

STRUGGLING TO STAY STANDING: CIRCUIT COURTS' VARYING APPROACHES TO CIVIL RIGHTS TESTERS AND ARTICLE III STANDING REQUIREMENTS

Abstract: On February 15, 2023, in *Laufer v. Naranda Hotels, LLC*, the United States Court of Appeals for the Fourth Circuit held that a public accommodations tester possessed Article III standing to bring a claim against a hotel for violating the Americans with Disabilities Act (ADA). In doing so, the Fourth Circuit equalized the sides of a growing conflict among circuit courts concerning the proper approach to ADA testers' ability to satisfy the constitutional requirements for standing. This Comment argues that the conclusions of the First, Fourth, and Eleventh Circuits recognizing that an ADA tester plaintiff has standing are correct and most effective in protecting the legislative purpose of the ADA and other civil rights laws. Further, this Comment argues that the approaches taken by the First, Fourth, and Eleventh Circuits offer two distinct pathways that demonstrate how an adherence to precedent supports a finding that an ADA tester plaintiff has standing.

INTRODUCTION

The passage of the Americans with Disabilities Act (ADA) in 1990 was meant to ensure equal access and opportunities for millions of Americans with disabilities, while also eliminating discrimination.¹ In reality, Americans with disabilities have found that the statute's enactment did not remove all barriers to their participation in society.² With many violations of the ADA still in existence,

¹ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213); see Amelia Hensel, *Disability Law—From Stair Flights to Websites: An Argument for Amending the Americans with Disabilities Act to Include Title VI That Applies to Online Spaces*, 45 U. ARK. LITTLE ROCK L. REV. 509, 512 (2023) (describing the legislative purpose behind the enactment of the Americans with Disabilities Act). The ADA passed with support from House and Senate Democrats and Republicans and was the culmination of a movement by Americans with disabilities pushing Congress to remove barriers to their integration into society. Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 30–31 (2000).

² See Hensel, *supra* note 1, at 512–13 (explaining that although Congress intended for the ADA to protect those with disabilities from discrimination in all facets of life, social and vocational hindrances remain that prevent their involvement in society). Although the ADA serves as a tool for social change and has improved access for those with disabilities in numerous ways, many argue that further change is necessary to completely remove impediments to their full integration in society. See, e.g., Peter D. Blanck, *Employment Integration, Economic Opportunity, and the Americans with Disabilities Act: Empirical Study from 1990–1993*, 79 IOWA L. REV. 853, 912–16 (1994) (providing empirical findings related to employment for those with disabilities and noting that although progress has been made regarding community integration, further compliance with the ADA is necessary for complete integration).

some individuals with disabilities act as “testers,” attempting to uncover violations of the ADA and bringing lawsuits to invoke compliance.³ In doing so, however, these litigants face questions as to whether they meet the constitutional standing requirements sufficient to proceed on their claims.⁴ In 2023, in *Laufer v. Naranda Hotels, LLC*, the U.S. Court of Appeals for the Fourth Circuit added its voice to the conversation regarding testers and Article III standing.⁵

Part I of this Comment examines Article III standing, the ADA, and the factual and procedural history of *Naranda Hotels*.⁶ Part II discusses courts’ various approaches in analyzing whether a tester’s alleged injury meets Article III standing requirements.⁷ Finally, Part III argues that the U.S. Courts of Appeals for the First, Fourth, and Eleventh Circuits reached the correct conclusion in granting ADA testers standing, and that these circuit courts’ analyses offer two possible approaches that courts can adopt to better uphold the purpose of the ADA.⁸

I. THE LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND OF *LAUFER V. NARANDA HOTELS, LLC*

In 2023, in *Laufer v. Naranda Hotels, LLC*, the U.S. Court of Appeals for the Fourth Circuit held that a public accommodations tester has standing to

³ See Hensel, *supra* note 1, at 512–13 (highlighting how Congress’s intentions for the ADA have not been completely fulfilled); Stephanie Pappas, *Despite the ADA, Equity Is Still Out of Reach*, AM. PSYCH. ASS’N (Nov. 1, 2020), <https://www.apa.org/monitor/2020/11/feature-ada> [perma.cc/LEQ8-QQMR] (outlining the prevalence of numerous barriers for people with disabilities, including in the areas of healthcare and employment); Kelly Johnson, Note, *Testers Standing Up for Title III of the ADA*, 59 CASE W. RES. L. REV. 683, 685 (2009) (noting the recent use of testers in ADA cases, as well as the historical use of testers in housing and employment matters, as an attempt to highlight discriminatory practices and statutory noncompliance).

⁴ See Johnson, *supra* note 3 (noting that federal courts are skeptical when faced with ADA tester plaintiffs and have, on several occasions, decided testers lack the standing necessary to pursue their claims). Compare *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 174 (4th Cir. 2023) (concluding a tester plaintiff does possess Article III standing), with *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (concluding an ADA tester plaintiff does not meet the Article III standing requirements).

⁵ See *Naranda Hotels*, 60 F.4th at 158, 174 (joining other circuit courts in facing the question of whether an ADA tester has standing to pursue her claims). Previously, the First, Second, Fifth, Tenth, and Eleventh Circuit Courts of Appeals had all faced the question of whether an ADA tester had standing. See, e.g., *Harty*, 28 F.4th at 440 (addressing the question of whether an ADA plaintiff alleged an injury in fact sufficient to possess standing); *Laufer v. Looper*, 22 F.4th 871, 877–78 (10th Cir. 2022) (same); *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 263, 268 (1st Cir. 2022) (same); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1270, 1274 (11th Cir. 2022) (same); *Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 272–73 (5th Cir. 2021) (same). The First, Fourth, and Eleventh Circuits concluded that the ADA tester plaintiffs possessed standing, but the Second, Fifth, and Tenth Circuits came to the opposite conclusion. Compare *Harty*, 28 F.4th at 443 (holding that an ADA tester did not possess standing), *Mann Hosp.*, 996 F.3d at 272–73 (same), and *Looper*, 22 F.4th at 877–78 (same), with *Acheson Hotels*, 50 F.4th at 271 (holding that the ADA tester had Article III standing), *Naranda Hotels*, 60 F.4th at 166, 174 (same), and *Arpan*, 29 F.4th at 1270, 1274 (same).

⁶ See *infra* notes 9–56 and accompanying text.

⁷ See *infra* notes 57–83 and accompanying text.

⁸ See *infra* notes 84–100 and accompanying text.

bring an action against a hotel for violating the ADA, creating an even split between the federal circuit courts that have weighed in on the issue.⁹ Section A of this Part discusses key constitutional provisions and cases that underpin the Article III standing requirements.¹⁰ Section B introduces the ADA, the requirements the ADA imposes on places of public accommodation, and the role testers play in ensuring businesses remain compliant.¹¹ Section C explains the factual and procedural history of *Naranda Hotels*.¹²

A. Article III Standing Requirements

Article III of the Constitution limits the judicial power of federal courts to matters involving “Cases” or “Controversies.”¹³ In limiting the scope of the federal courts’ power, the Constitution ensures that courts redress live disputes involving harmed or imminently threatened persons, rather than issue advisory opinions.¹⁴

⁹ See *Naranda Hotels*, 60 F.4th at 174 (acknowledging that its decision equalizes the sides of the issue of ADA tester plaintiff standing between federal circuit courts, with three circuits holding an ADA plaintiff had suffered an injury in fact sufficient for standing and three circuits coming to the opposite conclusion). The United States Courts of Appeals for the Second, Fifth, and Tenth Circuits concluded ADA testers failed to meet the Article III standing requirements, whereas the First, Fourth, and Eleventh Circuits concluded these types of plaintiffs did possess Article III standing to sue. *Compare Harty*, 28 F.4th at 443 (holding that an ADA tester did not allege a concrete injury sufficient to establish Article III standing because he had no intention of visiting the hotel or the area surrounding the hotel), *Mann Hosp.*, 996 F.3d at 272–73 (same), and *Looper*, 22 F.4th at 877–78 (same), with *Acheson Hotels*, 50 F.4th at 263, 271 (holding that although the ADA tester had no intention of staying at or around the hotel, she still sustained an injury sufficient for Article III standing), *Naranda Hotels*, 60 F.4th at 166, 174 (same), and *Arpan*, 29 F.4th at 1270, 1274 (same).

¹⁰ See *infra* notes 13–25 and accompanying text.

¹¹ See *infra* notes 26–43 and accompanying text.

¹² See *infra* notes 44–56 and accompanying text.

¹³ U.S. CONST. art. III, § 2, cl. 1. Through Article III, the founders established boundaries to the power of the federal judiciary. Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 123 (2011). The “Cases” and “Controversies” language within the Constitution outlines the only nine circumstances in which the federal courts have jurisdiction. See U.S. CONST. art. III, § 2, cl. 1 (listing the nine circumstances as “all Cases, in Law and Equity, arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”).

¹⁴ See *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (highlighting that a federal court’s power is limited to matters involving cases or controversies). Advisory opinions are non-binding insights by the judiciary into legal questions or interpretations of law. *Advisory Opinion*, CORNELL L. SCH.: WEX LEGAL INFO. INST., https://www.law.cornell.edu/wex/advisory_opinion [perma.cc/XF2T-KMYX] (June 2022). Avoiding the issuance of advisory opinions is a fundamental principle for federal courts. Alicia Bannon, *Judicial Advisory Opinions Explained*, STATE CT. REP. (Nov. 17, 2023), <https://statecourtreport.org/our-work/analysis-opinion/judicial-advisory-opinions-explained> [perma.cc/

To establish a case or controversy in accordance with Article III, a plaintiff must possess standing.¹⁵ In 1992, in *Lujan v. Defenders of Wildlife*, the Supreme Court articulated the Article III standing doctrine as requiring a plaintiff to have (1) “suffered an injury in fact,” (2) that is “fairly traceable to the challenged action of the defendant,” and (3) that is likely to be “redressed by a favorable decision.”¹⁶ Further, to establish standing in a matter where a plaintiff is seeking injunctive relief, the plaintiff must show a high likelihood that the defendant’s actions could harm them again.¹⁷

The injury in fact requirement is the primary issue addressed by courts in ADA tester cases.¹⁸ To suffer an injury in fact, a plaintiff must demonstrate “an invasion of a legally protected interest.”¹⁹ The invasion of one’s interest must be both concrete and particularized, as well as actual or imminent, to satisfy the standing doctrine.²⁰ The Supreme Court recognizes both tangible and intangible injuries as concrete.²¹ Two types of intangible injuries include infor-

JJ4M-LNAU]. State courts, however, are not bound by the Constitution’s case and controversy requirement, and thus may issue advisory opinions on legal questions without adjudicating a case, so long as it is permitted by the state constitution. *See id.* (distinguishing the case and controversy requirement for federal courts from state court practices).

¹⁵ *See* *Carney v. Adams*, 141 S. Ct. 493, 498–500 (2020) (explaining Article III case and controversy language and the components of the standing doctrine). The standing requirement evolved from the case and controversy language as a means of defining the types of parties suitable to request adjudication from federal courts. *See id.* (outlining the purpose of the standing doctrine).

¹⁶ *See* *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (first quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990); and then quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–43 (1976)) (outlining the three elements of standing).

¹⁷ *See* *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (noting that an equitable remedy requires showing an irreparable injury, which is a requirement only satisfied by demonstration of a high likelihood that the plaintiff will be harmed again). Injunctive relief is a type of equitable remedy where the court requires a party to act in a certain way or restricts a party from acting, as opposed to issuing legal remedies, such as monetary solutions. *Injunctive Relief*, CORNELL L. SCH.: WEX LEGAL INFO. INST., https://www.law.cornell.edu/wex/injunctive_relief [perma.cc/D73F-WF85] (June 2020).

¹⁸ *See* *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 162, 174 (4th Cir. 2023) (providing an overview of the various circuit courts’ analyses of the first *Lujan* element when evaluating whether an ADA plaintiff possesses standing). Although the first *Lujan* element for standing has been the most debated for ADA tester plaintiffs, after a court determines that an ADA tester plaintiff has suffered an injury in fact, the ADA tester plaintiff also must meet the other two *Lujan* elements. *See Lujan*, 504 U.S. at 560–61 (requiring a plaintiff to meet all three elements of standing). For the second *Lujan* element, the plaintiff must show a causal connection between the injury and the defendant’s actions. *See id.* at 560 (providing the second requirement for standing). Lastly, to satisfy the third element, it must be likely that a favorable decision by the court will redress the injury. *See id.* at 568, 571 (finding respondents failed to demonstrate redressability because any relief possible from the court would not rectify the injury claimed in plaintiff’s complaint and because any possibility of the desired relief was conjectural).

¹⁹ *See Lujan*, 504 U.S. at 560 (providing the definition of injury in fact).

²⁰ *See id.* at 581 (explaining that a party bringing suit must demonstrate that the actions of the defendant injured that specific plaintiff in a concrete way). A “particularized” injury requires a personal injury to the specific individual bringing the lawsuit. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339–41 (2016) (defining a concrete and particularized injury).

²¹ *See id.* at 340–41 (highlighting that “concrete” and “tangible” are not synonymous and that, therefore, intangible injuries can be concrete). The idea that a concrete injury is not always synony-

mational and stigmatic injuries.²² Informational injuries involve denial of information.²³ Alternatively, stigmatic injuries refer to harm to one's dignity.²⁴ Once a court establishes that a plaintiff has suffered an injury in fact, the plaintiff must also meet the remaining two *Lujan* elements before the plaintiff possesses Article III standing to sue.²⁵

B. The Americans with Disabilities Act and "Testers"

In 1990, Congress enacted the ADA to prohibit discrimination against individuals with disabilities.²⁶ Specifically, Title III of the ADA prohibits places of public accommodation from discriminating based on disability.²⁷ Under Ti-

mous with tangible ones comes from Supreme Court precedent, where the Court has found in previous cases that intangible injuries may also satisfy the concrete requirement. *See id.* at 340 (first citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009); and then citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 524 (1993) (providing insight into how the Supreme Court has recognized both tangible and intangible injuries as sufficient for standing). For standing, the courts have recognized tangible injuries to include economic and physical harm. *See Rachel Bayefsky, Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2321–22 (2018) (highlighting the two types of harm recognized by courts as tangible). Meanwhile, intangible harms are not defined so explicitly and instead typically require an analysis of common law principles or congressional action to determine the applicable definition. *See id.* at 2324–25 (noting that tangible harms are usually declared concrete without looking to legitimization from common law or Congress, but intangible harms are not).

²² *See Rachel Bayefsky, Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 N.Y.U. L. REV. 128, 143 (2024) (explaining stigmatic and informational injuries as two types of harms courts consider).

²³ *See id.* (providing the meaning of informational injury). An informational injury may occur where there is denial of information or an omission of required information. *Id.* at 143–44; *see FEC v. Akins*, 524 U.S. 11, 19, 21 (1998) (holding that preventing disclosure of donor and campaign information to a group of voters seeking to review a Federal Election Commission decision, as permitted by the Federal Election Campaign Act, was a sufficiently concrete and particularized injury in fact).

²⁴ Bayefsky, *supra* note 22, at 131. A stigmatic injury may occur when one's dignity is put into question, such as through stigmatization or discrimination. *See id.* (noting that various social policies may cause someone to endure stigmatic harm); *Allen v. Wright*, 468 U.S. 737, 755–56, 757 n.22 (1984) (indicating that a plaintiff can assert a claim of stigmatic injury if the plaintiff is personally subject to discriminatory treatment); *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (explaining that discrimination or stigmatization can cause injury to people denied equal treatment based on their membership in a disfavored group).

²⁵ *See Lujan*, 504 U.S. at 560–61 (providing the Article III requirements for standing). Although the first *Lujan* element is heavily debated in ADA tester cases, the court will also evaluate the other two *Lujan* elements where necessary to grant or deny standing. *See, e.g., Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 167 n.5 (4th Cir. 2023) (analyzing arguments related to the second and third elements of standing and providing rationale for the court's determination that both have been satisfied by the ADA tester plaintiff).

²⁶ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–121213).

²⁷ 42 U.S.C. § 12182(a) ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases . . . or operates a place of public accommodation."). Under the ADA, the term "disability" refers to "(A) a physical or mental impairment that substantially limits one or more major life activities

title III, public accommodations include both public and private businesses that provide goods or services to the public.²⁸ People subject to disability-based discrimination may initiate a civil action for injunctive relief that could result in a court ordering facilities to become disability accessible.²⁹

To ensure compliance with the ADA and other civil rights laws that prohibit various kinds of discrimination, people known as “testers” investigate places of public accommodation.³⁰ Testers attempt to acquire information and detect various legal violations, but do not always intend to visit or utilize the entities they investigate.³¹

In 1982, in *Havens Realty Corp. v. Coleman*, the Supreme Court addressed the issue of whether an individual acting as a tester to uncover housing discrimination possessed standing to sue under the Fair Housing Act of 1968 (FHA).³² The defendants in *Havens Realty* allegedly engaged in racial steering, intentionally misconstruing housing market availability to drive people of col-

. . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment” *Id.* § 12102(1).

²⁸ See *id.* § 12181(7) (providing a list of entities considered public accommodations under the ADA). Although public accommodations are generally understood as entities that affect commerce and are open to the public, under the ADA, private entities that “[o]wn; [l]ease; [l]ease to; or [o]perate a place of public accommodation” may also fall within Title III obligations. U.S. Dep’t of Just., *ADA Title III Technical Assistance Manual*, <https://www.ada.gov/resources/title-iii-manual/> [perma.cc/3RM8-AZLF] (Nov. 1, 1993); see 42 U.S.C. §§ 12181(7), 12182(a) (providing an extensive list of private entities that are considered public accommodations for the purposes of the ADA if their operations affect commerce, including hotels, restaurants, laundromats, and bakeries).

²⁹ See 42 U.S.C. § 12188(a)(2) (explaining the enforcement policies and procedures surrounding violations of the ADA); *id.* § 2000a–3 (outlining remedies and procedures as they pertain to civil actions for injunctive relief). The statutorily provided remedies are available to any person who is subjected to discriminatory actions, including those who are presently experiencing the discrimination and those who have “reasonable grounds” to believe they will be subjected to unlawful discrimination. *Id.* § 12188(a)(1).

³⁰ See, e.g., *id.* § 2000e-16 (prohibiting employment discrimination); *id.* §§ 3604–3606 (prohibiting discrimination in the housing and real estate markets); see *Naranda Hotels*, 60 F.4th at 159 (noting that the plaintiff is a tester with the goal of uncovering whether or not places of public accommodation comply with the ADA); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982) (involving tester plaintiffs investigating whether a real estate company was engaging in racial steering in violation of the Fair Housing Act).

³¹ APRIL J. ANDERSON, CONG. RSCH. SERV., LSB11110, “TESTER” LAWSUITS UNDER THE AMERICANS WITH DISABILITIES ACT 2 (2024); see also *Naranda Hotels*, 60 F.4th at 160 (noting that the plaintiff acting as a tester had no intention of staying at the hotel); *Havens Realty*, 455 U.S. at 374 (noting that the tester plaintiff had no intention of renting an apartment from the real estate corporation from which she was seeking information about the availability of apartments). Testers bringing private suits serve a complementary role to the federal government’s enforcement of the ADA and help bring attention to situations of noncompliance. ANDERSON, *supra*, at 3.

³² 455 U.S. at 366; 42 U.S.C. § 3604. The Fair Housing Act has been interpreted by courts as requiring governments and executive agencies to promote integration and social inclusion, and also to remove barriers to access to fair housing. Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 735–36 (2020).

or out of a certain county.³³ One of the plaintiffs, Coleman, was acting as a civil rights tester and claimed to have suffered an informational injury based on the FHA provision making it unlawful to represent dwellings as unavailable to any person because of race.³⁴ Although the tester had no intention of purchasing a house in the area, the Court concluded that the FHA conferred on “all persons” a legal right to accurate housing information and, as such, the tester had suffered an injury sufficient to grant standing.³⁵

In 2021, in *TransUnion LLC v. Ramirez*, the Supreme Court elaborated on the ability of tester plaintiffs to rely on statutory violations as a basis for standing.³⁶ Citing their rights under the Fair Credit Reporting Act, a class of individuals sued TransUnion, a credit reporting agency, for failing to provide their credit information in the statutorily required format.³⁷ The plaintiffs claimed to have suffered a concrete informational injury from these formatting violations, but the Court disagreed.³⁸ In coming to its conclusion, the Court highlighted that the plaintiffs had received the required information, just in the wrong for-

³³ 455 U.S. at 366–68; 42 U.S.C. § 3604. Racial steering is a practice intended to drive members of a certain race in or out of certain neighborhoods. *See Bell, supra* note 32, at 737–40 (providing an overview of the use of racial steering as a practice to promote racial segregation); T. Alexander Aleinikoff, Note, *Racial Steering: The Real Estate Broker and Title VIII*, 85 YALE L.J. 808, 808–10 (1976) (describing racial steering as a longstanding practice intended to direct buyers to or from particular areas). This intention to segregate through the housing market has since been deemed illegal through statutory enactments and foundational court cases. *See* 42 U.S.C. § 3604 (enacting the Fair Housing Act that prohibits discrimination in the housing market based on race); *see, e.g., Havens Realty*, 455 U.S. at 366 (addressing whether a tester plaintiff who was attempting to detect housing discrimination had standing); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 95 (1979) (involving Black testers being intentionally given incorrect information or outwardly denied housing).

³⁴ *Havens Realty*, 455 U.S. at 366; *see* 42 U.S.C. § 3604(d) (“[I]t shall be unlawful— . . . To represent to any person because of race [or] color . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.”).

³⁵ *See Havens Realty*, 455 U.S. at 373–74 (utilizing the language of the Fair Housing Act to conclude that “all persons” were entitled to truthful housing information, regardless of the Black tester’s intent to use such information).

³⁶ *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205, 2214 (2021) (explaining that a statutory obligation created by Congress still requires a court to conduct its own Article III standing analysis and that here, plaintiffs identified no “downstream consequences” resulting from incorrectly formatted information and thus did not suffer a harm sufficient for standing (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020))); *Lauer v. Looper*, 22 F.4th 871, 877 (10th Cir. 2022) (noting that *TransUnion* broadened the court’s understanding of injuries and the standing doctrine).

³⁷ *See TransUnion*, 141 S. Ct. at 2213 (stating plaintiffs’ contentions that a certain formatting of their credit reports was required by statute and thus receiving this information in an incorrect format was a deprivation of a right granted by statute). The plaintiffs in *TransUnion* noted that the Fair Credit Reporting Act required TransUnion to provide them with their entire credit files when requested. *Id.* at 2200–01. The plaintiffs then alleged that by receiving two separate mailings containing credit information, TransUnion’s mailings were incorrectly formatted such that the plaintiffs were deprived of the statutorily required information. *Id.* at 2213.

³⁸ *Id.* at 2213.

mat, and that the plaintiffs had suffered no “downstream consequences” from the failure to receive the information correctly.³⁹

The Court’s focus in *TransUnion* on “downstream consequences” altered some lower courts’ understanding of the requirements for Article III standing.⁴⁰ To some courts, *TransUnion* indicated that a tester’s alleged injuries must lead to adverse effects to satisfy Article III standing.⁴¹ To others, *Havens Realty* set the standard, requiring only that a tester plaintiff suffer a statutory violation to meet the injury in fact requirement for standing.⁴² Because of this division, cases involving testers and their standing to sue have become particularly salient as courts attempt to reconcile *Havens Realty* and *TransUnion* with the first element of the standing doctrine.⁴³

C. Factual and Procedural History of *Laufer v. Naranda Hotels, LLC*

Deborah Laufer is an individual with a disability who resides in Florida.⁴⁴ As a self-proclaimed tester, Laufer monitors places of public accommodation to ensure they are complying with the ADA.⁴⁵ In July 2020, Laufer visited

³⁹ *Id.* at 2214 (quoting *Trichell*, 964 F.3d at 1004). The Court determined that the plaintiffs failed to show how the format of providing two separate mailings caused harm to them and that the plaintiffs did not present evidence showing “confus[ion], distress[], or reli[ance] on the information in any way.” *Id.* (quoting *Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1039 (9th Cir. 2020) (McKeown, J., concurring in part), *rev’d and remanded*, 141 S. Ct. 2190 (2021)).

⁴⁰ *Id.* (quoting *Trichell*, 964 F.3d at 1004); *see Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443–44 (2d Cir. 2022) (stating that *TransUnion* required a plaintiff to have suffered “downstream consequences” from the alleged injury and holding that the tester plaintiff did not suffer any adverse consequences and thus did not meet the requirements for an injury in fact); *Looper*, 22 F.4th at 877–78 (same); *Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 272–73 (5th Cir. 2021) (concluding that the tester plaintiff failed to demonstrate that the missing statutory information had any relevance to her and as such did not meet the standing requirements).

⁴¹ 141 S. Ct. at 2214; *see Harty*, 28 F.4th at 443–44 (stating that *TransUnion* clarified the requirements for an injury in fact to require more than just a statutory violation); *Looper*, 22 F.4th at 877–78, 881 (holding that the defendants’ failure to provide a tester plaintiff statutorily required information is not enough to suffer an injury in fact without a further adverse consequence).

⁴² *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982); *see Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 271 (1st Cir. 2022) (seeing *Havens Realty* as the controlling precedent and holding that denial of information required by statute gives a tester plaintiff the right to sue); *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 166 (4th Cir. 2023) (same).

⁴³ *Havens Realty*, 455 U.S. at 373–74; *TransUnion*, 141 S. Ct. at 2214; *see, e.g., Acheson Hotels*, 50 F.4th at 263 (addressing the question of whether a tester has suffered an injury sufficient to meet the standing requirements); *Harty*, 28 F.4th at 440 (same); *Naranda Hotels*, 60 F.4th at 158 (same).

⁴⁴ *Naranda Hotels*, 60 F.4th at 158. Laufer is unable to walk a substantial distance without requiring an assistive device, such as a cane or wheelchair, and thus falls under the definition of disability provided by the ADA. *See id.* (providing details of Laufer’s disability and her status under the ADA); 42 U.S.C. § 12102 (defining disability as including “a physical . . . impairment that substantially limits one or more major life activities”).

⁴⁵ *Naranda Hotels*, 60 F.4th at 158, 159. Laufer has filed hundreds of lawsuits with similar claims of hotel websites not providing the required information under Title III of the ADA. *Id.*; *see, e.g., Mann Hosp.*, 996 F.3d at 271 (depicting one example of Laufer filing a claim for a reservation website

numerous hotel reservation websites to gather information about Naranda Hotels' Sleep Inn & Suites Downtown Inner Harbor in Baltimore, Maryland, intending to investigate whether the hotel met ADA requirements.⁴⁶ Finding that none of the websites provided accessibility information or the option to reserve accessible rooms, Laufer filed a claim in the United States District Court for the District of Maryland against Naranda.⁴⁷ Although her complaint made no mention of plans to visit Maryland, Laufer's ADA claim alleged that she suffered both an informational and a stigmatic injury because of Naranda's ADA violations.⁴⁸

In September 2020, Naranda filed a motion to dismiss Laufer's complaint for lack of standing.⁴⁹ Naranda argued that Laufer's status as a tester with a lack of travel plans to Baltimore meant she had not suffered an injury suffi-

failing to provide accessible room information); *Looper*, 22 F.4th at 874 (same); *Acheson Hotels*, 50 F.4th at 263-64 (same).

⁴⁶ *Naranda Hotels*, 60 F.4th at 160. Prior to filing the claim, Laufer checked six different reservation websites, including Booking.com and Expedia.com, none of which portrayed accessibility information. *Id.* Although hotels, and thus their booking websites, fall under places of public accommodation within the ADA, courts have come to conflicting conclusions when evaluating whether websites alone may qualify as places of public accommodation. See 42 U.S.C. § 12181(7) (explaining that hotels qualify as a public accommodation under the ADA if their operations affect commerce); Michele Astor-Pratt, *There's No Place Like Dot-Com: Are Websites Places of Public Accommodation Under Title III of the ADA?*, B.C. L. REV. E. SUPP. II-31, II-42 to -45 (2020), <https://bclawreview.bc.edu/articles/58/files/639ab635847c5.pdf> [<https://perma.cc/7J3N-FV2F>] (describing various circuit courts' conclusions when deciding whether websites are places of public accommodation and suggesting the language of Title III of the ADA, along with Congress's intent in passing the ADA, demonstrate that courts should consider websites as places of public accommodation).

⁴⁷ *Naranda Hotels*, 60 F.4th at 158. Specifically, Laufer's complaint pointed to Title III of the ADA, rendering discrimination based on disability in places of public accommodation unlawful. 42 U.S.C. § 12182(a). Federal regulations also require places of lodging, such as hotels, to allow guests with disabilities to reserve accessible rooms and require that the hotel make information about accessibility features readily available to guests. See 28 C.F.R. § 36.302(e) (2016) ("A public accommodation that . . . operates a place of lodging shall, with respect to reservations made by any means . . . (i) . . . ensure that individuals with disabilities can make reservations for accessible guest rooms . . . in the same manner as individuals who do not need accessible rooms; [and] (ii) [i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service . . .").

⁴⁸ *Naranda Hotels*, 60 F.4th at 160. Laufer's claim of an informational injury involved deprivation of information that she claimed entitlement to under the ADA, whereas the alleged stigmatic injury involved denigration and humiliation because of disability-based discrimination. See Complaint at 7, *Laufer v. Naranda Hotels, LLC*, No. 20-cv-02136 (D. Md. Dec. 16, 2020) (explaining that Naranda Hotels' violations deprived Laufer of being fully informed of her travel choices and caused her both frustration and humiliation).

⁴⁹ See Defendant's Motion to Dismiss at 1-2, *Laufer v. Naranda Hotels, LLC*, No.20-cv-02136 (D. Md. Dec. 16, 2020) (claiming Laufer failed to allege facts sufficient to possess standing to bring the action); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (outlining the three required elements of standing). Naranda Hotels also filed a motion to dismiss for failure to state a claim upon which relief can be granted. *Naranda Hotels*, 60 F.4th at 160. Federal Rule of Civil Procedure 12(b) provides the seven bases for dismissing a claim, and specifically, Rule 12(b)(6) requires that a complaint be legally sufficient. FED. R. CIV. P. 12(b)(6). Otherwise, a court will find the plaintiff failed to state a claim upon which relief can be granted. *Id.*

cient to meet the first element of *Lujan*.⁵⁰ In her response to Naranda's motion to dismiss, Laufer provided a declaration of her intention to visit the Baltimore area after the COVID-19 pandemic.⁵¹ After conducting an evidentiary hearing to evaluate Laufer's claimed travel plans, the district court dismissed Laufer's claim for lack of standing, finding the travel plans too speculative and unsubstantiated to establish standing.⁵²

On appeal, the U.S. Court of Appeals for the Fourth Circuit vacated the district court's decision, recognizing that Laufer possessed standing based on her claim of an informational injury, regardless of the legitimacy of her travel plans.⁵³ The Fourth Circuit reasoned that Laufer's inability to acquire accessibility information required by the ADA was a sufficient injury under the first *Lujan* element, and that her status as a tester did not detract from her ability to possess standing.⁵⁴ In vacating the district court's decision, the Fourth Circuit joined the First and Eleventh Circuits in holding that an ADA tester plaintiff

⁵⁰ *Lujan*, 504 U.S. at 560–61; *Naranda Hotels*, 60 F.4th at 160. Naranda Hotels argued that without plans reflecting an intention to occupy one of their hotel rooms in the Baltimore area, Laufer did not sustain an injury and thus could not legally pursue her claim. See Defendant's Motion to Dismiss, *supra* note 49, at 1–2 (explaining Naranda Hotels' reasoning for filing a motion to dismiss as based on the premise that Laufer is a tester with no intention of utilizing the information desired and thus did not, and will not, suffer an injury in fact).

⁵¹ *Naranda Hotels*, 60 F.4th at 160.

⁵² *Id.* at 158, 161. Prior to Laufer's claim against Naranda Hotels, she had filed similar lawsuits in other Maryland courts, and in dismissing Laufer's claim, the district court aligned with those other district court decisions. See *Laufer v. Ft. Meade Hosp., LLC*, No. 20-cv-1974, 2020 WL 6585955, at *4 (D. Md. Nov. 10, 2020) (dismissing Laufer's complaint for failure to demonstrate an injury that was sufficiently concrete and particularized because she had no intention of using the hotel services); *Laufer v. BRE/ESA P Portfolio, LLC*, No. SAG-20-1973, 2020 WL 6801924, at *3 (D. Md. Nov. 19, 2020) (same).

⁵³ *Naranda Hotels*, 60 F.4th at 162. In coming to this conclusion, the Fourth Circuit relied on a line of tester and informational injury cases. See *id.* at 163; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (holding that a tester suffered a concrete injury sufficient for standing after being denied housing information in violation of the Fair Housing Act); *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440, 448–49 (1989) (concluding plaintiffs suffered a distinct injury sufficient to provide standing after claiming to have been denied access to the ABA Committee records in violation of the Federal Advisory Committee Act); *FEC v. Akins*, 524 U.S. 11, 19, 21 (1998) (concluding that plaintiffs suffered an injury sufficient for standing when denied information on campaign contributions during their efforts to challenge the FEC's decision not to consider the American Israel Public Affairs Committee a "political committee" under the Federal Election Campaign Act).

⁵⁴ *Lujan*, 504 U.S. at 560–61; *Naranda Hotels*, 60 F.4th at 166. The Fourth Circuit determined that Laufer proved she suffered an injury in fact based on the inaccessibility of information required by the ADA and that based on *Havens Realty* and language in the federal regulations, no express intention to travel to the hotel was necessary to establish standing. *Naranda Hotels*, 60 F.4th at 166; see *Havens Realty*, 455 U.S. at 373–74 (holding an informational injury based on a violation of a statute is sufficiently particularized and concrete as to meet standing requirements, without plans to occupy the location of non-compliance); 28 C.F.R. § 36.302(e) (2016) (providing no express requirement that an individual intend to book a reservation to prove non-compliance with accessibility requirements).

possessed standing.⁵⁵ The Second, Fifth, and Tenth Circuits, however, have previously held that similarly situated plaintiffs do not meet the standing requirements, creating an even split among the circuit courts.⁵⁶

II. CONFLICTING APPROACHES TO *HAVENS REALTY* AND *TRANSUNION*

In *Laufer v. Acheson Hotels, LLC*, *Laufer v. Naranda Hotels, LLC*, and *Laufer v. Arpan LLC*, the U.S. Courts of Appeals for the First, Fourth, and Eleventh Circuits, respectively, reasoned that *TransUnion LLC v. Ramirez* did not substantially alter the determination that a tester plaintiff may possess standing.⁵⁷ The U.S. Courts of Appeals for the Second, Fifth, and Tenth Circuits, however, distinguished their cases from *Havens Realty Corp. v. Coleman*, or alternatively, held that *TransUnion* created a new standard for deciding whether a tester plaintiff has standing.⁵⁸ Section A of this Part analyzes the conclusions of the First, Fourth, and Eleventh Circuits that a tester plaintiff possessed standing.⁵⁹ Section B of this Part analyzes the different approaches by the Second, Fifth, and Tenth Circuits in deciding that a tester plaintiff did not possess standing.⁶⁰

⁵⁵ *Naranda Hotels*, 60 F.4th at 162, 174; *Laufer v. Acheson Hotels*, 50 F.4th 259, 263 (1st Cir. 2022) (holding that *Laufer* had standing); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1275 (11th Cir. 2022) (holding *Laufer's* allegations of a stigmatic injury facially sufficient to demonstrate standing).

⁵⁶ See *Naranda Hotels*, 60 F.4th at 166 (recognizing *Laufer* possessed Article III standing); *Acheson Hotels*, 50 F.4th at 263 (same); *Arpan*, 29 F.4th at 1268 (holding *Laufer's* claimed injury facially sufficient to demonstrate standing). But see *Harty v. W. Point Realty Inc.*, 28 F.4th 435, 443–44 (2d Cir. 2022) (holding an ADA tester did not have standing because without an intention to use the defendants' hotels, he failed to suffer a concrete injury); *Laufer v. Mann Hosp. LLC*, 996 F.3d 269, 272 (5th Cir. 2021) (same); *Laufer v. Looper*, 22 F.4th 871, 877–78 (10th Cir. 2022) (same).

⁵⁷ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021); see *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 271 (1st Cir. 2022) (determining that *Havens Realty* was the applicable precedent and, under that rationale, the ADA tester had Article III standing); *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 166 (4th Cir. 2023) (same); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1273–74 (11th Cir. 2022) (explaining that although *TransUnion* may be interpreted to narrow *Havens Realty*, a tester plaintiff with no plans to utilize the information can still suffer an injury in fact from a lack of statutorily required information).

⁵⁸ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982); *TransUnion*, 141 S. Ct. at 2214; see *Harty v. W. Point Realty Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (holding that under *TransUnion*, a plaintiff only has standing following a statutory violation when there is some harm beyond just the violation, and that a mere threat of future harm does not suffice for satisfying the injury in fact requirement for standing); *Laufer v. Mann Hosp. LLC*, 996 F.3d 269, 273 (5th Cir. 2021) (explaining that the plaintiff tester's case differs from that in *Havens Realty* because the present plaintiff is unable to demonstrate how the desired missing information has some relevance to her, and as such has not sustained an injury in fact); *Laufer v. Looper*, 22 F.4th 871, 878–79 (10th Cir. 2022) (stating that under *TransUnion*, suffering a concrete injury requires more than just a statutory violation and holding that the plaintiff was unable to portray how defendants' failure to provide information caused her a sufficiently concrete harm).

⁵⁹ See *infra* notes 61–76 and accompanying text.

⁶⁰ See *infra* notes 77–83 and accompanying text.

*A. The First, Fourth, and Eleventh Circuits' Standing Analyses:
Holding That Testers Have Standing*

In 2023, in *Naranda Hotels*, the Fourth Circuit addressed whether Laufer suffered an injury in fact sufficient to satisfy the first prong of the Article III standing requirements set out by the Supreme Court in *Lujan v. Defenders of Wildlife*.⁶¹ The court held that Laufer's claims of an informational injury accorded her standing, despite her lack of travel plans.⁶² Viewing *Havens Realty* as controlling, the court opined that the lack of accessibility information required by the ADA on the reservation websites was sufficient to determine Laufer suffered a concrete and particularized injury.⁶³ As in *Havens Realty*, where the Black tester's actual intention of using the housing information was not determinative of standing, the Fourth Circuit reasoned that it did not matter whether Laufer was planning to use the hotel.⁶⁴ The relevant inquiry was simply whether Laufer was unable to obtain information required by the statute.⁶⁵

With respect to *TransUnion*, the Fourth Circuit distinguished between cases where plaintiffs received no statutorily required information and those instances where statutorily required information was received incorrectly.⁶⁶ The Fourth Circuit relied on the notion in *Havens Realty* that a lack of intent to use information did not negate an informational injury, and in doing so argued that the "downstream consequences" requirement utilized in *TransUnion* was only applicable to those cases where some version of the required information was provid-

⁶¹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992); *Naranda Hotels*, 60 F.4th at 166.

⁶² See *Naranda Hotels*, 60 F.4th at 166 (concluding that Laufer's allegations contained all that was necessary to constitute an injury in fact sufficient for standing, as she failed to receive information required by statute for the hotel to disclose publicly). The Fourth Circuit found it unnecessary to review the lower court's findings with regard to the legitimacy of Laufer's alleged travel plans and instead saw the facts surrounding her travel as immaterial to the question of standing. *Id.*

⁶³ See *id.* at 163 (noting that under the criteria set forth in *Havens Realty*, an omission of statutorily required information alone constitutes an injury that meets the concrete and particularized requirements needed for an injury in fact under Article III standing); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (holding that "all persons" were entitled to truthful housing information, regardless of the tester's intent to use such information).

⁶⁴ See *Naranda Hotels*, 60 F.4th at 166 (noting that Laufer's intent, or lack of intent, to stay at the hotel or utilize the omitted accessibility information has no effect on the question of injury in fact, and that nowhere in the ADA does it require such intent to prove discrimination); *Havens Realty*, 455 U.S. at 374 (noting that the Black tester's intention, or lack thereof, to buy or rent a home with the false information provided did not negate the injury in fact sustained).

⁶⁵ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213); see *Naranda Hotels*, 60 F.4th at 166 (concluding that for the first element of standing Laufer alleged all that was needed, as she was unable to obtain information the ADA statutorily mandated).

⁶⁶ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021); see *Naranda Hotels*, 60 F.4th at 170 (concluding that the holding of *TransUnion* does not apply in cases where statutorily required information was not provided at all, and that its applicability in terms of requiring downstream consequences, in addition to a statutory violation, was only utilized because the information in *TransUnion* was provided, just in the wrong format).

ed to plaintiffs.⁶⁷ Thus, given that the information Laufer sought was not present on the reservation websites at all, the Fourth Circuit reasoned that the applicable precedent was the criteria set forth by *Havens Realty*.⁶⁸ In 2022, in *Laufer v. Acheson Hotels, LLC*, the First Circuit reached a similar conclusion when it held that Laufer had suffered a sufficiently concrete and particularized injury for standing, despite not intending to utilize the withheld information.⁶⁹

In 2022, in *Laufer v. Arpan LLC*, the Eleventh Circuit took a different approach from the First and Fourth Circuits in concluding that Laufer alleged an injury sufficient for standing.⁷⁰ Although the case was ultimately declared moot, the rationale is still indicative of how the Eleventh Circuit would approach an ADA tester plaintiff case.⁷¹ Unlike the First and Fourth Circuits, which based their decisions on the theory of informational injury, the Eleventh Circuit concluded that Laufer satisfied the first element for standing via her alleged stigmatic injury.⁷² Based on the court's interpretation of its own prior

⁶⁷ *Havens Realty*, 455 U.S. at 373–74; *TransUnion*, 141 S. Ct. at 2214 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)); see *Naranda Hotels*, 60 F.4th at 170 (finding the personal use and downstream consequences requirements of *TransUnion* inapplicable in the instant case). The Fourth Circuit understood *TransUnion*'s additional use or adverse consequence requirement to be limited to the types of scenarios like the one dealt with in *TransUnion*, and as such understood the facts in Laufer's case to fall outside of *TransUnion*'s requirements. 141 S. Ct. at 2214; see *Naranda Hotels*, 60 F.4th at 170 (explaining how *TransUnion*'s determination was inapplicable to the instant case).

⁶⁸ *Havens Realty*, 455 U.S. at 373–74; see *Naranda Hotels*, 60 F.4th at 170 170–71 (explaining that *Havens Realty* was not overruled by *TransUnion* and thus *Havens Realty* is the correct precedent to follow for the presented facts).

⁶⁹ See 50 F.4th 259, 268 (1st Cir. 2022) (explaining that one's status as a tester does not automatically destroy standing, and holding that the denial of information required under the ADA to the tester plaintiff was sufficient to constitute an injury in fact); *Havens Realty*, 455 U.S. at 373–74 (stating that it did not matter whether the tester was asking for information for the sole purpose of uncovering discriminatory practices rather than for purposes of purchasing a home).

⁷⁰ See 29 F.4th 1268, 1272–74 (11th Cir. 2022) (focusing on Laufer's alleged frustration and humiliation resulting from her inability to access information and approaching her claim through a stigmatic harm analysis, rather than an informational harm analysis). The Eleventh Circuit majority did not discuss Laufer's claim under an informational injury theory, but in a concurring opinion, Judge Jordan explained his belief that Laufer's allegations satisfied both an informational and stigmatic harm sufficient to constitute an injury in fact under the standing doctrine. See *id.* at 1276 (Jordan, J., concurring) (agreeing with the court that the tester plaintiff suffered a stigmatic harm and adding his belief that the tester plaintiff also possessed standing under the informational injury criteria set forth in *Havens Realty*).

⁷¹ See *Laufer v. Arpan LLC*, 77 F.4th 1366, 1366 (11th Cir. 2023) (declaring *Laufer v. Arpan* moot because of the dissolution of Arpan LLC and the lack of redress available to the plaintiff after the dissolution). Although the court later declared the case moot, its evaluation of the issue at hand is still demonstrative of an approach the court is likely to take if given another opportunity to address the legal question. See Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 UNIV. PA. L. REV. 772, 774 (1955) (explaining moot cases and advisory opinions are often viewed in relation to one another, and as such, moot cases may alleviate some uncertainty about a court's interpretation of a given legal matter).

⁷² Compare *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 271 (1st Cir. 2022) (holding that the ADA tester plaintiff had suffered an informational harm sufficient to satisfy the injury in fact re-

precedent, the court originally reasoned that Laufer could suffer a concrete injury simply by experiencing discrimination in violation of the statute.⁷³ *TransUnion*, however, made the court weary of its prior interpretation, and instead the court thought it necessary to evaluate standing under the *TransUnion* “downstream consequences” requirement.⁷⁴ Even when aligning its interpretation with the *TransUnion* decision, however, the court held that the humiliation, isolation, and frustration Laufer suffered from the lack of accessibility information were adverse consequences sufficient to plead a stigmatic injury.⁷⁵ As such, the court concluded that Laufer alleged an Article III qualifying injury.⁷⁶

*B. The Second, Fifth, and Tenth Circuits’ Standing Analyses:
Holding That Testers Lack Standing*

The U.S. Courts of Appeals for the Second, Fifth, and Tenth Circuits reached the opposite conclusion when evaluating whether Laufer and similarly situated plaintiffs suffered an injury sufficient to satisfy the standing doctrine.⁷⁷ In 2022, in *Harty v. West Point Realty, Inc.* and *Laufer v. Looper*, the

quirement), and *Naranda Hotels*, 60 F.4th at 166, 174 (same), with *Arpan*, 29 F.4th at 1274 (holding that the tester plaintiff suffered an adequate stigmatic injury to meet the standing requirements).

⁷³ See *Arpan*, 29 F.4th at 1273 (explaining that a broad reading of prior precedent would allow the court to conclude that a concrete injury exists when a plaintiff is subject to discrimination); Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213). The court utilized its own prior precedent in *Sierra v. City of Hallandale Beach*, in conjunction with Supreme Court precedent, to reach its holding that the tester plaintiff at least had suffered a sufficient stigmatic injury for standing. *Arpan*, 29 F.4th at 1273; *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1111–12, 1114 (11th Cir. 2021) (concluding that a deaf plaintiff suffered an Article III qualifying stigmatic injury when watching a video posted by the city on which the city refused to provide closed-captioning). The Eleventh Circuit originally considered whether it could read its decision in *Sierra* broadly to mean a concrete injury occurs whenever discrimination to a plaintiff occurs in violation of a statute. *Arpan*, 29 F.4th at 1273; *Sierra*, 996 F.3d at 1114. Aligning itself with the effects of the *TransUnion* decision, however, the court tightened its interpretation of *Sierra* to mean that suffering an emotional injury, such as frustration or humiliation, in conjunction with the discrimination is sufficient to adequately allege a stigmatic harm. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021); *Sierra*, 996 F.3d at 1114; see *Arpan*, 29 F.4th at 1273–74 (analyzing how the *Sierra* and *TransUnion* decisions affect the tester plaintiff’s alleged injury).

⁷⁴ *TransUnion*, 141 S. Ct. at 2214 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)); see *Arpan*, 29 F.4th at 1273–74 (narrowing its prior precedent to ensure the analysis could adhere to the *TransUnion* decision).

⁷⁵ *TransUnion*, 141 S. Ct. at 2214; see *Arpan*, 29 F.4th. at 1274 (holding that the tester plaintiff alleged a concrete stigmatic injury).

⁷⁶ See *Arpan*, 29 F.4th at 1274 (concluding that Laufer’s alleged stigmatic injury sufficiently met the first element of the standing framework).

⁷⁷ See *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (explaining that *TransUnion* required a plaintiff to have suffered downstream consequences from the alleged injury and holding that because the tester plaintiff had no intention of traveling to the hotel, he cannot allege the lack of information caused him concrete harm); *Laufer v. Looper*, 22 F.4th 871, 877–78 (10th Cir. 2022) (concluding that the tester plaintiff’s complaint failed to satisfy the injury in fact requirement because without more than a statutory violation, the plaintiff had not presented a concrete injury); *Laufer v.*

Second and Tenth Circuits, respectively, denied the plaintiffs standing for lacking a concrete informational injury because they did not demonstrate any adverse consequences from failing to receive accessibility information.⁷⁸ In both cases, the plaintiffs had no intention of visiting the location and, compelled by *TransUnion*'s language involving "downstream consequences," the courts held that failure to receive information required by the ADA was not alone sufficient for standing, absent some personal use for such unlawfully withheld information.⁷⁹

In 2021, in *Laufer v. Mann Hospitality, LLC*, the Fifth Circuit similarly reasoned that without a use for the withheld information, the missing ADA information did not cause Laufer to suffer a concrete injury.⁸⁰ In coming to this conclusion, the court distinguished the case from *Havens Realty*, where the

Mann Hosp., LLC, 996 F.3d 269, 272–73 (5th Cir. 2021) (holding that the tester plaintiff failed to depict a concrete injury sufficient for standing).

⁷⁸ See *Harty*, 28 F.4th at 443 (holding that because the tester plaintiff had no intention of traveling to the hotel, the missing accessibility information on the reservation website was not sufficient to cause the plaintiff concrete harm); *Looper*, 22 F.4th 8 at 877–78 (holding that the tester plaintiff's complaint fell short in alleging an injury in fact because, by lacking an intention to book a room at defendant's hotel, she did not suffer a concrete injury); *TransUnion*, 141 S. Ct. at 2205, 2214 (suggesting downstream consequences are necessary in order to allege a sufficient injury in fact).

⁷⁹ *TransUnion*, 141 S. Ct. at 2214 (quoting *Trichell*, 964 F.3d at 1004); Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213); see *Harty*, 28 F.4th at 443 (providing the reasoning behind denying the tester plaintiff standing); *Looper*, 22 F.4th 8 at 877–78 (same). The Tenth Circuit further elaborated its point that Laufer lacked Article III standing based on *TransUnion* by explaining that a statutory violation alone is insufficient for standing and by distinguishing *Havens Realty* from *Laufer v. Looper*. U.S. CONST. art. III, § 2, cl. 1; *TransUnion*, 141 S. Ct. at 2205; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982); see *Looper*, 22 F.4th at 877–80 (utilizing *TransUnion* to suggest a statutory violation is not a sufficient basis for an injury in fact when not combined with some future effect, and distinguishing the present case from *Havens Realty* because the omission of information was not grounded in misrepresentation or animus). The court explained that under the Fair Housing Act, truthful housing information was statutorily required and thus the Black tester in *Havens Realty* suffered a distinct injury because she was given untruthful information based on her race. See *Looper*, 22 F.4th at 879 (discussing the holding of *Havens Realty* as focusing on the Black tester plaintiff having been denied information on the basis of race, and distinguishing the instant case where the plaintiff did not outwardly receive false information given that all information on the website was the same for all users); *Havens Realty*, 455 U.S. at 373–74 (holding that the denial of truthful information and the transferring of false information to a Black tester plaintiff was a sufficient injury in fact); 42 U.S.C. § 3604(d). The Tenth Circuit, however, did not view the ADA violation as grounded in misrepresentation or animus in the same way as in *Havens Realty*, and because both disabled and non-disabled individuals had access to the same information on the reservation websites, the court concluded Laufer's alleged injury was inadequate. 455 U.S. at 373–74; see *Looper*, 22 F.4th at 879 (highlighting the presence of racial animus and misrepresentation in *Havens Realty* compared to the current case where those elements were not present).

⁸⁰ See 996 F.3d at 272–73 (outlining the requirement that the missing information have some relevance to the plaintiff to satisfy the injury in fact element of standing).

withheld information was relevant to the tester because the FHA specifically prohibited misrepresentations to “any person.”⁸¹

The tension and vastly different approaches among federal circuit courts highlight the courts’ confusion in determining the effects of *TransUnion* when assessing Article III standing for ADA tester plaintiffs.⁸² Without the Supreme Court’s guidance, the lower courts are tasked with formulating a framework that aligns with constitutional requirements and Supreme Court precedent, while at the same time protecting the right of those covered by the ADA to litigate their claims under the statute.⁸³

III. GRANTING TESTERS ARTICLE III STANDING: CONSTITUTIONALLY VALID AND POLITICALLY NECESSARY

The reasoning set forth in the decisions from the First, Fourth, and Eleventh Circuits lays out approaches to ADA tester cases that are both considerate of the requirements set forth by Article III of the Constitution and faithful to the objectives of the ADA.⁸⁴ In particular, the Eleventh Circuit’s evaluation of

⁸¹ *Havens Realty*, 455 U.S. at 373–74; see *Mann Hosp.*, 996 F.3d at 272–73 (distinguishing between the relevance of the information in *Havens Realty* and the present case); 42 U.S.C. § 3604(d) (“[I]t shall be unlawful—[t]o represent to any person because of race [or] color . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.”).

⁸² *TransUnion*, 141 S. Ct. at 2214. Compare *Harty*, 28 F.4th at 443 (holding that an ADA tester did not allege a concrete injury sufficient to establish Article III standing because he had no intention of visiting the hotel or the area surrounding the hotel), *Mann Hosp.*, 996 F.3d at 272–73 (same), and *Looper*, 22 F.4th at 877–78 (same), with *Laufer v. Acheson Hotels*, 50 F.4th 259, 263, 271 (1st Cir. 2022) (holding that although the ADA tester had no intention of staying at or around the hotel, she still sustained an injury sufficient for Article III standing), *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 166 (4th Cir. 2023) (same), and *Laufer v. Arpan LLC*, 29 F.4th 1268, 1270, 1274 (11th Cir. 2022) (same).

⁸³ See *supra* notes 61–81 and accompanying text (examining the approaches taken by numerous Courts of Appeals in attempting to come to a legally justified conclusion concerning whether ADA testers possess standing and the approaches taken in determining which Supreme Court precedent controls).

⁸⁴ See *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 263 (1st Cir. 2022) (holding that Laufer had satisfied the first prong of Article III standing through her alleged informational injury); *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 166 (4th Cir. 2023) (same); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1273–74 (11th Cir. 2022) (concluding that Laufer’s allegations of a stigmatic injury were facially sufficient for the injury in fact requirement of standing). The intention of the ADA was to eliminate discrimination directed toward people with disabilities throughout society. 42 U.S.C. § 12101(b). The ADA was modeled after the Civil Rights Act of 1964 and was also meant to provide protections to individuals with disabilities. See *Disability Rights Timeline*, TEMP. UNIV. INST. ON DISABILITIES, <https://disabilities.temple.edu/resources/disability-rights-timeline> [perma.cc/R8ES-4C29] (providing a timeline of the Disability Rights Movement and the historical milestones that led to the passage of the Americans with Disabilities Act). In 1990, President George H.W. Bush signed the ADA into law after years of lobbying by disability rights activists. *Id.* In holding that ADA testers have standing, the First, Fourth, and Eleventh Circuits found that the constitutional requirements were met, but also ensured that an avenue will continue to exist for those with disabilities to fight for compliance and for an end to discriminatory practices. See *Acheson Hotels*, 50 F.4th at 263 (holding Laufer had satisfied the constitutional requirements for standing); *Naranda Hotels*, 60 F.4th at 162, 174 (same); *Arpan*, 29

a stigmatic injury, along with the First and Fourth Circuit analyses of informational injuries, address two distinct ways of meeting the injury in fact requirement for standing that align with Supreme Court precedent and constitutional requirements.⁸⁵ This Part argues first, that the First, Fourth, and Eleventh Circuits' conclusions that the ADA tester plaintiffs suffered an Article III qualifying injury are preferable, and second, that these conclusions ensure the legislative purposes of the ADA and other civil rights laws are upheld.⁸⁶

The First and Fourth Circuits grounded their approach in the *Havens Realty Corp. v. Coleman* line of reasoning, holding that Laufer's inability to acquire information required by statute constituted a sufficient informational injury.⁸⁷ The First and Fourth Circuits held that the Supreme Court has not overruled its decision in *Havens Realty*.⁸⁸ As such, the Court's decision in *Havens Realty*, that an injury in fact can occur through violation of a statutory right alone, governs ADA tester cases like Laufer's.⁸⁹

For the federal circuit courts not compelled by the theory of informational injury under the *Havens Realty* line of reasoning, and concerned that informational injuries do not align with *TransUnion LLC v. Ramirez*'s "downstream consequences" requirement, the Eleventh Circuit's focus on a stigmatic injury offers a useful alternative framework.⁹⁰ Even if *TransUnion* made clear that

F.4th at 1275 (same); Pappas, *supra* note 3 (explaining that although the ADA was intended to ensure the same rights and opportunities for those with disabilities, barriers remain that prevent complete inclusion).

⁸⁵ See *Arpan*, 29 F.4th at 1274 (providing rationale for how an ADA tester plaintiff's allegation may be sufficient to sustain a stigmatic injury that qualifies as an injury in fact under Article III); *id.* at 1276 (Jordan, J., concurring) (opining that, alternatively, the *Havens Realty* line of reasoning governs and indicates that the tester plaintiff also suffered an informational injury in addition to the alleged stigmatic injury); *Acheson Hotels*, 50 F.4th at 263, 271 (holding Laufer alleged a sufficient informational injury); *Naranda Hotels*, 60 F.4th at 162, 174 (same).

⁸⁶ See *infra* notes 87–100 and accompanying notes.

⁸⁷ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982); see *Naranda Hotels*, 60 F.4th at 163–64, 166, 174 (understanding *Havens Realty* as the controlling precedent and comparing the facts at hand to the criteria set forth in *Havens Realty*); *Acheson Hotels*, 50 F.4th at 268–69 (same).

⁸⁸ See *Acheson Hotels*, 50 F.4th at 271 (noting that the court cannot overrule Supreme Court precedent until the Supreme Court does so itself); *Naranda Hotels*, 60 F.4th at 170–71 (explaining that *Havens Realty* continues as binding precedent and that *TransUnion* does not overrule *Havens Realty* until the Supreme Court decides otherwise).

⁸⁹ See *Naranda Hotels*, 60 F.4th at 170–71 (stating that *Havens Realty* remains binding precedent for cases where there is an allegation of an informational injury); *Acheson Hotels*, 50 F.4th at 271 (explaining that even if the court believes older decisions conflict with newer decisions, the court must follow Supreme Court precedent until the Supreme Court indicates a change in the law); *Havens Realty*, 455 U.S. at 374 (providing evidence that a violation of a statutory right to information may alone be sufficient to meet the injury in fact requirement of standing, without some use for such information).

⁹⁰ *Havens Realty*, 455 U.S. at 374; *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021) (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)); see *Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 272–73 (5th Cir. 2021) (noting that *Havens Realty* was distinguishable from the case at hand); *Laufer v. Looper*, 22 F.4th 871, 878–79 (10th Cir. 2022) (same); *Arpan*, 29 F.4th

violation of a statute alone is not enough to constitute an injury in fact, the Eleventh Circuit held that the resulting emotional harm faced by the plaintiff was sufficient to do so.⁹¹ Therefore, a plaintiff who experiences emotional harm, such as humiliation or isolation, from a discriminatory violation of a statute suffers a concrete, particularized injury that is even more convincing to establish standing.⁹²

Thus, First, Fourth, and Eleventh Circuit precedent provides persuasive evidence that an ADA tester plaintiff can suffer an injury in fact in two ways that suffice for constitutional standing requirements, and such a conclusion is also important in ensuring that the purposes of the ADA and other civil rights laws are upheld.⁹³ Although courts that conclude tester plaintiffs like Laufer lack standing are likely concerned with upholding limits on federal courts' power, such a decision restricts access to courts for people who suffer civil rights violations.⁹⁴ When Congress enacted the ADA, it was to ensure equal access and opportunities to those with disabilities.⁹⁵ Unfortunately, the implementation of all statutory requirements did not immediately follow.⁹⁶ Instead, testers have assumed the role of ensuring enforcement because actual imple-

at 1273–74, 1275 n.6 (demonstrating that even without adhering strictly to *Havens Realty*, allegations of a stigmatic injury can meet the required standards for an injury in fact to obtain standing).

⁹¹ *TransUnion*, 141 S. Ct. at 2214; *Arpan*, 29 F.4th at 1273–74 (explaining that the tester plaintiff's claim of suffering a concrete stigmatic injury was satisfactory, even under the narrower criteria set forth in *TransUnion*). At minimum, a lack of accessibility information required by the ADA on reservation websites stigmatizes those who fall under the ADA because those without a disability have all the information they require, whereas information needed by those with disabilities is absent. *See Arpan*, 29 F.4th at 1274–75 (noting that the tester plaintiff's claims of a stigmatic injury involved feelings of isolation and segregation due to the lack of accessibility information on the website).

⁹² *See TransUnion*, 141 S. Ct. 2205, 2214 (holding that a violation of a statutory obligation created by Congress still requires plaintiffs to show some adverse consequence resulting from the lack of information). In line with *TransUnion*, when the lack of ADA-required information results in humiliation or stigmatization, which it inevitably does by leaving those with disabilities without needed information, a plaintiff then has alleged "downstream consequences" and thus has suffered an injury in fact. *See id.* (quoting *Trichell*, 964 F.3d at 1004) (believing some downstream consequence must affect a plaintiff to satisfy the injury in fact requirement for an informational injury).

⁹³ *See, e.g.*, 42 U.S.C. § 12101(b) (noting the intention behind the ADA); *id.* at § 3604 (providing the criteria necessary to achieve Fair Housing in the United States); U.S. COMM'N ON CIV. RTS., SHARING THE DREAM: IS THE ADA ACCOMMODATING AT ALL? (2000), <https://www.usccr.gov/files/pubs/ada/ch2.htm> [perma.cc/R7A2-Y5K7] (highlighting how Congress's mission was for the ADA to ensure equal access to opportunity and participation in society).

⁹⁴ *See Sundquist*, *supra* note 13 (highlighting the framers' fear of placing too much power in federal courts); *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (denying a tester, whose disability falls within the definition of the ADA, from possessing standing, such that she could not ensure the hotel's compliance with the ADA); *Mann Hosp.*, 996 F.3d at 272–73 (same); *Looper*, 22 F.4th at 877–78 (same).

⁹⁵ *See* 42 U.S.C. § 12101 (providing Congress's findings pertaining to a societal tendency to isolate and segregate disabled individuals and explaining that the purpose of this Title of the U.S. Code is to provide a framework for the national elimination of discrimination against disabled individuals).

⁹⁶ *See Pappas*, *supra* note 3 (depicting remaining societal barriers for people with disabilities).

mentation of the ADA's protections and requirements has not been entirely forthcoming.⁹⁷ This strategy of utilizing testers to create lasting change and to enforce implementation of statutory requirements is not novel, as the civil rights movement has long utilized testers to uncover discrimination.⁹⁸ As such, a decision not to grant ADA testers standing could implicate others attempting to eliminate discriminatory practices.⁹⁹ Therefore, following the persuasive rationale used by the First, Fourth, and Eleventh Circuits to hold that ADA testers have standing plays a dual role of adhering to precedent and serving the very purposes intended by the legislature when enacting civil rights laws.¹⁰⁰

CONCLUSION

In 2023, in *Laufer v. Naranda Hotels, LLC*, the U.S. Court of Appeals for the Fourth Circuit held that an ADA tester, who was not intending to book a room, had standing to sue a hotel for not providing statutorily required accessibility information on reservation websites. In doing so, the Fourth Circuit relied on Supreme Court precedent in *Havens Realty Corp. v. Coleman*, where the Supreme Court held that a Black tester plaintiff fighting for compliance with the Fair Housing Act had successfully demonstrated that she suffered an informational injury. The Fourth Circuit decision led to an even split among the U.S. Circuit Courts of Appeals. With its decision, the Fourth Circuit joined the Eleventh Circuit, which went further and demonstrated that an ADA tester plaintiff suffered a stigmatic injury, even under the stricter *TransUnion LLC v. Ramirez* criteria. Together, these circuit court decisions offer two avenues of analysis that constitutionally grant testers standing and protect the overarching purpose of civil rights laws.

⁹⁷ See *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 159 (4th Cir. 2023) (noting that the plaintiff is a tester who aims to uncover whether places of public accommodation comply with the ADA); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 368 (1982) (involving tester plaintiffs investigating whether a real estate company was engaging in racial steering in violation of the Fair Housing Act).

⁹⁸ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1996-2, ENFORCEMENT GUIDELINES: WHETHER "TESTERS" CAN FILE CHARGES AND LITIGATE CLAIMS OF EMPLOYMENT DISCRIMINATION, (1996) (highlighting that the civil rights movement has for many years utilized testers to uncover discrimination, such as in proving segregation and housing discrimination).

⁹⁹ See, e.g., *id.* (noting the civil rights movement's ample use of testers as a means to uncover discrimination throughout history); *Fair Housing Testing Program*, CIV. RTS. DIV., U.S. DEP'T OF JUST., <https://www.justice.gov/crt/fair-housing-testing-program-1> [perma.cc/6UCE-KKPF] (Feb. 27, 2025) (highlighting the federal government's use of a Fair Housing Testing Program aimed at identifying discrimination in the housing and public accommodation sectors and describing testers as a valuable tool to root out discrimination).

¹⁰⁰ See *Laufer v. Acheson Hotels*, 50 F.4th 259, 263, 271 (1st Cir. 2022) (holding that the tester plaintiff satisfied the criteria for Article III standing through her alleged informational injury); *Naranda Hotels*, 60 F.4th at 162, 174 (same); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1275 (11th Cir. 2022) (concluding that a tester plaintiff's allegation of a stigmatic injury demonstrates an injury in fact sufficient for standing); U.S. COMM'N ON CIV. RTS., *supra* note 93 (outlining Congress's legislative goals in enacting the ADA).

