" standing would be a worthwhile endeavor. Similarly, in the First and Eleventh Circuits, *Amici* members benefit from knowing that it would be a waste of resources to challenge "tester" standing. It is this level of clarity, whatever the outcome on "tester" standing, that would help *Amici*'s members.

By this Court resolving the circuit split, there will be no need for "tester" standing motion practice. Testers will either have standing to commence ADA disability discrimination-based lawsuits alleging violations of the Reservation Rule or they will not have standing. In either scenario a defendant will not have to overcrowd district court dockets and expend precious resources by filing dispositive motions on this issue. Indeed, this Court resolving this issue at this point in time will certainly lead to judicial efficiency.

As set forth in the Petition, Laufer has filed over 600 lawsuits as a "tester" alleging violations of the Reservation Rule. Laufer is not the only serial filer in this space. Owen Harty has filed over 70 of these identical cases. If this issue is not resolved, the *Amici* anticipate hundreds, if not thousands, of identical filings in the

Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits over the next few years alleging "tester" standing. The result would be a depletion of resources for both *Amici*'s members and the judiciary as parties litigate an issue that can and should be resolved in this case.

Moreover, "tester"-initiated litigation alleging Reservation Rule violations raises an issue that is not present in non-"tester" initiated litigation. Litigation under the Reservation Rule involves whether a hotel or place of lodging *sufficiently* identifies and describes accessible features in the hotels and guest rooms 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. Thus, "testers" allege that the information does not meet the "testers' " needs. This forces defendants to litigate whether the information provided is sufficient for a person with hypothetical needs who has no interest in patronizing the hotel. Thus, in all circuits that have not ruled out "tester" standing, *Amici*'s members who are defendants in these cases will not only be forced to litigate "tester" standing but may also be entrenched in a factual battle about a hypothetical injury alleged by a "tester" relying upon an ambiguous Reservation Rule.

B. This issue is also very important to the food-service industry.

Many members of the *Amici* are part of the food-service industry and operate restaurants and other

food-service establishments. While this sub-group of the *Amici* are not impacted by the Reservation Rule, they are certainly impacted by the concept of "tester" ADA Title III cases. The area that is most concerning to these *Amici* members pertains to website accessibility lawsuits filed by plaintiffs alleging that websites owned, operated, maintained, or controlled by the restaurant defendant is inaccessible to persons with visual impairments. In these cases, plaintiffs routinely allege that they are unable to obtain information about the restaurant, including but not limited to hours of operation, location, menus offerings, specials, catering options, and seating options.

As stated in the Petition, the Fourth, Sixth, and Seventh Circuits have rejected "tester" standing in website accessibility cases. The remaining circuits have not addressed the issue. The *Amici* contend that if this Court decides "tester" standing in this case, even if the decision does not squarely address "tester" standing in the broader ADA context, it will go a long way in resolving the issue and obtaining clarity one way or the other as to whether "testers" will have standing in ADA Title III cases.

Again, like in the context set forth above pertaining to the Reservation Rule, what is an accessible website is completely ambiguous. Indeed, there is no federal regulation that specifically identifies what needs to be done to make a website "accessible" to comply with ADA Title III. "Testers" have the ability to allege any number of items in a complaint in an effort to create an issue of fact requiring trial. If the ultimate

conclusion that is going to be reached is that "testers" do not have standing in website accessibility cases, there is a great benefit in knowing that sooner rather than later to avoid unnecessary and ambiguous litigation.

This level of clarity will reduce the need for litigating Article III standing in these types of cases. Further litigation of these issues only serves to increase legal defense costs, increase the potential for fee awards to serial plaintiffs, and overcrowd court dockets. In sum, this is a great opportunity to resolve a conflict between the circuits and give the *Amici* a clear path forward when defending "tester" initiated ADA Title III litigation.

II. THE COURT MAY RESOLVE THE CIRCUIT SPLIT WITHOUT DISTURBING PRECEDENT.

The Petition explains that the decision below conflicts with decisions in the Second, Fifth and Tenth Circuits, and that the Court should grant *certiorari* to resolve the conflict. The Petition explains, further, that "testers" such as Laufer lack standing so the decision below should be reversed. But contrary to the suggestion of the decision below, Pet. App. 18a, the Court need not disturb any of the three key precedents in this area.

A. The Petition explains that Laufer did not suffer a concrete or particularized injury under *TransUnion*.

"The law of Art. III standing is built on a single basic idea—the idea of separation of powers." *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) (quotation marks omitted). "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *Id*. "For there to be a case or controversy under Article III, the plaintiff must have a personal stake in the case." *Id*. (quotation marks omitted). "To demonstrate their personal stake, plaintiffs must be able to sufficiently answer the question: 'What's it to you?'" *Id*. (quotation marks omitted).

"To answer that question in a way sufficient to establish standing, a plaintiff must show . . . that he suffered an injury in fact that is concrete, particularized, and actual or imminent." *Id*. (alteration added). "[C]oncrete" means "real, and not abstract." *Id*. (alteration added). "[P]articularized" means the injury must "affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 330-31 (2016) (quotation marks omitted).

The Petition explains that, upon granting *certiorari*, this Court should hold that under *TransUnion* the First Circuit below erred in holding that Laufer suffered a concrete and particularized injury. Pet. 30-32. We explain below that this Court may do so without disturbing *Havens Realty*, *Public Citizen*, or *Akins*, the

three key precedents in this area, contrary to the First Circuit's suggestion.

B. *Public Citizen* and *Akins* are distinguishable because the plaintiffs there sued under sunshine laws and were not "testers."

The First Circuit below suggested that Laufer has standing under *Public Citizen* and *Akins* unless *TransUnion* overruled them. Pet. App. 15a-24a. Not so. *Public Citizen* held that a legal foundation had standing to sue the Department of Justice to contend that the Federal Advisory Committee Act ("FACA") required the disclosure of the names of potential judicial nominees being considered by an American Bar Association committee. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 448-49 (1989). *Akins* held that a group of voters had standing to sue the Federal Election Commission ("FEC") to contend that the Federal Election Campaign Act of 1971 ("FECA") required the disclosure of certain campaign related information by the American Israel Public Affairs Committee ("AIPAC"). *Federal Election Commission v. Akins*, 524 U.S. 11, 21 (1998).

Public Citizen and *Akins* are readily distinguishable for each of two reasons. First, *TransUnion* held those cases did not support "informational injury" standing for a plaintiff alleging a violation of the Fair Credit Reporting Act ("FCRA") because "those cases involved denial of information subject to

public-disclosure or sunshine laws that entitle all members of the public to certain information," and the FCRA is not such a law. *TransUnion*, 141 S.Ct. at 2214. Inexplicably, the First Circuit ignored this portion of *TransUnion*. Pet. App. 17a-18a. The ADA and 28 C.F.R. § 36.302(e)(1)(ii) also are not public-disclosure or sunshine laws. Thus, *Public Citizen* and *Akins* are inapt.

Second, the plaintiffs in those cases were not "testers," but rather alleged that they needed the information consistent with the statute's purpose. *Public Citizen* reasoned the plaintiffs "seek access to the ABA Committee's meetings and records in order to monitor its workings and participate more effectively in the judicial selection process." *Public Citizen*, 491 U.S. at 449. *Akins* reasoned the plaintiffs claimed that the requested information "would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Akins*, 524 U.S. at 21. Because Laufer is a tester who disclaims any need for the information in question, Pet. 11, these cases are inapposite.

C. *Havens Realty* is distinguishable because the plaintiff there, but not Laufer, was the victim of intentional discrimination.

Havens Realty addressed the standing of testers who described themselves as "individuals who, without an intent to rent or purchase a home or apartment,

pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Plaintiff Sylvia Coleman was black, plaintiff R. Kent Willis was white, and both were "employed by" plaintiff Housing Opportunities Made Equal ("HOME") "to determine whether Havens practiced racial steering." *Id*. at 368. The individual plaintiffs alleged that on three days each inquired whether apartments were available, and each time Coleman was told "no" but Willis was told "yes." *Id*. at 368. (On a fourth day, Coleman and a different white tester made similar inquiries and received similar responses. *Id*.) The plaintiffs sued for violation of § 804(d) of the Fair Housing Act of 1968 ("FHA"), which provides, "it shall be 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." *Id*. at 367 n.2. *Havens Realty* held that Coleman had standing because she was the object of "discriminatory representations" in violation of the FHA, causing her to "suffer[ ] injury in precisely the form the statute was intended to guard against." *Id*. at 373-74.

In contrast, Laufer was not the victim of intentional discrimination. As the Tenth Circuit explained in holding that Laufer lacked standing to bring an identical suit elsewhere, "Ms. Coleman [in *Havens Realty*] was not just denied information. On four separate occasions, she asked about housing availability and was given false information *because of her race*." *Laufer v. Looper*, 22 F.4th 871, 879 (10th Cir. 2022) (emphasis added). In contrast, Laufer has not alleged the

defendant there "denied her information *because of* her disability. All individuals, whether or not disabled, had access to the same information on the [defendant's website]." *Id*. (emphasis added). "Ms. Laufer's alleged injury—her discovery that the [website] lacked certain information—is thus distinct from the injury suffered in *Havens Realty*, which was grounded in misrepresentation and racial animus." *Id*.; *see also Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1005 (11th Cir. 2020) ("[T]he Fair Housing Act does not seek to vindicate some amorphous interest in receiving unusable housing information. Instead, it protects the weighty interest in not being subjected to *racial discrimination*, which can inflict a concrete injury on anyone who personally experiences it") (emphasis added).

Havens Realty's analysis of HOME's standing supports the conclusion that intentional discrimination was essential to Coleman's standing. HOME employed Coleman as a tester and thus received the identical misrepresentations; but because HOME was an entity and not an individual, it was not the victim of racial discrimination. Sure enough, *Havens Realty* did not hold that HOME's receipt of these misrepresentations gave it standing. Rather, *Havens Realty* held only that HOME had standing because the defendant's steering practices impaired HOME's ability to provide counseling and referral services and drained its resources. *Id*. at 379.

Because Laufer does not allege that she was the victim of intentional discrimination, she does not qualify for standing under *Havens Realty*.

D. *Havens Realty*, *Public Citizen* and *Akins* are distinguishable for another reason: the plaintiffs were concretely and particularly injured by the defendants' denials of their requests for information.

Havens Realty, *Public Citizen* and *Akins* are distinguishable for the additional reason that the plaintiffs there suffered concrete and particularized injuries because they requested but were denied information, but Laufer did not. *TransUnion*, 141 S.Ct. at 2221 (Thomas, J., dissenting) ("this Court has recognized that the unlawful withholding of *requested* information causes a sufficiently distinct injury to provide standing to sue") (emphasis added) (citing *Public Citizen* and *Havens Realty*).

In *Havens Realty*, the black tester Coleman had standing because she was told falsely that apartments were not available in response to her inquiries on four occasions. *Id*. at 368, 374. The white tester Willis did not have standing, even though he learned about the defendant's false representations, because he was not personally the "victim of a discriminatory misrepresentation" in response to his own inquiries on three occasions. *Id*. at 368, 374-75. Thus, it was the tester's receipt of false information in response to his or her inquiry that gave rise to standing, not the tester's learning of false information generally.

Similarly, in *Public Citizen*, the Court repeatedly emphasized that the plaintiff had standing because

the plaintiff requested yet was denied the desired information, analogizing the plaintiff's injury to that of an unsuccessful applicant for information under the Freedom of Information Act. The Court reasoned, "Appellant WLF has *specifically requested*, and been refused, the names of candidates under consideration by the ABA Committee, reports and minutes of the Committee's meetings, and advance notice of future meetings." *Public Citizen*, 491 U.S. at 449 (emphasis added). "As when an agency denies *requests for information* under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." *Id*. (emphasis added). "Our decisions interpreting the Freedom of Information Act have never suggested that those *requesting information* under it need show more than that *they sought* and were denied specific agency records." *Id*. (emphasis added). "The fact that other citizens or groups of citizens might make the same complaint *after unsuccessfully demanding disclosure* under FACA does not lessen appellants' asserted injury, any more than the fact that numerous citizens might *request the same information* under the Freedom of Information Act entails that those who have been denied access do not possess a sufficient basis to sue." *Id*. (emphasis added). Again, no request for information, no concrete and particularized injury sufficient to give rise to standing.

Akins is in accord. The plaintiffs had standing because they unsuccessfully sought the desired information by filing an administrative complaint with the FEC, which the agency dismissed. *Akins*, 524 U.S. at 15-18, 21-25. *Akins* relied on *Public Citizen* in concluding that the plaintiffs' injury was not too abstract to satisfy the injury-in-fact requirement, quoting that case for the proposition that "[t]he fact that other citizens or groups of citizens might make the same complaint *after unsuccessfully demanding disclosure* . . . does not lessen [their] asserted injury." *Id*. at 24 (quoting *Public Citizen*, 491 U.S. at 449-50) (emphasis added) (alterations in original).

But as the Petition notes, Laufer did not request information, Pet. 10-11, unlike the plaintiffs in *Havens Realty*, *Public Citizen*, and *Akins*. She simply visited the online reservation for Coast Village and noticed that in her view it allegedly failed to provide sufficient information as to whether Coast Village was ADA-accessible. Pet. 10. Unlike the plaintiffs in *Havens Realty*, *Public Citizen*, and *Akins*, Laufer thus did not suffer a concrete and particularized injury.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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