No. 22-429

IN THE

Supreme Court of the United States

ACHESON HOTELS, LLC,

Petitioner,

v.

DEBORAH LAUFER,

Respondent.

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

BRIEF IN OPPOSITION

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Respondent, Deborah Laufer, hereby files this Brief In Response to the Petition For Writ Of Certiorari.

SUMMARY OF ARGUMENT

Respondent agrees with Petitioner that there presently exists a conflict among the Circuits on the same important matter and that clarity from this Court is badly needed. This conflict is not limited to the issue of whether or not a disabled person who alleges no intent to book a room at a hotel has standing to sue for its failure to provide certain information on its online reservations service ("ORS") - as Petitioner describes it. Rather, the implications are far broader.

If the rulings of the four Circuit Courts which ruled against standing prevail, then an important aspect of civil rights law spanning several decades would be effectively nullified. This point is rendered clear when one considers the greater questions presented:

1. When a civil rights plaintiff encounters discrimination as that term is expressly defined by statute, do they have the right to sue?

2. Is discrimination a real world harm, or is it nothing more than a threshold element a person must encounter, only thereafter to be required to demonstrate that discrimination caused some kind of additional consequential injury?

3. How do this Court's opinions in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), impact civil rights?

This Court's resolution of these questions will affect not only private enforcement rights under the Americans With Disabilities Act ("ADA"), it will likely either reaffirm or significantly narrow or overturn caselaw under various anti-discrimination statutes.

The briefs of the Petitioner and Amici demonstrate the vast analytical differences between the varied Circuit opinions. The purpose of this Response is therefore to attempt to sift the various elements and issues into an outline based on the *Spokeo* and *TransUnion* holdings as they interplay with discrimination, informational injury in the context of discrimination, stigmatic injury, dignitary harm, segregation, isolation and other harms.

As explained below, there is a clear reading by which this Court's decisions in *Spokeo* and *TransUnion* are consistent with its prior opinions in such cases as *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). By contrast, the seven Circuits which ruled on this matter are in conflict.

In *Havens Realty*, this Court held that a civil rights tester had standing to sue for being deprived of the right to truthful information under the Fair Housing Act ("FHA) even though she had no intention of making use of that information: specifically, to purchase a home or rent an apartment. In this regard, this Court held that Article III injury may exist solely by virtue of a statute creating those rights and, because the plaintiff satisfied the express language of the applicable statute, she had standing. In recent years, six different Circuits held that *Havens Realty* applied to the ADA and, therefore, tester status does not defeat standing and a tester's motive

for encountering discrimination is irrelevant. This was because the operative language of the ADA tracked the statutory phrases addressed by *Havens Realty*. On this point, the First Circuit correctly held that *Havens Realty* applied to the instant action. This was in agreement with one of the concurring opinions from the Eleventh Circuit, which also ruled in favor of standing. It was also recently joined by the Fourth Circuit. By contrast, the Fifth and Tenth Circuits, which ruled against standing, applied flawed reasoning in holding that *Havens Realty* did not apply. The Second Circuit addressed *Havens Realty* only briefly, implying that it applied but was narrowed by *Spokeo* and *TransUnion*.

This Court's 2016 decision in *Spokeo* and 2021 decision in *TransUnion* resulted in the fragmenting of Circuit Court opinions presented in the case at bar, despite the fact that neither *Spokeo* nor *TransUnion* were civil rights cases and neither expressly overturned *Havens Realty*.

Spokeo and *TransUnion* sifted statutes into two categories: one where the definition of injury found in the express language of a statute satisfies Art. III requirements and one where it does not. The first category is where a statute created a cause of action out of a harm that existed in the real world, but was not previously actionable. In that instance, courts must respect the express terms of the statute in defining injury. The second category is where a statute sets forth a bare procedural violation completely divorced from any real world harm. In that instance, *Spokeo* and *TransUnion* require that something additional be shown to establish injury.

In *Spokeo*, this Court identified deprivation of the right to information as the one example of the sort of statutory injury for which nothing additional is required. *Havens Realty* therefore arguably survived intact to the extent that it is considered a case about informational injury. However, in 2021, *TransUnion* potentially undermined *Spokeo*'s informational injury example[1] while substituting a different example. In this latter regard, *TransUnion* provided "discriminatory treatment" as the example of a real world harm made actionable by statute. At the same time, it stated that informational injury must result in downstream consequences to be cognizable. Thus, *Havens Realty* still survives undiminished, but arguably for different reasons. Of possible significance is the fact that in noting the need for downstream consequences as a new requirement for informational injury, *TransUnion* cited two Circuit court opinions, both of which considered whether or not imposition of such a requirement ran afoul of *Havens Realty*. Critically, both Circuit courts distinguished *Havens Realty* on the basis that it was a civil rights case and their cases were not. In short, one can thereby interpret *TransUnion* as follows: even if the deprivation of the statutory right to information is, by itself, insufficient, Art. III is satisfied where that deprivation constitutes discriminatory treatment because discrimination is a real world harm. For these reasons, Respondent submits that both *Spokeo* and *TransUnion* implicitly reaffirm *Havens Realty*.

The First Circuit touched upon this in passing, but reached its conclusions on other grounds, discussed

1. As explained below, the Fourth Circuit does not share this interpretation.

infra. The Eleventh and Fourth Circuits, which also ruled in favor of standing, based their conclusions on other grounds. The Circuit courts which ruled against standing addressed *TransUnion*'s express example of "discriminatory treatment" as a real world harm by ignoring it entirely.

Even without the benefit of *TransUnion*'s express reference to "discriminatory treatment", one can readily find that a disabled person's encounter with violations of the ADA are real world harms by reviewing the plain language in the findings and purposes set forth by Congress: such as the inability to fully participate in all aspects of society; isolation; segregation; exclusionary criteria; relegation to lesser services, benefits or other opportunities; inferior status; lack of equality of opportunity and full participation. In addition, opinions from this and other Courts demonstrate that such additional harms as stigmatic and dignitary harm also qualify as Art. III injury. These additional injuries exist independent of any *Havens Realty* analysis.

For the reasons below, Respondent proffers that anti-discrimination laws fall within the category of statutes identified by *Spokeo* and *TransUnion* for which courts must apply the definition of injury in accordance with the express terms of the statute. Moreover, the First Circuit's opinion, Judge Jordan's concurring opinion from the Eleventh, and the Fourth Circuit's recent opinion best address the applicability of *Havens Realty* and informational injury.

ARGUMENT

1. Respondent Agrees That Certiorari Should Be Granted

Respondent agrees that the various Circuits are in conflict in their interpretations of Supreme Court precedent. The first four Circuits to rule on the matter of ORS discrimination held against standing. *Laufer v. Mann Hospitality, L.L.C.*, 996 F.3d 269 (5th Cir. 4/28/21); *Laufer v. Alamac, Inc.*, 21-7056 (D.C. Cir., 9/10/2021)(unpublished opinion); *Laufer v. Looper*, 22 F.4th 871 (10th Cir. 1/5/22); *Harty v. West Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 3/18/22); *Laufer v. Ganesha Hosp., LLC*, 2022 U.S. App. Lexis 18437 (7/5/22)(unpublished). The last three Circuits, by contrast, have ruled in favor of standing on the same issue and criticized their Circuit counterparts. In *Laufer v. Arpan, LLC*, 29 F.4th 1268 (3/29/22)[2], the Eleventh Circuit disagreed with the prior Circuit holdings and ruled that plaintiff does have standing. *Arpan* consisted of multiple additional concurring opinions in which Judge Jordan described a broader basis for standing than that set forth in the main opinion. Before this Court is the First Circuit's decision *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259 (1st Cir. 10/5/22), which also ruled in favor of standing in a manner most similar to the concurring opinion of Judge Jordan. Recently, the Fourth Circuit agreed with *Acheson* and Judge Jordan. *Laufer v. Naranda Hotels, LLC*, 2023 U.S. App. Lexis 3602 (4th Cir. 2/15/23).[3]

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2. The *Arpan* Defendant's petition for rehearing *en banc* is pending.

3. Thus, the District Court *Naranda* decision cited by Respondent and some of the Amici has been reversed.

As described below, there is now a significant conflict among the seven (or six published) Circuits which impacts enforcement of not only the ADA, but civil rights in general. Therefore, resolution by this Court is warranted.

2. Serial Litigant Arguments Are Unwarranted

As a preliminary matter, the Respondent and, to a greater extent, the Amici, cast aspersions at this plaintiff as well as all ADA litigation. In portraying ADA plaintiffs as a nuisance, Respondent and the Amici seek to invoke a general tone of animosity in lieu of any legal argument relevant to Supreme Court precedent or Constitutional law. This argument is advanced in almost every ADA case by indignant defendants seeking to avoid the consequences of their continued discriminatory practices.

They leave out one critical factor: that very few have ever complied with the ADA voluntarily. Rather, nearly everybody waits until they are sued. The Amici consist primarily of large chains who are seeking permanent safe harbor from their long-standing and continuing discrimination. The ADA was enacted thirty-three years ago, yet for decades the large chains fixed their physical properties only on a lawsuit-by-lawsuit basis. Many of the Amici are serial violators. The same is true of actions to enforce ORS violations. The applicable Regulation was enacted in 2010, and the large hotel chains doubtless were made aware of the Regulation's requirements at that time, yet virtually no effort was made by any of them to comply with the law until many years later, when the volume of ORS lawsuits increased.

Although tens of millions of disabled Americans visit places of public accommodation or attempt to book rooms at hotels and all suffer the same discriminatory barriers, the ADA does not provide for any award of damages. It is for this reason that the ADA is enforced by only a small handful of plaintiff advocates. See *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1326 n.2 (11th Cir. 2013) ("It is not unprecedented in this country for advocacy groups and individual members of advocacy groups to find it necessary to file a long trail of lawsuits in federal courts to enforce legal and civil rights."). This Court has previously recognized the necessity that persons like this plaintiff serve as private attorneys general and "[a]ll of these civil rights laws depend heavily upon private enforcement ... to vindicate the important Congressional policies which these laws contain." *See Hensley v. Eckerhart*, 461 U.S. 424, 445-46 (1983). See also *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 418 (1978)(describing civil rights plaintiff as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'"); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972) ("The role of 'private attorneys general' is not uncommon in modern legislative programs.").

Petitioner and the Amici would have this Court ignore the reasoning of *Hensley* so that they can immunize themselves from suits by civil rights advocates seeking to enforce the law. Without civil rights advocates such as this plaintiff, there would be no enforcement of the ADA, and the Amici would be free to continue with their discriminatory practices without consequence. Indeed, the Amici have the power to put an end to ADA enforcement suits by simply complying with the law.

3. The Statute And Regulation

42 U.S.C. Section 12182(a) provides, in relevant part: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation..." By use of the word "or", it is plain that if a disabled person encounters a discriminatory "service", any interpretation that she additionally be deprived of access to a "good" or "facilit[y]" would be clearly erroneous because it would judicially replace the term "or" with "and".

The Regulation at issue herein, set forth at 28 C.F.R. 36.302(e),[4] requires that hotel reservation services made by any means (implicitly including ORS) provide the same options for reserving accessible rooms as other rooms and contain sufficient information regarding whether or not the "accessible" rooms and other features at the hotel are in fact accessible. This Regulation was promulgated pursuant to 42 U.S.C. Section 12182(b)(2)(A) and subpart (ii), which states that "discrimination" includes -

> "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, ..."

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4. See *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.")

The enforcement section, set forth at 42 U.S.C. Section 12188(a)(1), affords the right to sue "to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter...".

Generally, a court must apply the terms of the statute as written. *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1738 (2020). This is particularly true where restrictive language found in other parts of a statute are omitted from the provisions that govern a particular case. *INS v. Cardoza—Fonseca*, 480 U.S. 421, 432 (1987).

It is therefore significant that several other subsections of the same statute contain restrictive requirements absent from the Regulation and the Subsection that govern ORS discrimination. For example, Subsection 12182(b)(1)(A), provides a cause of action for various violations, but only if the plaintiff is a client or customer of the defendant. In *PGA Tour v. Martin*, 532 U.S. 661, 678-79 (2001), this Court applied this rule of statutory construction in holding that because Subsection 12182(b)(1)(A) contained a "clients or customers" requirement[5], but the general provision set forth in Subsection 12182(a) did not contain this restriction, it must be deemed excluded from cases under the general provision. The First, Sixth and Eleventh Circuits applied the same analysis in recognizing ADA

5. The Department of Justice, being granted promulgation authority by 42 U.S.C. Section 12186(b), could easily have implemented its ORS Regulation pursuant to the clients or customers section if it had intended for the Regulation to be enforceable only by disabled persons who intended to book rooms at hotels. Both *Acheson* and *Naranda* note the absence of this requirement. *Naranda*, 2023 U.S. App. Lexis 3602, *23; *Acheson,* 50 F.4th at 269.

tester standing. *Suarez-Torres v. Panaderia Y Reposteria Espana*, Inc., 988 F.3d 542, 550 (1st Cir. 2021); *Mosley v. Kohl's Dep't Stores*, 942 F.3d 752, 758 (6th Cir. 2019); *Houston*, 733 F.3d at 1333.

Even within Subsection 12182(b)(2)(A), two of the four subparts contain restrictive language that require a nexus between the discriminatory condition and the plaintiff's ability to do or access something else. Under Subpart (i), a violative eligibility criteria only qualifies as "discrimination" if it screens out disabled persons "from fully and equally enjoying any goods, services, facilities, ..." Similarly, Subpart (iii) contains the phrase "because of" and, therefore the failure of an entity to provide such items as auxiliary aids and services only qualifies as "discrimination" if it causes exclusion, denial of services, segregation or otherwise different treatment.

Applying, therefore, the above rules of statutory construction, Petitioner engaged in "discrimination" within the meaning of Subsection 12182(b)(2)(A) when its ORS failed to comply with the Regulation, promulgated under Subpart (ii), and Respondent was discriminated against when she encountered the discriminatory ORS. Respondent was also "discriminated against on the basis of disability in the full and equal enjoyment of [Petitioner's] services, facilities, privileges [and/or] advantages..." within the meaning of 12182(a). This Plaintiff was afforded the right to sue because she thereby fell under the category of "any person who is being subjected to discrimination on the basis of disability..." as set forth under 12188(a).

Accordingly, the Statute clearly and unambiguously provided a clear cause of action for Respondent and the

applicable rules of statutory construction prohibit the imposition of any requirement that she be a customer or client of the Petitioner, or that her encounter with the discriminatory ORS somehow impeded her access to any additional goods, services, accommodations, facilities, etc. of the Petitioner's hotel. In short, this Respondent was deprived of full and equal access of the hotel's services, privileges and advantages. The requirement imposed by the Second, Fifth, and Tenth Circuits that this somehow additionally impede her ability to become a client or customer or otherwise access a hotel's facilities and accommodations runs afoul of the above rules of statutory construction.

4. Two Types Of Statutes

In *Spokeo* and *TransUnion,* this Court identified two types of statutes: One in which the express terms of the statute set forth injury and one in which courts must require something additional.

With respect to the first type, *Spokeo*, 578 U.S. at 341, stated that "Congress may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" In *TransUnion*, 141 S.Ct. at 2204-05, this Court stated: "Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation.... In that way, Congress may "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law."[6]

6. In this respect, this Court reiterated long-standing precedent recognizing the right of Congress to enact statutes

TransUnion then stated:

> But even though "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.

141 S.Ct. at 2205. This sentence is subject to two opposing interpretations. One interpretation is that courts are **always** required to additionally find harm regardless of the statute. This seems to be the reasoning of the Second, Fifth and Tenth Circuits when they ruled against standing and to also have been a source of uncertainty for the Eleventh and First Circuits when they ruled in favor of standing. However this interpretation makes no sense, as it treats a harm which exists in the real world as synonymous with something that is also not remotely harmful. Respondent submits that it cannot be both.

Rather, the more logical interpretation is that the first part of the sentence referred to one kind of statute and the second part of the sentence referred to the other kind of statute. In other words, Art. III injury is inherently present where a harm existed in the real world before a statute made it actionable. In that instance, courts must "grant a plaintiff a cause of action to sue over the

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to create injury that would not have been actionable without the statute. See *Havens Realty*, 455 U.S. at 373; *Warth v. Seldin*, 422 U.S. 490, 514 (1975); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). See also *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968) (recognizing standing to sue based on statute).

defendant's violation of that statutory prohibition or obligation."

A. Real World Harm

The next issue is whether or not discrimination is a real world harm. *TransUnion* spoke directly to this point, stating:

> Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. See [*Spokeo, 578 U.S.*] at 340-341, 136 S. Ct. 1540, [1549][]. In that way, Congress may "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law." *Id.*, at 341, []; see *Lujan*, 504 U. S. at 562-563, 578[]; cf., e.g., *Allen v. Wright*, 468 U. S. 737, 757, n. 22 [](1984) **(discriminatory treatment)**.

141 S.Ct. at 2204-05 (emphasis added). It therefore seems clear that *TransUnion* expressly identified discrimination as a real world injury made legally cognizable by statute, and that courts must grant plaintiffs a cause of action to sue over statutory provisions prohibiting it. The First Circuit was the only Circuit to reference this passage. *Acheson*, 50 F.4th at 274. The other Circuits did not address it.[7]

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7. The role of discriminatory treatment within the context of a real world harm was only rendered clear when *TransUnion*

Congress identified the various real world harms inherent to disability discrimination in its Findings and Purposes. 42 U.S.C. Section 12101. These include disabled persons': preclusion from fully participating in all aspects of society; isolation; segregation; relegation to lesser services or opportunities; inferior status; lack of equality of opportunity and full participation; and that this includes areas of communication.[8] The First Circuit took this into account. *Acheson*, 50 F.4th at 264.

B. *Havens Realty*

The conflict between the Circuits begins with their disagreement as to whether or not *Havens Realty* applies. In addition to being about statutory rights, *Havens Realty* can be divided into two types of injury: the injury of discrimination and informational injury. As will be explained, to some extent these two types of harm can be addressed separately, but sometimes they overlap.

In *Havens Realty*, this Court held that a black tester had suffered injury under the FHA and had the right to sue for deprivation of truthful information, even though she did not intend to rent or purchase an apartment. The Court held that:

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identified it in July 2021 - after all the briefs had been submitted to the various Circuit courts. This is perhaps the reason why the only court which noted this point was *Acheson*, and only in passing. Respondent submits, however, that this is the most critical part of the analysis.

8. In this Section, at 42 U.S.C. Section 12101)(a)(4), Congress identified the harm that disabled persons had no legal recourse to redress the discrimination they experience. This is precisely the circumstance Petitioner and the Amici seek to restore.

> "As we have previously recognized, "actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth v. Seldin*, [522 U.S. 490], 500 [(1975)], quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3 (1973). Accord, *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (WHITE, J., concurring). Section 804(d), which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions. **That 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 § 804(d).** See *Pierson v. Ray*, 386 U.S. 547, 558 (1967); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (per curiam).

Havens Realty, 455 U.S. at 373-74 (emphasis added). *Havens Realty* specifically held that Plaintiff Colemen - the tester - had standing because the express language of the statute gave the right to sue to "any person". *Id.*

The ADA was enacted several years later with the same operative language as that which formed the basis of *Havens Realty* opinion. 42 U.S.C. Section 12182(a) states "No individual shall be discriminated against...". Similarly Section 12188(a) gives enforcement rights to "any person who is being subjected to discrimination on the basis of disability in violation of this subchapter". For this reason, six different Circuits held that testers have standing under the ADA. *Houston*, 733 F.3d at 1332-33.; *Civil Rights Educ. & Enforcement Ctr. v. Hosp. Properties Trust*, 867 F.3d 1093, 1101-02 (9th Cir. 2017); *Colo. Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211 (10th Cir. 2014); *Tandy v. City of Wichita*, 380 F.3d 1277, 1286 (10th Cir. 2004)(applying this to Title II); *Suarez-Torres v. Panaderia Y Reposteria Espana*, Inc., 988 F.3d 542 (1st Cir. 2021); *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752 (6th Cir. 2019); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447 (4th Cir. 2017).[9]

With respect to this Respondent's ORS claims, the First Circuit held that *Havens Realty* is "right on the nose for Laufer's case". *Acheson*, 50 F.4th at 269. "[W]e think *Havens Realty* shows the clear path here -- it is so similar to Laufer's case as to render any distinction insufficiently material." *Id.* at 271. The Eleventh Circuit's Judge Jordan reached a similar conclusion. *Arpan*, 29 F.4th at 1276, et seq.. The Fourth Circuit agreed. *Naranda*, 2023 U.S. App. Lexis 3602, *23.

9. Although not an ADA case, the Second Circuit applied similar reasoning in *Ragin v. Harry Maclowe Real Estate* Co., 6 F.3d 898 (2nd Cir. 1993), where black testers had standing to sue over discriminatory advertisements placed in the newspaper even though they were "combing the newspapers" to seek out and eradicate discrimination and had no intention of renting or purchasing a home.

By contrast, the Fifth and Tenth Circuits reasoned that *Havens Realty* does not apply. In *Mann*, the Fifth Circuit held that the information at issue in *Havens Realty* had "some relevance" to the tester. 996 F.3d at 273. However, whereas *Havens Realty*'s Plaintiff Coles needed the information for the purpose of finding a home, Plaintiff Coleman needed the information for no purpose other than encountering discrimination and filing a lawsuit to eradicate it. In other words, *Mann* may have been referencing the wrong *Havens Realty* plaintiff. The First Circuit criticized *Mann* on this point. *Acheson*, 50 F.4th at 272. Judge Jordan similarly criticized *Mann*'s reasoning. *Arpan*, 29 F.4th at 1281 (Jordan J., concurring). The Fourth Circuit joined in this criticism. *Naranda*, 2023 U.S. App. Lexis 3602, * 33.

In *Looper*, the Tenth Circuit also held that *Havens Realty* did not apply to the ADA on the basis that the *Havens Realty* plaintiff was not "just denied information," but rather "was given false information because of her race." 22 F.4th at 879. Thus, *Looper* concluded *Havens Realty* was grounded on misrepresentation and racial animus. *Id*. *Looper* did not explain how this conclusion directly contradicted its own prior opinion in *Tandy*. In *Tandy*, the Tenth Circuit previously held that because the operative language of the ADA was similar to the "any person" language at issue in *Havens Realty*, that it applied to Title II. *Tandy*, 380 F.3d at 1285-87. *Tandy* did not involve either misrepresentation or race based animus, but was strictly about the rights of disabled testers under Title II of the ADA. *Tandy* also cited *Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1103-04 (9th Cir. 2004), which involved discrimination against disabled persons rather than race. In *Looper*, the Tenth Circuit addressed this discrepancy by ignoring it entirely.

There is nothing in the *Havens Realty* opinion which supports *Looper*'s interpretation that it was premised on either misrepresentation or racial animus. Rather, *Havens Realty* specifically stated that Coleman "has suffered injury in precisely the form the statute was intended to guard against". 455 U.S. at 373-74. In *Acheson*, the First Circuit called *Looper*'s reasoning "a distinction without a difference." 50 F.4th at 273. Similarly, Judge Jordan criticized *Looper*, stating: "Once again, I see no difference, as a matter of establishing a cognizable injury, between being provided the wrong information in violation of federal law and being denied the information altogether in violation of federal law." *Arpan*, 29 F.4th at 1282 (Jordan, J., Concurring). The Fourth Circuit similarly criticized *Looper*. *Naranda*, 2023 U.S. App. Lexis 3602, * 33-34. Moreover, in *Spokeo*, 578 U.S. at 331, this Court cited *Federal Election Comm'n v. Akins*, 524 U. S. 11, 20-25, [] (1998), regarding the right to information. In turn, *Akins* had cited *Havens Realty* as standing for this right. *Id*. at 21 ("See also *Havens Realty[* , 455 U.S. 363, 373-374[]][10](deprivation of information about housing availability constitutes "specific injury" permitting standing)".[11]

Both the ADA and FHA prohibit discrimination. 42 U.S.C. Section 3604(d), at issue in *Havens Realty,* covered

10. Notably, *Akins* here pinpoint cites the pages in *Havens Realty* which discuss Plaintiff Coleman, who had no intention of making use of the information at issue.

11. In *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022), this Court recently cited *Havens Realty* and *Evers v. Dwyer*, 358 U.S. 202, 204 (1958), for the proposition that an injury is cognizable even if willingly incurred.

"race, color, religion, sex or national origin". See *Havens Realty*, 455 U.S. at 373. That Section was amended in 1988 to add "handicap" and "familial status. 1988-Pub. L. 100-430, Section 6(b)(1). There is nothing in *Havens Realty's* opinion which indicates this Court would have reached the opposite holding if the plaintiffs' claims had instead suffered discrimination on the basis of religion, sex or national origin. Indeed, there is nothing in the FHA which implies that separate standards are to be applied in accordance with the protected group enumerated. The *Acheson* Court, 50 F.4th at p. 28, fn. 6, reinforced its reasoning that *Havens Realty* applies on the basis that, on several occasions, this Court compared the ADA to the FHA or Title VII for guidance, citing *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998), *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Servs.*, 532 U.S. 598, 610 (2001), and *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 357 (2013).

Looper also reasoned that *Havens Realty* is distinguishable on the basis that Coleman was the direct recipient of misrepresentation, whereas Laufer had access to the same information as the general public. 22 F.4th at 879. Again, this logic is flawed. On this point, the First Circuit held that Laufer's injury was sufficiently particularized, "under any reading of *Havens Realty* or *TransUnion*" because she " was not given information she personally had a right to under the ADA and its regulations, causing her precisely the type of harm Congress and the regulation sought to curb -- the unequal ability to know what accommodations a person with disabilities can take advantage of." 50 F.4th at 275. *Naranda*, 2023 U.S. App. Lexis 3602, * *19-20, also rejected *Looper*'s logic on this point. This and other courts have recognized a plaintiff's

statutory right to information subject to **public** disclosure. See *Akins*, 524 U.S. at 21 ("Indeed, this Court has previously held that a plaintiff suffers an "injury in fact" when the plaintiff fails to obtain information which must be publically disclosed pursuant to a statute....."); *Public Citizen v. Department of Justice*, 491 U. S. 440, 449, [] (1989) (holding that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue" even though others could make the same complaint); *TransUnion*, 141 S.Ct. At 2214 (discussing plaintiff's rights over denial of information subject to public disclosure); *Co. Doe v. Pub. Citizen,* 749 F.3d 246, 263-64, (4th Cir. 2014)(plaintiff has right to information that must be disclosed pursuant to a statute notwithstanding the fact that other citizens may share the same complaint).

In sum, *Looper*'s rationale that Laufer does not have standing to sue over the content of a publicly available website is flawed because, as a disabled person, Laufer was entitled to accessibility information which the ORS was required, but failed, to provide.

In *Harty*, the Second Circuit (which held that a tester plaintiff has no standing to sue for ORS discrimination) referenced *Havens Realty* only in passing, with no indication as to whether or not it applied. 28 F.4th at 444, n.3. This was criticized by Judge Jordan for having failed to adequately address *Havens Realty. Arpan*, 29 F.4th at 1282 (Jordan, J. Concurring)("How is Ms. Coleman, a self-proclaimed tester seeking to ensure compliance with the FHA, any different than the plaintiff in Harty, or for our purposes, Ms. Laufer?"). In *Ganesha*, 2022 U.S. App.

Lexis 18437, at *6, the Second Circuit followed *Harty* in its unpublished opinion, citing *Havens Realty* but then reasoning that *TransUnion* had imposed downstream consequences over it. The *Acheson* Court criticized both, stating "our judicial neighbors did not explain why the ADA tester plaintiff didn't suffer an injury but the Black tester plaintiff in *Havens Realty* did, even though her only "interest in using the information" was testing compliance and bringing her lawsuit -- just as with an ADA-Reservation-Rule tester." *Acheson*, 50 F.4th at 272-73. The *Naranda* Court also disagreed with *Harty* that *TransUnion* had impacted the validity of *Havens Realty*. *Naranda*, 2023 U.S. App. Lexis 3602, * 27-32.

C. Informational Injury

Acheson, *Naranda* and *Arpan*'s Judge Jordan agreed that the plaintiff had suffered informational injury.

In *Spokeo*, 578 U.S. at 331, this Court cited deprivation of information as the example of a "violation of a procedural right" for which a plaintiff need not allege any additional harm beyond the one identified by Congress. On this point, this Court cited *Akins* which had, in turn, cited *Havens Realty*. In *Pub. Citizen*, 491 U.S. at 449, a case similar to *Akins*, this Court stated: "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." See also *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171-72 (2004)(citizens seeking disclosure under FOIA should not be required to explain why they need the information); *Acheson*, 50 F.4th at 270 (citing *Pub. Citizen* on this point); *Naranda*, 2023 U.S. App. Lexis 3602, **17-21; *Maloney v. Murphy*, 984 F.3d

50, 60 (D.C. Cir. 2020)(what plaintiff plans to do with the information he seeks is irrelevant to his standing).

The Circuit Courts which ruled against standing premise much of their opinions on language from *TransUnion*, in which this Court stated:

> For its part, the United States as amicus curiae, but not the plaintiffs, separately asserts that the plaintiffs suffered a concrete "informational injury" under several of this Court's precedents. [Citations to *Akins* and *Pub. Citizen* omitted.] We disagree. The plaintiffs did not allege that they failed to receive any required information. They argued only that they received it in the wrong format. Therefore, *Akins* and *Public Citizen* do not control here. In addition, those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information. This case does not involve such a public-disclosure law. See *Casillas v. Madison Avenue Assocs., Inc.*, 926 F. 3d 329, 338 (CA7 2019); *Trichell v. Midland Credit Mgmt., Inc.*, 964 F. 3d 990, 1004 (CA11 2020). Moreover, the plaintiffs have identified no "downstream consequences" from failing to receive the required information. *Trichell*, 964 F. 3d, at 1004. They did not demonstrate, for example, that the alleged information deficit hindered their ability to correct erroneous information before it was later sent to third parties. An "asserted informational injury that causes no adverse effects cannot satisfy Article III."

TransUnion, 141 S.Ct. at 2214.

This passage has been the subject of multiple approaches. In ruling against standing, the Fifth and Tenth Circuits opined that *Havens Realty* does not apply and that *TransUnion*'s downstream consequences requirement does. The Second Circuit apparently interprets *TransUnion* as having narrowed *Havens Realty*. In ruling in favor of standing, Judge Jordan, the First and Fourth Circuits opined that they were bound to apply *Havens Realty* because the Supreme Court has yet to overturn it.

On this latter point, *Acheson*, *Naranda* and *Arpan*'s Judge Jordan all expressed that they were bound to follow *Havens Realty* whether or not it had been undermined by potentially contrary language in *TransUnion*. *Acheson*, 50 F. 4th at 271; *Naranda*, 2023 U.S. App. 3602, *32; *Arpan*, 29 F.4th at 1275-76 (Jordan. J., Concurring). See also *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").[12]

Naranda goes further and sees no conflict between *TransUnion* and *Havens Realty*. *Naranda*, 2023 U.S. App. Lexis 3602, *32 ("we are satisfied that *TransUnion* most assuredly did not overrule *Havens Realty Realty*,

12. The question of whether or not *Havens Realty* should be overturned will be addressed further below.

Public Citizen and *Akins*."). According to *Naranda*, *TransUnion*'s reference to "downstream consequences" pertained to improperly formatted information rather than the deprivation of information altogether. Otherwise, *TransUnion* would have had to expressly overturn not only *Havens Realty*, but also *Spokeo*, *Akins, Public Citizen* and *Favish* on this point.

In addition to its informational injury aspects, the discriminatory aspects of *Havens Realty* also must be considered with respect to whether *TransUnion*'s downstream consequences requirement can be imposed. In this latter regard, *TransUnion* cited two cases on the point of downstream consequences: *Casillas* and *Trichell*. *Casillas* and *Trichell* both involved harmless informational violations of the Fair Debt Collection Practices Act ("FDCPA") and both considered whether they could impose "downstream consequences" requirements or whether *Havens Realty* prevented them from doing so. Both courts held that *Havens Realty* did **not** apply because it was an anti-discrimination case. *Trichell*, 964 F.3d at 1005; *Casillas*, 926 F.3d at 338. Another critical distinction is that both *Trichell* and *Casillas* considered it important that their statutes at issue required actual damages and that the plaintiff in neither case was seeking to compel the disclosure of any information. *Trichell*, 964 F.3d at 1004; *Casillas*, 926 F.3d at 338.

Thus, reading the *Trichell* and *Casillas* opinions into *TransUnion* supports the conclusion that *Havens Realty*'s omission of downstream consequences for informational injury remains valid in the context of civil

rights.[13] Similarly, *TransUnion*'s earlier express reference to "discriminatory treatment" as being a real world harm strongly implies that *TransUnion* did not mean to disturb *Havens Realty* or other civil rights cases. Neither *Spokeo*, *TransUnion*, *Casillas* nor *Trichell* involved anti-discrimination statutes and this Court did not expressly overturn *Havens Realty*. Indeed, as noted above, this Court has (post-*TransUnion*) cited *Havens Realty* without any indicia that it had been diminished. See *Cruz*, 142 S. Ct. at 1647.

In sum, regardless of whether caselaw pertaining to the "procedural"[14] violation of being deprived of the right to information has been modified by *TransUnion*, the deprivation of information in violation of an anti-discrimination statute is already a concrete real world harm and, therefore, no additional finding of downstream consequences should be necessary.

D. Stigmatic Injury, Dignitary Harm, Unequal Treatment And Other Downstream Consequences

The *Acheson* decision, as well as *Arpan*'s main decision, both addressed whether plaintiff's ORS discrimination rights survive **even if**[15] *TransUnion* now

13. It also may be properly interpreted as inapplicable to cases where, as here, the plaintiff seeks to compel disclosure of the information.

14. *Spokeo* refers to the deprivation of the statutory right to information as "procedural". This does not necessarily have the same meaning as a harm that exists in the real world.

15. By way of summary, *Harty*, *Mann* and *Looper* all concluded that *TransUnion* imposed this requirement and

imposes a downstream consequences requirement. In this respect, both courts concluded that such rights do survive on the basis that a plaintiff who encounters discrimination also suffers stigmatic injury, or dignitary harm.

Acheson noted that plaintiff's claims can include other harms. *Acheson*, 50 F.4th at 274, citing *Heckler v. Matthews*, 465 U.S. 728, 738-40 (1984) and *Allen v. Wright*, 368 U.S. 737, 755 (1984) (individuals personally denied equal treatment under the law can have standing). *Acheson*, 50 F.4th at 274, held:

> Laufer alleges she suffered "frustration and humiliation" when Acheson's reservation portals didn't give her adequate information about whether she could take advantage of the accommodations. Without that information, Laufer is put on unequal footing to experience the world in the same way as those who do not have disabilities. She alleges that the "discriminatory conditions" on Acheson's

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therefore held against standing. *Arpan*'s main decision authored by Judge Newsom concluded that *TransUnion* imposed this requirement, but that it was satisfied by stigmatic injury. *Arpan*'s Judge Jordan agreed that stigmatic injury satisfied any additional injury requirement imposed by *TransUnion*, but disagreed that *TransUnion*'s downstream consequences requirement should be applied in the first place because the plaintiff had suffered informational injury. *Acheson*'s opinion is similar to Judge Jordan's. *Naranda* reasoned that *TransUnion*'s downstream consequences requirement is simply inapplicable here. *Naranda*, 2023 U.S. App. Lexis 3602, *14, premised its opinion on the holding that the Plaintiff had suffered informational injury and therefore found it unnecessary to address the issue of stigmatic injury.

website contribute to her "sense of segregation[16] and isolation" and deprive her of "full and equal enjoyment of the goods, services, facilities, and/or accommodations available to the general public." Avoiding that was part of the point of the ADA -- the Act "is a measure expected to advance equal-citizenship stature for persons with disabilities" by aiming to "guarantee a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities."[17] [*Tennessee*

16. In *Trafficante*, 409 U.S. at 208, et. seq., this Court held that the Civil Rights Act's "persons aggrieved" language was to be interpreted broadly, thereby including white plaintiffs who had been deprived of the benefits of living in a racially integrated community. Several courts have also recognized segregation as a cognizable injury under the ADA. *Helen v. DiDario*, 46 F.3d 325, 333 (3rd Cir. 1995)(applying to public entity); *Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 858 (2003)(noting that Congress specifically identified segregation as a form of prohibited discrimination); *Mark H. v. Lemahieu*, 513 F.3d 922, 937 (9th Cir. 2008)(recognizing that the ADA prohibits segregation of disabled students in schools); *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1181 (10th Cir. 2003)(segregation of disabled individuals in institutions is prohibited by ADA). In the case at bar, the actions of Respondent and other hotels operating discriminatory online reservations services force Petitioner and other disabled persons to live in a community in which hotels use the internet to exclude disabled persons from the general public.

17. Some courts recognized that a disabled person's loss of the equality of opportunity is harmful. *Betancourt v. Ingram Park Mall, L.P.*, 735 F.Supp.2d 587, 602 (W.D. Tex. 2010); *King v. Our Lady of the Lake Hosp., Inc.*, 455 F. Supp. 3d 249, 257 (M.D. La. 2020); *Parada v. Sandhill Shores Prop. Owners Ass'n*, 2022 U.S. Dist. LEXIS 94566, *11 (S.D. Tx. 2022).

> *v.*] *Lane*, 541 U.S. [509] at 536 (Ginsburg, J., concurring) (cleaned up).

Acheson found that these satisfied any "downstream consequences" and "adverse effects" that *TransUnion* might require. *Acheson* concluded that:

> Laufer's feelings of frustration, humiliation, and second-class citizenry are indeed "downstream consequences" and "adverse effects" of the informational injury she experienced. See *TransUnion*, 141 S. Ct. at 2214. So even if post-*TransUnion* a plaintiff in the same shoes as the Black tester plaintiff in *Havens Realty* must show some "additional harm" from the denial of information to demonstrate a concrete injury, Laufer still meets that newly set bar.

Acheson, 50 F.4th at 275.

One such harm - stigmatic injury - traces its origin to such cases as *Allen*, 468 U.S. at 757 n.22, and *Heckler*, 465 U.S. at 739-40. In *Heckler*, this Court opined:

> [A]s we have repeatedly emphasized, discrimination 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, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 725 (1982), can cause serious noneconomic injuries to those persons who

> are personally denied equal treatment solely because of their membership in a disfavored group. Accordingly, as Justice Brandeis explained, when the "right invoked is that to equal treatment," the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

Hecker, 465 U.S. at 739.[18]

The main decision in *Arpan*, set forth at 29 F.4th at 1270-75, is in accord with *Acheson*'s holding that stigmatic injury survives *TransUnion*.

It is noteworthy that in *Looper*, the Tenth Circuit expressly declined to consider the issue of stigmatic injury. 22 F.4th at 883, fn.9. Similarly, the Second Circuit in *Harty* declined to consider "unequal treatment". *Harty*, 28 F.4th at 444. In *Ganesha*, 2022 U.S. App. Lexis 18437 at ** 6-7, the Second Circuit subsequently implied that the issue of stigmatic injury (ignoring the fact that it had declined to consider unequal treatment) had in fact been addressed in *Harty*, but held that such allegations as frustration and humiliation were too general, citing *Maddox v. Bank of N.Y. Mellon Trust Co., N.A.*, 19 F.4th 58, 65-66 (2d Cir. 2021). *Maddox* was not a discrimination

18. Similarly, in *Trafficante*, 409 U.S. at 207, this Court recognized that the white plaintiffs had suffered injury in part because they had been "stigmatized" as being residents of a white ghetto.

case and its standards regarding emotional harm are therefore inapplicable. Respondent submits that *Looper* and *Harty* could have resulted in opposite rulings if they had considered stigmatic injury or unequal treatment.

E. Locus Of Injury

The Amici argue that they are exposed to unrestricted nationwide enforcement (ignoring the fact that they would immunize themselves if they simply complied with the law). The origin of this argument can be found in *Allen*, in which this Court raised the example wherein " A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." 468 U.S. at 756. Whereas, however, the *Allen* example is simply that of a "concerned bystander", this Respondent is not. The person referenced in *Allen* could only personally encounter discrimination if he/she traveled to Maine where the target school is located. By contrast, hotels use online reservations services to reach out and market to citizens all over the nation and to transact business with them in their own homes. In *Allen*, the locus of any injury would be in distant Maine. By contrast, a disabled person who encounters a hotel's discriminatory online service does so in the comfort of their own home. In the instance of ORS discrimination, some courts have held that venue is proper in the state where the plaintiff resides. See, e.g. *Brooke v. Hotel Inv. Grp., Inc.*, 2017 U.S. Dist. Lexis 150171 (D. Ariz. 2017)(holding that venue is proper in the state where the plaintiff resides and encountered discriminatory ORS by out-of-state hotel). In *Camacho v. Vanderbilt University,* 2019 U.S. Dist. Lexis 209202 (S.D.N.Y. 2019), one district court held that an out-of-state university was subject to New York's Long Arm Statute

because it had used its website to market to and interact with state residents.

In the case at bar, as with all discriminatory online reservations systems, this Petitioner marketed nationwide, including Florida, where Respondent was located. It provided informational and interactive (booking) services to all non-disabled persons in Respondent's geographic area, but excluded Respondent and other disabled persons, thus subjecting her to less than full and equal enjoyment of its services, depriving her of equal opportunities and imposing a form of segregation upon her.

F. *Griffin, Brintley* and *Carello*

The Petitioner, Amici and Circuit Courts ruling against standing all cite *Griffin v. Department of Labor Federal Credit Union*, 912 F.3d 649 (4th Cir. 2019); *Brintley v. Aeroquip Credit Union*, 936 F.3d 489 (6th Cir. 2019); and *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830 (7th Cir. 2019). All three involved lawsuits against closed credit unions by non-member plaintiffs for failure to be compatible with screen reader software. In relying heavily on these cases as a basis for ruling against standing, the Circuit Courts (as well as the Petitioner and Amici) universally overlooked the express disclaimers therein. *Griffin* specifically stated that its holding was strictly limited to instances where the plaintiff was **legally barred** from availing himself of the defendant's services and explained that it was not considering "the rights generally of people with disabilities to sue for Internet-based harms under the ADA..." 912 F.3d at 652, 653 (emphasis added). Both *Brintley*, 936 F.3d at 492, and *Carello*, 930 F.3d at 833, indicated that they narrowly followed *Griffin* on this point.

Critically, Judge King - who wrote the Fourth Circuit's opinion in *Naranda* - was one of the three member panel on *Griffin*. In writing *Naranda*, Judge King expressly rejected *Griffin*'s applicability to ORS discrimination. See *Naranda*, 2023 U.S. App. Lexis 3602, ** 36-40. Therefore, reliance on *Griffin* by the Petitioner, the Amici, and the Circuit courts which cited it as a basis for ruling against standing is unfounded.

G. *Havens Realty* Should Not Be Overturned

Acheson, *Naranda* and *Arpan*'s Judge Jordan reasoned that they were bound to apply *Havens Realty* because this Court never expressly overturned it. The present question is whether this Court should do so now.

A holding which preserves *Havens Realty* would be entirely consistent with Supreme Court precedent, including *Spokeo* and *TransUnion*. The rationale would be relatively straight-forward. Discrimination is a harm which existed and continues to exist in the real world and it is only made actionable by anti-discrimination statutes, such as the Civil Rights Act, Fair Housing Act, Americans With Disabilities Act, etc.. A person who suffers discrimination within the meaning of those statutes has likewise incurred Art. III injury. Therefore, under *Spokeo* and *TransUnion*, courts must respect and apply the definition of injuries as they are set forth in those statutes. In this manner, *Havens Realty*, *Spokeo* and *TransUnion* are in harmony.

Conversely, a ruling which overturns *Havens Realty* would have profound impact. First, it would require a holding that discrimination is not a harm that exists in the real world - past or present.

This would mean that *Havens Realty*'s plaintiff Coleman suffered no injury, despite the fact that she was discriminated against because of her race. She would only be allowed to proceed if she demonstrated some kind of additional consequence.

This would overturn the six circuits which ruled that testers have standing under the ADA and also render ADA enforcement virtually impossible. Henceforward, it would not be enough that a disabled person visit a place of public accommodation and personally encounter such discriminatory barriers as inaccessible restrooms. Such would only qualify as injury if, for example, they needed to use the restroom and were prevented from doing so. Moreover, district courts would have *carte blanche* to deny injunctive relief on the rationale that the disabled person could never concretely predict that they would need to use that same restroom when they revisit on a specified date in the future.

In addition, this would overturn civil rights cases dating as far back as *Evers v. Dwyer*, 358 U.S. 202 (1958). It would not be enough that the *Evers* plaintiff suffered discrimination. He would have to show some other sort of harm: for example, that being made to sit in the black section of the bus forced him to walk further to disembark. He certainly could not claim that he was prevented from reaching his destination, because the only reason he rode that bus was to encounter discrimination and fight injustice.

If discrimination is no longer a real world harm, the list of civil rights decisions over the decades that would be narrowed or overturned would be significant. The Fifth Circuit's decision in *Mann*, Tenth Circuit's decision

in *Looper*, and Second Circuit's decisions in *Harty* and *Ganesha* have interpreted the law to precisely this end.

The Amici and Petitioner argue that the First Circuit's decision in *Acheson* threatens to dangerously expand the standing doctrine. To the contrary: the First Circuit's decision (as well as *Arpan* and *Naranda*) is the most consistent with existing precedent and affirming it is the clearest path to preserving (but clarifying) existing precedent. By contrast, it is the position of the Respondent, the Amici and the Circuits on which they rely that threatens the validity of decades of anti-discrimination decisions.

CONCLUSION

For the reasons stated above, Respondent agrees that a ruling by this Court is necessary to clarify a fundamental conflict among the Circuits, but that the First Circuit's opinion should ultimately be affirmed.

Respectfully submitted,

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