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

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INTEREST OF *AMICUS CURIAE*

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

SUMMARY OF ARGUMENT

I. The power to enforce public rights is vested exclusively in the Executive Branch. Yet Americans with Disabilities Act ("ADA") tester plaintiffs sue allegedly noncompliant businesses simply to enforce the law—not to redress personal injuries. These suits thus violate both Article III's standing requirement and Article II's requirement that federal law enforcement reside exclusively within—or at least within control of—the Executive Branch. This Court would accordingly vindicate not only Article III, but also Article II, interests by holding that

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, and its counsel made such a monetary contribution.

ADA tester plaintiffs like Respondent Deborah Laufer may not act as private attorneys general.

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

Private plaintiffs may, of course, sue to vindicate their own private rights, even when doing so may have the indirect effect of enforcing federal law. But a private citizen has no ability to act as a private attorney general. Even at common law, individual plaintiffs could sue over violations of their own private rights, but not for violation of public rights, like a defendant's general noncompliance with the law. Thus, when private plaintiffs sue simply to enforce the law, they violate Article II because law enforcement is a power reserved exclusively for the Executive Branch.

B. ADA tester plaintiffs directly violate these Article II principles.

The ADA allows individuals subjected to disability discrimination to sue, but every year thousands of suits are filed by "tester" plaintiffs that purport to advance the rights of disabled people generally. These suits take a variety of forms—suing over things like lack of closed captioning on gas pump screens, whether hotel websites note their accessibility features, and even the availability of non-braille gift cards. But the common thread is that tester plaintiffs have no personal stake in the suit. They do not intend to actually use the defendant's service; they simply wish to enforce compliance with the ADA.

In other words, ADA tester plaintiffs exercise core executive power in violation of Article II. Just like the Attorney General, these plaintiffs sue to enforce general compliance with the law. They exercise sole and exclusive discretion over whom to sue. They decide how many suits to file. They decide when to settle. And they do all of this without any Executive Branch oversight. Thus, they exercise powers reserved by the Constitution exclusively for the Executive Branch. This Court can and should curtail this unlawful delegation of executive power to private individuals by enforcing Article III standing doctrine to prohibit ADA tester suits.

II. If this Court blesses ADA tester standing, the practical problems with private law enforcement will only grow.

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

And the threat does not stop with the ADA. Several other federal statutes—including the Medicare Secondary Payer Act and the Clean Water Act—deputize uninjured private citizens to enforce their provisions. Predictably, each such scheme has produced abuses of power. In pursuit of monetary bounties, these plaintiffs repeatedly file suits that play fast and loose with the law and facts. These

suits impose real harms on defendants and frequently do little to nothing to benefit the public. Moreover, there is a growing and worrisome trend of state legislatures adopting similar private-enforcement schemes—a trend that, if encouraged, will surely lead to greater and greater delegations of executive power at both the state and federal level. This Court should reign in the abuses of these private delegations of law enforcement authority by enforcing established Article III limits.

ARGUMENT

I. ADA TESTER PLAINTIFF STANDING WOULD VIOLATE ARTICLE II.

Private attorney general provisions push the bounds of both Article III standing and Article II limits on who may exercise executive power. Indeed, the two principles are connected. This Court has repeatedly recognized that an expansive view of Article III standing risks violating the "Constitution's separation of powers." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021); *see also Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000); *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 209 (2000) (Scalia, J., dissenting); *id.* at 197 (Kennedy, J., concurring). As this Court recently explained, "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion*, 141 S. Ct. at 2207.

This case presents that concern. ADA tester plaintiffs like Laufer are self-described "private attorney[s] general." *Laufer v. Arpan LLC*, 29 F.4th 1268, 1290 (11th Cir. 2022) (Newsom, J., concurring). They bring hundreds—sometimes thousands—of suits against places of public accommodation. These suits allege minor, technical violations of the ADA, but minimal—if any—actual harm to the

tester. Laufer has admitted that she has no intent to visit the places she sues, including Petitioner Acheson Hotels. Rather, she searches out allegedly noncompliant companies for the sole purpose of enforcing her understanding of what the ADA requires. That is an "exercise of 'executive [p]ower.'" *Id.* at 1284. And she is not permitted to exercise it. This Court should vigilantly enforce Article III here to avoid infringing on the Executive Branch's Article II prerogatives.

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

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

The Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. This Clause prohibits the vesting of the executive power in anyone else or any other branch of government, because "all" of the executive power resides with the President. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). The proposition that the Congress could "vest [the executive power] in any other person" has long been "utterly inadmissible." *Martin v. Hunter's Lessee*, 14 U.S. 304, 329-30 (1816) (Story, J.).

The Take Care Clause—which states that the President "shall take Care that the Laws be faithfully executed"—serves a similar function. U.S. CONST. art. II, § 3. That Clause firmly places "the enforcement of federal law" in the hands of the President as "the chief constitutional officer of the Executive Branch." *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982). And it necessarily gives the President, as "the chief constitutional officer of the

Executive Branch," "supervisory . . . responsibilit[y]" over those who execute the law. *Id.* If the President were deprived of the "general administrative control of those executing the laws," it would be "impossible" for him "to take care that the laws be faithfully executed." *Myers v. United States*, 272 U.S. 52, 164 (1926); *see also* Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 63 (2d ed. 1871) ("[W]here a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one, or the performance of the other, is also conferred.").

Finally, the Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . which shall be established by Law." U.S. CONST. art. II, § 2. The Clause also states that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* A person is an officer under the Appointments Clause if they hold a "continuing" office established by law and wield "significant authority." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. 508, 511-12 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). The Clause ensures that "the President remains responsible for the exercise of executive power" by mandating that every "exercise of executive power . . . must at some level be subject to the direction and supervision of an officer nominated by the President." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988 (2021).

Together, these clauses ensure that the power to enforce federal law—and accountability for enforcement decisions—rests solely with the President and his accountable designees in the Executive Branch. *See Lujan v. Defs.*

of Wildlife, 504 U.S. 555, 577 (1992) (The Executive Branch's obligation to "take Care that the Laws be faithfully executed" is its "most important constitutional duty." (citation omitted)). That power includes, at its core, the "exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (explaining decision to "refus[e] to institute proceedings" is part of the Executive Branch's Article II powers); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (describing enforcing laws and "appoint[ing] the agents charged with the duty" to enforce them as executive functions).

"Civil enforcement decisions"—that is, decisions to bring suit in federal court for civil violations of federal law—thus fall within the Executive Branch's exclusive power. *In re Aiken Cnty.*, 725 F.3d 255, 264 n.9 (D.C. Cir. 2013) (Kavanaugh, J.). "[O]fficers of the executive branch" have "discretion" to "interpret[] a statute and direct[] the details of its execution." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (collecting cases). When the United States decides whether to bring a civil suit to enforce "general compliance" with federal law, it exercises a quintessential Executive Branch function. *TransUnion*, 141 S. Ct. at 2207. That is why, for example, the Federal Election Commission cannot be part of the legislative branch—it wields "enforcement power, exemplified by its discretionary power to seek judicial relief," and exercise of that power is limited to the Executive Branch. *Buckley*, 424 U.S. at 138.

None of this, of course, prohibits Congress from creating a private right of action for private citizens to sue to redress concrete and solely personalized injuries caused by violations of federal law. But it does limit them to redressing only "[i]ndividual rights," not "public rights."

Lujan, 504 U.S. at 578. A private individual who has personally been injured (say, because she was fired due to a disability) may file suit to redress that injury (seeking, for example, reinstatement and backpay) provided she has a cause of action. *See id.* at 577-78. That kind of suit incidentally advances the public interest in deterring the activity made unlawful by federal law, and Congress is well within its authority to consider that effect when choosing whether to create a private cause of action. But the primary result of such a suit must be the redress of the plaintiff's personal, specific injuries. *See Arpan*, 29 F.4th at 1291 (Newsom, J., concurring).

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

This distinction between suits that redress private injuries and those that advance the public interest traces to common law. "Common-law courts" had "broad power to adjudicate suits" brought by plaintiffs "involving the

alleged violation of private rights"—rights "belonging to individuals," like "personal security . . . property rights, and contract rights." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 344 (2016) (Thomas, J., concurring) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *2). But the rule was different for public rights. When the suit involved "a harm borne by the public at large, such as the violation of the criminal laws" or "'general compliance with regulatory law,' . . . only the government had the authority to" sue. *Id.* at 345 (citation omitted).

To ensure the appropriate separation of powers mandated by the Constitution, private individuals must not act as private attorneys general exercising the Executive Branch's exclusive authority to enforce public rights, including enforcing general compliance with federal law. Rather, private individuals may only act as citizens suing to redress real and concrete injuries that they have personally suffered.

B. ADA tester plaintiffs unconstitutionally wield unsupervised executive power.

ADA tester plaintiffs violate these core Article II principles. This Court should hold that tester plaintiffs lack Article III standing to prevent these violations and protect the separation of powers that is at the heart of standing doctrine.

1. ADA tester plaintiffs seek nothing less than to serve as private attorneys general policing ADA compliance across the country. Title III of the ADA allows "any person who is being subjected to discrimination on the basis of disability" to sue for redress. 42 U.S.C. § 12188(a)(1). And every year, places of public accommodation defend against thousands of lawsuits brought under that provision. Minh Vu, Kristina Launey, & Susan Ryan, *ADA Title III Federal Lawsuits Numbers Are Down But Likely To*

Rebound in 2023, Seyfarth Shaw (Feb. 14, 2023), bit.ly/42e1o5c. The source of these lawsuits is no secret. A significant number are brought by "ADA 'testers'—another term for serial plaintiff." Bob Blum, *The Ninth Circuit Recently Undercut Defenses Against ADA 'Serial Plaintiffs'*, DAILY J. (Feb. 17, 2023), bit.ly/3BZT3Ym.

Laufer herself admits she is one such "tester." *Arpan*, 29 F.4th at 1270. As "a self-described advocate for disabled people's rights," she files suit repeatedly to "advance the rights of disabled people generally." *Id.*; *id.* at 1284 (Newsom, J., concurring). Laufer specializes in website accessibility. She visits hotel websites to "assess the hotel's accessibility features," and sues if the website does not "provide information" about those features. *Id.* at 1271. But she freely admits that "she has no intention to visit the" hotels she sues, or even "the area in which [they are] located." *Id.*

Other ADA tester plaintiffs bring different types of suits—but the common feature in each suit is that the tester plaintiffs' only real interest is trying to "hold [the business] accountable for legal infractions." *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (quoting *TransUnion*, 141 S. Ct. at 2205). Some tester plaintiffs bring suits alleging that retailers violate the ADA if they do not offer gift cards in braille. *See Calcano v. Swarovski N. Am. Ltd.*, 36 F.4th 68, 71 (2d Cir. 2022) (explaining that the tester plaintiffs did not explain how they "were injured by the unavailability of braille gift cards"). Others bring suits against local businesses that offer video displays without closed captioning. *See Johnson v. 27th Ave. Caraf, Inc.*, 9 F.4th 1300, 1316 & n.7 (11th Cir. 2021) (holding tester plaintiff had standing to sue gas stations for lack of closed captioning on pump televisions, despite no "definite intention to visit a specific gas station in the future"). Some testers go so far as to carry cameras with them, so they

can "document ADA violations whenever [they] come across them," and then sue. *Langer v. Kiser*, 57 F.4th 1085, 1099 (9th Cir. 2023) (discussing plaintiff who has filed nearly 2,000 suits).

These tester plaintiffs have no personal stake in many, if not most (or even all), of the suits they file. They do not intend to patronize the defendant business, and so they do not—indeed, cannot—allege any individualized "adverse effects" from the ADA violation they allege. *Laufer v. Looper*, 22 F.4th 871, 881 (10th Cir. 2022). At most, they argue that the legal violations in question create some kind of "emotional" or stigmatic harm, *Arpan*, 29 F.4th at 1274, that is nothing more than an asserted injury in seeing the law allegedly violated. Unsurprisingly then, ADA tester plaintiffs do not seek a remedy intended to redress any injury personal to them. Rather, they seek injunctive relief forcing the defendant to comply with the ADA for the benefit of anyone who will patronize the defendant's business in the future—*i.e.*, not the plaintiff.

2. Article II prohibits this type of roving general law enforcement because it is, "at its core," the exercise of "executive power." *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1134 (11th Cir. 2021) (Newsom, J., concurring).

Civil enforcement of federal law is a fundamental and nondelegable power of the Executive Branch under the Vesting and Take Care clauses. *See supra* at 7 (citing *Buckley*, 424 U.S. at 138; *J.W. Hampton*, 276 U.S. at 406). And there is no meaningful difference in the way tester plaintiffs and the Attorney General may enforce the statute. Both are enforcing "general compliance" with federal law. *TransUnion*, 141 S. Ct. at 2207. Both wield the power of discretionary enforcement in doing so. 42 U.S.C. § 12188; *see also Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 44 (2d Cir. 2002). Both

decide, for instance, what types of alleged violations to target, how broadly or narrowly to read the law they seek to enforce, "how aggressively to pursue legal actions," and whether and when to settle. *TransUnion*, 141 S. Ct. at 2207. And both seek remedies that accrue to the public—injunctions to ensure compliance for all patrons—not remedies tailored to any individual injury. Testers, moreover, choose whether to "bring one lawsuit, or a dozen, or hundreds." *Arpan*, 29 F.4th at 1295 (Newsom, J., concurring). This ability to decide how and when "to institute proceedings" generally to enforce the law must remain solely within the Executive Branch, whose duty is to take care that the laws be faithfully executed. *Heckler*, 470 U.S. at 832.

Yet ADA tester plaintiffs seek to enforce federal law without any supervision from the Executive Branch. Typically, when executive power is delegated, the Executive Branch retains some control or supervision over its exercise. For instance, when this Court sketched out the outer boundaries of Congress's power to strip presidential authority over independent counsel, it emphasized that the Attorney General had "several means of supervising or controlling the prosecutorial powers" being wielded. *Morrison v. Olson*, 487 U.S. 654, 695-96 (1988). Likewise, the "Executive retains significant control over litigation pursued" by a False Claims Act *qui tam* plaintiff, including the power to unilaterally dismiss or settle the action. *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753 (5th Cir. 2001); 31 U.S.C. § 3730(c). And, to be clear, it is an open question whether that level of control is sufficient to avoid violating Article II. *See Vt. Agency of Nat. Res.*, 529 U.S. at 778 n.8 (expressly reserving that question).

None of those safeguards are present in ADA suits. Most courts have held that tester plaintiffs do not need to seek preclearance or a right-to-sue letter before filing.

See, e.g., *McInerney v. Rensselaer Polytechnic Inst.*, 505 F.3d 135, 138 (2d Cir. 2007). The Attorney General has the theoretical power to intervene in private ADA suits, *see* 28 C.F.R. § 36.501, but that does not translate to meaningful accountability. The United States cannot intervene as of right. *Compare id.* (explaining that the court has discretion to grant or deny the application) *with* 31 U.S.C. § 3730(b)(2) (allowing the United States to intervene as of right and take over prosecution of False Claims Act claims). And in the rare cases where the Attorney General does intervene, the private plaintiff continues litigating her ADA claim in parallel. *See, e.g.*, *Reg'l Econ. Cmty. Action Program*, 294 F.3d at 44.

ADA tester plaintiffs thus, in effect, act as unsupervised "Officers of the United States." U.S. CONST. art. II, § 2. Just as high-level appointees in the Department of Justice exercise the power to "conduct[] civil litigation" for the purpose of "vindicating public rights," so too do tester plaintiffs. *Buckley*, 424 U.S. at 140. Not only do they exercise discretion as to whether to file suit at all, but they exercise discretion over the kind of ADA violations to prioritize. Some, like Laufer, focus solely on "online reservation cases." *See Arpan*, 29 F.4th at 1295 (Newsom, J., concurring). Another group brings internet screen reader claims. *See, e.g.*, *Brintley v. Aeroquip Credit Union*, 936 F.3d 489, 491 (6th Cir. 2019); *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 832 (7th Cir. 2019); *Griffin v. Dep't of Lab. Fed. Credit Union*, 912 F.3d 649, 652 (4th Cir. 2019). Others focus on architectural barriers. *See, e.g.*, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1326 (11th Cir. 2013). And because testers may fill their role as long as they wish (often to the tune of hundreds, if not thousands, of lawsuits), they in effect hold a continuing enforcement position. *See Arpan*, 29 F.4th at 1295 (Newsom, J., concurring); *infra* at II.1.

3. Limiting Article III standing to only those individuals who seek to remedy injuries to themselves would prevent (or at least limit) tester plaintiff suits from violating Article II. Indeed, this is what Article III requires. As this Court recently explained, one of the reasons that "*unharmed* plaintiffs [may not] sue defendants who violate federal law" is precisely because that "not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion*, 141 S. Ct. at 2207; *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) ("Article III standing . . . ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed."). The fact is, "[s]tanding doctrine helps ensure that private parties do not exercise the 'discretionary power' that inevitably accompanies the authority to see that federal law or an area of federal law is obeyed." Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781, 827-28 (2009).

This delegation concern may stem primarily from Article II, but standing doctrine's protection of the separation of powers serves as a companion limit that prevents many of the most serious unconstitutional delegations of executive power.

* * *

In short, ADA tester plaintiffs exercise power reserved by the Constitution exclusively for the Executive Branch. This Court should step in to bring an end to these Article II violations by enforcing Article III's standing requirement.

II. UPHOLDING ADA TESTER STANDING WOULD COMPOUND ALREADY GROWING PROBLEMS WITH PRIVATE PARTIES WIELDING EXECUTIVE POWER.

If this Court were to hold that plaintiffs like Laufer have standing, then businesses across the country would be subject to a cottage industry of abusive and harmful ADA tester suits. Worse, expanding the scope of Article III to allow tester plaintiffs to sue nationwide would allow abuses of similar statutes and encourage legislatures to create new private rights of action that are more akin to bounty hunter regimes than traditional causes of action.

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

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

Id. at 1017-18 (citation omitted).

Tester plaintiffs have filed hundreds, sometimes thousands, of these harassing lawsuits. *See Arpan*, 29 F.4th at 1290 & n.2 (recognizing plaintiff has filed over 650 suits since 2018) (Newsom, J., concurring); *Kennedy v.*

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

Tester plaintiffs further abuse their enforcement powers when choosing their targets—typically mom-and-pop businesses that lack the resources to defend the lawsuit rather than settle. CAL. CIV. PROC. CODE § 425.55(a)(2) (noting legislative findings that ADA lawsuits "are frequently filed against small businesses on the basis of boilerplate complaints . . . seeking quick cash settlements rather than correction of the accessibility violation"); *Molski v. Mandarin Touch Rest.*, 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) (noting tester lawsuits target businesses by making expensive demands that could put them out of business, which leads them to "quickly settle the matter"). In fact, testers sometimes intentionally avoid suggesting how to solve the accessibility issue, lest they "sabotage" their ability to bring future cases. *See 27th Ave. Caraf*, 9 F.4th at 1315 (explaining a majority of the plaintiff's settlements intentionally involved only attorneys' fees, not prospective relief addressing the violation).

If the Executive Branch were to engage in this behavior, it could be held publicly to account. But private litigants are subject to none of the structural, "legal," or "practical checks that constrain public enforcement agencies." *Arpan*, 29 F.4th at 1295 (Newsom, J., concurring) (internal quotation marks omitted) (quoting Grove, *supra*, at 837); *see also Nike, Inc.*, 539 U.S. at 680 (Breyer, J.,

dissenting from the denial of certiorari) (similar). Indeed, there is nothing stopping the nominally private ADA tester plaintiffs from selecting their targets for improper reasons, like the resources the defendant has available to fight the allegation, whether the defendant is a competitor to a friend's or family member's business, or even the defendant's owner's race or religion.

If this Court were to adopt a broad view of Article III that permits private individuals to serve as roving private attorneys general unconstrained by public accountability or legal limitations on their discretion, there would be nothing to stop a flood of copycat abusive litigation across the country.

2. Abusive ADA litigation is just the tip of the iceberg. Unless this Court confirms Article III's proper, limited scope, the abuse of other federal private rights will increase, and both Congress and state legislatures will have further incentive to delegate yet more enforcement power to private individuals.

Multiple federal statutes, like the Medicare Secondary Payer Act, the Clean Air Act, and the Clean Water Act, already deputize uninjured private citizens to enforce federal law. Predictably, these schemes produce unproductive and at times abusive litigation.

The Medicare Secondary Payer Act has a private cause of action detached from injury to the plaintiff that allows a plaintiff to obtain a bounty for recovering money owed to Medicare. *See* 42 U.S.C. § 1395y(b)(3)(A). This has produced "abusive litigation" that has "drawn intense criticism from many a federal judge." *MAO-MSO Recovery II, LLC v. State Farm Mut. Auto. Ins. Co.*, 994 F.3d 869, 871, 878 (7th Cir. 2021). These plaintiffs routinely file multiple private actions "in the hope that discovery will show whether an actual case or controversy exists." *Id.* Then, they plead and replead their claims over and over, hoping

to exert maximum pressure on defendants to settle to avoid further litigation. *E.g.*, *MSP Recovery Claims, Series, LLC v. Zurich Am. Ins. Co.*, No. 18 C 7849, 2019 WL 6893007, at *3 (N.D. Ill. Dec. 12, 2019) (plaintiffs made "[n]ine attempts to establish standing and plead a cause of action"). Naturally, this cascade of pleadings "play[s] fast and loose with facts, corporate entities, and adverse judicial rulings." *MSP Recovery Claims, Series LLC v. USAA Gen. Indem. Co.*, No. 18-21626, 2018 WL 5112998, at *13 (S.D. Fla. Oct. 19, 2018); *see also Stalley v. Methodist Healthcare*, 517 F.3d 911, 920 (6th Cir. 2008) (threatening sanctions where plaintiff "and his attorneys know that he has no standing," "cited no legal authority," and "failed to persuade a single one of the many other courts in which he has raised" his claim). These "tactics are a flagrant abuse of the legal system." *MSP Recovery Claims, Series LLC v. New York Cent. Mut. Fire Ins. Co.*, No. 6:19-CV-00211, 2019 WL 4222654, at *6 (N.D.N.Y. Sept. 5, 2019).

Likewise, the Clean Air Act and Clean Water Act authorize private plaintiffs through citizen suits to effectively act as bounty hunters by seeking "civil fines payable to the [federal] treasury" and by "profit[ing] from . . . litigation [targeting corporations] by obtaining attorneys' fees or settlements that can be used to finance subsequent litigation." Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENV'T L. & POL'Y F. 39, 47, 50 (2001); 42 U.S.C. § 7604(a) (Clean Air Act citizen suit provision); 33 U.S.C. § 1365(a) (Clean Water Act citizen suit provision). As Justice Scalia noted, this has the potential to divert public remedies into private gain. *Laidlaw*, 528 U.S. at 209-10 (Scalia, J., dissenting) (explaining that this regime "gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiff's choosing"). Congress itself was concerned that these provisions

could be abused by citizen plaintiffs to bring "frivolous and harassing actions." *Nat. Res. Def. Council, Inc. v. EPA*, 539 F.2d 1068, 1071 (5th Cir. 1976) (quoting S. Rep. No. 1196, 91st Cong., 2d Sess. 38 (1970)).[2]

Outside of the federal system, there is also a growing and disturbing trend of state legislatures creating private rights of action that turn private citizens into bounty hunters seeking out legal violations for pecuniary or other gain. *E.g.*, CAL. BUS. & PROF. CODE § 22949.64; TEX. HEALTH & SAFETY CODE ANN. § 171.208(a). These laws not only raise the same legal and political accountability problems as the ADA's private enforcement provision, but, because they intentionally pit one group of citizens against another on extraordinarily contentious issues, dramatically heighten the risk of "unrestrained factionalism" that our Founders worried would "do significant damage to the fabric of government." *Storer v. Brown*, 415 U.S. 724, 736 (1974); *see also* THE FEDERALIST No. 51, at 349 (James Madison)

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[2] The False Claims Act—which allows private citizens called relators to file suit on behalf of the United States against those who have allegedly defrauded the federal government—encourages similar abuse. Relators, for example, often target a whole industry, *see, e.g.*, *ILR Briefly: Fixing the FCA Health Care Problem*, U.S. Chamber of Com. Inst. for Legal Reform, (Aug. 2022), https://bit.ly/3X2LGal (reviewing statistics and explaining that the False Claims Act has been disproportionately enforced against the health care industry), and ignore pre-filing diligence and specific pleading in service of quick and cheap filing, *see, e.g.*, *Atkins v. McInteer*, 470 F.3d 1350, 1360 n.17 (11th Cir. 2006) (explaining that relators often bring an action "solely to use the discovery process as a fishing expedition for false claims"). Holding that ADA tester plaintiffs lack standing would not curtail this abuse, as relator standing is based on the government's "partial assignment" of its claim to the relator. *Vt. Agency of Nat. Res.*, 529 U.S. at 778 n.8 (finding FCA relators have standing but "express[ing] no view on the question whether *qui tam* suits violate Article II"). This abuse nonetheless further demonstrates the ill effects of delegating law enforcement to private entities.

(noting that the best security of liberty is a system where "each" branch "may be a check on the other").

Rejecting Laufer's theory of standing in this case would be far from a panacea. But it would help stem some of the worst abuses of existing private rights of action and discourage both Congress and state legislators from enacting new laws empowering individuals to police their fellow citizens.

CONCLUSION

The Court should reverse the judgment of the Court of Appeals.

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Respectfully submitted,

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