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 *AMICI CURIAE* DISABILITY RIGHTS EDUCATION & DEFENSE FUND, ET AL. IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are eighteen organizations, many comprised of people with disabilities, that promote the rights of disabled people to participate fully in all aspects of society, including travel for work and leisure, and to access the goods, services, and benefits of places of public accommodation. *Amici* pursue these goals using various tools, including individual and impact litigation.

Some *Amici* have worked with testers to bring cases challenging violations of Title III of the Americans with Disabilities Act (ADA), and all *Amici* believe testers play a vital role in bringing the ADA's promise of full and equal participation closer to reality. *Amici* have a strong interest in ensuring that the progress of the last 33 years since the ADA's enactment is not stalled or reversed by an opinion holding that a disabled person who experiences the dignitary harm of discrimination lacks Article III standing simply because they were acting as a tester when they suffered that injury.[2]

SUMMARY OF ARGUMENT

Petitioner Acheson Hotels LLC ("Acheson") and many of its *amici* present this Court with a tautology: they define testers as unharmed people and then

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici*, their members and their counsel has made a monetary contribution to support the brief's preparation or submission.

[2] A list of *amicus* organizations, with brief descriptions, is compiled in the appendix.

reach the unremarkable conclusion that, so defined, testers lack standing. From this false premise, Acheson's *amici* spin out a dystopian narrative of unharmed plaintiffs shaking down small businesses, clogging the courts, and "threat[ening] . . . the cohesiveness of our union." Ctr. for Constitutional Responsibility ("CCR") Br. 1.

The flaw in this logic lies in treating all testers categorically based on their motive for the ultimately discriminatory encounter and equating this motive with lack of injury. Instead, as with any other plaintiff, the "irreducible constitutional minimum" of standing for a tester "contains three elements": 1) an injury-in-fact; 2) traceable to the defendant's conduct; and 3) likely redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Motive is not one of these elements.

If a tester can demonstrate an injury-in-fact "with the manner and degree of evidence required at the successive stages of the litigation" — plausible allegations at the pleading stage, specific facts supported by evidence for a case going to trial — and if traceability and redressability are also present, then that tester has standing. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2022).[3] If she cannot make that showing, she does not.

The question this case presents is whether a disabled person who pled that she experienced "frustration and humiliation" and a "sense of isolation and segregation" upon finding required accessibility information absent from a hotel's reservations service

[3] Unless otherwise specified, all internal quotations and citations are omitted.

has alleged an injury-in-fact sufficient to establish standing at the motion-to-dismiss stage. Such dignitary harms stemming from unequal treatment have a "close relationship" to harms historically providing a basis for lawsuits in American courts. *TransUnion*, 141 S. Ct. at 2200. Moreover, Congress has "elevate[d]" these sorts of harms to legally-cognizable status by passing anti-discrimination statutes with private rights of action for their violation, including the ADA. *Id.* at 2205. If Respondent Deborah Laufer's allegations of dignitary harm are plausible, the fact that she suffered that harm in a situation she intentionally subjected herself to — the hallmark of testing — should not deprive her of standing.

Unfortunately, Acheson's *amici* veer far from the question presented to broadly attack ADA litigation. These attacks ignore key facts, such as the ADA's modest requirements, the persistence of widespread noncompliance despite the ADA being in effect for over three decades, and the success of ADA lawsuits in removing barriers. Indeed, private enforcement is both authorized by the text of the ADA and essential to its effective implementation. But this Court need, and should, not engage with these policy arguments. It took this case to answer one question: whether the standards for establishing an Article III injury-in-fact are the same for ADA testers as for all other plaintiffs. The answer is "yes."

ARGUMENT

I. DISABILITY DISCRIMINATION CAN CONSTITUTE AN INJURY-IN-FACT FOR PURPOSES OF ARTICLE III STANDING.

A. Neither Ms. Laufer Nor *Amici* Are Asking This Court to Extend Standing to Unharmed Individuals.

Acheson's brief and those of its *amici* argue that unharmed plaintiffs should not have standing[4] — and describe the horrors that will ensue if such individuals are allowed into federal court. This is a straw man. Neither Ms. Laufer nor *Amici*[5] propose opening federal courts to the unharmed. Rather, the question presented is what types of harm suffered by a disabled person encountering discrimination are cognizable as injuries-in-fact sufficient to satisfy Article III.

Acheson frames this question in terms of whether Ms. Laufer intended to visit the public accommodation whose website she observed to lack information required by the ADA. This misconstrues the nature of the violation and injury at issue: a disabled person may suffer a cognizable injury-in-fact when she encounters prohibited disability discrimination and suffers dignitary or emotional harm as a result.

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[4] *See, e.g.*, CCR Br. 2 ("tester plaintiffs have no personal stake in the suit").

[5] When capitalized, "*Amici*" refers to the organizations submitting this brief.

B. The Indignity of Unequal Treatment Has Long Been Recognized as Actionable at Common Law and Has Been Made Cognizable by Acts of Congress.

Since before the Founding and continuing as a matter of early American common law, discriminatory treatment has been the basis of suits in court. *See Biden v. Knight First Amend. Inst. At Columbia Univ.*, 140 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring). Sometimes the injury in these early cases was presumed from the exclusion itself without any showing of emotional or economic harm, as a sort of strict-liability consequence of a public accommodation's breach of its duty to serve all customers. *See* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391, 403 (2020) (describing duty to serve as imposing de-facto strict liability); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies, Pt. 1*, 11 COLUM. L. REV. 514, 519 (1911) (describing common-law duty of innkeepers and others serving the public). As an early English court put it:

> Note that it was agreed by all the court that when a smith declines to shoe my horse, or an innkeeper refuses to give me entertainment at his inn, I shall have an action on the case notwithstanding no act is done; for it does not sound in agreement.

Bruce Wyman, *The Law of the Public Callings As A Solution of the Trust Problem*, 17 HARV. L. REV. 156, 158 (1904) (quoting Keilway 50).[6]

In other cases, courts focused on the indignity caused by expulsion or refusal to serve as a component of damages. Where a man was expelled from a train and required to walk across a railway bridge carrying heavy bundles to reach a station, the jury was permitted to consider "not only the annoyance, vexation, delay and risk, to which he was subjected, but also the indignity done to him by the mere fact of expulsion"—even though the expulsion occurred without many witnesses because it was from a freight train. *Chicago & A.R. Co. v. Flagg*, 43 Ill. 364, 365-66, 368 (1867); *see also Drew v. Peer*, 93 Pa. 234, 234 (1880) (Black plaintiffs ejected from theater entitled to consequential damages); *Smith v. Leo*, 36 N.Y.S. 949, 950 (Gen. Term 1895) (damages for "indignity and disgrace" of being expelled from dance hall).

The same principle that service denial may cause dignitary harm appeared in early cases under state constitutions and statutes that protected people from racial discrimination. For instance, the Michigan Supreme Court held that where the defendant offered to serve a Black plaintiff only if he sat in a separate section of the defendant's restaurant, this unequal treatment gave rise to a cause of action under the state's public accommodations law, which was found "declaratory of the common law" extending to all citizens a "right of action for any injuries arising from

[6] Keilway is an early English reporter reporting during the reign of Henry VII, that is, the late 15th and early 16th Centuries.

an unjust discrimination." *Ferguson v. Gies*, 46 N.W. 718, 720 (Mich. 1890). Similarly, the Louisiana Supreme Court held that a Black plaintiff denied admittance to a music venue was entitled to damages under state law. *Joseph v. Bidwell*, 28 La. Ann. 382, 383 (1876).

Congress acknowledged the dignitary harms of exclusion and unequal treatment when it passed the Civil Rights Act of 1964, a law enacted to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, 16 (1964)). And as this Court recently observed, public accommodations laws, including those passed by Congress, "play a vital role in realizing the civil rights of all Americans." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2303 (2023). Perhaps that is why this Court specifically identified discrimination as the sort of "concrete, de facto injury" that Congress can "elevate to the status of legally cognizable" even when, unlike the examples provided here, it was "previously inadequate at law." *TransUnion*, 141 S. Ct. at 2205 (citing *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984)).

C. Congress Identified and Made Actionable the Concrete, Harmful Discrimination People with Disabilities Face When It Passed the ADA.

Congress elevated disability discrimination by places of public accommodation to the status of legally-cognizable harm when it passed Title III of the

ADA.[7] The Findings section of the ADA specifically identified a number of "concrete, de facto" harms, *TransUnion*, 141 S. Ct. at 2205, impacting people with disabilities, including discrimination in public accommodations, as well as "outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, [and] failure to make modifications to . . . practices." 42 U.S.C. § 12101(a)(3), (5).

It also noted that disability discrimination, unlike discrimination based on race or other characteristics, had often not previously been actionable at law. *Id.* § 12101(a)(4). Congress therefore exercised its power, recognized by this Court in *TransUnion*, to elevate these concrete, de facto injuries to legally-cognizable status. 141 S. Ct. 2205; 42 U.S.C. § 12188(a)(1) (providing a cause of action to anyone "subjected to discrimination on the basis of disability in violation of this subchapter"). Accordingly, disabled people who encounter physical barriers or discriminatory policies have Article III standing to sue under the ADA. *See, e.g.*, *Sierra v. City of Hallandale Beach, Fla.*, 996 F.3d 1110, 1114-15 (11th Cir. 2021) (Deaf man challenging city's failure to caption its online videos "ha[d] standing to bring his claim under Title II [of the ADA], as he adequately alleged a stigmatic injury."); *Mielo v. Steak 'n Shake Operations, Inc.*, 897 F.3d 467, 480 (3d Cir. 2018) (mobility-impaired plaintiffs "sufficiently alleged a concrete harm in the form of

[7] The ADA also includes provisions regarding employment, (Title I, 42 U.S.C. § 12111 *et seq.*), and activities of state and local governments, (Title II, 42 U.S.C. § 12121 *et seq.*).

experiencing actual physical difficulty in ambulating through parking facilities which are allegedly not ADA-compliant"); *Nat'l Fed'n of the Blind, Inc. v. Wal-Mart Assocs., Inc.*, 566 F. Supp. 3d 383, 394 (D. Md. 2021) (blind shoppers denied opportunity to participate in self-checkout service established injury-in-fact).

Not all injurious discrimination faced by people with disabilities is intentional, as Acheson acknowledges. To a wheelchair-user, a building with only stairs and no ramp to the entrance "has the same practical effect as a facially discriminatory 'no persons who use wheelchairs allowed' sign." Pet. Br. 40. This is so even though the same building with the same stairs would be "available to everyone" whether they are "disabled or not." *Cf.* Chamber of Commerce of the U.S. ("Chamber") Br. 17.

Congress recognized that a policy neutral on its face can harm people with disabilities just like stairs without a ramp can, and the failure to modify such policies[8] can constitute actionable discrimination under the ADA. *See, e.g.*, *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1085-86 (9th Cir. 2004) (uniform application of a theater's policy of not reserving seats denied a wheelchair-user and his wife the "full and equal enjoyment" promised by Title III; "the ADA defines discrimination as a public accommodation treating a disabled patron the same as other patrons despite the former's need for a reasonable modification").

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[8] 42 U.S.C. § 12182(b)(2)(A)(ii) (requiring reasonable modification of policies unless modification would fundamentally alter what the accommodation provides).

Nor must disabled plaintiffs attempt to access a physically inaccessible structure, or ask for service and be refused, in order to have standing; as this Court has recognized and Congress stated in the text of the ADA, a person need not engage in a "futile gesture" to experience discrimination and its attendant dignitary harm. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 366 (1977); 42 U.S.C. § 12188(a)(1).

Consequently, multiple courts have held that plaintiffs who know of a barrier or discriminatory policy, and are thereby deterred from patronizing a public accommodation, have standing despite their lack of concrete plans to do so at a particular future time. *See, e.g.*, *Civil Rts. Educ. & Enf't Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093, 1099-1101 (9th Cir. 2017) ("*CREEC*") (mobility-impaired plaintiffs who called hotels to ask if they offered wheelchair-accessible shuttles and were told they did not, and who alleged that they were deterred from visiting those hotels as a result, had standing despite lacking plans to visit until the discriminatory policy changed); *Equal Rts. Ctr. v. Uber Techs., Inc.*, 525 F. Supp. 3d 62, 75-76 (D.D.C. 2021) (Jackson, J.) (mobility-impaired plaintiff had standing to challenge Uber's services for wheelchair-users despite never having downloaded Uber's application as she was deterred by knowledge of Uber's inaccessibility).

Moreover, a person is not harmed less by knowledge of a discriminatory policy, and does not lose standing to challenge that policy, because they learned of it over the phone rather than in person. *CREEC*, 867 F.3d at 1100. Similarly, if a business communicates on its website that it has a no-animals

policy without an exception for service dogs, rather than communicating this information in person when the disabled person attempts to patronize the business, the dignitary harm experienced by a disabled service dog user learning of the discriminatory policy is no less acute. *Cf. Bartell v. Grifols Shared Svcs. NA, Inc.*, 618 F. Supp. 3d 275, 281 (M.D.N.C. 2022) (granting preliminary injunction to blind plaintiff prohibited from having service dog accompany her during plasma donation due to "no animal" policy). Put another way, disability discrimination does not lose its ability to cause harm when it occurs online.

D. Dignitary Harm Caused by a Hotel's Violation of the ADA Can Create Standing, Regardless of Future Plans to Visit the Hotel.

Under the Reservation Rule, information about hotel accessibility features must be posted on hotel websites. 28 C.F.R. § 36.302(e)(1). Unfortunately, despite the 1990 enactment of the ADA and 2010 promulgation of the Reservation Rule, people with disabilities regularly encounter inaccurate or incomplete information, or no information at all, when they attempt to ascertain a hotel's accessibility features online.[9] The message these individuals receive during these encounters is that their patronage is less valuable and desirable than the

[9] *See* Kristen L. Popham et al., *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 Colum. HUMAN RTS. L. REV. F. 1 (2023), https://blogs.law.columbia.edu/hrlr/hrlr-online/disabling-travel-quantifying-the-harm-of-inaccessible-hotels-to-disabled-people/ (last visited Aug. 9, 2023).

patronage of nondisabled guests because the public accommodation did not consider disabled people among its potential customers. That is discrimination resulting in dignitary harm.[10] This is true regardless of the individual's reason for using the website. *Cf. Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 298 n.5 (7th Cir. 2000) (holding that employment tester had standing; noting "many people, not just testers, apply for jobs that they have no genuine intent to accept if offered to them . . . for a whole host of . . . reasons.").

Similarly, disabled people may use hotel websites for "a whole host of . . . reasons" besides booking imminent travel. For example, consider a wheelchair-user who plans to take a summer vacation with her family. The family is considering five potential locations, but the location and dates for the trip have not been set. The woman knows that she will need information about hotel accessibility features regardless of where she goes and when. To obtain this information, she uses the websites of various hotels at each of the five locations, but quickly finds that many of them lack the accessibility information required by the Reservation Rule. The message she receives is clear: she is not welcome at these hotels; she does not belong among their guests.[11] She feels saddened, frustrated, and insulted

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[10] It may also constitute an informational injury, as the First Circuit concluded, but *Amici* do not address informational injury in this brief.

[11] *See, e.g.*, Stacey Menzel Baker et. al., *How Consumers with Disabilities Perceive "Welcome" in Retail Servicescapes: A Critical Incident Study*, 23 J. OF SERV. MARKETING 160, 167-69

Footnote continued on next page

each time this happens. She has suffered dignitary harm.[12] The fact that she did not intend to visit a specific hotel in a specific location at a specific time when she encountered discrimination does not negate either that the discrimination occurred, or the harm it caused.

Accordingly, a complaint, like Ms. Laufer's, *see* J.A. 10a (Am. Compl. ¶ 14), alleging that the plaintiff suffered frustration and humiliation because a hotel operated its reservations service in a discriminatory manner, or that the hotel's discrimination contributed to the plaintiff's sense of isolation and segregation, has alleged a concrete and particularized injury in fact.[13] It also meets the pleading requirements of Rule 8 and must be credited on a motion to dismiss. As discussed in Part II below, the fact that a plaintiff experienced the discrimination that gave rise to those allegations of harm while acting as a tester neither discounts her allegations' plausibility nor defeats her standing.

(2007) ("customers perceive welcome (or not) by evaluating signals in the servicescape that cue whether they belong").

[12] The concrete dignitary harm of discrimination satisfies Article III independent of any downstream consequences. *TransUnion*, 141 S. Ct. at 2205, 2214; Resp. Br. 34-37.

[13] Dignitary harms have been found concrete and particularized both before and after this Court's decision in *TransUnion*. *See, e.g.*, *Zukerman v. United States Postal Serv.*, 64 F.4th 1354, 1362-63 (D.C. Cir. 2023) (unlawful viewpoint discrimination conferred standing); *Charlton-Perkins v. Univ. of Cincinnati*, 35 F.4th 1053, 1059-60 (6th Cir. 2022) (allegation of gender discrimination resulting in denied job conferred standing); *Congregation Rabbinical Coll. Of Tartikov, Inc. v. Vill. of Pomona, N.Y.*, 945 F.3d 83, 110 (2d Cir. 2019) (stigma from religious discrimination conferred standing).

Acheson worries that Ms. Laufer's injury may be shared by many other disabled people. Pet. Br. 23. If so, that is a natural consequence of Acheson's decision to do business on the Internet, through its own website and a number of others. J.A. 7a-9a. Back when hotel information was only available in (printed) Fodor's or Michelin Guides, fewer disabled people were likely to encounter that information, and fewer people were consequently harmed by hotels' failures to provide accessibility information. Acheson complains that if looking for, and not finding, information online could cause injury, "the law of standing would be dramatically expanded." Pet. Br. 24. It is not the "law of standing" that the Internet has expanded; it is the reach of any given business.

By making the apparently advantageous business decision to share information about its hotels with a much larger audience over the Internet, while simultaneously failing to provide the accessibility information that disabled members of that audience need in order to be treated equally, *see Fortyune*, 364 F.3d at 1086, Acheson is discriminating against every disabled person who encounters that noncompliant online reservations service. Each of these individuals — interacting with this noncompliant reservations service — could suffer their own concrete and particularized injury: the dignitary harm of disregard and erasure that Title III was enacted to prevent. This distinguishes them from the plaintiffs in *Allen v. Wright*, who the Court described as claiming that all members of a racial group were stigmatized by the government's discrimination, regardless of whether they personally experienced it. 468 U.S. at 754-56.

Ultimately, allegations like Ms. Laufer's may not survive the crucible of discovery or the credibility findings of a trial, but the pleading stage is not the place for those determinations. *See Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 737 (7th Cir. 2020) (Barrett, J.) ("[T]o say that a claim is not worth anything is a determination that concerns the merits rather than jurisdiction. Otherwise every losing suit would be dismissed for lack of jurisdiction."). Nor should the fate of claims like hers turn on her tester status.

II. THE FACT THAT A PLAINTIFF IS A TESTER DOES NOT DEPRIVE HER OF STANDING.

A. Plaintiffs Who Suffer Injuries-in-Fact Have Standing Regardless of Motive.

As early as 1958, this Court recognized that motive did not factor into the standing analysis, holding that a Black plaintiff who rode a segregated bus in Memphis for the purpose of instituting litigation had standing, even though he had never ridden a bus in Memphis before. *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) ("That the appellant may have boarded this particular bus for the purpose of instituting this litigation [was] not significant."). In 1967, the Court held that Black ministers who had used a whites-only waiting room in Jackson, Mississippi with the expectation of being arrested had standing to seek damages under 42 U.S.C. § 1983, "even assuming that they went to the Jackson bus terminal for the sole purpose of testing their rights to unsegregated accommodations." *Pierson v. Ray*, 386 U.S. 547, 558 (1967). This Court relied on those two cases in *Havens Realty Corp. v. Coleman*, recognizing

the standing of a Black tester injured by violations of the Fair Housing Act. 455 U.S. 363, 374 (1982).

Injured testers have been widely held to have standing to challenge violations of the ADA. *See, e.g.*, *Suárez-Torres v. Panaderia Y Reposteria España, Inc.*, 988 F.3d 542, 551 (1st Cir. 2021) (plaintiffs' status as testers did not defeat standing to challenge violations of Title III); *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752, 758 (6th Cir. 2019) (same); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 457 (4th Cir. 2017) (same); *CREEC*, 867 F.3d at 1102 (9th Cir. 2017) (same); *Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211 (10th Cir. 2014) (same) ("*CCDC*"); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332 (11th Cir. 2013) (same); *see also Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004) (testers had standing to challenge municipal bus system under ADA Title II). Importantly, the United States — while supporting neither party to the current case — explicitly approved of the tester standing upheld in several of these cases. U.S. Br. 14-16 (citing *Tandy*, *Mosley*, *Nanni*, *CCDC*, and *Houston*).

The three circuits that have ruled against Reservation Rule plaintiffs are not to the contrary, and the assertion that they have "rejected 'tester' standing" (Rest. Law Ctr. Br. 5) is inaccurate: none rejected tester standing *per se*, but rather held that the plaintiff in the specific case failed to plead a concrete injury. *See Harty v. West Point Realty, Inc.*, 28 F.4th 435, 444 n.3 (2d Cir. 2022) ("The law is clear that testers can have standing, but even testers have to show that they have suffered an Article III injury in fact."); *Laufer v. Looper*, 22 F.4th 871, 881-83 (10th

Cir. 2022) (reaffirming the standing of the testers in *Tandy* and *CCDC* and observing that tester status neither "defeat[s]" nor "automatically confer[s]" standing); *Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 273 & n.4 (5th Cir. 2021) (a tester must also show an injury-in-fact and citing *Houston* with approval).

B. Testers Have Standing When They Are Injured in the Course of Investigating Discrimination.

Acheson and its *amici* argue that a plaintiff cannot have standing where her injury was "self-inflicted." *See, e.g.*, Pet. Br. 42. This misconstrues the nature of civil rights testing. As this Court defined the undertaking in *Havens*, "'testers' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." 455 U.S. at 373. Thus while testers knowingly place themselves in circumstances in which they may encounter discrimination, any resulting injury is inflicted only by the discriminator. Testers uncover discriminatory policies and access barriers; they do not create them.

Even were this Court to accept Acheson's framing, the fact that an injury is ostensibly self-inflicted does not preclude it from being an injury-in-fact for Article III purposes. For example, this Court recently held that Senator Ted Cruz had standing to challenge provisions of federal election law despite his injury-in-fact being "willingly incurred": he had "knowingly triggered" the applicable statute. *Federal Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022) (citing *Evers* and *Havens*); *see also Havens*, 455 U.S. at 374 ("That the tester may have approached the real estate

agent fully expecting that he would receive false information . . . does not negate the simple fact of injury . . .").

C. Testers Who Intentionally Investigate and Seek to Remedy Discrimination Often Have Deeply Personal Reasons for Doing So.

Characterizing testers' injuries as "self-inflicted" or "manufacture[d]," Pet. Br. 43, implies a bad-faith motive invalidating the injury. Condemning all testers with broad brushstrokes, or demeaning their injuries as insubstantial, is unfair and inaccurate.

In most cases, disabled people who test for compliance with the ADA, and file suit when they encounter violations, do so because they confront the same sorts of discriminatory barriers and policies in their daily lives and understand on a personal level how harmful they are. In *CREEC*, for instance, one plaintiff, a wheelchair-user, traveled frequently in her role as a nonprofit executive and Legal Services Corporation board member. No. 3:15-cv-00221-JST (N.D. Cal.), ECF 38, ¶12. She therefore had firsthand experience of how frustrating, and professionally disruptive, it is when hotel shuttles are not wheelchair-accessible, motivating her to test other hotels to determine which would transport wheelchair-users and which would not. Similarly, one tester plaintiff in *CCDC* testified that she wanted to be able to patronize Hollister stores with her then twelve-year-old daughter, who "covet[ed]" that clothing brand. No. 09-cv-02757-WYD-KMT (D. Colo.), ECF 156 at 2.

ADA testers are not the two-dimensional caricatures Acheson's *amici* depict as either

unscrupulous villains or pawns of unscrupulous attorneys.[14] They are three-dimensional human beings with disabilities whose private rights are violated[15] when, while investigating compliance with a law passed for their benefit, they experience discrimination. And if, after experiencing that discrimination, they choose to vindicate their rights by filing suit, that choice does not alter the personal nature of their injury, nor its Constitutional sufficiency, even where their action in filing suit winds up benefitting others.

III. TESTING IS ESSENTIAL TO ENFORCEMENT OF THE ADA.

Amicus CCR argues that "private individuals must not act as private attorneys general." CCR Br. 9. To the contrary, this Court has regularly and recently recognized that private attorneys general play an important role in statutory enforcement.

The concept was discussed at length in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), in which plaintiffs — injured by race discrimination at restaurants — brought successful lawsuits to challenge that discrimination. The question before the Court was whether they were entitled to recover attorneys' fees pursuant to Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b).

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[14] In the rare cases where a tester plaintiff or her counsel behaves unethically, courts possess tools for combatting such misconduct. *See* Part IV-F, *infra*; *see also Suggestion of Mootness* 3 (referring to court-initiated disciplinary proceedings against a lawyer who previously represented Ms. Laufer in other cases).

[15] *See TransUnion*, 141 S. Ct. at 2217-18 (Thomas, J., dissenting) (discussing distinction between private and public rights).

This Court held that they were, and went on to explain:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . If [a plaintiff] obtains an injunction [under Title II], he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest priority.

Id. at 401-02.[16] This Court has since reiterated its support for the role of private attorneys general. *See Fox v. Vice*, 563 U.S. 826, 832-33 (2011); *see also New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1538-39 (2020) (Alito, J., dissenting) ("The prospect of an award of attorney's fees ensures that 'private attorneys general' can enforce the civil rights laws through civil litigation . . . .").

Private suits to enforce the ADA likewise "vindicate[e] a policy that Congress considered of the highest priority." *Newman*, 390 U.S. at 402; *see, e.g.*, *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 307 (1st Cir. 2003) ("It is fair to assume that Congress had the same understanding [as expressed in *Newman*] when it enacted Title III of the ADA.").

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[16] As the legislative history of the Civil Rights Attorney's Fees Act of 1976, codified at 42 U.S.C. § 1988, explains, "[t]he idea of the 'private attorney general' is not a new one." S. REP. NO. 94-1011, 3, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (listing statutes dating back to 1870).

Crucially, "Title III [of the ADA] incorporates enforcement provisions in private actions comparable to the applicable enforcement provisions in title II of the Civil Rights Act of 1964 (injunctive relief)." S. REP. NO. 101-116, 3 (1989); 42 U.S.C. § 12188(a) (incorporating 42 U.S.C. § 2000a-3). Congress chose to make private enforcement "'the primary method of obtaining compliance with the [ADA].'" *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1039-40 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972) (making same observation with respect to the Civil Rights Act)). Government enforcement of the statute, to be sure, also plays a critical role, but it cannot keep up with the rampant rates of noncompliance.[17]

The United States has confirmed as much in its *amicus* brief in this case, observing: "private suits — including suits by testers — are an essential complement to the federal government's enforcement of Title III and other antidiscrimination laws" by supplementing "the federal government's limited enforcement resources." U.S. Br. 1, 9.

Amici sincerely wish, a generation after the ADA's enactment, that the need for private enforcement by testers had abated, as hotels and other public accommodations have had ample time to come into compliance. Given this timeline — and widespread awareness of the statute and its application to private businesses — people with disabilities should by now be able to go about their lives, accessing buildings, being accompanied by their service dogs, obtaining the information they need to

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[17] Samuel Bagenstos, The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation, 54 UCLA L. REV. 1, 9-10 (2006).

travel, and generally "full[y] and equal[ly] enjoy[ing] . . . the goods, services, facilities, privileges, advantages, [and] accommodations of . . . place[s] of public accommodation." 42 U.S.C. § 12182(a).

This has not happened. Instead, *Amici* and their members and constituents routinely experience disability discrimination as an impediment to their professional and personal lives.[18] Disabled people continue to be excluded, relegated to inferior services and facilities, disadvantaged socially and economically — and deeply frustrated that their efforts toward full and equal enjoyment are not only obstructed but villainized by noncompliant businesses.

By the time a disabled person attempts to patronize a noncompliant public accommodation, it's too late for a lawsuit to be much use. When a disabled person encounters a building that should have been accessible when built, or doctor's office that long ago should have learned to provide sign language interpreters, or hotel website that is useless in planning a trip, the fact that they just achieved an injury-in-fact and an admit-one ticket to federal court does not let them enter the building, or understand their doctor, or plan their trip.[19]

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[18] *See, e.g.*, *Disabling Travel*, *supra*, note 9 (describing the harrowing experiences of disabled travelers forced to bathe with washcloths, or outdoors while covered with a towel for privacy, because of inaccessible hotel facilities; other people with disabilities reported that their inability to obtain information about accessibility features caused them to forgo travel altogether).

[19] Illustrating this point, during the drafting of this brief, two of the undersigned counsel attempted to reserve hotel rooms

Footnote continued on next page

Testers help solve this problem. Disabled people who are intentional about investigating barriers and other violations, even when doing so causes them harm, can accelerate society's progress toward a time when they and others can go about their daily lives expecting — and attaining — access to a wide range of facilities and services. In other words, by speeding the pace of compliance, testers bring the ADA's still-unfulfilled promise closer to fruition.

Acheson, perhaps unintentionally, illustrates the importance of testing by proposing that standing be limited to "a person [who] has imminent travel plans, tries to make a reservation at a hotel, and cannot obtain accessibility information." Pet. Br. 32; *see also* Atlantic Legal Found. Br. 17 ("Respondent would presumably have standing had she traveled to Maine and shown up at the motel, bags in hand . . . ."). According to Acheson, it is only at the point when a federal lawsuit would put a two- to three-year hold on their travel plans that disabled people can enforce the Reservation Rule. Instead of voluntary compliance by the businesses governed by Title III — first choice — or systemic enforcement by injured individuals — second choice — Acheson urges a regime that relies on people with disabilities delaying their lives to litigate or perhaps spending their time on the phone "reminding . . . hotel owner[s] of [their] obligations." Pet. Br. 49. This is not what Congress intended when it passed the ADA, nor is it what Article III of the Constitution requires.

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with disabled family members — one for a graduation; one for a funeral — and encountered violations of the Reservation Rule that disrupted their travel plans.

IV. THE BRIEFS OF ACHESON AND ITS *AMICI* ARE REPLETE WITH FALSE NARRATIVES.

A. The ADA is a Thoughtfully Balanced Statute that Imposes Only Modest Obligations on Private Businesses.

As this Court has recognized, Title III's requirements are "subject to important exceptions and limitations." *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 129 (2005). Policies need not be modified if doing so would "fundamentally alter" the services or accommodations being offered, 42 U.S.C. §§ 12182(b)(2)(A)(ii)-(iii); auxiliary aids are not required when they would "result in an undue burden," *id.* § 12182(b)(2)(A)(iii); and barrier removal is not required in existing facilities when it is not "readily achievable," *id.* § 12182(b)(2)(A)(iv).[20] These exceptions and limitations were "the result of extensive scrutiny, debate, and compromise involving Members of Congress, the administration, and the business and disability communities." 136 Cong. Rec. 17,366 (1990) (statement of Sen. Tom Harkin). *See also* Statement by President George Bush Upon Signing S. 933, P.L. 101-336, *as reprinted in* 1990 U.S.C.C.A.N. 601 (July 26, 1990) (The ADA was crafted to "give the business community the flexibility to meet the requirements of the Act without incurring undue costs.").

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[20] Acheson deems it an "irony" that Ms. Laufer did not challenge Acheson's post-suit update that the hotel is not accessible. Pet. Br. 40. This reflects the ADA's legislative compromise in action: if accessibility is not "readily achievable" for Acheson's older hotel, however concrete the dignitary harm to Ms. Laufer, Title III would not provide a cause of action.

Congress explicitly accounted for the potential hardships that remediation of violations could impose on small businesses. *See Hearing on S. 933 Before Committee on Small Business*, 101st Cong. (1990). Accordingly, the obligations the Act imposes are modest and set out the bare minimum requirements to ensure the ADA's goal of "address[ing] major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

B. The Number of Title III Filings is No Cause for Alarm.

Acheson's *amici* urge panic over what they portray as the large volume of ADA lawsuits. Chamber Br. 6-7. However, the trend in ADA litigation is no cause for alarm. The chart below, based on data published on www.uscourts.gov by the Administrative Office of the U.S. Courts,[21] shows that although the number of cases filed under Titles II and III of the ADA (PACER's "ADA-Other" category) has increased gradually over time, it remains consistently very low when compared to other types of civil cases. In fact, since 2008, cases filed under the "ADA-Other" category — represented by the red line — have averaged just 2.2% of federal civil filings, varying from a low of less than 1% to a high of 3.9%.[22] Hardly the "staggering" and "unrelenting" "tide" of ADA cases Acheson's *amici*

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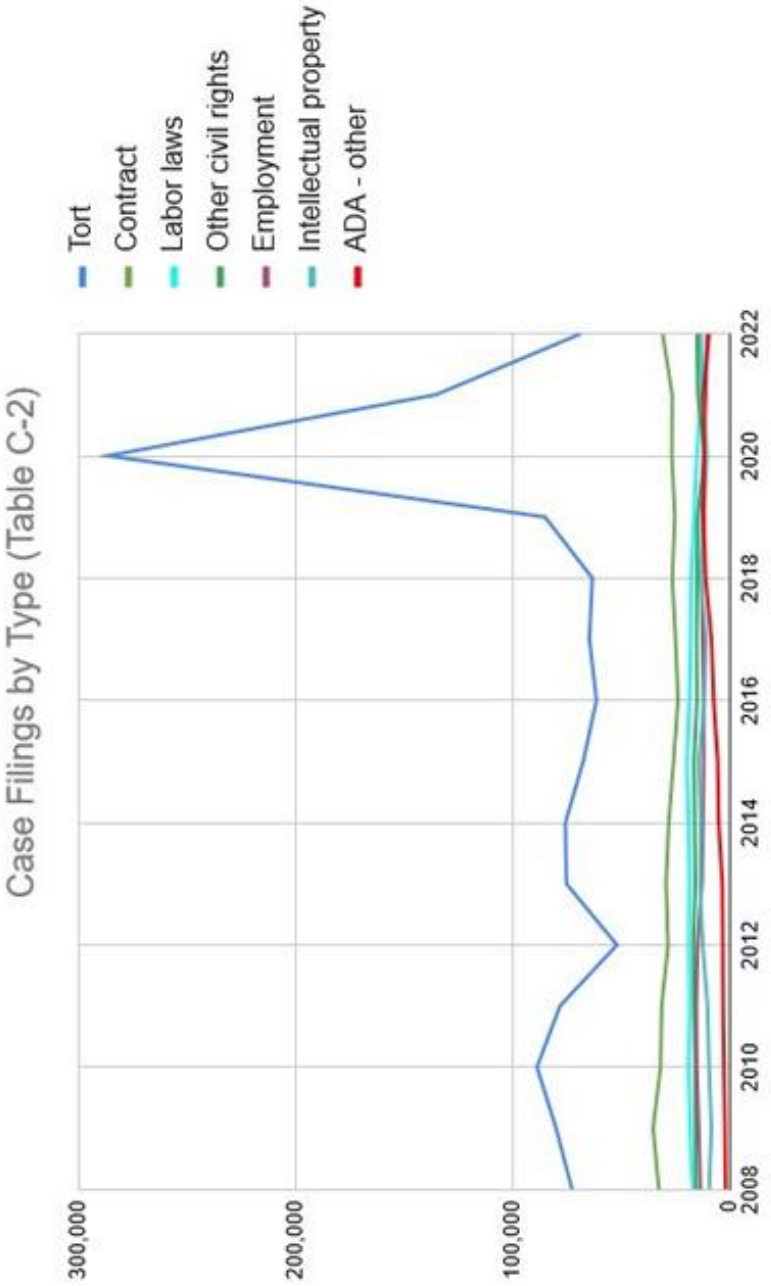
[21] U.S. Courts Caseload Statistics Data Table C-2 for the period ending December 31 from 2008-2022. https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C-2&pn=All&t=All&m%5Bvalue%5D%5Bmonth%5D=&y%5Bvalue%5D%5Byear%5D= (last visited July 26, 2023).

[22] *Id.* Alt text available from counsel.

claim to be "clog[ing] federal court dockets." Chamber Br. 7, 11; Retail Litig. Ctr. Br. 4, 11, 20, 22.


Case Filings by Type (Table C-2)
Tort
Contract
Labor laws
Other civil rights
Employment
Intellectual property
ADA - other
300,000
200,000
100,000
0
2008
2010
2012
2014
2016
2018
2020
2022

C. Most ADA Cases Result in Compliance.

Acheson's *amici* suggest that ADA lawsuits only seek money and do not result in compliance. Chamber Br. 16; Retail Litig. Ctr. Br. 4, 18, 21, 22. This is demonstrably false. There is no damages remedy under Title III[23] and, as discussed below, fees are not guaranteed. In California, one of the few states where damages are available under state law for ADA violations, data collected by the Commission on Disability Access over the last six years (2016-2021)[24] shows that 78% of the cases brought resulted in the plaintiff obtaining injunctive relief.[25]

D. ADA Litigation is Burdensome and Risky for Disabled Plaintiffs.

Acheson and its *amici* paint disabled plaintiffs and their attorneys as eager to file under Title III. To the contrary, Title III cases are risky and difficult to bring. Most disabled people are unwilling or unable to undertake the arduous litigation process, rendering

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[23] 42 U.S.C. § 12188(a).

[24] California Commission on Disability Access Annual Reports to California State Legislature, 2016-2021, available at: https://www.dgs.ca.gov/CCDA/Resources/Page-Content/CCDA-Resources-List-Folder/CCDA-Annual-Reports-to-Legislature-?search=CCDA%20report. California, in turn, accounted for nearly half of ADA lawsuits during this period. See Minh Vu et. al., *ADA Title III Federal Lawsuits Numbers Are Down But Likely To Rebound in 2023*, ADA TITLE III NEWS & INSIGHTS (Feb. 14, 2023) https://www.adatitleiii.com/2023/02/ada-title-iii-federal-lawsuits-numbers-are-down-but-likely-to-rebound-in-2023/.

[25] Data on injunctive relief was not collected prior to 2016.

the ADA a chronically under-enforced statute.[26] As courts and commentators have noted, even with the prospect of a fee award, most attorneys will not handle ADA cases because the cost is seldom justifiable. *See D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) (the fact that Title III provides only injunctive relief "removes the incentive for most disabled persons who are injured by inaccessible places of public accommodation to bring suit").

Litigating a Title III case — especially against the not-uncommon headwind of defense motions practice[27] — often takes many years and extensive resources. The recovery of fees is not guaranteed; if awarded, they are often nominal, with courts considering such factors as the rote/template nature of the work, and the amount of time and skill actually required. Further, fee awards are limited to prevailing parties. After this Court's rejection of the "catalyst theory" in *Buckhannon Board and Home Care v. West Virginia Department of Health and*

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[26] *Implementation of the Americans with Disabilities Act: Challenges, Best Practices and New Opportunities for Success* at 169, NAT'L COUNCIL ON DISABILITY, (July 26, 2007), https://permanent.fdlp.gov/lps91121/implementation-07-26-07.pdf (last visited July 26, 2023) ("Few civil rights plaintiffs, no matter how self-motivated and justified by circumstances, have sufficient resources of time, money, and specialized training to successfully bring and maintain a federal lawsuit by themselves.").

[27] *See, e.g.*, Amy F. Robertson, *ADA Defense Abuse: A Case Study*, CREECBLOG (Feb 27, 2018), https://creeclaw.org/2018/02/27/ada-defense-abuse-a-case-study/ (last visited July 26, 2023) (detailing the two-and-a-half-year course of a Title III case).

Human Services, 532 U.S. 598 (2001), recovery of fees is limited to contexts where a judicial order produces the plaintiff's desired change. This "judicial imprimatur" requirement reduces plaintiffs' leverage in settlement negotiations and weakens lawyers' incentives, as cases may become moot before judgment. Thus, the notion of an unbridled cash windfall for plaintiffs or their lawyers is at odds with on-the-ground realities.

As discussed above, private enforcement is necessary to achieve compliance with the ADA's accessibility requirements. Under the current remedial scheme, and in light of the above-described risks, serial litigation, combining high volume with specialization, may be the only cost-effective way for private counsel to bring suit. Bagenstos, *supra* note 17, at 15. Hence, "[f]or the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA." *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007). If individuals with the fortitude to take on the burden of enforcement as testers are stripped of standing moving forward, the result will inevitably be less private enforcement of the ADA, frustration of statutory goals, and the continued exclusion of people with disabilities from community life.

E. Any Harm Experienced by Businesses is Self-Created and Self-Controlled.

Acheson and its *amici* attack all serial ADA litigation as "fabricated," "abusive," "meritless," and "bad faith." Chamber Br. 4, 16; Retail Litig. Ctr. Br.

2. 11, 12, 20. They assert, without support,[28] that ADA plaintiffs have "target[ed] businesses in marginalized communities," "extracted" millions of dollars from small businesses, and "forc[ed] businesses to close." Retail Lit. Ctr Br. 18-21. They even make the offensive suggestion that ADA testers may start selecting "targets" based on "race or religion." CCR Br. 17. Missing in this dangerous rhetoric is any assertion that the businesses sued — including Acheson — were in compliance with the ADA. Rather, Acheson and its *amici* confuse unwelcome litigation with meritless litigation: the prominent theme in their briefing is indignation at the idea of businesses being held accountable for disability discrimination.

There is a simple way for hotels and other businesses to avoid being sued for ADA violations: follow the law. Voluntary compliance — which is supported by longstanding tax incentives[29] — would eliminate not only the phantom problems that trouble Acheson and its *amici*, but also the real problems the Reservation Rule was promulgated to address: the stigma and administrative burden inflicted on disabled people when they are excluded from the reservations services provided to non-disabled people.

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[28] For example, the Chamber's estimate of $6.625 billion in website-accessibility case costs ultimately relies on an unsourced infographic created by a vendor of website remediation services. Chamber Br. 14-15 n.15 (citing https://www.boia.org/blog/did-u-s-businesses-spend-billions-on-legal-fees-for-inaccessible-websites-in-2020, and https://www.accessibility.com/complete-report-2020-website-accessibility-lawsuits).

[29] *See* I.R.C. §§ 44, 190.

If sued for an ADA violation, whether intentional or inadvertent, businesses like Acheson are fully in control of whether they settle or litigate, and if they litigate whether they spend more on their lawyers' fees than it would cost to comply.[30] If remediation is undertaken early on, liability for the plaintiff's attorney's fees should be modest, limited to the cost of preparing and filing the complaint. In some instances, liability for plaintiff fees can be avoided entirely.[31] When exorbitant defense fees are associated with Title III cases, it is often the result of unreasonably fighting compliance.

F. Elimination of Tester Standing is an Overbroad and Unnecessary Response to the Few Attorneys Engaging in Bad-Faith Litigation Tactics.

To the extent that a small number of ADA lawyers and plaintiffs have used bad-faith litigation tactics or engaged in illegal activity, our legal system provides numerous mechanisms for addressing such abuse, just as it does for attorneys and plaintiffs in any other practice area.

Federal courts can issue pre-filing orders to curtail vexatious litigation, 28 U.S.C. § 1651(a);[32]

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[30] Indeed, given that it would take a couple of hours and at most a couple hundred dollars to comply with the Reservation Rule, any attorneys' fees incurred in this case, and in similar cases, lie largely at the feet of the noncompliant businesses.

[31] See discussion of *Buckhannon*, *supra*.

[32] *See, e.g.*, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (upholding prefiling order against an ADA Plaintiff who filed a large number of nearly-identical complaints containing factual allegations that were "contrived,

Footnote continued on next page

impose monetary sanctions, Fed. R. Civ. P. 11; 28 U.S.C. § 1927;[33] and award prevailing defendants attorneys' fees, 42 U.S.C. § 12205.[34] Federal courts also have a number of case management tools at their disposal to manage serial litigation. In California, for example, the Chief Judge of the Northern District has issued General Order 56, which stays discovery and motions practice in Title III cases and requires the parties to exchange information, jointly inspect the premises, program, service, activity, website, mobile software application, or other technology claimed to violate the ADA, and then meet and confer to discuss specific violations and solutions.[35] Even in districts without a similar general order, Federal Rule of Civil Procedure 16 gives district courts the power to manage Title III cases to screen out those without merit and expedite proceedings to alleviate court congestion.

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exaggerated, and defy common sense."). *See also Strojnik v. IA Lodging Napa First LLC*, No. 19-CV-03983-DMR, 2020 WL 2838814, at *12 (N.D. Cal. June 1, 2020) (declaring ADA plaintiff a vexatious litigant and enjoining future filings).

[33] *See, e.g.*, *Lozano v. Cabrera*, No. 22-55273, 2023 WL 2387583, at *1 (9th Cir. Mar. 7, 2023) (upholding sanctions award under 28 U.S.C. § 1927 and referring to the California State Bar).

[34] *See Garcia v. Alcocer*, No. 220CV08419VAPJEMX, 2022 WL 495051, at *4 and *7 (C.D. Cal., Jan. 19, 2022) (finding ADA action frivolous and awarding $36,775 in attorney's fees to the prevailing defendant).

[35] General Order No. 56, Americans With Disabilities Act Access Litigation (N.D. Cal. June 21, 2005), *amended* (Jan. 1, 2020), https://cand.uscourts.gov/wp-content/uploads/general-orders/GO-56.pdf (last visited July 26, 2023).

State Bar Associations also play a role in addressing bad-faith litigation: attorneys have been disbarred, suspended and/or otherwise disciplined for unethical behavior in ADA cases.[36] And in egregious situations, government can bring enforcement actions against lawyers alleged to be acting illegally.[37]

In light of the robust array of tools to address the very few attorneys and plaintiffs misusing the ADA, eliminating Article III standing for civil rights testers is unnecessary. Moreover, it would frustrate the ADA's goal of "equality of opportunity, full participation, independent living, and economic self-sufficiency." 42 U.S.C. § 12101(a)(7).

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[36] *See. e.g., Matter of Hubbard*, No. 16-O-10871, 2020 WL 2520270, at *14 (Cal. Bar Ct. May 13, 2020), *as modified* (June 3, 2020) (imposing a 2-year suspension and other discipline); Debra Weiss, *Lawyer who filed hundreds of ADA suits barred from practice in Texas federal court for three years*, ABA JOURNAL (Jul. 13, 2017), http://www.abajournal.com/news/article/texas_lawyer_who_filed_hundreds_of_ada_suits_is_temporarily_barred_from_pra (last visited July 26, 2023); April 10, 2012 order of disbarment of Theodore Pinnock for, among other things, filing ADA cases on behalf of a woman without her consent, https://apps.calbar.ca.gov/courtDocs/09-O-19377-2.pdf (last visited July 26, 2023).

[37] *See, e.g.*, U.S. Attorney's Office, Southern District of New York, *Attorney Pleads Guilty To Filing Fraudulent Lawsuits Under The Americans With Disabilities Act* (July 12, 2022) https://www.justice.gov/usao-sdny/pr/attorney-pleads-guilty-filing-fraudulent-lawsuits-under-americans-disabilities-act (last visited July 26, 2023).

CONCLUSION

Amici agree with both parties and the United States that the Court should dismiss this case as moot. *See* Suggestion of Mootness. If it does not, then it should affirm the opinion of the First Circuit.

Respectfully submitted,

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Appendix

Amici curiae are as follows:

Disability Rights Education & Defense Fund

American Association of People with Disabilities

The Arc of the United States

Autistic Women & Nonbinary Network

Autistic Self Advocacy Network

The Judge David L. Bazelon Center for Mental Health Law

The Coelho Center for Disability Law, Policy and Innovation

Civil Rights Education and Enforcement Center

Disability Rights Advocates

Disability Rights Bar Association

Disability Rights Legal Center

Muscular Dystrophy Association

National Association of the Deaf

National Disability Rights Network

National Council on Independent Living

National Federation of the Blind Inc.

Paralyzed Veterans of America

Washington Lawyers' Committee for Civil Rights and Urban Affairs