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 *AMICI CURIAE* RESTAURANT LAW CENTER, AMERICAN HOTEL & LODGING ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., RI HOSPITALITY ASSOCIATION, PUERTO RICO RESTAURANT ASSOCIATION/ASOCIACIÓN DE RESTAURANTES DE PUERTO RICO, NEW HAMPSHIRE LODGING & RESTAURANT ASSOCIATION, MASSACHUSETTS RESTAURANT ASSOCIATION, AND HOSPITALITY MAINE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

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

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[1] Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from the *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The American Hotel & Lodging Association is the largest hotel association in the U.S. representing all segments of the industry nationwide. It has over 30,000 members, including the ten largest hotel companies in the U.S.

The National Federation of Independent Business Small Business Legal Center, Inc. is a non-profit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts through representation on issues of public interest affecting small businesses.

The RI Hospitality Association represents over 900 food-service, hotels, vendors, and hospitality members in the state of Rhode Island.

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

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

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

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

SUMMARY OF ARGUMENT

This Court should resolve the circuit split this case presents by holding that self-proclaimed "testers" lack standing to sue for alleged violations of the "Reservation Rule," 28 C.F.R. § 36.302(e)(1)(ii), promulgated under Title III of the Americans with Disabilities Act ("ADA"). In those circuits that recognize "tester" standing (currently two), *Amici*'s lodging industry members must litigate whether their reservation information is sufficient for hypothetical patrons with hypothetical accessibility needs—the type of abstract disputation that Article III's standing requirement sensibly prohibits. In the six circuits in which the issue is unresolved, *Amici*'s thousands of members in the lodging industry must continue their expensive and wasteful "tester" standing motion practice. And everywhere, *Amici*'s thousands of food-service industry members and other businesses that serve the public remain vulnerable to "tester" lawsuits challenging website and other accessibility issues by those having no real plans to patronize their businesses.

This Court may resolve the circuit split without disturbing prior precedent, contrary to the First Circuit's suggestion below. Laufer is not suing under a sunshine law, does not need the information that is the

subject of her lawsuit, was not the victim of intentional discrimination, and did not suffer the concrete and particularized injury of making an unsuccessful request for information. She thus is fundamentally different from the plaintiffs in the three key precedents in this area.

ARGUMENT

I. RESOLVING THE ISSUE PRESENTED AGAINST "TESTER" STANDING IS VERY IMPORTANT TO *AMICI*.

A. "Testers" do not have standing to commence a lawsuit alleging a violation of the reservation rule.

Amici appreciate this Court's acknowledgement, by its grant of certiorari, of the importance of this issue as it relates to the hotel and lodging industry. This Court should resolve the important conflict between the circuit courts in this case regarding Article III "tester" standing as it relates to alleged violations of Title III of the ADA. *Amici* represent thousands of hotels and places of lodging that are squarely affected by the Reservation Rule and would benefit greatly by this Court reversing the decision below and holding that a self-proclaimed "tester" does not have standing to commence a lawsuit alleging non-compliance with the Reservation Rule. As this Court is aware, hundreds of *Amici* members have been subject to "tester" lawsuits of this nature where they have been forced to decide

between making a settlement payment or paying the litigation costs associated with defending their position. *See*, *e.g.*, *Kennedy v. Siesta Inn & Suites, Inc.*, 828 Fed. Appx. 658 (11th Cir. 2020); *see also Love v. Wildcats Owner LLC*, 532 F. Supp. 3d 872 (N.D. Cal. 2021). Indeed, many members of *Amici* are small hotels and bed-and-breakfasts with limited resources, and they cannot take on the defense costs and the risk of a fee award to a plaintiff that has no intention of visiting their properties.

Consider the circuits where this issue has been resolved appropriately. The Second, Fifth, and Tenth Circuits have rejected "tester" standing in cases alleging violations of the Reservation Rule. This conclusion is correct in that serial filers are prevented from filing hundreds of cases against properties they have no intention of ever patronizing and who never suffered any concrete harm. *See*, *e.g.*, *Laufer v. Ganesha Hosp. LLC*, No. 21-995, 2022 U.S. App. LEXIS 18437, **3–6 (2d Cir. 2022) (applying *Harty v. West Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 2022), and holding that plaintiff alleging, *inter alia*, claims for violations of the Reservation Rule lacked standing). If "testers" do file these types of claims, they will be quickly disposed of with a motion to dismiss. This Court reversing the below decision will serve to help reduce already crowded district court dockets and will certainly lead to judicial efficiency. As set forth in the Merits Brief of Petitioner ("Br."), Laufer has filed over 600 lawsuits as a "tester" alleging violations of the Reservation Rule. Br. 5. However, Laufer is not the only serial filer in this space. For

example, Samuel Love has also filed over 850 lawsuits involving similar matters. *UPDATE: ADA Plaintiffs Filing Multiple Lawsuits Targeting Hotel Websites*, CBSNEWS BAY AREA (August 30, 2021, 7:25 PM), available at https://www.cbsnews.com/sanfrancisco/news/update-ada-plaintiffs-filing-multiple-lawsuits-targeting-hotel-websites/; *see*, *e.g.*, *Love v. Ashford San Francisco II LP*, No. 20-CV-08458-EMC, 2021 U.S. Dist. LEXIS 73148, *2 (N.D. Cal. 2021) (plaintiff, Samuel Love, describing himself as a "'veteran ADA tester[]'"); *see also*, *e.g.*, *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1226 (11th Cir. 2021) (plaintiff alleging, *inter alia*, a violation of the reservation rule, "fil[ed] more than 250 ADA cases in the Southern District of Florida" within a four year period after initiating the instant case). Thus, if this issue is not resolved in favor of Petitioner, *Amici* anticipate hundreds, if not thousands, of identical filings across the country over the next few years alleging "tester" standing. The result would be a depletion of resources for both *Amici*'s members and the judiciary as parties litigate over an issue not harming these serial plaintiffs.

Moreover, "tester" standing should be denied because "tester"-initiated litigation alleging Reservation Rule violations raises an issue that is not present in non-"tester" initiated litigation. Litigation under the Reservation Rule involves the question of whether a hotel or place of lodging *sufficiently* identifies and describes accessible features in the hotels and guest rooms in enough detail to reasonably permit individuals with disabilities to assess independently whether a

given hotel or guest room meets his or her accessibility needs. Thus, "testers" allege that the information is inadequate to assess whether the accommodations meet the "testers'" needs. This forces defendants to litigate whether the information provided is sufficient for a person with hypothetical needs who has no interest in patronizing the hotel and has sustained no concrete injury. Thus, if "tester" standing is permitted, *Amici*'s members who are defendants in these cases will be entrenched in a factual battle about a hypothetical injury alleged by a disinterested "tester" relying upon an ambiguous Reservation Rule.

B. Resolving this issue will also benefit the food-service industry as "tester" standing may result in thousands of serial plaintiff filings.

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

options, and seating options. *See*, *e.g.*, *Haynes v. Pollo Operations, Inc.*, No. 17-CV-61003, 2018 U.S. Dist. LEXIS 51748, at *1 (S.D. Fla. Mar. 28, 2018).

The Fourth, Sixth, and Seventh Circuits have rejected "tester" standing in website accessibility cases. The remaining circuits have not addressed the issue. *Amici* contend that if this Court permits "tester" standing in this case, even if the decision does not squarely address "tester" standing in the broader ADA context, it may invite thousands of "testers," like the plaintiff in *Haynes*, to file website-based ADA Title III lawsuits.

Again, like in the context set forth above pertaining to the Reservation Rule, what is an accessible website is completely ambiguous. There is no federal regulation that specifically identifies what needs to be done to make a website "accessible" to comply with ADA Title III. *Amici* National Federation of Independent Business Small Business Legal Center, Inc. has published a white paper discussing the lack of clear federal regulation, congressional action, or general guidance on website accessibility for small businesses. *See* Rob Smith, *The ADA and Small Business: Website Compliance Amid a Plethora of Uncertainty*, https://tinyurl.com/kxhnb6v5 (last visited June 5, 2023) ("The result of the unforeseen interplay between emerging technology and the ADA has been uncertainty in the courts, obscurity from the Department of Justice [] on a compliance standard, and a catch-22 choice for small business owners[.]"). "Testers" can allege any number of items in a complaint in an effort to create an issue of fact requiring trial. If "testers" have standing in

website accessibility cases, there will be an incredible amount of unnecessary and ambiguous litigation.

II. THE COURT NEED NOT DISTURB PRECEDENT.

The Merits Brief of Petitioner aptly explains that "testers" such as Laufer lack standing so the decision below should be reversed. *Amici* emphasize below that, contrary to the suggestion of the First Circuit, Pet. App. 18a, this Court need not disturb any of the three key precedents in this area.

A. Laufer did not suffer a concrete or particularized injury under *TransUnion*.

"Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2203 (2021) (quotation marks omitted). To determine whether a party has Article III standing, courts look to whether she has "a personal stake in the case," which turns on how one answers the question of "What's it to you?" *Id*. (quotation marks omitted).

This question must be answered through a showing that plaintiff "suffered an injury in fact" that is at least "concrete" and "particularized." *Id*. For an injury to be concrete, it must be "real, and not abstract." *Id*. at 2204. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." *Spokeo,*

Inc. v. Robins, 578 U.S. 330, 330-31 (2016) (alteration added) (quotation marks omitted).

The Merits Brief of Petitioner explains that, under *TransUnion*, the First Circuit erred in holding Laufer suffered a concrete and particularized injury. Br. 17-18. *Amici* explain below that this Court need not disturb *Havens Realty*, *Public Citizen*, or *Akins*, the three key precedents in this area, contrary to the First Circuit's suggestion.

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

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

("AIPAC"). *Federal Election Commission v. Akins*, 524 U.S. 11, 21 (1998).

Public Citizen and *Akins* are readily distinguishable for each of two reasons. First, *TransUnion* held those cases did not support "informational injury" standing for a plaintiff alleging a violation of the Fair Credit Reporting Act ("FCRA") because "those cases involved denial of information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information," and the FCRA is not such a law. *TransUnion*, 141 S.Ct. at 2214. Inexplicably, the First Circuit ignored this portion of *TransUnion*. Pet. App. 17a-18a. The ADA and 28 C.F.R. § 36.302(e)(1)(ii) also are not public-disclosure or sunshine laws. Thus, *Public Citizen* and *Akins* are inapt.

Second, the plaintiffs in those cases were not "testers," but rather alleged that they needed the information consistent with the statute's purpose. *Public Citizen* reasoned the plaintiffs "seek access to the ABA Committee's meetings and records in order to monitor its workings and participate more effectively in the judicial selection process." *Public Citizen*, 491 U.S. at 449. *Akins* reasoned the plaintiffs claimed that the requested information "would help them (and others to whom they would communicate it) to evaluate candidates for public office, especially candidates who received assistance from AIPAC, and to evaluate the role that AIPAC's financial assistance might play in a specific election." *Akins*, 524 U.S. at 21. Because Laufer is a tester who disclaims any need for the information in question, Br. 6-7, these cases are inapposite.

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

Havens Realty addressed the standing of testers who described themselves as "individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982). Plaintiff Sylvia Coleman was black, plaintiff R. Kent Willis was white, and both were "employed by" plaintiff Housing Opportunities Made Equal ("HOME") "to determine whether Havens practiced racial steering." *Id*. at 368. The individual plaintiffs alleged that on three days each inquired whether apartments were available, and each time Coleman was told "no" but Willis was told "yes." *Id*. at 368. (On a fourth day, Coleman and a different white tester made similar inquiries and received similar responses. *Id*.) The plaintiffs sued for violation of § 804(d) of the Fair Housing Act of 1968 ("FHA"), which provides, "it shall be unlawful . . . to represent to any person because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." *Id*. at 367 n.2. *Havens Realty* held that Coleman had standing because she was the object of "discriminatory representations" in violation of the FHA, causing her to "sufer[] injury in precisely the form the statute was intended to guard against." *Id*. at 373-74.

In contrast, Laufer was not the victim of intentional discrimination. As the Tenth Circuit explained in holding that Laufer lacked standing to bring an identical suit elsewhere, whereas the plaintiff Coleman in *Havens Realty* "was given false information *because of her race*," Laufer has not alleged she was "denied her information *because of* her disability." *Laufer v. Looper*, 22 F.4th 871, 879 (10th Cir. 2022) (emphasis added). "Ms. Laufer's alleged injury—her discovery that the [website] lacked certain information—is thus distinct from the injury suffered in *Havens Realty*, which was grounded in misrepresentation and racial animus." *Id*. The Eleventh Circuit similarly emphasized that "the Fair Housing Act does not seek to vindicate some amorphous interest in receiving unusable housing information," but rather "protects the weighty interest in not being subjected to *racial discrimination*, which can inflict a concrete injury on anyone who personally experiences it." *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1005 (11th Cir. 2020) (emphasis added).

Moreover, *Havens Realty*'s analysis of HOME's standing supports the conclusion that intentional discrimination was essential to Coleman's standing. HOME employed Coleman as a tester and thus received the identical misrepresentations; but because HOME was an entity and not an individual, it was not the victim of racial discrimination. Sure enough, *Havens Realty* did not hold that HOME's receipt of these misrepresentations gave it standing. Rather, *Havens Realty* held only that HOME had standing

because the defendant's steering practices impaired HOME's ability to provide counseling and referral services and drained its resources. *Id*. at 379.

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

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

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

In *Havens Realty*, the black tester Coleman had standing because she was told falsely that apartments were not available in response to her inquiries on four occasions. *Id*. at 368, 374. The white tester Willis did not have standing, even though he learned about the defendant's false representations, because he was not

personally the "victim of a discriminatory misrepresentation" in response to his own inquiries on three occasions. *Id*. at 368, 374-75. Thus, it was the tester's receipt of false information in response to his or her inquiry that gave rise to standing, not the tester's learning of false information generally.

Similarly, in *Public Citizen*, the Court repeatedly emphasized that the plaintiff had standing because the plaintiff requested and was denied the desired information, analogizing the plaintiff's injury to that of an unsuccessful applicant for information under the Freedom of Information Act. *Public Citizen*, 491 U.S. at 449. WLF had "*specifically requested*, and been refused," the desired information." *Id.* (emphasis added). "As when an agency denies *requests for information* under the Freedom of Information Act," WLF's denied access to the information "constitutes a sufficiently distinct injury to provide standing to sue." *Id*. "Our decisions interpreting the Freedom of Information Act have never suggested that those *requesting information* under it need show more than that *they sought* and were denied specific agency records." *Id*. (emphasis added). It matters not that others "might make the same complaint *after unsuccessfully demanding disclosure* under FACA," or that others "might *request the same information* under the Freedom of Information Act." *Id*. (emphasis added). It is the unsuccessful request for information that may give rise to a concrete and particularized injury.

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

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

CONCLUSION

The Court should reverse the judgment.

Respectfully submitted,

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