NOTE

INJURY, IN FACT: THE INTERNET, THE AMERICANS WITH DISABILITIES ACT, AND STANDING IN DIGITAL SPACES

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The internet challenges core assumptions of standing doctrine. Standing jurisprudence places a premium on tangible injuries, like physical or monetary harms, and plaintiffs who allege intangible injuries can only enter federal court if their harms were traditionally recognized as a basis for a lawsuit in early American courts. But the internet is a recent invention, and intangible harms that occur online have no clear historical precedent.

Nowhere is this tension more evident than in a circuit split that has recently emerged on whether disability rights advocates who sue hotels because their reservations websites lack information about accessible features, like handrails and accessible entrances, have standing. The advocates claim that a Department of Justice regulation called the "Reservation Rule" requires hotels to provide information about accessible rooms, entrances, and other features on their reservations websites. Yet, hotels' websites remain widely noncompliant, effectively excluding disabled individuals from the internet economy and leading some to cancel travel plans altogether. To enforce the Reservation Rule, some disability rights advocates have begun navigating to hotels' reservations websites and determining whether they provide accessibility information, despite having no plans to travel to the hotels. If the websites lack such information, the advocates sue. The question is whether such individuals who merely "test" hotels' compliance with the regulation have standing to sue.

Courts are divided on the issue. Four courts of appeals have held that such testers do not have standing. These courts have reasoned that because such testers do not plan to visit the hotels, they do not suffer any concrete injury. Meanwhile, three courts of appeals have found standing for such testers under an informational or stigmatic harm theory. Under the former, testers suffer concrete injury because hotels deprive them of information to which they are legally entitled. And under the

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latter, testers experience legally cognizable discrimination when they visit noncompliant websites which effectively only serve nondisabled people.

However, these courts' reasoning is defective. The courts of appeals denying standing fail to appreciate that online harm can be concrete injury in fact under Article III. And the courts of appeals granting standing ignore the Supreme Court's pessimism about informational injury theories. These courts have also failed to adduce any compelling historical analogues for the testers' intangible harms, as the Supreme Court's precedent requires.

Practically no scholarship assesses the circuit split generated by such testers. The only papers remotely addressing this division narrowly locate its cause in conflicting Supreme Court caselaw, comment upon its significance on public law litigation, or analyze what plaintiffs must show to demonstrate future harm as opposed to whether the alleged harm is concrete. The papers often take an unsympathetic line against disability rights advocates and fail to propose solutions that would help courts adjudicate issues of standing.

Crucially, the existing scholarship entirely ignores a key phenomenon at the root of the circuit split: the internet. No scholar has appreciated that courts' disagreement stems from their differences in applying standing doctrine to testers' internet-based harms. While scholars disagree on theories of standing for internet-based injuries, no scholar has proposed and defended a theory of concrete injury that resolves this circuit split. And although scholars have debated whether websites fall under the Americans with Disabilities Act's ambit, that issue is analytically and practically distinct: It arises when disability rights advocates attempt to force inaccessible websites to incorporate screen reader software and concerns courts' interpretation of the ADA's text. By contrast, this issue concerns the constitutional question of Article III jurisdiction and arises when otherwise accessible websites nonetheless lack information required by disabled people to equally enjoy the websites.

This Note makes two contributions to the literature. First, it situates the circuit split in the context of the internet. It demonstrates many courts of appeals' unwillingness to consider virtual harm without a connection to a physical location as concrete injury in fact under Article III. In doing so, the Note argues that Article III does not distinguish between digital and physical harm, and plaintiffs could suffer concrete injury in fact in physical or digital spaces. Second, the Note develops and defends a new theory of standing for disability rights testers. On this theory, such testers experience intangible harm when they visit informationally deficient reservations websites because the absence of information about accessible entrances and handrails inhibits them from fully enjoying a space open to the public—the website—compared to nondisabled people. This harm is concrete injury in fact under Article III because it is analogous to one recognized by early American courts: denial of equal enjoyment of an inn's services. The theory also represents a faithful application of existing circuit court precedent from a distinct but factually analogous issue to Laufer's case. This precedent holds that disabled people have standing to sue when they encounter informational barriers that prevent them from fully enjoying a place that serves the public. Applied to Laufer's case, it dictates that she, too, suffers concrete injury in fact under Article III.

More broadly, the Note articulates a methodology that plaintiffs who encounter modern, internet-based harms can employ to access federal courts, and that courts can use to evaluate the strength of their arguments. It illuminates how

standing doctrine, which seems tailored to the analog world, can still fit the digital.

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INTRODUCTION

Deborah Laufer is a disability rights "tester."[1] Herself legally disabled—she cannot fully use her hands and uses a wheelchair to ambulate[2]—she has also filed hundreds of lawsuits across the United States since 2018 to enforce a regulation promulgated under the Americans with Disabilities Act ("ADA") called the "Reservation Rule."[3] The Reservation Rule requires hotels to "[i]dentify and describe" accessibility features—like bathroom handrails and accessible entrances—on online reservations systems.[4] It intends to empower disabled people to make hotel reservations as conveniently as nondisabled people. But many reservations websites remain noncompliant, and when Laufer encounters a deficient website, she feels "frustrat[ed] and humiliat[ed]" by her exclusion from the digital economy.[5] Despite having no intention to visit the hotels, she sues them to enforce the Reservation Rule.[6]

Laufer's feelings of being treated as a second-class citizen because of her disability are warranted. Disabled individuals regularly feel ignored in their everyday lives. Architectural structures that nondisabled people consider mundane—like sidewalks, stairs, and heavy doors—transform into seemingly insurmountable obstacles for disabled people.[7] Disabled people incur extra "administrative" costs for healthcare and disability benefits.[8] And when traveling, many disabled individuals report hotels' failure or unwillingness to make accommodations for them.[9]

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1. A tester is an individual who "pretends to be interested in a good or service" but in reality, is only attempting to ascertain whether her rights are being violated. *See* Catherine Cole, Note, *A Standoff:* Havens Realty v. Coleman *Tester Standing and* TransUnion v. Ramirez *in the Circuit Courts*, 45 HARV. J. L. & PUB. POL'Y 1033, 1033 n.2 (2023); *see also* Havens Realty Corp. v. Coleman, 455 U.S. 363, 368, 373 (1982).

2. Jasmine E. Harris et al., *The Disability Docket*, 72 AM. U. L. REV. 1667, 1726 (2023).

3. 28 C.F.R. § 36.302(e)(1) (2024). *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1295 (11th Cir. 2022) (Newsom, J., concurring) (noting that since 2018, Laufer has filed over 600 cases nationwide), *vacated*, Laufer v. Arpan LLC 77 F.4th 1366 (11th Cir. 2023).

4. 28 C.F.R. § 36.302(e)(1)(ii) (2024).

5. Arpan, 29 F.4th at 1270.

6. Laufer has sometimes asserted that she intends to travel to some destinations and accordingly needs lodging. *See, e.g.*, Laufer v. Mann Hosp., L.L.C., 996 F.3d 269, 271 (5th Cir. 2021). But judges have appeared skeptical of her claims of future travel. *See id.* And in some cases, Laufer has disclaimed any intentions of traveling. *See, e.g.*, Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 267 n.3 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023).

7. *See* Catherine Bigonnesse et al., *The Role of Neighborhood Physical Environment on Mobility and Social Participation Among People Using Mobility Assistive Technology*, 33 DISABILITY & SOC'Y 866, 881 (2018); Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 2021 (2015).

8. *See* Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2341 (2021) (detailing how disabled people must take on extra "admin" work for medical care, disability benefits, and more, that nondisabled people do not).

9. *See* Kristen Popham et al., *Disabling Travel: Quantifying the Harm of Inaccessible Hotels to Disabled People*, 55 COLUM. HUM. RTS. L. REV. F. 1, 20–31 (2023).

Although the ADA was designed to remedy the exclusion that disabled people like Laufer experience,[10] since its enactment in 1990, vast swaths of the economy have moved online.[11] And the digital transformation has excluded disabled people in two novel ways.[12] First, many websites remain inaccessible to millions of visually impaired and hard of hearing individuals, who require screen-reader software and other tools to access them.[13] These websites present an "internet accessibility" problem as they are altogether inaccessible to disabled people. Second, even websites that disabled people can access, like hotels' reservations websites, do not contain the information that disabled people need to fully enjoy them. For example, disabled travelers find it "difficult or impossible" to obtain information about accessible rooms from hotels' reservations systems,[14] leading some to cancel travel plans entirely.[15] These websites raise a distinct but equally significant "information deficiency" problem for disabled individuals.

Laufer's litigation aimed to remedy the informational deficiency barrier to disabled people's full participation in the digital economy. The Reservation Rule, which Laufer attempted to enforce, recognized that information about hotels' physical accessibility features—like handrails and accessible entrances—is necessary to disabled people's equal enjoyment of reservations websites. In concluding its rulemaking, the Department of Justice acknowledged that "basic nondiscrimination principles mandate that individuals with disabilities should be able to reserve hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms."[16] As Laufer discovered, however, the Reservation Rule remains vastly underenforced.[17] After sleeping in her car because hotels she visited could not accommodate her, she resolved to vindicate her rights.[18] Despite having no intention of visiting hotels, she would browse

10. *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 674 (2001) ("Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals.").

11. *See* Blake Reid, *Internet Architecture and Disability*, 95 IND. L.J. 591, 592 (2020) ("Access to the Internet is a primary driver of education, employment, civic participation, cultural engagement, and more.").

12. Saxon S. Kagume, *Virtually Inaccessible: Resolving ADA Title III Standing in Click-and-Mortar Cases*, 72 EMORY L.J. 675, 679 (2023) ("The expansive presence of the online world that has connected millions of Americans 'has also created a "digital divide" between the disabled and the nondisabled.'" (quoting Shani Else, *Courts Must Welcome the Reality of the Modern World: Cyberspace Is a Place Under Title III of the Americans with Disabilities Act*, 65 WASH. & LEE L. REV. 1121, 1127 (2008))).

13. *See* Reid, *supra* note 11, at 592.

14. 28 C.F.R. pt. 36, app. A at 804.

15. Popham et al., *supra* note 9, at 44.

16. 28 C.F.R. pt. 36, app. A at 805. The Rule does not require hotels to physically construct accessibility features, just to provide information about them on their reservation services.

17. *See* Popham et al., *supra* note 9, at 6 (noting that "Hotels' noncompliance . . . with the Reservation Rule in particular, is pervasive"); *id.* at 25 (finding that some hotels "provid[e] misleading, incomplete, and inaccurate information" on their websites).

18. Brief for Respondent at 1, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No.

their reservations websites, determine if they provided information about hotels' accessible entrances, handrails, and other features, and sue if they did not. Over several years, she and other disability rights testers sued thousands of hotels across the country.[19]

Motions to dismiss Laufer's cases for lack of standing generated a circuit split. Four courts of appeals held that Laufer did not have Article III standing to sue the hotels because she had suffered no concrete injury in fact.[20] Roughly, the courts reasoned that a disabled individual is injured by the lack of accessibility information on a hotel's reservations website only when she intends to visit that hotel.[21] Because Laufer did not plan to visit the hotels she sued, she suffered no concrete harm, they held. Conversely, three courts of appeals found standing for Laufer under an informational or stigmatic harm theory.[22] The First and Fourth Circuits held that Laufer was concretely harmed because she was deprived of information to which she was statutorily entitled, and suffered "frustration and humiliation" as a result.[23] The Eleventh Circuit held that Laufer's experiences of discrimination and "emotional turmoil" grounded in her inability to use hotels' reservation services to the same extent as nondisabled people constituted concrete injury in fact.[24]

This circuit split reflects a host of timely but unresolved legal issues the internet has raised in standing and disability rights. Digital media challenges standing doctrine's traditional conception of concrete injury in fact, which is fashioned to work best in an analog world. And courts disagree about applying standing principles to testers' internet experiences. In this circuit split, the courts of appeals denying Laufer standing have erroneously concluded that her online interactions do not constitute concrete harm unless they have a physical component: A desire to visit the actual hotel. In other words, they appear skeptical of "purely virtual" harm. But while the courts of appeals finding standing have correctly held that Article III does not distinguish between physical and virtual harm, they

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22-429).

19. *See* Langer v. Kiser, 495 F. Supp. 3d 904, 911 (S.D. Cal. 2020) (adjudicating a case by a Reservation Rule tester who had filed nearly 1500 cases); Harty v. W. Point Realty, Inc., 28 F.4th 435 (2d Cir. 2022) (resolving a case filed by a disabled tester other than Laufer); Cole, *supra* note 1, at 1035 (arguing that Harty's case raises the same issues as Laufer's).

20. Laufer v. Mann Hosp., L.L.C., 996 F.3d 269, 272 (5th Cir. 2021); Laufer v. Looper, 22 F.4th 871, 877-78 (10th Cir. 2022); Laufer v. Alamac Inc., No. 21-7056, 2021 WL 4765435, at *1 (D.C. Cir. Sept. 10, 2021).

21. *See, e.g.*, *Looper*, 22 F.4th at 878.

22. Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 174 (4th Cir. 2023); Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 274 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023); Laufer v. Arpan LLC, 29 F.4th 1268, 1274 (11th Cir. 2022).

23. *Naranda,* 60 F.4th at 174; Acheson Hotels, 50 F.4th at 259, 274.

24. *Arpan*, 29 F.4th at 1274-75. In Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023), the Supreme Court vacated the First Circuit's decision without deciding the standing issue. An en banc panel later vacated the Eleventh Circuit's opinion in Arpan as well. However, the reasoning of these courts is still persuasive authority in their respective circuits and remains academically interesting. Consequently, I will treat them as part of the split for this Note.

have failed to articulate a compelling theory of standing for internet testers like Laufer. The Supreme Court has not helped either. In December 2023, the Court dismissed *Acheson Hotels, LLC v. Laufer* as moot, preserving this circuit split and providing no guidance on applying standing principles to internet-based injuries.[25]

Scholars have largely ignored the circuit split generated by Laufer. The only papers remotely addressing it narrowly locate its cause in conflicting Supreme Court case law,[26] comment upon its general significance on public law litigation,[27] or analyze what plaintiffs must show to demonstrate *future* harm,[28] not whether internet injuries are *concrete* harms that meet Article III-standing requirements. For instance, scholars have observed that the Court's decision in *TransUnion v. Ramirez* casts doubt on the enduring validity of informational injury,[29] and on tester standing more generally.[30] But no scholar has appreciated that the key phenomenon at the root of this circuit split is the internet. Nor has any writer developed and defended a theory of standing to help courts resolve their disagreement about Laufer's standing.[31] Instead, scholars have often taken an unsympathetic line against disability rights testers.[32] One has even suggested there is no objective answer to the dispute and that resolution turns on one's sympathy toward government regulation.[33]

The broader scholarship on standing and disability rights similarly fails to

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25. 601 U.S. 1, 3 (2023).

26. *See* Bradford C. Mank, *Did the Supreme Court in* TransUnion v. Ramirez *Transform the Article III Standing Injury in Fact Test?: The Circuit Split over ADA Tester Standing and Broader Theoretical Considerations*, 57 U.C. DAVIS L. REV. 1131, 1171 (2023) (suggesting that TransUnion LLC v. Ramirez, 594 U.S. 413 (2021) and Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) militate opposite results in Laufer's case); Cole, *supra* note 1, at 1033-34 (same).

27. *See* Rachel Bayefsky, *Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 N.Y.U. L. REV. ONLINE 128, 131 (2024) (arguing that federal courts should not undermine the "public law" litigation model of tester standing).

28. *See* Cecily Kemp, Note, *Constitutional Standing for ADA Testers of Online Spaces*, 48 SETON HALL J. LEGIS. & PUB. POL'Y 357, 372 (2024); Kagume, *supra* note 12, at 689.

29. *TransUnion*, 594 U.S. at 413 (2021); *see* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 NYU L. REV. ONLINE 269, 283 (2021) (discussing FEC v. Akins, 524 U.S. 11 (1998), an informational injury case).

30. *See* Cole, *supra* note 1, at 1033 (discussing that after *TransUnion*, testing standing based on only a violation of statutory rights is in jeopardy). *Compare Havens Realty*, 455 U.S. at 373 (finding that a Fair Housing Act tester had standing because she alleged "invasion" of her statutory right (quoting Warth v. Seldin, 422 U.S. 490, at 500 (1975))), *with* TransUnion, 594 U.S. at 426 (holding that plaintiffs who had alleged Fair Credit Reporting Act violations, without more, did not have standing).

31. Kemp, *supra* note 30, at 374-75 identifies skepticism toward ADA tester plaintiffs and canvasses legislative solutions to the problem. *See id.* at 376-78. Unlike this Note, it does not develop or defend a theory of concrete injury in fact to assist courts in resolving the circuit split.

32. *See, e.g.*, Kagume, *supra* note 12, at 714.

33. *See* Mank, *supra* note 26, at 1185.

advance a solution to this circuit split. Scholars of Article III standing disagree on theories of concrete "intangible" harm—harm that does not involve monetary, physical, or other "tangible" harm—for internet-based injuries, but none has defended a theory to resolve this circuit split.[34] Separately, disability rights scholars have addressed the distinct problem of "internet accessibility." They have extensively debated a different circuit split on whether the ADA covers websites as a matter of statutory construction.[35] Yet that issue is analytically and practically distinct. It arises when disabled individuals attempt to force websites that they cannot even *access* to incorporate screen-reader and other accessibility tools, and concerns courts' diverging interpretations of the ADA's text. Analyzing that split, one scholar has diagnosed its cause in the Department of Justice's failure to issue guidance interpreting the ADA.[36] By contrast, this Note addresses the distinct problem of "information deficiency." It asks whether federal courts have jurisdiction when disabled people attempt to force websites that they *can* otherwise access to provide *information* that disabled people need to enjoy the websites as fully as nondisabled people. This issue is analytically distinct. It is a constitutional question concerning jurisdiction, not a statutory construction question concerning the case's merits.[37] In the Laufer circuit split, the Department of Justice *has* conducted a rulemaking and there is no comparable dispute about the

34. *See, e.g.*, Seth F. Kreimer, *"Spooky Action at A Distance": Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 745, 745 (2016) (arguing for an informational harm theory of online injury); Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 797-99 (2022) (framing online injuries as harms to one's privacy); Leslie Y. Garfield Tenzer, *Social Media Harms and the Common Law*, 88 BROOK. L. REV. 227, 245-48 (2022) (lamenting courts' failure to employ defamation to adjudicate social media harms); Vanessa K. Ing, Spokeo, Inc. v. Robins: *Determining What Makes an Intangible Harm Concrete*, 32 BERKELEY TECH. L.J. 503, 515 (2017) (proposing a three-part test for intangible injuries to be concrete); Emily A. Martin, *Article III Standing but Add a Little Bit of 21st Century Spice: How Data Breaches Illuminate the Continuously Contradictory Rulings of the Supreme Court*, 83 LA. L. REV. 703, 709-10 (2023) (arguing that the harm in data breaches should be evaluated under the zone-of-danger theory from the tort of negligent infliction of emotional distress).

35. *See, e.g.*, Ta'Chelle Jones, *Virtual Spaces as Places of Public Accommodation: Has Technology Outpaced the Americans with Disabilities Act?*, 47 OKLA. CITY U.L. REV. 265, 267 (2023); Trevor Paul, *Is a Website Subject to Title III of the ADA: Why the Text Applies to Only Websites "Of" a Place of Public Accommodation*, 8 TEX. A&M J. PROP. L. 179, 179 (2022); Samuel H. Ruddy, *Websites, Apps, Accessibility, and Extraterritoriality Under Title III of the Americans with Disabilities Act*, 108 GEO L.J. ONLINE 80, 86-87 (2019); Randy Pavlicko, Note, *The Future of the Americans with Disabilities Act: Website Accessibility Litigation After COVID-19*, 69 CLEV. ST. L. REV. 953, 960 (2021) (discussing the effects of covid-19 on the circuit split); Reid, *supra* note 11, at 602 n.59, n.60, n.61 (collecting sources on the proper statutory construction of the ADA).

36. *See* Youlan Xiu, *What Does Web Accessibility Look Like Under the ADA?: The Need for Regulatory Guidance in an E-Commerce World*, 89 GEO. WASH. L. REV. 400, 413 (2021).

37. In the internet accessibility circuit split, there is no significant dispute about Article III standing. *Cf.* Pavlicko, *supra* note 35, at 968-973 (identifying one district court opinion raising questions about standing in a Title III website accessibility case).

meaning of the Reservation Rule.[38] The information deficiency problem is also practically distinct from the website accessibility problem. Disabled people are excluded from the digital economy as much by informationally deficient websites as they are by inaccessible ones.

This Note makes two contributions to the literature. First, it situates the Laufer circuit split in the context of the internet. It demonstrates many courts of appeals' unwillingness to consider virtual harm without a connection to a physical location as concrete. In doing so, the Note argues that Article III does not distinguish between digital and physical harm, and plaintiffs could suffer concrete injury in fact under Article III in physical *or* digital spaces. Second, the Note develops and defends a new theory of standing for testers like Laufer. On this theory, such testers experience intangible harm when they visit informationally deficient reservations websites because the absence of information inhibits them from fully enjoying a space open to the public—the website—compared to nondisabled people. This harm is concrete injury in fact under Article III because it satisfies the concrete injury in fact test laid out by Supreme Court precedent. It is analogous to a harm recognized by early American courts: denial of equal enjoyment of an inn's services. The harm is also concrete injury in fact under a faithful application of unanimous circuit court precedent from a distinct but factually analogous issue. This precedent holds that disabled people have standing to sue when they encounter informational barriers that prevent them from fully enjoying a place that serves the public. Applied to Laufer's case, it dictates that she, too, suffers concrete injury in fact under Article III.

This Note proceeds in four parts. Section II outlines the doctrinal backdrop of Article III standing and civil rights testers. Section III evaluates courts of appeals' resistance to recognizing purely virtual harm as concrete Article III injury, and courts' failure to articulate a compelling theory of concrete intangible harm. Section IV articulates and defends a theory of purely virtual harm for testers like Laufer. The conclusion is that disability rights testers can successfully argue that modern, internet-based harms are concrete injury in fact.

I. STANDING FOR RESERVATION RULE TESTERS

A. Article III's Standing Requirement

Federal courts are courts of limited jurisdiction. They cannot adjudicate every claim presented to them. Instead, Article III instructs federal courts only to hear "Cases" and "Controversies."[39] The Supreme Court has interpreted these

38. *But see* Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 6 (2023) (Thomas, J., concurring) (reaching the Article III standing question, unlike the majority, and interpreting the Reservation Rule).

39. U.S. CONST. art. III, § 2; Spokeo, Inc. v. Robins, 578 U.S. 330, 337 (2016); TransUnion LLC v. Ramirez, 594 U.S. 413, 423 (2021).

words to fashion several doctrines limiting federal judicial power.[40] Chief amongst them is that of "standing," which requires the plaintiff to have a "personal stake" in the case.[41] Without the "irreducible constitutional minimum" of standing, plaintiffs cannot enter federal court.[42]

The Supreme Court has explained that standing doctrine is necessary to preserve the separation of powers.[43] If federal courts adjudicated in the absence of genuine controversies, their opinions on what the law requires would be purely "advisory."[44] They would therefore be departing from their constitutionally circumscribed judicial function,[45] and encroach upon legislative and executive functions by making law on such occasions.[46]

To establish standing, a plaintiff must show: 1) An "injury in fact"; 2) Which is "fairly traceable" to the "challenged conduct" of the defendant; and 3) Which will "likely" be remedied by a favorable decision.[47] Amongst these requirements, injury in fact is the "first and foremost" one.[48] The Supreme Court has instructed that a plaintiff's injury must be "concrete"—i.e. "real, and not abstract"[49]—"particularized," i.e. "affect[ing] the plaintiff in a personal and individual way"[50]—and "actual or imminent."[51]

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40. Chemerinsky, *supra* note 29, at 272 (citing ERWIN CHEMERINSKY, FEDERAL JURISDICTION 42 (8th ed. 2021)).

41. *TransUnion*, 594 U.S. at 423. As Justice Scalia famously put it, a plaintiff must be able to sufficiently answer the question: "What's it to you?" Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983). *See also* California v. Texas, 593 U.S. 659, 668 (2021) ("The Constitution gives federal courts the power to adjudicate only genuine 'Cases' and 'Controversies.' That power includes the requirement that litigants have standing.").

42. *Spokeo*, 578 U.S. at 338 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

43. United States v. Texas, 599 U.S. 670, 675 (2023) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)).

44. *TransUnion*, 594 U.S. at 424; *see also* United States v. Muskrat, 219 U.S. 346, 354–57 (1911) (describing the impropriety of advisory opinions).

45. *Texas*, 599 U.S. at 675–76 ("Standing doctrine helps safeguard the Judiciary's proper—and properly limited—role in our constitutional system.").

46. *See Hollingsworth v. Perry, 570 U.S. 693, 700 (2013)* ("[Standing] is an essential limit on [the Court's] power: It ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives."); *see also* Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1380 (2014) ("What prevents the federal judiciary from transforming itself into a lawmaker without a democratic backing is the constitutional limitation that federal courts act solely through the adjudicatory process.").

47. Students for Fair Admissions v. Harvard, 600 U. S. 181, 199 (2023) (quoting *Spokeo*, 578 U.S. at 338); *see Lujan*, 504 U.S. at 560–61.

48. *Spokeo*, 578 U.S. at 338 (quoting *First Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103)

49. TransUnion LLC v. Ramirez, 594 U.S. 413, 424 (2021) (quoting *Spokeo*, 578 U.S. at 340).

50. *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560 n.1).

51. *TransUnion*, 594 U.S. at 423.

Recently, the concreteness prong of injury in fact has received much attention, mainly because the Supreme Court has limited the kinds of harm that qualify as concrete. It has said that "tangible harms," like "physical harms and monetary harms," "readily qualify" as concrete.[52] "Intangible" harms like reputational harms, however, are less likely to be concrete for standing purposes.[53] If a plaintiff alleges her injury is intangible, the Supreme Court has said that she must show her harm bears a "close relationship to [a] harm[] traditionally recognized as providing a basis for lawsuits in American courts."[54] While plaintiffs do not need to demonstrate their intangible harm has an "exact duplicate" in American history and tradition, they must still identify a "close historical or common-law analogue" for their asserted intangible injury to pass the concrete injury in fact test.[55]

Importantly, the Supreme Court has emphasized the distinction between Article III jurisdiction and the merits of a case. The Court has bluntly stated that a plaintiff asserting an intangible injury cannot satisfy the concreteness prong of injury in fact simply by arguing that the defendant violated her rights under a statute or regulation.[56] A plaintiff must *independently* demonstrate that she has suffered an intangible harm which satisfies the concrete injury in fact test. Only once that threshold bar is crossed does a federal court have jurisdiction over the merits of her case. In other words, a plaintiff asserting an intangible injury must overcome Article III jurisdictional hurdles by showing that her injury has a close historical analogue *irrespective* of the legal injury she claims to have suffered. As the Supreme Court has explained, "injury in fact" is not "injury in law" under Article III,[57] and "Article III standing requires a concrete injury even in the context of a statutory violation."[58]

B. Standing for Testers of Civil Rights Statutes

Although scholars have debated whether testers of civil rights statutes—i.e. individuals who are not bona fide patrons of a service or establishment but wish only to enforce a civil rights statute—have Article III standing,[59] the Supreme Court has spoken clearly. In *Havens Realty Corp. v. Coleman*, the Supreme Court

52. *Id.* at 425.

53. *TransUnion*, 594 U.S. at 425.

54. *TransUnion*, 594 U.S. at 425 (suggesting that "reputational harms, disclosure of private information, and intrusion upon seclusion" are concrete intangible harms).

55. *Id.* at 424.

56. *Spokeo*, 578 U.S. at 341; *see TransUnion*, 594 U.S. at 440.

57. *TransUnion*, 594 U.S. at 427.

58. *Spokeo*, 578 U.S. at 341.

59. *See, e.g.*, Shannon E. Brown, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117 (1992); Steven G. Anderson, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217 (1992); Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 576 (1995).

squarely endorsed the idea that such testers could suffer concrete injury in fact.[60] In *Havens Realty*, testers of the Fair Housing Act attempted to enforce a provision which made it unlawful "[t]o represent to any person because of race . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."[61] When Sylvia Coleman, a black woman, inquired about the availability of rental apartments despite having no intention to actually rent one, she was told that none were available. The Court held that Coleman had standing because she was the victim of an intentional misrepresentation.[62]

Since *Havens Realty*, courts of appeals have recognized standing for testers wishing to enforce various provisions of the ADA. Courts have upheld standing for testers seeking to enforce Title II's prohibition against disability discrimination in the provision of government programs, activities, and services.[63] Many courts have also found that disabled testers who encounter physical barriers which impede full use and enjoyment of places that serve the public have standing to sue when they bring claims under Title III of the ADA.[64] For example, in *Houston* v. *Marod Supermarkets*, a wheelchair-bound plaintiff encountered restrooms that allegedly violated the ADA in a supermarket.[65] The court held that he had suffered concrete harm despite having no intention to patronize the establishment.[66]

For internet testers like Laufer, courts of appeals unanimously agree on two principles governing standing. First, they agree that Laufer's tester status does not exempt her from demonstrating the constitutional minimum of standing.[67] In other words, even testers must demonstrate that any intangible injury they claim is concrete under Article III standing requirements. Second, courts agree that Laufer need not have placed a "two-minute phone call" to inquire about a hotel's accessibility to have standing.[68] The agreement is uncontroversial: If disabled travelers had to exhaust private remedies in order to enter federal court, hardly any disabled individual would have standing. Even bona fide travelers would not

60. 455 U.S. 363, 382 (1982). *See* Brown, *supra* note 59, at 1127 ("*Havens* establishes a strong precedent for federal courts to hold that employment testers have standing under Title VII.").

61. 42 U.S.C. § 3604(d).

62. *Havens Realty*, 455 U.S. at 374–75.

63. *See, e.g.*, Tandy v. City of Wichita, 380 F.3d 1277, 1287 (10th Cir. 2004).

64. *See, e.g.*, Colorado Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205, 1208, 1211 (10th Cir. 2014); Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1325, 1334 (11th Cir. 2013); Nanni v. Aberdeen Marketplace, Inc., 878 F.3d 447, 457 (4th Cir. 2017).

65. 733 F.3d at 1326.

66. *Id.* at 1334.

67. *See* Laufer v. Looper, 22 F.4th 871, 882-83 (10th Cir. 2022) (rejecting the argument that testers are excused from demonstrating injury in fact); Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 273 (1st Cir. 2022) ("No one disputes that being a tester alone doesn't give you standing—the question is whether the test left [Laufer] with some injury.").

68. Brief for Petitioner at 6, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429), 2023 WL 3903833.

suffer concrete injury in fact if they could place such phone calls, leading to a largely unenforceable Reservation Rule.

Courts' disagreement about Laufer's case, however, begins at, and largely turns on, the concreteness prong of the injury in fact analysis.[69] Courts diverge on whether Laufer suffers concrete harm just by encountering the lack of accessibility information on hotels' websites. Part of the disagreement stems from the fact that Laufer suffers only intangible harm—she experiences no tangible harm like bodily or financial injury—and intangible harms are less likely to pass the concrete injury in fact test.[70] And as discussed earlier, under recent Supreme Court precedent, Laufer cannot satisfy the concrete injury in fact requirement simply by alleging that the hotels violated her rights under the Reservation Rule.[71] She must establish, independent of the claimed Reservation Rule violations, that she suffered concrete injury in fact when she encountered the informationally deficient hotel reservations websites. Courts disagree, however, about whether she did. The following section explains and analyzes this disagreement.

II. COURTS OF APPEALS' DISAGREEMENT ABOUT THE CONCRETENESS OF LAUFER'S HARM

The courts of appeals which have considered Laufer's, or a materially similar tester's, case have reached diverging outcomes. The Second, Fifth, Tenth, and D.C. Circuits held that Laufer's injury was not concrete because she did not intend to visit the hotels—just their websites. Conversely, the First and Fourth Circuits found standing, concluding that Laufer was concretely harmed because the hotels deprived her of information to which she was legally entitled. The Eleventh Circuit held that Laufer had standing because she experienced discrimination. This section describes the circuit split and argues that the courts of appeals which have rejected standing have improperly failed to recognize that intangible harm which occurs online can also be concrete. It also demonstrates that the courts of appeals which *have* found standing have proposed weak theories of concrete injury in fact.

A. The Second, Fifth, Tenth, and D.C. Circuits' Emphasis on Physical Harm

The Tenth Circuit provided the most comprehensive analysis denying standing to Laufer. In *Laufer v. Looper*, Laufer sued the Elk Run Inn, arguing that its

69. Although courts have occasionally voiced skepticism about the particularization and imminence of Laufer's injury, concreteness remains the most hotly contested aspect of Laufer's standing. *See, e.g.*, Laufer v. Alamac Inc., 621 F. Supp. 3d 1, 6 (D.D.C. 2021)

70. *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1272 (11th Cir. 2022) (noting that Laufer asserts an intangible injury); *see also* Part II.A.

71. *See* Part II.A; *see also* Harty v. W. Point Realty, Inc., 28 F.4th 435, 444 (2d Cir. 2022) (holding that a bare statutory or regulatory violation, even of anti-discrimination law, is insufficient to establish that an intangible harm is concrete injury in fact).

website violated the Reservation Rule because it omitted information about the Inn's accessibility features.[72] The Tenth Circuit held that Laufer's injury was not concrete. It reasoned that if Laufer had adduced "concrete plans to visit" or book a room at the Inn, she would have suffered concrete harm.[73] But because she had only visited the website and had no definitive plans to visit the hotel, she did not suffer concrete injury in fact.[74]

In so holding, the Tenth Circuit distinguished *Looper* from *Colorado Cross Disability Coalition v. Abercrombie & Fitch Co.*, a Tenth Circuit case upholding standing for testers of Title III of the ADA.[75] In *Colorado Cross*, disabled individuals sued Abercrombie & Fitch, alleging that the store violated Title III because architectural barriers, like the lack of an accessible entrance, prevented her from fully using and enjoying the space.[76] Even though the individuals did not intend to purchase anything, the court held that they had standing.[77] The Tenth Circuit distinguished *Colorado Cross* by reasoning that the testers in that case had visited and "intended to return to the defendants' *store*."[78] By contrast, Laufer had not alleged she would "encounter any accessibility barriers" because she would never visit the *hotel*, just its website.[79]

In denying Laufer standing, the Tenth Circuit implicitly rejected the argument that Laufer's experiences on the website *alone*, divorced of any connection to the physical hotel, could have concretely harmed her. But it is unclear why the court thought so. Surely an individual's experiences in the digital world, no less than her experiences in the physical world, can be the basis for concrete injury in fact. For instance, accessibility information is critical for disabled people to use a reservations website as conveniently as nondisabled people.[80] A lack of accessibility information prevents disabled people from fully enjoy the reservations website in a materially similar fashion as the architectural barriers in *Colorado Cross* prevented the disabled testers from enjoying the retail store. Yet the Tenth Circuit appeared skeptical of the possibility that harm encountered online, without more, could be concrete.

The Fifth Circuit's holding in *Laufer v. Mann Hospitality, L.L.C.* suggested a similar skepticism of purely virtual harm.[81] In that case, Laufer sued the owner of the Sunset Inn in Texas for failing to provide information about the Inn's

72. Laufer v. Looper, 22 F.4th 871, 874 (10th Cir. 2022).

73. *Id.* at 878.

74. *Id.*

75. Colorado Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205 (10th Cir. 2014).

76. *Id.* at 1208.

77. *Id.* at 1212.

78. *Looper*, 22 F.4th at 882 (emphasis added).

79. *Id.*

80. *See* Popham et al., *supra* note 9, at 22.

81. Laufer v. Mann Hosp., L.L.C., 996 F.3d 269 (5th Cir. 2021).

accessibility on its online reservation service.[82] The court recognized that Laufer had visited the website and encountered the lack of information.[83] But it held that because Laufer had "professe[d] no definite plans to *travel to* the Sunset Inn or anywhere else in Texas," she did not suffer a concrete injury.[84] Like the Tenth Circuit, the Fifth Circuit implied that because Laufer's harm was purely virtual, divorced from exposure to the actual hotel, it was not concrete injury in fact under Article III.[85]

The D.C. and Second Circuits also appeared to endorse a similar primacy of physical over virtual injury. The D.C. Circuit did so by affirming a district court ruling denying Laufer standing.[86] Citing the Fifth Circuit, the district court had held that Laufer's injury was not concrete because her "complaint lack[ed] any allegations that she intend[ed] to *visit* the District."[87] Her injury was therefore unlike that of testers seeking to enforce Title III against architectural barriers, whose "past and plausible future visits to a [physical] *location* sufficed to show standing."[88] The Second Circuit, in a materially similar case by a different tester, rejected the idea that testers could suffer concrete injury simply through website interactions.[89] Like Laufer, the disabled tester there had sued a hotel because its website did not include information about its accessibility features.[90] The court held that the tester did not have standing because he did not allege any "plans to visit West Point or the surrounding area," just the website.[91]

These courts of appeals all held that a disabled tester like Laufer could only be concretely injured if the interactions that led to her harm did not solely occur on a website. They required the underlying harm to have a component in the analog world. They failed to appreciate or even entertain the possibility that Laufer's inability to fully enjoy hotels' reservations websites based on her disability could itself form the basis for concrete injury in fact under Article III. This failure hints at an unwillingness to place harm that stems from online experiences on the same constitutional footing as harm that originates from physical encounters.

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82. *Id.* at 271.

83. *Id.* at 272.

84. *Id.* at 271 (emphasis added).

85. The court acknowledged that "after the coronavirus pandemic abates, [Laufer] intends to travel all throughout Texas." *Id.* But the court did not consider such claims credible.

86. Laufer v. Alamac Inc., No. 21-7056, 2021 WL 4765435, at *1 (D.C. Cir. Sept. 10, 2021).

87. Laufer v. Alamac Inc., 621 F. Supp. 3d 1, 9 (D.D.C. 2021) (emphasis added). Like in *Mann Hospitality*, Laufer asserted plans to travel to DC in *Alamac*. But the court again found the plans too vague. *See id.* at 12.

88. *Id.* at 9 (emphasis added).

89. Harty v. W. Point Realty, Inc., 28 F.4th 435, 439-40 (2d Cir. 2022).

90. *Id.* at 439.

91. *Id.* at 443 (citing Laufer v. Looper, 22 F.4th 871, 877–78 (10th Cir. 2022); Laufer v. Mann Hosp., L.L.C., 996 F.3d 269, 272–73 (5th Cir. 2021)). In Laufer v. Ganesha Hosp. LLC, No. 21-995, 2022 WL 2444747, at *2 (2d Cir. July 5, 2022), the Second Circuit rejected Laufer's claim of standing, finding that *Harty* controlled her case.

However, Article III does not obviously distinguish between online and in-person harm.[92] Indeed, the Supreme Court has said that various intangible harms can be concrete injuries under Article III and has never suggested that the concreteness of the injury turns on the location of its occurrence.[93] The relevant inquiry is the *nature* of harm, not its provenance. One can speculate as to why these courts believed that online injury is not concrete enough compared to physical injury. Perhaps the judges felt skeptical that websites are as "tangible" or "concrete" as the physical world. Nonetheless, Article III does not permit courts to make transactions in digital spaces distant second cousins to those that occur in person. If there is a distinction to be drawn, it is not between the online and physical.

B. The First and Fourth Circuits' Informational Injury Theory

The First and Fourth Circuits found that Laufer had suffered concrete injury in fact because she had suffered an "informational" harm: The Reservation Rule granted her a right to information about hotels which the informationally deficient websites had violated.[94] The courts cited a line of Supreme Court precedents establishing informational harm as concrete injury in fact under Article III.[95] In particular, the First Circuit reasoned that *Havens Realty*, described above, was "right on the nose" for Laufer's case.[96] Both cases involved testers, legal rights to information that did not require a bona fide intention to patronize the establishment,[97] and the infringement of such rights.[98] The Fourth Circuit agreed, reasoning:

> It matters not that Laufer is a tester who may have visited . . . hotel reservation websites to look for ADA violations in the form of noncompliance with the Hotel Reservation Regulation, and without any plan or need to book a hotel room, just as it mattered not that the Black plaintiff in Havens Realty was a tester who "may have approached [defendant Havens Realty] fully expecting that [she] would receive false information [in contravention of the Fair Housing Act], and

92. *See also* Laufer v. Arpan LLC, 65 F.4th 615, 618 (11th Cir. 2023) (Newsom, J., concurring) (arguing that Article III does not distinguish between online and in-person discrimination).

93. TransUnion LLC v. Ramirez, 594 U.S. 413, 425 (2021).

94. Laufer v. Acheson Hotels, LLC, 50 F.4th 259, 275 (1st Cir. 2022); Laufer v. Naranda Hotels, LLC, 60 F.4th 156, 167 (4th Cir. 2023).

95. Both courts cited Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), FEC v. Akins, 524 U.S. 11 (1998), and *Pub. Citizen v. U.S. Dep't of Just.*, 491 U.S. 440 (1989). *See Acheson Hotels*, 50 F.4th at 269; *Naranda Hotels*, 60 F.4th at 166.

96. *Acheson Hotels*, 50 F.4th at 269.

97. According to the First Circuit, *Havens Realty* involved a legal right to "truthful information about available housing" without requiring a "bona fide offer." *Id.* (citing *Havens Realty*, 455 U.S. at 373–74).

98. *Id.*

without any intention of buying or renting a home."[99]

The courts reasoned that *Havens Realty* controlled Laufer's case: If the tester in *Havens Realty* had suffered concrete Article III injury in fact, so had Laufer.

Although the First and Fourth Circuits' theory appears attractive, the Supreme Court's recent precedent in *TransUnion LLC v. Ramirez* has undermined the enduring validity of informational harm as a theory of Article III standing.[100] In *TransUnion*, a class of 8,185 plaintiffs sued TransUnion under the Fair Credit Reporting Act, alleging the company violated statutory obligations to follow reasonable procedures in handling their credit information.[101] The Court held that those individuals whose credit inaccuracies were not disclosed suffered no concrete harm because they experienced "no 'downstream consequences'" from the mishandling of their information.[102] *TransUnion* appears to stand for the proposition that plaintiffs like Laufer cannot establish concrete injury simply because a defendant has deprived them of information to which they had a statutory or regulatory right.[103] They need to show "'downstream consequences' from failing to receive the required information."[104] Laufer, however, suffered no downstream consequences. Her sole use for the information was to test the website's compliance, not to visit the hotel or book a room.[105] Consequently, *TransUnion* casts doubt on the First and Fourth Circuit's reasoning.[106]

Not only has *TransUnion* undermined *Havens Realty*, but as the Tenth Circuit persuasively pointed out, *Havens Realty* seems materially distinguishable from Laufer's case because it involved misrepresentations.[107] The rental agency in that case informed Sylvia Coleman that no apartments were available when in

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99. *Naranda Hotels*, 60 F.4th at 166.

100. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 442 (2021) (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (CA11 2020)) ("An 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'"). *See generally* Bradford C. Mank, *Do Seven Members of Congress Have Article III Standing to Sue the Executive Branch?: Why the D.C. Circuit's Divided Decision in* Maloney v. Murphy *was Wrongly Decided in Light of Two Prior District Court Decisions and Historical Separation-of-Powers Jurisprudence*, 74 RUTGERS UNIV. L. REV. 721, 735–38 (2022) (describing how *TransUnion* has undermined informational injury).

101. *TransUnion,* 594 U.S. at 417.

102. *Id.* at 442.

103. *Laufer v. Looper*, 22 F.4th 871, 881 (10th Cir. 2022).

104. *Id.* (quoting *TransUnion*, 594 U.S. at 442).

105. *Looper*, 22 F.4th at 881.

106. Although the First Circuit suggested that Laufer's feelings of "frustration and humiliation" upon failing to receive accessibility information were relevant downstream consequences, it seems unlikely that the Supreme Court will find such feelings sufficient for standing, especially when such feelings standing alone are insufficient to meet the concrete injury in fact test. *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 274–75 (1st Cir. 2022); *see also* Cole, *supra* note 1, at 1049 (expressing skepticism about the Court's support for a broad interpretation of injury under the *TransUnion* test).

107. *See Looper*, 22 F.4th at 879. By finding Laufer's reliance on *Havens Realty* inapposite, this Note distinguishes itself from the respondent's brief in opposition in *Acheson Hotels v. Laufer*, 601 U.S. 1 (2023). *See* Brief for Respondent, *supra* note 18, at 22-32.

reality several were. Laufer's case, by contrast, does not involve *misrepresentations*. The same information—or lack thereof—was encountered by *every* website visitor. The distinction is legally relevant, because as one scholar has suggested, the common law recognized misrepresentation as a harm that provided the basis for a lawsuit.[108] In other words, the *Havens Realty* plaintiff would satisfy the modern Supreme Court's history and tradition test for concrete injury in fact. But because Laufer's case did not involve a misrepresentation, her reliance on *Havens Realty* is weaker.

More generally, scholars have noted the doctrinal tension between *TransUnion* and *Havens Realty*, as the latter case appears to stand for a proposition that *TransUnion* seems to foreclose: That concrete "injury [in fact] . . . may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing."[109] Yet the Supreme Court has done little to resolve this tension. Given *TransUnion*'s recency compared to *Havens Realty*, and *TransUnion*'s strong suspicion that a violation of a statutory or regulatory right to information by itself constitutes concrete injury in fact under Article III, informational injury arguments are likely on weak footing.

C. The Eleventh Circuit's Stigmatic Harm Theory

In *Laufer v. Arpan LLC*, the Eleventh Circuit held that Laufer had suffered concrete injury in fact under Article III because she had experienced discrimination when she visited the website and encountered the lack of accessibility information.[110] The court analogized Laufer's case to its precedent in *Sierra v. City of Hallandale Beach*.[111] In *Sierra*, a deaf plaintiff "watched, but could not hear and thus understand," videos that a city posted on its official website for which it refused to provide closed captioning.[112] The court held that the plaintiff in *Sierra* had suffered concrete injury in fact. He was "personally and directly subjected to discriminatory treatment"[113] and suffered "humiliat[ion], embarrass[ment], and frustrat[ion]" as a result.[114] The Eleventh Circuit reasoned that *Sierra* controlled Laufer's case. The court found that Laufer, too, had experienced discrimination because of the lack of accessibility information on hotels' websites. The discrimination, accompanied by her experiences of "frustration and humiliation

108. *See* Mank, *supra* note 26, at 1176.

109. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). *See generally* Cole, *supra* note 1; Mank, *supra* note 26, at 1176; Chemerinsky, *supra* note 29, at 282–83.

110. *Arpan,* 29 F.4th at 1268, 1271 (11th Cir. 2022).

111. *Id.* at 1272–74; *see generally Sierra v. City of Hallandale Beach, Fla.*, 996 F.3d 1110 (11th Cir. 2021).

112. *Arpan*, 29 F.4th at 1273 (quoting *Sierra*, 996 F.3d at 1114).

113. *Id.*

114. *Id.* (quoting *Sierra*, 996 F.3d at 1114 n.4).

and a sense of isolation and segregation," constituted concrete injury in fact.[115]

The Eleventh Circuit's analysis suffers from several defects. First, the court surprisingly concluded that Laufer's asserted intangible injury did *not* satisfy the Supreme Court's concrete injury in fact test. The court held that the harm Laufer had experienced did not bear a "close relationship" to any harm traditionally recognized as providing a basis for lawsuits in early American courts.[116] Besides being strategically dubious, the court's analysis was not comprehensive. The court only considered two difficult to prove common law torts: intentional and negligent infliction of emotional distress. Finding them too dissimilar to Laufer's "emotional disquiet"—her feelings of "frustration and humiliation"—the court summarily concluded that Laufer could not meet the history and tradition test for concreteness under Article III.[117] The court not only failed to consider other historical analogues. It also opted to root its decision in doctrinally weaker circuit court case law as opposed to Supreme Court precedent.

Second, the court's theory of standing and its application to Laufer's case are unconvincing. The court acknowledged that under Supreme Court precedent, Laufer could not demonstrate concrete injury in fact simply by alleging that the hotels had violated her rights even under an anti-discrimination regulation like the Reservation Rule. Yet it argued that Laufer's "emotional injury that results from [the hotels'] illegal discrimination is" sufficient for concrete injury.[118] The court failed to explain why the emotional turmoil transformed the violation of the Reservation Rule into concrete injury in fact, when such emotions *on their own* would have been insufficient.[119] The court's theory also transformed the question of standing into one of fact-finding. Under it, testers in Laufer's shoes who do not suffer emotional turmoil presumably do not have standing, while those who claim to have suffered do. The standard thus raises administrability concerns, incentivizes testers to play up their emotions, and seems to misplace the harm.[120]

Even accepting the Eleventh Circuit's theory, the court assumed, without explanation, that Laufer suffered discrimination.[121] Later dissenting, Judge Grant attacked this omission and argued that the lack of accessibility information on a hotel's website would only discriminate against those disabled people who

115. *Id.* at 1274.

116. *Id.* at 1268, 1272.

117. *Id.* at 1272–73.

118. *Id.* at 1274.

119. *See* Cole, *supra* note 1, at 1042 ("[I]t is not obvious that the emotional pain that arises from a stigmatic injury due to discrimination is even a permissible ground for tester standing at all.").

120. *See* Cole, *supra* note 1, at 1049–50.

121. *Arpan*, 29 F.4th at 1274; *see also Laufer v. Arpan LLC*, 65 F.4th 615, 620 (11th Cir. 2023) (Grant, J., dissenting) ("The panel entirely fails to consider whether Laufer herself faced discrimination. Instead, it simply assumes—without analysis—that Laufer 'suffered illegal discrimination'.").

intended to book a room.[122] On her view, the discriminatory treatment would consist of disabled people's inability to book a room compared to nondisabled people. She argued that because Laufer did not intend to book a room, she did not experience discrimination at all.[123] By failing to more precisely locate Laufer's discriminatory treatment, the Eleventh Circuit exposed its theory to objections such as these.

While the Eleventh Circuit's theory starts with an ecumenical premise—that the lack of accessibility information is problematic because it affects Laufer on the basis of her disability—it goes astray by quickly dismissing any common law analogues, failing to explain what precisely Laufer's discrimination consisted in, and adopting a theory of harm that turns on a tester's emotional state. In a broader sense, it is emblematic of courts of appeals' dissatisfactory reasoning in this circuit split. The circuits denying standing fail to appreciate that Laufer's experiences on hotels' websites alone could have concretely injured her. Meanwhile, the courts finding standing have done so under vulnerable theories. The next section presents and defends a firmer theory of standing for testers like Laufer.

IV. TOWARD A NEW THEORY OF TESTER STANDING

This section proposes a theory of harm that part III.A hinted at, and that cuts between the Tenth and Eleventh Circuits' views. To remind readers, the Tenth Circuit rejected standing because Laufer did not intend to visit the physical hotel. Conversely, the Eleventh Circuit upheld standing because it found that Laufer had suffered discrimination and emotional turmoil.

On the theory of standing proposed here, Laufer suffered harm because she was unable to enjoy hotels' reservations websites as fully as nondisabled people. She was unable to do so despite being able to *access* the websites because the websites were *informationally deficient*: They did not provide information about hotels' accessibility features, like accessible entrances and handrails that disabled individuals needed. Without such information, Laufer, a disabled individual, could not enjoy a hotel's reservations website as fully as a nondisabled person.

The theory of harm strikes a middle ground between the Tenth and Eleventh Circuit's holdings. It effectively "uploads" the Tenth Circuit's views to the digital realm by positing that the relevant space of enjoyment can be *digital*—a hotel's reservations website—as opposed to a physical hotel. And like the Eleventh Circuit's, this theory is a species of stigmatic harm. It suggests that Laufer's injury consists in the inequity she experienced on account of her disability: She was unable to enjoy the reservations website as fully as a nondisabled person. After all, a nondisabled person would not need information about handrails and accessible entrances to enjoy a hotel's reservations website.

122. *Arpan*, 65 F.4th at 620 (Grant, J., dissenting).

123. *Id.*; *see also id.* at 617 (Newsom, J., concurring).

At first blush, this theory may appear to fare no better against Judge Grant's objection that Laufer did not experience discrimination because she, unlike a would-be traveler, did not intend to book a room.[124] However, the theory avoids the objection because it locates the discrimination at an analytically prior level: in the *ability* to fully enjoy the reservations website. Even though Laufer did not intend to book a room when she visited the website, she was *unable* to enjoy it as fully as a nondisabled person. That is because the website's informational deficiency impacted Laufer's *capacity* to enjoy the website. As previously described, without information about accessible entrances, handrails and other features, disabled individuals do not know if hotels can accommodate them. Therefore, they cannot, even in principle, enjoy reservations websites as fully as nondisabled people, even if they can otherwise access the websites due to screen reader software. Once Laufer's harm is located in her *inability* to equally enjoy hotels' reservations websites, Judge Grant's objection melts away. Laufer's intention to patronize the website is irrelevant—her harm consists in her inability to enjoy the website like a nondisabled person, an inequity which she experienced when she visited the website.

The remaining challenge is to show that this theory of intangible harm passes the Supreme Court's test for concrete injury in fact under Article III. In what follows, this Note offers two reasons for why it does. First, it argues that disabled peoples' inability to fully enjoy hotels' reservations websites is "close[ly] relat[ed]" to a harm "traditionally recognized as providing a basis for a lawsuit in American courts:" the inability to fully enjoy inns that held themselves out as open to the public.[125] Second, the Note argues that existing, unchallenged circuit court precedent—which holds that disabled peoples' exposure to informational barriers which prevent them from fully enjoying a place that serves the public constitutes concrete injury in fact—dictates that Laufer's harm is concrete. To remind readers, neither of these arguments turns on the text or scope of the legal rights created by the ADA or the Reservation Rule. Nor can it. Because the proposed theory is a theory of standing—of injury in fact, not injury in law—the point is to demonstrate that Laufer's intangible experiences constitute the kind of harm over which federal courts have jurisdiction, quite independent of whether her legal claims are meritorious.

A. Disabled People's Inability to Enjoy Hotels' Reservations Websites as Fully as Nondisabled People Is Analogous to the Common Law Harm of Unequal Enjoyment of Inns

Under Supreme Court precedent, Laufer must demonstrate that her alleged intangible injury—the inability to enjoy hotels' reservations websites as fully as nondisabled people—is closely related to a harm recognized by early American

124. *Id.* at 620 (Grant, J., dissenting).

125. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (cleaned up).

courts as providing the basis for a lawsuit.[126] This she can do. After describing the common law harm most analogous to her experiences—that of unequal enjoyment of inns—this Note explains why Laufer's experiences are closely analogous.

1. The Harm Recognized by Early American Courts

The pre-Founding era English common law imposed special duties on innkeepers and common carriers.[127] These establishments were viewed as engaging in a "common calling" or "public employment," and were generally required to serve all patrons who sought their services.[128] As early as the sixteenth century, an English court held, in *White's Case*, that innkeepers had a duty to admit guests if the inn was not full.[129] Shortly afterward, another court held in an *Anonymous* case that "[a]n action on the case lyeth against an innkeeper who denies lodging to a travailer for his money, if he hath spare lodging; because he hath subjected himself to keep a common inn."[130] And in 1701, the King's Bench accepted Lord Holt's proposition in *Lane v. Cotton* that innkeepers are "bound to receive all manner of people into his house till it be full"—since inns had engaged in a public employment, they were "bound . . . to serve the public."[131] What grounded the duty to serve was that innkeepers and common carriers *held themselves out* as open to the public.[132] For example in *Gisbourn v. Hurst*, the court held that a plaintiff who delivered cheese had become a common carrier because he had "undertak[en] for hire to carry the goods of *all persons indifferently*."[133]

Early American courts continued the English tradition of imposing a duty to serve on innkeepers and common carriers.[134] Justice Joseph Story's treatise recognized that innkeepers—"keepers of a *common* inn for the lodging and entertainment of travellers and passengers"[135]—were "bound . . . to take in all

126. *See id.*

127. *See, e.g.*, Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 516 (1911); Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. L. REV. 1283, 1304 (1996).

128. *Lane v. Cotton*, 88 Eng. Rep. 1458, 1465 (K.B. 1701) (Holt, J., dissenting) ("[O]ne that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public."); Vincent A. Marrazzo, *Public Accommodations Originalism*, 54 ST. MARY'S L.J. 741, 753 (2023) (citing Christopher Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 476 (2021)).

129. 2 Dyer 343, 344 (1586).

130. Burdick, *supra* note 127, at 519 (quoting BRUCE WYMAN, CASES ON PUBLIC SERVICE COMPANIES 127 (Harv. L. Rev. Ass'n, 1902)).

131. 88 Eng. Rep. at 1464–65.

132. Singer, *supra* note 127, at 1304.

133. 91 Eng. Rep. 220, 220 (KB 1710) (emphasis added).

134. Singer, *supra* note 127, at 1312.

135. JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS, WITH ILLUSTRATIONS FROM THE CIVIL AND THE FOREIGN LAW § 475, at 310 (Hilliard & Brown 1832) (citing

travellers and wayfaring persons, and to entertain them, if [they] can accommodate them, for a reasonable compensation."[136] Like the English common law, American courts justified the duty to serve on the grounds that innkeepers and common carriers held themselves out as serving the public.[137] For instance, the early American lawyer Francis Hilliard described an innkeeper as "one who receives as guests all who choose to visit his house, without any previous agreement as to the time of their stay, or the terms."[138]

Under the duty to serve, innkeepers and common carriers were not just required to allow patrons to *access* the establishment,[139] but also to enable them to fully and equally *enjoy* all services within. Common carriers, for instance, were required to "furnish [] passenger[s] a seat" even after they had allowed them aboard.[140] And in *Coger v. North Western Union Packet Co.*, the Iowa Supreme Court held that a steamboat was required to allow all passengers to equally enjoy the meal areas of a steamboat once they had boarded.[141] Innkeepers were only allowed to refuse service if they were at capacity, or if they had a "reasonable objection to the character or conduct of the plaintiff."[142] In *Markham v. Brown*, for example, the New Hampshire Supreme Court reasoned that an innkeeper, "[h]olding [his house] out as a place of accommodation for travellers, he cannot prohibit persons who come under that character . . . from entering, so long as he has the means of accommodation for them."[143]

As relevant to Laufer's case, *information* played a key role in triggering

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Thompson v. Lacy (1820), 106 Eng. Rep. 667 (KB)) (emphasis added).

136. *Id.* § 476, at 311 (citing *Lacy*, 106 Eng. Rep. at 667).

137. *See, e.g.*, Clute v. Wiggins, 14 Johns. 175, 176 (N.Y. Sup. Ct. 1817); Dwight v. Brewster, 18 Mass. (1 Pick.) 50, 54 (1822); Harris v. Stevens, 31 Vt. 79 (1858). *See also* JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 464–65 (photo. reprt. 1971) (1826 -1830) (defining common carriers as "those persons who undertake to carry goods generally, and for all people indifferently, for hire.").

138. *See* FRANCIS HILLIARD, 2 THE LAW OF TORTS 614 (1859).

139. *See* Burdick, *supra* note 127, at 519 (quoting The Six Carpenters' Case (1611), 8 Coke 146 (KB) ("[T]he law gives authority to enter into a common inn, or tavern.")); *see also* THEOPHILUS PARSONS, 1 LAW OF CONTRACTS 627 (photo. reprt. 1980) (1853) (reporting that innkeepers "cannot . . . refuse to [receive a guest], unless his house is full."); Jencks v. Coleman, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7, 258) (Story, J.) (reiterating the holding out theory, albeit in the common carrier context); Singer, *supra* note 127, at 1316–17. While scholars have suggested other theories which may ground innkeepers' duty to serve, such as that innkeepers were granted a license or franchise from the government—see, for example, Bruce Wyman, *Law of Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 163 (1903–1904) and Marrazzo, *supra* note 128, at 768—there is significant support for the holding out theory. *See* Marrazzo, *supra* note 128, at 762.

140. IRVING BROWNE, THE ELEMENTS OF THE LAW OF BAILMENTS AND COMMON CARRIERS 168 (N.Y. Banks Bros. 1896) (citations omitted).

141. 37 Iowa 145 (1873).

142. *Jencks*, 13 F. Cas. at 443.

143. 8 N.H. 523, 528 (1837); *see id.* at 530-31 (holding that innkeepers could only exclude comers on reasonable grounds such as if they caused quarrels, disturbances, or intruded into private rooms); *see also* Marrazzo, *supra* note 128, at 767.

innkeepers' duty to serve. Blackstone wrote that "if an inn-keeper . . . *hangs out a sign* and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal assumpsit an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler."[144] In other words, if an innkeeper displayed a sign offering services to the public, that was viewed as "having made a public invitation to come to one's property."[145] Justice Story later echoed this view when he wrote that "is not necessary, that the party should put up a sign as keeper of an inn. It is sufficient, if in fact he *keeps one*."[146]

Synthesizing these doctrinal strands, early American courts recognized that patrons who could not enjoy the services offered by an inn to the same extent as other patrons suffered a harm that provided a basis for a lawsuit against the innkeeper. As Blackstone described, innkeepers who failed to equally serve were thought to have breached an implied contract. By displaying a sign that they were open to the public, innkeepers created a "universal assumpsit"[147]—"a[n implied] promise to the world to accept and serve any traveler who seeks" the inn's services.[148] A patron's "act of stepping inside" constituted an acceptance, and the failure to provide lodging and other services was considered a breach of that implied contract.[149] Pursuant to the breach of contract, litigants could maintain "an action on the case" upon the universal assumpsit.[150]

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144. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165 (Edward Christian ed., 15th ed. 1809) (emphasis added) (citing 1. Ventr. 333).

145. Singer, *supra* note 127, at 1310.

146. STORY, *supra* note 135, § 475, at 310 (citing 5 Bac. Abr. Inn, B) (emphasis added).

147. 3 BLACKSTONE, *supra* note 144, at 166; *see also* Singer, *supra* note 127, at 1309 (citing James B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888) (describing that the duties of common callings were based on the doctrine of assumpsit as they had voluntarily "assumed" such obligations in a contractual or quasi-contractual sense by holding themselves out as open to the public)).

148. Singer, *supra* note 127, at 1310; *see* Frederic W. Peirsol, *An Innkeepers "Right" to Discriminate*, 15 FLA. L. REV. 109, 111 (1962) (describing that an "implied or an express contract" is created when innkeepers' invitation to the public is accepted); Burdick, *supra* note 127, at 522 ("So it seems safe to believe that originally anyone who held himself out to serve all who might apply was conceived of as assuming a public or common calling, and by force of this assumpsit was held to obligate himself to serve all who should apply and to serve with care."); *see also* Marrazzo, *supra* note 128, at 764 (explaining Burdick's assumpsit theory).

149. Singer, *supra* note 127, at 1310 (first citing JAMES B. BIRD, THE LAWS RESPECTING TRAVELLERS AND TRAVELLING; COMPRISING ALL THE CASES AND STATUTES RELATIVE TO THAT SUBJECT: INCLUDING THE USING OF HIRED HORSES, ROBBERY, ACCIDENTS, OBSTRUCTIONS, &C. UPON THE ROAD AND LAND AND WATER CARRIAGE IN GENERAL: AND ALSO, THE LAW RELATING TO INNKEEPERS, AS FAR AS RESPECTS THE RELATION SUBSISTING BETWEEN THEM AND THEIR GUESTS, &C. 51 (London 1819); and then citing Coggs v. Bernard (1703) 92 Eng. Rep. 107, 109); *see also id.* at 1345.

150. 3 BLACKSTONE, *supra* note 144, at 166 (emphasis added) (citing 1. Ventr. 333). This explains why the American jurist Irving Browne described that an innkeeper was "liable to an action for *not receiving*" as opposed to refusing. BROWNE, *supra* note 140, at 78 (emphasis added). One case suggests that English common law over a half-century after American founding may have developed in a different direction. *See Hawthorn v. Hammond* (1844) 1

Critically, the jurisprudence also suggests that early American courts were indifferent as to the *nature* of the barrier that obstructed patrons' equal enjoyment of the inn's services. Because the harm that courts recognized was denial of equal service to all comers, any barrier that obstructed equal enjoyment of an inn—whether it be the innkeeper's intentional denial of service or an unintentional obstruction—would have formed the basis for a lawsuit. And considering the importance that early American courts placed on information,[151] classes of people who could not equally enjoy an inn's services because of informational barriers—such as a lack of signs directing out-of-town travelers to entrances—would also have suffered a harm recognized by early American courts.[152] The recognition that all comers to an inn open to the public ought to be able to equally enjoy its services is critical to showing that disabled testers like Laufer have standing today.

2. Hotels' Reservations Websites Are Analogous to Inns

The first step in demonstrating that Laufer's inability to enjoy hotels' reservation websites as fully as nondisabled people is "close[ly] . . . analog[ous]" to the harm recognized by early American courts is to establish that hotels' websites bear a "close relationship" to inns, as defined by early American courts.[153] Yet this is fairly straightforward. As Blackstone, Story, Parsons, and Singer have detailed, the defining feature of inns at early American law was that they held themselves out as serving the public.[154] Hotels' websites share the same property. Like inns, hotels hold their reservations websites out as serving the public, including those living across the country and even the world. These reservations websites offer services, like the ability to reserve and pay for rooms, to *every* website visitor without purporting to offer their services selectively. Hotels' reservations websites are thus very similar to the inns that early American jurists analyzed.

The similarity between hotels' reservations websites and inns as defined under the common law is closer still because hotels' websites functionally substitute for a specific area of a physical inn: the front desk that offers reservation services. Early American litigants traveled to inns and reserved rooms at the front

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Car. & Kir. 404, 174 E.R. 866. But *TransUnion* narrowed *Spokeo*'s historical frame for common law analogues "in favor of a singular focus on 'American courts.'" Laufer v. Arpan LLC, 29 F.4th 1268, 1287 (11th Cir. 2022) (Newsom, J., concurring).

151. *See* 3 BLACKSTONE, *supra* note 144, at 165–166 (describing that patrons had a cause of action "if an inn-keeper . . . hangs out a sign and opens his house for travelers").

152. Although there is no perfectly on-point case from the early American tradition, legal scholars often employ the method used here—reasoning from the well-established principles behind a cause of action—to suggest that the cause of action was broader than the historical record reflects. *See, e.g.*, Singer, *supra* note 127, at 1291, 1298 (arguing that not only innkeepers and common carriers, but also retails stores had a duty to serve the public because they, too, held themselves out as serving the public).

153. TransUnion LLC v. Ramirez, 594 U.S. 413, 424 (2021).

154. *See supra* notes 132, 135.

desks. Today, Americans visit reservations website to view a hotel's available rooms, learn about pricing and availability, and make reservations. A reservations website may not provide all the services offered by a front desk of an early American inn, but such websites do provide many of the same services, often obviating the need to visit front desks altogether.

Beside the fact that hotels' websites serve the public at large and functionally substitute for inns' front desks, such websites also share other properties with inns. They have a location and an address, albeit in digital space.[155] Individuals can visit, navigate, exit, and revisit hotels' websites, just like inns. In fact, multiple individuals can do so simultaneously. And individuals can have emotional and psychological experiences on hotels' websites, just as they may in physical inns. Laufer herself claims to have had such experiences. Indeed, a rich tradition of Internet law scholarship has construed websites as *places* partly to appreciate the similarity of internet users' experiences in virtual and physical spaces.[156] As we all know, one can have experiences like making "friends" online and having spirited debates with them.[157] These metaphors establish that hotels' reservations websites are a crisp analogy to inns as defined by early American courts.

3. Laufer's Inability to Fully Enjoy Hotels' Reservations Websites Is Closely Related to the Harm Suffered by Early American Litigants

The next step in the argument requires demonstrating that Laufer's experiences on hotels' reservation websites closely resemble those of an early American plaintiff unable to equally enjoy an inn's services. This, too, is straightforward. Like the early American litigant, Laufer visited a space that held itself out as serving the public: the hotel's website. Like the early American litigant, Laufer entered the space and attempted to enjoy the services offered within: She navigated to the reservations page of the website, scrolled through it, and clicked on relevant links for information about the hotel's accessible entrances and handrails.[158] And like the early American litigant denied equal enjoyment of an inn's services, Laufer was unable to enjoy the reservations' website in the same manner as a nondisabled person. Because the website was informationally deficient—it lacked information about accessible entrances and handrails—Laufer

155. A website's address is called an IP (internet protocol) address.

156. *See, e.g.*, Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 359-60 (2003) (terming the "point of view of a user . . . logged on to the Internet" as the "internal perspective," from which individuals' experiences in digital spaces are materially similar to those in physical spaces); Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210, 211 (2007) (construing websites as akin to physical spaces).

157. *See* FACEBOOK, www.facebook.com (last visited Mar. 29, 2024); TWITTER, www.x.com (last visited Mar. 29, 2024).

158. *See* Complaint at *6a, Laufer v. Acheson Hotels, LLC., No. 20-cv-00344, 2021 WL 1993555 (D. Me. May 18, 2021). As Part IV.A.a explains, early American litigants who could enter an inn but were denied full enjoyment of the services once inside still suffered harm that provided the basis for a lawsuit

could not enjoy its services as a nondisabled person would, even though she could access it. The information deficiency impeded her *capacity* to make a meaningful reservation, as disabled people need such information to reserve hotel rooms. Realizing that she had been denied equal enjoyment, Laufer exited the website like an early American litigant leaving an inn in frustration. Laufer suffered exactly the kind of harm that an early American litigant did. She was denied equal enjoyment of a space that held itself out as serving the public—here, the hotel's website instead of a physical inn. This suffices to establish her harm as concrete injury in fact for Article III jurisdiction under the Supreme Court's precedents.

An opponent of standing might argue that Laufer's tester status throws a wrench in the analogy. After all, at the common law, only bona fide guests could sue innkeepers.[159] For example, the American jurist Irving Browne explained that only "guests" could bring an action against innkeepers, and "one becomes a guest by entering the inn and registering his name . . . *with the intention afterward* . . . of eating or lodging in the house."[160] Similarly, Justice Story noted that innkeepers are bound to entertain persons "for a reasonable compensation."[161] The opponent might adduce these examples to contend that because Laufer is not a bona fide guest—she visited the hotels' websites not to make a reservation but simply to determine whether they complied with the law—her experiences are not analogous to an early American litigant's.

Yet the tester-patron distinction is without a difference. As the Supreme Court has explained, plaintiffs alleging intangible harms do not need to demonstrate that the historical analogues which adduce are "exact duplicates" of a harm recognized by early American courts.[162] So long as the plaintiff's intangible harm bears a "close relationship" to a harm traditionally recognized, it will satisfy the Court's concrete injury in fact test under Article III.[163] The Court's decision in *TransUnion* itself exemplifies this latitude. As described above, the Court in *TransUnion* rejected the argument that plaintiffs had suffered concrete injury in fact simply because the defendant had allegedly violated the plaintiffs' rights under a statute. But the Court did find standing for several plaintiffs who argued that because the defendant had publicly disclosed "misleading" information about their credit profiles, their harm was analogous to the common law tort of defamation.[164] The Court expressly acknowledged that the plaintiffs' intangible injury was not a perfect fit. Defamation requires the publication of literally false information, but the defendant in *TransUnion* had only published misleading

159. *See* Peirsol, *supra* note 148, at 113.

160. BROWNE, *supra* note 140, at 77 (emphasis added).

161. STORY, *supra* note 135, § 476 at 311. *See also* Hall v. State, 4 Del. (4 Harr.) 132, 143–44 (1844) ("[A]n innkeeper is bound to receive all persons who are capable of paying a reasonable compensation for the accommodation provided.").

162. TransUnion LLC v. Ramirez, 594 U.S. 413, 424 (2021).

163. *Id.*

164. *Id.* at 433.

information about the plaintiffs. Yet the Court held that "the harm from a misleading statement of this kind bears a *sufficiently close relationship* to the harm from a false and defamatory statement."[165]

TransUnion clarified that any distinctions between a modern plaintiff's experiences and a historical analogue are legally salient only if they demonstrate that the plaintiff completely lacks an "essential" aspect of the historically recognized harm.[166] For example, in *TransUnion*, the Court held that those plaintiffs about whom misleading information had never been published at all did not have standing. Because their information remained hidden in private credit files, their intangible injury lacked an element "essential to liability" in a defamation suit: Publication.[167] In other words, while the plaintiffs whose misleading information had been published had suffered concrete injury in fact, those plaintiffs whose misleading information remained unpublished had not. In sum, the Court stressed that a modern plaintiff's intangible harm must be closely related to a historical analogue. But it only needs to be closely related. Not a duplicate.[168]

Laufer's harm is closely related to that experienced by an early American litigant, even if not a duplicate. Although Laufer was not a patron, she shares many of the same characteristics. Like a patron, Laufer accessed the space open to the public—the website in her case, as opposed to a physical inn. Like a patron, she entered the space, navigated it by scrolling through the website, and attempted to enjoy the services it offered within by searching for information about accessible entrances and handrails. And like a patron denied equal service, Laufer exited the website in frustration. In fact, one judge has observed that there is no objective difference between Laufer's actions and that of a patron.[169] The many similarities between Laufer and patrons thus render her akin to the

165. *Id.* (emphasis added).

166. *See id.* at 434.

167. *Id.*

168. Most courts of appeals have interpreted Supreme Court precedent to mean that plaintiffs' intangible injuries need only be similar in "kind, not degree" to a historical analog. *Compare* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 463 (7th Cir. 2020) (recognizing a kind, but not degree requirement), Robins v. Spokeo, Inc., 867 F.3d 1108, 1115 (9th Cir. 2017) (same), Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 690 (5th Cir. 2021) (same), Demarais v. Gurstel Chargo, P.A., 869 F.3d 685, 691 (8th Cir. 2017) (same), In re Horizon Healthcare Servs. Inc. Data Breach Litig., 846 F.3d 625, 639 (3d Cir. 2017) (same), Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 652–53 (4th Cir. 2019) (same), *and* Lupia v. Medicredit, Inc., 8 F.4th 1184, 1192 (10th Cir. 2021) (same), *with* Hunstein v. Preferred Collection and Mgt. Servs., Inc., 48 F.4th 1236, 1242 (11th Cir. 2022) (requiring plaintiffs to meet every "essential" element of the cause of action); *see also Hunstein*, 48 F.4th at 1264 (Newsom, J., dissenting) (describing the "kind-degree" framework). If the harm had to be an exact duplicate, then *TransUnion* would arguably impermissibly infringe on Congress' Article I powers to create new legal rights. For examples of such critiques, see Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349, 365–74 (2022) and Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of* TransUnion v. Ramirez, 101 B.U. L. REV. ONLINE 62, 64-66 (2021).

169. *See also* Laufer v. Arpan LLC, 65 F.4th 615, 617 (11th Cir. 2023) (Newsom, J., concurring) (arguing that Laufer and would-be travelers have *the exact same experience*).

plaintiffs in *TransUnion* whose misleading information was published.

The only difference between Laufer and a patron is that she lacked the *subjective intention* to patronize, but this difference does not make the harm Laufer experienced "essential[ly]" different from that suffered by early American patrons.[170] Laufer is far from the *TransUnion* plaintiffs whose information remained unpublished because unlike them, she *herself* experienced harm: the denial of equal enjoyment of services. If Laufer had not accessed the website or navigated it—for example, if she had sued simply after a friend had told her the website was informationally deficient—she would not have encountered any harm. But because Laufer accessed and used the website, she personally experienced the denial of equal service of a space open to the public. That is exactly the kind of harm that early American patrons experienced.

This section has argued that Laufer's inability to enjoy a hotel's reservations website as fully as a nondisabled person is closely analogous to a harm recognized by early American courts. Her experiences resemble those of an early American litigant who was denied equal enjoyment of the services of an inn. They do so because a hotel's reservations website is analogous to a physical inn—it is a space open to the public and offers similar services. Laufer's experiences are also analogous because like an early American patron, Laufer accessed the relevant space (the website), attempted to enjoy the services within, and was unable to do so equally—in her case, because the website was informationally deficient. The argument presented in this section establishes that Laufer's intangible harm passes the Supreme Court's history-and-tradition test for concrete injury in fact under Article III. This Note proceeds by presenting a second, different argument for why Laufer's intangible harm is concrete injury in fact under Article III.

B. Uploading the Architectural Barrier Cases to the Virtual World

The second argument for why Laufer's intangible harm is concrete injury in fact does not rely on a test articulated by Supreme Court precedents, but rather on unanimous courts of appeals' case law about what constitutes concrete injury in fact under Article III. These cases also concern disability rights testers. But they address a distinct fact pattern. They hold—universally—that a disabled individual suffers concrete injury in fact under Article III when she encounters a physical barrier which impedes her from enjoying a place that serves the public, like a hotel or restaurant. The argument is that this case law, when applied to internet testers like Laufer, dictates that they too suffer concrete injury in fact under Article III.

Accordingly, the strength of this argument depends on the enduring acceptance of this line of case law. Luckily, all courts of appeals have accepted these cases' holdings. And the Supreme Court has also suggested that the status

170. *TransUnion*, 594 U.S. at 434.

of these cases is not in dispute.[171] The argument presented in this section is therefore a viable alternative to the prior section's argument.

1. The Circuit Court Case Law

Courts of appeals unanimously agree that disabled individuals who encounter architectural barriers like the lack of wheelchair ramps at places which hold themselves out as serving the public suffer concrete injury in fact under Article III.[172] These litigants typically sue to force the establishments, like hotels and restaurants, to make "reasonable modifications" for disabled people under Title III of the ADA.[173] But courts recognize that regardless of the strength of the plaintiffs' Title III claims, they suffer an injury that clears the Article III threshold jurisdictional question.

In adjudicating such cases, courts have also held that disabled individuals who have no intention of patronizing the establishments suffer concrete injury in fact under Article III. For example, in *Nanni v. Aberdeen Marketplace*, a wheelchair-bound individual sued a shopping center alleging that "noncompliant curb ramps, [a] sidewalk ramp, and routes of travel caused him serious difficulties in safely navigating and accessing" it.[174] Even though the individual did not intend to purchase anything, the court held that he had suffered concrete injury in fact. It reasoned that "[a]rchitectural barriers, such as those identified here, result in exclusion, segregation, and other differential treatment of persons with disabilities."[175]

The case law also uniformly holds that disabled people suffer concrete injury in fact not only when architectural barriers impede them from *accessing* places which serve the public, but also when such barriers impede *equal enjoyment* of a place which is otherwise accessible.[176] For example, in *Mosley v. Kohl's*

171. Transcript of Oral Argument at 30–31, 88–89, Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023) (No. 22-429).

172. *See* Nanni v. Aberdeen Marketplace, Inc., 878 F.3d 447 (4th Cir. 2017); Houston v. Marod Supermarkets, Inc., 733 F.3d 1323 (11th Cir. 2013); Colorado Cross Disability Coal. v. Abercrombie & Fitch Co., 765 F.3d 1205 (10th Cir. 2014); Daniels v. Arcade, L.P., 477 F. App'x 125 (4th Cir. 2012); Suárez-Torres v. Panaderia y Reposteria España, Inc., 988 F.3d 542 (1st Cir. 2021); Mosley v. Kohl's Dep't. Stores, Inc., 942 F.3d 752 (6th Cir. 2019); Gaylor v. Hamilton Crossing CMBS, 582 F. App'x 576 (6th Cir. 2014); Civil Rights Educ. & Enf't Ctr. v. Hosp. Props. Tr., 867 F.3d 1093 (9th Cir. 2017); Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133 (9th Cir. 2002); Steger v. Franco, Inc., 228 F.3d 889 (8th Cir. 2000); Kreisler v. Second Ave. Diner Corp., 731 F.3d 184 (2d Cir. 2013); Camarillo v. Carrols Corp., 518 F.3d 153 (2d Cir. 2008).

173. 42 U.S.C. § 12182(b)(2)(A)(ii).

174. *Nanni*, 878 F.3d at 450.

175. *Id.* at 455.

176. *See Id.* at 450 (holding that architectural barriers affecting tester's ability to "safely *navigat[e]* and access[]" the shopping center deprived tester of "full and equal enjoyment" of the shopping center) (emphasis added); *Daniels*, 477 F. App'x at 129 (finding that "inaccessible restrooms" deprived plaintiff of the benefits of a market); *Suárez-Torres*, 988 F.3d at 546

Department Stores, Inc., a disabled tester who used a mobility device encountered "inaccessible doors; improperly spaced grab bars; and sinks, mirrors, and toilet-paper dispensers that … [were] too high" in the restroom of a department store.[177] The Sixth Circuit held that the tester had suffered concrete injury in fact.[178] Similarly, in *D'Lil v. Best Western Encina Lodge & Suites*, a paraplegic encountered structures that made it difficult for her to "maneuver in the front lobby and desk area" of a hotel even after she had entered.[179] Inside her room, "many of the facilities, including the door hardware, curtain and heating controls, and lamps were either too high or too far from a clear path of travel for her to use," and the bathroom contained an inaccessible bathtub.[180] The Ninth Circuit concluded that the individual had suffered concrete injury in fact under Article III and her case could proceed to the merits of her Title III statutory claim.[181]

Importantly for Laufer, courts have liberally construed the term "architectural barrier" to apply to information as well. Courts have held that when disabled individuals do not receive information that is necessary for them to enjoy an establishment as fully as nondisabled people, they suffer concrete injury in fact under Article III. For example, in *Steger v. Franco, Inc.*, a blind plaintiff sought to use the men's restroom in a café, "but was unable to locate it because the restroom was not marked with raised lettering, braille, or other signage that would identify it to a blind person."[182] The Ninth Circuit held that he had suffered concrete injury in fact.[183] Similarly, in *Kreisler v. Second Avenue Diner Corp.*, a wheelchair-bound individual was unable to enter a diner because of steps at the front entrance.[184] Even though the diner possessed a "small, portable, wooden ramp," the Second Circuit held that the diner's failure to display "a sign stating

(holding that "inadequate accessible parking, lack of accessible seating and service counters, and structural deficiencies in the accessible restroom" including a discriminatory policy of locking the accessible restroom led to unequal enjoyment of a bakery); *Colorado Cross*, 765 F.3d at 1208 (finding that even though disabled tester was able to enter a store, she was deprived of full enjoyment because she had to enter through a locked side door and had to ask employees to move tables and furniture); *Houston*, 733 F.3d at 1326, 1332 (holding that the lack of a "clear path of travel connecting all essential elements of the supermarket, and . . . restrooms that failed to comply with all necessary ADA regulations" and so discriminated against disabled tester); *Steger*, 228 F.3d at 893–94 (noting barriers including an "elevator that lacks audible signals and closes while people are in the doorway; stairs lacking proper handrails; tile flooring which does not meet slip-resistant standards; and a drinking fountain that obstructs a hallway" as discriminatory).

177. 942 F.3d at 755.

178. *Id.* at 761.

179. 538 F.3d 1031, 1034 (9th Cir. 2008).

180. *Id.*

181. *Id.* at 1041.

182. 228 F.3d at 891–92. The disabled individual in *Steger* was not a tester, but a patron, but that difference is immaterial here, as even a tester likely would've had standing due to exposure to the barrier.

183. *Id.* at 894.

184. 731 F.3d 184, 186 (2d Cir. 2013).

that a ramp is available" concretely injured the plaintiff under Article III.[185] And in *Camarillo v. Carrols Corp.*, a legally blind individual who could nonetheless read "enlarged writing at a very close distance" sued a restaurant that did not have "large print menus" for her to read.[186] The court held that the restaurant's failure to provide the plaintiff information about the menu deprived her of "full and equal enjoyment" of the facility.[187] Accordingly, she cleared the Article III jurisdictional hurdle because her experiences constituted concrete injury in fact.

These cases, which span multiple courts of appeals, stand for the following rule: When disabled individuals do not receive information which is necessary for them to be able to enjoy an establishment open to the public as fully as non-disabled people, they suffer concrete injury in fact under Article III. This is so even when disabled individuals do not intend to patronize the establishment and when they can otherwise *access* the establishment. As the next sub-section illustrates, applying this rule to Laufer's case dictates that she, too, suffers concrete injury in fact under Article III.

2. Applying the Circuit Court Case Law to Laufer's Fact Pattern

Under the rule unanimously adopted by courts of appeals regarding architectural barriers, Laufer suffers concrete injury in fact. This conclusion follows from two insights. First, hotels' reservations websites are closely analogous to hotels, restaurants, and the establishments that the circuit court case law concerns. As Part IV.A.a explained, hotels' reservations websites share the defining feature of establishments engaged in "public callings": They hold themselves out as open to the public.[188] Like hotels, reservations websites cater to individuals the world over. They do not select their customers but serve all visitors. Reservations websites are also similar to hotels in that they functionally substitute for a physical space: the front desk which provides reservations services. And hotels' reservations websites share other attributes with hotels. They have a location, are navigable, and offer a space for emotional and psychological experiences. Consequently, reservations websites are the kinds of spaces which the circuit court case law covers.

The second insight critical to appreciating why Laufer suffered concrete injury in fact is that Laufer encountered an informational barrier which inhibited her ability to enjoy a space open to the public. Laufer entered the relevant space—the website. She attempted to enjoy it—by scrolling through the reservations page and searching for accessibility information—in much the same way as the disabled testers in *Mosley* and *Colorado Cross* attempted to enjoy the retail

185. *Id.*

186. 518 F.3d 153, 154 (2d Cir. 2008) (per curiam).

187. *Id.* at 157. *See also* Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1136, 1138 (9th Cir. 2002) (finding that "inadequate signs" were accessibility barriers).

188. *See* Burdick, *supra* note 127, at 515; Singer, *supra* note 127, at 1304.

stores. But Laufer failed to receive information about accessible entrances and handrails which was necessary for her to enjoy the website as fully as a nondisabled person—just like the blind plaintiff in *Steger* failed to receive information necessary to enjoying the café because it lacked braille signs. In other words, Laufer encountered an informational deficiency which effectively operated as a barrier and prevented her from enjoying the reservations website as fully as a nondisabled person. Under the court of appeals' unchallenged precedent, her experiences therefore constitute concrete injury in fact. And, as noted above, Laufer's tester status does nothing to negate this conclusion.

This section has presented a second argument to establish that Laufer's inability to equally enjoy hotels' reservations websites constitutes concrete injury in fact under Article III. The argument draws on unchallenged precedent from courts of appeals and applies it to Laufer's case. It is worth noting that this precedent concerned different legal claims on the merits than Laufer's: The individuals in these cases sued under Title III of the ADA, while Laufer sued under the Reservation Rule. Yet the distinction is immaterial. Under the modern understanding of Article III, theories of standing are in some sense analytically distinct from the underlying legal claim that plaintiffs advance. Because Laufer's case is about standing, not about the merits of her case, this precedent can still apply to her and justify the theory of standing that this Note defends. The next section continues the defense of the theory presented by responding to the strongest objections.

C. Defending the Theory of Standing

The primary critique leveled against testers like Laufer is that if courts grant standing, that would open the floodgates of litigation.[189] Critics argue that "[o]ver the past decade, online accessibility lawsuits have grown exponentially" because of serial disability rights litigants, who have "progressively inundat[ed] the federal courts."[190] Critics lament that granting testers standing would contribute to such burdens, and perhaps even convert courts into a venue for the "vindication

189. Evelyn Clark, *Enforcement of the Americans with Disabilities Act: Remedying "Abusive" Litigation While Strengthening Disability Rights*, 26 WASH. & LEE J. C.R. & SOC. JUST. 689 (2020); Kagume, *supra* note 12, at 714.

190. Kagume, *supra* note 12, at 714 (citing Minh Vu, Kristina Launey & John Egan, *The Law on Website and Mobile Accessibility Continues to Grow at a Glacial Pace Even as Lawsuit Numbers Reach All-Time Highs*, ABA (Jan. 1, 2022), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2022/jf22/vu-launey-egan/); *see also* 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, 91 (2016); F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 89 (2012) ("A fourth objection to expanding standing to all risks of injury is that it would open the floodgates of litigation and overburden the federal dockets."); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 191 (2000) ("Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.").

of [plaintiffs'] value interests."[191] They argue that courts should deny such testers standing and prohibit them from entering federal court.

The critics fail to appreciate, however, that the theory of standing defended here imposes real constraints on who can sue. The theory only permits those testers who have personally encountered the informational deficiency on hotels' websites to pass Article III's concrete injury in fact test.[192] Litigants must themselves have accessed the reservations website, scrolled through the appropriate webpages, and determined that the website lacks information about accessible entrances, handrails, and the like. For example, Laufer browsed the entirety of hotels' websites and sued only once certain that the websites were informationally deficient.

The theory of standing defended here would not empower those testers who never themselves encountered the informational deficiency. For example, testers who never accessed reservations websites but sued simply because a friend had told them about the informational deficiencies would not suffer concrete injury in fact. Nor would those testers have standing who, despite accessing the website, failed to visit the appropriate webpages (such as the "Reservations" page), or search for information about accessible entrances and handrails in a reasonable manner. As both the arguments presented to justify this theory of standing recognize, a plaintiff who has not personally experienced harm does not suffer concrete injury in fact under Article III. The tester who sues based on hearsay is merely aware of someone else's harm but has not herself experienced differential treatment. She thus entirely lacks an essential aspect of early American patrons' harm because she did not herself access the space which served the public. And the tester who fails to appropriately search for accessibility information on the reservations website has not, like the testers in *Mosley* and *D'Lil*, personally "encountered" an accessibility barrier. Neither early American courts, nor today's courts of appeals would recognize standing in these hypotheticals.[193]

The theory of standing also only applies to websites. This Note has consistently construed hotels' reservations websites as *spaces* that hold themselves out as serving the public. That is because the historical case law and courts of appeals' precedent stand for the rule that those denied equal enjoyment of *spaces* which hold themselves out as serving the public suffer concrete injury in fact under Article III. Consequently, disabled individuals who claim they cannot obtain information about accessible entrances and handrails through *other services* offered by a hotel—like a telephone line—do not experience concrete injury in fact under this theory. After all, a telephone *service* is not akin to a *space* in the

191. Kagume, *supra* note 12, at 718 (citing United States v. SCRAP, 412 U.S. 669, 687 (1973)).

192. *See also* Allen v. Wright, 468 U.S. 737, 755 (1984) (requiring that a person must be "personally denied" equal treatment to have standing).

193. *See, e.g.*, Scherr v. Marriott Int'l, Inc., 703 F.3d 1069, 1075 (7th Cir. 2013) (holding that a disabled individual's mere awareness of an architectural barrier at a place that she has neither visited nor intends to visit is not concrete injury in fact under Article III).

same way that a reservations website is.[194] It does not have a location, is not navigable, and multiple individuals cannot simultaneously access it in the same way as a physical or digital website. Because disabled individuals must visit spaces to experience injury, they cannot claim concrete injury in fact when denied information through other services under this theory of standing.[195]

The theory of standing defended by this Note is also limited in that it only applies to websites that serve the public. It does not allow testers to sue for websites that selectively offer their services like "private clubs." As the English treatise writer, Frederick Charles Moncrieff, wrote, no duty arises "if a man claims to exercise an arbitrary selection of guests, and does not in any way advertise or outwardly profess to be a common innkeeper."[196] Website owners would likewise have no duty to make accommodations for disabled people if they were selective in their clientele. The significance of this limitation is appreciated in light of a trio of recent court of appeals' decisions.[197] In these cases, visually impaired testers sued credit unions under the ADA's Title III because their websites were incompatible with "screen reader" software and therefore inaccessible to them. The court held that the testers did not have standing. Under the theory presented in this Note, the same result would follow. Because the credit unions, unlike hotels, did not serve the public—they limited their clientele to policemen and government employees—they did not trigger the traditional common law duty to serve comers.

The theory of standing presented in this Note also only applies to disabled individuals. Nondisabled people are not typically inhibited from enjoying reservations websites that lack information about accessible entrances and handrails. Therefore, only disabled individuals will experience the unequal enjoyment of informationally deficient reservations websites necessary for concrete injury in fact under Article III. It is a separate question whether the theory *in general* empowers nondisabled people to sue when they do not receive information necessary to make purchasing decisions on websites. The answer is likely no. The unanimous circuit court precedent from Part IV.B.a on which the theory relies only contemplates standing for protected classes—here disabled people. And the theory also seems to foreclose use for nondisabled people for another reason. Because it is a theory of stigmatic harm, it relies on notions of *unequal*

194. *See* Alfred Avins, *What is a Place of "Public" Accommodation?*, 52 MARQ. L. REV. 1, 59 (1968) (describing the differences between services and spaces of places which serve the public).

195. The contrary view, that any service offered by a hotel, even one not akin to a physical space, must provide information necessary for disabled people to equally enjoy it is defended in Brief for Respondent, *supra* note 18, at 25. This view appears significantly more expansive.

196. *See* FREDERICK CHARLES MONCRIEFF, THE LIABILITY OF INNKEEPERS, 18 (London, W. Maxwell & Son, 1874); Marrazzo, *supra* note 128, at 762.

197. *See* Carello v. Aurora Policemen Credit Union, 930 F.3d 830 (7th Cir. 2019); Brintley v. Aeroquip Credit Union, 936 F.3d 489 (6th Cir. 2019); Griffin v. Dep't Lab. Fed. Credit Union, 912 F.3d 649 (4th Cir. 2019).

enjoyment. Nondisabled individuals who claim they were harmed by not receiving information must therefore demonstrate that the lack of information affected their capacity to enjoy the website as fully as *other* nondisabled people. This challenge seems harder to surmount.

In any event, the mechanics of federal court litigation constrain how widely litigants—disabled or nondisabled—can deploy this theory of standing in practice. As explained in Part II.A, a plaintiff must clear the Article III barrier of federal jurisdiction by demonstrating a concrete injury in fact *separately* from presenting a plausible legal claim on the merits. Consequently, even if a plaintiff successfully demonstrates concrete injury in fact, her legal case may still be meritless, and the court may dismiss it pursuant to a Rule 12(b)(6) motion. The possibility of a Rule 12(b)(6) dismissal would deter plaintiffs from filing meritless lawsuits in practice even if such plaintiffs could otherwise satisfy the concrete injury in fact test under Article III. These arguments demonstrate that critics' floodgates concerns are overblown.

Critics do not just raise weak objections, but also fail to appreciate that courts have more appropriate tools to penalize abusive litigants than by denying them standing. Rule 11 and other sanctions, for example, remain an excellent option to punish litigants who present frivolous claims designed to inundate courts or extract settlements from small businesses.[198] In recent years, courts even have begun successfully deploying sanctions.[199] For example, district courts in the Fifth, Ninth, and Eleventh Circuits have imposed pre-filing requirements upon abusive ADA litigants.[200] Given that Congress has specifically empowered courts to sanction abusive litigants, constricting standing doctrine is not the right remedy to abusive disability rights litigation.[201]

While some might argue that granting standing to disability rights testers is in tension with the Supreme Court's jurisprudential trend of narrowing standing for plaintiffs,[202] tester standing is here to stay. Even as the Court has tightened standing requirements in recent cases, it has reiterated the enduring validity of tester standing multiple times. It has done so by approvingly citing *Havens Realty*

198. *See* FED. R. CIV. P. 11; 28 U.S.C. § 1927 (2018) (providing that attorneys who "multipl[y] the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct"). *See also* Kagume, *supra* note 12, at 716 (describing that disability rights litigants often target small businesses and propose settlements).

199. *See* Clark, *supra* note 189, at 721.

200. *See* Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir. 2007); Mayes v. PTP Invs., No. 13-5475 , 2014 U.S. Dist. LEXIS 70369, at *13 (E.D. La. May 21, 2014) (following *Molski*); Segal v. Rickey's Rest. & Lounge, Inc., No. 11-61766, 2012 U.S. Dist. LEXIS 87379, at *19–20 (S.D. Fla. June 25, 2012) (same).

201. *See* Leslie Lee, *Giving Disabled Testers Access to the Federal Courts: Why Standing Doctrine Is Not the Right Solution to Abusive ADA Litigation*, 19 VA. J. SOC. POL'Y & L. 320, 343 (2012).

202. *See, e.g.*, TransUnion LLC v. Ramirez, 594 U.S. 413 (2021).

in several cases, one as recent as 2022.[203] The only justice who is skeptical of tester standing is Justice Thomas, who has suggested that testers violate Article II by acting as "private attorney general[s]."[204] Yet his view has gained little traction. Laufer's case simply presents an extension of well-established standing principles to society's next frontier: the internet.

CONCLUSION

This Note has analyzed an issue dividing courts of appeals. It has described courts' disagreement about whether disabled individuals suffer concrete injury in fact under Article III when they visit hotels' reservations websites despite having no intention of visiting the hotels. It has situated the disagreement in the context of the internet, illustrating that the courts denying standing have failed to appreciate that plaintiffs can suffer concrete harm solely through their online experiences, divorced from any physical component. The Note has also critiqued the reasoning of courts of appeals which have granted standing, demonstrating that their reasoning is doctrinally vulnerable.

This Note has then presented and defended a theory of concrete injury in fact which resolves courts' disagreement. It has argued that disabled people suffer an intangible harm when they visit hotels' reservations websites because even though they can access the websites, the websites are informationally deficient. They do not contain information about the hotel's accessible entrances, handrails, and the like. This information is critical for disabled people to be able to enjoy the reservations website in the same manner as nondisabled people. Disabled people's inability to do so constitutes a stigmatic harm.

The Note has offered two reasons for why this intangible harm is concrete injury in fact under Article III. First, it satisfies the Supreme Court's history-and-tradition test for concrete injury because the harm is analogous to that experienced by early American litigants who sued innkeepers for being unable to unequally enjoy an inn's services. Second, the Note argues that unanimous courts of appeals' precedent in a separate but factually analogous issue dictates that the disabled individuals in this case suffer concrete injury in fact under Article III. The precedent holds that disabled plaintiffs suffer concrete injury in fact when they encounter an architectural barrier which inhibits their ability to fully enjoy a place open to the public. Applied to this circuit split, the precedent dictates that disabled individuals who encounter informationally deficient websites also suffer concrete injury in fact under Article III. In sum, this Note demonstrates how plaintiffs can argue that modern, internet-based harms are concrete injury in fact despite a turn toward history and tradition in the Supreme Court's standing jurisprudence.

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203. *See* FEC v. Cruz, 596 U.S. 289, 297 (2022); Bank of Am. Corp. v. City of Miami, 581 U.S. 189, 197–98 (2017).

204. Acheson Hotels, LLC v. Laufer, 601 U.S. 1, 12 (2023) (Thomas, J., concurring).