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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in protecting meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

This Court's "doctrine of standing derives from the case-or-controversy requirement," and "that requirement in turn is grounded in historical practice." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016). "[H]istory and tradition" thus provide "a meaningful guide to the types of cases that Article III empowers federal courts to consider." *United States v. Texas*, 143 S. Ct. 1964, 1970 (2023) (quoting *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008)). This is one of those cases.

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[1] Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus* agrees with Respondent, as explained in her Suggestion of Mootness filed July 24, 2023, that this Court should vacate the judgment below on mootness grounds in light of Respondent's dismissal of her complaint with prejudice. However, *amicus* offers this brief to aid this Court should it decide to reach the standing issue in the question presented.

Here, "history and tradition" support Deborah Laufer's standing because her asserted harm has a "'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (quoting *Spokeo*, 578 U.S. at 340-41)—namely, the dignitary harms that, at common law, gave rise to private actions for infringement of what was then known as the innkeeper's "duty to entertain." Under this Court's precedents, that common-law analogue is sufficient—though not necessary, *id.* at 2204-05 (discussing Congress's role in "elevat[ing] harms")—to render Laufer's injury cognizable. Petitioners and their *amici* wholly fail to grapple with this critical history.

Instead, they assert that Laufer's effort to seek redress for the harm she has experienced runs afoul of separation of powers principles because she is a "tester," and her suit will benefit other disabled individuals. This, too, is wrong: regardless of her desire to serve the larger community of people with disabilities, Laufer is a disabled person herself, and she seeks to enforce *her own right* to accessibility information and freedom from discrimination under the ADA and to remedy *her own harm*. That should end the matter.

But even if this Court were to discount Laufer's allegation of deeply personal injury, there still would be no sound historical basis for concluding that her suit runs afoul of Article II or Article III because the practice of private individuals suing to enforce federal law is itself deeply rooted in our nation's "history and tradition."

Deborah Laufer is a disabled person within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12102. She uses a wheelchair or cane to

get around, has limited use of her hands, and is visually impaired. Pet App. 2a-3a. As relevant here, Title III of the ADA and its implementing regulations require hotel websites to provide sufficient information to "permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(ii). When Laufer visited Petitioner's website for the Coast Village Inn and Cottages in Wells, Maine, and discovered that it lacked the information to which she was legally entitled as a person with a disability, she filed to suit to remedy this discrimination, including the "humiliation and frustration" she suffered from "being treated like a second-class citizen." J.A. 19a.

This asserted harm has a "close relationship," *TransUnion*, 141 S. Ct. at 2200 (quoting *Spokeo*, 578 U.S. at 340-41), to the dignitary harms that, at common law, gave rise to private actions for infringement of the duty to entertain imposed on innkeepers, common carriers, and other public-facing businesses. Indeed, this Court has previously recognized that public accommodations laws like the ADA are closely "analogous" to this common-law duty. *Curtis v. Loether*, 415 U.S. 189, 195-96 & n.10 (1974); *see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995) (discussing Massachusetts public accommodations law's "venerable history"); *Civil Rights Cases*, 109 U.S. 3, 40 (1883) (Harlan, J., dissenting) (characterizing the "innkeepers" provision of the Civil Rights Act of 1875 as rooted in the common-law duty to entertain). And more importantly, not only do public accommodations laws grow out of the *duty* imposed by the common law on innkeepers and other public businesses, but the *harms* that formed the basis of suits for breach of that

duty are nearly identical to the stigmatic injury that Laufer asserts here.

The duty to entertain, which traces to the earliest period of the common law, was premised on the notion that innkeepers and common carriers engage in a "public profession," 1 C.G. Addison, *A Treatise on the Law of Torts* 748 (1876), requiring them to comply with certain obligations "which do not exist in the case of business of a purely private character," Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs that Arise Independent of Contract* 282 (1879). The public nature of the duty meant that its breach was prosecutable by "indictment at common law," but it also created a private right to non-discriminatory treatment that entitled private individuals to file suits "for the recovery of *any* damages that may have been sustained" by a breach. 1 Addison, *supra*, at 748 (emphasis added). To protect this private right, plaintiffs at common law regularly filed tort suits premised on emotional and dignitary injuries they suffered from being excluded from a place of public accommodation.

Common-law courts did not question the veracity of those harms for purposes of ascertaining whether plaintiffs had cognizable injuries that could form the basis of their lawsuits. Yet at bottom, that is what Petitioner invites this Court to do—to hold that the discrimination and stigmatic harm that Laufer suffered cannot be real simply because her interest in Petitioner's website was motivated by her goal of ensuring Petitioner's compliance with the ADA and its implementing regulations rather than a planned visit to the hotel. This Court should reject that invitation, particularly at the pleading stage of this case. Because Laufer alleges "a stigmatic injury suffered as a direct result of having personally been denied equal

treatment" when she visited Petitioner's website, *Allen v. Wright*, 468 U.S. 737, 755 (1984), her injury is both concrete and particularized.

Petitioner and its *amici* also assert that Laufer's litigation undermines executive enforcement authority and thus runs afoul of the separation of powers principle that drives standing doctrine. But this, too, is wrong as a matter of "history and tradition." Since the Founding of this nation, private individuals have filed suits to enforce laws that protect the public welfare, and there is no evidence from that period of anyone—members of Congress, this Court, or the executive branch—questioning such suits for infringing on executive power or violating separation of powers principles more broadly.

Private enforcement lawsuits designed to supplement the government's efforts to protect the public welfare have existed for hundreds of years. For instance, the *qui tam* action—which unlike the ADA, does not even require private plaintiffs to assert their own injuries—dates all the way back to thirteenth-century England. Though born at common law as a means of gaining entry to the esteemed royal courts, *qui tam* suits promptly evolved into creatures of statute as Parliament recognized the utility of harnessing private citizens to aid in enforcing the law. By the time of the Founding, *qui tam* actions were well established, and early state legislatures and the first Congresses passed countless laws authorizing *qui tam* prosecutions or containing "informer" provisions designed to incentivize private citizens to aid the government in ensuring that laws protecting the public welfare were obeyed.

Two early American *qui tam* statutes are particularly relevant here. First, in 1789, the First Congress passed a law that required United States

customs officers to publicly display a table of customs rates, fees, and duties at all ports. The law contained a *qui tam* provision incentivizing private individuals to sue customs officers even when the private individuals' sole injury (though Congress did not even use that term) was deprivation of that legally required information. In other words, these individuals who, like Laufer, were deprived of information—but who, unlike Laufer, did not even claim any associated emotional or stigmatic injury—were encouraged to file suit to enforce a public-welfare law. What is more, the informers' suits targeted the negligence of customs officers—technically, executive officials themselves—yet apparently no one objected that these lawsuits infringed on executive power.

Second, in 1794, the Third Congress passed a law to limit the United States' involvement in the international slave trade that authorized both federal law enforcement officers and private citizens who discovered violations to bring suit. Frustrated with the federal government's slow mobilization around the law, prominent abolition societies—which in many respects, functioned as the historical predecessors to testers and tester organizations—sent out their members to serve as informers and hired lawyers sympathetic to their cause to develop litigation against the law's violators. These societies filed the first successful prosecutions under the law, yet no one objected to their litigation as violating Article III's case-or-controversy requirement or infringing on executive enforcement discretion. To the contrary, as one scholar has meticulously documented, key "constitutional actors—presidents, legislators, executive officials, federal judges—embraced [these] private informers." James E. Pfander, *Public Law Litigation in Eighteenth Century America: Diffuse Law*

Enforcement for a Partisan World, 92 Fordham L. Rev. (forthcoming 2023) (manuscript at 4-5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4424076. Enforcement of the 1794 statute thus demonstrates "early republic reliance on private enforcement of public laws." *Id.* at 4.

In sum, "history and tradition" provide no reason to dismiss this case for lack of standing. Deborah Laufer's stigmatic injury has a close common-law analogue, making it sufficiently concrete under this Court's precedents, and her role as a tester does nothing to change that fact or otherwise undermine the separation of powers principles animating this Court's standing doctrine.

ARGUMENT

I. Laufer's Asserted Harm Is Closely Analogous to the Humiliation and Sense of Exclusion that Formed the Basis for Common-Law Suits for Breach of the Innkeeper's Duty to Entertain.

A. The history of the innkeeper's duty to entertain "may be traced to the earliest period of the common law." Cong. Globe, 42d Cong., 2d Sess. 383 (1872) (Sen. Sumner) (in debate on the Civil Rights Act of 1875); *see Civil Rights Cases*, 109 U.S. at 40 (Harlan, J., dissenting) (similar). In the *Holinshed's Chronicles*, written during the reign of Queen Elizabeth I, a chapter titled "Of our Inns and Thoroughfares" boasted that unlike other nations, "*every man* may use his inn as his own house in England." 1 *Holinshed's Chronicles of England, Scotland, and Ireland* 414 (1807 ed.). In his revered *Commentaries*, Blackstone explained that an innkeeper or common carrier's "refus[al] to entertain a traveller without a very sufficient cause" was an

"indict[able]" offense. 4 William Blackstone, *Commentaries on the Laws of England* 167-68 (1769).

This duty carried over to the new Republic, where prominent treatise-writers described it as a *public duty* which vested a *private right* to be entertained in the prospective patron. As one early American treatise-writer explained, with only narrow exceptions for travelers unable to pay, those infected with contagious diseases, and those who presented themselves in a "disorderly manner or intoxicated," any "traveler turned away without cause, either before or after being received," could "sustain an action therefor" in the American common-law courts. Cooley, *supra*, at 635. Another explained that breach of the common law duty to entertain was not just subject to "indictment at common law," but also could be remedied by a private "action for the recovery of . . . damages." 1 Addison, *supra*, at 748; *see also* Joseph Story, *Commentaries on the Law of Bailments* 437 (9th ed. 1878) (innkeeper is "bound to receive [all guests], and if upon false pretences he refuses, he is liable to an action").

The common-law duty to entertain, and the coordinate tort action for its breach, arose during a time when advanced bookings were neither customary nor possible, meaning travelers "arriving in a place to spend the night would have been put to a great inconvenience if the innkeeper, who ran the only inn in the place, had been at liberty to refuse to admit the traveller without reasonable ground." Paul Hartmann, *Racial and Religious Discrimination by Innkeepers in U.S.A.*, 12 Modern L. Rev. 449, 449 (1949). Yet as noted above, the duty's origin was broader: it was premised on the deeply rooted principle that "where-ever any subject takes upon himself a public trust for the benefit of the rest of his fellow-

subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him." *Lane v. Cotton*, 12 Mod. 472, 484, 88 Eng. Rep. 1458, 1464 (K.B. 1701) (Holt, C.J.). Thus, "innkeepers," as "a sort of public servants," owed a fundamental duty to treat all comers with respect. *Rex v. Ivens*, 7 Car. & P. 213, 219, 173 Eng. Rep. 94, 96 (N.P. 1835); *Emmke v. De Silva*, 293 F. 17, 20 (8th Cir. 1923) (an inn "engaged in business of a public nature" has the "duty of extending to [every person] respectful and decent treatment").

Recognizing the dignitary harms—the fundamental disrespect—wrought by an innkeeper "say[ing] to one, you shall come into my inn, and to another you shall not," *Ivens*, 7 Car. & P. at 219, breach of the common law duty to entertain allowed "for the recovery of *any* damages that may have been sustained by [the] refusal," 1 Addison, *supra*, at 748 (emphasis added), including intangible harms like stigmatic and emotional injuries. The common-law courts' recognition of these intensely personal harms is consistent with their treatment of the right to be entertained as a private "civil or political right[]"—a right held by each individual not to be subject to a carrier or innkeeper's discrimination. Cooley, *supra*, at 282-83.

Accordingly, early American courts adjudicating cases for breach of the common law duty to entertain repeatedly characterized the harm forming the basis of these lawsuits as including the emotional harm stemming from the breach, particularly (though not exclusively) for plaintiffs excluded on the basis of immutable characteristics like disability and race. For instance, in *Jackson v. Virginia Hot Springs Co.*, 213 F. 969 (4th Cir. 1914), the court described the

plaintiff's injury from being turned away from an inn and its hot springs, along with his disabled wife, as consisting of both the resulting need "to go and travel a distance of a mile, in cold and inclement weather, in order to procure lodgings and entertainment elsewhere," and the fact that "the plaintiff was mortified, humiliated, discomfited, and distressed" by the inn's refusal to entertain him and his family. *Id.* at 972. Both types of harm—not just the pecuniary damages incurred from having to seek other lodging—formed the basis of the plaintiff's suit. *See also, e.g.*, *Hoover v. Haynes*, 91 N.W. 392, 394 (Neb. 1902) (plaintiff denied entry to hotel on basis of race could recover for "mental pain and anguish" and "disgrace and humiliation" if "evidence [were] introduced to sustain a verdict for damages on that account"); *Hoover v. Haynes*, 93 N.W. 732, 733 (Neb. 1903) (reiterating on motion for rehearing that evidence of "injury to feelings, and mental pain" could be awarded if "warranted by the evidence"); *Aaron v. Ward*, 136 A.D. 818, 823 (N.Y. App. Div. 1910) (analogizing to duty of innkeepers, woman denied entry to bathhouse on basis of Jewish ancestry could recover for "indignity and disgrace"), *aff'd* 96 N.E. 736 (N.Y. 1911).

Cases involving common carriers similarly allowed recovery for stigmatic and emotional injuries alongside the cost of seeking alternative transportation. Case after case in the late nineteenth century upheld jury instructions to that effect. *See, e.g.*, *Quigley v. Cent. Pac. R. Co.*, 20 F. Cas. 138 (C.C.D. Nev. 1878) (upholding jury charge that "the plaintiff was entitled to recover . . . the price of a second ticket, loss of time, and expenses of staying over, and that [the jurors] were entitled to take into consideration the *indignity*" (emphasis added)); *Smith v. Pittsburg, Ft. Wayne & Chi. Ry. Co.*, 23 Ohio St. 10, 17 (1872)

(upholding jury instruction allowing recovery for "the injury to the feelings" of the plaintiff stemming from his expulsion from a rail car); *Louisville & N.R. Co. v. Frizzle*, 108 So. 615, 616 (Ala. Ct. App. 1926) ("In this case plaintiff had a right to recover, not only the additional cost and expense necessary to procure other Pullman tickets . . . , but also, under the sound discretion of the jury, actual damages for mental suffering and humiliation caused by his wrongful ejection or rejection.").

In one prominent case, the Supreme Court of Illinois upheld a lower court's charge that a woman excluded from a train car on the basis of race could recover "in addition to the actual damages, something for the *indignity, vexation and disgrace*" to which she was subjected. *Chi. & Nw. Ry. Co. v. Williams*, 55 Ill. 185, 190 (1870) (emphasis added). The court explained that "if the party in such case is confined to the actual pecuniary damages sustained, it would, most often, be no compensation at all, above nominal damages, and no salutary effect would be produced on the wrong doer by such a verdict." *Id.* In other words, even if a plaintiff ultimately suffered no tangible inconvenience from being denied rail services, her dignitary injury still constituted a cognizable harm that could give rise to a private tort suit. Indeed, the court seemed to encourage such suits for their deterrent effect on bad actors.

B. The dignitary harm described in these cases plainly constitutes "a close historical or common-law analogue" to Deborah Laufer's stigmatic injury. *TransUnion*, 141 S. Ct. at 2204. Just as, for example, the plaintiff in *Jackson* felt "humiliated" and "distressed" by the inn's refusal to accommodate him and his disabled wife, 213 F. at 972, Laufer "suffered humiliation and frustration at being treated like a

second class citizen" because of her disability and at "being denied equal access and benefits to the goods, facilities, accommodations and services" provided by Petitioner, J.A. 18a-19a. Just as, for example, the Black plaintiff excluded in *Hoover* claimed feelings of "disgrace" and "indignity" at being "refused . . . access" to the defendant's hotel, 91 N.W. at 393-94, Laufer felt a "sense of isolation and segregation" from being "deprive[d]" of "the full and equal enjoyment of the goods, services, facilities, privileges and/or accommodations available to the general public," J.A. 10a. Notably, these sorts of harms have been repeatedly recognized as real injuries by this Court. *See, e.g.*, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (citing "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments"); *id.* at 292 (Goldberg, J., concurring) ("Discrimination . . . is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (describing the "stigmatizing injury" arising out of "discrimination in the allocation of publicly available goods and services").

True enough, Laufer, unlike the plaintiffs in the common-law cases, did not actually go to Petitioner's hotel and receive a rejection face-to-face; rather, she was excluded when she discovered that Petitioner's website did not provide accessibility information to which she, as a disabled person, was legally entitled. But this distinction is irrelevant for purposes of the standing inquiry: the fact that Laufer was not singled out for mistreatment, but instead was mistreated on the basis of a policy excluding all those within her protected class, does not make her dignitary injury any

less real. *Cf. Hoover*, 93 N.W. at 733 (dignitary harms stemming from discriminatory exclusion are not "imaginary injuries" although "[o]rdinarily no direct proof can be had" as to them).

This is consistent with the early American common-law cases—for purposes of ascertaining whether plaintiffs had cognizable claims, courts focused on the feelings alleged by the excluded plaintiffs rather than the relative validity of those feelings under the given circumstances, particularly at the pleading stage. For instance, in *Jackson*, the court did not suggest that the plaintiff's feelings of humiliation were not merited or could not form the basis for a lawsuit just because he and his disabled wife were turned away from the inn in the middle of the night without any witnesses to their exclusion and mortification. 213 F. at 970. In *Hoover*, the Court made clear that the issue of the validity of "injury to feelings" is a matter for the jury in calculating the appropriate damages. 93 N.W. at 733. And in *Chicago & Northwestern Railway*, the Supreme Court of Illinois clarified that although the plaintiff faced exclusion stemming from a railway employee's personal discriminatory animus, a blanket policy of a railway to "exclude colored persons from [a] car" that was "justified on the ground of mere prejudice" would provide just as much basis for a tort suit as the employee's personal animus. 55 Ill. at 188-89.

It is also irrelevant for purposes of the standing inquiry set forth by this Court in *TransUnion* whether the plaintiffs in these common-law cases actually sought to make use of the defendant inn or common carrier, unlike Laufer who admits that she never intended to stay at Petitioner's hotel. Even if the common-law duty to entertain *were* limited only to those seeking to be bona fide guests of an inn, *but see*

Respondent Br. 42 (citing *Markham v. Brown*, 8 N.H. 523, 523 (1837)), that still would say nothing about the degree to which Laufer's *injury* is analogous to the *injuries* suffered by common-law plaintiffs who complained of exclusion from an inn or common carrier.

Put another way, what matters for purposes of this Court's standing inquiry is not the preciseness of the match between the *duties* imposed on innkeepers at common law and those imposed by the ADA; rather, what matters is the similarity of plaintiffs' *harms* arising out of a hotel's breach of either duty. This makes sense, given that public accommodations laws substantially "broaden[ed]" the common-law duty to entertain. *Hurley*, 515 U.S. at 572.

Here, those harms are nearly identical: Laufer, like the common-law plaintiffs described above, suffered feelings of exclusion and stigma when Petitioner failed to provide her, a disabled person, with accessibility information to which she is entitled under the ADA and its implementing regulations. *Cf. TransUnion*, 141 S. Ct. at 2204 (harms must be "analog[ous]" but an "exact duplicate" is "not require[d]"). Under the test this Court set forth in *TransUnion*, that is sufficient to render Laufer's injury judicially cognizable—an injury creates a "case" or "controversy" when "a plaintiff's asserted *harm* has a 'close relationship' to a *harm* traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 2209 (emphasis added).

* * *

In sum, Deborah Laufer has alleged a deeply personal injury with a close common-law analogue, which renders her harm judicially cognizable under this Court's precedents. That, on its own, provides

sufficient grounds to reject Petitioners' arguments that Laufer's suit infringes on executive power or unduly expands judicial authority. As one member of this Court has put it, "it is only when 'unharmed plaintiffs' are before the Court that Article III forecloses interference with the 'discretion of the Executive Branch.'" *Texas*, 143 S. Ct. at 1999 (Alito, J., dissenting) (quoting *TransUnion*, 141 S. Ct. at 2207). That should end the matter.

But even if this Court were to discount Laufer's allegation of deeply personal stigmatic injury and indulge the characterization of Laufer as a "private attorney general" focused on protecting other people's rights, *e.g.*, Ctr. for Const. Responsibility Br. 2, there still would be no historical basis for concluding that her suit runs afoul of Article II or Article III, as the next Section discusses.

II. Since Our Nation's Founding, Private Citizens Have Taken Active Roles in Enforcing Laws Promoting the Public Welfare Without Constitutional Objection.

A. As this Court has acknowledged, there is a "long tradition" in this country, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000), of private citizens filing suits to aid the government in enforcement of laws to "vindicat[e] . . . polic[ies] that Congress considered of the highest priority," *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (per curiam). This historical pedigree is "particularly relevant to the constitutional standing inquiry," *Vt. Agency*, 529 U.S. at 774, as "matters that were the traditional concern of the courts at Westminster" are "the staple of judicial business," *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

These private enforcement lawsuits first emerged through the *qui tam* action, which gained prominence in England during the thirteenth century. *Vt. Agency*, 529 U.S. at 774. Short for "*qui tam pro domino rege quam pro seipso*," which literally means "he who as much for the king as for himself," *qui tam* actions originated at common law, where they were used as a means to gain access to the esteemed royal courts. 3 William Blackstone, *Commentaries on the Laws of England* 160 (1768). Because those courts typically only heard matters involving the king, *see* F.C. Milsom, *Trespass from Henry III to Edward III, Part III: More Special Writs and Conclusions*, 74 L.Q. Rev. 561, 585 (1958), commoners would allege royal interests in addition to their own private interests to "obtain a common law remedy . . . for a private wrong that also affected the king[]," Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81, 85 (1972); *see, e.g.*, *Prior of Lewes v. Master Roger de Holt* (1300), *reprinted in Select Cases in the Exchequer of Pleas*, 48 *Selden Society* 198 (1931) (asserting king's interest in lands held under royal tenure); *Rex et John Gobbard v. Hanville* (undated), *reprinted in* 48 *Selden Society*, *supra*, at 215 (asserting interest in safety of the king's men).

By the start of the fourteenth century, due to both the expansion of the royal courts' jurisdiction to cover all legal disputes (rendering unnecessary the technique of asserting royal interests to get into a preferred forum), as well as Parliament's enactment of a slew of new laws expressly providing for *qui tam* suits, the common-law *qui tam* action was largely displaced by statutory *qui tam* actions. *Vt. Agency*, 529 U.S. at 775. These new statutes took a variety of forms. Many permitted injured parties to sue to vindicate their own interests as well as the Crown's.

See, e.g., A Remedy for Him Who Is Wrongfully Pursued in Admiralty Court, 2 Hen. 4, c.11 (1400). Others permitted informers to obtain a bounty for their information even in the absence of an injury, *see, e.g.*, Statute Prohibiting the Sale of Wares After Close of Fair, 5 Edw. 3, c.5 § 6 (1331), under the rationale that "every offence, for which such action is brought, is supposed to be a general grievance to every body," 2 William Hawkins, *A Treatise of the Pleas of the Crown* 380 (1787); *see* 3 Blackstone, *supra*, at 160 ("such actions . . . are given to the people in general"). Regardless of form, Parliament viewed *qui tam* actions as critical tools for effectuating its will, as they "vastly expanded law enforcement resources and greatly increased the likelihood that [a violator of the law] would be caught, all at no cost to the government apart from the contingent promise of [a portion] of any penalties recovered." Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1255 (2018). Law enforcement officials welcomed this assistance. *Id.*

This notion of the vital role of private citizens in government law enforcement made its way across the Atlantic, where "[*q*]*ui tam* actions appear to have been as prevalent . . . as in England, at least in the period immediately before and after the framing of the Constitution," *Vt. Agency*, 529 U.S. at 776; *see Marvin v. Trout*, 199 U.S. 212, 225 (1905) (such actions "have been in existence . . . in this country since the foundation of our government"). Legislatures in the new Republic took various approaches to crafting *qui tam* statutes. Initially, many states adopted English *qui tam* statutes wholesale or with minor modifications. *See, e.g.*, New Jersey Gaming Law, Act of Feb. 8, 1797, §§ IV, V (1800), N.J. Laws 224-25

(repealed 1847) (adopted from the English Gaming Law, 9 Anne, c.14, § 2 (1710)); *State v. Bishop*, 7 Conn. 181, 185 (1828) (describing the Miller's Toll statute in colonial Connecticut, taken directly from England). The first Congresses, however, expanded upon that approach, enacting both statutes with British origins and wholly original ones, largely out of "fear[] that exclusive reliance upon federal law enforcement machinery would not suffice to enforce the penal laws of the nation." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 303 (1989).

Thus, it was not long before American laws enlisting citizens in public law enforcement covered a wide range of subjects, "including those criminalizing the import of liquor without paying duties, prohibiting certain trade with Indian tribes, criminalizing failure to comply with certain postal requirements, and criminalizing slave trade with foreign nations." Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 175 (1992) (footnotes omitted).[3]

Such statutes grew so common in the new Republic that by the turn of the nineteenth century, as Chief Justice Marshall noted, "[a]lmost every fine or forfeiture under a penal statute, [could] be recovered

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[3] *See also, e.g.*, Act of Mar. 1, 1790, § 3, 1 Stat. 101, 102 (regarding filing of census forms); Act of July 20, 1790, § 1, 1 Stat. 131, 131 (regarding contracts with mariners and seamen); *id.* § 4, 1 Stat. at 133 (regarding harboring runaway seamen); Act of July 22, 1790, § 3, 1 Stat. 137, 138 (regarding trade with Indians); Act of Feb. 25, 1791, § 8, 1 Stat. 191, 196 (regarding the Bank Act); Act of Mar. 3, 1791, § 44, 1 Stat. 199, 209 (regarding the Distilled Spirits Act); Act of Feb. 20, 1792, § 25, 1 Stat. 232, 239 (regarding the Post Office Act); Act of May 19, 1796, § 18, 1 Stat. 469, 474 (regarding trade with Indian tribes).

by an action of debt as well as by information." *Adams v. Woods*, 6 U.S. 336, 341 (1805); *see also* Dan L. Hargrove, *Soldiers of Qui Tam Fortune,* 34 Pub. Cont. L.J. 45, 52 (2004) ("Chief Justice John Marshall, like other early federal judges to rule on such cases, blessed [them]." (citing *Adams*, 6 U.S. at 336; *United States v. Simms*, 5 U.S. 252 (1803); *Ketland, qui tam v. The Cassius*, 2 U.S. 365 (C.C.D. Pa. 1796); *Evans, qui tam v. Bollen*, 4 U.S. 342 (C.C.D. Pa. 1800)).

As in England, many early American statutes also provided financial incentives that encouraged citizens to "don the mantle of a public prosecutor," Krent, *supra*, at 297, 300, and act as "informers" or "relators." These statutes were liberally construed, *see, e.g.*, *Adams*, 6 U.S. at 340-41 (interpreting statute providing award for informer as authorizing him to sue); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (describing the Founding-era rule that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue"), and this Court has recognized their powerful deterrent effects, *see Marvin*, 199 U.S. at 225 (explaining, with regard to a law meant "to discourage and, if possible, prevent gambling," that the law offered informers a "right to recover the penalty or forfeiture" from a violation "for the purpose of suppressing the evil in the interest of the public morals and welfare").

Congress also passed these laws to enlist the assistance of private parties who were in the best position to discover illegal behavior. For instance, the 1863 False Claims Act had the principal goal of "stopping the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). Fundamentally,

"[t]he idea behind the provision was that individuals within the entity defrauding the government would have superior knowledge of fraud over that of the Department of Justice." Gretchen L. Forney, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under the False Claims Act*, 82 Minn. L. Rev. 1357, 1364 (1998). This law did not require private individuals to assert their own injuries; rather, as this Court has held, it allowed private individuals to vindicate the "United States' injury in fact." *Vt. Agency*, 529 U.S. at 774.

B. At the same time, other early *qui tam* statutes allowed informers who claimed no personal injury to vindicate the public interest even against United States officers without "borrowing" any injury from the federal government. For instance, a law known as An Act to Regulate the Collection of the Duties Imposed by Law on the Tonnage of Ships or Vessels, and on Goods, Wares and Merchandises Imported into the United States, ch. 5, 1 Stat. 29 (1789) ("1789 Act"), contained a *qui tam* provision authorizing "informer[s]" to sue for forfeiture of one hundred dollars against any United States customs officer who failed to "constantly [keep] in some public and conspicuous place of his office, a fair table of the rates of fees, and duties demandable by law," *id.* § 29, 1 Stat. at 45.

Two aspects of this law deserve special attention here. First, much like the ADA regulation Laufer seeks to enforce, the 1789 Act required the posting of specific information for the benefit of the public good, yet to ensure compliance, it relied primarily on private enforcement by informers who discovered the failure to post. *Id.* Second, the fact that the informer provision operated against government officers themselves belies the notion that private enforcement

of laws serving the public welfare infringes on executive authority. *See* Beck, *supra*, at 1294-95 (suggesting that *qui tam* enforcement against customs officers may have been prompted by the sheer number of such officers, making presidential oversight of their behavior challenging). Or at the very least, it makes clear that the first Congress did not think so. *See, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (views of the First Congress "provide[] contemporaneous and weighty evidence of the Constitution's meaning" (quoting *Bowsher v. Synar*, 478 U.S. 714, 723 (1986)).

The early American experience with another eighteenth-century federal informer law—this one passed by the Third Congress to limit the United States' participation in the international slave trade—also merits special attention here for "cast[ing] serious doubt on the claim that Article II was understood at the time to vest the executive with an exclusive enforcement discretion that forecloses Congress from relying on private informers to play a supplemental or independent role in law enforcement." Pfander, *supra*, at 22. The Act of March 22, 1794, ch. 11, 1 Stat. 347 ("1794 Act"), which was modeled on several New England statutes preceding it, barred the modification of vessels in United States ports for the purpose of transporting enslaved people and imposed a fine of two-hundred dollars for every person taken aboard a ship to be transported into slavery. *Id.* The law provided that fines recovered would be divided between the United States and "him or her who shall sue for and prosecute the same," *id.* § 2, 1 Stat. at 349, allowing both federal law enforcement officers and private citizens—including the well-known abolition societies proliferating at the time—to bring suit to

enforce it against private merchants. *Id.*; Pfander, *supra*, at 12.

In many respects, those abolition societies functioned as the historical predecessors to testers. They sent out their members to act as informers and ultimately serve as plaintiffs, secured skilled lawyers sympathetic to their cause to serve as counsel, and financed the litigation themselves. Pfander, *supra*, at 7, 13. Indeed, members of the Providence Abolition Society were the first to bring successful prosecutions under the 1794 Act, as they grew frustrated with the federal government's slow pace of initiating its own prosecutions. Charles Rappleye, *Sons of Providence: The Brown Brothers, the Slave Trade, and the American Revolution* 305-06 (2006).

The 1794 Act "reflects a remarkable consensus" by all three branches of government "as to the legitimacy of no-injury private informer litigation." Pfander, *supra*, at 12. No member of Congress raised Article II or Article III concerns when the bill was debated, nor did President Washington threaten to veto it in the name of preserving his branch's power. *Id.* Federal trial courts dutifully enforced the statute when cases filed by private litigants reached them, ordering the condemnation of implicated vessels, *e.g.*, *id.* at 13 (describing Rhode Island federal court order for condemnation and sale of the *Hope* in case brought by abolition society), and allowing juries to return considerable awards against private merchants even in the absence of federal law enforcement involvement in the litigation, *e.g.*, *id.* at 15 (describing a New York federal case involving the *Peggy* brig that ended in a $16,000 jury verdict for the abolition-society plaintiff). And when forfeiture appeals eventually made it to this Court, it never questioned the underlying cases as violating Article II or Article III. *See, e.g.*, *The Merino*,

22 U.S. 391 (1824) (upholding forfeiture of vessel under the 1794 Act); *The Plattsburgh*, 23 U.S. 133, 145 (1825) (same); *The Emily and Caroline*, 22 U.S. 381 (1824) (same).

Stepping back, it is clear that despite the ubiquity of private parties enforcing laws that promoted the public welfare at the Founding—and of cases analyzing and applying those laws—there is simply no record of early American jurists suggesting that these enforcement actions undermined or were at odds with the Constitution's separation of powers. Indeed, there is simply "no evidence that anyone at the time of the framing" believed that private enforcement of public laws "produced a constitutional doubt." Sunstein, *supra*, at 176; *see* Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance,* 40 Stan. L. Rev. 1371, 1409 (1988) (these suits "were not viewed as raising constitutional problems"). Thus, "[w]hatever one might say about its wisdom as a matter of policy," Pfander, *supra*, at 3, the argument that tester litigation infringes on executive power by functioning as private enforcement of public laws is wholly without merit as a matter of constitutional text and history.

* * *

This Court has held that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 578 U.S. at 340. Here, history plays an important role in two respects: it provides a close common-law analogue for Deborah Laufer's asserted harm, and it belies the notion that testers who engage in private enforcement of laws promoting the public welfare infringe on executive power or undermine Article III's "case" or "controversy" requirement.

CONCLUSION

This Court should vacate the judgment below in light of Respondent's dismissal of her complaint with prejudice. If this Court reaches the standing issue in the question presented, it should affirm the judgment of the court below.

Respectfully submitted,

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