Constitutional Standing for ADA Testers of Online Spaces

Cecily Kemp[*]

I. INTRODUCTION 357
II. CIVIL RIGHTS TESTERS 360
A. Fair Housing Act Testers 361
B. Employment Testers 362
III. THE STANDING DOCTRINE 363
A. Lujan 363
B. TransUnion and Spokeo 364
IV. THE AMERICANS WITH DISABILITIES ACT OF 1990 365
V. STANDING FOR ADA TESTERS 367
VI. THE CIRCUIT SPLIT ON STANDING FOR ADA TESTERS OF WEBSITES 368
A. The Tenth Circuit: Distinguished Haven's Realty, Held ADA Website Testers Do Not Satisfy TransUnion and Spokeo 369
B. The Second Circuit: ADA Website Testers Do Not Satisfy TransUnion 370
C. The Eleventh Circuit: ADA Website Testers' Injury Satisfies TransUnion 370
D. The First Circuit: Haven's Realty Governs, Not TransUnion 371
E. The Fourth Circuit: Haven's Realty Governs, Not TransUnion 371
VII. FACTORS THAT CONTRIBUTE TO COURTS' REJECTION OF STANDING FOR ADA TESTERS OF WEBSITES 372
A. Failure to Show Injury in Fact and Lack of "Plausible" Future Risk of Injury Required for Injunctive Relief 372
B. The Circuit Split on Whether Websites are "Places of Public Accommodation" 373
C. General Skepticism Toward ADA Tester Plaintiffs 374
D. Fear of the Disability Con 375

[*] J.D. Candidate, 2024, Seton Hall University School of Law; B.A., 2017, Indiana University Bloomington. Many thanks to Professor Doron Dorfman for his enthusiastic support, thoughtful feedback, and wealth of knowledge and insight. I would also like to express my gratitude to my family and my partner for all their love and support. Finally, I would like to thank the members of the Seton Hall Law Journal of Legislation and Public Policy for their advice and suggestions.

VIII. SOLUTIONS 376
A. Amend the ADA 376
B. Grant Standing to ADA Testers of Websites 378
1. Website Inaccessibility for ADA Tester Plaintiffs is a Concrete Injury in Fact Within the Intent of the Act 378
2. Website Inaccessibility Produces a Concrete Injury Within the Meaning of TransUnion and Spokeo 379
3. Courts Should Recognize Future Risk of Harm for ADA Testers of Websites 381
C. Guidance from the Ninth Circuit's Langer v. Kiser Decision 383
VIII. CONCLUSION 385

I. INTRODUCTION

Deborah Laufer is a wheelchair user,[1] qualified as disabled under the Americans with Disabilities Act ("ADA").[2] She is also a disability advocate, an "ADA tester," who has filed hundreds of lawsuits to enforce the accessibility standards of the ADA since its enactment in 1990.[3] In October 2022, the First Circuit held in *Laufer v. Acheson Hotels* that Laufer had constitutional standing to bring such suits.[4]

In March 2023, the Supreme Court granted certiorari to review the issue,[5] but dismissed it for mootness in December 2023, after Laufer voluntarily dismissed her pending suits due to disciplinary actions against one of her attorneys, urging the Court "to refrain from resolving a difficult question in a case that is otherwise over."[6] In dismissing the case, the Court declined to reach the merits of the standing issue but emphasized that it "might exercise [its] discretion differently in a future case."[7] Commentators hoped the Supreme Court's review of *Laufer v. Acheson* would provide some long-awaited clarity or guidance on the decades-long circuit split on whether ADA testers may establish

1 *See* Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 263 (1st Cir. 2022).

2 The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1990); *see* Laufer v. Looper, 22 F.4th 871, 874 (10th Cir. 2022).

3 *See Acheson*, 50 F.4th at 265.

4 *Id.* at 263.

5 *See* Laufer v. Acheson Hotels, LLC, 50 F.4th 259 (1st Cir. 2022), *cert. granted*, 143 S. Ct. 1053 (2023).

6 Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18, 21 (2023).

7 *Id.* at 22.

standing sufficient to sustain a claim in federal courts.[8] Instead, it seems that for now, the circuit split will only continue to deepen.[9]

Testers are individuals who pose as prospective applicants, customers, or renters for the purpose of testing a business's or an entity's compliance with a statute or regulation. Historically, testers have been an important means of uncovering unlawful discrimination and enforcing various civil rights statutes, such as the Fair Housing Act of 1968[10] (the "FHA") or the Civil Rights Act of 1964.[11] Since Congress enacted the ADA, attorneys and advocates have also utilized testers as a way to uncover unlawful discrimination toward individuals with disabilities and as a way to enforce the broad goals of the ADA.[12]

Because testers often may have no intent to actually avail themselves of the goods or services a business or entity offers, courts have grappled with whether testers can establish a concrete injury in fact required for standing under Title III of the Constitution.[13] While the Supreme Court held in 1982 that fair housing testers have standing to

8 *See* Mark S. Sidoti & Daniel S. Weinberger, *Do Self-Appointed 'Tester' Plaintiffs Have Standing to Sue Under the ADA?*, N.Y.L.J. (May 15, 2023), https://www.law.com/newyorklawjournal/2023/05/15/do-self-appointed-tester-plaintiffs-have-standing-to-sue-under-the-ada/ ("The Supreme Court is now poised in Acheson Hotels to answer the "tester" plaintiff standing question that has divided the circuits. In doing so, it will need to reconcile its own standing precedents, which appear to be in tension with one another.").

9 *See Acheson*, 144 S. Ct. at 21 ("Though Laufer's case is dead, the circuit split is very much alive."); *see also* Joseph J. Lynett et al., *U.S. Supreme Court Vacates, Dismisses as Moot Decision Holding ADA 'Tester' Has Standing to Sue*, JACKSON LEWIS (Dec. 8, 2023), https://www.jacksonlewis.com/insights/us-supreme-court-vacates-dismisses-moot-decision-holding-ada-tester-has-standing-sue ("[T]he Court declined to address the merits of whether the tester had a sufficient concrete and particularized injury to establish standing, holding the case had become moot and leaving in place a deep circuit split on the standing issue."); David Raizman & Zachary V. Zagger, *Supreme Court Says Case Over ADA 'Tester' Standing Is Moot, But Issue Is Still Alive*, OGLETREE DEAKINS (Dec. 5, 2023), https://ogletree.com/insights-resources/blog-posts/supreme-court-says-case-over-ada-tester-standing-is-moot-but-issue-is-still-alive/ ("[T]he dismissal of the case as moot does not offer relief for the business community and provides virtually no indication for how this Court (or any other court) will resolve the tester standing issue going forward.")

10 The Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (1968).

11 The Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*. (1964).

12 *See, e.g.*, Laufer v. Looper, 22 F.4th 871, 874 (10th Cir. 2022).

13 *See* Mendy Halberstam et al., *Circuit Courts Split on Standing to Sue in ADA Title III Website Accessibility Claims*, JDSUPRA (Apr. 21, 2022), https://www.jdsupra.com/legalnews/circuit-courts-split-on-standing-to-sue-5702699/.

sue in federal court,[14] courts have not consistently found standing for ADA testers.[15] This, despite the reality that enforcement of the ADA is largely dependent on private enforcement,[16] per Congressional intent under the "private attorney general model" of rights enforcement, which allows a private individual, as opposed to a government agency itself, to sue in order to vindicate the public interest.[17]

Meanwhile, as the internet becomes more and more integrated into everyday life, an increasing amount of ADA testers have filed suits to seek enforcement of the ADA in online spaces.[18] This has resulted in a circuit split over whether ADA testers of websites may establish standing in addition to the circuit split over whether ADA testers of brick-and-mortar businesses can establish standing.[19] Around the time of the First Circuit's decision in *Laufer v. Acheson*, the Ninth Circuit recognized in *Langer v. Kiser* that Chris Langer, a paraplegic wheelchair user and disability advocate, and other ADA testers of brick-and-mortar

14 *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373–74 (1982) ("A tester who has been the object of misrepresentation made unlawful under [the Fair Housing Act] 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.").

15 *See* Leslie Lee, *Giving Disabled Testers Access to Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation*, 19 VA. J. SOC. POL'Y & L. 319, 329–30 (2011).

16 Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of Abusive ADA Litigation*, 54 UCLA L. REV. 1, 9–10 (2006) (explaining that, because the government has not allocated many resources to ADA enforcement, the Department of Justice's Disability's Rights Section suffers from "significant operational consequences" and does not have a very large capacity to enforce disability rights. Thus, "[b]ecause the government does not fully enforce the ADA, private enforcement is essential"); *see also* Doron Dorfman & Mariela Yabo, *The Professionalization of Urban Accessibility*, 47 FORDHAM URB. L.J. 1213, 1239 (2020) (explaining that "the absolute majority of ex post enforcement of disability access laws is done through private litigation") [https://doi.org/10.2139/ssrn.3674101].

17 *See* Yabo, *supra* note 16, at 1240 ("The ADA prescribes enforcement through a 'private attorney general model,' which requires people to use private attorneys to bring a suit, rather than governmental agencies on behalf of people with disabilities, to secure their civil rights."); *see also* Michael Waterstone, *A New Vision of Public Enforcement*, 579 MINN. L. REV. 434, 447 (2007) (describing a brief history of the "private attorney general" model as it pertains to the ADA).

18 Ashima Dayal & Maxine Sharavsky Garrett, *United States: ADA & Website Compliance >> Lawsuits By the Disabled Against Websites Spike*, MONDAQ BUS. BRIEFING (July 17, 2019), https://www.mondaq.com/unitedstates/discrimination-disability-sexual-harassment/826392/ada-website-compliance-lawsuits-by-the-disabled-against-websites-spike; Martin H. Orlick, *United States: ADA Website Tester's Lawsuit Dismissed Again*, MONDAQ BUS. BRIEFING (Dec. 23, 2020), https://www.mondaq.com/unitedstates/hotels-hospitality/1019422/ada-website-tester39s-lawsuit-dismissed-again.

19 *See* Halberstam, *supra* note 13.

stores had constitutional standing to bring ADA tester suits.[20] The Ninth Circuit's holding in *Langer* is significant because it reasons a court should not rely on a tester's previous litigation history when it considers the case immediately before it,[21] and because it provides a test for "immediate injury" that accounts for the reality disabled individuals face when they encounter barriers to access.[22] In this way, *Langer* has the potential to reframe the way courts view testers. Although *Langer* discusses standing for ADA testers of physical spaces, its reasoning is directly applicable to the current circuit split on standing for ADA testers of websites and other online and digital platforms.

This Comment will first present and discuss various converging factors that explain ADA website testers' difficulties in establishing standing. Then, against this backdrop, this Comment explains *Langer* to address some of these concerns and to ultimately argue that courts should recognize standing for ADA testers of websites.

This comment starts by briefly discussing the history of civil rights testers in Section II. Section III outlines the current constitutional standing doctrine. Then, Section IV provides a summary of Title III of the ADA, and Section V discusses treatment of ADA testers generally. Sections VI and VII discuss the current circuit split on ADA website testers, as well as some factors that contribute to outcomes in the caselaw. Finally, Section VIII proposes some solutions.

II. CIVIL RIGHTS TESTERS

Testers are individuals who pose as potential applicants, customers, or tenants seeking certain services, accommodations, or opportunities for the purpose of determining whether a particular business or entity complies with particular laws and regulations.[23] As such, testers have played an important historic role in some of the country's civil rights movements by exposing unlawful discrimination

20 Langer v. Kiser, 57 F.4th 1085, 1090 (9th Cir. 2023).

21 *Id.*

22 *Id.* at 1093.

23 *See Become A Tester Frequently Asked Questions: What Is a Tester?*, EQUAL RIGHTS CTR., https://equalrightscenter.org/become-a-tester/ ("Testers are individuals who pose as persons seeking certain services, accommodations, or opportunities (e.g. housing, employment, accessibility, goods or services, etc.) for the purpose of collecting information. The information gathered is analyzed and may be used to determine an entity's compliance with applicable standards for equal treatment."); Komal S. Patel, *Testing the Limits of the First Amendment: How Online Civil Rights Testing Is Protected Speech Activity*, 118 COLUM. L. REV. 1473, 1482 (2018) (defining testers as "individuals whose only aim is to test whether a particular entity is engaging in unlawful discrimination by posing as a potential patron, employee, or tenant.").

and thereby helping to enforce civil rights statutes and regulations. By shedding light on the role of testers in promoting antidiscrimination efforts, I attempt to contextualize and even normalize the practice of ADA testers in both physical and online environments.

A. Fair Housing Act Testers

Testers, by definition, often do not expect to obtain or avail themselves of the benefits of the business or entity he or she is testing. Still, general recognition of standing exists for tester plaintiffs or organizations that use testers to enforce equality, and especially for testers who seek to enforce equality in the housing realm under the FHA and similar state statutory schemes.[24] This is because the Supreme Court recognized standing for testers who sue to enforce the FHA in *Havens Realty Corp. v. Coleman*.[25]

In this case, a Black tester sued a rental agency to enforce the FHA after the agency repeatedly told her that no vacancies existed at one of their complexes on the same days it told a white tester the same complex had availability.[26] The Supreme Court recognized that, in passing the FHA, "Congress . . . conferred on all 'persons' a legal right to truthful information about available housing."[27] Elaborating on this, the Court then recognized that an injury in fact required for Article III constitutional standing "may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."[28] In doing so, the Court explicitly recognized standing for fair housing testers and explained that testers who experience discrimination in violation of the FHA "suffered injury in precisely the form the statute was intended to guard against."[29]

Today, use of "testers" as a methodology to enforce the FHA is widely accepted. In fact, the Housing and Civil Enforcement Section of the Civil Rights Division at the Department of Justice has implemented the Fair Housing Testing Program. [30] This program employs tester volunteers to identify, investigate, and help take action against instances of unlawful discrimination in housing accessibility.[31] Many other

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24 *See* Patel, *supra* note 23, at 1482.

25 455 U.S. at 374.

26 *Id.* at 368.

27 *Id.* at 373.

28 *Id.*

29 *Id.* at 373–74.

30 *See Fair Housing Testing Program*, U.S. DEP'T. OF JUST. (updated June 13, 2023), https://www.justice.gov/crt/fair-housing-testing-program-1.

31 *See id.*

organizations and nonprofits also regularly utilize fair housing testers to enforce the FHA and to make housing more accessible by eliminating or minimizing housing discrimination.[32]

B. Employment Testers

Organizations also use testers to uncover discriminatory employment and hiring practices that violate Title VII of the Civil Rights Act of 1964 ("Title VII").[33] The Equal Employment Opportunity Commission issued guidance in 1990 and 1996 that approved the use of testers to test for discriminatory hiring practices.[34] The Supreme Court has not decided a case that recognizes standing specifically for employment discrimination testers, however, and it was not until 2000 that a federal court of appeal first held that Congress intended to extend standing to employment testers in *Kyles v. J.K. Guardian Security Servs. Inc*.[35]

In *Kyles*, Black testers who experienced discrimination in the hiring process after applying for a receptionist position filed suit, alleging racially discriminatory practices in violation of Title VII, and the Seventh Circuit rejected the notion that a plaintiff must be a bona fide applicant to achieve standing.[36]

In doing so, the court emphasized that Congress "has considerable authority to shape the assessment of standing" by "creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[37] The Seventh Circuit additionally recognized that courts "have long recognized that humiliation, embarrassment, and like injuries—the very type of injuries that [the testers] allege they suffered []—constitute cognizable and compensable harms stemming

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[32] *See, e.g.*, *Fair Housing Testing Investigators*, FAIR HOUSING JUST. CTR., https://www.fairhousingjustice.org/our-work/fair-housing-testing-investigations/; *Fair Housing Testers*, CMTY LEGAL SERVS, https://www.clsmf.org/fair-housing-testers/.

[33] *See, e.g.*, Khorri Atkinson, *Test Used to Ensure Fair Housing Also Can Combat Hiring Bias*, BLOOMBERG LAW: DAILY LABOR REPORT (Sept. 14, 2022, 11:00 AM), https://news.bloomberglaw.com/daily-labor-report/test-used-to-ensure-fair-housing-also-can-combat-hiring-bias.

[34] U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NOTICE NO. N-915-062, STANDING OF TESTERS TO FILE CHARGES OF EMPLOYMENT DISCRIMINATION (1990), *superseded by* U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC NOTICE NO. 915.002, ENFORCEMENT GUIDANCE: WHETHER TESTERS CAN FILE CHARGES AND LITIGATE CLAIMS OF EMPLOYMENT DISCRIMINATION (1996).

[35] Kyles v. J.K. Guardian Sec. Servs., 222 F.3d 289, 300 (7th Cir. 2000); *see also* Daniel M. Tardiff, *Knocking on the Courtroom Door: Finally an Answer from within for Employment Testers*, 32 LOY. U. CHI. L.J. 909, 950 (2001).

[36] *Kyles*, 222 F.3d at 300.

[37] *Id.* at 294.

from discrimination," and this was sufficient for constitutional standing regardless of a tester's interest in actually obtaining employment.[38]

Despite the Seventh Circuit's decision, courts in recent years have held the current constitutional standing doctrine to be in tension with the understanding of tester standing in *Havens* and *Kyles*. The supposed tension of the doctrines forms a significant obstacle to ADA tester plaintiffs' ability to establish standing and results in the dismissal of many complaints filed by disability advocates seeking to enforce disability rights. This Comment argues not only that this tension is reconcilable, but also that the current doctrine is not at odds with finding standing for ADA testers of online and digital spaces. The Ninth Circuit's *Langer* decision bolsters this proposition.

III. THE STANDING DOCTRINE

A. Lujan

The United States Constitution limits the jurisdiction of federal courts to justiciable cases and controversies.[39] Among other doctrines involved in determining justiciability, a plaintiff must also have standing in order to sue,[40] and the Supreme Court's decision in *Lujan v. Defenders of Wildlife* elucidates the contemporary standing doctrine, setting forth a three-part test that guides current standing analysis.[41] First, in order for a plaintiff to have standing, that plaintiff must first demonstrate that he or she has suffered an "injury in fact."[42] An "injury in fact" is an invasion of a legally protected interest[43] that is "concrete and particularized; and [] actual or imminent, [but] not conjectural or hypothetical."[44] Second, a causal connection must exist between the injury and alleged offending conduct, meaning that the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."[45] Third, the plaintiff must show that it is likely, "and not merely

38 *Id.* at 300.

39 U.S. CONST. art. III, § 2.

40 *See* Charles Alan Wright et al., *The Concept(s) of Justiciability*, 33 FED. PRAC. & PROC. JUD. REV. § 8331.

41 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

42 *Id.*

43 *Id.*

44 *Id.* (internal citations omitted).

45 *Id.*

speculative," that the court can provide a remedy if the plaintiff receives a decision in his or her favor.[46]

If the plaintiff seeks injunctive relief, then the standing doctrine provides that it is insufficient for a plaintiff to merely show a past exposure to illegal conduct.[47] The past conduct must also be accompanied by "continuing, present adverse effects,"[48] and the plaintiff must demonstrate a reasonably certain risk of future harm stemming from the offending conduct that is not baseless or merely speculative.[49]

B. TransUnion and Spokeo

The Supreme Court built upon the standing doctrine in *TransUnion LLC v. Ramirez*[50] and *Spokeo, Inc. v. Robins*,[51] holding that a statutory violation alone is insufficient for a plaintiff to establish "injury in fact" for standing:[52] the plaintiff must additionally show he or she suffered a concrete injury or harm that stems from the statutory violation.[53] The injury or harm may be tangible or intangible but must be "a real controversy with real impact on real persons."[54] Elaborating on this, the Court distinguished (1) a cause of action that arises from a mere statutory violation of federal law and (2) a cause of action that arises from a harm that a plaintiff suffered as a result of such violation.[55] Although this distinction is not always clear-cut, one way to assess whether an injury is concrete is to assess whether the alleged injury has a "close relationship" to a harm traditionally recognized as a basis for a lawsuit in American courts.[56]

Thus, for example, if a credit reporting company committed a federal statutory violation by incorrectly formatting its mailings to a consumer, but the consumer was unaffected by this statutory violation and did not suffer any effects or harm stemming from it, then under *TransUnion* and *Spokeo*, the customer would not be able to establish "injury in fact" sufficient for Article III constitutional standing.[57]

46 Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992).
47 *Id.* at 564.
48 *Id.*
49 Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).
50 594 U.S. 413 (2021).
51 578 U.S. 330 (2016).
52 *TransUnion*, 594 U.S. at 426; *Spokeo*, 578 U.S. at 341.
53 *Spokeo*, 578 U.S. at 341.
54 *TransUnion*, 594 at 424.
55 *Id.* at 426–27.
56 *Id.* at 425.
57 *Id.* at 440.

Because a plaintiff must do more than allege a violation of a federal statute for their claim to be "justiciable" in federal court, the holding in *TransUnion* has implications for whether and the extent to which Congress can "create new substantive rights, the violation of which alone would confer standing."[58] In addition to *TransUnion*'s implications for plaintiffs involved in class actions and commercial lawsuits, legal commentators have discussed what *TransUnion*'s holding may mean for civil rights actions, especially in situations where advocates have used "tester" plaintiffs.[59]

IV. THE AMERICANS WITH DISABILITIES ACT OF 1990

Congress enacted the Americans with Disabilities Act of 1990[60] to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[61] At the time of its enactment, members of Congress heralded the ADA as "a final proclamation that the disabled will never again be excluded, never again be treated as second-class citizens[,]" and as "a major step forward toward ending discrimination against those with disabilities and making it possible for them to participate fully in our society."[62] President George H. W. Bush, who signed the Act into effect, stated that it "promise[d] to open up all aspects of American life to individuals with disabilities" and "signal[ed] the end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life."[63]

Title III of the ADA makes it unlawful for private businesses or entities to discriminate against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public

58 *See* Maria E. Eliot et al., *Supreme Court Limits Standing for Statutory Claims*, PAUL WEISS (July 6, 2021), https://www.paulweiss.com/practices/litigation/supreme-court-appellate-litigation/publications/supreme-court-limits-standing-for-statutory-claims?id=40501.

59 *See* Robin Nunn, *US Supreme Court Majority Rules No Harm, No Foul in TransUnion LLC v. Ramirez*, MORGAN LEWIS: LAWFLASH (June 29, 2021), https://www.morganlewis.com/pubs/2021/06/us-supreme-court-majority-rules-no-harm-no-foul-in-transunion-llc-v-ramirez; *see also* Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 285 (2021).

60 The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (1990).

61 42 U.S.C. § 12101(b)(1).

62 136 CONG. REC. S9684-03 (1990) (statement of Sen. Donald W. Riegle Jr.).

63 Statement by President George Bush Upon Signing S. 933 (July 26, 1990), https://www.archives.gov/research/americans-with-disabilities/transcriptions/naid-6037493-statement-by-the-president-americans-with-disabilities-act-of-1990.html.

accommodation."[64] The Act provides a list of private entities that explicitly fall under the definition of public accommodations, and includes, but is not limited to, inns, hotels, motels, or other places of lodging.[65]

In order to implement and achieve compliance with the ADA, the Department of Justice promulgated Regulations to act as a guide for places of public accommodation.[66] One such regulation, referred to as the "Reservations Rule,"[67] provides that, "with respect to reservations made by any means," places of lodging must identify and describe accessible features in the hotels and guest rooms it operates—whether it is via telephone, in-person, or through a third party.[68] This encompasses online reservation systems.[69]

In addition, while the ADA declares a commitment from the Federal Government to play a "central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities[,]"[70] Title III also creates the right for "any person who is being subjected to discrimination on the basis of disability" to bring private causes of action to enforce private entities' compliance with the ADA.[71] Only private persons with a qualifying disability may file a lawsuit in federal court to address the violation.[72]

As for relief, the ADA provides for equitable or injunctive relief.[73] The federal statute itself does not provide relief in the form of monetary damages, but private citizens who file suit to enforce the ADA may recover "reasonable" attorney's fees within the court's discretion.[74]

64 42 USC § 12182(a).

65 42 U.S.C. § 12181(7)(A).

66 28 C.F.R. § 36.101 (2016).

67 *See, e.g.*, Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 265 (1st Cir. 2022).

68 28 C.F.R. 36.302(e)(1)(ii).

69 Specifically, 28 C.F.R. § 36.302(e)(1)(ii) mandates that places of lodging must "identify and describe accessible features in the hotels and guest rooms offered through its reservations service." Courts recognize that this encompasses hotel online reservation systems. *See, e.g.*, Love v. Marriott Hotel Servs., 40 F.4th 1043, 1045 (9th Cir. 2022) ("The regulation at issue in this appeal is the "Reservations Rule," which regulates the accessibility information that hotels must post on their online booking websites.").

70 42 U.S.C. § 12101(b)(3).

71 42 U.S.C. § 12188(a)(1)–(2).

72 *Id.*

73 42 U.S.C. § 2000a-3(a).

74 42 U.S.C. § 2000a-3(b).

V. STANDING FOR ADA TESTERS

Because only persons with a qualifying disability, as contemplated by the ADA, can bring a private suit to enforce the ADA, ADA testers are, therefore, persons with a qualifying disability who visit businesses to check to see if the business complies with the ADA. Federal Courts of Appeal that have addressed the question of whether ADA testers of *physical, brick-and-mortar* spaces have standing to sue in federal court generally conclude that an individual's status as a tester does not by itself defeat or foreclose standing because "Congress did not limit ADA protections to 'clients or customers' or otherwise impose a bona fide visitor requirement."[75]

However, widely adopting the view that ADA tester status does not foreclose standing is not the same as affirmatively holding that ADA testers have standing because a violation of the ADA alone sufficiently constitutes an injury in fact for standing.[76] Indeed, compared to FHA testers and employment testers, courts have historically treated ADA testers' injury pleadings with an added level of scrutiny.[77]

And while courts may not have foreclosed standing for ADA testers of *physical* spaces, standing for ADA *website* testers who visit a business's online platform to check for ADA compliance may be less assured. The ADA was enacted in 1990, before widespread commercial internet use, and did not explicitly account for websites or online platforms as "places" that fall within the statute.[78] At the same time, as technology continues to develop and the internet becomes more and

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75 Suarez-Torres v. Panaderia Y Reposteria Espana, Inc., 988 F.3d 542, 550–51 (1st Cir. 2021) (citing Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1132–34 (11th Cir. 2013)); *see also* Civ. Rts. Educ. and Enf't Ctr. v. Hosp. Props. Tr., 867 F.3d 1093, 1102 (9th Cir. 2017) (holding "[p]laintiffs' status as ADA testers . . . does not deprive them of standing."); Mosley v. Kohl's Dep't Stores, Inc., 942 F.3d 752, 758 (6th Cir. 2019) ("[E]ven assuming that Mosley is an 'ADA tester,' his status as such does not deprive him of standing."); Nanni v. Aberdeen Marketplace, Inc., 878 F.3d 447, 457 (4th Cir. 2017) ("[N]either Nanni's status as an 'ADA tester' nor his litigation history strips him of standing to sue . . .").

76 *See, e.g.*, Colorado Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1211 (10th Cir. 2014) (holding ADA testers may have standing because "[a]nyone who has suffered an invasion of the legal interests protected by Title III [of the ADA] may have standing, regardless of his or her motivation in encountering that invasion. However . . . a tester must demonstrate that she has indeed suffered cognizable injury in fact."); Laufer v. Mann Hosp., LLC, 996 F.3d 269, 273 (5th Cir. 2021) ("Laufer's assumed status as an 'ADA tester' does not absolve her of the need to show an injury in fact for standing purposes.")

77 *See* Lee, *supra* note 15, at 329–30.

78 Blake Reid, *Two Paths for Digital Disability Law*, COMMUNIC'NS OF THE ACM, May 2022, at 36 [https://doi.org/10.1145/3527201].

more ubiquitous, an increasing amount of ADA testers monitor whether websites or online platforms are accessible to those with disabilities under the ADA and file lawsuits in federal courts for violations.

As a result, courts are currently grappling with how to treat standing for ADA testers of websites, with some courts finding differences between ADA testers of physical spaces and ADA testers of online platforms and intimating the implications this may have for a plaintiff's "injury." The Northern District of New York, for example, compared the two types of testers by suggesting that, while ADA testers of *physical* spaces "must actually travel to and attempt to access the defendant's property," testers who operate *online* do not have to contend with the same logistical considerations for testing.[79] This is because, unlike physical spaces, a webpage on the internet is "easily and instantly accessible."[80] The implication here is that, unlike testers of physical spaces, ADA website testers do not necessarily have to move from their home to check for ADA compliance, and therefore, the injuries these testers allege may be questionable.

VI. THE CIRCUIT SPLIT ON STANDING FOR ADA TESTERS OF WEBSITES

The current circuit split over whether ADA testers of websites have standing largely involves violations of the Reservation Rule.[81] Precedent in the Tenth Circuit and Second Circuit holds that ADA testers of websites cannot satisfy the concrete injury in fact requirement for standing.[82] While it is unclear how the Supreme Court's order to vacate the First Circuit's *Laufer v. Acheson* decision affects the First Circuit's and the Eleventh Circuit's approach to ADA website tester standing going forward,[83] the First Circuit, the Eleventh Circuit, and the Fourth Circuit have historically held that the emotional injury ADA website testers experience because of inaccessibility can be a concrete injury sufficient to establish standing.[84]

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79 Laufer v. Dove Hess Holdings, LLC, No. 5:20-cv-00379, 2020 WL 7974268, at *14 (N.D.N.Y. Nov. 18, 2020).

80 *Id.*

81 *See* brief explanation of the Reservation Rule *supra* Part III.

82 Laufer v. Looper, 22 F.4th 871, 883 (10th Cir. 2022); Harty v. West Point Realty, Inc., 28 F.4th 435, 440 (2d. Cir. 2022).

83 *See* Minh N. Vu & John W. Egan, *SCOTUS Punts on Whether ADA "Testers" Have Standing in Acheson v. Laufer*, SEYFARTH SHAW LLP (Dec. 6, 2023), https://www.adatitleiii.com/2023/12/scotus-punts-on-whether-ada-testers-have-standing-in-acheson-v-laufer/.

84 Laufer v. Arpan, LLC, 29 F.4th 1268, 1275 (11th Cir. 2022); Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 275 (5th Cir. 2022); Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 162 (4th Cir. 2023).

The Supreme Court's contribution to the standing doctrine outlined in *TransUnion* and *Spokeo* proves to be extremely significant in the current debate over standing for website testers—indeed, *TransUnion* and *Spokeo* factor heavily into all four circuits' decisions. Specifically, the Tenth Circuit and Second Circuit have held that *TransUnion* bars constitutional standing for ADA testers of websites.[85] Meanwhile, the Eleventh Circuit has held that ADA website testers may satisfy standing even under *TransUnion*,[86] and the Fourth Circuit joined the First Circuit in acknowledging *TransUnion*'s ruling but holding that *Havens Realty* governs standing for ADA tester plaintiffs unless the Supreme Court explicitly provides that *TransUnion* overrules it.[87]

A. The Tenth Circuit: Distinguished Haven's Realty, Held ADA Website Testers Do Not Satisfy TransUnion and Spokeo

The Tenth Circuit held in *Laufer v. Looper* that Laufer, the ADA tester plaintiff who had visited a hotel's website to test for accessibility and compliance with the ADA's Reservation Rule, failed to demonstrate she suffered a concrete injury required for constitutional standing.[88] In its decision, the Tenth Circuit distinguished Laufer's case from *Havens Realty*:

> In *Havens*, the tester was given false information, but in the instant case—notwithstanding the fact that the hotel failed to list any information about accessibility features—all individuals, regardless of disability, had access to the same information on the hotel's website and the website therefore did not deny Laufer information.[89]

The Tenth Circuit instead relied heavily on *TransUnion* and *Spokeo* to hold that Laufer failed to plead any concrete "injury in fact" required for standing.[90] Although Laufer's complaint sufficiently alleged a statutory violation of the ADA's reservation rule, the court reasoned Laufer did not have any actual interest in booking a room, and therefore held she could not demonstrate a concrete injury that resulted from the hotel's violation of the Reservation Rule.[91]

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85 *See Laufer v. Looper*, 22 F.4th at 878; *Harty*, 28 F.4th at 444.

86 *See Arpan*, 29 F.4th at 1274–75.

87 *Acheson*, 50 F.4th at 271; *Naranda*, 60 F.4th at 170–71.

88 *Laufer v. Looper*, 22 F.4th at 883.

89 *Id.* at 879.

90 *Id.* at 877.

91 *Id.* at 877–78.

Finally, the Tenth Circuit held that, although Laufer pleaded intent to access the system again to test for compliance, and although the system was not compliant with the Reservation Rule, this did not suffice to establish "injury in fact," because Laufer could still access the system.[92]

B. The Second Circuit: ADA Website Testers Do Not Satisfy TransUnion

In *Harty v. West Point Realty, Inc.*, the Second Circuit similarly declined to recognize standing for an ADA tester plaintiff who alleged that a website violated the Reservation Rule in its failure to specify accessible features.[93] The tester claimed that this deprived him of the "same goods, services, and features of the [hotel] available to the general public."[94] In its decision, the Second Circuit relied on *TransUnion*, reasoning that *TransUnion* "makes clear that a statutory violation alone, however labeled by Congress, is not sufficient for Article III standing," and held that the tester lacked standing because he had only asserted a statutory violation constituting discrimination under the ADA and no actual injury as a result.[95]

C. The Eleventh Circuit: ADA Website Testers' Injury Satisfies TransUnion

By contrast, the Eleventh Circuit has held in *Laufer v. Arpan LLC* that Laufer suffered a concrete injury in fact sufficient to establish Title III standing, even though she had no intention to visit the hotel or the area in which it is located.[96] In this case, Laufer again sued a hotel, alleging its website violated the ADA's Reservation Rule because it failed to provide the option to book accessible rooms or provide information about the room's accessibility features.[97] Applying *TransUnion*, the Eleventh Circuit acknowledged that the frustration and humiliation Laufer experienced because of noncompliance did not bear a close relationship to a "traditional common-law cause of action" as specified by *TransUnion*.[98] Nevertheless, the court explained that *TransUnion* did not hold this to be determinative of standing, because Eleventh Circuit

92 *Id.* at 883.
93 Harty v. West Point Realty, Inc., 28 F.4th 435, 440 (2d. Cir. 2022).
94 *Id.*
95 *Id.* at 444.
96 Laufer v. Arpan, LLC, 29 F.4th 1268, 1275 (11th Cir. 2022).
97 *Id.* at 1271.
98 *Id.* at 1272.

precedent has recognized that intangible injury in fact occurs as a result of discrimination for individuals who have personally experienced the discrimination, and because courts may still make an independent determination about whether a pleaded injury constitutes a concrete harm according to caselaw precedent.[99] Applying this to Laufer's case, the Eleventh Circuit reasoned that the frustration and humiliation Laufer suffered as a result of the hotel's violation of the Reservation Rule adhered to a line of cases that recognize the emotional injury stemming from discrimination and thus falls within the bounds of injury in fact that the Supreme Court laid out in *TransUnion*.[100]

D. The First Circuit: Haven's Realty Governs, Not TransUnion

The First Circuit held in *Laufer v. Acheson Hotels, LLC*, that Laufer pleaded a concrete injury in fact sufficient to establish constitutional standing stemming from a website's noncompliance with the Reservation Rule, explaining the regulation provides no carveout that requires an individual to want to make a reservation.[101]

The court reasoned that *Haven's Realty*—not *TransUnion*—governed the case, because just as the rental management agency deprived the FHA tester of information regarding the availability of apartment units based on her race, the hotel denied Laufer information to which she was legally entitled, as the purpose of the Reservation Rule is to "reasonably permit [Laufer] to assess independently whether a given hotel . . . meets . . . her accessibility needs."[102] Even if *Haven's Realty* did not govern, the First Circuit reasoned that Laufer sufficiently alleged a concrete injury under *TransUnion* because she suffered intangible dignitary harm and stigmatic injuries caused by discrimination—an injury courts have traditionally recognized as a concrete injury in fact.[103]

E. The Fourth Circuit: Haven's Realty Governs, Not TransUnion

Finally, the Fourth Circuit has held in *Laufer v. Naranda Hotels, LLC*, that Laufer sufficiently pleaded concrete injury, relying on *Haven's Realty* and a line of cases that followed *Haven's Realty*.[104] Specifically, in addition to *Haven's Realty*, *Public Citizen v. United States Department of*

99 *Id.* at 1273–74.
100 *Id.* at 1274–75.
101 Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 269 (5th Cir. 2022)
102 *Id.*
103 *Id.* at 274.
104 Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 164–66 (4th Cir. 2023).

Justice[105] and *Federal Election Commission v. Akins*[106] provided that a deprivation of a statutorily-created right to certain information creates an injury in fact without requiring plaintiffs to demonstrate an intended use for the information at the time of request or once it has been received or denied.[107] Therefore, ADA website testers do not need to have concrete plans or intent to patronize a hotel as a guest when they check the hotel's website for compliance with the Reservation Rule.[108] Moreover, the Fourth Circuit held that an injury "may be concrete, though widely shared," and so, although Laufer's "alleged information injury may be widely shared, it is also concrete and particularized."[109] With respect to the requirement that a plaintiff must show a "real or immediate threat that she will be wronged again" for injunctive relief, the court reasoned that Laufer had "plausible intentions to return to Naranda's hotel websites as part of the "system" . . . for continually monitoring websites."[110]

Furthermore, addressing *TransUnion*, the Fourth Circuit held that "it cannot be fairly concluded that *TransUnion* overruled *Havens Realty*, *Public Citizen*, and *Akins*," rather, "the *TransUnion* Court distinguished *Public Citizens* and *Akins* without questioning their validity."[111]

VII. FACTORS THAT CONTRIBUTE TO COURTS' REJECTION OF STANDING FOR ADA TESTERS OF WEBSITES

A. Failure to Show Injury in Fact and Lack of "Plausible" Future Risk of Injury Required for Injunctive Relief

In addition to denying standing to ADA website testers because they could not demonstrate actual injury in fact, courts frequently deny standing to ADA website testers because of the tester's inability to sufficiently demonstrate future risk of injury that is required for the ADA's injunctive relief. For example, the Second Circuit held that the tester could not demonstrate risk of future harm required for injunctive relief because his intention to use the website to reserve a guest room

105 Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989).
106 Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998).
107 *Naranda*, 60 F.4th at 165.
108 *Id.* at 166.
109 *Id.* at 167.
110 *Id.* at 168.
111 *Id.* at 170.

"in the near future" could not support a finding of actual or imminent injury.[112]

Even when ADA website testers plead intent to utilize a webpage's services, intent to revisit the platform in the future,[113] or more concrete intent to visit the physical space,[114] courts have held the pleading to be vague and "insufficient to support a finding of actual or immediate injury" necessary for standing.

B. The Circuit Split on Whether Websites are "Places of Public Accommodation"

The ongoing debate over whether and when a website, online, or digital platform is a "place of public accommodation" within the meaning of Title III of the ADA may inform courts' hesitancy to recognize standing for ADA website testers. This question has been litigated in courts for two decades, and the answer remains unsettled.[115] Specifically, circuits disagree about whether a website must have a "nexus" to an actual physical space or whether a website may be a place of public accommodation regardless of its connection to an actual physical location.[116]

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112 Harty v. West Point Realty, Inc., 28 F.4th 435, 444 (2d. Cir. 2022).

113 *See, e.g.*, Kennedy v. Floridian Hotel, Inc., No. 1:18-cv-20839, 2018 WL 10601977, at *4 (S.D. Fla. Dec. 7, 2018) (holding that, although plaintiff's complaint professed intent to utilize a hotel website to reserve a room as well as intent to revisit the website in the future, plaintiff's "boilerplate" assertions lacked specificity and failed to demonstrate any real or immediate threat of injury).

114 *See, e.g.*, Sarwar v. Patel Invest. Inc., No. 5:21-cv-118, 2022 WL 1422196, at *9 (D. Vt. May 5, 2022) (holding that, although an ADA website tester plaintiff stated intention to stay at the hotel, he failed to show concrete injury because he could not demonstrate actual intent or interest in staying at the hotel or in its area); Laufer v. Galtesvar OM, LLC, No. 1:20-CV-00588-RP, 2020 WL 7416940, at *6 (W.D. Tex. Nov. 23, 2020) (holding that plaintiff lacked standing even though plaintiff pleaded intent to travel to and stay in the area in which the hotel was located).

115 Reid, *supra* note 78; Hassan Ahmad, *Beyond Sight: Modernizing the Americans with Disabilities Act and Ensuring Internet Equality for the Visually Impaired*, 25 J. GENDER RACE & JUST. 321, 337 (2022) ("[T]here is a developing Circuit split regarding whether internet webpages are considered places of public accommodation under the ADA.").

116 For more discussion about this circuit split, see Ahmad, *supra* note 115, at 337 ("The disagreements over whether the internet is to be considered a place of public accommodation have manifested into what some courts call the nexus test . . . This has resulted in the development of a circuit split, with some circuits requiring such a nexus test for a successful Title III claim, and other circuits holding no such nexus is necessary."), see also Francine Esposito et al., *The 'Other' ADA Claim – Website Accessibility Under Title III*, DAY PITNEY LLP (Apr. 28, 2022), https://www.daypitney.com/insights/publications/2022/04/27-ada-claim-website-accessibility-under-title-iii/.

If courts are unsettled as to whether websites must comply with the ADA, even less secure is courts' tendency to recognize that ADA noncompliance on digital platforms could produce an injury in the first place.

C. General Skepticism Toward ADA Tester Plaintiffs

In addition to constitutional standing concerns, general skepticism toward tester plaintiffs is another major factor that informs the frequency with which courts dismiss ADA website tester claims. Many legal professionals, scholars, and courts fear that allowing testers to use the ADA to file a high volume of complaints in courts across the country will enable abusive or predatory serial litigation.[117] Specifically, these commentators describe ADA testers as drivers of an extortive "cottage industry," where professional plaintiffs, working with attorneys or law firms, systematically file high volumes of lawsuits against businesses that violate the ADA for personal gain.[118] Although Title III of the ADA only provides injunctive relief and attorney's fees as remedies, commentators are concerned with situations where suits are brought under the ADA in conjunction with a state's specific antidiscrimination statute that allows for monetary damages,[119] resulting in cash settlements before they are fully litigated, because businesses would

117 Bagenstos, *supra* note 16, at 2 ("In the past two decades, business groups and their political allies have often criticized broad civil rights remedies—particularly the availability of money damages—as encouraging abusive and extortionate litigation practices."); *see also* Lee, *supra* note 15, at 342.

118 *See* Yabo, *supra* note 16, at 1241 (describing "[c]laims about misuse of law and abusive practices by people with disabilities and their lawyers, who allegedly created a "cottage industry" around the practice of going from business to business looking for noncompliance…"); Helia Garrido Hull, *Vexatious Litigants and the ADA: Strategies to Fairly Address the Need to Improve Access for Individuals with Disabilities*, 26 CORNELL J. L. & PUB. POL'Y 71, 73 (2016); Bagenstos, *supra* note 16, at 16 ("Critics have attacked serial ADA litigation as burdening the courts with unnecessary law suits that line the pockets of plaintiffs' attorneys without actually improving access."); *see also* Ken Barnes, *The ADA Lawsuit Contagion Sweeping U.S. States*, FORBES: OP. (Dec. 22, 2016, 11:05 AM), https://www.forbes.com/sites/realspin/2016/12/22/the-ada-lawsuit-contagion-sweeping-u-sstates/?sh=29e8f39134ee; Joseph Chandlee, *ADA Regulatory Compliance: How the Americans with Disabilities Act Affects Small Businesses*, 7 U. BALT. J. LAND & DEV. 37, 49 (2018); Abigail Sterling & Allen Martin, *Serial Plaintiff Turns California ADA Lawsuits Into a Lucrative Cottage Industry*, CBS SAN FRANCISCO (Aug. 2, 2021, 7:00 PM), https://www.cbsnews.com/sanfrancisco/news/serial-plaintiff-turns-california-ada-lawsuits-into-lucrative-cottage-industry/.

119 Evelyn Clark, *Enforcement of the Americans with Disability Act: Remedying "Abusive" Litigation While Strengthening Disability Rights*, 26 WASH. & LEE J. C.R. & SOC. JUST. 689, 699 (2020).

rather settle than expend time and resources on litigation.[120] This skepticism toward tester plaintiffs is also reflected in many court opinions issued in the course of website accessibility litigation.[121]

ADA testers and serial litigation are understandable concerns for businesses, especially for small businesses that may not have the resources to understand how to address violations of the ADA or to challenge a lawsuit in court.[122] But skepticism of serial or professional plaintiffs should not be the reason to dismiss a complaint at the pleading stage if a tester sufficiently pleads facts to establish constitutional standing and to meet the pleading standard.[123]

When discussing ADA litigation initiated by serial or professional plaintiffs, it is also important to consider that the legislative history of the ADA supports the notion that Congress recognized the value of enabling private causes of action and private enforcement of the ADA to ensure compliance against private parties.[124] And this is especially important because enforcement of disability law in the U.S. today largely falls upon private enforcement.[125]

D. Fear of the Disability Con

Implicit biases and perceptions about the deservingness of disabled individuals may be yet another factor that informs courts' failure to recognize standing for ADA tester plaintiffs. At the time it was

120 Hull, *supra* note 118, at 73 (describing how "some attorneys are exploiting provisions within the ADA, and related laws, for personal monetary gain by filing self-serving, fee-driven lawsuits that often do not advance the rights of individuals with disabilities"); *see also* Barnes, *supra* note 118.

121 *See* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act*, 58 VAND. L. REV. 1807, 1815 (2005) (describing the "sense among commentators that the judiciary is generally hostile to the ADA."); *see also Galtesvar*, 2020 WL 7416940, at *7 (implying that Laufer only filed an affidavit pleading facts to demonstrate risk of future injury because she was "[s]eemingly getting wise to the various courts that have struck down her pleadings on standing grounds"); Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004) (describing an ADA tester plaintiff "as [a] professional pawn[] in an ongoing scheme to bilk attorney's fees," and "unscrupulous law firms" as participants in "a kind of legal shakedown scheme, whose "shotgun litigation tactics undermine both the spirit and purpose of the ADA.")

122 Chandlee, *supra* note 118, at 37.

123 For discussion on why judicial hostility toward testers/serial plaintiffs may not be the best solution to "abusive" serial litigation, see generally Bagenstos, *supra* note 16; Lee, *supra* note 15.

124 *See* Lee, *supra* note 15, at 339; *see also* Adam Milani, *Wheelchair Users Who Lack "Standing:" Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 WAKE FOREST L. REV. 69, 75–76 (2004).

125 *See* Yabo, *supra* note 16, at 1240; Doron Dorfman, *Afterword: The ADA's Imagined Future*, 71 SYRACUSE L. REV. 933, 945 (2021).

enacted, the ADA was considered revolutionary and unique because Congress created rights that compel the state and private actors to affirmatively take action to provide certain means for people with disabilities to fully participate in society.[126] But because accommodations for individuals with disabilities take visible forms that are present in everyday life, it is not uncommon for persons without disability to view these accommodations as " 'special rights' prone to abuse by those who fake disabilities," rather than means to facilitate full societal participation for individuals with disabilities.[127]

This preoccupation with a disabled person's "special rights" often results in questioning the legitimacy of an individual's disability and in suspicion toward disabled persons' assertion of their rights. This is a phenomenon Professor Doron Dorfman refers to as "Fear of the Disability Con."[128] While it is acknowledged that some people likely take advantage of disability laws, the widespread suspicion of abuse and stereotypes that result often function as another barrier that prevents individuals with disabilities from fully asserting their rights under the ADA.[129]

In the context of ADA testers of websites, it is difficult to determine whether or the degree to which the "Fear of Disability Con" may inform courts' understanding of injury suffered by plaintiffs filing complaints against businesses for violation of the ADA. Nevertheless, it is important and valuable for courts to be aware of the phenomenon as well as the implicit biases present in public perceptions of plaintiffs with disabilities as they respond to and draft opinions on motions in this area of the law.

VIII. SOLUTIONS

A. Amend the ADA

One solution to help resolve issues that surround ADA tester plaintiffs' constitutional standing is to amend the ADA to explicitly recognize the right of individuals with disabilities to have equal access to websites and online platforms. This has limits and is only part of the

126 Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 LAW & SOC'Y REV. 1051, 1057–58 (2019) [https://doi.org/10.1111/lasr.12437].

127 Doron Dorfman, *Pandemic "Disability Cons,"* 49 J. OF LAW, MED., & ETHICS 401, 402 (2021) [https://doi.org/10.1017/jme.2021.60].

128 Dorfman, *supra* note 126, at 1053.

129 Dorfman, *supra* note 126, at 1051.

solution, however, because the recognition of websites as "places" within the ADA is not determinative of whether a court may find standing for an ADA tester plaintiff.[130]

Additionally, there currently exists a lack of federal guidance on the ways businesses and other entities may update or design their online platforms to comply with the ADA.[131] Therefore, the promulgation of clearer regulations and guidelines would put businesses on better notice of what would constitute compliance and what they must consider in their web design.[132]

Finally, Leslie Lee suggested in 2011 that Congress amend the ADA to explicitly grant standing to ADA testers of physical spaces to better ensure compliance with the Act's broad goals.[133] In light of the increasingly urgent need for websites to be accessible to individuals

130 Using Fair Housing testers as an example, the enactment of the FHA in 1968 recognized the right for individuals to have equal opportunity to housing and made it unlawful to discriminate based on race in the housing realm, but it was not until *Havens Realty* in 1982 that the Supreme Court held that FHA testers have standing to sue in federal court. Similarly, the Reservation Rule in the Code of Federal Regulations places an affirmative duty on businesses to identify accessible hotel rooms and accessibility features in hotel rooms—and courts have not denied this applies to online reservation platforms. But as the current circuit split reveals, this did not necessarily lead to courts' recognition of standing for ADA testers who file claims to enforce their rights under this rule.

131 Ahmad, *supra* note 115, at 349. In 2010, the U.S. Department of Justice promulgated an Advanced Notice stating that it intended to "revis[e] the regulations implementing Title III . . . in order to establish requirements for making the goods, services, facilities, privileges, accommodations, or advantages offered by public accommodations via the internet," and specifically aimed at making "sites on the World Wide Web . . . accessible to individuals with disabilities." *See* Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43395 (July 26, 2010) (codified as 28 C.F.R. §§ 35–36). Despite voiced intent, the DOJ never enacted official regulations for making internet platforms more accessible to individuals with disabilities, and in 2017, the DOJ announced formal withdrawal of its 2010 Advance Notice, stating hesitancy about "whether promulgating regulations about the accessibility of Web information and services is necessary and appropriate." *See* Nondiscrimination on the Basis of Disability; Notice of Withdrawal of Four Previously Announced Rulemaking Actions, 80 Fed. Reg. 60932, 60932 (Dec. 26, 2017).

132 For more discussion about issues that surround enforceable website accessibility under the ADA, see Blake E. Reid, *Internet Architecture and Disability*, 95 IND. L. J. 591 (2020). In this article, Reid explains how parties and commentators have looked to the Web Content Accessibility Guidelines ("WCAG") promulgated by the World Wide Web Consortium for ways to make websites, apps, and other online platforms more accessible. But while the WCAG provide a plethora of helpful criteria, a lack of official clarity as to which WCAG guidelines will constitute sufficient compliance under the ADA will still affect courts' conception of injury.

133 Lee, *supra* note 15, at 346–352.

with disabilities, Congress could consider amending the ADA to recognize standing for ADA testers of both physical and online spaces.

These solutions would be ideal foundations for greater ADA expansion and enforcement, but the passage of the ADA in 1990 was championed as an impressive feat of bipartisan cooperation within Congress.[134] Such bipartisan cooperation does not exist today, which makes amendments to the ADA unlikely. Therefore, many look to the courts to enforce and interpret the ADA as currently written.

B. Grant Standing to ADA Testers of Websites

1. Website Inaccessibility for ADA Tester Plaintiffs is a Concrete Injury in Fact Within the Intent of the Act.

By enacting the Americans with Disabilities Act, Congress recognized the myriad ways society has historically marginalized and isolated individuals with disabilities.[135] Congress explicitly intended to provide a statutory remedy to address this issue by creating a comprehensive scheme aimed at eliminating or at least minimizing inequality of access to information, facilities, and services for people with disabilities.[136] Congress also expressed clear intent for the ADA to adapt to changing times and technology.[137] And as law professors Bradley Allan Areheart and Michael Ashley Stein have emphasized, "[f]or a growing number of people, the [i]nternet is their world—a place where one can do nearly everything one needs or wants to do."[138] Indeed, Areheart and Stein argue, "the paradigmatic right of people with disabilities 'to live in the world' naturally encompasses the right 'to live in the internet.'"[139] The ever-increasing integration of the internet into everyday life, combined with the ADA's legislative history, language, and broad goals of eradicating disability discrimination on multiple levels in society, leans heavily in favor of understanding internet accessibility as a right squarely within the meaning of the Act.

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134 Laura Rothstein, *Would the ADA Pass Today: Disability Rights in an Age of Partisan Polarization*, 12 ST. LOUIS U. J. HEALTH L. & POL'Y 271, 278–79 (2019) (discussing the history of the ADA provided in LENARD J. DAVIS, ENABLING ACTS: THE HIDDEN STORY OF HOW THE AMERICANS WITH DISABILITIES ACT GAVE THE LARGEST US MINORITY ITS RIGHTS (2015)).

135 42 U.S.C. § 12101(a)(2)–(3).

136 *See* 42 U.S.C. §§ 12101(a)(5), (b).

137 Ahmad, supra note 115, at 327 (citing H.R. REP. NO. 10–485, at 391 (1990)).

138 Bradley Allan Areheart & Michael Ashley Stein, *Integrating the Internet*, 83 GEO. WASH. L. REV. 449, 456 (2014).

139 Areheart, *supra* note 138, at 456–57.

This means that a website's noncompliance with accessibility requirements itself should be considered an injury within the protections of the ADA because it denies individuals with disabilities "the *opportunity [. . .] to participate in or benefit from* the goods, services, facilities, privileges, advantages, or accommodations."[140] Similarly, if a website's format is accessible to nondisabled persons but inaccessible to disabled individuals, this is equivalent to a business providing disabled individuals with "a good, service, facility, privilege, advantage, or accommodation that is *not equal* to that provided to other individual[s]" in violation of the ADA.[141] Furthermore, if a business's website is such that a disabled individual has to resort to offline solutions to avail themselves of the benefits of a business due to website inaccessibility, the business has discriminated against disabled individuals by providing "a good, service, facility, privilege, advantage, or accommodation that is *different or separate from* that provided to other individuals."[142]

2. Website Inaccessibility Produces a Concrete Injury Within the Meaning of TransUnion and Spokeo

Courts should recognize constitutional standing for ADA testers of websites because testers do suffer a concrete injury that results directly from inaccessible webpages in violation of the ADA—particularly when webpages violate the Reservation Rule—and the injury is of the kind described in *TransUnion* and *Spokeo*.

TransUnion provided that "Congress may 'elevate' harms that 'exist' in the real world before Congress recognized them to actionable legal status."[143] *TransUnion* also clarified that Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is."[144] But this concern is not present for ADA website testers. The ADA acknowledged that, "many people with physical or mental disabilities have been precluded from [full participation in all aspects of society] because of discrimination," [145] and the Act aimed to "provide a clear and comprehensive national mandate for the elimination of discrimination

140 *See* 42 U.S.C. § 12182(b)(1)(A)(i) (emphasis added).
141 *See* 42 U.S.C. § 12182(b)(1)(A)(ii) (emphasis added).
142 *See* 42 U.S.C. § 12182(b)(1)(A)(iii) (emphasis added).
143 TransUnion LLC v. Ramirez, 594 U.S. 413, 426 (2021).
144 *Id*.
145 42 U.S.C. § 12101(a)(1).

against individuals with disabilities."[146] When an individual with a disability, regardless of their motivation, experiences discrimination because they are unable to access certain webpages, cannot fully utilize certain digital platforms, or cannot identify which rooms in a place of lodging will have amenities that accommodate their needs, it is difficult to see how this type of barrier would constitute a "legal infraction" that "is not remotely harmful."[147]

The *TransUnion* opinion itself mentioned "discriminatory treatment" as an example of a "concrete, de facto injur[y]" that Congress may "elevate" to be "legally cognizable," [148] and courts have accordingly recognized harm that results from encountering discrimination as a concrete injury sufficient to satisfy constitutional standing.

TransUnion further provided that a key method for determining whether an injury amounts to a "concrete injury in fact" required for standing is to assess whether the alleged harm bears "close relationship" to a harm traditionally recognized as a cause of action in American courts.[149] Many ADA testers of websites plead to the "frustration and humiliation" they experienced because of the website's inaccessibility or inadequate information regarding accommodations.[150] Thus, even if courts are unpersuaded that an individual's encounter with discrimination can itself be a concrete injury in fact, the emotional consequences persons with a disability experience in the face of discrimination, such as frustration and humiliation, certainly bear a close relationship to the traditionally recognized injury of dignitary harm.

This is especially so because, for disabled individuals, the experience of encountering inaccessible websites and violations of the Reservation Rule should be viewed in the greater context of "Disability Admin," a form of administrative labor that occurs in everyday life and is largely "invisible," overlooked, and can become particularly burdensome in the everyday lives of people with disabilities.[151] Among the types of Disability Admin, "Discrimination Admin," involves contesting unfair treatment, requesting legally mandated accommodations, and even includes "the work of deciding when,

146 42 U.S.C. § 12101(b)(1).

147 *TransUnion*, 594 U.S. at 426.

148 *Id*.

149 *Id.* at 425.

150 *See, e.g.*, Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 160 (4th Cir. 2023).

151 Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2341 (2021).

whether, and how to speak up to challenge discriminatory treatment."[152]

In first-hand accounts of how Reservation Rule violations affect disabled individuals, Kristin L. Popham, Elizabeth F. Emens, and Jasmine E. Harris have recorded how, in the grand scheme, disregard for the Reservation Rule "contributes to significant administrative burdens, presents safety risks, signals exclusion of disabled travelers," and has meaningful consequences.[153] Violations of the Reservation Rule produce feelings of humiliation,[154] "drive[] the isolation and exclusion of people with disabilities,"[155] and contribute to greater feelings of ostracism and stigmatization.[156] Therefore, arguments that disabled persons can remedy Reservation Rule violations by a "simple phone call" to the hotel, Popham, Emens, and Harris argue, are gravely out of touch with the lived experience of persons with disabilities,[157] and this narrative "distracts from systemic underenforcement of and noncompliance with the ADA."[158] ADA testers are important to combat these dignitary harms because "[t]esters are a critical part of absorbing some of this harm," but this does not mean testers are immune to such injuries: They repeatedly encounter such discrimination, and the resulting "institutional exclusionary signals become amplified" and compound.[159] Presentations of tester plaintiffs' harms as "manufactured," "self-inflicted," and "not impending," they argue, "mischaracterize" and "demonize disabled plaintiffs' pursuit of remedies for widespread noncompliance."[160]

3. Courts Should Recognize Future Risk of Harm for ADA Testers of Websites

The "imminence" requirement for standing when a plaintiff seeks injunctive relief provides that "'some day' intentions–without any description of concrete plans, or indeed even any specification of when

152 Emens, *supra* note 151, at 2349–2351.

153 Kristin L. Popham, Elizabeth F. Emens & Jasmine E. Harris, *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 COLUMBIA HUMAN RIGHTS LAW REVIEW FORUM 1, 20 (2023).

154 Popham, *supra* note 153, at 54.

155 Popham, *supra* note 153, at 59.

156 Popham, *supra* note 153, at 60.

157 Popham, *supra* note 153, at 34.

158 Popham, *supra* note 153, at 53.

159 Popham, *supra* note 153, at 62–63.

160 Popham, *supra* note 153, at 7–8

the some day will be–do not support a finding of" actual injury.[161] Courts that have declined to find standing for ADA testers of websites have cited plaintiffs' failure to demonstrate risk of future harm as a reason for rejecting standing—and sometimes even when plaintiffs pleaded intention and plans to visit the website or the place of lodging in the near future—because the alleged plans were not "concrete" enough.[162]

In holding this way, courts imply that because ADA website testers are testers, they cannot or are less likely to have "concrete" plans to patronize a website or location compared to, for example, someone who visited a website with bona fide intent to patronize the business. This logic is problematic and poses issues for a couple of reasons.

First, this works against the purpose of the ADA, which provides that no person with a disability is required "to engage in a futile gesture if such person has actual notice that a person or organization covered by [the ADA] does not intend to comply with its provisions."[163] When courts deny standing to ADA tester plaintiffs because their intent, as a tester, to revisit a website is not sufficiently plausible, they are intimating to disabled individuals that, to have more success in asserting their rights to accessibility, they must repeatedly try–and fail–to be a bona fide customer at a place that they know is inaccessible to them. Not only is this ask contrary to the purpose of the ADA and removed from the realities faced by persons with disabilities, but it also reveals the fact that courts often overlook or dismiss the possibility that, in some cases, disabled individuals may not demonstrate a bona fide persistent intent to visit a business as a bona fide patron because of the very fact that this business is inaccessible to them. It would be perfectly logical and reasonable for a person with a disability *not* to have concrete, bona fide plans to try to patronize a business or a business's webpage that he or she knows or has reason to believe will not accommodate their disability.[164]

On the other hand, professional testers of webpages may be more likely to have "concrete" plans to patronize this business in the future, because of their structured plans to regularly visit places to check for ADA compliance. Courts should therefore consider the contradictory

161 Lujan v. Def. of Wildlife, 504 U.S. 555, 564 (1992).

162 *See, e.g.*, Sarwar v. Patel Invs. Inc., No. 5:21-cv-118, 2022 WL 1422196, at *4 (D. Vt. May 5, 2022).

163 42 U.S.C. § 12188(a)(1).

164 *See, e.g.*, Oral Argument at 26:6–27:23, Acheson Hotels, LLC v. Laufer, 144 S. Ct. 18 (2023) (No. 22-429), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-429_4315.pdf.

and somewhat absurd results that could stem from continued rejection of standing for ADA testers of websites because courts deem the likelihood of future injury insufficiently "imminent."

Consider the facts in *Sarwar v. Patel Invs. Inc.*,[165] for example. On a trip to see more of the East Coast and to visit the hotels for which he checks ADA compliance and accessibility, ADA website tester Saim Sarwar traveled through several states, visited a monument in Vermont twice, and detailed his itinerary day by day.[166] In his complaint against the owner of a motel in Vermont, Sarwar explained that toward the end of each day, he would look online for suitable lodging and pleaded in his complaint that he "ruled out the motel [in Vermont] because of absence of information of the website,"[167] opting instead to stay at a lodging in New Hampshire.[168] The District of Vermont, however, inferred that, because Sarwar "stayed in other states (New Hampshire and Massachusetts) on the two nights when a stay in [Vermont] was possible," Sarwar had no interest in staying in Vermont, and held that Sarwar failed to demonstrate concrete injury.[169] The court dismissed Sarwar's case.[170] But certainly, Sarwar pleaded facts to demonstrate he had future intent to try to revisit the motel's website, because he planned to pass through Vermont a second day. This was not too speculative under Supreme Court precedent. If these facts are insufficient to demonstrate concrete risk of future harm, it is difficult to understand under what facts a court would find imminent risk of future harm.

C. Guidance from the Ninth Circuit's Langer v. Kiser Decision

In 2023, the Ninth Circuit recognized standing for ADA testers of *physical* spaces and provided reasoning that is also directly applicable to addressing standing issues for ADA *website* testers,[171] because it responds to the conundrum of demonstrating "future injury" for persons with a disability and may provide a way for courts to reframe how they consider the likelihood of future injury in the context of website accessibility.

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165 Sarwar v. Patel Invs. Inc., No. 5:21-cv-118, 2022 WL 1422196, at *1 (D. Vt. May 5, 2022).

166 *Id.* at *1–2.

167 *Id.* at *4.

168 *Id.* at *1.

169 *Id.* at *4.

170 *Id.*

171 *See* Langer v. Kiser, 57 F.4th 1085,1094–96 (9th Cir. 2023).

Specifically, in *Langer*, the Ninth Circuit strongly cautioned against courts relying on a plaintiff's past litigation when making credibility determinations about injury in fact and future injury because, in many cases, a plaintiff's intent to visit places of public accommodation they previously sued "says little" about a plaintiff's intent to visit the place involved in the suit at hand.[172] For example, even assuming, arguendo, that a tester previously sued a restaurant and did not have legitimate intent to return to that restaurant, it does not follow that the tester necessarily lacks true intent to return to a different business. The tester may have a number of reasons they would like to return to that other business.[173] For instance, the business may be a place close to home or may be a place that the tester wants or needs to visit regularly.[174]

The Ninth Circuit's holding in *Langer* recognized this reality and provided an answer that is directly applicable to ADA website testers in the "deterrent effect doctrine."[175] Specifically, the Ninth Circuit recognized that current deterrence from visiting a place of public accommodation is sufficient to demonstrate an intent to return required for future injury.[176] A plaintiff may establish this by demonstrating knowledge of an ADA violation at a place of public accommodation and then by either (1) showing they are currently deterred from returning because of the barrier; or (2) by showing they were previously deterred and intend to return to the non-compliant place of public accommodation.[177] The Ninth Circuit also held that plaintiffs can demonstrate future intent by showing an intent to return once the noncompliance is cured.[178]

In addition to advocating for the "deterrent effect doctrine," the Ninth Circuit in *Langer* joined the Eleventh Circuit in recognizing that a plaintiff's profession as an ADA tester makes it more likely that he or she will visit the place of public accommodation in the future and therefore suffer the same injury again.[179] This bolsters the proposition that ADA testers of websites who plead future plans to visit the same website again or plead intention to visit and stay in the area in which the hotel is

172 *Id*. at 1095.

173 *Id*.

174 *Id*.

175 *Langer*, 57 F.4th at 1093.

176 *Id*. (citing Civil Rights Educ. and Enf't Ctr. v. Hosp. Prop. Trust, 867 F.3d 1093 (9th Cir. 2017)).

177 *Id*.

178 *Id*.

179 *Id*. at 1098 (citing Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1340 (11th Cir. 2013)).

located are not expressing a vague, "some day" intent to return that was the object of concern in *Lujan v. Defenders of Wildlife*. In fact, the *Lujan* opinion elaborated that while imminence cannot "be stretched beyond its purpose" in order "to ensure that the alleged injury is not too speculative," imminence "is concededly a somewhat elastic concept."[180] And unlike the plaintiffs in *Lujan*, who expressed intention to return to Sri Lanka and Egypt at some point in the future to observe endangered species but had offered no concrete plans to actually do so,[181] ADA website testers are expressing concrete plans to use the computer in their home to visit websites as part of a schedule they set for themselves to regularly check for accessibility. Some ADA website testers also express concrete plans to attempt to patronize the brick-and-mortar business. When ADA website testers continuously encounter barriers in violation of the ADA, the likelihood that they will experience the same kind of injury in future attempts is not merely "speculative," "conjectural," or "hypothetical."[182]

VIII. CONCLUSION

Private enforcement of civil rights statutes is critical to effect meaningful change, and testers can have an incredible impact on modern enforcement of civil rights. But because tester plaintiffs visit a business solely for the purpose of testing its compliance with a federal statute and without intent to avail themselves of the business's goods or services, courts have not consistently found that ADA tester plaintiffs who visit a website solely to test its ADA compliance have suffered a concrete injury in fact required for Article III constitutional standing. When courts have held that the ADA website tester plaintiffs lack constitutional standing, it is also usually because they failed to plausibly plead future intent to visit or patronize the business. Other factors that inform lack of standing for tester plaintiffs include general skepticism toward tester plaintiffs out of fear of risk of abusive or predatory serial litigation, the "Fear of Disability Con," and the fact that courts are split over whether and when a website should be considered a "place of public accommodation" under Title III of the ADA.

The Ninth Circuit's holding in *Langer v. Kiser* has the potential to change the way that courts view testers because it addresses these concerns and its reasoning is directly applicable to standing for ADA website testers as much as it is applicable to ADA testers of physical

180 *Lujan*, 504 U.S. at 606 n.2.

181 *Id*. at 564.

182 *Id*. at 560.

spaces. Courts, and especially the Supreme Court, should adopt *Langer*'s approach to tester standing because, as the world becomes more and more integrated with the internet, recognition of ADA website tester standing will help realize Congress's aim of "address[ing] the major areas of discrimination faced day-to-day by people with disabilities."[183]

183 42 U.S.C. § 12101(b)(4).