No. 22-429

In the Supreme Court of the United States

ACHESON HOTELS LLC, PETITIONER,

v.

DEBORAH LAUFER, RESPONDENT.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN RESORT DEVELOPMENT ASSOCIATION, AMERICAN BANKERS ASSOCIATION, AND ICSC AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

JUSTIN VERMUTH
ROBERT CLEMENTS
AMERICAN RESORT DEVELOPMENT ASSOCIATION
1201 15th Street NW
Washington, DC 20005

MARK A. PERRY
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
mark.perry@weil.com

BRIAN G. LIEGEL
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Avenue
Miami, FL 33131

Additional Counsel Listed on Inside Cover

THOMAS PINDER
ANDREW DOERSAM
AMERICAN BANKERS ASSOCIATION
1333 New Hampshire Ave. NW
Washington, DC 20036

BETSY LAIRD
LESLEY CAMPBELL
ICSC
1251 Ave of the Americas,
45th Floor
New York, NY 10020

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici*, their members, or counsel made a monetary contribution to its preparation or submission.

every size, in every industry sector, and from every region of the country.

One of the Chamber's important functions is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community, including at the certiorari and merits stage of *Spokeo, Inc v. Robins*, 578 U.S. 330 (2016), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021).

The American Resort Development Association ("ARDA") is the non-profit trade association representing the interests of the time-share and vacation ownership industries. ARDA's membership is comprised of over 500 companies, which house more than 5,000 individual ARDA members, and represents 95% of the timeshare industry. ARDA regularly advocates on behalf of the interest of its members and the industry as a whole.

The American Bankers Association is the voice of the nation's $23.6 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $19.2 trillion in deposits and extend nearly $12.2 trillion in loans. The American Bankers Association regularly advocates on behalf of its members on important policy issues and through amicus curiae briefs on issues of importance to the industry.

ICSC is the global trade association of the shopping center and retail real estate industry. Founded in 1957, the association represents developers and operators of retail properties across the globe, as well as the tenants who occupy them, ranging from shopping center owners,

developers, managers, marketing specialists, investors, retailers and brokers, as well as academics and public officials. Comprised of nearly 50,000 members, ICSC's mission is to advance the industry by promoting and elevating the marketplaces and spaces where people shop, dine, work, play and gather as foundational and vital ingredients of communities and economies. In furtherance of this mission, ICSC represents its members through advocacy on important public policy issues and through filing amicus curiae briefs in pending appeals on issues of importance to the retail real estate industry.

This case presents a question of Article III standing that extends far beyond the specific circumstances of this case, the resolution of which is important to the Nation's entire business community. Respondent is a self-avowed "tester"—a private individual who has taken it upon herself to file hundreds of lawsuits under Title III of the Americans with Disabilities Act ("ADA"), including (as here) against businesses that she has never visited or has any intention of visiting. As a direct result of such artificial lawsuits, businesses nationwide face litigation under the ADA brought by persons who suffered no injury whatsoever. Such abusive litigation tactics subvert rather than advance the purposes of the ADA, and put the federal courts in the impossible position of adjudicating non-existent controversies. *Amici*, as representatives of the American business community, have an interest in ensuring that Article III's actual-injury requirement is followed so that lawsuits are brought only by persons with a genuine stake in the outcome. This is not such a case.

INTRODUCTION

Article III requires that a plaintiff suffer personal, concrete injury before filing a lawsuit. Without this personal-injury requirement, "standing would extend nationwide" to all members of a particular group on the basis of an "abstract stigmatic injury" regardless of the location of an individual plaintiff. *Allen v. Wright*, 468 U.S. 737, 755-56 (1984).

Respondent and other "tester" plaintiffs—or, more precisely, their counsel—routinely file lawsuits that transgress the bounds of Article III. Despite never visiting (or even intending to visit) businesses, testers like Respondent have filed thousands of cases against companies nationwide based on alleged failures to provide information about accessibility accommodations on their websites. This latest wave in abusive litigation alleging violations of the Americans with Disabilities Act ("ADA") is part of a much broader phenomenon affecting millions of businesses nationwide that face the prospect of similar lawsuits, which have exploded exponentially due to the actions of serial tester plaintiffs.

These fabricated lawsuits denigrate the laudable goals of the ADA, which was enacted in 1990 to create clear standards to eliminate discrimination against individuals with disabilities. 42 U.S.C. § 12101(b)(2). *Amici* and businesses nationwide support this anti-discrimination principle and their members have adopted robust accessibility programs. But this case and others brought by testers are not about accessibility and are not filed by individuals who have personally experienced disability discrimination. They are instead driven by the economics of attorneys' fees. Small businesses are disproportionately harmed by these litigation tactics, and often settle lawsuits of even questionable merit to

avoid litigation expenses, negative publicity, and a judgment that could throw them into bankruptcy.

To generate enough volume to make it worth their lawyers' while, serial tester plaintiffs file multiplicitous lawsuits against businesses with which they never interact. As this case illustrates, this tactic disregards Article III's personal-injury requirement as testers try to rely instead on abstract assertions of stigmatic or informational injury. This Court's long-standing precedent, however, precludes claims by "offended observers" who claim to have been affected by conduct that does not cause them personal, concrete injury. This case provides the Court with another opportunity to confirm that Article III does not permit the federal courts to adjudicate claims by those who do not suffer the requisite harm before filing suit.

ARGUMENT

I. Serial Tester Plaintiffs Have Generated a Surge in ADA Litigation

1. The ADA was passed in 1990 to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). Title III of the ADA accordingly requires that "[n]o 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." *Id.* § 12182(a). The scope of "places of public accommodations" covered by Title III is intentionally broad, covering facilities "operated by a private entity whose operations affect commerce," and fall within one of twelve enumerated categories. 28 C.F.R. § 36.104. This expansive definition covers "[v]irtually

every privately operated business or facility open to the public," including hotels, restaurants, stores, banks, salons, gas stations, and entertainment venues. Bradford W. Coupe, et al., *The Department of Justice's Final Regulations Implementing Title III of the Americans with Disabilities Act*, 71 Ed. Law Rep. 353 (1992).

Title III defines acts that constitute unlawful discrimination by these places of public accommodation. General prohibitions include denying disabled patrons the opportunity to participate, or providing access to only unequal or separate benefits. 42 U.S.C. § 12182(b)(1). Title III also lists several categories of acts and omissions which constitute discrimination against disabled patrons. These include (1) failing to make "reasonable modification[s]" to policies, practices, or procedures necessary to provide access to businesses and (2) failing to take "steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services." *Id.* § 12182(b)(2).

Congress authorized two avenues to enforce Title III's requirements. First, the Attorney General is empowered to investigate alleged violations and obtain injunctions and civil penalties against violators. 42 U.S.C. § 12188(b). Second, Congress created a private right of action, entitling prevailing plaintiffs to injunctive relief as well as attorneys' fees and costs. *Id.* § 12188(a)-(b); 42 U.S.C. § 12205.

2. The number of private federal lawsuits filed under Title III of the ADA has exploded in recent years. According to Lexis's LexMachina database, in 2013, there

were 3,535 ADA lawsuits filed.[2] By 2016, that number doubled to 7,519. That amount increased to 8,699 in 2017 and, from 2018 through 2022, there were continuously more than 11,000 ADA lawsuits filed each year. 2021 saw a staggering 12,298 filings—a 349% increase over just nine years earlier. While the new ADA case filings reduced slightly in 2022 to 9,529, new cases in 2023 are yet again set to surpass the 10,000 mark.

Even more notable than the number of suits is the data on *who* is responsible for filing them. Over the past ten years, more than 80% of all ADA cases have been brought on behalf of "high volume plaintiffs"—those who file at least eight cases in a year. That percentage share has increased over recent years, with high volume plaintiffs accounting for more than 85% of ADA lawsuits filed in 2022. These serial filers account for the skyrocketing number of ADA filings. In 2013, serial filers accounted for just 2,367 new cases. That number jumped to 9,785 in 2018 and exceeded 10,000 cases in each of 2019, 2020 and 2021—more than a 400% increase over the number of filings in 2013. By contrast, the number of ADA cases filed by non-serial plaintiffs has stayed consistent, ranging between 1,168 and 1,736 cases over the same period.

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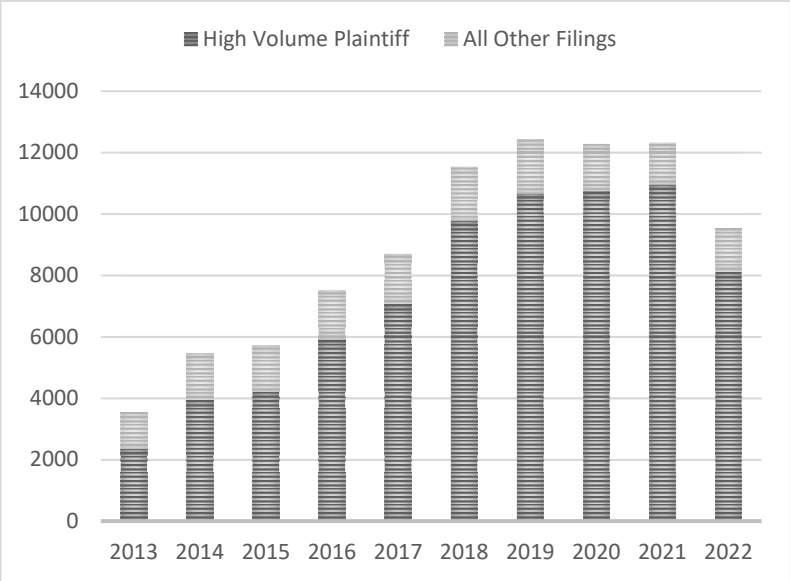
[2] LexMachina is available at law.lexmachina.com. LexMachina contains all civil federal district court cases in PACER, except Prisoner Petitions and Social Security cases, pending since 2009. Data in this section represents cases filed that were classified as "Civil Rights: ADA". LexMachina excludes employment-related claims under Title I of the ADA from this dataset.

Chart 1: Frequent Filers in ADA Cases 2013-2022[3]



3. Serial tester plaintiffs are even more prevalent in cases alleging violations of the Reservation Rule at issue here. Since 2011, owners of "hotels and guest rooms" have been required by federal regulation to provide "enough detail to reasonably permit" disabled individuals to "assess independently whether a given hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(1)(ii); *see also* 75 F. Reg. 56236-01, at 56275 (Sept. 15, 2010). Yet in the first six years of the Reservation Rule's existence, only 10 complaints alleging a violation of the Rule were filed in federal court.[4]

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[3] LexMachina, *supra* n.2.

[4] Based on a search using Lexis' LexMachina database for federal district court complaints citing 28 C.F.R. § 36.302(e)(1)(ii) and containing the Reservation Rule's language "enough detail to reasonably permit", filed between January 1, 2011 and December 31, 2022.

As with other ADA cases, litigation exploded to 164 Reservation Rule cases in 2017, 664 in 2018, 934 in 2019, and topping out at 1,043 cases in 2020.[5] Again, tester plaintiffs are the cause of this explosion. Of the 3,657 Reservation Rule cases ever filed (through May 31, 2023), 3,569 have been filed by serial plaintiffs.[6] That leaves just 88 cases for which serial filers are not responsible. In some years, these frequent-filers accounted for nearly all of the new cases. For example, in 2017, 161 of the 164 Reservation Rule cases were filed by serial plaintiffs.[7] In the first five months of this year, only *one* case was filed by a non-serial filer.[8]

Specifically, the totals were: 2011 (0 cases), 2012 (0 cases), 2013 (2 cases); 2014 (2 cases); 2015 (2 cases); 2016 (4 cases). *See* https://law.lexmachina.com/cases.

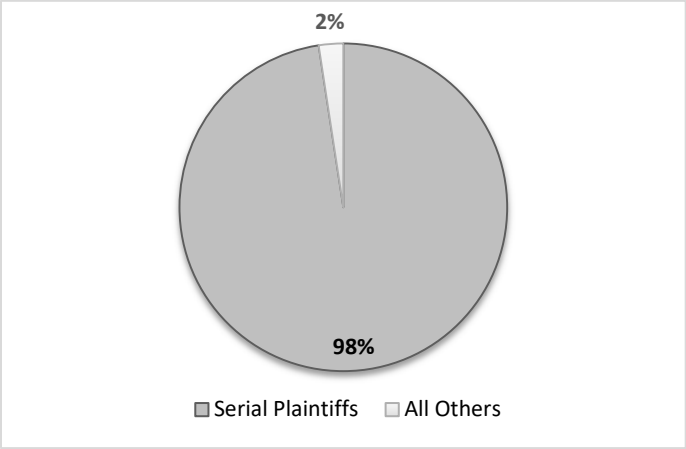
[5] This number likely undercounts the actual number of cases alleging violations of the Reservation Rule as it is limited to those specifically alleging the failure to provide "enough detail" to assess accessibility. Courts have recognized that many tester plaintiffs file boilerplate "form complaints" which may not make the specific bases of each alleged ADA violation clear. *E.g.*, *Peters v. Winco Foods, Inc.*, 320 F. Supp. 2d 1035, 1040-41 (E.D. Cal. 2004).

[6] LexMachina, *supra* n.4. Based on a search using Lexis' LexMachina database for federal district court complaints citing 28 C.F.R. § 36.302(e)(1)(ii) and containing the Reservation Rule's language "enough detail to reasonably permit", filed between January 1, 2011 and May 31, 2023. Cases filed by high volume plaintiffs were identified using LexMachina's "ADA High Volume Plaintiff" case tag.

[7] LexMachina, *supra* n.6.

[8] *Id.*

Chart 2: Tester Plaintiff Reservation Rule Cases[9]



Even more astounding is the few individuals responsible for the vast majority of Reservation Rule litigation. Respondent (with 578 cases) leads the pack of tester plaintiffs, but eight others have each filed more than 100 such cases.[10] Together, these nine frequent-filers account for 2,467 of the filed cases—an astounding 67%. Eighteen others have filed 20 or more cases, for a total of 806. As such, these 27 individuals accounted for nearly 90% of all Reservation Rule cases nationwide.

II. Attorney-Driven Tester Cases Harm Small Businesses

1. Far from contesting the phenomenon that the statistics illustrate, Respondent appears to embrace it. In her view, ADA enforcement depends on "a small number of private plaintiffs" who "bring serial litigation"

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[9] *Id.*

[10] LexMachina, *supra* n.6; https://law.lexmachina.com/reports/entities?cases_ke=9pWEg-QblSM.

across the country. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1290 (11th Cir. 2022) (Newsom, J. concurring). Courts have likewise observed that serial tester plaintiffs, often represented by the same set of counsel, are responsible for the dramatic increase in ADA lawsuits. *See id.* at 1295 (Newsom, J., concurring); *Shayler v. 1310 PCH, LLC*, 51 F.4th 1015, 1018 (9th Cir. 2022) (collecting cases describing serial plaintiffs filing "abusive ADA litigation").

To keep up this unrelenting pace of new filings, serial tester plaintiffs run roughshod over the constraints on federal-court jurisdiction imposed by Article III. Some, like Respondent here, do not even contend that they intend to visit the allegedly-violating business at all. Predictably, this opens the floodgates to litigation, as Respondent and her fellow serial filers can identify new targets from their own homes, armed with only an internet connection. The decision below, and others like it, enable this avalanche of litigation by failing to require tester plaintiffs to allege (let alone prove) any intent to frequent the business they sue.

In other ADA lawsuits, tester plaintiffs make vague, boilerplate, and even implausible allegations about their intent to return to the property to obtain an injunction. While some courts have allowed these cases to proceed, others have identified flaws and ordered the cases dismissed for lack of standing. Several businesses, however, have been required to fight through summary judgment and even a trial before obtaining a dismissal based on a lack of standing—costing tens of thousands of dollars or more in legal fees responding to lawsuits in which no plaintiff was personally injured.

For example, in one recent case, a plaintiff alleged that he planned to return to the tavern he sued despite either knowing or being "willfully blind to the fact that this was false" because the business had closed. *Langer v. Badger Co., LLC*, No. 18-cv-934-LAB, 2020 WL 2522081, at *3 (S.D. Cal. May 15, 2020). As the court in that case observed, "[a]t the very least, this amounts to a fraud on the Court." *Id.* In another case, a plaintiff had sued a check cashing store, alleging it failed to maintain a lowered transaction counter when he visited in August 2020. *See Garcia v. Alcocer*, No. 20-cv-08419-VAP, 2021 WL 5760300, at *3 (C.D. Cal. Dec. 1, 2021). After a bench trial, the court ruled the plaintiff lacked standing because his allegations that he intended to return were not credible. *Id.* Notably, the court explained the plaintiff would need to travel for 90 minutes, take two trains and a bus, and pass many check cashing stores and banks on the way (some of which he had previously sued). *Id.* at *2. The court also found that the plaintiff lacked credibility because he had sued 78 stores in August 2020, but could not recall the types of businesses he sued. *Id.* at *3.

Respondent herself has been found to lack credibility. One district court held that she lacked standing based on "implausible" and contradictory testimony regarding travel plans that "significantly undermine[d] her credibility." *Laufer v. Naranda Hotels, LLC*, No. CV-SAG-20-1974, 2020 WL 7384726, at *6-7 (D. Md. Dec. 16, 2020), *vacated and remanded*, 60 F.4th 156 (4th Cir. 2023). As that judge found: "Even if one takes a charitable view of the fluid itineraries in her filings and testimony and assumes that she will travel to a number of northeastern states as well as Maryland, such a tour

cannot in good faith be deemed to include states like Colorado, Texas, Wisconsin, and Illinois. The existence of the plethora of contradictory representations renders her testimony about her planned Maryland trip highly dubious." *Id.* at *8.

2. These examples, and the thousands like them, are typical of tester-led ADA litigation today. While enacted to "open up all aspects of American life to individuals with disabilities,"[11] the current state of ADA litigation bears little resemblance to the accessibility-focused regime that *amici* and their members support, and Congress envisioned.

Courts have recognized that the ADA's private enforcement model has led to the "unforeseen consequences" of "widespread abuse" by a small cadre of tester plaintiffs and their counsel responsible for serial litigation. *Shayler*, 51 F.4th at 1017. The impetus of these serial lawsuits is not to benefit disabled patrons who intend to frequent businesses. Rather, given the statutory fee-shifting provision, 42 U.S.C. § 2000a-3(a)-(b), the "current ADA lawsuit binge is driven by the economics of attorney's fees." *Shayler,* 51 F.4th at 1018 (alteration adopted, citation omitted); *see also* H.R. Rep. 115-539 at 6 (2017) (surveying court decisions remarking that "the ADA's statutory scheme … has resulted in an explosion of private ADA-related litigation that is

[11] Signing Statement of President George H.W. Bush, July 26, 1990, available at: https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037493-statement-by-the-president-americans-with-disabilities-act-of-1990.html.

primarily driven by the ADA's attorneys' fees provision").[12] As many courts have commented, "[t]his type of shotgun litigation undermines both the spirit and purpose of the ADA" because "the means for enforcing the ADA (attorneys' fees) have become more important and desirable than the end (accessibility for disabled individuals)." *Brother v. Tiger Partner, LLC*, 331 F. Supp. 2d 1368, 1375 (M.D. Fla. 2004).

3. This abusive ADA litigation comes with substantial costs, which are disproportionately borne by small businesses. No study has yet revealed the total amount of expenses businesses pay because of ADA litigation initiated by serial filers. Some analyses suggest, however, that legal fees and remediation costs can quickly reach $50,000 or more.[13] An analysis of costs to defend cases filed in the rapidly-growing ADA "website accessibility" context estimated that small businesses can face costs of $25,000, even when the plaintiff sent only a demand letter.[14] Using that conservative estimate and multiplying by the 265,000 demand letters received in 2020, the

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[12] *See also* U.S. Chamber of Commerce, Institute for Legal Reform, *How small businesses are targeted with abusive ADA lawsuits*, (Oct. 12, 2022), https://instituteforlegalreform.com/blog/small-businesses-targeted-with-ada-lawsuits/.

[13] *See* Complaint, *People v. Potter Handy, LLP, et al.*, No. CGC22599079 (Cal. Super. Ct. Apr. 11, 2022).

[14] *See* Bureau of Internet Accessibility, *U.S. businesses potentially spent billions on legal fees for inaccessible websites in 2020*, (Jan. 7, 2021), https://www.boia.org/blog/did-u-s-businesses-spend-billions-on-legal-fees-for-inaccessible-websites-in-2020.

total cost to businesses faced with this litigation was estimated at $6.625 billion in just one year.[15] A recent article by U.S. Representative Ken Calvert calculated the cost of abusive ADA litigation in California alone at $4.3 billion, a staggering figure which affects job creation, business expansion, and productivity.[16]

4. The Nation's small businesses have been disproportionately impacted by abusive ADA litigation. Many small business owners lack the time and resources necessary to defend a fact-intensive litigation and, accordingly, quickly pay to settle these cases, even where a plaintiff's allegations of standing (not to mention an actionable violation) are suspect. *See, e.g.*, *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) (describing "cottage industry" of ADA litigants filing lawsuits "requesting damage awards" under state law "that would put many of the targeted establishments out of business"). These quick settlements even occur where multiple ADA inspectors cannot "agree on what, if anything" a business had done wrong, making it "impossible for the [business] to provide any remedies" in response to the alleged violation. U.S. Chamber, Institute for Legal Reform, *supra* n.12.

Given the prospect of "quick cash settlements," tester plaintiffs and their attorneys are incentivized to target small businesses. This creates a repeating cycle respon-

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[15] *Id.*

[16] Ken Calvert, *Stop lawsuit abuse taxation plaguing small businesses*, The Desert Sun, (Mar. 1, 2023), https://www.desertsun.com/story/opinion/contributors/valley-voice/2023/03/01/lets-stop-lawsuit-abuse-taxation-plaguing-small-businesses/69951390 007/.

sible for the proliferation of this litigation. *E.g.*, Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, at 34515 (June 17, 2008) ("Small businesses are particularly vulnerable to title III litigation and are often compelled to settle because they cannot afford the litigation costs involved in proving whether an action is readily achievable.").[17]

The proliferation of ADA lawsuits has not been good for anyone, other than a few opportunistic plaintiffs' attorneys who file hundreds of these lawsuits on behalf of tester plaintiffs. These cases rarely resolved on the merits, instead settling for "quick cash" rather than correction. Cal. Civ. P. Code § 425.55(a)(2); *see also Rodriguez v. Investco, L.L.C.*, 305 F. Supp. 2d at 1278, 1282 1281 n.12 (M.D. Fla. 2004). This litigation strategy increases case filings and funds more abusive lawsuits, but it does little, if anything, to improve access for disabled patrons. Indeed, under the decision below and others like it, businesses face litigation not from customers, but a small group of testers (potentially thousands of miles away), seeking out businesses to sue without any desire to even visit.

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[17] *See also* Cal. Civ. P. Code § 425.55(a)(2) (finding that "these lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, apparently seeking quick cash settlements rather than correction of the accessibility violation"); Amy Yee, *U.S. businesses get hit with record numbers of disability lawsuits*, Bloomberg (April 14, 2022), https://www.bloomberg.com/news/articles/2022-04-14/u-s-small-businesses-get-hit-with-record-numbers-of-disability-lawsuits.

III. Many Tester Cases Clash With Article III's Personal-Injury Requirement

1. The current state of ADA Title III litigation illustrates the problems that arise when courts fail to enforce Article III's requirement that an injury "affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (citation omitted). Respondent and other tester plaintiffs have each filed hundreds of lawsuits against businesses nationwide, yet their allegations often fail to establish personal or particularized injury. In this case, for example, Respondent's only connection to Petitioner is that she viewed its website as part of a campaign to identify litigation targets. On that website, she received the same information available to everyone who would access the website—disabled or not. She has no intention, now or ever, to visit Petitioner's property, was never provided false information by Petitioner, and never suffered discriminatory treatment on the basis of her disability from Petitioner. And she has made similar allegations against hundreds of other properties she has no intention of ever visiting. The decision below, which found sufficient "informational injury" (Pet. App. 18a-19a), and the Eleventh Circuit's finding of "stigmatic harm" in a similar case (*Arpan*, 29 F.4th at 1274-75), deviate from decades of this Court's Article III jurisprudence.

2. In *Allen v. Wright*, 468 U.S. 737, 739-40 (1984), this Court held that a nationwide class of black public-school children lacked standing to sue the Internal Revenue Service for failing to deny tax-exempt status to racially discriminatory private schools. The plaintiffs claimed that they had standing because they were "harmed directly" by government financial aid to dis-

criminatory public schools. *See id.* at 752. This Court rejected that basis, holding that plaintiffs must allege "a stigmatic injury suffered as a direct result of having *personally* been denied equal treatment." *Id.* at 755 (emphasis added).

The *Allen* Court also explained the dire consequences of accepting the plaintiffs' standing allegations: "If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school." *Id.* at 755-56. In such a case "[a]ll such persons could claim the same sort of abstract stigmatic injury" asserted by the plaintiffs. *Id.* at 756. For example, this Court explained that "[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." *Id.* This broad interpretation of standing was soundly rejected, as it would transcend constitutional limits and "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* (citation omitted).

Since *Allen*, this Court has repeatedly refused to approve of an "offended observer" theory of standing. *See, e.g., Spokeo*, 578 U.S. at 339; *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); *City of Ocala v. Rojas*, 143 S. Ct. 764, 764 (2023) (Gorsuch, J., concurring in denial of certiorari) ("This Court has never endorsed the notion that an 'offended observer' may bring an Establishment Clause claim."); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J. concurring) ("Offended observer standing cannot be squared with this

Court's longstanding teachings about the limits of Article III.").

Just two years ago in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021), this Court reaffirmed that the creation of a statutory prohibition "does not relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III[.]" This is because "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Id.* (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019) (Barrett, J.)). Returning to the example from *Allen*, this Court posed two hypotheticals to explain how this principle operates in practice:

> Suppose first that a Maine citizen's land is polluted by a nearby factory. She sues the company, alleging that it violated a federal environmental law and damaged her property. Suppose also that a second plaintiff in Hawaii files a federal lawsuit alleging that the same company in Maine violated that same environmental law by polluting land in Maine. The violation did not personally harm the plaintiff in Hawaii.

Id. at 2205. Even though *both* plaintiffs were provided with a statutory cause of action, "Article III standing doctrine sharply distinguishes between them" because the latter has failed to show the required personal injury. *Id.* at 2206.

This distinction is critical because failing to enforce Article III's personal-injury requirement and allowing "*unharmed* plaintiffs to sue defendants who violate federal law . . . infringe[s] on the Executive Branch's Article

II authority." *Id.* at 2207 (emphasis in original). As the explosion of tester-led ADA filings illustrates, these serial filers alone choose "how to prioritize and how aggressively to pursue legal actions against defendants." *Id.* Article II, however, preserves this power for the Executive Branch and not for "private plaintiffs (and their attorneys)." *Id.*; *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting) (failing to enforce Article III standing requirements, "turns over to private citizens the function of enforcing the law … as a self-appointed mini-[agency]"). The lower court's lax application of the personal-injury requirement has predictably resulted in aggressive over-enforcement by private plaintiffs who are "not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *TransUnion*, 141 S. Ct. at 2207; *see also Arpan*, 29 F.4th at 1296 (Newsom, J., concurring).

3. Article III is vital to limiting a federal court's power to decide cases to only those individuals who have *personally* suffered *concrete* harm. Yet, tester plaintiffs like Respondent here have filed thousands of cases in which they suffered no personal injury. Viewed under this Court's long-standing jurisprudence, Respondent is simply an online version of an offended observer who lacks standing. She viewed Petitioner's website and observed that it was (allegedly) not complying with the Reservation Rule. She identified the potential for *others* not to have immediate access to information *they needed* to decide whether they wanted to stay at Petitioner's property. *See Laufer v. Arpan LLC*, 65 F.4th 615, 620 (11th Cir. 2023) (Grant, J., dissenting from denial of reh'g en banc) ("At most, [Laufer] observed that other

disabled people may be hindered by the hotel's alleged regulatory violations if *they* try to book a room. But identifying a problem that might affect a third party is not the same thing as a personal denial of equal treatment.") (emphasis in original).

While Respondent alleges that the potential for others to be harmed caused her "frustration and humiliation," that "stigmatic injury" is no different from the generalized frustration in others not following the law—which this Court's cases make clear does not give standing. *Id.* at 619. "[N]o matter how sincere" or "deeply committed" Respondent is to "vindicating that general interest on behalf of the public," it cannot establish the sort of personal injury required by Article III. *Carney v. Adams*, 141 S. Ct. 493, 499 (2020).

Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), does not create an exception to the well-settled offended observer precedent. *See Arpan*, 65 F. 4th at 621 (Grant, J., dissenting from denial of reh'g en banc) ("[T]he Supreme Court has never said that tester status offers an exception to Article III's standing requirements."). In *Havens Realty*, this Court held that a black tester named Sylvia Coleman had standing to sue for discrimination under the Fair Housing Act. *See* 455 U.S. at 373-74. Because she was falsely told four times that apartments were unavailable for her, while white persons were told that apartments were available for them, the Court held Ms. Coleman had suffered "specific injury" under the applicable statutory provision (which required landlords to provide truthful information on the availability of housing) even though she did not have "any intention of buying or renting a home." *Id.* at 374. *Havens Realty* is readily distinguishable from Respondents' case here. Ms. Coleman visited a housing complex

four times and personally suffered discriminatory treatment on the basis of race at each visit. By contrast, Respondent has merely observed that Petitioner's website might fail to provide "enough detail" about disability accommodations to *others* who may want to reserve a room. Ms. Coleman received false information because of her race and suffered discriminatory treatment, which her white counterpart did not. *Id.* at 374-75. Yet Petitioner did not provide Respondent different information on its website because of her disability. Respondent received the same information a non-disabled visitor to Petitioner's website would receive. Article III "sharply distinguishes" between those (like Ms. Coleman) who personally experience discrimination and those (like Respondent) who do not. *See TransUnion*, 141 S. Ct. at 2206. The court below (and others) failed to recognize that this distinction makes a constitutional difference.

By allowing lawsuits like this one to proceed, the lower courts have invited the thousands of cases filed by tester plaintiffs that do not suffer actual injury. Article III, however, forbids plaintiffs without personal injury from filing lawsuits merely to "ensure a defendant's 'compliance with regulatory law.'" *Id.* (quoting *Spokeo*, 578 U.S. at 345 (Thomas, J. concurring)). Enforcement of this Court's well-established standing requirements will help prevent countless businesses nationwide from being subjected to litigation by tester plaintiffs without any genuine stake in the outcome.

CONCLUSION

The decision of the First Circuit should be reversed.

Respectfully submitted.

JENNIFER B. DICKEY
JONATHAN D. URICK
U.S. CHAMBER
LITIGATION CENTER
1615 H Street NW
Washington, DC 20062

JUSTIN VERMUTH
ROBERT CLEMENTS
AMERICAN RESORT
DEVELOPMENT ASSOCIATION
1201 15th Street NW
Washington, DC 20005

THOMAS PINDER
ANDREW DOERSAM
AMERICAN BANKERS
ASSOCIATION
1333 New Hampshire
Ave. NW
Washington, DC 20036

MARK A. PERRY
Counsel of Record
WEIL, GOTSHAL & MANGES LLP
2001 M Street NW
Washington, DC 20036
(202) 682-7000
mark.perry@weil.com

BRIAN G. LIEGEL
WEIL, GOTSHAL & MANGES LLP
1395 Brickell Ave.
Miami, FL 33131

BETSY LAIRD
LESLEY CAMPBELL
ICSC
1251 Ave. of the Americas,
45th Floor
New York, NY 10020

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