

PUBLIC-LAW LITIGATION AT A CROSSROADS: ARTICLE III STANDING AND “TESTER” PLAINTIFFS

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Federal courts have recently grappled with an issue that falls at the intersection of Article III standing and disability, and that presents critical questions about the future of litigation promoting societal change. The issue is whether a plaintiff with disabilities has standing to challenge the failure by a place of public accommodation to provide accessibility information on its website when the plaintiff lacks concrete plans to visit the establishment. The Supreme Court heard argument in a case presenting this question—Acheson Hotels v. Laufer—in October 2023, but two months later it ruled that the case must be dismissed as moot, for case-specific reasons. The Article III standing question therefore remains unresolved, to percolate in the lower courts and plausibly to return to the Supreme Court through another vehicle. The standing issue raises doctrinal quandaries because it reveals the fault line between two models of litigation: a “public-law” model that permits plaintiffs, often backed by interest groups, to use litigation to advance public aims; and a “private-right” model that treats as the default mode of litigation a suit by A against B in tort, property, or contract. This Essay unravels the doctrinal and conceptual threads of the standing issue raised in Acheson and similar cases, and it offers proposals for courts to resolve the issue in a way that would not broadly undermine public-law litigation.

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INTRODUCTION

The idea of a “test case” is a staple of public-law litigation meant to bring about societal change. Plaintiffs subject themselves to a legal violation so that they can sue.¹ In recent years, federal courts have confronted a question that raises fundamental issues about “test cases” and public-law litigation more generally.

The question involves Article III standing and disability. The following facts are illustrative. A plaintiff visits the website of a hotel and sees that it does not include legally required information about features accessible to the disabled. However, the plaintiff does not intend to visit the hotel; instead, she is a “tester” seeking to ascertain whether the hotel is complying with anti-discrimination laws. The plaintiff, therefore, sues in federal court pursuant to a private right of action embedded in a statute or a regulation. The hotel challenges the plaintiff’s Article III standing on the ground that the plaintiff did not intend to patronize the hotel, so she was not actually harmed by the absence of accessibility information. Does such a disability tester have standing?

Over the past few years, federal courts of appeals have divided on whether disability testers like the plaintiff just described have standing²—a question I will call the “disability tester standing issue.” The Supreme Court agreed to hear one of these cases, *Acheson Hotels v. Laufer*, in its 2023

¹ See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (Black “tester” plaintiff asked apartment complex about availability of apartment to ascertain compliance with fair housing laws).

² Compare *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443–44 (2d Cir. 2022), *Laufer v. Looper*, 22 F.4th 871, 878 (10th Cir. 2022), and *Laufer v. Mann Hosp., LLC*, 996 F.3d 269, 272 (5th Cir. 2021) (finding no Article III standing), with *Laufer v. Acheson Hotels (Acheson II)*, 50 F.4th 259 (1st Cir. 2022), and *Laufer v. Arpan LLC*, 29 F.4th 1268, 1274–75 (11th Cir. 2022), *vacated*, 77 F.4th 1366 (11th Cir. 2023) (finding Article III standing).

Term.³ Following the grant of certiorari, however, Laufer asked the Court to dismiss the case on mootness grounds.⁴ Laufer’s justifications for mootness were specific to her situation; she had filed a notice of voluntary dismissal before the district court based on the conduct of the attorneys who represented her at earlier stages of the lawsuit.⁵ The Supreme Court, after holding oral argument in October 2023, held that Laufer’s case was moot.⁶ The Court did not address the disability tester standing issue that Laufer’s case had raised, so that question remains unresolved; as the Court acknowledged, “the circuit split is very much alive.”⁷

The disability tester standing issue may well be addressed by the Supreme Court in a later case and, in the meantime, it confronts the lower courts.⁸ Even in circuits with precedent on this issue, courts of appeals must decide how broadly or narrowly to read their precedent, and whether to overrule it; and district courts must determine how to carry out appellate courts’ directions. Therefore, the disability tester standing issue will continue to percolate. Resolution of that issue may substantially affect the ability of private plaintiffs to enforce the Americans with Disabilities Act (ADA), and it will influence the law of Article III standing more broadly.⁹

This Essay analyzes the disability tester standing issue by highlighting tension in the Supreme Court’s treatment of two models of litigation. The “public-law” model permits plaintiffs, often backed by interest groups, to use litigation to promote public aims. The “private-right” model treats the default mode of litigation as a suit by A against B in tort, property, or contract. The disability tester standing issue is challenging because some lines of Supreme Court doctrine are skeptical of public-law litigation, while others embrace it.¹⁰ Further, the public-law and private-right models of litigation overlap.

To elaborate, constitutional standing doctrine tends to disfavor suits by “ideological” litigants seeking redress for broadly shared harms that they have arguably courted by setting up a “test case.” But many of the Court’s significant decisions involve such litigants, who come from across the

³ Laufer v. Acheson Hotels, LLC (*Acheson II*), 50 F.4th 259, 263–64 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023).

⁴ Suggestion of Mootness at 3–5, *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023) (No. 22-249); *see* Transcript of Oral Argument at 5–23, *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023) (No. 22-429) (discussing Laufer’s suggestion of mootness).

⁵ *See* Suggestion of Mootness, *supra* note 4, at 4–5; *see also infra* Section II.A.

⁶ *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023).

⁷ *Id.*

⁸ *See* Transcript of Oral Argument, *supra* note 4, at 19 (describing the issue in *Acheson* as an “important” one that “probably is going to need to be decided at some point”).

⁹ *See infra* notes 70–87 and accompanying text.

¹⁰ *See infra* Part I.

political spectrum.¹¹ And the distinction between “ideological” and “non-ideological” plaintiffs is far from self-evident. The line is particularly difficult to draw when plaintiffs allege that they have suffered dignitary or stigmatic harm due to discrimination. Individuals can personally suffer stigmatic harm resulting from widely applicable social policies. Their legal challenges to those policies straddle the boundary between vindication of private interests and promotion of the public good.

This Essay argues that the federal courts should not disfavor public-law litigation by rejecting tester suits. Instead, the courts should accept these suits as appropriate vehicles for legal enforcement, including in situations where testers allege stigmatic harm. Recognizing that the courts will seek a limiting principle for tester standing, the Essay presents a menu of practical proposals. The courts could hold that plaintiffs have standing because the denial of legally required information in the context of disability tester suits gives rise to stigmatic harm. Alternatively, the courts could deny standing to plaintiffs to the extent they have disclaimed an intent to travel to a place of public accommodation, or deny standing to disability tester plaintiffs based on the particular language of the regulations they are invoking. In these ways, the courts would avoid undermining tester litigation more broadly.

The Essay uses the phrase “disability tester standing issue” to refer to the question of whether a plaintiff with disabilities, who lacks concrete plans to visit a place of public accommodation, nevertheless has standing to sue the establishment for failing to provide legally required information on its website about access for people with disabilities. There are other kinds of disability testers, such as individuals who seek to physically enter an establishment to ascertain the presence of disability accommodations. In other words, this Essay focuses primarily on suits with facts close to those of *Laufer*’s case, which are the basis for the circuit split left unresolved. Yet many points in the Essay could speak to multiple forms of disability testing.

The Essay, then, analyzes the disability tester standing issue against the background of conceptual tensions that have attended constitutional standing doctrine for several decades.¹² In Part I, the Essay examines the development

¹¹ See *infra* notes 59–63 and accompanying text.

¹² For other papers addressing the disability tester standing issue, see Catherine Cole, Note, *A Standoff: Havens Realty v. Coleman, Tester Standing, and TransUnion v. Ramirez in the Circuit Courts*, 45 HARV. J.L. & PUB. POL’Y 1033 (2022); Colten H. Erickson, *Disabled Litigants’ Standing Issue: Ensuring Rhode Island’s Standing Doctrine Is Accessible to ADA Tester Litigants*, 27 ROGER WILLIAMS U. L. REV. 475, 503 (2022); Julian Gregorio, *Standing and Originalism After Laufer v. Arpan*, 29 F.4th 1268, NOTRE DAME J.L. ETHICS & PUB. POL’Y 724 (2023). These pieces do not focus on the public-law/private-right issue considered in this Essay, and they look at topics (such as Rhode Island’s standing doctrine and originalism) not taken up here. My prior work on Article III standing deals with “intangible” and stigmatic harm. See, e.g., Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018) (cited in *TransUnion*

of Article III standing doctrine through the lens of the public-law/private-right distinction. Although today's standing doctrine arose partially to restrict suits brought by public interest groups,¹³ the Court continues to hear numerous suits that fit into the public-law litigation mold.¹⁴ Part II draws on the ambivalence in the Court's treatment of public-law litigation to excavate the conceptual roots of the doctrinal puzzles posed by disability tester suits. It then challenges the dichotomy between public-law and private-right litigation, arguing that these forms of litigation are not sharply divided in a way that would justify disfavoring public-law litigation. Part III provides several alternatives for how the courts should proceed in cases similar to *Acheson*, ranked as follows: ideally, greater deference to Congress in defining proper plaintiffs;¹⁵ if not, recognition of the plaintiff's distinctive informational and stigmatic harms; if not, a narrow holding denying the plaintiff's standing without undercutting public-law litigation more generally.

A definitional note: As understood here, the "public-law" model of litigation enables plaintiffs—often supported by interest groups—to use litigation to promote public aims, that is, those whose realization would benefit the public broadly. For example, civil rights plaintiffs engaged in public-law litigation when they embarked on a legal strategy of violating segregation laws in order to challenge them in court.¹⁶ The "private-right" model involves suits between private individuals or corporate entities that are primarily geared toward redressing harm imposed on individual plaintiffs rather than on a wider swath of the population. The "default" mode of litigation, from the private-right perspective, is a suit between A and B in tort, property, or contract. Private-right litigation *could* be against the government, but the closer it conforms to the default mode, the more likely it is to be justiciable. As Part II emphasizes, the line between public-law and

v. Ramirez, 594 U.S. 413, 429 n.2 (2021)); Rachel Bayefsky, *Psychological Harm and Constitutional Standing*, 81 BROOK. L. REV. 1555 (2016). This Essay, while drawing on those themes, differs in several respects, as it (a) focuses on public-law litigation; (b) tackles this issue in the setting of disability testers; and (c) speaks to the issue in the aftermath of *Acheson*. For an illuminating paper reviewing the Supreme Court's recent approach toward cases involving disabilities, see Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, *The Disability Docket*, 72 AM. U. L. REV. 1709 (2023).

¹³ RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 116–17, 153–55 (7th ed. 2015).

¹⁴ See *infra* notes 59–63 and accompanying text.

¹⁵ For arguments that Congress rather than the courts should decide standing, see, for example, William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 (1988); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 188–89 (1992).

¹⁶ See, e.g., *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (noting that the fact "[t]hat the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant"); *Barr v. City of Columbia*, 378 U.S. 146, 147 (1964) (involving a "'sit-in' demonstration").

private-right litigation is not a clear one. But these understandings can serve as starting points for the analysis.

I

STANDING DOCTRINE DIVIDED: THE SUPREME COURT'S AMBIVALENCE TOWARD PUBLIC-LAW LITIGATION

Constitutional standing doctrine in its current form—with the trifecta of injury in fact, causation, and redressability—took shape during the 1970s and 1980s.¹⁷ At that time, legal developments put pressure on the “traditional model” of a suit challenging conduct that “unlawfully invaded legal interests plainly recognized at common law, such as contract and property rights.”¹⁸ These developments included the growth of the administrative state and the enactment of statutes to protect interests “shared by large numbers of people,” including environmental and consumer protection laws.¹⁹ Partially in light of the concern that numerous people might be able to enforce these laws, the Court instituted standing requirements cabining the class of potential plaintiffs.²⁰ The Court rooted these requirements in Article III’s limitation of the federal judicial power to “cases” and “controversies.”²¹

The 1984 case *Allen v. Wright*, which helped to solidify these features of standing doctrine, is especially relevant to the discrimination and stigma issues raised in disability tester standing litigation. In *Allen*, the Court rejected Article III standing for parents of Black schoolchildren who claimed that the Internal Revenue Service had failed to fulfill its legal obligation “to deny tax-exempt status to racially discriminatory private schools.”²² The *Allen* Court rebuffed the plaintiffs’ argument that they had “standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination.”²³ “There can be no doubt,” the Court acknowledged, “that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.”²⁴ But stigmatic injury “accords a basis for standing only to ‘those persons who are personally denied equal treatment’ by the challenged discriminatory conduct.”²⁵ That was not true, the Court indicated, for the plaintiffs in *Allen*. For if those plaintiffs’ “abstract stigmatic injury

¹⁷ See, e.g., *Allen v. Wright*, 468 U.S. 737, 750–51 (1984) (identifying these standing requirements).

¹⁸ FALLON ET AL., *supra* note 13, at 116.

¹⁹ *Id.* at 116–17.

²⁰ See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

²¹ *Id.*; U.S. CONST. art. III, § 2.

²² *Allen*, 468 U.S. at 739.

²³ *Id.* at 755.

²⁴ *Id.*

²⁵ *Id.* (citing *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)).

were cognizable,” then “[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine.”²⁶

The *Allen* decision, in addition to furnishing an important precedent vis-à-vis stigmatic harm, reflected deep concerns about litigation promoting public aims. According to *Allen*, federal courts should not become “a vehicle for the vindication of the value interests of concerned bystanders.”²⁷ *Allen* also evinced skepticism about the breadth of the remedies that federal courts might be asked to issue in public-law litigation, such as “injunctive relief directed at certain systemwide law enforcement practices.”²⁸ Further, the Court suggested that Article II, which assigns enforcement discretion to the executive, “counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.”²⁹

Allen thus illustrates the connection between modern constitutional standing doctrine and a certain vision of separation of powers. That vision casts litigation over private interests as the default mode of judicial activity. Public-law litigation, by contrast, runs the risk of embroiling the courts in disputes more appropriately handled by the political branches of government.³⁰

The Supreme Court doubled down on Article III standing doctrine in the 1992 case *Lujan v. Defenders of Wildlife*, which held that even when Congress creates a right of action permitting plaintiffs to sue, Article III standing independently checks the power of federal courts to review the case.³¹ In restricting Congress’s power to authorize plaintiffs to sue, the *Lujan* Court signaled caution about the “private attorney general” model of litigation. Under this model, in Pamela Karlan’s words, “Congress can vindicate important public policy goals by empowering private individuals to bring suit,”³² including through fee-shifting provisions.³³ Constitutional standing doctrine, by cutting back on Congress’s ability to authorize private suits, tended to limit plaintiffs’ use of the courts as a locus for large-scale social change.

²⁶ *Id.* at 756.

²⁷ *Id.* (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

²⁸ *Id.* at 760.

²⁹ *Id.* at 761.

³⁰ For additional examples of this trend, see, for example, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), and *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982).

³¹ 504 U.S. 555, 578 (1992).

³² Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186.

³³ See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (explaining the relationship between fee-shifting provisions and encouragement for plaintiffs to bring civil rights suits).

Nonetheless, a countervailing doctrinal current permitted and even encouraged public-law litigation to proceed. For example, in the 1973 case *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, the Supreme Court held that “an unincorporated association formed by five law students” with a “primary purpose . . . to enhance the quality of the human environment for its members, and for all citizens” had standing to challenge an order of the Interstate Commerce Commission permitting railroads to increase freight rates.³⁴ The *SCRAP* Court accepted plaintiffs’ allegations about a multi-pronged chain of causation between increased rates and environmental degradation.³⁵ The result was to greenlight a suit by individuals with the central purpose of promoting the public good.

The Supreme Court’s 1982 decision in *Havens Realty v. Coleman*—a key precedent for testers³⁶—is also consonant with a favorable assessment of public-law litigation. Two “tester plaintiffs,” one Black and one white, made inquiries regarding the availability of apartments.³⁷ “Testers,” the Court explained, “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.”³⁸ The white plaintiff was told that housing was available; the Black plaintiff was told that housing was not available.³⁹ They both sued the real estate company under a private right of action in the Fair Housing Act of 1968.⁴⁰

The Court held that the Black tester (but not the white tester) had standing.⁴¹ The Fair Housing Act, the Court indicated, made it unlawful for a covered entity “[t]o represent to *any person* because of race . . . that any dwelling is not available . . . when such dwelling is in fact so available.”⁴² Therefore, Congress had “conferred on all ‘persons’ a legal right to truthful information about available housing.”⁴³ The Black plaintiff had “alleged injury to her statutorily created right to truthful housing information,” as she was falsely told that apartments were not available.⁴⁴ Hence, the Black tester had satisfied the Article III injury requirement.

The Court found standing based on denial of access to information in other cases as well: the 1989 case *Public Citizen v. Department of Justice*,

³⁴ 412 U.S. 669, 678 (1973) (internal quotation marks omitted).

³⁵ *See id.* at 688–90.

³⁶ *See infra* Section II.B.1.

³⁷ *Havens Realty v. Coleman*, 455 U.S. 363, 368 (1982).

³⁸ *Id.* at 373.

³⁹ *Id.* at 368.

⁴⁰ *Id.* at 366.

⁴¹ *Id.* at 374–75.

⁴² *Id.* at 373 (emphasis in original) (internal quotations omitted) (quoting 42 U.S.C. § 3604(d)).

⁴³ *Id.* at 373.

⁴⁴ *Id.* at 374. The white plaintiff, by contrast, had not been given false information and so did not have standing. *See id.* at 374–75.

which concerned requests for information under the Freedom of Information Act,⁴⁵ and the 1998 case *Federal Election Commission v. Akins*, which concerned disclosure requirements for political advocacy organizations.⁴⁶ In both cases, the groups driving the suits wanted information in order to promote their visions of the public good through scrutiny of certain entities.

Thus, constitutional standing doctrine has not uniformly rejected public-law litigation. But since the 1980s and especially in the last few years, the tide in constitutional standing doctrine has turned increasingly in favor of a private-right model of litigation—at least in Justices’ outward pronouncements.

The Supreme Court’s recent major Article III standing case *TransUnion v. Ramirez* illustrates the trend.⁴⁷ The plaintiffs in *TransUnion* (members of a putative class) sued TransUnion, a credit reporting agency, under the Fair Credit Reporting Act, for failing to use reasonable procedures to ensure that their credit files were accurate.⁴⁸ For each of the plaintiffs, TransUnion’s credit file falsely identified them as entries on a government watchlist for terrorists and other dangerous individuals.⁴⁹ But TransUnion had disseminated the credit reports to third parties for only some of the plaintiffs.⁵⁰

The Supreme Court found standing only for the plaintiffs whose misleading credit reports had been disseminated to third parties.⁵¹ Building on its 2016 decision *Spokeo, Inc. v. Robins*,⁵² the Supreme Court in *TransUnion* reiterated that injury in fact needed to be “concrete”—that is, real—in addition to being “particularized.”⁵³ To decide whether injury was concrete, the Court emphasized “history and tradition”: The question was “whether plaintiffs have identified a close historical or common-law analogue for their asserted injury.”⁵⁴ In *TransUnion* itself, plaintiffs whose credit reports were not disseminated to third parties could not assert an injury sufficiently similar to the common-law tort of defamation to have Article III standing.⁵⁵

TransUnion tightened Congress’s ability to grant standing by enacting private rights of action. Moreover, the case boosted a private-right model of

⁴⁵ 491 U.S. 440, 443 (1989).

⁴⁶ 524 U.S. 11, 20–22 (1998).

⁴⁷ 594 U.S. 413 (2021).

⁴⁸ *Id.* at 421.

⁴⁹ *Id.* at 433.

⁵⁰ *Id.* at 417.

⁵¹ *Id.*

⁵² 578 U.S. 330 (2016).

⁵³ *TransUnion*, 594 U.S. at 424.

⁵⁴ *Id.* For another recent case emphasizing “history and tradition” in the standing inquiry, see *United States v. Texas*, 599 U.S. 670, 676–77 (2023).

⁵⁵ *TransUnion*, 594 U.S. at 433–34.

litigation. The Court emphasized that plaintiffs must be able to “demonstrate their personal stake” in the sense of being “able to sufficiently answer the question ‘What’s it to you?’”⁵⁶ The directive to consider “historical or common-law analogue[s]”⁵⁷ appears to treat as the default model of litigation a suit between private individuals over tort, contract, or property rights. The twentieth-century federal statutes enacted “to protect interests, unprotected at common law, that were shared by large numbers of people”⁵⁸ seem to be disfavored bases for suit in federal court.

At the same time, the Supreme Court has not jettisoned public-law litigation. It continues to adjudicate numerous suits by litigants acting in support of their visions of the public good—in areas such as voting,⁵⁹ freedom of speech,⁶⁰ affirmative action,⁶¹ and campaign finance.⁶² The Court also hears cases brought by state entities in which “pocketbook injury” to the state litigants is much less clear than state officials’ ideological interest in bringing suit.⁶³ Though the Justices’ normative views might be part of the story, it is not only “conservative” plaintiffs that have established standing to pursue public aims.⁶⁴ Another part of the story is the Supreme Court’s underlying ambivalence toward public-law litigation.

In fact, there are important reasons to maintain a robust sphere of public-law litigation. First, groups disserved by the political process should have a place to turn to advance their legal rights. The courts (including federal courts) are an influential venue, though by no means perfect.⁶⁵ Some

⁵⁶ *Id.* at 423 (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983)).

⁵⁷ *Id.* at 424.

⁵⁸ FALLON ET. AL., *supra* note 13, at 116.

⁵⁹ *See, e.g., Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2334 (2021) (voting rights suit brought by Democratic National Committee and affiliates).

⁶⁰ *See, e.g., 303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2308–09 (2023) (First Amendment suit brought by graphic designer seeking not to create wedding websites at odds with her beliefs).

⁶¹ *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2158 (2023) (challenge to affirmative action brought by organization opposed to the practice).

⁶² *See Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1647 (2022) (challenge to campaign finance restrictions brought by politician who chose to subject himself to the restrictions to establish basis for challenge).

⁶³ *See Tara Leigh Grove, Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883, 1883–90 (2019). For recent critiques of state standing doctrine, see William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 165–77 (2023); Ann Woolhandler & Julia D. Mahoney, *State Standing After Biden v. Nebraska* (Aug. 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4528538 [<https://perma.cc/MSD5-WCWD>].

⁶⁴ *See, e.g., Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2565 (2019) (finding standing for Democratic-led states to challenge Trump Administration’s addition of citizenship question to census); *Allen v. Milligan*, 143 S. Ct. 1487, 1502 (2023) (permitting suit challenging Alabama voting maps as racially discriminatory, though not explicitly mentioning standing).

⁶⁵ Of course, there is debate about the value of federal judicial review in protecting minorities.

of the most celebrated applications of federal judicial power, such as those related to the civil rights movement, involved public-law litigation activities.⁶⁶ Second, government enforcement of federal law may be hampered by a lack of resources, including in the ADA context.⁶⁷ Hence, public enforcement is usefully supplemented by lawsuits from private individuals and public-interest organizations.

There are rejoinders to both these points; one might argue, for example, that government underenforcement of federal law is a feature, not a bug.⁶⁸ Even for those taking this view, a third point may be persuasive: Attempts to favor private-right over public-law litigation in the standing arena run into the problem of differentiating these types of litigation along dimensions relevant to standing. In other words, courts must identify aspects of public-law litigation that render it especially problematic from a standing perspective. As I argue below, however, public-law litigation overlaps with private-right litigation in significant respects, and the effort to distinguish them cleanly for standing purposes is counterproductive.⁶⁹ Therefore, the federal courts should hesitate before adopting an approach to standing rooted in skepticism about public-law litigation.

In sum, the federal courts today stand at a crossroads. Will they further restrict federal litigation to cases resembling “traditional” private-right disputes? Or will they embrace the fact that their cases have long included, and continue to include, litigation aimed at advancing the public interest?

II

BETWEEN PUBLIC LAW AND PRIVATE RIGHT: ARTICLE III STANDING AND DISABILITY TESTER LITIGATION

Cases involving tester standing for plaintiffs with disabilities, such as *Acheson*, underscore tensions regarding the status of public-law litigation in the Supreme Court’s jurisprudence. First, I briefly provide background on this type of litigation, using Laufer’s case as an illustrative example. Second, I analyze the doctrinal quandaries raised by these cases and connect them to conceptual dilemmas in the Court’s treatment of public-law litigation. Third,

For an argument that federal courts historically have not played this role, see Nikolas Bowie, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S. 5–12 (June 30, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf> [<https://perma.cc/BYZ2-K966>]. The claim here is simply that federal litigation should be an avenue open to people whose interests are devalued by the political process and who seek to better their legal lot.

⁶⁶ See, e.g., Stephen L. Wasby, *Civil Rights Litigation By Organizations: Constraints and Choices*, 68 JUDICATURE 337, 339–47 (1985) (describing dynamics of civil rights litigation campaigns).

⁶⁷ See *infra* notes 95–97 and accompanying text.

⁶⁸ See *infra* notes 123–25 and accompanying text.

⁶⁹ See *infra* Section II.C.

I argue that public-law and private-right litigation do not differ in a manner that should affect the standing analysis.

A. Background on Acheson and Disability Tester Litigation

The facts of the case the Supreme Court recently dismissed as moot, *Acheson Hotels v. Laufer*, are instructive in highlighting various features of disability tester litigation. Plaintiff Laufer, who is disabled, visited the website of an inn operated by Acheson and found that the website did not identify accessible rooms or provide sufficient information for her to determine whether the inn’s features were accessible to her.⁷⁰ According to Laufer, the dearth of information on Acheson’s website violated a Department of Justice (DOJ) regulation providing that a “public accommodation” operating a “place of lodging” must “with respect to reservations made by any means . . . [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.”⁷¹ The DOJ regulation was promulgated pursuant to Title III of the ADA, which provides that “[n]o 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.”⁷²

Laufer sued Acheson in federal district court in Maine pursuant to a private right of action authorizing suit for violation of the ADA and the DOJ regulation.⁷³ She sought declaratory and injunctive relief, as well as attorney’s fees and costs, as damages are not available.⁷⁴ So what was the standing problem? Laufer does not appear to have had concrete plans to visit Acheson’s hotel; according to the First Circuit’s decision in her case, she “disclaim[ed]” such intent.⁷⁵ Instead, Laufer’s complaint stated that she was an “advocate” for “similarly situated disabled persons,” and that her advocacy included working as “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.”⁷⁶ The suit against Acheson was not an isolated case; Laufer seems to

⁷⁰ Laufer v. Acheson Hotels, LLC (*Acheson II*), 50 F.4th 259, 263–64 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023).

⁷¹ *Id.* (quoting 28 C.F.R. § 36.302(e)(1)(ii) (2016)).

⁷² 42 U.S.C. § 12182(a).

⁷³ *Acheson II*, 50 F.4th at 265.

⁷⁴ *Id.* at 265, 276 n.7.

⁷⁵ *Id.* at 267 n.3.

⁷⁶ Laufer v. Acheson Hotels, LLC (*Acheson I*), No. 2:20-CV-00344-GZS, 2021 WL 1993555,

have filed over 650 cases involving non-compliant online reservation systems of other lodging establishments.⁷⁷

Acheson challenged Laufer's Article III standing, arguing that she was not harmed by any absence of information on its reservations system.⁷⁸ Although the district court granted Acheson's motion to dismiss,⁷⁹ the First Circuit reversed and held that Laufer had standing.⁸⁰ The First Circuit thereby deepened a split among the federal courts of appeals, including in cases involving Laufer herself.⁸¹ The Supreme Court granted certiorari in March 2023.⁸²

In August 2023, Laufer moved to dismiss the Supreme Court case as moot.⁸³ She explained that an attorney who had previously represented her had been disciplined for ethical misbehavior, and that, as a consequence, Laufer had decided to dismiss her claim before the district court with prejudice.⁸⁴ Therefore, Laufer argued, the Supreme Court should deem her case moot.⁸⁵ Acheson opposed Laufer's suggestion of mootness, contending that Laufer was strategically seeking to moot the case to avoid an adverse ruling.⁸⁶ The Supreme Court deferred a response to Laufer's suggestion of mootness to after oral argument, which it held in October 2023.⁸⁷

In December 2023, the Supreme Court vacated the First Circuit's judgment and remanded Laufer's case to the First Circuit with instructions to dismiss the case as moot.⁸⁸ Seven Justices—all except Justices Thomas and Jackson—joined an opinion by Justice Barrett that disposed of the case on mootness grounds and declined to reach the Article III standing issue.⁸⁹ Justice Jackson concurred in the judgment, questioning the Court's practice

at *2 (D. Me. May 18, 2021), *rev'd and remanded*, 50 F.4th 259 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023).

⁷⁷ *Id.* at *3.

⁷⁸ *Acheson II*, 50 F.4th at 267.

⁷⁹ *Acheson I*, 2021 WL 1993555, at *6.

⁸⁰ *Acheson II*, 50 F.4th at 278.

⁸¹ For cases holding that the tester (sometimes Laufer herself) lacked Article III standing, see *Harty v. West Point Realty, Inc.*, 28 F.4th 435 (2d Cir. 2022); *Laufer v. Mann Hosp., LLC*, 996 F.3d 269 (5th Cir. 2021); and *Laufer v. Looper*, 22 F.4th 871 (10th Cir. 2022). For other cases holding that Laufer had standing, see *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 163 (4th Cir. 2023); *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022), *vacated on other grounds*, 77 F.4th 1366 (11th Cir. 2023).

⁸² *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023).

⁸³ Suggestion of Mootness, *supra* note 4.

⁸⁴ *Id.* at 3–4.

⁸⁵ *Id.* at 11.

⁸⁶ Petitioner's Opp. to Suggestion of Mootness at 6, *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (No. 22-249).

⁸⁷ Transcript of Oral Argument, *supra* note 4.

⁸⁸ *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023).

⁸⁹ *Id.*

of vacating the appellate court’s decision.⁹⁰ Justice Thomas was the only Justice who would have reached the Article III standing issue; he expressed the view that Laufer lacked standing,⁹¹ and some of his arguments are discussed below.⁹²

The Supreme Court’s reasons for mootness were, like Laufer’s arguments, case-specific: The Court noted that Laufer had “voluntarily dismissed her pending ADA cases after a lower court sanctioned her lawyer” and had “represented to this Court that she will not file any others.”⁹³ The Court left unresolved the Article III standing question on which it had granted certiorari and that had given rise to a circuit split. Thus, the disability tester standing issue is now back in the lower courts, plausibly to return to the Supreme Court at a later point in time.

The Article III standing question has ramifications for enforcement of the ADA. According to a brief submitted by the Department of Justice (DOJ) in *Acheson*, testers are important for enforcing Title III of the ADA and its associated regulations.⁹⁴ Although the U.S. government could sue noncompliant establishments,⁹⁵ DOJ explained, “federal agencies have limited enforcement resources.”⁹⁶ Moreover, in the words of a Ninth Circuit opinion, “the unavailability of damages reduces or removes the incentive for most disabled persons who are injured by inaccessible places of public accommodation to bring suit under the ADA.”⁹⁷ DOJ, in its *Acheson* brief, further indicated that “because patrons frequently have only an ephemeral relationship with places of public accommodation, individuals with disabilities who encounter ADA violations often have little practical reason to incur the burdens of a lawsuit seeking prospective relief.”⁹⁸ These are all reasons why testers matter for practical enforcement of the ADA, and why the standing of testers is significant.

B. Doctrinal Tensions and Conceptual Underpinnings

Standing for disability tester plaintiffs presents knotty doctrinal issues, which reflect deeper conceptual underpinnings—namely, the Supreme

⁹⁰ *Id.* at 14 (Jackson, J., concurring in the judgment).

⁹¹ *See id.* at 5 (Thomas, J., concurring in the judgment).

⁹² *See infra* notes 128–30 and accompanying text.

⁹³ *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 5 (2023).

⁹⁴ Brief for the United States as Amicus Curiae Supporting Neither Party at 16, *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1 (2023) (No. 22-429) [hereinafter “DOJ Br.”]; *see also* Kelly Johnson, Note, *Testers Standing Up for Title III of the ADA*, 59 CASE W. RESV. L. REV. 683, 689 (2009).

⁹⁵ *See* 42 U.S.C. § 12188(b).

⁹⁶ DOJ Br., *supra* note 94, at 16.

⁹⁷ *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007).

⁹⁸ DOJ Br., *supra* note 94, at 16–17; *see also* Harris, Tani & Wakschlag, *supra* note 12, at 1728.

Court's ambivalence about public-law versus private-right litigation. This section discusses four doctrinal conundrums: (1) the application of *Havens Realty*; (2) the role of informational standing; (3) the treatment of stigmatic harm; and (4) the trajectory of Article III standing post-*TransUnion*.

1. *The Application of Havens Realty*

Disability tester standing cases hinge to a significant extent on courts' treatment of *Havens Realty*, the apartment tester standing case from 1982. In *Havens Realty*, the Supreme Court held that a Black tester had been denied a congressionally conferred "legal right to truthful information about available housing" and therefore had Article III standing to sue.⁹⁹ Since *Havens Realty*, the Supreme Court has taken a more restrictive approach to Congress's ability to "create" standing by granting a legal entitlement.¹⁰⁰ If a case like *Acheson* reaches the Court again, the Court may hesitate to overrule *Havens Realty* outright, perhaps wishing to save its institutional capital for other precedents.

Courts, including the Supreme Court, may nevertheless seek to distinguish *Havens Realty*. One possibility is to hold that the statutory right of action in *Havens Realty* was worded capaciously enough to include testers, unlike the narrower language in the ADA regulations.¹⁰¹ This approach is discussed below.¹⁰² Overall, however, the thrust of *Havens Realty* is to permit standing for testers who have no intention of using the good or service in question, and who are instead seeking to ascertain whether the defendant is providing the legally required information to people in the tester's own protected class. That seems to describe disability testers well.

The treatment of *Havens Realty* in disability tester litigation will reflect courts' approach to public-law litigation more generally. A tester plaintiff deliberately comes into contact with a defendant's conduct to force the defendant to change its ways and to set a broader precedent. Testers thus fit into the framework of public-law litigation. But they may be suspect from a private-right perspective. The Supreme Court has described courts as "essentially passive instruments of government" that "do not, or should not,

⁹⁹ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982).

¹⁰⁰ *See, e.g., TransUnion v. Ramirez*, 594 U.S. 413, 426–27 (2021) (noting that Congress's creation of a cause of action does not relieve courts of their responsibility to decide independently whether a plaintiff has suffered a concrete harm under Article III); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 556 (1992) (holding that plaintiffs lacked standing because they did not demonstrate that they suffered an injury in fact).

¹⁰¹ *See* Brief of Petitioner at 29–33, *Acheson Hotels v. Laufer*, 601 U.S. 1 (2023) (No. 22-429) [hereinafter "Acheson Br."]; DOJ Br., *supra* note 94, at 18–19.

¹⁰² *See infra* Section III.D.

sally forth each day looking for wrongs to right.”¹⁰³ To be sure, courts do not “make up” test cases; testers bring them to courts. Nevertheless, a test case departs from a model according to which X injures Y without Y putting herself in a position to be injured.

The Supreme Court, however, has never rejected Article III standing for individuals simply because they are “testing” a law to bring about societal change. The idea of a test case is a tried-and-true public-interest strategy employed by organizations with an array of political orientations. Instead the Supreme Court has, in effect, insisted that tester plaintiffs have “skin in the game.” If a plaintiff challenging racial segregation rode a bus or sat at a lunch counter for the purpose of suing and bringing down the system of segregation, the plaintiff would still have standing.¹⁰⁴ But the fact that the plaintiff rides the bus or sits at the lunch counter gives the plaintiff a personal stake in the suit.

The question raised by disability tester suits is: What counts as skin in the game? Is a plaintiff’s visit to a hotel website similar in relevant respects to a ride on the bus? Reciting the doctrine that the plaintiff must personally suffer concrete injury does not answer this question. Rather, a court must decide whether the plaintiff has incurred harm. Two candidates for such harm are informational injury and stigmatic injury, considered next.

2. Informational Standing

The Supreme Court’s approach to informational standing is consistent with ambivalence about public-law litigation. The denial of information could be viewed as a harm that personally and concretely affects each individual to whom information is denied. Thus, the Court in *Federal Election Commission v. Akins* indicated that informational injury, though widely shared, could be cognizable.¹⁰⁵

Yet the notion of informational injury, read broadly, could be used to challenge an array of practices. Interactions between citizens, and between citizens and the government, are frequently mediated through informational disclosure.¹⁰⁶ Harms resulting from the denial or unauthorized disclosure of

¹⁰³ *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring)).

¹⁰⁴ *See Fed. Election Comm’n v. Cruz*, 142 S. Ct. 1638, 1647 (2022) (holding that injury may suffice for standing even if it “could be described in some sense as willingly incurred”); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (asserting, in challenge to segregation in busing, “[t]hat the [plaintiff] may have boarded this particular bus for the purpose of instituting this litigation is not significant”).

¹⁰⁵ 524 U.S. 11, 24–25 (1998).

¹⁰⁶ *See* Seth F. Kreimer, “*Spooky Action at a Distance*”: *Intangible Injury in Fact in the Information Age*, 18 U. PA. J. CONST. L. 746, 752–53 (2016) (describing the ubiquity of cases involving disclosure or misuse of information).

information are therefore common. Perhaps for this reason, the Supreme Court in *TransUnion* suggested mechanisms to cut back on informational standing. In particular, the Court stated that the plaintiffs in that case had “identified no downstream consequences from failing to receive the required information.”¹⁰⁷

In disability tester litigation, a court might require the plaintiff to demonstrate “downstream consequences” from failing to receive the required information. In this event, however, the denial of information would become superfluous, as the real basis for standing would be the “downstream consequences.” Hence, “informational standing” could lose its efficacy as an independent basis for Article III injury. But that result is—at a minimum—in tension with the Supreme Court’s approach in earlier cases such as *Akins*.¹⁰⁸

An expansive understanding of informational standing is a powerful tool for public-interest litigators with a variety of ideological leanings. The question for federal courts is whether to blunt this tool by treating the denial of information as essentially superfluous, parasitic on the impairment of an independent “concrete interest.”

3. *Stigmatic Harm*

Disability tester standing litigation raises fundamental questions about the cognizability of stigmatic harm as well. As the First Circuit stated in its *Acheson* decision, “Laufer alleges she suffered ‘frustration and humiliation’ when Acheson’s reservation portals didn’t give her adequate information about whether she could take advantage of the accommodations. Without that information, Laufer is put on unequal footing to experience the world in the same way as those who do not have disabilities.”¹⁰⁹

Per *Allen v. Wright*, stigmatic harm can count as Article III injury in a discrimination case, but plaintiffs must be “personally subject to discriminatory treatment.”¹¹⁰ What does it mean for a plaintiff to be personally subject to discriminatory treatment arising from contact with a website?

Courts may well be concerned that accepting a claim of stigmatic injury made by individuals like Laufer would greatly widen the circle of potential plaintiffs. Presumably, numerous people with disabilities could visit a hotel website without intending to stay at a hotel. More generally, far-reaching recognition of stigmatic harm as injury in fact risks undermining a purely

¹⁰⁷ *TransUnion v. Ramirez*, 594 U.S. 413, 442 (2021) (internal quotation marks omitted).

¹⁰⁸ See *supra* notes 45–46 and accompanying text.

¹⁰⁹ *Laufer v. Acheson Hotels, LLC (Acheson II)*, 50 F.4th 259, 274 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023).

¹¹⁰ 468 U.S. 737, 757 n.22 (1984).

private-right model of litigation. Stigmatic harm frequently crosses geographic boundaries, as people could be stigmatized by witnessing conduct taking place elsewhere. In addition, stigmatic harm often stems from group-based discrimination. If a defendant's action disrespects members of a group on account of their belonging to the group, other members of the group could reasonably feel stigmatized. Redressing the individual's injury could then require changing the status of the group.¹¹¹ Litigants challenging group-based stigma may well seek a broader restructuring of legal relations.

Courts may additionally be worried that permissive standing for stigmatic harm will lead to tenuous claims of stigmatization. In the context of standing to challenge religious displays on public land as violations of the Establishment Clause, Justices Gorsuch and Thomas have criticized so-called "offended observer" standing, namely, standing for individuals who come across the displays and take issue with what they perceive as government endorsement of religion.¹¹² The risk is that anyone could claim to be offended by a defendant's action, eviscerating limitations on constitutional standing.

And yet the Supreme Court has not treated stigmatic harm as reducible to mere "offense." To the contrary, the Court has treated stigmatic harm as "one of the most serious consequences of discriminatory government action . . . sufficient in some circumstances to support standing."¹¹³ If the category of cognizable stigmatic injury is not to be redundant, it must include cases in which the plaintiff has been treated as "less than" even without losing a "tangible" benefit such as a job opportunity or a place in college—or an actual visit to a hotel. Further, it is not clear why geographic proximity to the source of stigma should be determinative, especially because so much of modern commerce takes place over the internet.

Instead, someone who belongs to a group may be genuinely stigmatized when she comes across barriers to the full participation of members of her group in society. A hotel website that fails to contain legally required accessibility information may send the message that the hotel is not especially concerned about providing the information needed by people with disabilities who wish to book a trip. That message could plausibly strike many people with disabilities as stigmatizing or disrespectful.

Comparisons to other situations might help illustrate the issues that

¹¹¹ See Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 GEO. L.J. 1263, 1293 (2021) (discussing links between relief for individuals and relief for other members of a group).

¹¹² See *City of Ocala v. Rojas*, 143 S. Ct. 764, 764–65 (2023) (mem.) (opinion of Gorsuch, J.) (respecting denial of certiorari); *City of Ocala v. Rojas*, 143 S. Ct. 764, 765–68 (2023) (mem.) (Thomas, J., dissenting) (opposing denial of certiorari); see also *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2098–2103 (2019) (Gorsuch, J., concurring in the judgment).

¹¹³ *Allen*, 468 U.S. at 755.

courts face in determining whether a tester plaintiff's claimed dignitary harm counts as injury in fact. Here are a couple:

Racial diversity in hiring. Congress passes a statute banning certain public employers from considering racial diversity when making hiring decisions and enacts a private right of action for individuals to enforce the statute. Jeff, an advocate critical of affirmative action, visits the websites of several covered public employers and sees what he deems to be veiled references to racial diversity programs. Jeff does not intend, however, to apply to these employers. Rather, Jeff, who is white, argues that racial diversity programs express disrespect toward non-minorities by disregarding their qualifications. Alternatively, Jeff is a member of a minority group, and he argues that racial diversity programs stigmatize minorities by suggesting that minorities cannot be hired based on merit. Could Jeff have standing based on stigmatic harm?

Religious accommodations in college. Congress passes a law requiring colleges that accept federal funds to provide information regarding housing accommodations for religious students. Amy is a high school student who belongs to a religion that requires men and women to live separately before marriage. Amy visits the websites of numerous colleges to see if they provide information regarding the availability of single-sex dormitory hallways. Amy would not apply to all these colleges even if they changed their dormitory practices. However, to Amy, the colleges' failure to provide the statutorily required information conveys a message of disrespect for her religion. The colleges, she contends, are saying: This is not a welcoming place for you and your community. Could Amy assert stigmatic harm with respect to the colleges to which she does not intend to apply?

One might contend that Jeff and Amy are like disability testers, and that neither of them suffers dignitary harm. But it is not clear that such a bright-line rule can be defended. To say that these plaintiffs were not personally subject to discriminatory treatment is to beg the question, for the issue is what constitutes discriminatory treatment. To many, stigmatizing an ethnicity or religion effectively treats individual members of the group with disrespect.

All in all, stigmatic harm is neither easy to ignore nor easy to contain. This type of harm straddles the boundary between individual injury and social consequences. To the extent one is concerned about litigation brought to redress widespread social harm, stigmatic harm may appear risky. Yet it is hard to deny that broad-based stigmatic harm can inflict individual injury. Consequently, the question of what to do about stigmatic harm is one of the quandaries involved in disability tester litigation.

4. *The Impact of TransUnion*

Courts' treatment of *TransUnion* in disability tester lawsuits will help to illuminate their approach toward public-law litigation. *TransUnion*, with its emphasis on "history and tradition," privileges harms that resemble common-law causes of action closer to the private-right end of the spectrum. The question, then, is how courts should respond when Congress passes statutes that supplement common-law causes of action, presumably because Congress found common-law claims wanting.¹¹⁴ One of Congress's goals in passing these statutes is to encourage private enforcement of federal law, and that goal is consonant with the public-law litigation model. The judiciary now faces a choice about whether to curtail Congress's ability to advance this aim.

It is unclear how the injury asserted by disability tester plaintiffs interacts with the "history and tradition" approach of *TransUnion*.¹¹⁵ *TransUnion* appears to have singled out "discriminatory treatment" as an example of how "[c]ourts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation."¹¹⁶ But *TransUnion* left open what it means to afford "due respect" while insisting on a strict distinction between a cause of action and "concrete harm."¹¹⁷ Moreover, there are potential common-law analogues to testers' stigmatic harm, such as tort causes of action for offensive-touching battery.¹¹⁸ It remains to be determined, however, at which level of generality courts should assess the similarity between historical causes of action and a tester's asserted stigmatic harm.

Courts' application of *TransUnion* in disability tester litigation will help to clarify the extent to which they are willing to accept congressionally defined causes of action geared toward enforcement of statutes by private plaintiffs for the public good. Overall, the doctrinal puzzles presented by disability tester litigation reflect conceptual ambiguities in the Supreme Court's jurisprudence on the legitimacy and value of public-law litigation.

¹¹⁴ See Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 82 (2015) ("Congress is in a position where it needs to be able to articulate new injuries, as they often are key components of new policy regimes.").

¹¹⁵ See *Laufer v. Arpan LLC*, 29 F.4th 1268, 1286 (11th Cir. 2022) (Newsom, J., concurring).

¹¹⁶ *TransUnion v. Ramirez*, 594 U.S. 413, 425 (2021).

¹¹⁷ *Id.* at 2205.

¹¹⁸ See Brief for Respondent at 41–44, *Acheson Hotels v. Laufer*, 143 S. Ct. 1053 (2023) (No. 22-429) [hereinafter *Laufer Br.*]; Bayefsky, *supra* note 111, at 1318 (discussing longstanding foundations of dignitary torts).

C. *Separating Public Law from Private Right: The Complexities*

This Section highlights the difficulties of differentiating between public-law and private-right litigation in a manner that justifies disfavored treatment of public-law litigation in the standing analysis. I address several features of public-law litigation that may prompt skepticism from federal courts, such as proactiveness in “creating” a case and ideological motivation. I argue that these features are not unique to public-law litigation and should not be the basis for disapproval of public-law litigation in standing doctrine.

1. *Proactivity vs. Passivity*

One might suggest that public-law plaintiffs create lawsuits, while private-right plaintiffs become involved in litigation only because they are hit with a real-world wrong. Some concern about testers may emanate from the sense that they are “ginning up” litigation. Yet plaintiffs need not be passive to have standing. In the 2022 case *Federal Election Commission v. Cruz*, the Supreme Court held that Senator Ted Cruz had standing to challenge campaign finance rules even if his motivation in engaging in certain financial transactions “was to establish the factual basis for this challenge.”¹¹⁹ Citing *Havens Realty*, the Court stated that “an injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred.”¹²⁰ Thus, a plaintiff’s interest in setting up a “test case” does not nullify standing.

2. *Ideological Motivation*

Perhaps private-law litigants are seeking to better their own situation, while public-law litigants are aiming to spur wider legal or political change. Yet this dichotomy is not stark. In a study of medical malpractice litigation, for example, plaintiffs expressed an interest in changing the conduct of doctors and hospitals so that others would be less likely to suffer in similar ways in the future.¹²¹ These plaintiffs are traditional tort litigants asserting their own harms or those of family members, but they are motivated at least partially by the interest in effectuating broader change. On the flip side, the Black tester in *Havens Realty* may have been aiming to change social structures, but she may also have been thinking about her own ability to

¹¹⁹ 142 S. Ct. 1638, 1647 (2022) (quoting Plaintiffs’ Response to Defendants’ Statement of Undisputed Material Facts, ¶ 56, *Cruz v. Fed. Election Comm’n*, 542 F. Supp. 3d 1 (D.D.C. 2021) (No. 19-cv-908)).

¹²⁰ *Id.*

¹²¹ Tamara Relis, “It’s Not About the Money!”: A Theory on Misconceptions of Plaintiffs’ Litigation Aims, 68 U. PITT. L. REV. 701, 729 (2007).

flourish in a world that regarded people like her as dubious rental prospects based on the color of their skin. In other words, “ideological” motivation is not limited to public-law litigants, and it is not the only driving force behind public-law litigation. The difficulties of separating people’s multifaceted motivations are compounded when one considers the evidentiary challenges of proving motivations in court. Thus, the criterion of ideological motivation is a poor candidate for distinguishing between public-law and private-right litigation in a manner relevant to standing doctrine.

3. *Enforcement Discretion*

One might argue that standing doctrine should disfavor suits in which private plaintiffs encroach on the Executive Branch’s enforcement discretion.¹²² The Supreme Court has at times suggested that standing doctrine is informed by the Article II concern that private plaintiffs not usurp the Executive Branch’s duty to “take Care that the Laws be faithfully executed.”¹²³ On this view, the executive should decide “how to prioritize and how aggressively to pursue legal actions against defendants”—rather than private plaintiffs who “are not accountable to the people.”¹²⁴ If Title III of the ADA is underenforced, for example, then the Executive Branch should decide whether to invest more resources in pursuing violators.

But how does a court determine whether a lawsuit poses a threat to executive enforcement authority? Judge Newsom of the Eleventh Circuit has suggested that “testers” like Laufer pose a clear threat.¹²⁵ Justice Thomas endorsed this view in his concurrence in the Supreme Court’s *Acheson* judgment: “[T]esters exercise the sort of proactive enforcement discretion properly reserved to the Executive Branch, with none of the corresponding accountability.”¹²⁶

But we might ask why testers threaten executive enforcement discretion. Does the sheer number of a tester’s lawsuits render her a usurper of executive power? Even if she filed only one lawsuit, she could select her target based on her own preferences rather than the public’s priorities. Is the problem that testers pick and choose whom to sue among potential violators? That would also be true of a Black plaintiff during segregation who selected one lunch counter at which to sit or one bus to ride.¹²⁷ Did such a plaintiff lack standing? If the response is that the plaintiff at the lunch counter is

¹²² See *Laufer v. Arpan LLC*, 29 F.4th 1268, 1291 (11th Cir. 2022) (Newsom, J., concurring).

¹²³ *Allen v. Wright*, 468 U.S. 737, 761 (1984) (quoting U.S. CONST. art. II, § 3).

¹²⁴ *TransUnion v. Ramirez*, 594 U.S. 413, 429 (2021).

¹²⁵ *Arpan*, 29 F.4th at 1291 (Newsom, J., concurring).

¹²⁶ *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 13 (2023) (Thomas, J., concurring in the judgment) (quoting *Arpan*, 29 F.4th at 1291 (Newsom, J., concurring)).

¹²⁷ See *Evers v. Dwyer*, 358 U.S. 202, 204 (1958) (noting that a plaintiff boarding a “particular bus for the purpose of instituting . . . litigation is not significant”).

personally subject to discriminatory treatment, and testers are not, then the Article II issue collapses into the more general test for concrete harm. Accordingly, it is doubtful that courts could operationalize the idea of Article II enforcement discretion to identify the kind of public-law litigation that warrants skepticism.

4. Justice Thomas's Standing Theory

Justice Thomas's standing theory, elaborated in recent cases,¹²⁸ might be considered a candidate for distinguishing fruitfully between public-law and private-right litigation. In Justice Thomas's view, the scope of Article III judicial power historically depended on whether the individual was asserting the individual's own rights or those belonging to the community as a whole. "Where an individual sought to sue someone for a violation of his private rights, such as trespass on his land, the plaintiff needed only to allege the violation,"¹²⁹ rather than to show any additional "concrete" harm. "But where an individual sued based on the violation of a duty owed broadly to the whole community, such as the overgrazing of public lands, courts required 'not only *injuria* [legal injury] but also *damnum* [damage]'"¹³⁰—in today's parlance, concrete harm.

Drawing on Justice Thomas's standing theory, one might argue that public-law litigation should be disfavored to the extent plaintiffs seek to enforce duties owed to the community as a whole. But the question remains how to decide whether plaintiffs are seeking to enforce such a duty. Is a hotel's duty to provide information about access for people with disabilities owed only to disabled people with imminent plans to visit the hotel, or to all disabled people who access the website, or to the population at large? The response to this question would presumably affect the classification of the plaintiff's claim in terms of public or private rights. One might look to the statutory or regulatory language to answer the question,¹³¹ but that would require substantial engagement with the merits of the case and might not be conclusive.¹³² The dividing line between duties owed to individuals and duties owed to the public at large is not clear.¹³³

¹²⁸ See *TransUnion*, 594 U.S. at 446–50 (Thomas, J., dissenting); *Spokeo, Inc. v. Robins*, 578 U.S. 346, 343–49 (Thomas, J., concurring).

¹²⁹ *TransUnion*, 594 U.S. at 447 (Thomas, J., dissenting).

¹³⁰ *Id.* (quoting *Spokeo*, 578 U.S. at 346 (Thomas, J., concurring)).

¹³¹ See *Spokeo*, 578 U.S. at 349 (Thomas, J., concurring).

¹³² See *infra* notes 133–43 and accompanying text.

¹³³ Justice Thomas's concurrence in the judgment in *Acheson* added a third category of "quasi-private rights, or statutory entitlements"—namely, "privileges or franchises that are bestowed by the government on individuals." *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 11 n.2 (2023) (Thomas, J., concurring in the judgment) (internal quotation marks omitted) (quoting *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 573 U.S. 138, 171 (2015)). One might place the right to

In sum, public-law and private-right litigation are not easily disaggregated along the axes of proactivity, ideological motivation, use of enforcement discretion, or the assertion of rights belonging to the community as a whole. Courts should therefore hesitate to rely on a distinction between public-law and private-right litigation to resist standing in cases that appear to fall on the public-law side of the dividing line.

III

THE PATH FORWARD

How, then, should Article III standing doctrine develop in disability tester cases, as courts continue to grapple with the question left unresolved in *Acheson*? I offer and evaluate several suggestions. First, and ideally, courts could defer to Congress in determining which tester suits are justiciable. Second—accepting that the ship may have sailed with respect to the first suggestion—courts could rule that disability tester plaintiffs have standing based on their distinctive informational and stigmatic harms. Third, courts could rule that testers lack standing to the extent they have disclaimed an intent to visit a place of public accommodation—a case-specific issue. Fourth, courts could follow DOJ’s suggestion to deny standing to disability testers based on the particular language of the regulation at issue. In all these ways, courts could resolve cases such as *Acheson* in a way that avoids substantial damage to public-law litigation.

A. Deference to Congress

Efforts to distinguish “tester” litigation from “traditional” litigation enmesh courts in value-laden decision-making.¹³⁴ The Supreme Court currently seems to permit suits that fit the public-law litigation mold provided the plaintiff is herself “among the injured.”¹³⁵ But determining when a litigant has been personally harmed is not value-neutral. Is it harmful for a pro-choice individual to live in a society where abortion is banned even if she is past childbearing age? Is it harmful for a pro-life individual to live in a state where companies with over 100 employees must subsidize

disability accessibility information—a right created by statute and regulation—into the third category. Justice Thomas stated, however, that “[w]e need not classify Laufer’s legal interests” in terms of the public/private right distinction because Laufer had failed to allege either a violation of her own private rights or a “cognizable injury to herself” based on the violation of a public right. *Id.* at 11 n.2 (2023) (Thomas, J., concurring in the judgment). Justice Thomas’s decision not to classify Laufer’s interest may reflect the difficulty of distinguishing between public rights, private rights, and “quasi-private rights” in the context of disability testers.

¹³⁴ See Sunstein, *supra* note 15, at 188–89 (“In classifying some harms as injuries in fact and other harms as purely ideological, courts must inevitably rely on some standard that is normatively laden and independent of facts.”).

¹³⁵ *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972).

abortions, even if the individual has no intention of working for such a company? Adjudicating between competing perspectives on harm requires moral argumentation.¹³⁶ The same is true of distinguishing between actionable stigma and mere “offense.”

The question then becomes “who decides”: Which institution should be tasked with making these determinations? Congress is better placed than the federal courts to fulfill that role, as scholars have often argued.¹³⁷ If courts are in charge of sifting traditional plaintiffs asserting a private right from non-traditional plaintiffs pursuing the public good, they risk inviting allegations of bias and damaging the courts’ legitimacy. It would be better to rely on the political representativeness and accountability generated by congressional imprimatur.

One might argue that the Article III check, enforced by the federal judiciary, is needed to prevent Congress from authorizing inappropriate types of suits such as those seeking advisory opinions.¹³⁸ But courts could block Congress from creating rights of action in extreme cases, as if Congress allowed the President to ask for judicial advice before formulating foreign policy.¹³⁹ Deciding when a case is “extreme” poses a challenge. Yet the case for deference to Congress would be fairly clear in most situations.

The Supreme Court, however, has been reluctant to defer to Congress in recognizing Article III standing.¹⁴⁰ Assuming that reluctance will continue, the next Section turns to the question of how courts could approach standing in disability tester litigation.

B. Informational and Stigmatic Injury

If the federal courts themselves are to tackle the question of whether disability tester plaintiffs have skin in the game, they will need to make some distinction between plaintiffs with a concrete stake and plaintiffs without. Any line the courts draw runs the risk of arbitrariness. But that is a risk the Supreme Court has assumed in deciding to sort injuries that are “real” from injuries that are not.

One possible approach is to combine informational standing and

¹³⁶ See Fletcher, *supra* note 15, at 232–33.

¹³⁷ See, e.g., *id.* at 234–37; Sunstein, *supra* note 15, at 191; Townsend, *supra* note 114, at 82.

¹³⁸ See *TransUnion v. Ramirez*, 594 U.S. 413, 423 (2021) (“Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only ‘the rights of individuals,’ and that federal courts exercise ‘their proper function in a limited and separated government.’”) (citations omitted).

¹³⁹ See, e.g., Letter from Thomas Jefferson, Sec’y of State, to Chief Justice Jay and Associate Justices (July 18, 1793), reprinted in FALLON ET AL., *supra* note 13, at 50–51 (asking for advice from Supreme Court Justices on questions involving the lawful conduct of foreign relations “which do not give a cognizance of them to the tribunals of the country.” (emphasis in original)).

¹⁴⁰ This may be less true, however, in the discrimination context. See *TransUnion*, 594 U.S. at 426.

stigmatic harm. When the denial of legally required information leads to stigmatic harm, the plaintiff has standing. On this view, disability testers plausibly incur injury in fact. They are challenging informational barriers to accessibility for people with disabilities like them. These barriers are a source of stigmatic harm; they underscore and compound limitations in societal opportunities faced by people with disabilities, and they entrench differences between people with disabilities and others.¹⁴¹ The claimed legal violation—the failure to provide required accessibility information—gives rise to dignitary harm, namely, the stigma coming from the plaintiff’s contact with a website that sends a message of exclusion.

If courts take this approach, they could identify features of disability tester suits that make denial of information especially likely to cause stigmatic harm. Perhaps informational injury is more stigmatizing in the setting of disability-based discrimination because the absence of knowledge about accommodations creates an especially strong barrier to societal participation. Perhaps hotel websites are distinctive in the sense that people are particularly likely to visit them from a geographically distant location; so injury in fact should not depend on where the plaintiff is located. A person who receives a debt-collection letter with allegedly misleading information about the statute of limitations (for example) would not share these features of disability tester litigation involving places of public accommodation, and a court could still hold that the debt-collection plaintiff had not suffered stigmatic harm.¹⁴²

Therefore, courts could rule that disability tester plaintiffs have Article III standing due to the combination of informational injury and stigmatic harm, without sliding down a “slippery slope” whereby all denials of information cause stigmatic harm. Still, on this approach, any person with disabilities could visit a hotel website and have standing independent of plans to visit. If courts are unwilling to take that step, they could look for other ways to distinguish plaintiffs with skin in the game from plaintiffs without.

C. Case-Specific Concreteness

One option is to look at the record in particular cases to gauge the definiteness of the plaintiff’s lack of intent to visit the place of public accommodation. For example, in *Laufer’s* case, the First Circuit stated that *Laufer* had “disclaim[ed] any” intent to visit Maine (where *Acheson’s* hotel

¹⁴¹ For an in-depth analysis of the concept of stigma, see ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

¹⁴² See *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 997–98 (11th Cir. 2020).

is located).¹⁴³ Perhaps a plaintiff who professes no intent whatsoever to visit the hotel should not have standing. But matters might be different for a plaintiff who explains that she is keeping her options open. This approach is analogous, though not identical, to the Seventh Circuit’s analysis in a case denying standing to a blind plaintiff who alleged he faced barriers to accessing a credit union’s website.¹⁴⁴ In an opinion by then-Judge Barrett, the court explained that the plaintiff had suffered no concrete harm because Illinois law blocked him from using the Credit Union’s services.¹⁴⁵ When there is a clear barrier to use of the relevant services—either a legal barrier, or a barrier erected by the plaintiff’s own disclaimer—the plaintiff should not (according to the current proposal) have standing. Absent such a barrier, matters might be different.

One might still raise the line-drawing question: How concrete must a plaintiff’s plans to make a reservation be? But courts would not need to provide a general answer to this question in the context of a specific case. Instead, they could indicate whether a particular plaintiff had made sufficiently or insufficiently concrete plans. To be sure, that approach may leave lower courts and potential litigants with less guidance for future cases. Nonetheless, a body of precedent on the adequacy of plaintiffs’ allegations in disability tester litigation could build up over time. And the standing door would remain ajar for litigants who evince greater openness to traveling than Laufer did. In this way, courts could resolve disability tester cases without striking a general blow against tester standing or public-law litigation.

D. *Language of the Regulation*

The U.S. government, which filed a brief in *Acheson* in support of neither party, advocated another means of denying standing to Laufer on a relatively narrow basis.¹⁴⁶ The U.S. government’s view was based on the specific wording of the regulation that Laufer claims Acheson violated.¹⁴⁷ The U.S. government’s approach would apply not only to Laufer’s case, but also to similarly situated plaintiffs relying on the same regulation. The regulation provides that public accommodations “shall, with respect to reservations made by any means, including by telephone, in-person, or

¹⁴³ At least, this is the First Circuit’s characterization. *Acheson II*, 50 F.4th 259, 267 n.3 (1st Cir. 2022), *vacated and remanded*, 601 U.S. 1 (2023).

¹⁴⁴ *Carello v. Aurora Policemen Credit Union*, 930 F.3d 830, 832 (7th Cir. 2019).

¹⁴⁵ *Id.* at 834.

¹⁴⁶ See DOJ Br., *supra* note 94 (arguing that Laufer lacked standing because the regulation does not confer a freestanding informational right on individuals who do not seek to use a hotel’s reservation service).

¹⁴⁷ *Id.* at 18. Acheson makes a similar argument in distinguishing *Havens Realty*. See *Acheson Br.*, *supra* note 101, at 30.

through a third party,” describe accessible features.¹⁴⁸ Laufer’s interaction with Acheson’s website, DOJ’s argument ran, was not “with respect to reservations,” because she was not using or trying to use Acheson’s reservations service.¹⁴⁹ Therefore, Laufer was not covered by the language of the regulation.

This “with respect to reservations” argument could also be marshaled to distinguish cases like Laufer’s from *Havens Realty*.¹⁵⁰ The statutory provision in *Havens Realty* made it unlawful “[t]o represent to *any person* because of race . . . that any dwelling is not available . . . when such dwelling is in fact so available.”¹⁵¹ By contrast, the regulatory provision that Laufer cited does not mention “any person,” and it contains the “with respect to reservations” language. Though the Supreme Court in *Havens Realty* found standing based on the expansive language of the law the tester was seeking to enforce, the courts could come to a different conclusion in disability tester cases like Laufer’s.¹⁵²

The “with respect to reservations” argument raises questions. First, the regulatory text does not clearly limit enforcement of the regulation to those attempting to make a reservation (or even considering it).¹⁵³ The phrase “with respect to reservations” is most naturally read as a lead-in to the enumeration of specific means to make a reservation (“by telephone, in-person, or through a third party”), rather than a limitation on who can enforce the regulation. Second, the proper interpretation of the regulation—and the issue of whether a plaintiff fits under its description—may be more for the merits than the standing stage.¹⁵⁴ Still, the merits question of whether a plaintiff has a cause of action may overlap with the standing inquiry, particularly if the Supreme Court is willing to be more deferential to Congress’s definition of injury in

¹⁴⁸ 28 C.F.R. § 36.302(e) (2016).

¹⁴⁹ See DOJ Br., *supra* note 94, at 19.

¹⁵⁰ See Acheson Br., *supra* note 101, at 30.

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

¹⁵² Justice Thomas, concurring in the judgment in the Supreme Court’s *Acheson* decision, also focused on the specific language of the statute and regulation Laufer claimed were violated. According to Justice Thomas, the ADA statute—which provides that “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the . . . services . . . of any place of public accommodation,” 42 U.S.C. § 12182(a)—“prohibits only discrimination based on disability—it does not create a right to information.” *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 11 (2023) (Thomas, J., concurring in the judgment). Noting that Laufer alleged that the DOJ’s regulations “create[d] an entitlement to accessibility information,” Justice Thomas responded: “But even assuming a regulation could—and did—create such a right, Laufer asserts no violation of her own rights with regard to that information,” as she had not alleged an intent to visit the hotel or book a hotel room elsewhere in Maine. *Id.* at 12. Justice Thomas’s language seems to suggest skepticism about whether a regulation (as distinct from a statute) could create an enforceable right, a topic beyond the scope of this Essay.

¹⁵³ See Laufer Br., *supra* note 118, at 29.

¹⁵⁴ See *id.* at 31–32.

discrimination cases.¹⁵⁵

Third, there is some ambiguity about what it means (in DOJ's words) to "us[e] or attempt[t] to use" a reservations service.¹⁵⁶ Would it be sufficient (as DOJ suggests) for an individual to "consider[r] whether to make[] a reservation"?¹⁵⁷ If so, a tester might find it fairly straightforward to allege she is considering making a reservation. This result might bring a court close to the proposal made above;¹⁵⁸ a court should, in effect, deny standing when the plaintiff disclaims the intent to visit, and leave open the possibility of standing in other cases.

Despite these questions, the specific regulatory language provides a way for a court to reject standing for plaintiffs like Laufer without undermining tester standing in other contexts, such as the Fair Housing Act setting of *Havens Realty*. Further, a focus on the regulatory text would permit the agency to broaden the regulatory language, in which case the standing inquiry could change.

In sum, courts have several options for resolving disability tester standing cases in a way that does not disfavor public-law litigation. They could: defer to Congress in defining the standing of disability tester plaintiffs; acknowledge that these testers have incurred stigmatic harm as a consequence of an informational injury; deny standing to plaintiffs to the extent they have disclaimed an intent to travel to a place of public accommodation; or deny standing to testers based on the specific language of the regulation they are suing to enforce. These paths would allow courts to avoid a sweeping holding about civil rights tester litigation and to maintain openness to plaintiffs seeking to achieve societal legal goals.

CONCLUSION

In the aftermath of the Supreme Court's mootness ruling in *Acheson*, the disability tester standing issue raised in that case will continue to percolate in the federal courts and may well make its way back up to One First Street. This Essay has highlighted the broader ramifications of disability tester standing for public-law litigation.

Federal courts currently face a choice about the approach they should take toward public-law litigation. Though the Supreme Court has displayed skepticism toward this type of lawsuit, it continues to hear numerous cases by plaintiffs interested in using litigation to further their vision of the public good. Disavowing litigation by "testers," in particular, would be at odds with

¹⁵⁵ See *TransUnion v. Ramirez*, 594 U.S. 413, 426 (2021).

¹⁵⁶ DOJ Br., *supra* note 94, at 19.

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* notes 143–45 and accompanying text.

federal courts' longstanding practices. Moreover, public-law litigation does not differ from private-right litigation in a way that justifies disfavored treatment in the standing analysis. Instead of downgrading public-law litigation, courts should resolve the disability tester standing question in a manner that recognizes the genuine legal stake of plaintiffs seeking to achieve public aims.

More generally, federal courts today stand at a crossroads: How will they treat litigants who allege forms of injury that cross geographical boundaries and straddle the line between personal and collective harm? The answer to this question will significantly affect the role of the federal courts and their relationship to litigants who turn to these courts to pursue systemic change.