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 PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members in every state. Since its founding in 1971, Public Citizen has worked before Congress, administrative agencies, and courts to promote enactment and enforcement of laws protecting consumers, workers, and the public, and to foster open and fair governmental processes.

Public Citizen has a longstanding interest in issues of federal court jurisdiction, including issues concerning standing to seek judicial review of allegedly unconstitutional or unlawful government action. Public Citizen has submitted numerous briefs as amicus curiae addressing standing issues, including in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), and *FEC v. Cruz*, 142 S. Ct. 1638 (2022).

In its own litigation, too, Public Citizen often confronts standing issues. Standing based on informational injuries is of particular concern to Public Citizen because it has often litigated cases under the Freedom of Information Act, the Federal Advisory Committee Act, the Federal Election Campaign Act, and similar statutes where a plaintiff's standing is based on deprivation of information to which it claims legal entitlement. For example, Public Citizen was an appellant in one of this Court's leading decisions on informational standing, *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989).

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief.

Public Citizen believes that unduly narrow conceptions of the injuries that give rise to standing are obstacles to genuinely aggrieved persons who seek remedies for harms attributable to violations of the Constitution and laws. Public Citizen is particularly concerned that some of the limitations on informational standing advocated by petitioner Acheson Hotels in this case—including the argument that denial of information is an injury only when the plaintiff can identify "downstream consequences" attributable to it—would impair access to the courts by plaintiffs who have suffered concrete injuries in the form of denial of information to which they have a substantive entitlement.

These concerns are particularly acute because standing decisions tend to expand beyond their facts, as government and private defendants seize on words used in decisions finding that particular plaintiffs lack standing to argue that differently situated plaintiffs lack standing based on superficial similarities. Phrases, such as "downstream consequences," that may seem expressive of why one plaintiff lacks standing are particularly likely to be applied overbroadly to other plaintiffs. Public Citizen believes this brief will be helpful to the Court in articulating the appropriate contours of informational standing should its resolution of this case require it to address that subject.

SUMMARY OF ARGUMENT

This Court has repeatedly held that, under Article III of the Constitution, a plaintiff's standing to litigate a claim in federal court depends on whether she has suffered an "injury in fact," not just in law. The Court has defined an injury in fact as one that exists in the real world, whether tangible or otherwise. The

allegedly unlawful denial of information that an individual seeks is a harm that genuinely exists and that is closely related to harms that have traditionally received legal protection. Accordingly, throughout this Court's development of standing doctrine over the past six decades, the Court has acknowledged that informational injuries are sufficient to provide a plaintiff with Article III standing.

Moreover, as the Court has repeatedly recognized, the denial of information to which a plaintiff claims a substantive entitlement qualifies as an injury regardless of whether the plaintiff can identify specific harmful consequences flowing from her lack of information. The Court's recent decision in *TransUnion* does not impose a new requirement that a plaintiff show "downstream consequences" from the denial of information. *TransUnion* held only that plaintiffs who were *not* denied information, but who complained about the *manner* in which information was presented to them without identifying how the formatting errors harmed them, had failed to demonstrate an injury in fact. *See* 141 S. Ct. at 2213–14.

In addition, the injurious nature of an informational injury does not depend on the *source* of the claimed legal entitlement to information and does not require a showing that a statute explicitly creates a right to the information sought. After all, what Article III requires is injury in *fact*, not injury in law, and the *existence* of an informational injury does not depend on whether the legal protection for the interest in information comes from a statute, a regulation, or some other source. To be sure, determining whether an informational injury is *actionable* requires identifying a substantive legal basis for the claim and a right of action under which redress for the injury can be sought.

Those questions go to the merits of the claim, not to Article III standing, and both statutes and regulations may provide the applicable substantive law that determines whether a claim seeking redress for an informational injury is meritorious.

Under these principles, the respondent here—a civil rights tester who claims that she was unlawfully denied information to which she was entitled—has Article III standing to invoke an available statutory right of action that, on her view of the law, can provide her relief. Whether she is correct that the law she invokes creates an entitlement to information is not a matter of standing: It is the merits issue that her claimed injury gives her standing to litigate. On the sole question presented in this case—whether respondent had Article III standing—the Court should (if it reaches the question in the face of both parties' acknowledgment that the case is moot) affirm the decision of the court of appeals.[2]

ARGUMENT

I. Standing based on informational injury is firmly rooted in this Court's precedents.

This Court's decisions have repeatedly stated that an "irreducible constitutional minimum" of standing is "an injury in fact that is both concrete and particularized and actual or imminent, not conjectural or hypothetical." *Dep't of Educ. v. Brown*, 143 S. Ct. 2343, 2351 (2023) (cleaned up). The Court has further emphasized that the requirement that an injury be

[2] Acheson has argued that it mooted the case by correcting its reservation system and providing respondent Laufer the information she sought, and Ms. Laufer now agrees the case is moot because she has dismissed her case with prejudice.

"concrete" does not refer to whether it is physically "tangible." *Spokeo*, 578 U.S. at 340. Rather, "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Id*. Put another way, it must be " 'real,' and not 'abstract.' " *Id*.

As the decision in *TransUnion* emphasizes, the *reality* of an injury—whether it is an injury in fact—is a different question from whether it is recognized as a legal injury: "[A]n injury in law is not an injury in fact." 141 S. Ct. at 2205. Thus, the Court has held that a plaintiff may lack standing even though a law enacted by Congress confers on the plaintiff a legal entitlement and a right of action to obtain a judicial remedy for actions by a defendant that infringe that entitlement. *See id*. at 2205–06. That is, the Court's recent standing decisions hold that "Congress 'may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,' " *id*. at 2204–05 (quoting *Spokeo*, 578 U.S. at 341), but only if the injuries involve "harms that 'exist' in the real world before Congress recognized them to actionable legal status," *id*. at 2205 (citation omitted).

Although the Court has identified bodily harm, physical damage to property, and monetary losses as quintessential concrete injuries, *see id.* at 2204, it has also recognized that "[v]arious intangible harms can also be concrete"—"[c]hief among them … injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts," *id.* Such real, although intangible, harms include injuries to reputation, intrusions on privacy, and violations of constitutional rights. *Id*. And as the Court pointed out in *Spokeo*, those real injuries also include deprivations of information to which a plaintiff claims entitlement. *See* 578 U.S. at 342 (citing

FEC v. Akins, 524 U.S. 11, 20–25 (1998); *Pub. Citizen*, 491 U.S. at 449).

The Court's acknowledgment of informational injuries as a basis for standing reflects the reality that information has intrinsic value and that the denial of information to one who seeks it inflicts a harm that exists as surely as do other intangible injuries. In what has come to be known as the "Information Age,"[3] information is increasingly a commodity, a tool for acquiring and exercising power, and a means of individual and social improvement. Information also is, and long has been, a subject of legal entitlements. Individuals and entities may have property rights in information (such as trade secrets, *see Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474–76 (1974)), as well as privacy rights that give legal protection to highly personal information, *see Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 488 (1975). Entitlements of *access* to information have also traditionally received legal protection: Trustees have a duty to furnish information to beneficiaries, Restatement (Third) of Trusts § 82 (2007); agents have a duty to give information to their principals, Restatement (Third) of Agency § 8.11 (2006); and contractual entitlements to information are also common, *see* Raymond T. Nimmer & Patricia A. Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 L. & Contemp. Probs. 103, 125 (Summer 1992). And outside the realm of private relationships, the common law has long recognized that citizens have a right of access to information about certain government actions, especially

[3] *See*, *e.g.*, Manuel Castells, *The Information Age, Vols. 1–3: Economy, Society and Culture* (1999).

judicial proceedings. *See*, *e.g.*, *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 261 (4th Cir. 2014).

Statutes and regulations also create legal entitlements to information. Perhaps most prominently, the Freedom of Information Act (FOIA), 5 U.S.C. § 552, grants any person the right to obtain records from federal agencies on request; the Federal Advisory Committee Act (FACA), 5 U.S.C. § 1001 *et seq.*, creates similar rights of access to information from committees that advise agencies; the Government in the Sunshine Act, 5 U.S.C. § 552b, provides a right of access to agency proceedings; and the Federal Election Campaign Act (FECA), 52 U.S.C. § 30101 *et seq.*, imposes reporting and disclosure requirements to provide information to members of the public about sources of campaign funds tapped by candidates for federal office, political parties, and political committees. Other statutes and regulations require employers to post notices providing a variety of information to employees,[4] retirement plans to convey information to beneficiaries,[5] corporations to report information to shareholders,[6] and companies to provide information about their use of toxic chemicals for the benefit of surrounding communities.[7]

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[4] *See* https://www.dol.gov/general/topics/posters (describing workplace posting requirements of various federal statutes and regulations).

[5] *See*, *e.g,*, 29 U.S.C. §§ 1024(b) & 1025(a) (ERISA provisions requiring reporting of plan and benefit information to plan participants).

[6] *See*, *e.g.*, 15 U.S.C. § 78n(c); 17 C.F.R. § 240.14a-3 (requiring corporations to provide annual reports to shareholders).

[7] *See*, *e.g.*, Emergency Planning & Community Right-to-Know Act, 42 U.S.C. § 11001 *et seq.* (requiring companies to (*Footnote continued*)

Informational entitlements also receive constitutional protection. Under this Court's precedents, the First Amendment's protection of freedom of speech encompasses the exchange of information, including commercial traffic in information: "This Court has held that the creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Moreover, the Court has held that this protection extends to the interest of those who desire to *receive* information without improper government interference, as well as those who wish to convey it. In *Sorrell*, for example, the plaintiffs included data miners and their customers (pharmaceutical manufacturers) asserting "their First Amendment rights" to obtain information that pharmacies were prohibited from providing them. *See id.* at 561. Likewise, in *Bigelow v. Virginia*, 421 U.S. 809 (1975), this Court extended First Amendment protection to an advertiser's commercial speech in large part because of "the constitutional interests of the general public" in obtaining "information of potential interest and value" about the lawful commercial availability of services—interests shared not only by "readers possibly in need of the services offered, but also … those with a general curiosity about, or genuine interest in, the subject matter." *Id.* at 822; *see also Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976) (emphasizing the informational interests of consumers and society).

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report inventories and releases of toxic chemicals and to provide public access to material safety data sheets, and authorizing citizen suits to compel compliance).

Indeed, the Court has repeatedly held that the First Amendment provides "a constitutional right to receive" as well as to originate speech. *Reno v. ACLU*, 521 U.S. 844, 874 (1997); *see also Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' "). The Constitution's protection of the dissemination of information extends "to the communication, to its source and to its recipients both." *Va. State Bd.*, 425 U.S. at 756. Constitutional protection thus protects against governmental interference with "access to information" as well as restraints on self-expression. *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

In light of both the real-world existence of interests in information and the long tradition of legal protection of those interests, this Court has, since the beginning of its development of modern standing doctrine over the last several decades, consistently recognized that a deprivation of information sought by a plaintiff is an injury in fact. In *Virginia State Board*, for example, the Court held that a claimed limitation on the interest in receiving information allowed consumers to challenge the constitutionality of a state law prohibiting pharmacists from advertising prescription drug prices. *See* 425 U.S. at 757 & n.15. The Court reasoned straightforwardly that a "right to receive … advertising … may be asserted" by individuals who wished to receive information about drug prices. *Id*. at 757. The Court did not require the appellees to establish that they had been injured in any other way by their lack of access to advertising by pharmacists, or even that they could not have obtained the price information they wanted by "digging it up themselves." *Id*. at 757 n.15.

Not long after, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court recognized that the denial of a legal right to information, like interference with the constitutionally protected interests at issue in *Virginia State Board*, inflicts injury for Article III purposes. There, the Court held that individuals alleging that they received false information about the availability of housing in violation of section 804(d) of the Fair Housing Act, 42 U.S.C. § 3604(d), had standing because the statute created "an enforceable right to truthful information," and a person who received false information "has suffered injury in precisely the form the statute was intended to guard against." 455 U.S. at 373.

The Court acknowledged the reality of informational injury most directly in its decisions in *Public Citizen* and *Akins*. *Public Citizen* involved the claim that the American Bar Association's Standing Committee on Federal Judiciary was an advisory committee under FACA—a claim that, if successful, would have subjected the committee to statutory requirements that committee meetings be open to the public and that committee records be made available to the public unless exempt under FOIA. The Court held that the denial of access to those records, which the plaintiffs desired and had requested, was an "injury sufficiently concrete and specific to confer standing." 491 U.S. at 448. The Court explained:

> As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue. 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. … There is no reason for a different rule here.

Id. at 449.

In *Akins*, the Court likewise recognized that the denial of information desired by an individual is, in itself, a concrete injury. The plaintiffs' claim was that an organization was a "political committee" under FECA, which would require it to report various information, including the sources of its donations, to the Federal Election Committee (FEC), from which the information would in turn be available to the public. The plaintiffs claimed standing based on their interest as voters in obtaining that information. As in *Public Citizen*, this Court agreed that the denial of information as to which the plaintiffs had an undoubted interest was a "concrete" injury for Article III purposes. 524 U.S. at 21. The Court reiterated that "a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute." *Id*.

Notably, although the statute at issue in *Akins* did not itself create a cause of action to compel disclosure of information directly to voters, the Court did not suggest that a direct statutory entitlement to information was essential or even relevant to the Article III standing inquiry. Rather, it considered whether the denial of information that it identified as the injury-in-fact required by Article III was within the "zone of interests" protected by FECA as part of its inquiry into whether the plaintiffs had "prudential" standing. *See id*. at 19. Because the interest of voters in obtaining information about political spending was "injury of a

kind that FECA seeks to address" by requiring such information to be reported to the FEC, *id*. at 20, the plaintiffs' injury was actionable under FECA's provision allowing individuals "aggrieved" by FEC action to bring suit, *see id*. at 19.

This Court's decision in *Spokeo*, in which the Court articulated the requirement that an injury "must actually exist" apart from Congress' s identification of an actionable legal right, 578 U.S. at 340, is fully consistent with its recognition in *Public Citizen* and *Akins* that the denial of information, in itself, may satisfy that criterion. *Spokeo* explicitly endorsed that view, citing the informational interests that sufficed to provide standing in those cases to illustrate the statement that plaintiffs alleging violations of certain rights that are created by (or within the zone of interests protected by) a statute "need not allege any *additional* harm beyond the one Congress has identified." *Id*. at 342. *TransUnion*, too, acknowledged the holdings of *Public Citizen* and *Akins*, and recognized that they establish that members of the public who allege the denial of an entitlement to information have standing. *See* 141 S. Ct. at 2214.

II. Informational injury may exist regardless of "downstream consequences" and be based on legally protected informational interests not specifically defined by statute.

Notwithstanding this Court's longstanding recognition that the deprivation of information is injury in fact for purposes of Article III, petitioner Acheson Hotels asks the Court to impose two critical limitations on informational standing. First, Acheson insists that a deprivation of information is injurious only if it has

the consequence of inflicting (or creating an imminent threat of) some other form of injury. Second, Acheson asserts that the denial of information can constitute injury in fact only if a *statute* creates a right to obtain or receive that information. Both limitations, however, are fundamentally irreconcilable with this Court's standing jurisprudence, and both rest on a failure to appreciate the consequences of the Court's acknowledgment that the denial of information is an injury that exists in the real world.

A. Where a plaintiff claims infringement of a substantive interest in information, Article III does not require proof of additional injuries caused by the withholding of information.

The notion that an informational injury is insufficient to create an Article III case or controversy unless it is accompanied by some other, consequential injury is directly at odds with the holdings of *Public Citizen* and *Akins*. In both of those decisions, the Court expressly stated that the withholding of information sought by the plaintiffs was in itself sufficient to constitute injury in fact. *Akins*, 524 U.S. at 21; *Public Citizen*, 491 U.S. at 449.

To be sure, the Court mentioned in both cases that the plaintiffs alleged that the information sought would be useful or relevant to them for the same generalized reasons that led Congress to provide for public access to the information. *See Akins*, 524 U.S. at 21 (stating that the Court had "no reason to doubt" that information of the type sought would help voters evaluate candidates); *Public Citizen*, 491 U.S. at 449 (stating that appellants sought access to the committee's information "in order to monitor its workings and

participate more effectively in the judicial selection process"). But in neither case did the Court state that its decision turned on those allegations, and in neither did it demand evidence of any specific harm attributable to the denial of the particular information beyond the denial itself. Thus, the plaintiffs' recitation of the "generic rationale for the public right of access [they sought] to vindicate," *Grae v. Corrections Corp. of Am.*, 57 F.4th 567, 573 (6th Cir. 2023) (Gibbons, J., dissenting), did not establish a consequential injury separate from the denial of information. It merely demonstrated that the withholding of the information itself *was* the type of injury the statute on which they relied aimed to prevent. *See Kelly v. RealPage Inc.*, 47 F.4th 202, 211–12 (3d Cir. 2022). *Spokeo* confirms that in such cases, where the denial of information is the "harm … Congress has identified," standing does not require any additional showing. 578 U.S. at 342.

Public Citizen underscored its holding that an informational injury was sufficient to establish Article III standing by pointing out that the Court had never demanded that plaintiffs seeking records under FOIA "show more than that they sought and denied specific agency records." 491 U.S. at 449 (citing cases). Under FOIA and similar statutes that create substantive disclosure entitlements, the harm Congress sought to prevent by compelling disclosure is the withholding of information. A plaintiff that alleges the denial of information thus alleges "the type of harm Congress sought to prevent by requiring disclosure." *Campaign Legal Ctr. v. FEC,* 31 F.4th 781, 789 (D.C. Cir. 2022) (citation omitted). Requiring more would upend decades of settled practice under FOIA and similar statutes, and would sharply limit the efficacy of FOIA as "a means for citizens to know what their government

is up to," "a structural necessity in a real democracy" and one incompatible with imposing on citizens a requirement "to explain why they seek the information." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (cleaned up).

Nothing in this Court's ruling in *TransUnion* suggests that denial of access to information to which a plaintiff claims some substantive entitlement is not itself an injury that can support Article III standing. The relevant discussion in *TransUnion* stands instead for a much narrower proposition: that where a potential "informational injury" does *not* stem from the denial of information to which a plaintiff claims a substantive entitlement, but rather from the provision of that information in an allegedly improper *format*, the plaintiff must identify some harmful consequence of the claimed error. Where, as in *TransUnion*, plaintiffs do not allege that the error resulted either in any misunderstanding of the information conveyed or in any other harmful "downstream consequence," they have failed to allege an injury in fact, because Article III is not satisfied by "[a]n asserted informational injury that causes *no* adverse effects"—not even the denial of information. *TransUnion*, 141 S. Ct. at 2214 (emphasis added; citation omitted).

Specifically, the claims in *TransUnion* that gave rise to this Court's brief discussion of informational standing were based on the defendant's having provided information to members of the plaintiff class in two mailings rather than one. The plaintiffs did not present evidence that anyone other than the named plaintiff even opened the mailings or was confused, misled, distressed, or otherwise adversely affected by the way the information was provided. *See id*. at 2213. Although the United States, as amicus curiae, argued

that the plaintiffs suffered a concrete informational injury, this Court determined that the plaintiffs themselves, unlike the plaintiffs in *Public Citizen* and *Akins*, "did not allege that they failed to receive any required information," only "that they received it *in the wrong format*." *Id.* at 2214. In addition, the information at issue in *TransUnion*, unlike that in *Public Citizen* and *Akins*, was not the subject of disclosure laws creating a substantive right of access to members of the general public. *Id.*

For these reasons, this Court stated that the holdings of *Public Citizen* and *Akins* that the denial of information itself sufficed to establish injury were inapplicable. "Moreover," the Court noted, the plaintiffs also had not identified any "downstream consequences"—i.e., injuries other than the denial of information—attributable to the claimed formatting error. Read in this context, the Court's concluding statement that an Article III informational injury requires some "adverse effects" means that a plaintiff must demonstrate either an actual denial of information or some other adverse effect attributable to the way the information was provided—not that denial of information can never, in itself, qualify as the required "adverse effect" (that is, injury).

Requiring some additional showing of consequential harm when, unlike in *TransUnion*, a plaintiff challenges an actual withholding of information to which he claims a substantive entitlement or interest in receiving would contradict a key aspect of the holdings of *Spokeo*, *TransUnion*, and the decisions on which they built: Intangible injuries are also injuries in fact when they actually exist in the real world. There is no principled basis for denying the reality of the injury that occurs when someone wants

information, claims a legal basis for obtaining it, and does not receive it. And there is similarly no basis in this Court's standing jurisprudence for holding that a person who has suffered one injury in fact must assert a second one to proceed in court (assuming satisfaction of the requirements of causation and redressability). Moreover, assessments of whether the consequences to the plaintiff of the denial of sought-after information are of sufficient magnitude to give rise to standing would entangle courts in assessing the "value of the information" sought, which is ordinarily not a matter for "the government" to decide. *Sorrell*, 564 U.S. at 579 (citation omitted).

That a denial of information itself can give rise to standing does not, however, mean that all claims involving withholding of information (or provision of misinformation) involve cognizable informational injuries for purposes of Article III. When a plaintiff alleges a violation of a requirement that information be provided as a part of a set of *procedures* aimed at protecting some other interest—for example, when notice is required as a step in an administrative decisional process—this Court's holdings that " 'bare procedural violation[s], divorced from any concrete harm,' … do[ ] not suffice for Article III standing" require a showing that the procedural default threatens some other concrete interest. *TransUnion*, 141 S. Ct. at 2313 (quoting *Spokeo*, 568 U.S. at 341); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing."). However, when a plaintiff claims an interest in substantive information, the denial of that information is itself an Article III injury.

See Casillas v. Madison Ave. Assocs., 926 F.3d 329, 334–35 (7th Cir. 2019).

Similarly, claims invoking interests protected by the common-law tort of fraud and its statutory analogs, while requiring proof of misrepresentation or breach of a duty to disclose material information, generally do not rest on an interest in information as such or seek to remedy informational injuries. Rather, such claims typically exist to vindicate pecuniary interests, and standing to assert them rests on harms to those interests rather than informational injury. *See*, *e.g.*, *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38 (2011) (stating that a federal securities fraud claim requires proof of economic loss caused by an alleged misrepresentation or omission).[8]

Finally, in cases where a plaintiff seeks to compel a defendant to act (or refrain from acting) in conformity with a claimed legal requirement, the fact that a remedy would incidentally provide the plaintiff with information does not by itself create informational standing for a plaintiff who otherwise has no legal entitlement to receive information or other concrete

[8] Analytically, the insufficiency of informational standing in such cases is likely better viewed not as an Article III issue but as a matter of the scope of the interests protected by the relevant statutory or common-law right of action. Although the Court formerly referred to the latter issue as "prudential standing," it now recognizes that the issue poses a *merits* rather than *standing* inquiry—that is, "whether [the plaintiff] has a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). Thus, in this category of cases, if a source of law created a substantive entitlement to the information in question and a right of action to enforce that entitlement that did not require proof of pecuniary loss, Article III would not stand as a barrier to claims resting on informational injury.

interest at stake. For example, a plaintiff does not have informational standing to compel an agency to issue a rule merely because the resulting rulemaking notice would provide information about the contents of the rule, or to compel an agency to enforce the law merely because doing so would provide information that the law was being enforced. Put another way, a plaintiff cannot avoid this Court's holdings that there is no individual Article III interest in "general compliance with regulatory law," *Spokeo*, 578 U.S. at 345 (Thomas, J., concurring); *TransUnion*, 141 S. Ct. at 2207 & n.3, by reframing that interest as one in receiving *information* by compelling general compliance with regulatory law. *See*, *e.g.*, *Common Cause v. FEC*, 108 F.3d 413, 417–18 (D.C. Cir. 1997) (holding that a mere interest in learning whether a violation of law had occurred would not provide standing to compel an agency to take an enforcement action against the claimed violation). Lawsuits brought to vindicate a specific legally protected interest in receiving information, however, do not present a similar Article III problem. *See Akins*, 524 U.S. at 23–24.

B. An informational injury sufficient to satisfy Article III requirements does not presuppose a right to information explicitly defined by a statute.

Acheson's argument that an informational interest created by a regulation cannot be the source of an informational injury satisfying Article III lacks support in precedent or reason. Although many informational injury cases in this Court and the lower courts refer to the sufficiency of injuries involving deprivations of statutory rights to information, *see*, *e.g.*, *Pub. Citizen*, 491 U.S. at 449; *Friends of Animals v. Jewell*, 828 F.3d

989, 992 (D.C. Cir. 2016), this Court has not stated that only those informational rights explicitly created by statute suffice, and the reasoning of its decisions is irreconcilable with any such limitation.

This Court's decisions hold that Article III requires "an injury in fact," *not* "an injury in law." Whether the denial of information is an injury in fact—one that really exists—does not depend on the source of law that makes it actionable. Of course, the injury must also be "legally protected" or "legally cognizable," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 578 (1992), and it must come within the zone of interests protected by a right of action created by Congress or the common law, *see Akins*, 524 U.S. at 19–20; *see also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("[P]rivate rights of action to enforce federal law must be created by Congress."). But those requirements, which go to the merits of a claim, are readily satisfied where, as here, a valid federal regulation defines the contours of substantive statutory rights, and a statutory right of action exists to enforce those rights. Article III does not require courts to pretend that a deprivation of information to which an individual is entitled by regulation, and for which Congress has provided a statutory remedy, is an injury that does not exist in fact.

This Court's decisions in *Akins* and *Lujan* confirm that a right to information explicitly created by statute is unnecessary for Article III standing. In *Akins*, the statute at issue provided for filing of reports by political committees and for public posting of those reports by the FEC, but did not expressly create an individual right of access to such reports or a cause of action through which an individual plaintiff could directly seek to obtain them; instead, it provided only that persons "aggrieved" by the FEC's dismissal of a

complaint could seek judicial review of the FEC's action. This Court nonetheless found an informational injury in fact, and held that seeking redress for it fell within the scope of the statutory right of action.

In *Lujan*, the Court went further still. The Court there stated that an interest closely akin to an informational one—"the desire to … observe an animal species, even for purely esthetic purposes"—"is undeniably a cognizable interest for purpose of standing." *Id.* at 562–63. The statutory requirements at issue in *Lujan* called for actions to protect endangered species, but created no right to observe them. Even so, the Court recognized that, if the government's alleged failure to comply with its legal obligations created an actual or imminent threat to a plaintiff's plans to observe particular animals, it would be "clear" that the plaintiff had suffered an injury in fact. *Id.* at 566. If that interest clearly sufficed as a basis for an injury in fact, an informational interest explicitly defined by regulation must also be sufficient.

III. Respondent had Article III standing to bring this action.

In this case, respondent Deborah Laufer asserted an interest in receiving information concerning the availability of accessible accommodations at Acheson's inn. A lawful regulation provides that the failure to provide that information to a person with a disability through a hotel's reservations service is a violation of the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability (including failure to accommodate individuals with disabilities) by places of public accommodation. *See* 42 U.S.C. §§ 12182(a) & (b)(2)(A)(ii); 28 C.F.R. § 36.302(e)(1)(ii). The ADA provides a right of action

for injunctive relief for "any person being subjected to discrimination on the basis of disability in violation" of the statute. 42 U.S.C. § 12188(a)(1).

Seeking to test Acheson's compliance, Ms. Laufer used Acheson's online reservation system and did not receive the information specified in the regulation. She invoked the statutory right of action, alleging that her use of the reservation system for that purpose was covered by the regulation's requirements and therefore that she had suffered actionable discrimination under the ADA. Ms. Laufer has thus claimed an "inability to obtain information" concerning Acheson's ability to accommodate persons with her disabilities "that, *on [her] view of the law*, the statute requires." *Akins*, 524 U.S. at 21 (emphasis added). For the reasons explained above, that allegedly unlawful denial of information to which she claims a substantive entitlement is an injury in fact, regardless of whether she has suffered any other injuries as a consequence.

Acheson, and the United States as amicus curiae, argue that the regulation does not require the provision of information to a tester because the regulation's informational requirement applies only "with respect to reservations made by any means," 28 C.F.R. § 36.302(e)(1)(ii), and Ms. Laufer neither made nor tried to make a reservation. But on Ms. Laufer's reading, the regulation *does* apply to her use of the reservation system, and she suffered actionable discrimination under the ADA in the form of the denial of the required information. Which view is correct—that is, whether the regulation is properly construed to entitle a tester to receive the required information—is a merits issue, not a question of whether the denial of information sought by Ms. Laufer was an Article III injury in fact. The injury she suffered sufficed to permit

federal adjudication of whether she actually suffered discrimination in violation of the statute and whether Acheson must remedy that violation by making the information available. Accordingly, should the Court reach the only question presented in this case—the existence of Article III standing—it should affirm the court of appeals' ruling on that issue.

CONCLUSION

If it does not dismiss this case as moot, the Court should affirm the decision of the court of appeals that respondent had Article III standing to bring this case.

Respectfully submitted,

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