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Comments

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INTRODUCTION

Deborah Laufer is a disabled Florida resident who cannot walk more than a few steps without an assistive device, so she makes her way around the world with the use of a cane or wheelchair.[1] She has "limited use of her hands," which impairs her ability to grasp objects, and she suffers from vision impairment.[2] Despite her physical limitations, Deborah has been planning a cross-country road trip since 2019.[3] Undoubtedly, such an excursion poses many obstacles for a person with limited mobility. Deborah requires accessible parking spaces close to facility entrances, and the adjacent access aisles must be wide enough for her to use a ramp to get in and

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1. Laufer v. Acheson Hotels, LLC, No. 2:20-CV-00344-GZS, 2021 WL 1993555, at *2 (D. Me. May 18, 2021).

2. *Id.*

3. *Id.*

out of her vehicle.[4] Anywhere she visits must provide paths connecting the accessible spaces, and those routes must be "level, properly sloped, [and] sufficiently wide" for her to transit.[5] Amenities, such as sinks and mirrors in hotels and tables in restaurants, must be lowered so that she can reach them.[6] She requires grab bars around toilets to safely transfer on and off of them from her wheelchair or cane.[7] Even unwrapped pipes "pose a danger of scraping or burning her legs."[8]

Unfortunately, the COVID-19 pandemic has delayed Deborah's long-awaited road trip, but she intends to embark on her travels once the pandemic subsides.[9] That is not to say that she hasn't kept busy. She has been planning her lodging—and filing more than six hundred lawsuits in fifteen states—in the meantime.[10]

More precisely, Deborah Laufer has been filing lawsuits against hundreds of hotels challenging the compliance of their online reservation systems with Americans with Disabilities Act (ADA) regulations that require the disclosure of certain accessibility information for places of lodging.[11] She is a self-proclaimed "advocate of the rights of similarly situated disabled persons" and "a 'tester' for the purpose of asserting her civil rights and monitoring, ensuring, and determining whether places of public accommodation and their websites are in compliance with the ADA."[12] In this context, a "tester" is an ADA-qualified disabled individual who visits places of public accommodation with the express purpose of seeking

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4. Complaint at 1–2, Laufer v. Newport Hotel Grp., LLC, No. 20-CV-00422-JJM-PAS (D.R.I. Sept. 23, 2020).

5. *Id.* at 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. Laufer v. Acheson Hotels, LLC, No. 2:20-CV-00344-GZS, 2021 WL 1993555, at *5 (D. Me. May 18, 2021).

10. Lotus Cannon & Minh Vu, *NY Federal Judge Puts the Kibosh on 17 Reservations Website Lawsuits Filed by Same Plaintiff*, JD SUPRA (July 8, 2021), https://www.jdsupra.com/legalnews/ny-federal-judge-puts-the-kibosh-on-17-9392946/ [https://perma.cc/KLS7-P5TV]; David Sharp, *Woman Files ADA Lawsuits Across US as 'Tester' of Compliance*, AP NEWS (Oct. 10, 2020), https://apnews.com/article/lifestyle-us-news-travel-lawsuits-maine-a8f3e01d3be1e9b94dd0c8faa59fa982 [https://perma.cc/3VX2-TE24].

11. *See* Sharp, *supra* note 10.

12. Complaint at 2, Laufer v. Newport Hotel Grp., LLC, No. 20-CV-00422-JJM-PAS (D.R.I. Sept. 23, 2020).

out and remedying ADA regulatory deficiencies through civil litigation.[13] While ADA tester litigants have traditionally visited physical places of public accommodation to remedy physical barrier violations, Laufer is a tester of a different and increasingly prevalent kind: she is a website tester seeking to remedy digital ADA noncompliance.

Laufer's pronouncement of her tester status might cast doubt on the veracity of her travel plans, but should it bear on the viability of her civil rights claims? Thus far, federal courts seem to think so—or, at least, the rate at which courts have dismissed Laufer's claims appears to indicate.[14] Unfortunately, the logical extension of the legal reasoning federal courts have used to dismiss Laufer's hotel website ADA compliance claims—namely, Article III standing doctrine—could have a detrimental precedential effect on how courts handle ADA tester standing generally, even in the context of physical barrier litigation.

In 2020, Laufer filed four ADA Title III complaints in the United States District Court for the District of Rhode Island against places of lodging in the state.[15] While each case was either voluntarily dismissed or settled before the court addressed the standing issue, defendants' standing challenges have succeeded in other courts in the First Circuit.[16] To encourage effective enforcement of the ADA, Rhode Island courts should retain their statutory grant analysis and interpret the statutory cause of action included in Title III of the ADA as a statutory grant of standing to aggrieved disabled litigants. Alternatively, Rhode Island courts should hold that tester status does not destroy injury in fact in ADA litigation and should interpret intent to return to the place of public accommodation broadly. These judicial determinations will help actualize the

13. Kelly Johnson, *Testers Standing Up for Title III of the ADA*, 59 CASE W. RES. L. REV. 683, 685 (2009).

14. *See, e.g.,* Laufer v. Mann Hosp., LLC, 996 F.3d 269 (5th Cir. 2021).

15. *See generally* Complaint, Laufer v. Newport Hotel Grp., LLC, No. 20-CV-00422-JJM-PAS (D.R.I. Sept. 23, 2020); Complaint, Laufer v. Shanti Hosp., Inc., No. 20-CV-00353-MSM-PAS (D.R.I. Aug. 13, 2020); Complaint, Laufer v. SAH Hosp., LLC, No. 20-CV-00352-MSM-PAS (D.R.I. Aug. 13, 2020); Complaint, Laufer v. Radha Krishna, LLC, No. 20-CV-00351-WES-PAS (D.R.I. Aug. 13, 2020).

16. *See, e.g.*, Laufer v. Acheson Hotels, LLC, No. 2:20-CV-00344-GZS, 2021 WL 1993555, at *2, *5 (D. Me. May 18, 2021). Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico comprise the First Circuit.

promise of access and civil rights for Americans with disabilities under the law that has been in effect and underenforced for more than thirty years.

Part I of this Comment outlines the background of the Americans with Disabilities Act and the role that tester litigation plays in its enforcement. Part II outlines federal standing doctrine, Rhode Island standing doctrine, and the differences between the two. Finally, Part III outlines the judicial decisions necessary to ensure effective enforcement of the ADA in Rhode Island.

I. THE AMERICANS WITH DISABILITIES ACT AND TESTER LITIGANTS

Congress enacted the Americans with Disabilities Act in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities . . . [and] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[17] Title III of the ADA (Title III) provides broad regulatory coverage to address discrimination on the basis of disability in places of public accommodation.[18] Title III broadly requires that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[19] While the Department of Justice may commence civil actions under Title III, enforcement has been primarily relegated to litigation by aggrieved disabled individuals.[20] However, despite the broad grant of statutory causes of action under Title III and its enacting regulations, aggrieved individuals with disabilities who bring civil actions under Title III are limited to recovering attorney's fees and injunctive relief.[21]

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17. 42 U.S.C. § 12101(b)(1)–(2).

18. Johnson, *supra* note 13, at 692–93.

19. 42 U.S.C. § 12182(a).

20. *See* Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. REV. 1, 10 n.34 (2006) ("the Department of Justice reached 107 public accommodations settlements in ten years—'less than one settlement a month by an agency charged with national enforcement'") (quoting RUTH COLKER, THE DISABILITY PENDULUM 192 (2005)).

21. 42 U.S.C. § 12188(a)(1)–(2).

Without an avenue for recovering statutory or compensatory damages that could make a single suit worthwhile for a disabled person who encounters a non-compliant accessibility barrier, potential Title III litigants have little incentive to pursue civil litigation to vindicate their rights.[22] Yet, a "cottage industry" has arisen around ADA "tester" litigation.[23] Testers are ADA-qualified disabled individuals who visit places of public accommodation with the express purpose of seeking out and remedying Title III regulatory deficiencies through civil litigation.[24] One federal court succinctly summarized the economics of the ADA tester "cottage industry":

> The scheme is simple: an unscrupulous law firm sends a disabled individual to as many businesses as possible, in order to have him aggressively seek out any and all violations of the ADA. Then, rather than simply informing a business of the violations, and attempting to remedy the matter through "conciliation and voluntary compliance," . . . a lawsuit is filed, requesting damage awards that would put many of the targeted establishments out of business. Faced with the specter of costly litigation and a potentially fatal judgment against them, most businesses quickly settle the matter.[25]

However "unscrupulous" the law firms filing Title III tester lawsuits might be, the net effect of the litigation is commercial-scale enforcement of the ADA where Department of Justice enforcement is lacking.[26] As the Ninth Circuit observed in a 2008 case addressing the issue of ADA tester litigant standing, "[f]or the ADA to yield

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22. *See generally* Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000).

23. Rodriguez v. Investco, LLC, 305 F. Supp. 2d 1278, 1280–81 (M.D. Fla. 2004).

24. Johnson, *supra* note 13, at 685.

25. Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004); *see also* Carri Becker, *Private Enforcement of the Americans with Disabilities Act Via Serial Litigation: Abusive or Commendable?*, 17 HASTINGS WOMEN'S L.J. 93, 97–99 (2006).

26. Bagenstos, *supra* note 20, at 30 (". . . the limited remedies [under Title III] have led to massive underenforcement of the ADA's public accommodations title, and they have left serial litigation as one of the only ways to achieve anything approaching meaningful compliance with the statute."). *See generally* Johnson, *supra* note 13, at 723 ("Tester standing is the solution to the severe underenforcement and continued willful violations of Title III.").

its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA."[27]

Since the beginning of the COVID-19 pandemic, ADA tester litigation under a relatively innocuous provision of the ADA's enacting regulations concerning hotel online reservation systems (ORS) has taken federal courts by storm.[28] The ORS regulation, 28 C.F.R. § 36.302(e)(ii), requires that:

> A public accommodation that owns, leases (or leases to), or operates a place of lodging shall, with respect to reservations made by any means, including by telephone, in-person, or through a third party . . . [i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs.[29]

Seemingly, tester litigants seeking to exercise their private right of action to enforce the ORS regulation need only visit a hotel or motel's website and encounter a non-compliant description of ADA-compliant facilities to give rise to a cognizable claim.[30] However, disabled individuals seeking injunctive relief and attorney's fees under the ORS regulation in federal courts have faced a pivotal jurisdictional barrier common to physical barrier ADA tester litigants: Article III standing.[31]

Traditionally, ADA testers have had to clear two significant hurdles to establish standing in federal courts: injury in fact that is "concrete" under *Lujan v. Defenders of Wildlife*[32] and "real and

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27. D'Lil v. Best W. Encina Lodge & Suites, 538 F.3d 1031, 1040 (9th Cir. 2008) (quoting Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir. 2007)).

28. *See, e.g.,* Laufer v. Acheson Hotels, LLC, No. 2:20-CV-00344-GZS, 2021 WL 1993555, at *2 (D. Me. May 18, 2021); Sarwar v. Om Sai, LLC, No. 2:20-CV-00483-GZS, 2021 WL 1996385, at *2 (D. Me. May 18, 2021).

29. 28 C.F.R. § 36.302(e)(1), (e)(1)(ii) (2022).

30. *See id.*

31. *See* Johnson, *supra* note 13, at 685.

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

immediate" under *City of Los Angeles v. Lyons*.[33] Recently, two U.S. Supreme Court decisions amplifying the injury in fact requirement—*Spokeo, Inc. v. Robins*[34] and *TransUnion LLC v. Ramirez*[35]—threaten all ADA tester litigant standing in federal courts.

II. FEDERAL AND RHODE ISLAND STANDING DOCTRINE

A. *Article III Standing: Concrete and Particularized Injury in Fact*

The U.S. Supreme Court announced the modern analytical framework for Article III standing in *Lujan*,[36] in which environmental groups brought an action against the Secretary of the Interior seeking a declaration that a recently promulgated regulation violated the Endangered Species Act (ESA).[37] The ESA included a citizen suit provision that "any person may commence a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter."[38] The sole issue on appeal was whether the environmental groups had standing to seek judicial review of the regulation.[39] Writing for the majority, Justice Scalia outlined three elements that constitute the "irreducible constitutional minimum of standing" under Article III of the Constitution: injury in fact, causation, and redressability.[40] The Court explained that the first prong, injury in fact, requires "an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical."[41] The causation prong requires that "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the

33. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
34. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016).
35. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).
36. *Lujan*, 504 U.S. 555.
37. *Id.* at 557–58.
38. *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g)).
39. *Id.* at 558.
40. *Id.* at 560–61.
41. *Id.* at 560 (internal citations and quotations omitted).

challenged action of the defendant.'"[42] The redressability prong requires that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"[43]

Applying the injury in fact requirement to the case in *Lujan*, the Court explained that the plaintiffs' "generalized grievance" concerning government compliance with the ESA and their "some day" intentions to visit foreign lands to observe endangered species adversely affected by the recently promulgated regulation were not sufficiently concrete or particularized to confer Article III standing.[44] The Court rejected the Eighth Circuit's standing analysis which concluded that because the citizen-suit provision of the ESA created a "procedural right" to "any person," anyone could sue to vindicate the procedural requirements of the ESA.[45] The Court held that generalized public interest in "proper administration of the law" cannot be "converted into an individual right by a statute that denominates it as such, and that permits all citizens . . . to sue," wholly apart from any particularized harm.[46]

In a 1983 article, Antonin Scalia distilled the Article III standing doctrine down to one succinct question: "[w]hat is it to you?"[47] As the *Lujan* court focused primarily on the "particularized" element of the injury in fact analysis, "most courts and scholars focused on the second part of that rude question; 'What's it *to you*?'"[48] However, after the Supreme Court's 2016 decision in *Spokeo, Inc. v. Robins* that dealt heavily in the "concrete" element of the *Lujan* decision, "the focus shifted to the first part of the question: '*what is it* to you?'"[49]

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42. *Id.* (quoting Simon v. E. Kentucky Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

43. *Id.* at 561(quoting *Simon*, 426 U.S. at 38, 43).

44. *Id.* at 564, 573–74.

45. *Id.* at 572–73.

46. *Id.* at 576-577.

47. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) ("The Supreme Court has described standing as "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."' In more pedestrian terms, it is an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'").

48. Richard L. Heppner Jr. *Statutory Damages and Standing After* Spokeo v. Robins, 9 CONLAWNOW, 125, 128 (2018).

49. *Id.*

In *Spokeo, Inc. v. Robins* (2016), the Supreme Court addressed the issue of whether the defendant's alleged violations of the Fair Credit Reporting Act's (FCRA) procedural requirements constituted a concrete injury sufficient to satisfy the injury in fact prong of Article III standing analysis.[50] The FCRA "regulates the creation and the use of 'consumer report[s]' by 'consumer reporting agenc[ies]' for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment."[51] Additionally, the FCRA includes a provision for a private right of action and statutory damages of "not less than $100 and not more than $1,000" for willful failure to comply with the Act as an alternative to actual damages.[52] The plaintiff alleged that Spokeo qualified as a "consumer reporting agency" because the company operated a service that allowed users to search for other individuals' "address, phone number, marital status, approximate age, occupation, hobbies, finances, shopping habits, and musical preferences."[53] The plaintiff discovered that a search of himself on Spokeo's website rendered entirely inaccurate information, including that he was married, in his 50s, employed, wealthy, and had a graduate degree.[54] The plaintiff alleged that he suffered "[imminent and ongoing] actual harm to [his] employment prospects" as a result of the inaccurate information.[55]

The Court ultimately vacated and remanded the Ninth Circuit's decision (which held that plaintiff had established Article III standing) because it did not analyze the "concrete" and "particularized" elements independently—relying solely on the "particularize" element to confer standing.[56] The Court reasoned that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have

50. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544 (2016).
51. *Id.* at 1545.
52. 15 U.S.C. § 1681n(a)(1)(A).
53. *Spokeo*, 136 S. Ct. at 1546.
54. *Id.* at 1554 (Ginsburg, J., dissenting).
55. *Id.* (Ginsburg, J., dissenting) (alteration in original).
56. *Id.* at 1550 (majority opinion); *see* Robins v. Spokeo, Inc., 742 F.3d 409, 412 (9th Cir. 2014) ("Congress's creation of a private cause of action to enforce a statutory provision implies that Congress intended the enforceable provision to create a statutory right . . . . the violation of a statutory right is usually a sufficient injury in fact to confer standing.").

standing."[57] Furthermore, for the purpose of evaluating the "concreteness" requirement for an "intangible harm," the Court explained that:

> Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.[58]

The Court emphasized that a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury in fact requirement of Article III."[59] In this context, a "procedural violation" is a violation of a procedural right granted by Congress that does not necessarily constitute a concrete injury sufficient to satisfy Article III standing.[60] Surprisingly, given the length of the Court's opinion dedicated to the meaning of "concrete and particularized" injury and a strong implication that the majority did not believe the plaintiff satisfied the "concreteness" prong, the Court did not address whether the plaintiff satisfied Article III standing.[61] However, the Court's apparent trepidation didn't last long.

In 2021, the Supreme Court once again addressed the "concreteness" element of injury in fact in the context of statutorily created private rights of action under the FCRA in *TransUnion LLC v. Ramirez*.[62] At issue in the case was whether certain plaintiffs in a large class action had standing to sue under the FCRA, which created a statutory cause of action for certain violations concerning reasonable procedures for reporting credit information.[63] TransUnion had tagged all of the class members' credit reports with an alert that suggested each individual's name matched a name on

57. *Spokeo*, 136 S. Ct. at 1547–48.

58. *Id.* at 1549.

59. *Id.*

60. *See id.* at 1550 ("[plaintiff] cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm.").

61. *See id.*

62. TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021).

63. *Id*. at 2203.

a list "maintained by the U. S. Treasury Department's Office of Foreign Assets Control (OFAC) of terrorists, drug traffickers, and other serious criminals."[64] The relevant part of the decision discussed whether class members whose credit reports TransUnion had not transmitted to third parties had suffered a concrete injury in fact to satisfy Article III standing. While the Court generally echoed its prior decision in *Spokeo*, the Court somewhat clarified the meaning of the *Spokeo* rule:

> For standing purposes . . . an important difference exists between (i) a plaintiff 's statutory cause of action to sue a defendant over the defendant's violation of federal law, and (ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law. Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been concretely harmed by a defendant's statutory violation may sue that private defendant over that violation in federal court.[65]

The Court reasoned that the class members whose credit report had been transmitted to third parties satisfied the *Spokeo* "concreteness" standard because the dissemination of the incorrect credit reporting data bore a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation."[66] However, the Court held that those class members whose credit reports TransUnion had not provided to third parties did not suffer a concrete injury and did not establish Article III standing.

B. *Applying the* Spokeo *and* TransUnion *Injury in Fact Analysis to ADA Tester Claims*

The injury in fact analysis announced in *Spokeo* and *TransUnion* has potentially devastating effects for ADA tester litigation in federal courts—specifically in cases involving digital places of

64. *Id.* at 2201.
65. *Id.* at 2205.
66. *Id.* at 2208 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

public accommodation, though not necessarily exclusively. Many federal courts have dismissed website accessibility tester cases for lack of concrete injury in fact in the wake of the *Spokeo* decision.[67] While, to date, courts have only applied the *Spokeo* injury in fact standard to dismiss website accessibility tester litigation, the logic courts sometimes apply to distinguish these cases from physical barrier Title III litigation is flimsy, if not entirely flawed. For example, the United States District Court for the Northern District of New York explained the distinction as follows:

> The injury experienced by an ADA tester plaintiff who encounters a discriminatory barrier to access at a physical location—regardless of her motivation for visiting the premises—is "concrete" because the barrier directly bars her from "full and equal" enjoyment of the facilities on equal footing with nondisabled individuals, and is "particularized" because it affects her in a unique, individualized way that is not experienced by other disabled individuals who may be aware of and offended by the premises' violations, but never travel to or try to access the premises . . . . By contrast, an ADA tester who encounters a hotel ORS that fails to comply with § 36.302(e)(1) certainly may suffer the type of "dignitary" and "informational" injuries Plaintiff complains of here; however, if the tester has no actual desire to use the ORS for any purpose, and the information required by § 36.302(e)(1) has no actual specific relevance to the tester beyond her generalized desire to find and redress ADA violations, those injuries are no more concrete or particularized than the injuries suffered by any disabled individual who happens to stumble across a non-compliant website while surfing the internet from the comfort of their home.[68]

In this instance, the court seems to assume that an ADA tester plaintiff who visits a physical place of public accommodation to seek out a Title III violation has the dual purpose of enjoying the facilities she is testing. That is not necessarily the case, particularly if

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67. *See, e.g.,* Laufer v. Mann Hosp., LLC, 996 F.3d 269, 272 (5th Cir. 2021) (dismissing for lack of concrete injury).

68. Laufer v. Dove Hess Holdings, LLC, No. 520CV00379BKSML, 2020 WL 7974268, at *13 (N.D.N.Y. Nov. 18, 2020) (citation omitted).

the Title III plaintiff is a true "tester," as originally contemplated in the landmark Supreme Court decision that granted tester standing in the context of the Fair Housing Act, *Havens Realty Corporation v. Coleman*.[69] In fact, the informational injury described in the latter example bears a closer resemblance to the facts of *Havens* than does the physical barrier example.[70] In proffering such a scant distinction between physical and digital ADA tester litigation, courts seem to be fooled by the unsympathetic (digital barrier) trojan horse that could deprive the more sympathetic (physical barrier) tester litigant of Article III standing if courts apply the same analysis in both situations.

C. *Article III Standing: Actual or Imminent Injury in Fact*

City of Los Angeles v. Lyons[71] was the U.S. Supreme Court's touchstone for the "actual or imminent" element of the Article III injury in fact analysis in the context of injunctive relief outlined in *Lujan*.[72] In *Lyons*, the respondent sought injunctive relief against the use of police chokeholds "except in situations where the proposed victim of said control reasonably appears to be threatening the immediate use of deadly force."[73] A police officer had put Adolph Lyons, the original plaintiff, in a chokehold during a traffic stop while he "offered no resistance or threat whatsoever."[74] The chokehold rendered Lyons unconscious and damaged his larynx.[75] Lyons alleged that:

> [T]he city's police officers, "pursuant to the authorization, instruction and encouragement of defendant City of Los Angeles, regularly and routinely apply these choke holds in innumerable situations where they are not threatened by the use of any deadly force whatsoever," that numerous persons have been injured as the result of the application

69. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982) ("'[T]esters' are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices.").

70. *See id.*

71. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

72. *See generally* Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

73. *Lyons*, 461 U.S. at 98.

74. *Id.* at 97.

75. *Id.* at 98.

> of the chokeholds, that Lyons and others similarly situated are threatened with irreparable injury in the form of bodily injury and loss of life, and that Lyons "justifiably fears that any contact he has with Los Angeles police officers may result in his being choked and strangled to death without provocation, justification or other legal excuse."[76]

The Court held that a plaintiff may not seek injunctive relief "[a]bsent a sufficient likelihood that he will again be wronged in a similar way."[77] While Lyons had standing to claim damages against the city and individual officers involved in the incident, he did not have standing to seek injunctive relief because he could not show "a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part."[78] His alleged future injury was "conjectural" or "hypothetical" rather than "real and immediate" and did not satisfy Article III standing to seek injunctive relief.[79] The Court noted that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[80]

In the context of Title III litigation, the *Lyons* decision bears on a plaintiff's ability to establish standing to seek injunctive relief by requiring the plaintiff to "demonstrate a likelihood that he will suffer future discrimination at the hands of the defendant."[81] Additionally, overarching the ADA tester standing analysis is the *Lujan* Court's comment concerning the interests of the environmental group's desire to "some day" visit the foreign environments to witness the wildlife: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."[82]

Courts have analyzed the "likelihood of future discrimination" issue differently in the contexts of physical and digital barrier Title

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76. *Id.*
77. *Id.* at 111.
78. *Id.* at 105.
79. *Id.* at 102.
80. *Id.* (quoting O'Shea v. Littleton, 414 U.S. 488, 495–96 (1974)).
81. Gregory v. Otac, Inc., 247 F. Supp. 2d 764, 770 (D. Md. 2003).
82. Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992).

III litigation. In litigation involving physical barriers, courts require a plaintiff to show an intent to return to the premises to "demonstrate a likely future harm."[83] When assessing the plausibility of a plaintiff's intent to return, courts weigh several factors, including: "(1) the plaintiff's proximity to the defendant's place of public accommodation; (2) the plaintiff's past patronage; (3) the definiteness of the plaintiff's plan to return; and (4) the plaintiff's frequency of nearby travel."[84] However, in the context of Title III litigation involving digital barriers, courts must consider the issue of what "intent to return" means when the digital barrier is present wherever a plaintiff has an internet connection. Some courts have held that a non-compliant website that reasonably deters a plaintiff from frequenting a physical place of public accommodation is enough to confer standing under the "actual or imminent" prong of the Article III injury in fact requirement solely on the basis of the deterrence—without regard to any actual intent to visit the physical premises at any future date.[85] Under this analysis, "intent to

83. Norkunas v. Park Rd. Shopping Ctr., Inc., 777 F. Supp. 2d 998, 1002 (W.D.N.C. 2011) ("In order to demonstrate a likely future harm, Plaintiff must demonstrate an intention to return to the Park Road Shopping Center.").

84. *Id.*; *see also, e.g.,* Access 4 All, Inc. v. Wintergreen Com. P'ship, Ltd., No. CIV.A.3:05-CV-1307-G, 2005 WL 2989307, at *3 (N.D. Tex. Nov. 7, 2005) ("When analyzing this likelihood of return, courts have examined such factors as: (1) the proximity of the defendant's business to the plaintiff's residence, (2) the plaintiff's past patronage of the defendant's business, (3) the definitiveness of the plaintiff's plans to return, and (4) the plaintiff's frequency of travel near the defendant."); D'Lil v. Stardust Vacation Club, No. CIV-S-00-1496DFL PAN, 2001, WL 1825832, at *3 (E.D. Cal. Dec. 21, 2001) ("In determining whether the plaintiff's likelihood of return is sufficient to confer standing, courts have closely examined factors such as: (1) the proximity of defendant's business to plaintiff's residence, (2) the plaintiff's past patronage of defendant's business, (3) the definitiveness of plaintiff's plans to return, and (4) the plaintiff's frequency of travel near defendant.").

85. Laufer v. T & C Inn, LLC, No. 20-CV-3237, 2021 WL 1759263, at *5 (C.D. Ill. May 4, 2021) (denying motion to dismiss for lack of standing) ("This threat of future injury can be shown by an intent to return to or use the public accommodation . . . but the threat can also be shown by establishing that the plaintiff is reasonably deterred from the accommodation because of the discrimination."); *see also* Poschmann v. Fountain TN, LLC, No. 219CV359FTM99NPM, 2019 WL 4540438, at *2 (M.D. Fla. Sept. 19, 2019) ("Plaintiff's ADA claim is based upon the Fountain Cottages Inn's website failing to identify the accessible features of the motel and its rooms, in violation of 28 C.F.R. § 36.302(e)(1)(ii). Therefore, the relevant 'future injury' inquiry relates to the motel's website and reservation system, rather than the motel's physical property.").

return" relates only to the plaintiff's plausible intent to return to the *website*.[86] Other courts, however, have held that "when challenging ADA violations on a website, a plaintiff must allege a specific and individualized reason for accessing and using the website in order to allege a past or future injury for standing purposes."[87] Ostensibly, intent to return to the website *for the purpose of testing its ADA compliance* is not enough without an intent to use the website for the purpose of accessing the physical premises or services offered there within.

If courts read *Lyons* too broadly in Title III website litigation, the logical application of the rule to physical barrier litigation could render Title III wholly unenforceable by true physical barrier tester litigants. Denying standing to testers seeking to enforce ADA website regulations by requiring the plaintiff to show a purpose for accessing the website again in the future beyond testing it for ADA compliance could open the door to denying standing to ADA testers who visit physical places of accommodation for the sole purpose of testing their ADA compliance. If courts require a litigant suing to challenge a hotel website's ADA compliance to show a *purpose* for visiting the website beyond testing its compliance again in the future, would courts not also require a litigant suing to challenge a physical premises' ADA compliance—such as a parking space that is too narrow or accessibility ramp that is too steep—to show a *purpose* for visiting the premises beyond testing its compliance? A "purpose" requirement attached to the "intent to return" analysis

86. For readability, throughout this comment, "intent to return," in quotations, will refer to the additional element courts require Title III plaintiffs to satisfy to establish standing to seek injunctive relief under *Lyons* and its Title III progeny. *See* Laufer v. T & C Inn, LLC, No. 20-CV-3237, 2021 WL 1759263, at *4 (C.D. Ill. May 4, 2021) ("This threat of future injury can be shown by an intent to return to or use the public accommodation").

87. Laufer v. Dove Hess Holdings, LLC, No. 520CV00379BKSML, 2020 WL 7974268, at *11 (N.D.N.Y. Nov. 18, 2020), *motion to certify appeal denied*, No. 520CV00379BKSML, 2021 WL 365881 (N.D.N.Y. Feb. 3, 2021). *See* Griffin v. Dep't of Lab. Fed. Credit Union, 912 F.3d 649, 656 (4th Cir. 2019) ("[Status as an ADA tester] cannot create standing in the absence of an otherwise plausible assertion that a return to the website would allow [the plaintiff] to avail himself of its services."); Carello v. Aurora Policemen Credit Union, 930 F.3d 830, 834-35 (7th Cir. 2019) (quoting Griffin, 912 F.3d at 656) (Without "an otherwise plausible assertion that a return to the website would allow [him] to avail himself of [the Credit Union's] services," Carello is no more entitled to an injunction than any other interested citizen.).

under the "actual or imminent" prong of Article III injury in fact seems to defeat the intent of the Supreme Court's decision in *Havens Realty Corporation v. Coleman*, which allowed for tester standing in the context of the FHA, and by proxy, tester standing generally.[88]

D. *Existing Rhode Island Standing Doctrine*

Fortunately, though the ADA is a federal statute, federal courts are not the only available forum for Title III enforcement. Even if an ADA tester litigant cannot establish standing in a federal court under the strict Article III standing analysis, that litigant might still have standing in a state court because Article III standing requirements do not apply to state courts. In some instances, the space between state and federal standing doctrine can lead to the paradox of exclusive state-court jurisdiction over federal claims.[89] While a defendant may remove state court actions based on federal claims to federal court if the latter has original jurisdiction over the action, where Article III standing doctrine would bar the plaintiff's claim, the defendant is prohibited from removing the action from state court.[90]

Rhode Island courts have traditionally followed federal standing doctrine closely, but not precisely. The Rhode Island Constitution does not contain a "case and controversy" requirement to exercise judicial power.[91] However, the Rhode Island Supreme Court has made it clear that "[s]tanding is a threshold inquiry into whether the party seeking relief is entitled to bring suit."[92] In fashioning the State's standing analysis, the Rhode Island Supreme Court frequently looks to federal standing doctrine and has adopted many aspects of Article III standing. Particularly, the Rhode Island Supreme Court has adopted the Article III injury in fact requirement, defining injury in fact by quoting *Lujan* directly: "an invasion

88. Havens Realty Corp. v. Coleman, 455 U.S. 363, 375–76, 381–82 (1982).

89. *See generally* Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211 (2021).

90. *Id.*

91. R.I. Ophthalmological Soc'y v. Cannon, 317 A.2d 124, 130 (R.I. 1974) ("Unlike the United States Constitution, there is no express language in the Rhode Island constitution which confines the exercise of our judicial power to actual 'cases and controversies.'"). *See generally* R.I. CONST. art. X.

92. Narragansett Indian Tribe v. State, 81 A.3d 1106, 1110 (R.I. 2014).

of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.'"[93] Furthermore, while the Rhode Island Supreme Court has not adopted the *Lyons* analysis for standing to seek injunctive relief directly, Rhode Island courts have applied a similar analysis for evaluating standing, stating that "injuries that are prospective only and might never occur cannot form the basis of a permanent injunction" and that "[s]urmise alone cannot afford the basis for injunctive relief."[94]

Despite Rhode Island's standing analysis following many principles of Article III standing, it diverges from federal standing analysis in one crucial aspect: when the U.S. Supreme Court doubled down on its injury in fact analysis in *Spokeo* and *TransUnion*, the Rhode Island Supreme Court explicitly held the door open for statutory grants of standing devoid of injury in fact.[95] On the same day that the U.S. Supreme Court announced its *TransUnion* decision in June of 2021, the Rhode Island Supreme Court announced its decision in *Epic Enterprises LLC v. 10 Brown & Howard Wharf Condominium Association*.[96] Quoting a 2005 decision of the same court, the Rhode Island Supreme Court affirmed that "[a] party acquires standing either by suffering an injury in fact *or as the beneficiary of express statutory authority granting standing*."[97]

In *Tanner v. Town Council of Town of East Greenwich*, the Rhode Island Supreme Court determined that a Rhode Island

93. Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997) ("We described our standing requirement as 'whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise' . . . . Sometimes referred to as the 'injury in fact' requirement . . . .") (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992)).

94. R.I. Tpk. & Bridge Auth. v. Cohen, 433 A.2d 179, 182, 184 (R.I. 1981); *see* Boyer v. Bedrosian, 57 A.3d 259, 271 n.27 (R.I. 2012) (quoting Los Angeles v. Lyons, 461 U.S. 95 (1983) ("[P]ast exposure to harm will not, in and of itself, confer standing upon a litigant to obtain equitable relief '[a]bsent a sufficient likelihood that he will again be wronged in a similar way.'"); Di Chiara v. Town Council, Town of Johnston, No. P.C. 87-0728, 1987 WL 859814, at *2 (R.I. Super. Apr. 24, 1987) (citing Los Angeles v. Lyons, 461 U.S. 95 (1983)) ("[I]n order for injury to be irreparable it must be presently threatened or imminent and not merely speculative or past harm never capable of occurring again.").

95. *See* Epic Enters. LLC v. 10 Brown & Howard Wharf Condo. Ass'n, 253 A.3d 383 (R.I. 2021).

96. *Id.*

97. *Id.* at 388 (emphasis added) (quoting Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 792 (R.I. 2005)).

statute requiring certain public notices for meetings of public bodies provided a statutory grant of standing devoid of injury in fact.[98] The statute broadly stated that "[a]ny citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general."[99] The court explained that "in statutory standing cases, such as this, the analysis consists of a straight statutory construction of the relevant statute to determine upon whom the Legislature conferred standing and whether the claimant in question falls in that category." After determining that the purpose of the statutes was to "protect the public's right to participate in the political process," the court held that the plaintiff, who was merely a resident of the defendant town, did not need "to possess a personal stake or interest in the substance of the meeting to assert a right to attend a meeting of a public body."[100]

Therefore, at present, plaintiffs may establish standing in Rhode Island courts by either satisfying the injury in fact analysis common to Rhode Island and federal standing doctrine or establishing that the plaintiff is "the beneficiary of express statutory authority granting standing."[101] However, plaintiffs seeking injunctive relief in Rhode Island courts must still satisfy an "imminency" element similar to the federal standing analysis under *Lyons*. Namely, the alleged injury cannot be "prospective only" and uncertain to occur.[102]

III. ENSURING RHODE ISLAND STANDING DOCTRINE IS ACCESSIBLE TO ADA TESTER LITIGANTS

The Rhode Island Supreme Court has only heard one Title III case since the ADA came into effect in 1990, but the court did not address the issue of standing in that case.[103] Therefore, the question of ADA tester litigant standing is still an open question in

98. *Tanner*, 880 A.2d at 792–93.

99. *Id.* at 792.

100. *Id.* at 792 n.6.

101. Epic Enters. LLC v. 10 Brown & Howard Wharf Condo. Ass'n, 253 A.3d 383, 388 (R.I. 2021) (emphasis added) (quoting Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 792 (R.I. 2005)).

102. R.I. Tpk. & Bridge Auth. v. Cohen, 433 A.2d 179, 182 (R.I. 1981).

103. Marques v. Harvard Pilgrim Healthcare of New Eng., Inc., 883 A.2d 742 (R.I. 2005).

Rhode Island courts. In the wake of the federal standing doctrine the U.S. Supreme Court expounded upon in *Spokeo* and *TransUnion*, cases involving Title III website litigation could be coming to Rhode Island state courts as the U.S. District Court for the District of Rhode Island dismisses them for lack of standing. To guarantee standing for physical barrier litigation, and to prevent the extension of the restrictive standing analysis federal courts have employed to dismiss website tester litigation, Rhode Island courts should bulwark ADA tester standing in website litigation to ensure access for all disability litigation in Rhode Island.

A. *Rhode Island Courts Should Reject the Strict Federal Spokeo/TransUnion Standing Analysis and Retain Rhode Island's Existing Statutory Grant Analysis*

While the Rhode Island Supreme Court has traditionally adhered closely to federal standing analysis trends, the court should reject the U.S. Supreme Court's restrictive standing analysis espoused in *Spokeo* and *TransUnion* that specifically foreclosed Congress's ability to grant standing to litigants for injuries not closely related to traditional causes of action under common law.[104] As previously discussed, Rhode Island courts are not bound by Article III standing analysis. Additionally, Rhode Island courts are not restricted by any "case and controversy" requirement in the Rhode Island Constitution to exercise judicial power.[105] To give effect to the ADA—and statutory civil rights litigation that does not bear a close relationship to traditional causes of action under common law generally—the Rhode Island Supreme Court should retain its existing standing analysis that includes an avenue for statutory grants of standing devoid of concrete injury in fact.[106]

However, the U.S. Supreme Court's exclusion of statutory grants of standing, and the argument for amending Rhode Island standing doctrine in accordance, is not without merit. If the Rhode

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104. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2205 (2021); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

105. R.I. Ophthalmological Soc'y v. Cannon, 317 A.2d 124, 130 (R.I. 1974); *see* R.I. CONST. art. X.

106. *See* Epic Enters. LLC, 253 A.3d at 383 (R.I. 2021); Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 792 (R.I. 2005) ("A party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing.").

Island Supreme Court does not rid its existing standing doctrine of the statutory grant analysis, it could open the door to a flood of lawsuits claiming to proceed under the authority of statutory grants from Congress that no longer have Article III standing under the recently bolstered "concreteness" element pronounced in *Spokeo* and *TransUnion*. For example, the U.S. Supreme Court in *Spokeo* proposed the hypothetical in which a credit reporting agency harmlessly misstates an individual's zip code.[107] Under a statutory grant analysis, an individual who discovers that a credit reporting agency misstated her zip code could sue the credit reporting agency under the FRCP's statutory grant of standing and recover statutory damages of $100 to $1000 for each violation, regardless of any injury or inconvenience to the plaintiff caused by the incorrect zip code.[108]

To the extent that some might find this result unpalatable, it should be noted that Congress drafted the law in such a way that allows for this result under a strict statutory grant analysis framework. The U.S. Supreme Court itself commented in *Spokeo* that "Congress is well positioned to identify intangible harms that meet minimum Article III requirements."[109] However, as the Court went on to explain, under the "concreteness" element of Article III injury in fact analysis, "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[110] For a state contemplating whether to undo its statutory grant standing analysis, it should also be instructive to consider where the U.S. Supreme Court's standing analysis leaves statutory civil rights litigation generally. What common law cause of action is closely related to the statutorily created private rights of action under the Civil Rights Act of 1964? Or, more directly, what common law cause of action is closely related to any statutorily created private right of action under Title III (physical barrier or otherwise)? In *TransUnion*, Justice Thomas, dissenting, highlighted

107. *Spokeo*, 136 S. Ct. at 1550 (2016) ("[N]ot all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.").

108. 15 U.S.C. § 1681n(a).

109. *Spokeo*, 136 S. Ct. at 1543.

110. *Id.* at 1549.

the absurdity of the majority's decision regarding statutorily created private rights of action:

> No matter if the right is personal or if the legislature deems the right worthy of legal protection, legislatures are constitutionally unable to offer the protection of the federal courts for anything other than money, bodily integrity, and anything else that this Court thinks looks close enough to rights existing at common law . . . . The 1970s injury-in-fact theory has now displaced the traditional gateway into federal courts.[111]

While $100 to $1000 in statutory damages for every FCRA violation may seem untenable, Congress deemed such the appropriate remedy for violations of the private rights it created under the Act.[112] To allow for effective enforcement of legislatively recognized private rights generally, and private rights recognized under Title III specifically, Rhode Island should retain its statutory grant standing analysis.

B. *Rhode Island Courts Should Interpret the ADA as Providing a Statutory Grant of Standing*

Rhode Island courts should interpret the statutory language of Title III as a grant of standing to disabled litigants. In cases of standing by statutory grant, Rhode Island courts use statutory interpretation to determine whether a statute confers standing to a particular plaintiff.[113] The statutory language at issue in Title III reads as follows:

> The remedies and procedures set forth in section 2000a-3(a) of this title are the remedies and procedures this subchapter provides to any person who is being subjected to discrimination on the basis of disability in violation of this subchapter.[114]

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111. TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2221 (2021) (Thomas, J., dissenting) (citations omitted).

112. 15 U.S.C. § 1681n(a).

113. Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 793 (R.I. 2005) ("In statutory standing cases, such as this, the analysis consists of a straight statutory construction of the relevant statute to determine upon whom the Legislature conferred standing and whether the claimant in question falls in that category."). *Id.* at 792 n.6.

114. 42 U.S.C. § 12188(a)(1) (emphasis added).

Similar to the Rhode Island Supreme Court's analysis in *Tanner v. Town Council of Town of East Greenwich*, where the court held that the statutory language, "[*a*]*ny citizen* . . . who is aggrieved," conferred standing to the plaintiff, Rhode Island courts should interpret the "any person" language provided in Title III as a statutory grant of standing to disabled individuals who seek to enforce the ADA.[115] Nothing in Title III's statutory grant suggests that the grant does not apply equally to tester litigants,[116] and Congress drafted Title III to closely mirror the FHA eight years after the U.S. Supreme Court held that the FHA conferred standing to tester litigants.[117]

To the extent that federal courts could dismiss an ADA tester litigant's suit for lack of injury in fact under the *Spokeo*/*TransUnion* analysis when a plaintiff merely tests a physical or digital place of public accommodation for ADA compliance, as the Rhode Island Supreme Court held in *Tanner*, when a litigant is the beneficiary of a statutory grant of standing, the litigant need not suffer any concrete injury.[118] Therefore, a tester litigant seeking to enforce the ADA's lodging website regulation need not have any particular utility for the absent statutorily required information. All that Rhode Island courts should require litigants to show to confer statutory standing under Title III is that 1) the litigant is an ADA-qualified disabled individual as defined under 42 U.S.C. § 12102, and 2) the litigant has been discriminated against on the basis of her disability as defined by Title III under 42 U.S.C. § 12182(b)(2) and its enacting regulations.

Applied to the general facts of Deborah Laufer's serial litigation, a Rhode Island court that interprets Title III as a statutory grant of standing would hold that Laufer has standing to pursue her lodging website tester litigation. Laufer, who is vision impaired and bound to a wheelchair or cane, is certainly a disabled individual

115. *Tanner*, 880 A.2d at 792.

116. *See* 42 U.S.C. § 12188(a)(1).

117. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982).

118. *See Tanner*, 880 A.2d at 792–93 ("the statutory requirement that an individual be 'aggrieved' by a violation of the OMA does not require that a plaintiff allege some harm to his or her economic or property interests, but rather that his or her right to be 'advised of and aware of' the performance, deliberations, and decisions of government entities was, or may be, violated."). *Id*. at 793.

as defined in 42 U.S.C. § 12102.[119] Based on her pleadings, the hotel defendants she has sued have discriminated against her based on her disability because their booking websites have not provided adequate information regarding the hotels' accessibility accommodations in accordance with 28 C.F.R. § 36.302(e)(ii). If Rhode Island courts retain the statutory grant route to establishing standing, and if the courts interpret Title III as providing a statutory grant, then Laufer and other similarly situated ADA tester litigants will have standing in Rhode Island courts.

C. *Alternatively, Rhode Island Courts Should Hold that Tester Status Does Not Destroy Injury in Fact in ADA Litigation*

Alternatively, Rhode Island courts should hold that disabled individuals who encounter ADA non-compliant barriers, physical or digital, have suffered an injury in fact sufficient to satisfy Rhode Island's standing doctrine regardless of the litigant's status as a tester. Rhode Island courts should look to *Havens Realty Corp. v. Coleman*, in which the U.S. Supreme Court originally granted tester standing in the context of the Fair Housing Act (FHA) under the federal injury in fact framework.[120] The statute at issue in *Havens*, 42 U.S.C. § 3604(d), states that it is "unlawful . . . [t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."[121] The Court reasoned that:

> A tester who has been the object of a misrepresentation . . . has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions. That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of [42 U.S.C. § 3604(d)].[122]

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119. *See* Complaint at 1–2, Laufer v. Newport Hotel Group, LLC, No. 20-CV-00422-JJM-PAS (D.R.I. Sept. 23, 2020).

120. *See generally Havens*, 455 U.S. 363.

121. 42 U.S.C. § 3604(d) (emphasis added).

122. *Havens*, 455 U.S. at 373–74.

As the U.S. Supreme Court held in *Havens* regarding FHA tester litigants, Rhode Island courts should not deprive litigants of standing based on their tester status. Tester litigants seeking to enforce physical barrier regulations may be "discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations"[123] regardless of their purpose for visiting a physical place of public accommodation. Correspondingly, tester litigants seeking to enforce ADA lodging website regulations under 28 C.F.R. § 36.302(e)(ii) may be discriminated against based on their disability, regardless of their purpose for visiting the website.

Similar to the FHA tester litigants in *Havens*, whom the U.S. Supreme Court held had a statutory right to accurate information regarding the availability of housing rental information irrespective of their intent to rent, Deborah Laufer has a right to ADA compliant accessibility information regarding a hotel's disability accommodations, regardless of whether she has an actual intent to stay at a particular hotel. The ADA's ORS regulation requires that hotels' online reservation systems "[i]dentify and describe accessible features in the hotels and guest rooms offered through its reservations service in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs."[124] Logically, the duty to provide information regarding accessibility accommodations arises before an ADA-qualified litigant determines whether to rent a room at the place of lodging in question. Therefore, a "concrete and particularized" informational injury occurs when the would-be renter seeks, but is not provided, the accessibility information she has a statutory right to *before* an intent to book a reservation arises. To hold otherwise would deprive physical barrier tester litigants standing in Rhode Island courts if they could not prove that they intended to enjoy the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of" a place of public accommodation.[125]

While the deprivation of standing might seem tempting in the unsympathetic serial litigant website case, if courts impute an

123. 42 U.S.C. § 12182(a).
124. 28 C.F.R. § 36.302(e)(ii) (2022).
125. 42 U.S.C. § 12182(a).

intent requirement into its injury in fact analysis, the precedent could prevent the physical barrier ADA tester litigant from establishing standing in Rhode Island courts. Despite the weight of federal authority to the contrary regarding website ADA litigation, in Rhode Island, the informational injury Laufer suffers as a result of non-compliant hotel websites should be enough to satisfy Rhode Island injury in fact analysis, even if the courts do not interpret Title III as a statutory grant of standing.

D. *Rhode Island Courts Should Loosely Interpret the "Intent to Return" Requirement for Injunctive Relief in the Context of ADA Litigation if Analyzing Under the Injury in Fact Prong*

Under the injury in fact route to establishing standing, to the extent that Rhode Island courts apply a *Lyons*-like analysis for injunctive relief standing, Rhode Island courts should loosely interpret "intent to return."[126] Plainly, Rhode Island courts should only require an intent to return to the place of public accommodation or website without regard to the plaintiff's purpose for doing so. While Rhode Island courts will not grant injunctive relief standing for "injuries that are prospective only and might never occur,"[127] legitimate ADA tester litigants have already encountered the non-compliant physical or digital barrier and need only return to the place of public accommodation to encounter the barrier again. In Title III litigation, the likelihood of a litigant encountering a specific non-compliant barrier again is not as attenuated as the *Lyons* plaintiff's risk of being illegally placed in a chokehold by police without provocation[128] or the *Lujan* plaintiffs' "some day" intentions to visit far away, foreign lands to observe certain endangered species.[129]

Furthermore, the statutory language of Title III itself casts into doubt the applicability of the "intent to return" requirement in Title

126. *See* Norkunas v. Park Rd. Shopping Ctr., Inc., 777 F. Supp. 2d 998, 1001 (W.D.N.C. 2011) ("In order to demonstrate a likely future harm, Plaintiff must demonstrate an intention to return to the Park Road Shopping Center."); Boyer v. Bedrosian, 57 A.3d 259, 271 n.27 (R.I. 2012) (quoting City of Los Angeles v. Lyons, 461 U.S. 95 (1983) ("[P]ast exposure to harm will not, in and of itself, confer standing upon a litigant to obtain equitable relief '[a]bsent a sufficient likelihood that he will again be wronged in a similar way.'").

127. R.I. Tpk. & Bridge Auth. v. Cohen, 433 A.2d 179, 182, 184 (R.I. 1981).

128. City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

129. Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992).

III litigation. A provision in 42 U.S.C. § 12188(a)(1) explicitly specifies that "[n]othing in this section shall require a person with a disability to engage in a *futile gesture* if such person has actual notice that a person or organization covered by this subchapter does not intend to comply with its provisions."[130] If the "futile gesture" provision is to have any effect, it is that the tester litigant need not plead a concrete plan to return to a place of public accommodation if she has "actual knowledge" that the accommodation is not ADA compliant.[131]

In the context of online reservation systems, Rhode Island courts should analyze the intent to return to the website as just that—intent to visit the website—without regard to the analytically separate element of purpose for doing so. As noted above, the informational injury arises before an ADA-qualified litigant determines whether to rent a room. Therefore, Rhode Island courts should confine their "intent to return" analysis to the intent to return to the place of injury—the website—regardless of any intent to make a reservation therein. Once again, the "futile gesture" exception provided in 42 U.S.C. § 12188(a)(1) supports the proposition that an ADA tester litigant need not plead an intent to return to a place of accommodation for the purpose of "full and equal enjoyment of the . . . facilities"[132] if the litigant has "actual notice that a person or organization . . . does not intend to comply with" the requirements of the ADA.

E. *Adverse Impact on Small Business*

Opponents of serial Title III litigation object that the litigation is harmful to small businesses.[133] Frankly, it is difficult for a small business to ensure it is in compliance due to the ADA's extensive regulations for places of public accommodation.[134] A small business

130. 42 U.S.C. § 12188(a)(1) (emphasis added).

131. *See id.*

132. 42 U.S.C. § 12182(a).

133. *See* Becker, *supra* note 25, at 109–12 (2006); Lauren Markham, *The Man Who Filed More Than 180 Disability Lawsuits: Is it Profiteering – or Justice?*, N.Y. TIMES MAG. (Aug. 29, 2021), https://www.nytimes.com/2021/07/21/magazine/americans-with-disabilities-act.html [https://perma.cc/C7TP-T39N].

134. Becker, *supra* note 25, at 99 ("One of the major problems with the ADA is how easy it is to be out of compliance: a single bathroom must meet at least

that is caught with even the smallest infraction can find itself on the hook for thousands of dollars in attorney's fees.[135] On occasion, a Title III suit may force a small business to close its doors permanently.[136] However, widespread ADA non-compliance is a product of three decades of underenforcement of the essential civil rights statute.[137] Broad Title III enforcement in Rhode Island courts is bad for small businesses that are not in compliance with the ADA and are, therefore, at least passively, discriminating on the basis of disability. Furthermore, Title III does not require that businesses incur excessive expense to provide the most accessible services conceivable, but only requires "*reasonable* modifications in policies, practices, or procedures," and removal of architectural barriers "where such removal is *readily achievable*."[138]

While it is regrettable that Congress did not provide a notification requirement or cure period for defendants before plaintiffs can litigate the merits of their claims, as the law stands today, Title III private litigant suits are the best tool available to achieve greater accessibility in Rhode Island for disabled individuals.[139] Over time and undoubtedly hundreds of ADA tester lawsuits, businesses of all sizes will recognize that strict ADA compliance is mandatory, and

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95 different standards from the height of the toilet paper dispenser to the exact placement of handrails. Even through good faith efforts, such as hiring an ADA compliance expert, a business can still find itself subject to a lawsuit for the most minor and unintentional of infractions, such as telephone volume controls needing adjustment. In fact, it is estimated that less than 2% of public buildings nationwide are in full compliance of the ADA.").

135. *See* Molski v. Mandarin Touch Rest., 347 F. Supp. 2d 860, 863 (C.D. Cal. 2004).

136. *See* Markham, supra note 133.

137. Jasmine Harris & Karen Tani, *Debunking Disability Enforcement Myths*, REGUL. REV. (Oct. 25, 2021), https://www.theregreview.org/2021/10/25/harris-tani-debunking-disability-enforcement-myths [https://perma.cc/SKN8-JXDR] ("Notwithstanding the evidence of congressional intent, and notwithstanding decades of evidence that the ADA is significantly underenforced, popular narratives cast ADA litigation as inherently suspect."); *see* NAT'L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT 92 (2018) ("The nation cannot be content for full integration and equal rights for all people with disabilities to remain simply aspirational."); NAT'L COUNCIL ON DISABILITY, NATIONAL DISABILITY POLICY: A PROGRESS REPORT 95 (2015) ("Although youth and young adults with disabilities were born into a post-ADA environment, far too many have not experienced the civil rights for equitable access that federal legislation was enacted to protect.").

138. 42 U.S.C. § 12182(a) (emphasis added).

139. *See generally* Bagenstos, *supra* note 20.

the result will be greater accessibility and compliance. Once again, as the Ninth Circuit observed, "[f]or the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA."[140] Rhode Island courts should not deny disabled individuals' civil rights for the sake of avoiding harm to businesses that discriminate on the basis of disability by failing to make reasonable modifications to their premises and services in accordance with Title III.

CONCLUSION

Deborah Laufer is not a sympathetic plaintiff. The hundreds of lawsuits she has filed cast doubt on the veracity of her complaints, and she stands to profit on the scheme. However, ADA testers like Laufer, both in the physical and digital realm, provide necessary enforcement of the historically under enforced civil rights statute enacted by Congress in 1990. However unlikely Laufer's alleged road trip seems, the precedent set by dismissing the lawsuits of similarly situated individuals in Rhode Island courts for lack of standing could deny standing to physical barrier ADA tester litigants.

ADA tester litigation is a crucial tool for disabled Americans seeking to enforce their civil rights. While ADA tester standing is under assault in the federal courts, Rhode Island courts are not bound by the standing requirements of Article III of the U.S. Constitution. To protect the civil rights of disabled Rhode Islanders and those wishing to visit the state, Rhode Island courts should ensure ADA testers can satisfy Rhode Island standing doctrine and enforce their rights under Title III by retaining its statutory grant analysis and interpreting Title III as a statutory grant of standing. Alternatively, Rhode Island courts should hold that tester status does not destroy injury in fact and loosely interpret the intent to return requirement for injunctive relief in the context of Title III litigation.

The protection of ADA tester litigant standing will permit effective enforcement of Title III and help actualize the promise of

140. *See* D'Lil v. Best W. Encina Lodge & Suites, 538 F.3d 1031, 1040 (9th Cir. 2008) (quoting Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir. 2007)).

access and civil rights for Americans with disabilities. In the words of Albert Dytch, a frequent ADA tester litigant and the subject of a recent New York Times Magazine article,[141] "[t]he civil rights of those with disabilities are violated every time they're denied the same benefits and privileges as the able-bodied. Yet relatively few have the time, energy, courage, and fortitude to insist that these rights are honored and protected in accordance with the law."[142] More than thirty years after Congress enacted the ADA, to ensure a more accessible and inclusive state, Rhode Island courts should recognize tester litigants' important function as the primary enforcers of Title III and guarantee that the state's standing doctrine is accessible to disabled individuals seeking to assert their civil rights.

141. Markham, *supra* note 133.

142. Albert Dytch, *The View from a Wheelchair*, ACCESSIBLE NOW, https://accessiblenow.net [https://perma.cc/6PZG-NSDA] (last visited Jan. 15, 2022).