No. 22-429

In the Supreme Court of the United States

ACHESON HOTELS, LLC,

Petitioner,

v.

DEBORAH LAUFER,

Respondent.

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

BRIEF FOR MASSACHUSETTS, CONNECTICUT, THE DISTRICT OF COLUMBIA, ILLINOIS, MARYLAND, NEW JERSEY, NEW YORK, OREGON, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
David C. Kravitz*
Deputy State Solicitor
Ann E. Lynch
David R. Rangaviz
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 963-2427
david.kravitz@mass.gov
**Counsel of Record*
(Additional counsel listed on signature pages)

TABLE OF CONTENTS

Page

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. Discrimination is inherently harmful to its victims. 4

II. Testing is a critical tool to reveal and document discrimination. 9

   A. Testing has documented the persistence of housing discrimination across the United States. 9

   B. Testing assists with policymaking as well as in enforcement of our civil rights laws. 15

III. Allegations that a plaintiff has personally suffered the harm of unlawful discrimination are sufficient to show injury-in-fact. 19

   A. Exclusion from a service, as alleged by respondent, is discrimination actionable under the ADA. 19

   B. Discriminatory exclusion from a reservation service is an injury-in-fact, regardless of whether the person then intends to complete a reservation. 21

   C. The Court need not revisit the status of “informational” injury that causes no harm because such an injury is not at issue in this case. 25

D. The suggestion by the United States that the text of the Reservation Rule defeats respondent's standing lacks merit. 30

1. Neither the ADA nor the Reservation Rule imposes any "use" requirement.... 31

2. A violation of the Reservation Rule is complete when the information it requires is not made available............. 33

CONCLUSION 36

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Choate, 469 U.S. 287 (1985)................ 6
Allen v. Wright, 468 U.S. 737 (1984).................. 5, 26
Egbert v. Boule, 142 S. Ct. 1793 (2022) 29
FEC v. Akins, 524 U.S. 11 (1998)........................... 24
FEC v. Cruz, 142 S. Ct. 1638 (2022) 25
Fulton v. City of Philadelphia,
141 S. Ct. 1868 (2021) 5
Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 4, 22-25, 28, 30, 32-33, 36
Heart of Atlanta Motel, Inc. v. United States,
379 U.S. 241 (1964) 5
Heckler v. Mathews, 465 U.S. 728 (1984) 4-5, 21
Jama v. Immigration and Customs Enforcement, 543 U.S. 335 (2005)...................... 32
Laufer v. Arpan LLC, 29 F.4th 1268
(11th Cir. 2022).. 27
Laufer v. Arpan LLC, 65 F.4th 615
(11th Cir. 2023).. 24
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 28
Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 28
Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018) 5
McKennon v. Nashville Banner Pub. Co., 513
U.S. 352 (1995) 18
National Pork Producers Council v. Ross, 143
S. Ct. 1142 (2023) 29-30
New Prime, Inc. v. Oliveira,
139 S. Ct. 532 (2019) 20

Obergefell v. Hodges, 576 U.S. 644 (2015) 5
Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999) 6
Richardson v. Howard, 712 F.2d 319
(7th Cir. 1983) 10
Roberts v. U.S. Jaycees, 468 U.S. 609 (1984) 5
S. Ca. Hous. Rights Ctr. v. Krug, 564 F. Supp.
2d 1138 (C.D. Cal. 2007) 17
Spokeo Inc. v. Robins,
578 U.S. 330 (2016) 4, 26, 28-30
Tennessee v. Lane, 541 U.S. 509 (2004) 1-2, 6
TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021) 4, 19, 25-30
US Airways, Inc. v. Barnett,
535 U.S. 391 (2002) 23
Warth v. Seldin, 422 U.S. 490 (1975) 28

Statutes, Rules, and Legislative Materials

28 C.F.R. § 36.302 .... 4, 20-21, 31-32, 34-35
28 C.F.R. Pt. 36, App. A 34-35
42 U.S.C. § 12101 .... 1, 26, 28-29
42 U.S.C. § 12131 2
42 U.S.C. § 12132 2
42 U.S.C. § 12182 .... 19, 23, 29, 31-33
42 U.S.C. § 12188 .... 20, 27
775 Ill. Comp. Stat. 5/3-102 16
Ill. Pub. Act. 102-896 (May 24, 2022) 16
Rev. Code Wash. 59.18.255 16

Miscellaneous

The American Heritage Dictionary (2d coll. ed. 1991) 20

Timothy T. Brown *et al.*, *Discrimination Hurts: The Effect of Discrimination on the Development of Chronic Pain*, 204 Soc. Sci. & Med. 1 (2018) 7

Center for the Study of Inequality at Cornell Univ., What We Know Project, *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?* (2019) 7

Civil Rights Division, U.S. Dep't of Justice, *Fair Housing Testing Program* 9

Complaint, *Massachusetts v. Peabody Properties, Inc.*, No. 2179CV00098 (Mass. Super. Ct., Hampden Cty., Feb. 26, 2021) 16-17

Fair Housing Advocates of Northern California, *National Origin and Source of Income Discrimination in Rental Housing in Marin, Sonoma, & Solano Counties 2019-2020 Audit Report* 15

Fair Housing Advocates of Northern California, *Race Discrimination in Rental Housing in Marin and Solano Counties* (2017) 14

Fair Housing Center of Central Indiana, *2017 Fair Housing Education & Rental Testing Audit Report* (2018) 11

Fair Housing Center of Central Indiana, *Fair Housing Rental Testing Audit Report on Section 8 Denial Rates in Marion County, Indiana* (2014) 15-16

Fair Housing of Marin, *Discrimination Against Latino Families in Marin and Sonoma Counties* (2016) 11

Final Judgment by Consent, *Massachusetts v. Peabody Properties, Inc.*, No. 2179CV00098 (Mass. Super. Ct., Hampden Cty., Mar. 23, 2021) 17

Greater New Orleans Fair Housing Action Center, *Housing Choice in Crisis: An Audit Report on Discrimination against Housing Choice Voucher Holders in the Greater New Orleans Rental Housing Market* (2021) 15-16

Greater New Orleans Fair Housing Action Center, *No Happy Tail: Emotional Support Animals in Housing* 12-13

Housing Opportunities Made Equal of Virginia, Inc., *A Study of Housing Discrimination Against Same-Sex Couples in Virginia* (2015) 11

Lauren Krnjacki *et al.*, *Disability-based Discrimination and Health: Findings from an Australian-based Population Study*, 42(2) Aus. & N.Z. J. Pub. Health 172 (2018) 8

Jamie Langowski *et al.*, *Qualified Renters Need Not Apply: Race and Voucher Discrimination in the Metro Boston Rental Housing Market* (2020) 13

Jamie Langowski *et al.*, *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market*, 29 Yale J.L. & Feminism 321 (2018) 10

Louisiana Fair Housing Action Center, *Denials, Discounts and Discrimination: An Investigation into Racial Discrimination in Rental Practices in the Gulf South* (2021) 14

Eun Ha Namkung & Deborah Carr, *The Psychological Consequences of Disability over the Life Course: Assessing the Mediating Role of Perceived Interpersonal Discrimination*, 61(2) J. Health & Soc. Beh. 190 (2020).. 8

Nat'l Fair Hous. Alliance, *Are You Listening Now? A National Investigation Uncovers Housing Discrimination against the Deaf and Hard of Hearing* (2013)..........................11-12

Office of the Att'y Gen. Disability Rights Bureau, *Investigation and Technical Assistance Activity Report on Fiscal Year 2021-2022* (July 28, 2022) 18

Agueda Pacheco-Flores, *Washington Lawmakers OK Bill to Ban Housing Bias Based on Tenant's Source of Income*, Seattle Times (Mar. 7, 2018) 16

Yin Paradies *et al.*, *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, 10(9) PLoS One 1 (2015)....................6-7

Maggie Scales, *After Senator Duckworth Shared She Couldn't Access Theatre, Mass. Residents with Disabilities Say Problems Persist Here Too*, Boston Globe (Aug. 2, 2023)...28-29

Chalia Stallings-Ala'ilima, *Protecting Veterans' Access to Housing*, Att'y Gen. J.......................... 12

Jeromey B. Temple & Margaret Kelaher, *Is Disability Exclusion Associated with Psychological Distress? Australian Evidence from a National Cross-sectional Survey*, 8(5) BMJ Open 1 (2018) 8

The Thurgood Marshall Institute & Nat'l Fair Hous. Alliance, *The Bad Housing Blues: Discrimination in the Housing Choice Voucher Program in Memphis, TN* (2022) 15-16

U.S. Dep't of Hous. & Urb. Dev., *Assistance Animals* 12

U.S. Dep't of Hous. & Urb. Dev., *Fact Sheet: Fiscal Year 2022 Fair Housing Initiatives Program (FHIP) Grants State-by-State Awards* (Mar. 21, 2023) 10

U.S. Dep't of Hous. & Urb. Dev. Office of Policy Dev. and Research, *Housing Discrimination Against Racial and Ethnic Minorities 2012* (2013) 10

Wash. State Office of the Att'y Gen., *AG's Sweep Uncovers Illegal Housing Discrimination Against Veterans* (Feb. 27, 2018) 12

Webster's II New Riverside Univ. Dictionary (1984) 20

Monnica T. Williams *et al.*, *Posttraumatic Stress Disorder and Racial Trauma*, 32(1) PTSD Res. Q. 1 (2021) 7

INTERESTS OF *AMICI CURIAE*

The *amici* States—Massachusetts, Connecticut, the District of Columbia, Illinois, Maryland, New Jersey, New York, Oregon, and Washington—share sovereign and compelling interests in protecting people with disabilities from discrimination within our borders. As Congress expressly recognized in enacting the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (ADA), "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem" that "denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous." *Id.* §§ 12101(a)(2), (8). Disability discrimination inflicts serious harm on its victims, and also "impede[s] people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life." *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring). *Amici* States would benefit if those contributions could be fully realized, and we are deeply committed to the goal of making the ADA's promise of equal access and opportunity for people with disabilities into a reality.

However, *amici* States—like the federal government—lack the resources to achieve that goal on our own. *See* U.S. Br. 16 (noting that "federal agencies have limited enforcement resources"). Accordingly, enforcement of the ADA by private parties—including testers—is an essential

complement to our ongoing efforts to eliminate discrimination against people with disabilities. Testing has been shown to be an extremely effective means of identifying and remedying unlawful discrimination across many civil rights contexts. Discrimination can be difficult to prove, and a well-designed test offers a reliable way to demonstrate its existence beyond serious dispute. Conversely, a well-designed test can also sometimes show that conduct that may appear in some way to be discriminatory in fact is not. Testing thus helps to uncover unlawful discrimination and also shields lawful conduct from unjustified litigation.

As public entities subject to certain of the ADA's requirements, *see* 42 U.S.C. §§ 12131(1)(A), 12132; *Lane*, 541 U.S. at 533-34, *amici* States also have an interest in limiting the ability to sue under the ADA to those plaintiffs who have actually suffered harm as a result of disability discrimination. We have no interest in frivolous or nuisance lawsuits being brought against us or anyone else. As explained herein, however, we believe that testers such as respondent do themselves suffer harm from discrimination when they are excluded from services like the hotel reservation system at issue here, and that they therefore should have a cause of action under the ADA.

For these reasons and those set forth below, *amici* States respectfully submit that respondent in this case had standing to sue.

SUMMARY OF THE ARGUMENT

This Court has long recognized that invidious discrimination is inherently harmful to those who experience it, whether on the basis of their race, sex, sexual orientation, or disability. Social science research confirms that discrimination harms its victims directly and personally, with numerous studies documenting adverse health outcomes for people who suffer discrimination.

Discrimination can be difficult to prove, however, and testing is a uniquely effective means of gathering evidence of its existence. *Amici* States and the federal government have therefore long supported and used testers as a means of rooting out unlawful discrimination. Testers not only uncover individual perpetrators of discrimination, but also can reveal broad patterns of discrimination, which in turn assists *amici* States in deploying their limited resources and developing policy responses.

Amici States therefore urge this Court to conclude that the tester in this case had standing. The ADA's careful definitions of discrimination, based on extensive congressional findings regarding the nature of and harm caused by discrimination based on disability, create a cause of action for a person with a qualifying disability who is not afforded services that a public accommodation makes generally available. The complaint here duly alleges that petitioner's failure to comply with the ADA harmed respondent herself by excluding her from the service petitioner offers. That harmful and discriminatory exclusion

suffices to establish standing under this Court's well-established test for injury-in-fact.

Petitioner's argument that respondent suffered no harm because, notwithstanding her exclusion from using the reservation system, she had no ultimate intention to visit its hotel cannot be squared with this Court's precedent, most significantly *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which upheld standing on virtually indistinguishable facts. And nothing in this Court's more recent decisions detracts from *Havens Realty*'s conclusion. In particular, the discussion in *TransUnion LLC v. Ramirez* of situations where "[n]o concrete harm" is at issue, 141 S. Ct. 2190, 2214 (2021), has no relevance to this case, because—as this Court has repeatedly recognized—discriminatory treatment is inherently harmful. This case, rather, is emblematic of this Court's recognition in *TransUnion* and *Spokeo Inc. v. Robins*, 578 U.S. 330 (2016), that Congress has the authority to create a cause of action to remedy such concrete harms. Finally, the United States's position that this tester lacks standing under its reading of the Reservation Rule, 28 C.F.R. § 36.302(e), lacks merit, as that position cannot be squared with the text of the ADA, the Rule itself, or the rest of the regulation in which the Rule appears.

ARGUMENT

I. Discrimination is inherently harmful to its victims.

This Court has repeatedly confirmed what *amici* States know to be true: invidious discrimination causes harm. "[D]iscrimination itself, by perpetuating

archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community, can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (citation and internal quotation marks omitted). Justice Goldberg's emphatic defense of antidiscrimination laws as "the vindication of human dignity, and not mere economics," *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (concurring opinion), rings as true today as it did nearly 60 years ago.

For example, "the stigmatizing injury often caused by racial discrimination," this Court observed in *Allen v. Wright*, is "one of the most serious consequences of discriminatory government action." 468 U.S. 737, 755 (1984). Sex discrimination, too, the Court held in *Roberts v. U.S. Jaycees*, "deprives persons of their individual dignity" and inflicts "stigmatizing injury." 468 U.S. 609, 625 (1984). More recently, the Court observed that "'[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,'" *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (quoting *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018)), and "recogni[zed] that laws excluding same-sex couples from the marriage right impose stigma and injury," *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015); *see also id.* at 668 (concluding that laws barring same-sex couples from marriage "harm and humiliate the children of same-sex couples").

The Court has similarly recognized that discrimination based on disability inflicts serious harm on its victims. Prior to the ADA's enactment, this Court approvingly quoted the observations of Members of Congress with respect to the harm that even unintentional discrimination on the basis of disability inflicts. *See Alexander v. Choate*, 469 U.S. 287, 295-96 (1985) ("Representative Vanik . . . described the treatment of the handicapped as one of the country's 'shameful oversights,' which caused the handicapped to live among society 'shunted aside, hidden, and ignored.'") (citation and footnotes omitted). This Court has since recognized the "stigmatizing injury" caused by "unwarranted assumptions" that people with disabilities are "incapable or unworthy of participating in community life." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (citation and internal quotation marks omitted); *see also*, *e.g.*, *Lane*, 541 U.S. at 535 (Souter, J., concurring) ("[L]ike other invidious discrimination, [laws burdening people with disabilities] classified people without regard to individual capacities, and by that lack of regard did great harm."); *id.* at 536 (Ginsburg, J., concurring) (noting the ADA's goal to "guarantee a baseline of equal citizenship by protecting against stigma and systematic exclusion from public and private opportunities") (citation, internal quotation marks, and alteration omitted).

Research has confirmed what this Court has recognized: discrimination is inherently harmful. For example, a statistical analysis of nearly 300 published studies concluded that "racism is significantly related to poorer health, with the relationship being stronger for poor mental health and weaker for poor physical

health." Yin Paradies *et al.*, *Racism as a Determinant of Health: A Systematic Review and Meta-Analysis*, 10(9) PLoS One 1, 24-25 (2015) (noting "[t]he impacts of racism on the dysregulation of cognitive-affective regions such as the prefrontal cortex, anterior cingulate cortex, amygdala and thalamus"); *see also, e.g.*, Timothy T. Brown *et al.*, *Discrimination Hurts: The Effect of Discrimination on the Development of Chronic Pain*, 204 Soc. Sci. & Med. 1, 7 (2018) (concluding that over 4 million people "likely suffer from . . . chronic pain that is caused by psychological distress due to discrimination"). Posttraumatic stress disorder, or PTSD, is particularly closely linked with race discrimination. *See, e.g.*, Monnica T. Williams *et al.*, *Posttraumatic Stress Disorder and Racial Trauma*, 32(1) PTSD Res. Q. 1, 1 (2021) ("Racism has been linked to a host of negative mental health conditions, but the connection between racial discrimination and PTSD symptoms appears to be the most robust."). Studies have similarly documented a strong correlation between anti-LGBTQ+ discrimination and poor mental health outcomes. *See, e.g.*, Ctr. for the Study of Inequality at Cornell Univ., What We Know Project, *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?* (2019), https://tinyurl.com/2faxfjnu (detailing findings from 300 peer-reviewed studies and concluding that 95% of them "found that discrimination is associated with mental and physical health harms for LGBT people").

Not surprisingly, studies also confirm a link between discrimination based on disability and poor health outcomes for people with disabilities. A large-scale study from Australia, for example, found that

"persons with a disability who cite an instance of discrimination were about 2.2 times more likely to be in psychological distress, compared with those who did not experience discrimination in the last year." Jeromey B. Temple & Margaret Kelaher, *Is Disability Exclusion Associated with Psychological Distress? Australian Evidence from a National Cross-sectional Survey*, 8(5) BMJ Open 1, 15 (2018). The association was especially significant in health-care settings: "70% of persons citing discrimination from health staff were in psychological distress, with this group being two times more likely to be in distress than those who did not cite health staff as a source of discrimination." *Id.* at 19; *see also, e.g.*, Eun Ha Namkung & Deborah Carr, *The Psychological Consequences of Disability over the Life Course: Assessing the Mediating Role of Perceived Interpersonal Discrimination*, 61(2) J. Health & Soc. Beh. 190, 203 (2020) (reporting data that "clearly show that perceived interpersonal discrimination was a significant pathway linking disability with psychological well-being for working-age adults"); Lauren Krnjacki *et al.*, *Disability-based Discrimination and Health: Findings from an Australian-based Population Study*, 42(2) Aus. & N.Z. J. Pub. Health 172, 173 (2018) (finding "a moderate to strong association between disability-based discrimination and self-rated health and psychological distress").

In short, invidious discrimination, including discrimination on the basis of disability, harms its victims. *Amici* States have a compelling interest in preventing the infliction of such harms on our residents, and we therefore support both public and private efforts to identify and remedy discrimination.

II. Testing is a critical tool to reveal and document discrimination.

In *amici* States' experience, testing by private plaintiffs is an exceptionally effective means of identifying and combatting illegal discrimination. Testing has been shown to increase compliance with numerous civil rights laws, including the ADA. *Amici* States concur with the federal government that "testing can be a valuable tool to investigate housing, lending, and public accommodations market practices and to document illegal discrimination." Civil Rights Division, U.S. Dep't of Justice, *Fair Housing Testing Program* (last updated Feb. 7, 2023), https://tinyurl.com/kae2htf6.

As detailed below, testing has a long track record of documenting discrimination against people with disabilities and in other contexts. Petitioner's arguments, by undercutting testers' claims of injury-in-fact when they encounter discrimination, would if accepted inevitably curtail the ability of testers to turn to the federal courts as a means of redressing illegal discrimination, thus depriving *amici* States and others seeking to end such discrimination of a critical tool.

A. Testing has documented the persistence of housing discrimination across the United States.

The context of housing discrimination well illustrates the invaluable contributions of testers to

identifying discrimination.[1] The U.S. Department of Housing and Urban Development (HUD) has conducted major national testing studies approximately once per decade since the 1970s,[2] and for years has also funded local fair housing programs. In 2022, HUD granted more than $54 million to 182 fair housing programs in 42 states, including most of the *amici* States.[3] Some of this grant money is specifically intended to fund testing.[4]

Fair housing programs, in turn, conduct testing in response to individual reports of discrimination and

---

[1] *See, e.g.*, Office of Policy Dev. and Research, U.S. Dep't of Hous. & Urb. Dev., *Housing Discrimination Against Racial and Ethnic Minorities 2012*, at xii (June 2013), https://tinyurl.com/3uk93thn ("HUD 2012 Report") ("Paired testing offers a uniquely effective tool for directly observing differential treatment of equally qualified homeseekers, essentially catching discrimination in the act[.]"); Jamie Langowski *et al.*, *Transcending Prejudice: Gender Identity and Expression-Based Discrimination in the Metro Boston Rental Housing Market*, 29 Yale J.L. & Feminism 321, 331 (2018) ("Matched-pairs testing is a recognized methodology for research and enforcement and has been used in the housing market context since the 1960s and by the federal government starting in the 1970s."); *Richardson v. Howard*, 712 F.2d 319, 322 (7th Cir. 1983) (noting that tester evidence may receive more weight because testers are "careful and dispassionate observers").

[2] HUD 2012 Report, *supra* n.1, at xi.

[3] U.S. Dep't of Hous. & Urb. Dev., *Fact Sheet: Fiscal Year 2022 Fair Housing Initiatives Program (FHIP) Grants State-by-State Awards* (Mar. 21, 2023), https://tinyurl.com/mr49d7rz.

[4] *See id.* (describing "fund[ing for] non-profit fair housing organizations to carry out testing and enforcement activities to prevent or eliminate discriminatory housing practices").

also conduct systemic testing of their service areas.[5] Testing studies conducted within just the past few years have documented the persistence of discrimination in housing markets around the country.

In particular, testing has revealed significant disability-based discrimination in housing. For example, a 2013 national study conducted 303 matched-pair tests of "117 rental firms in 98 cities in 25 states" to assess the level of discrimination against individuals who are deaf or hard of hearing.[6] "[A]bout one in four rental firms exhibited some form of differential treatment against deaf or hard of hearing callers."[7] A second phase of testing showed, among other things, that "40 percent of rental firms hung up on deaf or hard of hearing individuals at least once"; "86 percent of the rental firms gave more information about available apartments and amenities to the hearing callers than to deaf or hard of hearing callers"; "76 percent of rental firms told hearing testers about more available units"; and "70 percent of rental firms

---

[5] *See, e.g.*, Fair Housing Center of Central Indiana, *2017 Fair Housing Education & Rental Testing Audit Report* (2018), https://tinyurl.com/52cdabrk; Fair Housing of Marin, *Discrimination Against Latino Families in Marin and Sonoma Counties* (2016), https://tinyurl.com/4un6s682; Housing Opportunities Made Equal of Virginia, Inc., *A Study of Housing Discrimination Against Same-Sex Couples in Virginia* (2015), https://tinyurl.com/wmfw8snk.

[6] Nat'l Fair Hous. Alliance, *Are You Listening Now? A National Investigation Uncovers Housing Discrimination against the Deaf and Hard of Hearing* 7 (2013), https://tinyurl.com/3z7enp7z.

[7] *Id.* at 7.

quoted higher rental rates to deaf or hard of hearing testers."[8]

State entities conduct their own testing studies as well. For example, in 2016 the Washington Attorney General's Office "initiated testing across the state" to "confirm the existence and gauge the scope" of a suspected practice among certain housing providers of discriminating against veterans with disabilities. Chalia Stallings-Ala'ilima, *Protecting Veterans' Access to Housing*, Att'y Gen. J., https://tinyurl.com/4rwjfaaa. The testing revealed that multiple providers were illegally refusing to accept housing vouchers from veterans with disabilities; most of the providers "entered into agreements with the Attorney General's Office to end their discrimination." Wash. State Office of the Att'y Gen., *AG's Sweep Uncovers Illegal Housing Discrimination Against Veterans* (Feb. 27, 2018), https://tinyurl.com/59m28bzk.

Greater New Orleans Fair Housing Action Center likewise used testers to assess whether housing providers in Baton Rouge and New Orleans were complying with their obligation to accommodate individuals with disabilities who need assistance animals.[9] "Of the 60 tests conducted, 24 housing providers categorically refused to consider making any

---

[8] *Id.* at 11.

[9] Greater New Orleans Fair Housing Action Center, *No Happy Tail: Emotional Support Animals in Housing* 8, https://tinyurl.com/53psps6x ("*No Happy Tail*"). Federal law requires housing providers to make reasonable accommodations for assistance animals that, among other things, "provide[] emotional support that alleviates one or more identified effects of a person's disability." U.S. Dep't of Hous. & Urb. Dev., *Assistance Animals*, https://tinyurl.com/bdzkb5tt.

exception to their pet policy to permit an emotional support animal to live on the property."[10] Twenty percent considered the question but never provided a final answer and another 20% would have charged illegal additional fees.[11] Only 20% of the housing providers surveyed would have complied with the law.[12]

Testing has also revealed other forms of housing discrimination. For example, a 2020 study of Boston's rental market, which involved 50 test groups, each consisting of two matched pairs—200 tests in total—revealed substantial unlawful race-based discrimination, as well as discrimination against housing choice voucher holders, which is unlawful in Massachusetts.[13] The authors found that 38% of Black testers without vouchers were not contacted, whereas only 8% of the white testers without vouchers were "ghosted" early in the interaction.[14] The authors also found that 80% of the white testers without a voucher were able to see a housing site, whereas only 48% of the Black testers were able to do so.[15] Race-based disparities persisted with respect to "extra" information housing providers shared with, and incentives they offered to, testers.[16]

---

[10] *No Happy Tail*, *supra* n.9, at 9.

[11] *Id*. at 2.

[12] *Id*.

[13] Jamie Langowski *et al.*, *Qualified Renters Need Not Apply: Race and Voucher Discrimination in the Metro Boston Rental Housing Market* (2020), https://tinyurl.com/hun4nrnt.

[14] *Id*. at 17 Fig. 4.

[15] *Id*. at 17 Fig. 5.

[16] *Id*. at 17-18 Figs. 6-8.

Similarly stark results emerged from the Louisiana Fair Housing Action Center, which conducted 240 matched-pair tests of housing providers in New Orleans; Jackson, Mississippi; and Houston and Dallas, Texas.[17] Overall, 53% of the paired tests showed evidence of differential treatment based on race: the Black tester experienced discriminatory treatment in 60% of the tests in Houston, 57% of the tests in New Orleans, 48% of the tests in Jackson, and 44% of the tests in Dallas.[18] Additionally, "white testers were offered discounted rent or financial incentives that were not made available to [Black] testers."[19] And another audit reached similar conclusions in Northern California, where more than half of the 46 matched-pair tests evidenced "at least some discrepancies or disadvantages in treatment for the [Black] tester."[20]

Use of testers thus can and does reveal pervasive discrimination on the basis of disability, race, and other prohibited categories, that would otherwise go unidentified.

---

[17] Louisiana Fair Housing Action Center, *Denials, Discounts and Discrimination: An Investigation into Racial Discrimination in Rental Practices in the Gulf South* 7 (2021), https://tinyurl.com/4drtc3z9.

[18] *Id*. at 11.

[19] *Id*. at 17.

[20] Fair Housing Advocates of Northern California, *Race Discrimination in Rental Housing in Marin and Solano Counties* 10, 12 (2017), https://tinyurl.com/ynjsfnx8.

B. Testing assists with policymaking as well as in enforcement of our civil rights laws.

In addition to identifying discrimination, testing audits can also assist *amici* States and others in developing policy and allocating resources, including resources devoted to enforcement.

For example, several fair housing programs have used testers to assess discrimination against housing choice voucher holders both in jurisdictions that have laws prohibiting such discrimination and those that do not.[21] Many of these testing studies suggest that

---

[21] *See, e.g.*, Fair Housing Center of Central Indiana, *Fair Housing Rental Testing Audit Report on Section 8 Denial Rates in Marion County, Indiana* 3 (2014) ("*Marion County*"), https://tinyurl.com/mr397xnu (reporting that "housing providers refused to accept vouchers 82 percent of the time"); The Thurgood Marshall Institute & Nat'l Fair Hous. Alliance, *The Bad Housing Blues: Discrimination in the Housing Choice Voucher Program in Memphis, TN* 4 (2022) ("*Bad Housing Blues*"), https://tinyurl.com/mrn7yexx ("84.4 percent of tests … documented discrimination based on the tester's source of income"); Fair Housing Advocates of Northern California, *National Origin and Source of Income Discrimination in Rental Housing in Marin, Sonoma, & Solano Counties 2019-2020 Audit Report* 19, https://tinyurl.com/5cmvkhck ("53 percent showed discrimination based on source of income"); Greater New Orleans Fair Housing Action Center, *Housing Choice in Crisis: An Audit Report on Discrimination against Housing Choice Voucher Holders in the Greater New Orleans Rental Housing Market* 8 (2021), https://tinyurl.com/56jp56vb ("Landlords denied voucher holders the opportunity to rent units eight-two percent (82 percent) of the time, either by outright refusal to accept vouchers or by the addition of insurmountable requirements for voucher

legislation to prohibit such discrimination would assist in furthering the goals of the housing choice voucher program,[22] which include enabling low-income tenants to choose a home and a neighborhood.[23] In part because of advocacy highlighting such testing-based studies of source of income discrimination, in 2018 Washington banned discrimination against housing choice voucher holders.[24] Illinois enacted a similar ban in 2022.[25]

Testing-based audits of a housing market can also identify the need for and spur enforcement actions by both fair housing programs and government agencies. As one example, after Massachusetts Fair Housing Center (MFHC) audits showed some discriminatory treatment for individuals who are deaf or hard of hearing, MFHC conducted a paired test of a specific housing provider that ultimately revealed discriminatory treatment, including a hang up, a direct refusal to accommodate, and failure to follow up with the deaf tester.[26] This testing-based evidence

---

holders making it impossible for voucher holders to rent units."). As of 2021, 20 states and 112 cities or counties protected housing choice voucher holders from discrimination. *Bad Housing Blues*, *supra*, at 38.

[22] *See, e.g.*, *Marion County*, *supra* n.21, at 15.

[23] *Bad Housing Blues*, *supra* n.21, at 24-25.

[24] *See* Rev. Code Wash. 59.18.255; Agueda Pacheco-Flores, *Washington Lawmakers OK Bill to Ban Housing Bias Based on Tenant's Source of Income*, Seattle Times (Mar. 7, 2018), https://tinyurl.com/y93nc33c.

[25] Ill. Pub. Act. 102-896 (May 24, 2022) (codified at 775 Ill. Comp. Stat. 5/3-102).

[26] Complaint, *Massachusetts v. Peabody Properties, Inc.*, No. 2179CV00098, at 4-6 (Mass. Super. Ct., Hampden Cty., Feb. 26, 2021).

ultimately led to complaints against the housing provider by both MFHC itself and the Commonwealth of Massachusetts.[27] As a part of the resolution, the housing provider agreed to adopt a policy regarding the provision of auxiliary aids and services to individuals who are deaf or hard of hearing, train its staff on fair housing laws and its new policy, obtain specialized training from the Massachusetts Commission for the Deaf and Hard of Hearing, and advertise the availability of sign language interpreters.[28]

Similarly, the Southern California Housing Rights Center (HRC) relied on testing evidence to enforce laws barring discrimination against families with children. *See S. Ca. Hous. Rights Ctr. v. Krug*, 564 F. Supp. 2d 1138 (C.D. Cal. 2007). The testing occurred after an individual inquired about housing and was told that families with children were discouraged at the property. *Id.* at 1140. HRC's investigation included "five phone tests, three on-site tests, and one on-site survey." *Id.* Finding that defendants had unlawfully discriminated against families with children, the court ordered "injunctive relief . . . to ensure that Defendants stop discriminating," including mandated annual fair housing training, fair housing signage, and revision of its rental policies and procedures. *Id.* at 1146, 1155. Orders such as these, arising in large part from testing evidence, aid *amici* States in ensuring compliance with our laws and

---

[27] *Id.* at 2, 8-9.

[28] Final Judgment by Consent, *Massachusetts v. Peabody Properties, Inc.*, No. 2179CV00098, at 4-6 (Mass. Super. Ct., Hampden Cty., Mar. 23, 2021).

combatting unlawful discrimination within our jurisdictions.

In sum, testers—and litigation arising out of testing—are an essential part of the fabric of civil rights enforcement in this country. Neither the States nor the federal government have adequate resources to fully protect their residents from the harm that discrimination causes. *See, e.g.*, Office of the [Illinois] Att'y Gen. Disability Rights Bureau, *Investigation and Technical Assistance Activity Report on Fiscal Year 2021-2022* (July 28, 2022), https://tinyurl.com/3h4rp3n3 (reporting 437 open investigations and 242 new complaints received in one fiscal year); U.S. Br. 16. And, as this Court has recognized, the ability of individuals alleging discrimination to proceed in court is of tremendous value in furthering the objectives of civil rights laws. *See, e.g.*, *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358-59 (1995) ("The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination . . . is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of the [law's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance.").

If testers are not able to litigate when they discover discrimination, the inevitable result will be less enforcement of civil rights laws and more unlawful discrimination.

III. Allegations that a plaintiff has personally suffered the harm of unlawful discrimination are sufficient to show injury-in-fact.

For all the reasons already discussed, *amici* States have a strong interest in the ability of private plaintiffs to seek redress in court when they have identified, and been subjected to, discrimination. And a straightforward application of this Court's familiar test shows that a plaintiff like respondent here—who alleged that she attempted to use petitioner's hotel reservation system but was excluded from doing so—has alleged sufficient facts to establish injury-in-fact under Article III. *See, e.g.*, *TransUnion*, 141 S. Ct. at 2203. Petitioner's contrary arguments are inconsistent with this Court's precedent and with common sense. And the position advanced by the United States that respondent has not alleged injury-in-fact within the meaning of ADA Title III and the Reservation Rule, *see* U.S. Br. 17-22, cannot withstand scrutiny.

A. Exclusion from a service, as alleged by respondent, is discrimination actionable under the ADA.

The allegations of respondent's complaint readily meet the ADA's definition of "discrimination." Congress defined "discrimination" in the context of public accommodations like hotels to include "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . services . . . to individuals with disabilities." 42 U.S.C. § 12182(b)(2)(A)(ii).

Dictionaries published around the time of the ADA's enactment in 1990 define "afford" in this context to mean "provide." *See, e.g.*, The American Heritage Dictionary 18 (2d coll. ed. 1991) ("To provide"); Webster's II New Riverside Univ. Dictionary 83 (1984) ("To provide"); *see also New Prime, Inc. v. Oliveira*, 139 S. Ct. 532, 539-40 & n.1 (2019) (looking to "dictionaries of the era" to ascertain a statutory "term's meaning at the time of the Act's adoption"). And Congress has granted a cause of action to "any person who is being subjected to discrimination on the basis of disability in violation of this subchapter." 42 U.S.C. § 12188(a)(1). Thus, any person with a qualifying disability to whom a covered "service" is not being "afford[ed]"—i.e., provided—by a public accommodation has a cause of action under the ADA. And under the so-called "Reservation Rule," 28 C.F.R. § 36.302(e) (which petitioner has not challenged as *ultra vires*, Pet. App. 5a n.2), one such "service" is the "reservations service" maintained by a "place of lodging." *Id.* §§ 36.302(e)(1), (e)(1)(ii). More specifically, the Rule makes plain that a hotel operator must "modif[y]" its "means" of making "reservations" so that "individuals with disabilities [can] assess independently whether a given hotel or guest room meets his or her accessibility needs." *Id.* §§ 36.302(a), (e)(1), (e)(1)(ii).

Taking the allegations of respondent's complaint as true, as is required at this stage of the proceedings, respondent has plainly alleged "a failure" on petitioner's part to comply with the Reservation Rule, and thus with the ADA. *See, e.g.*, JA 6a-7a (complaint); Pet. App. 3a (summarizing the complaint's allegations). She has alleged that she, personally, experienced the effects of petitioner's

failure to comply with the ADA when she tried to "ascertain" whether petitioner's hotel met her accessibility needs, "was unable to do so" because the requisite information was not available, was thus deprived of a service that is available to the general public, and thereby "suffered, and continues to suffer, frustration and humiliation as the result of the discriminatory conditions present at Defendant's website." JA 6a-7a, 10a. Respondent has thus alleged that she, a person with disabilities, has suffered "discrimination" within the meaning of the ADA. The fact that she was unable to "assess" whether the hotel "meets . . . her accessibility needs," 28 C.F.R. § 36.302(e)(1)(ii), is enough to establish a violation; neither the ADA nor the Reservation Rule requires more.

B. Discriminatory exclusion from a reservation service is an injury-in-fact, regardless of whether the person then intends to complete a reservation.

Having adequately alleged that she suffered "discrimination" as defined in federal law, one might think it obvious that respondent has alleged facts sufficient to support standing. *See, e.g.*, *Heckler*, 465 U.S. at 739-40 ("[A]s we have repeatedly emphasized, discrimination itself . . . can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group."). But, petitioner urges, the complaint's allegations do not state an injury-in-fact because respondent had no intention to visit petitioner's hotel and therefore could not have been harmed by its alleged discrimination. This

argument runs headlong into this Court's unanimous decision in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). That case held that a person denied legally-required information for discriminatory reasons has been discriminated against, and has thereby been harmed, regardless of whether the person intended to act on the information. *Id.* at 373-74. And, having suffered harm, that person has standing to bring a federal action if Congress has authorized it. *Id.* at 374.

Specifically, *Havens Realty* upheld Article III standing for a Black "tester" who was falsely told that an apartment complex had no availability, even though she had no intention of actually renting an apartment. *Id.* This Court observed that the statute "banned discriminatory [false] representations," and held that the tester "suffered injury in precisely the form the statute was intended to guard against." *Id.* at 373-74.[29] The Court held that the tester's lack of "any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of [the statute]." *Id.* at 374. And the Court concluded that because the tester alleged that she "suffered 'specific injury' from the challenged acts of petitioners, . . . the Art. III requirement of injury in fact is satisfied." *Id.*

---

[29] As the Court explained, the relevant statute at the time made it "unlawful for an individual or firm covered by the Act '[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.'" 455 U.S. at 373 (emphasis deleted) (quoting the then-current version of 42 U.S.C. § 3604(d)).

Importantly to the Article III analysis, the statute in *Havens Realty* did not ban *all* false representations about housing. It banned "discriminatory" false representations, i.e., false representations made "*because of* race, color, religion, sex, or national origin." *Id.* at 373-74 (internal quotation marks omitted; emphasis added); *see also id.* at 375 (noting that a white tester lacked standing because, *inter alia*, he "d[id] not allege that he was a victim of a discriminatory misrepresentation" and thus "ha[d] not pleaded a cause of action under" the statute at issue). Similarly here, the ADA creates a cause of action to redress the harms of disability-based *discrimination*, including discrimination in the form of "fail[ing] to make reasonable modifications . . . necessary to afford . . . services . . . to individuals with disabilities," 42 U.S.C. § 12182(b)(2)(A)(ii), as elucidated in the Reservation Rule.[30] Thus, like the tester in *Havens Realty*, respondent has alleged that she was discriminated against, and thus injured, "in precisely the form the statute was intended to guard against." 455 U.S. at 373.

---

[30] That the discriminatory misrepresentation at issue in *Havens Realty* was likely intentional, whereas a failure to supply information regarding accessibility may only be negligent, is irrelevant. As petitioner concedes, the ADA extends to "'discriminatory effects,'" because "for a person who uses a wheelchair, the failure to provide a wheelchair ramp has the same practical effect as a facially discriminatory 'no persons who use wheelchairs allowed' sign." Pet. Br. 40 (citation omitted). The excluded person suffers concrete harm in both situations. *Cf. US Airways, Inc. v. Barnett*, 535 U.S. 391, 397-98 (2002) (holding that, in light of "the [ADA]'s basic equal opportunity goal," exceptions may be required even to an employer's "neutral rules").

A simple hypothetical demonstrates that *Havens Realty* applies to 21st-century services and testing methods such as those at issue here. Imagine that a Black tester, instead of walking into an apartment complex's rental office, visited its website and, after filling out an online application form that asked for the applicant's race, received an automated response because of his race falsely stating that no apartments were available. Under *Havens Realty*, the tester would surely have standing to sue, even though in this hypothetical the complex owner "had no idea who [the tester] was," Pet. Br. 40, and even though millions of other Black people could similarly visit the site, fill out the form, and allege illegal racial discrimination upon receiving the automated response. That tester would personally suffer the harm of discrimination all the same. Discrimination that occurs online is still discrimination. *See, e.g.*, *Laufer v. Arpan LLC*, 65 F.4th 615, 618 (11th Cir. 2023) (Newsom, J., concurring in the denial of rehearing *en banc*) (stating, in a case virtually identical to this one, that he was "just not convinced that Article III itself distinguishes between online and in-person 'discrimination.'").[31]

---

[31] For similar reasons, petitioner's argument that respondent's injury is not "particularized," Pet. Br. 22, lacks merit. The complaint alleges that respondent *personally* suffered the ill effects of petitioner's allegedly noncompliant website. *See* JA 6a-7a, 10a-11a. The fact that millions of other people with disabilities might *also* have tried and failed to use petitioner's website is of no moment; that fact is simply inherent in the nature of Internet websites. That a lot of people may be in a position to suffer a particular injury-in-fact does not render that injury non-particularized or otherwise defeat standing. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'").

Nothing this Court has said since it decided *Havens Realty* has called into question its holding on the standing of "testers" seeking to root out discrimination. Indeed, in the post-*TransUnion* case of *Federal Election Commission v. Cruz*, this Court approvingly described *Havens Realty* as standing for the proposition that "a 'tester' plaintiff posing as a renter for purposes of housing-discrimination litigation still suffered an injury under Article III." 142 S. Ct. 1638, 1647 (2022). Substituting the word "disability" for "housing" in that description decides this case in respondent's favor.

C. The Court need not revisit the status of "informational" injury that causes no harm because such an injury is not at issue in this case.

The essence of petitioner's argument is that *TransUnion* has changed this Court's standing doctrine with respect to so-called "informational injury" that does not cause "downstream consequences." *See* Pet. Br. 17-19, 27-28. Regardless of whether that is an accurate assessment of *TransUnion*, it is irrelevant to this case. Because discrimination is inherently harmful, this case does not concern "pure" informational injury, such as the one the Court found insufficient for standing in *TransUnion*. *See* 141 S. Ct. at 2209-12.

This case, rather, is a straightforward instance of what *TransUnion* acknowledged that Congress has the authority to do: to "'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.'" *TransUnion*, 141

S. Ct. at 2205 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). *TransUnion* expressly recognized "discriminatory treatment" as an example of such a concrete, *de facto* injury for which Congress may authorize a cause of action, *id.* at 2205 (citing *Allen*, 468 U.S. at 757 n.22). And the ADA makes pellucid that Congress intended to do exactly that with respect to discrimination against people with disabilities.

In the ADA, Congress recognized that people with disabilities have suffered, and continue to suffer, profound harm because of discrimination. *See, e.g.*, 42 U.S.C. § 12101(a)(1) ("physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination"); *id.* § 12101(a)(2) ("historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"). Congress recognized that, prior to the ADA's enactment, people with disabilities often had no way to obtain redress for that harm. *See id.* § 12101(a)(4) ("unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination"). And Congress intended to change that by creating a cause of action for disability discrimination. *See, e.g.*, *id.* § 12101(b) ("It is the purpose of this chapter— . . . (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with

disabilities”); *id.* § 12188(a)(1) (“The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter”). A clearer statement of congressional intention to recognize and make legally cognizable the harms arising out of discrimination against persons with disabilities is difficult to imagine.

Thus, contrary to petitioner’s contention, *TransUnion* does not “resolve[] this case” in its favor. Pet. Br. 18. *TransUnion*’s concern was with “unharmed plaintiffs” being granted a statutory cause of action. *See, e.g.*, 141 S. Ct. at 2207 & n.3; *see also id.* at 2200 (“No concrete harm, no standing.”). But a person with disabilities who suffers discrimination exactly as Congress has defined it in the ADA is hardly “unharmed.” *TransUnion* nowhere limits—in fact, it expressly affirms—the ability of Congress to authorize a *harmed* plaintiff to proceed in federal court.[32] *See* 141 S. Ct. at 2204-05. And, for the reasons stated

---

[32] The Eleventh Circuit thus erred in holding that, after *TransUnion*, “[t]o find concrete injury whenever an individual personally experiences discrimination in violation of a federal statute would be to equate statutory violations with concrete injuries.” *Laufer v. Arpan LLC*, 29 F.4th 1268, 1274 (2022). That conclusion fails to appreciate the inherent harm of discrimination, as *TransUnion* and numerous other cases discussed *supra* Part I have expressly recognized, and also fails to heed *TransUnion*’s command that “[c]ourts *must* afford due respect to Congress’s decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant’s violation of that statutory prohibition or obligation.” 141 S. Ct. at 2204 (emphasis added).

above, respondent has adequately alleged that she has been harmed by petitioner's failure to comply with the ADA as explicated by the Reservation Rule.

It follows that this Court need not address whether or to what extent *TransUnion* and *Spokeo* have called into question the oft-quoted line from *Linda R.S. v. Richard D.* that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." 410 U.S. 614, 617 n.3 (1973); *see, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Havens Realty*, 455 U.S. at 373; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992). *Cf.* Pet. Br. 27-28. That question is irrelevant here because this case is not one in which "no injury would exist without the statute." To the contrary, as explained above and recognized by Congress in the ADA itself, discrimination against people with disabilities—including, as here, discrimination in the form of exclusion from a service that is provided to the public—has inflicted enormous injury on millions of Americans over the years, and it continues to do so today. *See* 42 U.S.C. §§ 12101(a)(3) ("discrimination against individuals with disabilities persists in such critical areas as . . . access to public services"), 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices, . . . and relegation to lesser services"); *see also, e.g.*, Maggie Scales, *After Senator Duckworth Shared She Couldn't Access Theatre, Mass. Residents with Disabilities Say Problems Persist Here Too*, Boston Globe (Aug. 2, 2023), https://tinyurl.com/bd5azutr (reporting that U.S. Senator could not attend movie with her children due

to broken elevator and that people with disabilities in Massachusetts routinely experience similar problems). By enacting the ADA, Congress "elevate[d]" that harm to "actionable legal status." *TransUnion*, 141 S. Ct. at 2205 (citation and internal quotation marks omitted). The harm underlying an ADA cause of action is the concrete, *de facto* injury of discrimination, not a purely informational injury such as the one at issue in *TransUnion*. *See* 141 S. Ct. at 2209.

Of course, Congress could not arbitrarily define "discrimination" to include a scenario in which "[n]o concrete harm" occurs, *id.* at 2214, and thereby satisfy Article III. But no such fanciful hypothetical is at issue here. In Title III of the ADA, Congress enacted several definitions of disability-based "discrimination," each of which closely relates to its detailed findings concerning unfair treatment of persons with disabilities. *See* 42 U.S.C. § 12182(b) (definitions of discrimination); *id.* § 12101 (findings). "[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements," *Spokeo*, 578 U.S. at 341, "[c]ourts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation," *TransUnion*, 141 S. Ct. at 2204. *See also, e.g.*, *Egbert v. Boule*, 142 S. Ct. 1793, 1802 (2022) ("At bottom, creating a cause of action is a legislative endeavor . . . . Congress is far more competent than the Judiciary to weigh [the relevant] policy considerations.") (citation and internal quotation marks omitted); *National Pork Producers Council v.*

Ross, 143 S. Ct. 1142, 1161 (2023) (plurality opinion of Gorsuch, J.) ("[Congress] is better equipped than this Court to identify and assess all the pertinent economic and political interests at play across the country."). Congress's carefully calibrated definitions of "discrimination" in the ADA, and its determination to make such discrimination actionable, are precisely the kinds of legislative determinations that, under *Spokeo* and *TransUnion*, require judicial deference.

D. The suggestion by the United States that the text of the Reservation Rule defeats respondent's standing lacks merit.

The United States, like petitioner, urges that the lower court's decision be reversed, but for very different reasons. The United States correctly recognizes that the harm of discrimination against people with disabilities is a concrete, *de facto* injury that Congress has, through the ADA, elevated to actionable status, U.S. Br. 14-16, and correctly rejects petitioner's argument that *Havens Realty*'s holding on tester standing has been weakened, *id.* at 22-29. But, the United States argues, *this* tester does not come within the rule of *Havens Realty* because the Reservation Rule "does not confer an informational right on every individual with a disability who merely visits the hotel's website without using or attempting to use the reservation service." *Id.* at 19. Thus, the United States contends, respondent "has not alleged that she used, attempted to use, or planned to use the Inn's reservation service. Instead, she alleges only

that she viewed the Inn's website . . . ." *Id.* at 19-20. This theory does not hold up to scrutiny.[33]

1. Neither the ADA nor the Reservation Rule imposes any "use" requirement.

The problem with the United States's argument is that neither the ADA nor the Reservation Rule requires that a person with a disability intend to "use" a "service" from which she has been discriminatorily excluded in order to have a cause of action. As explained above, any person with disabilities to whom a covered "service" is not being "afford[ed]"—i.e., provided—by a public accommodation has a cause of action under the ADA. 42 U.S.C. §§ 12182(a),

---

[33] At the outset, the United States's purported distinction between someone who "uses" an online reservation service and someone who "viewed" the website in enough detail to determine that it does not appear to comply with the Reservation Rule seems elusive at best. It would be impossible to determine whether the hotel's website "[i]dentif[ies] and describe[s] accessible features in the hotels and guest rooms" in accordance with the Rule, 28 C.F.R. § 36.302(e)(1)(ii), without visiting the hotel's website, bringing up the reservation system, and then clicking through the system looking for that information—without, in other words, "using" the website's reservation system. *See* Resp. Br. 30. Indeed, the United States itself describes the purpose of the Rule as "address[ing] . . . the ability to *review* and reserve available rooms through websites or other[] means." U.S. Br. 19 (emphasis added). And the complaint alleges that respondent "review[ed]" petitioner's website in the course of trying to "ascertain whether [the hotel] meet[s] . . . her accessibility needs," but that she "was unable to do so" because of petitioner's alleged failure to comply with the Reservation Rule. JA 6a-7a. In common parlance, respondent tried to, but could not, *use* the online reservation system to determine whether the hotel met her accessibility needs.

(b)(2)(A)(ii); *see* Part III.A, *supra*. Neither the statute nor the Rule imposes any additional requirement that the excluded person intend to "use" the service from which she was excluded. And, as discussed, respondent has adequately alleged that she, *personally*, was not afforded the ability to make use of the hotel's reservation service "to assess independently whether [this] hotel or guest room meets . . . her accessibility needs." 28 C.F.R. § 36.302(e)(1)(ii); *see* Part III.B, *supra*.

That Title III of the ADA does not generally require that plaintiffs intend to patronize the public accommodation in order to have a cause of action is made even clearer by one section of the statute that *does* impose that requirement. For a particular subset of cases set forth in 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii), Congress limited the scope of the statute to "clients or customers of the covered public accommodation." *Id.* § 12182(b)(1)(A)(iv). But this case does not fall within that subset, and by its terms the "clients or customers" limitation applies only "[f]or purposes of clauses (i) through (iii) of this subparagraph." *Id.* Congress thus obviously knew how to limit the statute's scope to "clients or customers"; its decision not to do so for the parts of the statute at issue here should be respected. *See, e.g.*, *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."); *Havens Realty*, 455 U.S. at 374 ("Whereas Congress, in prohibiting discriminatory refusals to sell

or rent in § 804(a) of the Act, required that there be a 'bona fide offer' to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d).") (citation and footnotes omitted).

Thus, the United States's characterization of respondent's allegations as "a statutory violation that infringes the rights of others," U.S. Br. 20, is simply incorrect. The "right" at issue here is the right of people with disabilities to be free from discrimination as defined in the ADA, and such discrimination includes a hotel's alleged failure to "afford"—to provide—services, including its online reservation service, to people with disabilities. *See* 42 U.S.C. § 12182(b)(2)(A)(ii). Respondent is a person with disabilities, and she has alleged that petitioner's online reservation service was not available *to her*, because it failed to provide information on accessibility that the Reservation Rule requires. *See* JA 6a-7a (alleging that respondent utilized the hotel's website to try to "ascertain" whether the hotel's accessibility features "meet … her accessibility needs," but that she "was unable to do so"). She has thus alleged that she "suffered injury in precisely the form the statute was intended to guard against." *Havens Realty*, 455 U.S. at 373.

2. A violation of the Reservation Rule is complete when the information it requires is not made available.

The United States also insists that the Reservation Rule "does not confer a freestanding right to accessibility information," instead urging that "the

Rule's requirements focus on the reservation process," which the United States narrowly characterizes as "requiring a hotel to hold accessible rooms for individuals with disabilities, to allow those rooms to be reserved in advance, and to ensure that, once reserved, those rooms will actually be available upon check-in." U.S. Br. 18 (citing 28 C.F.R. §§ 36.302(e)(1)(iii)-(v)).[34] But the United States can characterize the Rule that way only by ignoring the provision actually at issue in this case, which requires the hotel's reservation system to "*identify and describe* accessible features." 28 C.F.R. § 36.302(e)(1)(ii) (emphasis added). The Rule thus expressly requires the provision of *information*—namely, the website must "identify" and "describe" accessibility features of the hotel in "detail." *Id.* This interpretation is consistent with the Department of Justice's own recognition that "[t]he ability to *obtain information* about accessible guest rooms" is distinct from the ability "to make reservations for accessible guest rooms in the same manner as other guests, and to be assured of an accessible room upon arrival"; the Department reports that commenters with disabilities saw all three as "of critical importance." 28 C.F.R. Pt. 36, App. A at 804 (emphasis added).

Moreover, subsection (e)(1)(ii) nowhere requires that the information be acquired *for the purpose* of actually making a reservation. To the contrary, that provision states that the purpose of the information is

---

[34] Arguably, the Reservation Rule envisions the provision of information regarding accessibility as part of the "process" of making a reservation; in any event, as explained in the text, the Rule's express requirement that certain information be made available defeats the United States's argument on this point.

to make it possible for "persons with disabilities to *assess* independently whether a given hotel or guest room meets his or her accessibility needs." *Id.* § 36.302(e)(1)(ii) (emphasis added). Such an "assess[ment]" might or might not be accompanied by an intention to visit the hotel in question. Either way, the Rule makes plain that a violation is complete when it is established that the "assess[ment]" is impossible.

Interpreting the Rule as creating a right to information is consistent with other provisions of the same regulation. In particular, subsection 36.302(f), which addresses ticketing for events, states that a ticket seller "shall, upon inquiry— (i) *Inform* individuals with disabilities . . . of the locations of all unsold or otherwise available accessible seating . . . [and] (ii) *Identify and describe* the features of available accessible seating in enough detail to reasonably permit an individual with a disability to assess independently whether a given accessible seating location meets his or her accessibility needs." 28 C.F.R. § 36.302(f)(2) (emphasis added). Subsection (f)(2)(i)'s use of the verb "inform" obviously requires the provision of information, *see, e.g.*, *id.* Pt. 36, App. A at 810 ("a public accommodation, *upon being asked*, must *inform* persons with disabilities and their companions of the locations of all unsold or otherwise available seating") (emphasis added), and the immediately following subsection (f)(2)(ii) instructs ticket sellers to answer an "inquiry" by "identify[ing]" and "describ[ing]" the venue's accessibility features, using language virtually identical to subsection (e)(1)(ii), the provision at issue here. There is no requirement that the person making the "inquiry" have any intention of actually buying a ticket.

In short, the ADA creates a cause of action for testers like respondent who allege that they have suffered harm from disability-based discrimination in the form of a public accommodation's failure to afford a reasonable modification necessary for a person with a disability to obtain services offered to the public. The Reservation Rule sets forth requirements for one such service, namely, hotel reservation systems, and nothing in the Rule's text limits a tester's ability to obtain redress for a failure to provide accessibility information that the Rule expressly requires. Therefore, respondent has standing under a straightforward application of *Havens Realty*.

CONCLUSION

The court of appeals properly held that respondent had standing to sue.

Respectfully submitted,

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of
Massachusetts
David C. Kravitz*
Deputy State Solicitor
Ann E. Lynch
David R. Rangaviz
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 963-2427
david.kravitz@mass.gov

**Counsel of Record*

August 9, 2023

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Ave.
Hartford, CT 06106

KWAME RAOUL
Attorney General
State of Illinois
100 W. Randolph St.
Chicago, IL 60601

BRIAN L. SCHWALB
Attorney General
District of Columbia
400 6th St., NW,
Suite 8100
Washington, DC
20001

ANTHONY G. BROWN
Attorney General
State of Maryland
200 Saint Paul Place,
20th Floor
Baltimore, MD 21202

MATTHEW J. PLATKIN
Attorney General
State of New Jersey
Richard J. Hughes
Justice Complex
25 Market St.
Trenton, NJ 08625

LETITIA JAMES
Attorney General
State of New York
28 Liberty St.
New York, NY 10005

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504