No. 23-742

IN THE
Supreme Court of the United States

MILAN KISER AND DIANA KISER,

Petitioners,

v.

CHRIS LANGER,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae New England Legal Foundation (NELF) is a nonprofit, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston.[1] NELF's membership consists of corporations, law firms, individuals, and others who believe in its mission of promoting inclusive economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members and supporters include a cross-section of large and small businesses and other organizations from all parts of the Commonwealth, New England, and the United States.

NELF is committed to the enforcement of Article III's restriction of the Federal Judiciary's subject matter jurisdiction to "cases" and "controversies," under which the plaintiff must establish a concrete harm. Adherence to this requirement of Article III standing preserves the Constitution's separation of powers, by preventing federal courts from engaging in the general enforcement of the law. NELF is also committed to the doctrine of statutory standing, under which a court should decide whether Congress has authorized the plaintiff's claim.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no counsel for a party authored NELF's amicus brief, in whole or in part, and that no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief.

For these and other reasons discussed below, NELF believes that its brief will assist the Court in deciding whether to grant certiorari in this case, to decide whether an individual has Article III standing to sue as a tester of a place of public accommodation, under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*.

SUMMARY OF ARGUMENT

In *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 144 S. Ct. 18 (2023), this Court was poised to decide whether an individual has Article III standing to sue a place of public accommodation for alleged noncompliance with the ADA, when she has no intention to visit that place as a patron. However, an unanticipated turn of events rendered that case moot. This case now before the Court presents the same issue of ADA tester standing. Accordingly, certiorari should be granted to decide that issue.

The District Court in this case conducted a bench trial and made detailed, first-hand findings from which it rejected the credibility of the respondent's testimony that he intended to visit the petitioners' commercial property as a customer. The court concluded that the respondent's *sole* motivation, all along, was to visit the petitioners' property as an ADA tester.

In a split decision, a panel of the Ninth Circuit erred when it rejected the trial court's findings as "clearly erroneous," under Fed. R. Civ. P. 52. Based on this erroneous ruling, the panel majority wrongly

concluded that the respondent was a thwarted customer of the petitioners' property who established Article III standing.

In the alternative, the panel majority also held that the respondent established Article III standing as an ADA tester. The court concluded that the respondent's motivation in returning to the petitioners' property was *irrelevant* under Article III, according to Ninth Circuit precedent interpreting *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982).

Therefore, this case is a strong vehicle for deciding whether an ADA tester has Article III standing. The District Court reached the unassailable conclusion that the respondent only intended to visit the petitioners' property as a tester, and the Ninth Circuit held that, as a tester, the respondent had Article III standing.

It is difficult to see how an ADA tester could establish a concrete harm required under Article III, let alone state a claim recognized under the ADA. Unlike an individual with disabilities who *is* a thwarted customer--Congress's apparent area of concern--a tester does not seek to gain access to a place of public accommodation to enjoy the benefits of the goods or services offered there. A tester is not personally harmed by any unlawful structural barriers to entry. His own ADA rights are not violated. He is not personally denied equal treatment by the defendant's alleged discriminatory conduct.

Instead, a tester is essentially a concerned but *unharmed* observer seeking to enforce the ADA rights of others. An uninjured tester's attempted private enforcement of the law exceeds Article III's jurisdictional limits.

Such private enforcement of the law would also intrude upon the Department of Justice's exclusive, and politically accountable, power to enforce the ADA on behalf of the general public, under Article II. In this case, for example, rather than suing the petitioners, a Government official could have simply engaged them in a productive dialogue to make any necessary changes to their parking lot.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A TESTER UNDER THE AMERICANS WITH DISABILITIES ACT HAS ARTICLE III STANDING.

A. This Case Is A Strong Vehicle For Deciding The Issue, Because The District Court Made The Unassailable Evidentiary Finding That The Respondent's Sole Motivation Was To Visit The Petitioners' Property As A Tester, And The Ninth Circuit Held That, As A Tester, The Respondent Had Article III Standing.

In *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 144 S. Ct. 18 (2023), this Court was poised to decide

whether an individual has standing, under Article III of the United States Constitution, to sue a place of public accommodation for alleged noncompliance with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*., when the individual has no intention to visit that place as a patron.[2] *See id.,* 144 S. Ct. at 20-21. However, an unanticipated turn of events rendered that case moot. *See id.* at 21-22. This case now before the Court presents the same issue of ADA tester standing. Accordingly, certiorari should be granted to decide that issue.

The District Court in this case conducted a bench trial and made detailed, first-hand findings from which it rejected the credibility of the respondent's testimony that he intended to visit the petitioners' commercial property as a customer. *See*

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[2] Article III provides, in relevant part:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to *Controversies* between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. Art. III, § 2 (emphasis added).

Appendix (App.) 47-50 (Gordon, J., dissenting from Ninth Circuit panel decision, discussing District Court's evidentiary findings concerning respondent's demeanor while testifying, internal inconsistencies in his testimony, prior inconsistent statements, and fact that respondent was "serial tester" who had filed nearly 2,000 ADA public accommodation suits).[3] In fact, the trial court concluded that the respondent's *sole* motivation all along, from his first visit to the petitioners' property through the present day, was to observe the property for alleged ADA violations. App. 47. In other words, the District Court concluded that the respondent was a tester and was only interested in enforcing the ADA rights of others.

A split panel of the Ninth Circuit erred when it rejected the District Court's findings and ultimate conclusion as "clearly erroneous," under Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral

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[3] In particular,

> The [District Court] based its adverse credibility finding both on Langer's demeanor while testifying and on the substance of what he claimed. The court observed that Langer's direct testimony 'was delivered in a rote fashion' and 'without noticeable reflection.' When Langer was cross-examined, the court noted, his counsel 'appeared to be visibly coaching' him, and Langer 'peppered his testimony with professions of uncertainty, lack of knowledge, or an inability to recall.' As to the substance of Langer's testimony, the court noted that it was flatly contradictory as to critical points.

App. 47.

or other evidence, must not be set aside unless clearly erroneous, and the reviewing court *must* give due regard to the trial court's opportunity to judge the witnesses' credibility.") (emphasis added).[4] Based on that erroneous ruling, the panel majority wrongly concluded that the respondent was a thwarted customer of the petitioners' property and, therefore, had Article III standing. App. 27.

The Ninth Circuit should have deferred to the trial court's evidentiary findings, which were based primarily on that court's direct observation of the respondent's live testimony. Indeed,

> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be

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[4] The panel majority's stated reasons for rejecting the District Court's findings are especially troubling. "We reject the district court's 'ultimate determination' regarding Langer's credibility because it relied on Langer's motivation for going to the Lobster Shop and his ADA litigation history." App. 17.

Contrary to the panel majority's view, the respondent's motivation for visiting the property--i.e., as a tester or as a customer--is essential to deciding whether he has suffered a concrete harm under Article III, as amicus discusses below. Moreover, the District Court had the broad discretion to draw reasonable inferences from the respondent's status as a serial ADA litigant when evaluating the credibility of his testimony that he intended to return to the petitioners' property as a customer. *See House v. Bell*, 547 U.S. 518, 559 (2006) ("[C]learly-erroneous standard applies even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or *inferences from other facts*.") (cleaned up) (emphasis added).

> aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985). *See also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990) ("[T]he 'clearly erroneous' standard *requires* the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions.") (emphasis added); *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals *may not reverse* it.") (cleaned up) (emphasis added).

In light of this clear precedent, the panel majority simply misapplied the clearly-erroneous standard when it rejected the District Court's evidentiary findings. "After considering the record viewed in its entirety in the instant case, we conclude that the Court of Appeals failed properly to apply this standard." *Amadeo*, 486 U.S. at 223 (cleaned up). Accordingly, this Court should reverse that ruling and reinstate the District Court's ultimate conclusion that the respondent was a tester who never intended to visit the petitioners' property as a customer.

Notably, the panel majority also held, in the alternative, that the respondent established Article III standing as an ADA tester. App. 28. The court concluded that his motivation in returning to the petitioners' property was *irrelevant* under Article III,

according to Ninth Circuit precedent interpreting *Havens Realty*. App. 15, 28. "He went there because he liked lobster, or to test for ADA compliance, or perhaps both. His motivation is not relevant. We only evaluate whether a plaintiff has an intent to return, and we hold that Langer does." App. 28.

In short, the District Court reached the unassailable conclusion that the respondent only intended to visit the petitioners' property as a tester, and the Ninth Circuit held that the respondent had Article III standing as a tester. Therefore, this case is a strong vehicle for deciding whether an ADA tester has Article III standing.

B. An ADA Tester Cannot Establish A Concrete Injury Required Under Article III Because He Is Not Personally Harmed By Any Unlawful Structural Barriers To Entry At The Place Of Public Accommodation That He Observes For Potential ADA Violations.

Article III limits a federal court's jurisdiction to deciding "cases" and "controversies."[5] This means that the plaintiff must have a personal stake in the outcome of the suit, "in other words, standing." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). To establish standing, the plaintiff must show that the defendant caused him to suffer a concrete and personal harm that a federal court can

[5] *See* n.2, above, for Article III's relevant text.

redress. "If 'the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve.'" *Transunion*, 594 U.S. at 423 (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019) (Barrett, J.)).

The issue here is whether the respondent, an ADA tester, is likely to suffer a concrete harm.[6] "No concrete harm, no standing." *Transunion*, 594 U.S. at 417. While a concrete injury need not be tangible (such as a monetary or physical harm), nonetheless the injury must bear "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Id.* at 424 (cleaned up).

It is difficult to see how an ADA tester could establish a concrete harm required under Article III, let alone state a claim recognized under the ADA.[7]

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[6] Title III of the ADA, which covers places of public accommodation, limits the plaintiff's recovery to prospective injunctive relief. *See* 42 U.S.C. § 12188(a)(1) ("The remedies and procedures set forth in section 2000a-3(a) of this title [42 U.S.C. § 2000a-3(a)] 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."). Section 2000a-3(a), in turn, provides that the plaintiff may bring "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order." 42 U.S.C. § 2000a-3(a).

[7] "The [first] question is whether the statute grants the plaintiff the cause of action that he asserts. . . . [This is] an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Bank of Am. Corp. v. City of Miami, Fla.*, 581 U.S. 189, 196-97 (2017). A tester's

Unlike an individual with disabilities who *is* a thwarted customer--i.e., Congress's apparent area of concern[8]--a tester does not seek to gain access to a place of public accommodation to enjoy the benefits of the goods or services offered there. A tester is not personally harmed by any unlawful structural barriers to entry. His own ADA rights are not violated. Simply put, a tester is not "personally denied equal treatment by the challenged

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private enforcement of the law for the sake of others is apparently not what Congress had in mind when it guaranteed individuals with disabilities the general right to "the full and equal *enjoyment*" of places of public accommodation. 42 U.S.C. § 12182(a) (emphasis added). Congress reinforced this right of *active participation* in places of public accommodation in more detail in § 12182(b). First, Congress defined the term "individual," as used in that subsection, to "refer to the *clients or customers* of the covered public accommodation." 42 U.S.C. § 12182(b)(1)(A)(iv) (emphasis added). Next, Congress ensured those individuals "the opportunity . . . to *participate* in or *benefit* from" those places. 42 U.S.C. § 12182(b)(1)(A)(i) (emphasis added).

While the parties apparently did not raise this issue of statutory standing below, its consideration at this stage of the case could avoid adjudication of the Article III standing issue. "When legislation and the Constitution brush up against each other, our task is to seek harmony, not to manufacture conflict." *United States v. Hansen*, 599 U.S. 762, 781 (2023). Consideration of the issue could also provide a clear statutory basis for distinguishing the tester's claim in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), on which the Ninth Circuit in this case relied to conclude that an ADA tester has Article III standing. App. 15. *See Acheson Hotels*, 144 S. Ct. at 25-26 (Thomas, J., concurring) (distinguishing *Havens Realty* on basis that Fair Housing Act, at issue in that case, provided tester plaintiff with right of action for receiving false information, while ADA did not).

[8] *See* n.7, above.

discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (cleaned up), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Instead, a tester seeks only to identify potential ADA violations. He is essentially a concerned but *unharmed* observer seeking to enforce the law on behalf of others. Any conceivable "observational injury" would be too abstract and amorphous to amount to a concrete harm, because it would not have the requisite "close historical or common-law analogue." *Transunion*, 594 U.S. at 424.

Lacking any identifiable concrete harm, an ADA tester would not have Article III standing. Therefore, an unharmed tester's attempted private enforcement of the law for the sake of others would exceed Article III's jurisdictional limits. "An uninjured plaintiff who sues in those circumstances is, by definition, not seeking to remedy any harm to herself but instead is merely seeking to ensure a defendant's 'compliance with regulatory law.'" *Transunion,* 594 U.S. at 428 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring)). *See also Transunion*, 594 U.S. at 427 ("'Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions.'") (quoting *Casillas*, 926 F.3d at 332)).

An uninjured tester's private enforcement of the ADA would also intrude upon the Department of

Justice's exclusive, and politically accountable, power to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3.[9] "A regime where . . . unharmed plaintiffs [could] . . . sue defendants who violate federal law . . . would infringe on the Executive Branch's Article II authority." *Transunion*, 594 U.S. at 429. *See also Acheson Hotels*, 144 S. Ct. at 27 (Thomas, J., concurring) ("Testers exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch, with none of the corresponding accountability.") (cleaned up); *Transunion*, 594 U.S. at 429 ("Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."). In this case, for example, rather than suing the petitioners, a Government official could have simply engaged them in a productive dialogue to make any necessary changes to their parking lot.[10]

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[9] *See* 42 U.S.C. § 12188(b)(1)(A)(i) ("The Attorney General shall investigate alleged violations of this subchapter [governing places of public accommodation], and shall undertake periodic reviews of compliance of covered entities under this subchapter."); § 12188(b)(1)(B)(i)-(ii) ("If the Attorney General has reasonable cause to believe that . . . any person or group of persons is engaged in a pattern or practice of discrimination under this subchapter; or . . . any person or group of persons has been discriminated against under this subchapter and such discrimination raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.").

[10] *See Acheson Hotels*, 144 S. Ct. at 26 (Thomas, J., concurring) ("This case exemplifies the dangers [of a politically unaccountable tester's private enforcement of the ADA]. An official could have informed Acheson Hotels that its website

In sum, certiorari review is warranted to decide whether an ADA tester has Article III standing, when the tester observes and identifies potential ADA violations but does not suffer any resulting concrete harm.

CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court grant the Petition for Certiorari.

Respectfully submitted,

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failed to comply with the Reservation Rule, and Acheson Hotels could have updated its website to explain it had no accessible rooms. Laufer, however, chose to 'enforce' each technical violation of the ADA she could uncover with a lawsuit. Because she is a private plaintiff, no discretion was required or exercised.").