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 RESPONDENT

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QUESTION PRESENTED

Petitioner failed to provide accessibility information as part of its online hotel reservation services in violation of Title III of the Americans with Disabilities Act, which defines unlawful disability discrimination to include the failure of a place of public accommodation to make the "reasonable modifications" necessary for disabled people to enjoy its services as fully as non-disabled people. *See* 42 U.S.C. § 12182(b)(2)(A)(ii).

The question presented is whether a disabled person experiences an Article III injury in fact when she encounters that discriminatory barrier to fully and equally enjoying petitioner's reservation services, even if she does not intend to stay at petitioner's hotel.

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INTRODUCTION

Just before her 40th birthday, respondent Deborah Laufer was diagnosed with multiple sclerosis and lost the ability to move freely without a wheelchair. Among the many new challenges she faced as a disabled person living in this country, she found it nearly impossible to travel overnight as a wheelchair user. Hotels rarely provided accessibility information on their reservation websites, and the information they did provide was often inaccurate. Ms. Laufer sometimes ended up sleeping in her car after she arrived at a hotel and found that it could not accommodate her.

When a hotel fails to provide accessibility information as part of its online reservation services, it engages in unlawful disability discrimination under the Americans with Disabilities Act (ADA). Title III of the ADA defines disability discrimination to include not only the intentional exclusion of disabled people from places of public accommodation, but also the failure to make reasonable modifications to afford disabled people an equal opportunity to enjoy the "service[s]" provided by places of accommodations. 42 U.S.C. § 12182(b)(1)(A)(ii). A Justice Department regulation commonly referred to as the Reservation Rule, 28 C.F.R. § 36.302(e)(1), explains that Title III requires hotels to ensure that their online reservation services include the accessibility information necessary for disabled people to enjoy the services as fully as nondisabled people.

When Ms. Laufer learned that the hotels' failure to include accessibility information on their reserva-

tion websites constituted unlawful disability discrimination, and that Title III allows disabled individuals to obtain injunctions requiring noncompliant hotels to follow the law, she decided to enforce her rights. She understood that she would receive no financial benefit for bringing these lawsuits, but saw it as an opportunity to help herself and other disabled people who found themselves unable to make travel plans because of the widespread failure of the hotel industry to comply with the Reservation Rule.

Because Title III's private cause of action is limited to injunctive relief, suing to enforce the Reservation Rule is essentially useless to a disabled traveler who encounters a noncompliant reservation website while looking for a room based on imminent travel plans, as no injunction could be entered in time to help. Reservation Rule enforcement thus depends on disabled "tester" plaintiffs like Ms. Laufer, who identify noncompliant hotels and bring suit independent of any travel plans. Over the last five years, countless hotels have added accessibility information to their reservation websites in response to Ms. Laufer's tester suits, benefiting Ms. Laufer and other disabled travelers.

Petitioner Acheson Hotels, LLC, is one of the hotels Ms. Laufer sued after finding that it failed to include accessibility information as part of its online reservation services. Acheson asks this Court to hold that Ms. Laufer lacks Article III standing because she had no intent to stay at Acheson's hotel when she encountered its Title III violation. As explained in Ms. Laufer's Suggestion of Mootness filed July 24, 2023, Ms. Laufer has dismissed her complaint with prejudice, and as such, the Court should simply vacate the

judgment below on mootness grounds without addressing Acheson's standing challenge.

In the event the Court decides to resolve the standing issue, it should affirm the First Circuit's holding that Ms. Laufer experienced actionable disability discrimination when she used Acheson's reservation service to test its ADA compliance. Title III provides a cause of action to "any person" with disabilities who personally encounters an unlawful accessibility barrier and is thus "subjected to discrimination on the basis of disability." 42 U.S.C. § 12188(a)(1). When Ms. Laufer visited Acheson's online reservation services and found that Acheson had failed to provide the accessibility information necessary for her to enjoy the service as fully as non-disabled people, she personally experienced discriminatory treatment that inflicted injury in fact under Article III and that is actionable under Title III, regardless of her intent.

Acheson's contrary argument is foreclosed by *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which held that a Black plaintiff suffered actionable discrimination under the Fair Housing Act (FHA) when she was falsely told that the defendant had no apartments available to rent, even though she inquired about availability for the sole purpose of testing the defendant's compliance with the FHA. *Havens Realty*'s approval of tester standing to challenge unlawful discrimination is consistent with the Court's well-established precedent recognizing discriminatory treatment as an Article III injury in fact that "Congress may elevate to the status of [a] legally cognizable injur[y]." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-05 (2021) (internal quotation marks omitted).

Congress did just that with disability discrimination when it enacted the ADA. Title III reflects Congress's judgment that "there was a compelling need for a clear and comprehensive national mandate to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (internal quotation marks omitted). And because discrimination is itself a concrete injury that inflicts dignitary harm regardless of any downstream consequences, this Court has long recognized that a plaintiff who has a cause of action based on her personal experience of discriminatory treatment need not allege any additional injury to establish standing. Congress's provision of a cause of action to Reservation Rule testers thus accords with Article III's requirements.

STATEMENT OF THE CASE

I. Statutory and regulatory background

Passed by overwhelming bipartisan consensus in 1990, and reinforced with the same consensus in 2008, the ADA reflects Congress's recognition that "discrimination" has precluded "many people with physical or mental disabilities" from "fully participat[ing] in all aspects of society." 42 U.S.C. § 12101(a)(1). Congress's objective was "the elimination or reduction of physical and social structures" that thwart "equal-citizenship stature for persons with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring).

To this end, Title III of the ADA provides that "[n]o individual shall be discriminated against 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). Title III defines disability discrimination to include not only the "intentional exclusion" of disabled people, *id.* § 12101(a)(5)), but also the failure to afford disabled people an equal opportunity "to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation," *id.* § 12182(b)(1)(A)(ii).

A place of public accommodation thus engages in unlawful discrimination when it fails to make "reasonable modifications [to its] policies, practices, or procedures" as "necessary to afford [its] goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities." *Id.* § 12182(b)(2)(A)(ii). Inns, hotels, motels, and other places of lodging are included in Title III's definition of public accommodations. *Id.* § 12181(7)(A).

The ADA authorizes the Attorney General to promulgate regulations to carry out its provisions. *See id.* § 12186(b). In 2010, the Justice Department exercised that authority by issuing a Reservation Rule addressing "the application of [Title III's] statutory reasonable-modification requirement to reservation services offered by hotels and other places of lodging." U.S. Br. 3 (citing 28 C.F.R. § 36.302(e)). The Rule provides that under Title III, a "place of lodging" must "with respect to reservations made by any means, including by telephone, in-person, or through a third party ... [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).

During the Rule's notice and comment period, the hotel industry urged the Department to adopt language requiring only that people with disabilities be able to make reservations "in a substantially similar manner" as non-disabled people, thereby permitting hotels to require disabled people to confirm directly with the hotel that an accessible room is available. 28 C.F.R. pt. 36, app. A at 804. The Department rejected this proposal, explaining that "basic nondiscrimination principles mandate that individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms." *Id.* at 805.

Accessibility information is particularly vital to making online reservation services usable for disabled people because the ADA does not require that every hotel offer accessible rooms. *See* 42 U.S.C. § 12182(b)(2)(A)(iv)) (exempting older buildings where accessibility is not "readily achievable"). The Reservation Rule thus "recognizes that an individual who uses a wheelchair, for example, cannot book a room using an online reservation service—and thus is not afforded equal access to that service—if she cannot determine whether the hotel or specific rooms are wheelchair accessible." U.S. Br. 5.

The Department's guidance explains the the Rule does not apply directly to third-party reservation services, but requires hotels to provide any such services it uses with "information concerning" the hotel's accessibility features. 28 C.F.R. pt. 36, app. A at 805.

Title III provides a cause of action to "any person who is being subjected to discrimination on the basis of disability in violation of this subchapter." 42 U.S.C. § 12188(a)(1). A prevailing plaintiff may obtain injunctive relief and attorney's fees, but not monetary damages. *Id.*

II. Factual and procedural background

Deborah Laufer is disabled within the meaning of the ADA, 42 U.S.C. § 12102. She is visually impaired, has limited use of her hands, and must use a wheelchair or cane to move around. J.A. 2a. To stay at a hotel, she needs, among other things, passageways wide enough and properly graded for her wheelchair and a bathroom with grab bars to help her transfer from her wheelchair. *Id.* at 2a-3a.

In Ms. Laufer's experience making travel plans, she found that, despite the Reservation Rule, most hotels had made little effort to provide accessibility information on reservation websites, rendering their online reservation services unusable by people with disabilities. *Id.* at 16a-17a. But because the only relief available for violating Title III is an injunction, 42 U.S.C. § 12188(a)(1), there would be no point to bringing suit based on an imminent need to reserve a room, as no injunction could be entered in time to help.

Based on this experience, Ms. Laufer decided to become a Reservation Rule "tester"—i.e., a person with disabilities who tests online hotel reservation systems for compliance independent of travel plans, and then seeks injunctions requiring noncompliant hotels to abide by the Rule. *See* J.A. 3a, 17a. She brings these suits to remedy the discrimination she

experiences in being unable to use these hotels' reservation services in the same way as non-disabled people, the accompanying humiliation and sense of isolation she experiences, and the deprivation of "information required to make meaningful choices for travel." *Id.* at 10a.

At the time Ms. Laufer filed her complaint, Acheson Hotels operated the Coast Village Inn and Cottages in Maine. Pet. App. 3a. On multiple occasions before filing suit, Ms. Laufer reviewed Acheson's reservation website and saw that Acheson did not identify whether it had accessible rooms or offer the option of booking an accessible room. J.A. 6a-7a. She also reviewed several third-party reservation websites that Acheson used and saw that there was no accessibility information available on those websites either. *Id.* at 7a-9a.

Ms. Laufer brought suit to obtain injunctive relief directing Acheson to modify its online reservation services as required by the Reservation Rule, along with attorney's fees. *Id.* at 13a. Her amended complaint alleged that she reviewed Acheson's reservation services not only for testing purposes, but also because she "had plans to drive from Florida to Maine," where she would "meet with her sister" and take her grandchild to "tourist attractions, points of interest, [and] educational and historic sites." *Id.* at 6a.

Ms. Laufer alleged that the "discriminatory conditions" of Acheson's online reservation services "infringe [her] right to travel free of discrimination," "deprive her of the information required to make meaningful choices for travel," cause her to suffer "frustra-

tion and humiliation," contribute to her "sense of isolation and segregation," and deprive her of "the full and equal enjoyment" of Acheson's services. *Id*. at 10a. She also alleged that she intended to return to Acheson's online reservation services in the future to test its compliance with Title III. *Id*. at 9a-10a.

Acheson sought to dismiss the complaint on the ground that Ms. Laufer's tester status deprived her of Article III standing. The district court agreed, holding that Ms. Laufer's history of bringing Title III tester suits made it "implausible" that she planned to visit Maine, and that she could not "allege concrete harm" without "a genuine plan to make a reservation." Pet. App. 47a-49a.[1]

The First Circuit reversed, rejecting Acheson's claim that Ms. Laufer lacked Article III standing because she visited Acheson's reservation website for the purpose of testing Title III compliance. *Id.* at 13a. The First Circuit explained that this Court had already rejected Acheson's argument in a legally indistinguishable case, *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). *Havens Realty* held that a Black plaintiff suffered actionable discrimination under the Fair Housing Act (FHA) when the defendant realtor falsely told her there were no apartments available to rent, even though she inquired about availability for

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[1] Ms. Laufer traveled cross-country with her sister and granddaughter in summer 2021, *see* Suggestion of Mootness App. A. 4a, while her First Circuit appeal was pending. She did not challenge the district court's plausibility finding on appeal, *see* Pet. App. 11a n.3, as by that time she no longer had travel plans that could serve as a basis for injunctive relief.

the sole purpose of testing the defendant's compliance with the FHA. Pet. App. 13a-14a.

The First Circuit found *Havens Realty* "right on the nose for Laufer's case—both to her status as a tester and the injury she suffered." *Id.* at 14a. The Reservation Rule defines "the denial of accessibility information [as] actionable discrimination against disabled persons" under Title III, "just as the statute made the denial of information in *Havens Realty* actionable racial discrimination." *Id.* at 20a.

The First Circuit further observed that this Court has repeatedly recognized in other cases "that denial of information to which plaintiffs have a legal right can be a concrete injury in fact," citing *Federal Election Commission v. Akins*, 524 U.S. 11, 20-21 (1998), *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449-50 (1989), and *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016). Pet. App. 15a-16a. Ms. Laufer, the court concluded, suffered a particularized informational injury because she "is a person with disabilities" who "was not given information she personally had a right to under the ADA and its regulations." *Id.* at 27a-29a.

In addition to the First Circuit, the Fourth and Eleventh Circuits have found that Ms. Laufer is personally injured by the defendant hotels' noncompliance with the Reservation Rule and that her tester status does not deprive her of Article III standing.[2]

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[2] By contrast, the Second, Fifth, Tenth, and D.C. Circuits have held that only plaintiffs who intend to stay at the hotel in question have standing to challenge violations of the Reservation *(cont'd)*

The Fourth Circuit agreed with the First Circuit that *Havens Realty* compels the conclusion that Ms. Laufer suffered an actionable informational injury when the defendant hotel's website withheld the accessibility information it was legally required to provide under Title III and the Reservation Rule, and that her tester status does not alter that conclusion. *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 163-64 (4th Cir. 2023).

The Eleventh Circuit took a different approach. Relying on *Allen v. Wright*, 468 U.S. 737 (1984), and *Heckler v. Mathews*, 465 U.S. 728 (1984), the court of appeals held that "[a]n individual who suffers an intangible injury from discrimination can establish standing if he personally experienced the discrimination." *Laufer v. Arpan LLC*, 29 F.4th 1268, 1273 (11th Cir. 2022), *reh'g denied*, 65 F.4th 615 (11th Cir. 2023) (internal quotation marks omitted). "[D]iscrimination itself," the court explained, "can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Id.* (internal quotation marks omitted). Because Ms. Laufer alleged that she suffered "illegal discrimination" that resulted in "frustration and humiliation" and a "sense of isolation

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Rule. *See Laufer v. Looper*, 22 F.4th 871, 883 (10th Cir. 2022); *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443-44 (2d Cir. 2022); *Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 272-73 (5th Cir. 2021); *Laufer v. Alamac Inc.*, No. 21-7056, 2021 WL 4765435, at *1 (D.C. Cir. Sept. 10, 2021).

and segregation," the court concluded that she "adequately pleaded a concrete stigmatic injury." *Id.* at 1274.

III. Ms. Laufer's dismissal of her complaint with prejudice.

Although Acheson transferred its interest in the Coast Village Inn to new owners in August 2022, it filed a petition for a writ of certiorari in November 2022. *See* Pet. 10 n.1; Coast Inn Village, https://perma.cc/FAS2-WGA8 (last visited July 31, 2023); *see also* Opp. to Suggestion of Mootness 11-12 (asserting that Acheson's owner, Juliana Acheson, continues to pursue this litigation because she now owns a different bed and breakfast that she "is on the verge of protecting" from future, hypothetical Title III lawsuits).

The Court granted Acheson's petition on March 27, 2023. On July 13, 2023, undersigned counsel learned that an attorney named Tristan Gillespie was disciplined by the United States District Court for the District of Maryland for conduct taken in different ADA cases he filed on behalf of Ms. Laufer and another plaintiff. *See In re Tristan W. Gillespie*, No. 21-MC-00014, ECF No. 13 (June 30, 2023) (Panel Report and Recommendation), *adopted by court*, ECF No. 14 (D. Md. July 5, 2023), *motion for reconsideration filed*, ECF No. 15 (July 21, 2023) & *appeal filed*, ECF No. 16 (July 26, 2023). The disciplinary order concludes that Mr. Gillespie violated his ethical duty to keep his clients informed, his duty of candor to the court, and his duty of candor and fairness to opposing counsel. *Id.* Mr. Gillespie had no involvement in the present case before this Court, and undersigned counsel have

not had any involvement in any case filed on behalf of Ms. Laufer beyond representing Ms. Laufer before this Court at the merits stage.

Ms. Laufer has not engaged in any improper conduct relating to this or her other ADA cases. *See* Suggestion of Mootness App. 1a-4a (Ms. Laufer's declaration confirming she has never received any financial benefit from her federal ADA claims, which she pursued solely "to help [her]self and other people with disabilities who want to visit their families and to travel"). Recognizing, however, that the allegations of misconduct against Mr. Gillespie could distract from the merits of her claims against Acheson and other hotels, she decided to dismiss all of her pending cases with prejudice. Undersigned counsel promptly informed Acheson's counsel and the Court about the Gillespie order and Ms. Laufer's intent to dismiss her claims. *See* Suggestion of Mootness 4.

On July 20, 2023, Ms. Laufer voluntarily dismissed her complaint with prejudice in the district court pursuant to Federal Rule of Civil Procedure 41. Notice of Voluntary Dismissal, *Laufer v. Acheson Hotels, LLC*, No. 20-CV-00344 (D. Me. July 20, 2023), ECF No. 45. On July 24, 2023, Ms. Laufer filed a Suggestion of Mootness with this Court, urging the Court to find this case moot and vacate the decision below based on Ms. Laufer's dismissal of her complaint. On July 28, 2023, Acheson filed a response opposing dismissal on that ground.

SUMMARY OF ARGUMENT

Because Ms. Laufer has dismissed her complaint with prejudice, the Court should vacate the decision below and remand with instructions to dismiss the

appeal as moot. In the event the Court decides to reach the standing question presented by Acheson's petition, it should affirm the First Circuit's holding that a disabled person experiences actionable disability discrimination when she uses a hotel's online reservation service to test its ADA compliance and finds that it fails to provide the accessibility information necessary for her to enjoy the service in the same way as non-disabled people.

I.A. Acheson's challenge to Ms. Laufer's standing is legally indistinguishable from the standing challenge this Court rejected in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Although the plaintiff in *Havens Realty* lacked "an intent to rent or purchase a home or apartment" when she attempted to obtain information about housing availability from the defendant realtor, the Court found that she satisfied the "Art. III minima of injury in fact" requirement when the realtor discriminatorily withheld that information in violation of the Fair Housing Act (FHA). *Id.* at 372-73.

Like the right to nondiscriminatory housing information conferred by the FHA, Title III's "right to equal access to the facilities and services of a place of public accommodation … does not depend on the motive behind a plaintiff's attempt" to use those facilities and services. U.S. Br. 14-15 (internal quotation marks omitted). A plaintiff who personally encounters a Title III violation thus experiences actionable discrimination even if the reason for the encounter is to test compliance.

Acheson acknowledges that the deprivation of information can in some circumstances amount to "discrimination on the basis of disability" under Title III, but urges that its failure to make its online reservation services available to people with disabilities causes a cognizable injury under Title III only to the extent that it thwarts a disabled plaintiff's plans to stay at its hotel. This argument ignores that Title III applies not just to places of public accommodation, but also to the "service[s]" they provide. 42 U.S.C. § 12182(a)). This suit is a challenge to Acheson's failure to provide equal access to its online reservation system, which is a service Acheson provides in its capacity as a place of public accommodation.

I.B. The government declines to endorse Acheson's view that a Reservation Rule plaintiff must intend to visit the hotel in order to experience actionable discrimination, but nonetheless concludes that Ms. Laufer lacks standing because she "merely view[ed]" Acheson's reservation website without intending to use it to make or consider making a reservation. U.S. Br. 9.

The government's "intent to reserve" requirement is just as counter textual as Acheson's "intent to stay" requirement. A disabled individual does not need to attempt to reserve a room in order to personally encounter the discriminatory informational barrier to full and equal enjoyment of Acheson's reservation services. The government does not and cannot identify any functional difference between Ms. Laufer clicking through and reviewing Acheson's online reservation system and a would-be reservation maker doing the same thing.

In any event, although Ms. Laufer has emphasized the application of Title III's cause of action to her claim in order to demonstrate the similarity between this case and *Havens Realty*, that is the only respect in which it matters to the standing inquiry here. The government's and Acheson's freestanding arguments that Ms. Laufer's claim falls outside the Reservation Rule and Title III run afoul of the Court's longstanding recognition that "the absence of a valid … cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). The sole standing question is whether Ms. Laufer suffered concrete injury when she experienced unlawful discrimination while using Acheson's online reservation service to test its compliance with Title III, a question that is resolved by *Havens Realty*.

I.C. The government correctly rejects Acheson's argument that its failure to provide accessibility information on its reservation website did not "'personally subject" Ms. Laufer to discriminatory treatment. Petr's Br. 39. Acheson cannot seriously contend that if the plaintiff in *Havens Realty* had encountered a sign on the realtor's door (or, these days, its website) stating, "We have no apartments available for rent if you are Black," she would not have "personally" experienced discriminatory treatment because the realtor "had no idea who [she] was." *Id.* at 40. So, too, when a disabled person encounters a hotel reservation service that has not been modified to afford equal access to people with disabilities, she experiences a deprivation of her personal right to "full and equal enjoyment" of the hotel's services, 42 U.S.C. § 12182(a), regardless of whether the hotel intended to target her individually.

IIA. As this Court has recognized many times over the last four decades, *Havens Realty* was correctly decided. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), in particular, affirms *Havens Realty*'s core tenet: "[D]iscriminatory treatment" is among the "harms that exist in the real world" that Congress "may elevate to the status of legally cognizable injuries" under Article III without requiring any additional harm. *Id.* at 2205 (internal quotation marks omitted). This is because "[d]iscrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in the disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (internal quotation marks omitted).

When Acheson failed to make the minimal modifications necessary for people with disabilities to fully enjoy its online reservation services, it perpetuated the "archaic and stereotypic notions" of disabled people as "less worthy participants in the political community." *Id.* (internal quotation marks omitted). The dignitary harm Acheson inflicted on disabled people who sought to enjoy its reservation services is no different than if Acheson had a practice of ignoring the existence of wheelchair users who approach the reservation desk in its lobby.

II.B. History and tradition confirm Congress's determination that a place of public accommodation inflicts actionable injury when it discriminatorily withholds access to its services. Nondiscrimination laws

like the ADA "grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants." *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2314 (2023). The common law specifically recognized the dignitary harms inflicted by discriminatory innkeeper practices and extended a cause of action to plaintiffs who approached an innkeeper without any interest in booking a room.

III. A prominent theme in Acheson's briefing is that disabled tester plaintiffs "abuse" the ADA when they voluntarily expose themselves to unlawful accessibility barriers and then seek injunctive relief under Title III to eradicate the discriminatory treatment. Acheson's villainization of Title III testers is both factually wrong and legally irrelevant.

Because Title III does not provide for money damages, most disabled people are unable to expend the resources necessary to challenge the unlawful accessibility barriers they encounter in their daily lives. Making matters worse, suing to enforce the Reservation Rule is essentially useless to a disabled traveler who encounters a noncompliant reservation website while looking for a room based on imminent travel plans, as no injunction could be entered until long after the trip occurred (at which point the traveler would no longer be entitled to an injunction under Acheson's "intent to stay" theory). Title III testers, and in particular Reservation Rule testers, are thus crucial to fulfilling the ADA's goals.

Acheson and its amici complain about the volume of Title III litigation, but offer no explanation for why it would be problematic for a small number of lawyers

and plaintiffs to file a large number of meritorious ADA cases. If there is any takeaway from the hundreds of violations Ms. Laufer has found and challenged over the last five years, it is that the hotel industry's failure to comply with the Reservation Rule has been egregious. Proactive compliance by the hotel industry would eliminate not only the serial litigation that Acheson condemns, but also the precise problem the Rule was promulgated to address: the dignitary harm and unequal administrative burden inflicted on disabled people when they are excluded from using reservation services provided to non-disabled people.

The specific concerns that Acheson and its amici raise regarding unethical litigation practices are irrelevant to the constitutional standing question Acheson presents, and ably addressed by our legal system. Courts can impose monetary sanctions and disciplinary penalties against attorneys for unethical behavior, and state bar associations have a range of additional tools to punish attorneys who cross ethical lines. Regardless, narrowing Article III is not an appropriate solution to attorney misconduct.

IV. Although Acheson has opposed Ms. Laufer's Suggestion of Mootness urging the Court to dispose of this case based on Ms. Laufer's dismissal of her complaint, it contends that Ms. Laufer's claim is moot for a different reason: The Coast Village Inn (now under new ownership) has updated its website to include a banner announcing that the Inn does not offer accessible rooms. This mootness argument is wrong. Whether the new website information satisfies the Reservation Rule's requirements is a merits question that is inappropriate to resolve at this stage in the litigation. And even if the new information satisfies the

Rule's requirements, a defendant's voluntary cessation of unlawful conduct does not moot a claim under this Court's well-established case law. Moreover, although the Inn's website is updated, Acheson has presented no evidence of any effort to update the information presented about the Inn on third-party reservation systems.

ARGUMENT

Because Ms. Laufer has now dismissed her complaint with prejudice, the Court should vacate the decision below and remand with instructions to dismiss the appeal as moot. *See* Suggestion of Mootness. In the event the Court decides to reach the standing question presented by Acheson's petition, Ms. Laufer submits the following argument.

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At the time Ms. Laufer filed her complaint, Acheson owned the Coast Village Inn, which has an online reservation service that provides information about the rooms and amenities at its hotel and permits users to reserve rooms without having to call the hotel. The Inn's website, however, failed to provide information about the accessibility of its hotel for people with disabilities, thereby preventing disabled people from using its reservation service in the same manner as non-disabled people. *See* J.A. 7a; Petr's Br. 7 (noting that Coast Village's website was updated to include accessibility information "*after* Laufer filed her lawsuit" (emphasis added)).

Acheson does not and cannot meaningfully contest that its failure to provide accessibility information amounted to unlawful disability discrimination under

the Reservation Rule, which the Justice Department promulgated pursuant to its authority to carry out Title III's requirement that places of public accommodation make reasonable efforts to eliminate barriers to the "full and equal enjoyment" of their goods and services by people with disabilities. 42 U.S.C. § 12182(a)-(b). Acheson argues instead that Article III's injury-in-fact requirement renders that discrimination non-actionable by a disabled plaintiff who uses the Inn's online reservation services to test its compliance with the Reservation Rule, without intending to stay there. *See* Petr's Br. 31-32.

Acheson's argument is foreclosed by *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which held that a plaintiff who experiences a discriminatory denial of information in violation of a statutory right has Article III standing even if she voluntarily exposed herself to the discrimination for the purpose of testing the defendant's compliance with the law. *Havens Realty*'s approval of tester standing to challenge unlawful discrimination is consistent with the Court's well-established precedent recognizing discriminatory treatment as an Article III injury in fact that "Congress may elevate to the status of [a] legally cognizable injur[y]." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-05 (2021) (internal quotation marks omitted).

I. *Havens Realty* forecloses Acheson's challenge to Ms. Laufer's standing.

Acheson's challenge to Ms. Laufer's standing is legally indistinguishable from the standing challenge this Court rejected in *Havens Realty*. Sylvia Coleman, a Black woman, sought information about housing availability from the defendant realtor. She had no intent to rent an apartment in the complex, but rather inquired for the purpose of testing whether the realtor would provide her with accurate information. After the realtor falsely told her that no units were available, she sued under the Fair Housing Act (FHA), 42 U.S.C. § 3604(d).

This Court rejected the realtor's argument that Ms. Coleman's tester status deprived her of standing to sue. The Court acknowledged that Ms. Coleman lacked "an intent to rent or purchase a home or apartment" when she attempted to obtain information about housing availability from the realtor, but nonetheless concluded that she satisfied the "Art. III minima of injury in fact" requirement when the realtor unlawfully withheld that information. *Havens Realty*, 455 U.S. at 372-73. The Court explained that § 3604(d) made it unlawful to "represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available," and that was exactly what had happened to Ms. Coleman, regardless of her motive for seeking the information. *Id.* (quoting § 3604(d)). She thus had standing as "the object of a misrepresentation made unlawful under [the statute]," which injured her "in precisely the form the statute was intended to guard

against"—i.e., the "discriminatory" denial of housing information. *Id.* at 373-74.

Havens Realty applies with full force to a disabled plaintiff who sues under Title III to challenge an unlawful discriminatory barrier to using the facilities and services of a place of public accommodation: So long as the plaintiff personally encounters the discriminatory treatment, she is injured "in precisely the form the statute was intended to guard against," regardless of her motive in the encounter. *See* U.S. Br. 14-15. Acheson's failure to comply with the Reservation Rule imposed an unlawful discriminatory barrier on the use of its reservation services by disabled people, and as such a disabled person experiences actionable discrimination when she encounters that barrier, regardless of the motive that led her to the encounter.

A. *Havens Realty*'s reasoning squarely applies to Reservation Rule testers.

Eight years after *Havens Realty*, Congress worded the cause of action for Title III violations to track the cause of action that this Court recognized as permitting tester suits: Just as the FHA confers a private cause of action to "any person" who is denied truthful housing information for discriminatory reasons, 42 U.S.C. § 3604(d), Title III confers a private cause of action to "any person who is being subjected to discrimination on the basis of disability," *id.* § 12188(a)(1). And just as the FHA "plainly omit[s]" any requirement that the plaintiff who experiences the defendant's discriminatory denial of housing information intend "to rent or purchase," Title III imposes no intent requirement on the plaintiff who experiences the defendant's discriminatory treatment—

a "congressional intention [that] cannot be overlooked in determining whether testers have standing to sue." *Havens Realty*, 455 U.S. at 373-74.

Title III tester standing thus "follows directly" from *Havens Realty*: Like the right conferred by the FHA, the "right to equal access to the facilities and services of a place of public accommodation … does not depend on the motive behind a plaintiff's attempt" to use those facilities and services. U.S. Br. 14-15 (internal quotation marks omitted). Indeed, the courts of appeals have uniformly recognized both that Congress made Title III's cause of action available to plaintiffs who encounter an unlawful physical barrier to enjoying a place of public accommodation—even if they visited only to test compliance—and that such plaintiffs are concretely injured for Article III purposes.[3]

Acheson does not contest that *Havens Realty*'s reasoning applies generally to Title III, permitting disabled testers to bring suit challenging physical barriers they encounter in places of public accommodation. And although Acheson observes that, unlike the FHA, Title III does not specifically grant disabled individuals "a private cause of action to vindicate an informational right," Petr's Br. 12, Acheson acknowledges

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[3] *See Suarez-Torres v. Panaderia y Reposteria Espana, Inc.*, 988 F.3d 542 (1st Cir. 2021); *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752 (6th Cir. 2019); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447 (4th Cir. 2017); *C.R. Educ. & Enf't Ctr. v. Hosp. Props. Tr.*, 867 F.3d 1093 (9th Cir. 2017); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205 (10th Cir. 2014); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323 (11th Cir. 2013).

that the deprivation of information can in some circumstances amount to "discrimination on the basis of disability" under Title III, 42 U.S.C. § 12188(a)(1). *See* Petr's Br. 32 ("[I]f a person has imminent travel plans, tries to make a reservation at a hotel, and cannot obtain accessibility information, she arguably has a cause of action under the ADA because she has been denied the 'full and equal enjoyment' of the hotel.").

According to Acheson, however, Title III "permits plaintiffs to sue [only] if they have been subjected to discrimination that renders them unable to fully and equally enjoy *the place of public accommodation*—here, the hotel." Petr's Br. 31. Acheson thus urges that its failure to make its online reservation services available to people with disabilities causes a cognizable injury under Title III only to the extent that it thwarts a disabled plaintiff's plans to stay at its hotel. *Id.* at 31-32.

As the government notes, this argument ignores that Title III applies not just to places of public accommodation, but also to the "services" they provide. U.S. Br. 23 (quoting 42 U.S.C. § 12182(a)). This suit is not a challenge to Acheson's failure to provide equal physical access to its hotel. It is a challenge to Acheson's failure to provide equal access to its online reservation system, which is a service Acheson provides in its capacity as a place of public accommodation. *Id.* at 18. When a hotel reservation website fails to "[i]dentify and describe accessible features … in enough detail to reasonably permit individuals with disabilities to assess" the hotel's accessibility, 28 C.F.R. § 36.302(e)(1)(ii), it deprives individuals with disabilities of the "right of equal access to and enjoyment of a particular 'service[]' offered by hotels," U.S.

Br. 9 (alteration in original), regardless of the plaintiff's intent in seeking to enjoy that service.

This conclusion also follows from the consensus among the courts of appeals and the government that, under *Havens Realty*, disabled testers have standing to challenge unlawful physical barriers in places of public accommodation, *see supra* p. 25: A disabled plaintiff who encounters an unlawful physical barrier at a place of public accommodation experiences actionable discrimination even if she went to the place of public accommodation for the purpose of testing its Title III compliance. *See* U.S. Br. 14-15. So too, then, does a disabled plaintiff experience actionable discrimination when she encounters an unlawful informational barrier to using a hotel reservation service even if she used or attempted to use the system for the purpose of testing its Title III compliance.

To the extent Acheson suggests that only people who intend to stay at a hotel are capable of using its reservation services, *see* Petr's Br. 31-33, that claim is both factually and legally wrong. Anyone may use Acheson's reservation website to review room options, compare rates, check availability, and even reserve a room, without intending to stay at the hotel. Perhaps they are using the online reservation system to determine whether the hotel is comparable to the one they are staying at; perhaps they want to know whether the lodging options in one city are better than those of another city; or perhaps they 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. In every scenario, a hotel's failure to provide accessibility information deprives a disabled

reservation system user of "the full and equal enjoyment" of the hotel's reservation services, 42 U.S.C. § 12182(a), regardless of whether the user intends to stay at the hotel.

Significantly—and again in close parallel to the FHA provisions in *Havens Realty*—Congress limited the reach of the ADA's anti-discrimination provisions to "clients or customers" elsewhere in Title III, *id.* § 12182(b)(1)(A)(iv), but did *not* include that limitation in the provision requiring public accommodations to make reasonable modifications for "individuals with disabilities," *id.* § 12182(b)(2)(A)(ii); *cf. Havens Realty*, 455 U.S. at 374 ("Whereas Congress, in prohibiting discriminatory refusals to sell or rent in § 804(a) of the Act … required that there be a 'bona fide offer' to rent or purchase, Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d)."). The Reservation Rule thus requires even hotels that are *not* accessible to provide that information on their reservation websites, recognizing that accessibility information is necessary to a disabled person's full and equal enjoyment of a reservation service even where she cannot stay at the hotel due to physical inaccessibility. *See* 28 C.F.R. pt. 36, app. A at 805.

B. Ms. Laufer experienced actionable discrimination when she encountered an unlawful barrier to her full and equal enjoyment of Acheson's reservation services.

Although the government agrees with Ms. Laufer that Acheson's failure to comply with the Reservation Rule qualifies as actionable discrimination under Title III, and that Reservation Rule "testers" have

standing to challenge that discrimination under *Havens Realty*, U.S. Br. 24, the government nonetheless concludes that Ms. Laufer does not have standing in this case. The government distinguishes Ms. Laufer's claim from the one in *Havens Realty* on a narrow ground: Because the Reservation Rule's "requirements focus on the reservation process," a plaintiff must make a reservation, attempt to make a reservation, or consider making a reservation to experience the discriminatory informational barrier inflicted by Acheson's failure to provide accessibility information. *Id.* at 18-19. According to the government, Ms. Laufer fails that test because she "merely view[ed]" Acheson's online reservation services. *Id.* at 9.

As an initial matter, the government notably declines to endorse Acheson's view that a plaintiff must intend to visit the hotel in order to experience actionable discrimination as a result of Acheson's failure to provide accessibility information.[4] Nowhere in the

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[4] Although the government notes the First Circuit's observation that Ms. Laufer did not intend to travel to Maine, *see* U.S. Br. 6, 19, it does so in the context of explaining that Ms. Laufer does not fall within the category of "potential travelers" whom the government believes has a cause of action under Title III because they are *considering* making a reservation, even if they do not use or attempt to use the reservation system to book a room. *See id.* at 19 (asserting that the Reservation Rule protects individuals with disabilities "who are making, or considering whether to make, a reservation"); *id.* at 19-20 (asserting that because the lower courts found that Ms. Laufer "has no genuine plan to make a reservation" and has "disclaimed any intent to travel to Maine," "[a]s this case comes to the Court, Laufer has not alleged that she used, attempted to use, or planned to use the Inn's reservation service").

brief does the government suggest that a disabled plaintiff who uses a reservation service to book a room cannot do so with an intent to test the service's Title III compliance rather than an intent to keep the reservation and actually stay at the hotel. To the contrary, the government recognizes that such a plaintiff is in precisely the same position as Ms. Coleman was: Like "the Black tester plaintiff in *Havens Realty*," a "Reservation Rule tester" "who is denied equal access to a hotel's reservation service suffers a particularized injury, too." *Id.* at 24.

The government's "intent to reserve" requirement, however, is just as counter textual as Acheson's "intent to stay" requirement. As the government elsewhere recognizes, *id.* at 14-15, Title III provides a cause of action to any disabled person who personally encounters an unlawful accessibility barrier and is thus "subjected to discrimination on the basis of disability." 42 U.S.C. § 12188(a)(1). A disabled individual does not need to attempt to reserve a room in order to personally encounter the accessibility barrier on Acheson's reservation website. As noted earlier, *supra* p. 27, she could be using the website for any number of purposes other than reserving a room. To add to the list: She could be looking for a hotel where she can visit relatives or friends if they choose to stay there; she could be daydreaming about a trip she might take if she wins the lottery; or she could be figuring out how much of a salary raise she would need to take the trip without winning the lottery.

In every scenario, the disabled website user encounters a discriminatory barrier when she cannot find the accessibility information necessary for her to enjoy the online reservation service as fully and

equally as non-disabled people. A disabled person who visits a reservation website for the purpose of determining Title III compliance likewise has precisely the same encounter: "[I]f would-be travelers personally experience discrimination on the [hotel's] website, then Laufer must as well—because she and they have *the exact same experience*. The hotel displays the very same content to them on the very same webpage, and they view and interact with that content in the very same way." *Laufer v. Arpan LLC*, 65 F.4th 615, 617 (11th Cir. 2023) (Newsom, J., concurring in the denial of rehearing en banc).

Indeed, to the extent the government purports to distinguish "attempting to use" a reservation website from "visiting" that website, *see* U.S. Br. 20, it does not and cannot identify any functional difference between Ms. Laufer clicking through and reviewing Acheson's website and a would-be reservation maker doing the same thing. Ms. Laufer is not akin to someone "who drive[s] by a restaurant" rather than going inside and personally encountering the absence of a wheelchair ramp, *id.*; she used Acheson's online reservation system and interacted with it and encountered the lack of accessibility information in exactly the same way as someone trying to make a reservation. By the government's reasoning, a wheelchair user who encounters an inaccessibly narrow aisle in a store is a "visitor" who merely observes the discrimination unless she tries to buy something—a distinction the government elsewhere rejects. *See id.* at 14-15 (endorsing Title III tester challenges to physical accessibility barriers). In short, the government's the-

ory boils down to an intent-driven test that is both internally inconsistent and irreconcilable with *Havens Realty* and the plain text of Title III.

Finally, while Ms. Laufer has emphasized the application of Title III's cause of action to her claim in order to demonstrate the similarity between this case and *Havens Realty*, that is the only respect in which it matters to the standing inquiry here. The government's and Acheson's freestanding arguments that Ms. Laufer's claim falls outside the Reservation Rule and Title III run afoul of the Court's longstanding recognition that "the absence of a valid … cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 89 (1998); *see also Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional.").

The government asserts that "standing and the merits overlap" in this case because Ms. Laufer's standing "is predicated on the assertion that she has suffered a violation of an enforceable legal right conferred by Congress." U.S. Br. 21. The government is mistaken: Ms. Laufer's *standing* arises from the Article III injury in fact—i.e., the "real-world harm," *id.* at 22— of being discriminatorily denied enjoyment of a service offered to non-disabled people. Ms. Laufer's *cause of action* arises from Congress's decision to "elevate" disability discrimination "into a cognizable injury" under the ADA, *id.* (internal quotation marks omitted). These inquiries do not overlap simply because the government has styled its cause of action argument as a standing argument. *See id.* at 17-22 (concluding that Ms. Laufer lacks standing based

solely on the argument that Title III's cause of action does not apply to her under the Reservation Rule). This is particularly true given the government's focus on the wording of the Rule over the statute. *See Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (an agency cannot by regulation alter a cause of action provided by Congress). The sole standing question is whether Ms. Laufer suffered concrete injury when she experienced unlawful discrimination while using Acheson's online reservation service to test its compliance with Title III, a question that is resolved by *Havens Realty*.

C. Acheson's other efforts to distinguish this case from *Havens Realty* fail.

The government corrects course when it rejects Acheson's argument that, unlike the realtor's failure to provide Ms. Coleman with truthful housing information, Acheson's failure to provide accessibility information on its reservation website does not "personally subject" Ms. Laufer to discriminatory treatment. Petr's Br. 39-40; *see* U.S. Br. 23-24 (rejecting Acheson's argument that "no discrimination occurs when a defendant provides the same information to all comers").

If Acheson means to point out that it did not deny accessibility information only to Ms. Laufer, but rather set up its online reservation services so that *no* disabled persons can access the accessibility information they need to fully enjoy the service, it is hard to see how that distinction helps Acheson. Acheson cannot seriously contend that if Ms. Coleman had confronted a sign on the realtor's door (or, these days, its website) stating, "We have no apartments available

for rent if you are Black," Ms. Coleman would not have "personally" experienced discriminatory treatment because the realtor "had no idea who [she] was." Petr's Br. 40. So, too, when a disabled person confronts a hotel reservation system that has not been "reasonabl[y] modifi[ed] as necessary to afford equal access to individuals with disabilities," U.S. Br. 23, she experiences a deprivation of her personal right to "full and equal enjoyment" of the hotel's services, 42 U.S.C. § 12182(a), regardless of whether the hotel intended to target her individually.

Acheson appears to recognize as much when it acknowledges that "a disabled person [who] tries to access a property and is prevented from doing so" by the lack of a wheelchair ramp is "a victim of discrimination" under the ADA. Petr's Br. 40; *see id.* ("[T]he failure to provide a wheelchair ramp has the same practical effect as a facially discriminatory 'no persons who use wheelchairs allowed' sign—it prevents people who use wheelchairs from accessing the property."). Acheson's failure to eliminate a discriminatory informational barrier to the use of its online reservation system—a "service[]" provided by a "place of public accommodation," 42 U.S.C. § 12182(a)—likewise amounts to actionable discrimination against "a disabled person [who] tries to access [the reservation service] and is prevented from doing so" due to the lack of accessibility information.

II. *Havens Realty* was correctly decided.

As this Court has recognized many times over the last four decades, *Havens Realty* was correctly decided. *See, e.g.*, *FEC v. Cruz*, 142 S. Ct. 1638, 1647 (2022); *Bank of Am. Corp. v. City of Miami*, 581 U.S.

189, 197 (2017); *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Heckler v. Mathews*, 465 U.S. 728, 740 n.7 (1984); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 348 (2016) (Thomas, J., concurring).

TransUnion in particular, affirms *Havens Realty*'s core tenet: "[D]iscriminatory treatment" is among the "harms that exist in the real world" that Congress "may elevate to the status of legally cognizable injuries" under Article III. 141 S. Ct. at 2205 (internal quotation marks omitted). Congress did just that with disability discrimination when it enacted the ADA.

A. A person who experiences discrimination suffers a concrete injury independent of any downstream consequences.

This Court has "long recognized" that discrimination is itself a concrete injury, *Heckler*, 465 U.S. at 738, "sufficient … to support standing" for "'those persons who are personally denied equal treatment' by the challenged discriminatory conduct," *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quoting *Heckler*, 465 U.S. at 740).

In such cases, the "'injury in fact' is … the denial of equal treatment resulting from the imposition of [a] barrier"—a "discriminatory classification" that inflicts harm irrespective of whether the plaintiff might have attained some tangible benefit absent the discrimination. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666-67 (1993). So, for example, plaintiffs who challenge programs that confer benefits based on a protected characteristic need not show that, but for

the classification, they would have received the benefit sought; the classification itself inflicts the Article III injury. *See*, *e.g.*, *Haaland v. Brackeen*, 143 S. Ct. 1609, 1638 (2023) ("The racial discrimination [petitioners] allege counts as an Article III injury."); *Gratz v. Bollinger*, 539 U.S. 244, 261-62 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978).

Heckler v. Mathews is illustrative. The male plaintiff challenged a pension offset that applied differently to men than to women. If the plaintiff succeeded "in having the gender-based classification stricken," however, "he would derive no personal benefit from the decision because of a severability provision that would render the offset applicable to everyone "without exception." 465 U.S. at 737. The Court rejected the argument that the severability provision deprived the plaintiff of standing to challenge the offset, explaining that the "personal injury" he suffered was "unequal treatment … solely because of his gender," an injury that could be redressed either by "extending the program's benefits to the excluded class" or by "declar[ing] the statute a nullity and order[ing] that its benefits not extend to the class that the legislature intended to benefit." *Id.* at 738-39 (internal quotation marks and brackets omitted); *see also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2355 (2020) (rejecting argument that Article III requires plaintiffs to show a tangible harm beyond "unequal treatment").

As the Court explained, "the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied

the party discriminated against"; instead, "discrimination itself, by perpetuating archaic and stereotypic notions or by stigmatizing members of the disfavored group as innately inferior and therefore as less worthy participants in the political community can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler*, 465 U.S. at 738 (internal quotation marks omitted).

So, too, with the right to equal treatment guaranteed by the ADA to people with disabilities. The ADA reflects Congress's judgment that people with disabilities face widespread discrimination that interferes with their "right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1). Although the ADA provides a statutory remedy for disability discrimination beyond the protections provided by the Constitution, the underlying harm of unequal treatment is at the core of the Equal Protection Clause and among the "*de facto* injuries" that Congress is well within its authority to elevate to a legally cognizable injury. *See TransUnion*, 141 S. Ct. at 2205 (citing "discriminatory treatment" as an example of a "*de facto* injur[y] that w[as] previously inadequate in law"); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2314 (2023) ("[P]ublic accommodations laws 'vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964))); *see also Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 833-34 (7th Cir. 2019) (Barrett, J.) (observing with respect to a Title III disability discrimination claim, "[t]here is no doubt that dignitary harm is cognizable; stigmatic injury is

'one of the most serious consequences' of discrimination") (quoting *Allen*, 468 U.S. at 755)).

When Acheson failed to make the minimal modifications necessary for disabled people to fully and equally enjoy the online reservation services it provides to non-disabled people, it perpetuated the "archaic and stereotypic notions" of disabled people as "less worthy participants in the political community." *Heckler*, 465 U.S. at 739-40. The dignitary harm Acheson inflicted on disabled individuals who attempted to enjoy its online reservation services is no different than if Acheson had a practice of ignoring the existence of wheelchair users approach the reservation desk in its lobby.

Indeed, although disability discrimination is "most often the product, not of invidious animus, but rather of … benign neglect," *Alexander v. Choate*, 469 U.S. 287, 295 (1985), one need look no further than Acheson's briefing for disability animus. Rather than acknowledging the indignity it inflicted on disabled individuals when it excluded them from its online reservation services, Acheson repeatedly asserts that Ms. Laufer should have been content with seeking accessibility information by phone or email. *See* Petr's Br. 6, Pet. 4, 10. Surely Acheson would not tell someone turned away from a lobby reservation desk because of her race or religion that she has nothing to complain about because the hotel telephone operator will take her call. And yet Acheson has no qualms about chastising Ms. Laufer for not simply making "a two-minute phone call" to the hotel once she realized that Acheson did not provide accessibility information

on its reservation websites.[5] Petr's Br. 6; *see also* Pet. 4, 10 (same, but the call takes five minutes).

Acheson's dismissiveness toward the stigmatization and inferior status it inflicted on disabled persons when it excluded them from its online reservation services reflects precisely the attitude that compelled Congress to provide disabled persons with a cause of action to enforce their right to be "integrate[d] … into the economic and social mainstream of American life." *PGA Tour*, 532 U.S. at 675 (internal quotation marks omitted); *see 303 Creative*, 143 S. Ct. at 2328 (Sotomayor, J., dissenting) (the exclusion of disabled persons from "areas of public life … work[s] harms not only to disabled people's standards of living, but to their dignity too"). Acheson may think it would have been "more appropriate" for Ms. Laufer to make "a polite phone call" "reminding" Acheson of its obligation to provide disabled people with equal access to its reservation services. Petr's Br. 49-50. But Congress was well within its authority when it decided to make that right enforceable in court.

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[5] Moreover, as anyone who has tried to obtain customer service by phone in recent years appreciates, getting *any* sort of information via a phone call, let alone accurate accessibility information, is often difficult and time consuming. Comparing lodging options and making reservations online is far more efficient and convenient than attempting to get through to a live hotel employee by phone during business hours, and Title III entitles disabled people to enjoy that efficiency and convenience just as non-disabled people do. *See generally* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 Minn. L. Rev. 2329, 2377 (2021) (describing the ways that "[i]naccessibility complicates seemingly simple tasks" for disabled people, imposing "myriad forms of admin costs").

Nor is there any basis for Acheson's claim that the "logical implication of Laufer's position" is that "*anyone*—not just someone who uses a wheelchair—would have Article III standing to sue for failure to provide accessibility information." *Id.* at 21-22. As the ADA makes clear, Acheson's failure to provide the accessibility information necessary for persons with disabilities to fully and equally enjoy its reservation services discriminates against *persons with disabilities*. *See* 42 U.S.C. § 12188(a)(1). A disabled person experiences that discrimination "in a personal and individual way," *Spokeo*, 578 U.S. at 339 (internal quotation marks omitted), when she personally confronts the unlawful informational barrier that prevents her from enjoying the reservation service in the same way as non-disabled people. Acheson's assertion that whether Ms. Laufer's injury in that encounter is "particularized" depends on her "need for" the accessibility information, Petr's Br. 22-24, is irreconcilable with *Havens Realty* and misunderstands the Court's precedent recognizing discriminatory treatment as an Article III injury in itself.

This case thus bears no resemblance to *Allen v. Wright*'s "concerned bystander" hypothetical in which a Black person in Hawaii challenges the grant of a tax exemption to a racially discriminatory school in Maine. 468 U.S. at 756. Ms. Laufer was not simply made aware of discrimination occurring across the country, but rather personally experienced discriminatory treatment when she visited Acheson's online reservation services and encountered an unlawful barrier to her full and equal enjoyment of that service.

Acheson is also wrong to compare Ms. Laufer to "offended observer" plaintiffs challenging Establishment Clause violations. Petr's Br. 25-26. Unlike the Establishment Clause's structural guarantees, which apply equally to all citizens (and not simply those who claim offense), "the essence" of the right to be free from discrimination "is a personal one." *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938); *see also Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (referring to the "*personal* right to equal protection of the laws"); *Spokeo*, 578 U.S. at 348 (Thomas, J., concurring) (statutory discrimination confers a private right). The harm that a person subjected to discrimination experiences is a particularized injury to her even if others also might be subjected to the same injury.

Finally, Acheson asserts that the voluntary nature of Ms. Laufer's encounter with Acheson's reservation services rendered her injury "self-inflicted" and therefore non-cognizable. Petr's Br. 42-43. Again, *Havens Realty* forecloses that claim: That Ms. Coleman "may have approached the real estate agent fully expecting that [s]he would receive false information, and without any intention of buying or renting a home, d[id] not negate the simple fact of injury within the meaning" of the statute. 455 U.S. at 374. That principle has long applied with special force in discrimination cases, *see, e.g.*, *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (finding it "not significant" that the plaintiff intentionally exposed himself to discrimination), and was reaffirmed by this Court just last term in *Federal Election Commission v. Cruz*, 142 S. Ct. at 1647 (citing *Havens Realty* for the proposition that standing

exists "even if the injury could be described in some sense as willingly incurred").

B. History and tradition confirm that the discriminatory denial of services by a place of public accommodation inflicts concrete injury.

Acheson makes two errors when it argues that a Reservation Rule tester's dignitary injuries are insufficient under Article III because they do not bear "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." Petr's Br. 45 (quoting *Transunion*, 141 S. Ct. at 2213). First, this Court has repeatedly held that such a relationship is unnecessary where Congress has recognized a *de facto* injury that exists in the world—here, the discriminatory exclusion of disabled people from using services offered by places of public accommodation—and elevated it to a legally cognizable injury. *See* U.S. Br. 26 (citing *Transunion*, 141 S. Ct. at 2204-05; *Spokeo*, 578 U.S. at 340-41; and *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562-63 (1992)).

Second, history and tradition confirm Congress's determination that a place of public accommodation inflicts concrete injury when it discriminatorily withholds access to its services. *See* U.S. Br. 26-27. Nondiscrimination laws like the ADA "grow from nondiscrimination rules the common law sometimes imposed on common carriers and places of traditional public accommodation like hotels and restaurants." *303 Creative*, 143 S. Ct. at 2314. The common law specifically recognized the dignitary harms inflicted by insulting or discriminatory innkeeper practices. *See* U.S. Br. 26-27. In *Jackson v. Virginia Hot Springs*

Co., 213 F. 969, 971 (4th Cir. 1914), for example, the plaintiff was permitted to seek damages for the distress and humiliation he and his wife experienced when they were refused lodging due to his wife's disabilities. This common law right of access to inns was not limited to people who were certain to book a room, but rather extended to plaintiffs who, "before deciding to become a guest," found it useful to "inquire what room he can get and what price will be charged, and to make such other investigation as is possible." Joseph Henry Beale, Jr., *The Law of Innkeepers and Hotels Including Other Public Houses, Theaters, Sleeping Cars* § 89 (1906).

The common law cause of action also extended to plaintiffs who approached an innkeeper without any interest in booking a room. *See, e.g.*, *Markham v. Brown*, 8 N.H. 523, 523 (1837) (innkeeper duty of equal treatment applied to a driver who sought to enter the inn to solicit passengers). This makes sense, as the dignitary harm inflicted by an innkeeper's insults or discriminatory treatment is a harm the common law recognized as arising from the encounter itself, not any underlying intent on the part of the plaintiff. *See, e.g.*, *De Wolf v. Ford*, 193 N.Y. 397, 399, 406 (1908) (plaintiff had right to recover for "such injury to her feelings and such personal humiliation as she may have suffered" when a hotel employee subjected her to "vile and insulting language"); *Frewen v. Page*, 238 Mass. 499, 504-05 (1921) ("damages may be assessed for humiliation and injury to the plaintiff's feelings" due to hotel conduct that was "abusive, insulting, and wanting in ordinary respect and decency"); *Hawthorn v. Hammond* (1844) 174 Eng. Rep.

866, 868, 1 CAR. & K. 404, 404 (annoyance and distress are recoverable when denied service by innkeeper); *Emmke v. De Silva*, 293 F. 17, 20-21 (8th Cir. 1923) ("Notwithstanding no physical injury was inflicted, plaintiff was entitled to recover on account of the mental anguish and humiliation to which she was subjected" when the hotel manager accused her of unchastity.).

The common law thus recognized that discriminatory treatment inflicts dignitary harm even if the plaintiff successfully secures accommodations. *See In re The Sue*, 22 F. 843 (D. Md. 1885) (plaintiff could sue common carrier for placing her in segregated sleeping car); *Constantine v. Imperial London Hotels Ltd* (1944) 2 All ER 171 (KB) at 172-73, 178 (plaintiff could sue for nominal damages when defendant refused to offer available room in requested hotel due to plaintiff's race, but accommodated him at another hotel).

In the years following the Civil War, many states—and eventually Congress—codified the common law's obligation on innkeepers to provide nondiscriminatory access. *See* Elizabeth W. Sepper, *A Missing Piece of the Puzzle of the Dignitary Torts*, 104 Cornell L. Rev. Online 70, 72 (2019); U.S. Br. 26. "From the time of their passage, courts frequently referred to [statutory] public accommodations laws as codifying the common law rule of equal treatment in public places." Sepper, *supra*, at 74; *see also, e.g.*, *Ferguson v. Gies*, 82 Mich. 358, 363 (1890) (emphasizing that Michigan's statutory civil rights protection "is only declaratory of the common law, as [the court] understand[s] it to now exist in this state"); *Thomas v. Pick Hotels Corp.*, 224 F.2d 664, 665-66 (10th Cir. 1955)

(noting that state laws prohibiting discrimination in public accommodations are "merely declaratory of the common law"). The ADA reflects this tradition of codifying and expanding the common law innkeeper duty to provide all comers with equal treatment and access to a hotel's services.

III. Acheson's public policy arguments are misplaced.

A prominent theme in Acheson's briefing, reiterated by its business group amici, is that disabled tester plaintiffs "abuse" the ADA when they voluntarily expose themselves to unlawful accessibility barriers and then seek injunctive relief under Title III to eradicate the discriminatory treatment. *See, e.g.,* Pet. 27-28, 30; Petr's Br. 2-3, 49-50. Acheson's villainization of Title III testers is both factually wrong and legally irrelevant.

Title III is, by all accounts, "massively underenforced." Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. Rev. 1, 6 (2006). Without the possibility of damages for Title III violations, most disabled people are unable to expend the resources necessary to challenge the unlawful accessibility barriers they encounter in their daily lives. *See D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1040 (9th Cir. 2008) ("[T]he law's provision for injunctive relief only removes the incentive for most disabled persons who are injured by inaccessible places of public accommodation to bring suit." (internal quotation marks omitted)).

Recognizing the unlikelihood of facing suit under Title III, businesses often take a "wait and see" approach to Title III compliance, removing accessibility barriers only after someone files a complaint. Bagenstos, *supra*, at 12. Making matters worse, suing to enforce the Reservation Rule is essentially useless to a disabled traveler who encounters a noncompliant reservation website while looking for a room based on imminent travel plans, as no injunction could be entered until after the trip has occurred (at which point the traveler would no longer be entitled to an injunction under Acheson's "intent to stay" theory).

Title III testers, and in particular Reservation Rule testers, are thus crucial to fulfilling the ADA's goal of ensuring that people with disabilities experience "equality of opportunity, full participation, independent living, and economic self-sufficiency" as they go about their daily lives. 42 U.S.C. § 12101(a)(7). And while Acheson and its amici emphasize the number of suits Ms. Laufer has filed, they do not identify anything inherently problematic about a small number of lawyers and plaintiffs filing a large number of meritorious ADA cases.

If there is any takeaway from the hundreds of violations Ms. Laufer has found and challenged over the last five years, it is that the hotel industry's failure to comply with the Reservation Rule has been egregious. No defendant hotel can responsibly claim ignorance about its obligations under the Rule, which has been in effect for over a decade, nor is compliance expensive or difficult to accomplish. Proactive compliance by the hotel industry would eliminate not only the serial litigation that Acheson condemns, but also the precise problem the Rule was promulgated to address: the

dignitary harm and unequal administrative burden inflicted on disabled people when they are excluded from fully and equally enjoying the reservation services provided to non-disabled people. *See* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 Minn. L. Rev. 2329, 2352 (2021) (describing the extensive "accommodation work" in which people with disabilities must engage to equally access places of public accommodation).

In all events, any concerns about the volume of Title III litigation fall squarely within Congress's domain. Title III is a product of legislative compromise, combining an expansive private right of action with limited remedies. *See* Ruth Colker, *ADA Title III: Fragile Compromise*, 21 Berkeley J. Emp. & Lab. L. 377 (2000). Congress has considered and declined amending Title III's private right of action numerous times. *See, e.g.*, H.R. 2804, 109th Cong. (2005) (proposing a pre-suit notice requirement for Title III private actions); H.R. 3590, 106th Cong. (2000) (same). The Court should reject Acheson's efforts to amend Title III by judicial fiat.

The specific concerns that Acheson and its amici raise regarding unethical litigation practices are irrelevant to the constitutional standing question Acheson presents, and ably addressed by our legal system. Courts can impose monetary sanctions against attorneys for unethical behavior, *see* Fed. R. Civ. P. 11, and state bar associations have a range of additional tools to punish attorneys who cross ethical lines. *See, e.g.*, *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047 (9th Cir. 2007) (imposing sanctions on litigant and attorney who engaged in vexatious litigation while recognizing the importance of scrupulous Title III tester

plaintiffs). Regardless, narrowing Article III is not an appropriate solution to attorney misconduct.

Importantly, for all their disdain toward Title III tester plaintiffs, Acheson and its amici offer no meaningful alternative for enforcing Title III generally or the Reservation Rule in particular. As just noted, *supra* p. 51, the impossibility of obtaining timely injunctive relief for an impending trip means that tester plaintiffs are the *only* option for private enforcement of the Reservation Rule. The Attorney General has statutory authority to enforce Title III, but limited resources to do so. *See* U.S. Br. 16. Congress acts well within its authority when it chooses "to rely in part upon private litigation as a means of securing broad compliance with" civil rights laws, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968).[6]

Finally, although Acheson portrays itself as a victim of a "pathological" lawsuit, Opp. to Suggestion of Mootness 12, Acheson does not dispute that at the time Ms. Laufer filed suit, it provided no accessibility information on its website, in blatant violation of the Reservation Rule. *See* Petr's Br. 7 (noting that Coast Village added accessibility information to its website

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[6] Ms. Laufer notes that there is no Article II challenge before the Court, as Acheson presented only an Article III standing question in its petition. *See* Pet. i. Ms. Laufer agrees with the government, however, that private tester litigation does not usurp the Executive Branch's authority to enforce the law. Where, as here, a tester plaintiff challenges unlawful discrimination that they personally encountered (or will personally encounter, in the case of injunctive relief), their suit does not pursue public rights or otherwise infringe on the Executive Branch's prerogative to set enforcement priorities. *See* U.S. Br. 26 n.*.

"*after* Laufer filed her lawsuit" (emphasis added)). Nor does Acheson dispute that it could have been successfully sued for unlawful disability discrimination under Title III by a disabled person who visited its website with the intent of staying at its hotel, *see id.* at 32—a lawsuit that would have looked precisely the same as this one but for the lengthy dispute over Ms. Laufer's standing. Ms. Laufer's position in that dispute is not merely non-frivolous, but prevailed in three circuits, *see* supra pp. 10-11. Being sued for indisputably violating a nondiscrimination law by a plaintiff with a valid cause of action and a strong standing argument is not an injustice that Acheson suffered, but rather a consequence of violating the law.

IV. Laufer's claims are moot only because she dismissed her complaint with prejudice.

As explained in Ms. Laufer's Suggestion of Mootness, Ms. Laufer has dismissed her complaint with prejudice in the district court pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), and as such the Court should dispose of the case on that ground. Notably, Acheson also no longer has a stake in this litigation, as it has transferred its interest in the Coast Village Inn to a different legal entity, 876 Post LLC. *See* Pet. 10 n.1; Coast Inn Village, https://perma.cc/FAS2-WGA8 (last visited July 31, 2023) (noting that, as of August 2022, the Inn is under new ownership).

Acheson has opposed the Suggestion of Mootness, asserting that Acheson's owner, Juliana Acheson, wants to continue to pursue this litigation because she now owns a different bed and breakfast that she

"is on the verge of protecting" from future, hypothetical Title III lawsuits. Opp. to Suggestion of Mootness 11-12. At minimum, the fact that both of the parties before the Court are no longer parties to this case in any practical sense makes it an exceedingly poor vehicle for resolving the standing dispute.

This is particularly true given that Acheson agrees Ms. Laufer's claim is moot, albeit for a different reason: The Coast Village Inn has now updated its website to include a banner announcing that the Inn does not offer accessible rooms. Petr's Br. 51. This is incorrect for at least three reasons.

First, it is unclear that the updated accessibility information on the Inn's website satisfies the Reservation Rule, which directs hotels to describe accessible features in both "hotels *and* guest rooms offered through its reservation service." 28 C.F.R. § 36.302(e)(1)(ii) (emphasis added). Regardless, whether the Inn's website banner complies with Title III goes to the merits of Ms. Laufer's ADA claim, not Article III jurisdiction. *See Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019) (whether defendant "did anything … amounting to a legal wrong is a prototypical merits question, which no court has addressed …. [I]t is no reason to find this case moot.").

Second, a "defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Rather, "a defendant claiming that its voluntary compliance moots a case

bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Adding text to a website is something that can easily be undone.

Third, the Inn's failure to provide accessibility information to third-party reservation services also forecloses its mootness argument. Under the Reservation Rule, a hotel's obligations extend to "reservations made by *any* means, including … through a third party." 28 C.F.R. § 36.302(e)(1) (emphasis added). Thus, hotels "must provide these third-party services with information concerning the accessible features of the hotel and the accessible rooms." 28 C.F.R. pt. 36, app. A at 805. As the First Circuit noted, "Acheson hasn't suggested that the third-party websites have been updated," nor "has Acheson represented that it made [accessibility] information available to all of the thirteen third-party booking websites that Laufer alleges were noncompliant, but they just haven't put the info online." Pet. App. 34a. Acheson has made no claim to the contrary before this Court.

Finally, with respect to Acheson's claim that Ms. Laufer cannot be injured by "failing to receive [accessibility] information" from third-party websites that she already possesses, Petr's Br. 51, Acheson misunderstands the nature of Ms. Laufer's injury. A hotel injures disabled persons who attempt to enjoy its reservation services so long as those services, third-party or otherwise, treat them as inferior to non-disabled people and unworthy of acknowledgement. The reservation desk attendant who ignores a wheelchair user in a hotel lobby inflicts dignitary harm on her wholly

apart from whether she knows the answer to the question she approached him to ask; an online reservation service that ignores wheelchair users is no different.

CONCLUSION

The judgment below should be vacated solely on the ground that Ms. Laufer's dismissal of her complaint mooted her appeal.

Respectfully submitted,

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* Not admitted in the District of Columbia. Providing legal services pursuant to D.C. Ct. of Appeals Rule 49(c)(3).