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

REPLY BRIEF OF PETITIONER

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Respondent Deborah Laufer will not be injured by the absence of accessibility information on the website of a hotel she does not intend to visit. Laufer has no need for the information she seeks, so she is not harmed by not getting it. Laufer claims that because she was deprived of accessibility information, she was the victim of discrimination and therefore sustained a dignitary injury. But discrimination yields an actionable dignitary injury only when the plaintiff is "personally subject to discriminatory treatment." *Allen v. Wright*, 468 U.S. 737, 757 n.22 (1984). Laufer cannot satisfy that requirement merely by visiting Coast Village's website to check whether it complies with the ADA.

Notwithstanding Laufer's decision to abandon her case, the Court should decide the question presented. The question is important, the circuits are divided, and the arguments on both sides are fully aired. Moreover, if the Court does not decide the question presented in this case, it may not get another opportunity to do so. Future "tester" plaintiffs may do exactly what Laufer is attempting to do here: abandon their cases at the last minute to avoid an adverse ruling and facilitate the bringing of additional lawsuits. The Court should not set the precedent that this tactic is acceptable.

I. This Court's Precedents Establish that Laufer Lacks Standing.

Laufer contends that she experienced discrimination because of her disability by being deprived of accessibility information regarding Acheson's hotel. However, neither the deprivation of

information, nor the stigma she claims to have experienced, constitutes a cognizable Article III injury.

A. Laufer Did Not Suffer an Informational Injury.

The First Circuit characterized Laufer's injury as the deprivation of information to which Laufer was entitled by statute. It held that "denial of information to which plaintiffs have a legal right can be a concrete injury in fact." Pet. App. 15a.

Laufer scarcely defends that rationale, and for good reason—it contradicts this Court's precedent. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), establishes that Laufer's informational injury does not qualify as concrete harm. Laufer alleges she did not receive information regarding Coast Village's accessibility. But because she does not intend to visit Coast Village, she "identifie[s] no downstream consequences from failing to receive the required information." *Id.* at 2214 (quotation marks omitted). Absent "adverse effects," an "asserted informational injury … cannot satisfy Article III." *Id.* (quotation marks omitted).

In addition, Laufer's harm is not particularized. Laufer alleges that she experienced stigma from failing to receive accessibility information. But because *any* disabled person could say the same thing, Laufer has not "sufficiently differentiated [her]self from a general population of individuals affected in the abstract by the legal provision [she] attacks." *Carney v. Adams*, 141 S. Ct. 493, 502 (2020).

Contrary to Laufer's and the government's contentions, Resp. Br. 40 and U.S. Br. 24, Acheson is not saying that visiting a website can *never* cause a particularized injury. For example, a plaintiff may be able to show a particularized injury if she plans to travel, visits the online reservation service of a hotel at her destination, and is deprived of accessibility information she would actually use.

Here, however, Laufer cannot establish particularization merely by alleging that she visited Coast Village's website. "Those who merely peruse websites that they can't benefit from have less in common with bystanders than they do with passersby." *Brintley v. Aeroquip Credit Union*, 936 F.3d 489, 494 (6th Cir. 2019) (Sutton, J.). As Acheson's opening brief explained (Pet. Br. 25), Laufer's argument implies that *United States v. Richardson*, 418 U.S. 166 (1974), would come out the opposite way if a plaintiff visited the CIA's website and observed that information was absent. Neither Laufer nor the government addresses this concern.

B. Laufer Did Not Suffer a Stigmatic Injury.

Laufer frames her injury as arising from discrimination, not the deprivation of information. She contends that her injury is the result of being "discriminatorily denied enjoyment of a service offered to non-disabled people." Resp. Br. 31. Laufer acknowledges that a non-disabled person lacks standing to obtain accessibility information the person does not need, even if guaranteed access to that information by statute. Resp. Br. 39. But, Laufer claims, she suffers

an actionable "dignitary harm" when a hotel like Acheson deprives her of information on its website because of her disability. Resp. Br. 37.

Laufer's asserted "dignitary harm" does not satisfy Article III. Undoubtedly, discrimination can inflict a stigmatic injury. *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984). But such an injury only "is judicially cognizable to the extent that [the plaintiffs] are personally subject to discriminatory treatment." *Allen*, 468 U.S. at 757 n.22. Here, the only people who are even arguably personally subject to Acheson's alleged "discriminatory treatment" are people who were prevented from accessing the hotel by the denial of information.

As both the text of the Reservation Rule and its accompanying commentary make clear, the Reservation Rule prevents discrimination in access to hotels. By its terms, the Reservation Rule applies "with respect to reservations made by any means." 28 C.F.R. § 36.302(e)(1)(ii). Thus, it protects people making reservations, and hence trying to access hotels. The Justice Department's commentary likewise explains: "Each year the Department receives many complaints concerning failed reservations. Most of these complaints involve individuals who have reserved an accessible hotel room only to discover upon arrival that the room they reserved is either not available or not accessible." Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 75 Fed. Reg. 56,236, 56,273 (Dep't of Just. 2010). The Reservation Rule prevents

that outcome by ensuring that people who travel have accurate information about their destinations.

Thus, a person who accesses a deficient online reservation service *in anticipation of travel* may plausibly allege that she is the victim of discrimination. A traveler who uses a wheelchair needs information about accessibility in advance—she cannot risk showing up at a hotel and finding out she cannot enter it. If she lacks information about accessibility, she has been deterred from making a reservation on account of her disability—just as if the hotel were *inaccessible*. Laufer, however, was not deterred from accessing Coast Village because she had no intention of traveling there. Hence, she was not "personally subject to discriminatory treatment." *Allen*, 468 U.S. 737 at n.22.

Title III of the ADA is an intensely practical statute. Rather than remedying past harms, it solves existing problems. A person who claims to have suffered past stigmatic harm due to a violation of ADA Title III lacks a remedy. Instead, ADA Title III authorizes courts to issue injunctions to eliminate accessibility barriers on a forward-looking basis. A person who will never encounter the barriers lacks standing to challenge them.

Laufer contends otherwise. She points out that the ADA bars discrimination "on the basis of disability in the full and equal enjoyment of the goods, *services*, facilities, privileges, advantages, or accommodations of any place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). According to Laufer, Coast Village's "online reservation system" is a "service" under the ADA. Resp. Br. 25. By failing to

provide accessibility information on its online reservation service, Laufer contends, Acheson failed "to provide equal access to its online reservation system," *id.*, and hence discriminated against Laufer.

Laufer's argument is unpersuasive. To begin, it is counterintuitive for Laufer to suggest that she was deprived, on the basis of disability, of the full and equal enjoyment of Acheson's online reservation service. She had no difficulty accessing the online reservation service. Her disability in no way inhibits her use of the Internet. If the lack of information is an accessibility barrier, it impedes access to the hotel, not the website.

Even assuming that Laufer was in some sense "discriminated against on the basis of disability in the full and equal enjoyment of" Acheson's online reservation service, 42 U.S.C. § 12182(a), this "discrimination" is not a cognizable injury when it merely prevented Laufer from accessing information about physical accessibility that, by her own admission, she will never need. Laufer's argument parallels an argument that was rejected in three recent appellate decisions, including one by then-Judge Barrett. *See Carello v. Aurora Policemen Credit Union*, 930 F.3d 830 (7th Cir. 2019) (Barrett, J.); *Brintley v. Aeroquip Credit Union*, 936 F.3d 489 (6th Cir. 2019) (Sutton, J.); *Griffin v. Dep't of Lab. Fed. Credit Union*, 912 F.3d 649 (4th Cir. 2019) (Wilkinson, J.). In all three cases, visually impaired "testers" sued credit unions, alleging that their websites violated the ADA because the websites were not compatible with "screen readers" and hence not usable for people with visual impairments. In all three cases, however, the plaintiffs

were legally ineligible to become members of the credit unions.

The plaintiffs had a stronger case than Laufer for being "discriminated against on the basis of disability in the full and equal enjoyment of" the credit unions' websites. Unlike Laufer, they actually could not use the websites because of their disability. Even so, in all three cases, the courts held that the plaintiffs lacked standing. As the Seventh Circuit explained, the asserted dignitary injury was "necessarily abstract, amounting to mere indignation that the Credit Union is violating the ADA." *Carello*, 930 F.3d at 834. The injury was also not particularized because "there is no connection between [the plaintiff] and the Credit Union that distinguishes him from anyone else who is ineligible for membership and offended by the Credit Union's failure to comply with the ADA." *Id.* As the Sixth Circuit similarly explained: "The internet is a vast and often unpleasant place. It contains plenty that may offend, and those who set out looking for dignitary slights won't be disappointed. But merely browsing the web, without more, isn't enough to satisfy Article III." *Brintley*, 936 F.3d at 494; *see also Griffin*, 912 F.3d at 654.

Unlike the plaintiffs in *Carello*, *Brintley*, and *Griffin*, Laufer was not ineligible to visit Coast Village; she merely did not plan to visit. Still, the same reasoning applies. When a website facilitates access to a place of public accommodation, a person is "personally subject to discriminatory treatment," *Allen*, 468 U.S. at 757 n.22, only when her access to that place is impeded. A failure to receive information regarding hotel access

is not an injury when a person is not trying to access the hotel. Indeed, if the *Carello*, *Brintley*, and *Griffin* plaintiffs, who could not access the website *at all*, lacked standing, then Laufer, who *could* access the website but merely failed to obtain accessibility information she would never use, necessarily lacks standing too.

Laufer contends that non-travelers might access an online reservation service merely to become *aware* of whether the hotel is accessible. For example, they might "want to determine whether the hotel treats disabled people and non-disabled people as equally deserving of the information they need to determine whether the hotel can accommodate them." Resp. Br. 26. *Allen*, however, establishes that mere awareness of discrimination is insufficient to establish standing. Under Laufer's theory of Article III, a "black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine." 468 U.S. at 756. "Constitutional limits on the role of the federal courts preclude such a transformation." *Id.* *Allen*'s holding would not change if a plaintiff visited the Maine school's website and read about its discriminatory policy. Under *Allen*, plaintiffs lack standing unless they are personally subject to a discriminatory policy. Plaintiffs do not satisfy that requirement merely by checking websites for compliance with civil rights statutes.

Indeed, based on Laufer's reasoning, a disabled plaintiff could argue she has standing to challenge an *accessibility barrier* physically present at a hotel she did not intend to visit. She could allege that she

searched the Internet for evidence of inaccessible hotels in order "to determine whether the hotel treats disabled people and non-disabled people as equally deserving of the information they need to determine whether the hotel can accommodate them." Resp. Br. 26. Yet Laufer does not dispute that she lacks standing to challenge any physical barriers to accessibility at a hotel she does not intend to visit. Laufer's claimed injury from a purported lack of access to the online reservation system should be treated the same way.

Laufer further states that the Title III of the ADA is not limited to "clients or customers." Resp. Br. 27. But this is irrelevant. It is possible that a person who is not a "client or customer" will have standing under the ADA. For example, if a person who uses a wheelchair wants to enter a hotel for purposes of meeting her friend who is a guest, the person might be injured by an accessibility barrier. This does not mean that a web-surfer has standing to sue over the absence of information on an online reservation system that she will not use.

Any doubt is resolved by history. To be judicially cognizable, a harm must have a "close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2213.

There is no tradition of litigation by plaintiffs who failed to obtain information about accessing a place that they did not intend to access. Laufer's lengthy list of citations, Resp. Br. 41-44, proves the point. All of Laufer's cases involve people suing hotels that denied them physical access. For example, Laufer's lead case,

Jackson v. Virginia Hot Springs Co., 213 F. 969 (4th Cir. 1914), involved a wayfarer who "lawfully requested and required the defendant to suffer and permit him to stay and lodge." *Id.* at 971. Laufer cites secondary authority stating that the right of access extended to plaintiffs who, "before deciding to become a guest," inquired about prices. Resp. Br. 42. But again, this proves Acheson's point: Here, Laufer was never deciding to become a guest.

Contrary to Laufer's contention, Acheson is not saying that disability discrimination *never* satisfies *TransUnion*'s tradition-based test. Laufer's cases suggest that denial of access to an inn *is* a traditional Article III injury—which means a person who was *denied access* on the basis of disability *has* suffered a traditionally-recognized harm giving rise to standing. But no tradition suggests that the denial of information Laufer does not intend to use is legally actionable.

The government agrees that Laufer lacks standing. It observes, correctly, that the Reservation Rule guards access to online reservation services. A person who is not making a reservation is not deprived of full and equal access to online reservation services. U.S. Br. 17-20; Pet. Br. 29-30.

Although the government's brief supports neither party, there is not much daylight between the government's position and Acheson's position. Both agree that the failure to make modifications qualifies as discrimination under the ADA. Pet. Br. 40; U.S. Br. 15. Both agree that the Reservation Rule removes an accessibility barrier for travelers. Pet. Br. 32-33; U.S. Br. 18-19. And both agree that Laufer lacks standing

to challenge a violation of the Reservation Rule because she is not a traveler. Pet. Br. 30; U.S. Br. 19-20.

C. *Havens Realty* Does Not Assist Laufer.

Laufer's argument hinges on *Havens Realty*. She characterizes Acheson's argument as "legally indistinguishable from the standing challenge this Court rejected in *Havens Realty*." Resp. Br. 22. To the contrary, the differences between *Havens Realty* and this case are plain.

The *Havens Realty* Court relied on the Fair Housing Act's express bar on discrimination *in the provision of information*—a bar with no analog in the ADA. The Fair Housing Act makes it illegal for landlords to "represent to any person because of race … that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d). It also confers a private cause of action on anyone injured by a violation of that provision. 42 U.S.C. § 3612(a) (1982).

In *Havens Realty*, the plaintiff, Sylvia Coleman, was a Black "tester" who inquired whether housing was available. The landlord falsely represented to her that housing was unavailable, while telling a white "tester" that housing was available. She sued.

This Court held that Coleman had standing. It reasoned that "the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (quotation marks and citations omitted).

Section 804(d) of the Fair Housing Act, "which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment." *Id.* "A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions." *Id.* at 373-74.

This reasoning does not apply here. No provision of the ADA "establishes an enforceable right to truthful information," and Laufer has not "suffered injury in precisely the form the statute was intended to guard against." *Id.* Although the Reservation Rule does require hotels to provide information, it is a regulation, not a statute—and even the Reservation Rule requires that information only for purposes of making reservations, which Laufer was not. Pet. Br. 28-30.

Laufer insists that the ADA is no different from the Fair Housing Act because the ADA includes general language barring discrimination in the full and equal enjoyment of "services." Resp. Br. 25-26. According to Laufer, Acheson's denial of access to its "service" violates the ADA just like Havens Realty's discriminatory lies about housing violated the Fair Housing Act, so "testers" have standing to challenge both. *Id.*

As observed above, however, Laufer has not encountered discrimination in the provision of a "service." The deprivation of accessibility information was a barrier to accessing the *hotel*, and Laufer lacks standing to challenge such a barrier. *Supra*, at 4-5.

Additionally, as the government contends, the "service" at issue is the online reservation service, which Laufer did not seek to use. U.S. Br. 17-20. Either way, Laufer was not deprived of access to a "service" in the same way that Coleman was deprived of the information guaranteed to her by statute. At a minimum, the ADA does not create an independent statutory entitlement to information with anywhere near the type of clarity as the Fair Housing Act.

Laufer, however, insists that the ADA's coverage does not matter. She disagrees that her standing "is predicated on the assertion that she has suffered a violation of an enforceable legal right conferred by Congress." Resp. Br. 31. Instead, she contends, her standing arises from the "real-world harm" of being the victim of discrimination. *Id.* In her view, the availability of a cause of action is a merits question that is irrelevant to her standing. *Id.* at 31-32.

But this argument goes to show that Laufer is arguing for an expansion, rather than an application, of *Havens Realty*. *Havens Realty*'s holding was expressly premised on the existence of an enforceable legal right conferred by Congress: The Court emphasized that the Fair Housing Act was a statute "creating legal rights, the invasion of which creates standing." 455 U.S. at 373 (quotation marks omitted). Laufer's position in this Court, by contrast, is that it does not matter, for standing purposes, whether the ADA confers a right to accessibility information. According to Laufer, the asserted "discrimination" is enough to establish standing regardless of the ADA's

coverage. Resp. Br. 31-32. That argument wanders far afield from *Havens Realty*'s rationale.

Taken on its own terms, Laufer's argument lacks merit. Merely declaring her experience to be "discrimination" does not establish an Article III injury-in-fact. Laufer must instead show that her injury has been "traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2213. Laufer has failed to make that showing for the asserted "discrimination" at issue here—unintended failure to provide unneeded information to persons with disabilities at large.

In this respect, too, this case differs materially from *Havens Realty*, in which the landlord lied to Coleman because of Coleman's race. Intentional racial discrimination has unquestionably been "traditionally recognized as providing a basis for a lawsuit in American courts." *Id.*; *see Allen*, 468 U.S. at 757 n.22. Moreover, Coleman could plainly show particularization: Havens Realty personally discriminated against *her*. Finally, Coleman brought a traditional action for damages arising from discrimination she suffered in the past. Pet. Br. 42.

Laufer's theory of harm, by contrast, is decidedly non-traditional. Laufer seeks solely forward-looking relief: she intends to expose herself to Coast Village's website and anticipates experiencing dignitary harm by failing to receive accessibility information. Laufer's plans to visit a website that she knows lacks information she does not need, for purposes of intentionally inflicting future feelings of "inferior[ity]" on herself that justify continuing this lawsuit, Resp. Br.

50-51, fall far afield from the types of traditional harms giving rise to standing.

D. Laufer's Injury Is Self-Inflicted.

Finally, Laufer lacks standing because her injury is self-inflicted. She intends to return to Acheson's website or to third-party hotel websites for the purpose of causing herself to experience the indignity of being deprived of accessibility information. Article III does not permit a plaintiff to manufacture an injury in this manner. *See* Pet. Br. 43 (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)).

Laufer and the government point out that self-inflicted injuries can in some cases give rise to standing, pointing to *FEC v. Cruz*, 142 S. Ct. 1638 (2022). Resp. Br. 40-41; U.S. Br. 29. In *Cruz*, this Court held that "an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." 142 S. Ct. at 1647.

But Laufer argues for an unwarranted extension of standing based on self-inflicted injuries. *Cruz* involved an unconstitutional statute that chilled private citizens' speech. The plaintiff's decision to expose himself to that statute did not change the fact that the statute stripped him of his right to speak. Here, by contrast, because Laufer is unable to show that the sought-after information is useful to her, she asserts a dignitary injury. In effect, she asserts standing based on her plan to visit a website for the purpose of being offended

by it. Permitting a plaintiff to establish standing in this manner would go well beyond what *Cruz* permits.

Contrary to Laufer's view, Acheson is not advocating the abolition of "tester" standing, either in general or under the ADA. In particular, Acheson is not arguing that a plaintiff who is denied access to a building lacks standing merely because that plaintiff's motive is to test ADA compliance. Instead, Acheson is arguing that this case would be a significant extension of "tester" standing. The Court has never held, and should not hold for the first time, that the freestanding expectation of future stigma—untethered to any concrete injury like the right to speak or the right to access a building—is an Article III injury when the plaintiff intends to inflict that stigma on herself.

E. Acheson's Position Does Not Reflect Disability Animus.

Acheson observed in its brief that Laufer could have obtained the information she needed via a short phone call or email to the hotel. Pet. Br. 6, 49. Acheson disagrees with Laufer's assertion that this observation reflects "disability animus." Resp. Br. 37.

Acheson harbors no disability animus. Acheson regularly welcomed guests with disabilities while it owned Coast Village, and Ms. Acheson continues to do so at her current bed-and-breakfast. Although Coast Village, an older building, did not meet all ADA requirements applicable to new construction, it did include accommodations such as easy-entry showers. Pet. App. 40a n.2. Acheson always provided detailed

and prompt information regarding those accommodations upon request.

Because this information did not appear on Coast Village's online reservation service, Laufer states: "Acheson does not and cannot meaningfully contest that its failure to provide accessibility information amounted to unlawful disability discrimination under the Reservation Rule." Resp. Br. 20-21. To the contrary, Acheson's consistent position has been that it never violated the Reservation Rule. The First Circuit concluded that this was a merits argument rather than a standing argument, Pet. App. 9a-10a, and Acheson accepts that determination, but this does not mean Acheson *concedes* it violated the ADA.[1]

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[1] The Reservation Rule applies to hotel reservations "made by any means," 28 C.F.R. § 36.302(e)(1)(ii), and hence plainly applies to hotel reservations made *using* websites. However, it nowhere states that accessibility information must be made available *on* the website, rather than via a telephone conversation using a phone number *linked from* the website, which is how Acheson provided the information. The Reservation Rule says nothing about websites, while the DOJ's *Guidance on Web Accessibility and the ADA* (Mar. 18, 2022), https://www.ada.gov/resources/web-guidance/, says nothing about the Reservation Rule. Moreover, the Reservation Rule does not require that any specific information be provided, but instead requires that hotels "[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs." 28 C.F.R. § 36.302(e)(1)(ii). This implies that hotels must provide *individualized* information to disabled persons, suggesting that hotels may comply with the rule by

If Acheson's website violated the ADA, that violation reflected Acheson's failure to anticipate Laufer's interpretation of the Reservation Rule, not "disability animus" or "dismissiveness toward the stigmatization and inferior status it inflicted on disabled persons." Resp. Br. 37-38. Acheson strongly disputes that it is comparable to hotels that turn away guests based on their race or religion, as Laufer contends. Resp. Br. 37.

II. Laufer's Concerns About ADA Under-Enforcement Do Not Justify Permitting Uninjured Plaintiffs to Sue.

Laufer contends that the ADA is "massively underenforced." Resp. Br. 44 (quotation marks omitted). She opines that the Attorney General has "limited resources" to enforce Title III. *Id.* at 47. Hence, she characterizes Title III testers as "crucial" to fulfilling the ADA's goals. *Id.* at 44-45.

As this Court explained in *TransUnion*, however, concerns over the government's limited resources do not justify transferring enforcement authority to private plaintiffs. "[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the

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making a human being available who can answer their specific accessibility questions. Indeed, given that accessibility needs vary, a personal conversation may prove necessary for a disabled person to make an informed decision.

purview of private plaintiffs (and their attorneys)." 141 S. Ct. at 2207. "Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law." *Id.*

There are strong reasons that the Attorney General should have the exclusive authority to enforce general compliance with law. Acheson's opening brief stated:

> Notably, moreover, Laufer seeks attorney's fees in all of her lawsuits. When she settles her suits, she obtains fees as part of her settlements. She and her counsel therefore have a financial interest in pursuing this litigation campaign, which may color their assessment of whether the lawsuits are in the public interest. …
>
> There are good reasons that Justice Department officials who enforce the law are not permitted to have personal financial stakes in their lawsuits. This ensures that the officials can assess the public interest in an unbiased fashion. There are no such assurances with regard to Laufer and similar testers and their counsel.

Pet. Br. 50. At the time Acheson wrote that, it was completely unaware of the disciplinary proceeding against Laufer's lawyer. Nevertheless, that disciplinary proceeding gives credence to Acheson's concern.

Acheson does not suggest that all lawyers for "testers" commit ethical violations. Acheson agrees with Laufer that the particular allegations against Laufer's lawyer should not distract the Court in its

resolution of the broader legal issues. Nevertheless, the *temptation* to pursue private goals over the public interest will exist in every case brought by a private plaintiff, which is one reason Article III vests enforcement authority solely in the Executive Branch.

What is more, public officials will pursue different enforcement strategies than private plaintiffs. As Acheson argued in its opening brief (Pet. Br. 49-50), the Attorney General may determine, considering the equities, that small bed-and-breakfasts already on the brink of bankruptcy should not have to pay thousands of dollars in attorney's fees based on their alleged failure to strictly comply with a regulation they may have never heard of. By contrast, forcing bed-and-breakfasts to pay thousands of dollars is a feature, not a bug, of testers' litigation program—it is the very aspect of the program that makes it profitable for their lawyers. When a lawsuit is more profitable than conciliation, a private lawyer will file the lawsuit rather than conciliate, regardless of what might be in the public interest.

It is difficult to see why, as Laufer contends, "tester plaintiffs are the *only* option for private enforcement of the Reservation Rule." Resp. Br. 47. It is perfectly plausible that another disabled plaintiff might intend to travel and thus would have standing to challenge the information provided by a hotel on its website. Even if that plaintiff travels and stays at a different hotel before the lawsuit ends, the case would not necessarily become moot: the plaintiff can allege an intent to travel again.

Indeed, far from eliminating ADA enforcement, Acheson merely seeks to align standing in Reservation Rule cases with standing in other Title III cases. It is well-established that in a Title III case alleging a physical accessibility barrier, a plaintiff lacks standing to seek injunctive relief unless she intends to return to the building. As the government correctly explains, "[a] plaintiff's mere awareness of an ADA violation at a public accommodation that she has neither visited nor intends to visit does not suffice." U.S. Br. 15. The same should be true for the Reservation Rule.

III. Laufer Has Received the Information She Seeks.

Even if there was an Article III controversy at the case's inception, there no longer is one because Laufer has obtained the information she seeks. Pet. Br. 51-53. Laufer's contrary arguments are unpersuasive.

First, Laufer deems it "unclear" whether the current version of the website satisfies the Reservation Rule and then says this dispute "goes to the merits." Resp. Br. 49. That is incorrect. To establish standing, Laufer must demonstrate future injury. Laufer claims that her injury is being deprived of information on the basis of disability. If she is not deprived of information, there is no injury. Stating that Coast Village's compliance is "unclear" is not enough to establish an injury.

Second, Laufer claims that "[a]dding text to a website is something that can easily be undone." Resp. Br. 49-50. Laufer gives no reason to believe this would ever occur. In any event, it does not matter. Whether

the website is altered or not, Laufer now *has* the information she seeks, and thus cannot be injured by being deprived of that information.

Third, Laufer contends she will be injured when she visits third-party websites lacking accessibility information. Resp. Br. 50-51. She contends that, regardless of whether she already possesses accessibility information, she will experience dignitary harm. *Id.* But the indignity of being deprived of information is significantly undercut when the plaintiff already possesses it. Moreover, as the government states, U.S. Br. 31-32, it is speculative to suggest that an injunction against Acheson would redress those indignities caused by third party websites.

Laufer's argument would radically expand "tester" standing. There are numerous online travel agencies (hotels.com, kayak.com, and so forth). If even one of those websites fails to provide disability information, Laufer's argument suggests that a "tester" plaintiff has standing to sue *all* hotels listed on the website. Under Laufer's position, whether the hotel should be held responsible for the third-party website's contents would be deemed a merits issue. The Court should not expose all hotels in America—even those whose websites include accessibility information—to such suits.

IV. The Court Should Decide the Question Presented.

For the reasons stated in Acheson's opposition to Laufer's suggestion of mootness, the Court should

decide the standing question on which it granted certiorari.

There has been one recent development. On August 15, 2023, contrary to Acheson's expectation (Opp. To Sugg. of Mootness at 10 n.3), the Eleventh Circuit vacated its prior decision in *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022), on the ground that Arpan LLC had been dissolved seven weeks before the case was decided. The court observed that its order came "[s]ome fifteen months after we issued our opinion in this case," and the court was not "happy about being left in the dark for so long." *Laufer v. Arpan LLC*, No. 20-14846, __ F.4th __, 2023 WL 5209551, at *1 (11th Cir. Aug. 15, 2023). In the Fourth Circuit, however, the decision finding that Laufer has standing continues to be binding precedent. Opp. To Sugg. of Mootness at 9.[2]

Laufer contends that Acheson no longer has a stake in this case because it transferred its interest in Coast Village after the litigation commenced. Resp. Br. 48. Acheson acknowledged this transfer in the petition for certiorari. Pet. 10 n.1. Acheson further explained that it is still the appropriate litigant to prosecute this case,

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[2] In *Laufer v. Red Door 88, LLC*, No. 22-1055 (10th Cir.), and *Laufer v. Campfield Properties, LLC.*, No. 22-1106 (10th Cir.), Laufer moved to dismiss the appeals as moot on July 26, 2023, but then withdrew those motions on August 11, 2023. When ordered by the court to explain her position, Laufer stated on August 15, 2023 that the appeals should be dismissed. But on August 23, 2023, the Tenth Circuit denied the motions to dismiss and instead continued to hold the appeals in abeyance pending this Court's *Acheson* decision.

and any injunction would bind the successor entity. *Id.*; *see* Fed. R. Civ. P. 25(c); *Nat. Res. Def. Council, Inc. v. Texaco Refin. & Mktg., Inc.*, 2 F.3d 493, 506 (3d Cir. 1993). Laufer's brief in opposition did not mention this issue. To the contrary, Laufer acquiesced in the grant of certiorari. In her merits brief, Laufer correctly states that the property was transferred, but she does not dispute Acheson's legal analysis that Acheson is the proper party to prosecute this case.

Beyond that, Laufer does not meaningfully respond to the concerns raised in Acheson's opposition to the suggestion of mootness. As Acheson explained, the Court granted certiorari to decide an important question on which the circuits are divided. Even if the Court vacates the First Circuit's decision, there will still be a circuit split. Moreover, the Court may not get another opportunity to decide this issue if future plaintiffs do what Laufer has done here: abandon her lawsuit at the last minute to pave the way for further lawsuits and settlements. Rather than countenance that tactic, the Court should decide the question on which it granted certiorari and hold that Laufer lacks standing.

CONCLUSION

The judgment of the First Circuit should be reversed.

Respectfully submitted,

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