

No. 22-429

In The
Supreme Court of the United States

ACHESON HOTELS, LLC,
Petitioner,

v.

DEBORAH LAUFER,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF OF DISABILITY
ANTIDISCRIMINATION LAW SCHOLARS AS
***AMICI CURIAE* IN SUPPORT OF**
RESPONDENT

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INTEREST OF *AMICI CURIAE*¹

Amici are leading scholars and teachers of disability law and antidiscrimination law. *Amici* have written extensively about the law's purpose and capacity, if complied with, to advance social norms of inclusion and belonging and how, conversely, inaccessibility creates unseen administrative burdens that disproportionately harm disabled people. *Amici* have extensive experience studying and teaching issues arising under the Americans with Disabilities Act and other antidiscrimination laws, and share a scholarly and civic interest in the proper application of the Act and advancing a correct understanding of the harms that it is designed to prevent and remedy. A full listing of *amici* appears in the Appendix.

Denial of an online reservations service—including by denying the ability to review and compare accommodations early in the travel planning process—contributes to the exclusion of people with disabilities from American life and falls squarely within the heartland of what the ADA is meant to remedy. *Amici* write to explain how this service denial imposes concrete harms sufficient to establish Article III standing on disabled people, including administrative burdens that fall disproportionately on disabled people and dignitary harms.

Such harms are suffered by people with disabilities like Respondent, Ms. Deborah Laufer,

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

regardless of immediate plans to travel to a hotel. If cognizable injury depended upon imminent travel plans, enforcement would come too late to be of any use, just as the day of an appointment—or even the month before, when you first made the appointment—is too late to seek an ADA remedy for the needed elevator to get to a meeting on the second floor. Without testers like Ms. Laufer, the ADA could not meet its objective of eliminating the sometimes unintentional but still damaging exclusion of people with disabilities from travel and related services enjoyed by the public.

INTRODUCTION AND SUMMARY OF ARGUMENT

Imagine you own a small hotel. So far as you know, you've never had any disabled guests stay in your hotel, and no more than one or two people have even asked about booking an accessible room. This doesn't surprise you. As an older building with no recent renovations, your hotel has no accessible rooms, and the law doesn't require you to create them. You therefore don't expect disabled people to want to stay there. Your website has a "book now" button that allows users to explore options and book rooms online. You see no reason to put accessibility information on your website, though. You aren't aware of disabled guests anyway, and, if a disabled person were interested in booking a room, they could just call your reservations number to find out about accessibility.

This seemingly reasonable perspective likely springs from inattention, not malice. But with or without animus, this failure to provide a service leads

to exclusion and the kind of injury to disabled people that Ms. Laufer suffered, and that the ADA sought to remedy.

The ADA aims to eliminate barriers that stop people with disabilities from participating fully in every facet of American life. Not just the literal physical barriers, but also the social structures that foster exclusion. Such barriers remain widespread in the travel industry, and the ADA requires hotels and other travel companies to fix them when it can be done without excessive cost. Online hotel reservation services fall into the easy-to-fix category; it takes just a few hours' work to update them with accessibility information.

When hotels fail to do that work, people with disabilities suffer both practical and expressive harms. It is no small administrative burden to make a phone call—or, more likely, a series of phone calls—to research different options and book a room. A disabled person need not be on the verge of a trip to suffer this harm. While many nondisabled people enjoy travel planning, scrolling through appealing pictures of sumptuous locales, the reality is often quite different for disabled people. People with disabilities who are denied access to online reservation services, and shunted to often uninformed call centers and uncertain hold times, are thus harmed by that exclusion, regardless of whether they had yet decided to make a reservation. Disabled people are also harmed by the signal sent by the denial of an online reservation service, indicating that they are not considered potential customers or part of the traveling public.

Ms. Laufer suffered these same harms when she encountered—and was excluded from—Acheson’s online reservation service. That she also sought to test Acheson’s compliance with the law does not negate the harm she suffered nor render it legally irrelevant as “self-inflicted,” any more than we would say a first responder was not injured by an on-the-job injury on the theory that they chose to take on the risk and therefore their injury was “self-inflicted.” Ms. Laufer was motivated to be a tester because it was a means of remedying widespread ADA noncompliance. Such noncompliance had already harmed her personally and deterred her from making travel plans.

Compliance testing is crucial if the ADA is to live up to its promise, because government enforcement alone is far from sufficient to change behavior. And it benefits all of us when suits like Ms. Laufer’s secure injunctive relief that makes it possible for Ms. Laufer and other people with disabilities to live fully in the world, as Congress intended when enacting the ADA.

ARGUMENT

I. The ADA Is Designed to Remedy Harms Caused by Negligent Exclusion, which Pervades the Travel Industry.

A. The ADA Targets the Widespread Problem of Benign Neglect.

The ADA’s scope is intentionally broad. The obligations Congress imposed are not limited to bad actors making decisions based on anti-disability animus, nor to ensuring only that a business treats all

people “the same.” Rather, the Act is designed to ensure that disabled people have a right to live in the world, to travel safely and freely, and to participate and belong in our community just as nondisabled friends, relatives, neighbors, and colleagues do.

Congress thus designed the ADA to address several different forms of discrimination that “diminish a person’s right to fully participate in all aspects of society.” 42 U.S.C. § 12101(a)(1). Congress found that disabled people are “frequently precluded from” full participation “because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers.” ADA Amendments Act of 2008, Pub. L. No. 110–325, §2(a)(2), 122 Stat. 3553. People with disabilities “continually encounter various forms of discrimination, including” both “outright intentional exclusion” and “the discriminatory effects of . . . failure to make modifications to existing facilities and practices,” and “relegation to lesser services [and] activities.” 42 U.S.C. § 12101(a)(5).

The Act’s broad focus on eradicating obstacles to full participation in society was the culmination of a pre-Act policy shift toward integration—that is, entitling disabled people “to full participation in the life of the community and encouraging and enabling them to do so”—rather than limiting the ability “to move about and be in public places,” often to the point of physically separating disabled people from society. Jacobus tenBroek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841, 842-47 (1966) (describing how federal and state laws began to embody integration beginning in the early Twentieth Century).

Congress's objective for the ADA is thus nothing short of "the elimination or reduction of physical and social structures" that thwart "equal-citizenship stature for persons with disabilities," *Tennessee v. Lane*, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring), and the "integrat[ion]" of disabled people "into the economic and social mainstream of American life," *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (quoting S. Rep. No. 101-116, at 20 (1989)).

To secure the right of people with disabilities to live in the world, the Act puts a responsibility on businesses to take some affirmative steps to eliminate barriers to full participation. *See* Resp. Br. at 5; U.S. Br. at 23-24; 42 U.S.C. § 12182(b)(2)(A)(ii) (defining discrimination to include "failure to make reasonable modifications . . . necessary to afford . . . services . . . or accommodations to individuals with disabilities" unless an exception applies).

The law does not require businesses to eliminate barriers at any cost. For example, structural barriers in "existing facilities" need be removed only if doing so is "readily achievable," 42 U.S.C. § 12182(b)(2)(A)(iv), and procedures need not be modified if doing so would "fundamentally alter the nature of . . . goods [and] services," *id.* § 12182(b)(2)(A)(ii). Moreover, an entity need not provide the "auxiliary aids and services" necessary to "to ensure that no individual with a disability is excluded" from the entity's services if doing so would be an "undue burden." *Id.* § 12182(b)(2)(A)(iii). These non-exhaustive examples demonstrate that the rights the Act confers (and the obligations it imposes) are qualified by consideration of the circumstances of individual businesses.

But where no such considerations apply, the Act does not excuse noncompliance based on ignorance or inadvertence. On the contrary, Congress considered inadvertent discrimination to be a central part of the problem. “Discrimination against [disabled people] was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.” *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (considering the Rehabilitation Act). The Act is thus designed to change social norms—to prompt (and require) businesses to consider disabled people as part of the community that uses their services and to design those services accordingly.

Yet, inadvertent discrimination by well-meaning actors is still common. Even conscientious government agencies can exhibit “benign neglect” when it comes to serving disabled people. Noting that “the ADA . . . seek[s] to prevent . . . discrimination that results from ‘benign neglect,’” a district court found that New York City had failed to account for people with disabilities in emergency planning. *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 980 F. Supp. 2d 588, 597 (S.D.N.Y. 2013).

Hotels and other public accommodations can exhibit such “benign neglect” despite no ill intentions. Even if intent is benign, the harms are significant. The failure to consider disabled people as part of the community or potential customer base can—even through inadvertence—create forms of exclusion and segregation that were once achieved by direct efforts to keep disabled people out of public view through widespread institutionalization and legal proscriptions.

See Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 917-19 (2019) (describing history of institutionalization); SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 23-24 (2009) (discussing early nuisance ordinances, known as the “ugly laws,” that criminalized the sight of disability in public spaces). We have, thankfully, moved forward as a nation, but so long as businesses still fail to consider or understand the barriers faced by disabled people seeking to use their services, exclusion remains.

B. Exclusion Remains a Significant Problem in the Travel Industry.

Decades after the ADA was first enacted, it is still far too difficult for disabled people to travel freely throughout the country as nondisabled friends and family members can. “[S]ignificant disability discrimination exists within all sectors of the tourism industry.” Jennie Small, Simon Darcya, and Tanya Packer, *The Embodied Tourist Experiences of People with Vision Impairment: Management Implications Beyond the Visual Gaze*, 33 TOURISM MGMT. 941, 943 (2012) (citations omitted).

As the Reservation Rule recognizes, one significant form of exclusion is the denial of online reservation services. Without the ability to both shop for and book accessible rooms online—which necessarily requires accurate online information about whether any rooms are accessible and which ones are available—people with disabilities are excluded from using online booking services.

The Reservation Rule thus separately requires hotels to eliminate barriers in not only the act of booking, but also the comparison shopping and planning that precedes it, *i.e.*, obtaining the information necessary to make decisions about whether and where to book. The Reservation Rule provides for these and other interrelated steps which should work together to ensure meaningful access as Congress intended. *See* Kristen L. Popham et al., *Disabling Travel: Quantifying the Harm of Inaccessible Hotels for Disabled People*, 55 COLUM. HUM. RTS. L. REV. F. 1 (2023). Hotels therefore must “ensure that individuals with disabilities can make reservations for accessible guest rooms during the same hours and in the same manner as individuals who do not need accessible rooms,” 28 C.F.R. § 36.302(e)(1)(i). And they must also “[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.” *Id.* § 36.302(e)(1)(ii).

These explicit requirements implement Title III’s mandate that hotels make “reasonable modifications to reservations policies, practices, or procedures when necessary to ensure that individuals with disabilities are able to reserve accessible hotel rooms with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms.” 28 C.F.R. Pt. 36, app. A at 804. To meet this standard, the accessibility-information component of the rule is “essential,” because without it, people with disabilities

cannot “benefit from the services offered by the place of lodging.” *Id.* at 805.

Research confirms that providing accurate information to the traveling public is a crucial aspect of providing travel services, and that such services are not accessible when disabled people cannot make plans to use them. “When we focus on accessible tourism, we mainly talk about infrastructure. Our research has shown that the biggest challenge is actually information.” *Accessible Tourism—The Elephant in the Room That Airbnb and Tourism Venues Overlook*, Univ. Queensland (May 17, 2019), <https://tinyurl.com/2xna43bb> (quoting speech by accessibility expert Dr. Sara Dolnicar describing her research). Disabled people “simply cannot find out the information they require to assess whether a specific accommodation is suitable for them or not. That’s remarkable in this day and age, when everything seems to be on the internet.” *Id.* Providing accessibility information is the “quickest and easiest way forward to improving accessible tourism.” *Id.*

Yet many hotel reservation services remain inaccessible to people with disabilities because they fail to provide the accessibility information necessary to travel planning. A recent study found that even for hotels with accessible rooms, nearly one fifth still provided no accessibility information online whatsoever. Mobility Mojo, *Global Hotel Accessibility: Insights 2020*, at 4 (Oct. 2021), <https://tinyurl.com/2c9dptf5> (Global Hotel Insights). More than half had some “accessibility information on their website but do not allow accessible bedroom bookings to be made through their online platform.”

Id. And, in a survey of travelers with disabilities, less than half reported they were able to obtain the information they needed to make a reservation on the first try (and even some of those travelers later learned they received inaccurate information, as promised accessibility features were not actually available). Popham et al., *supra*, at 20-21.

For people with disabilities to be able to use a hotel's reservation services with the "same efficiency, immediacy, and convenience" as nondisabled people, 28 C.F.R. Pt. 36, app. A at 804, equal access to accurate information and to an online reservation option is essential. And it is just as important to know which rooms (or properties) are *not* accessible, so as to know which rooms (properties, or sometimes, destinations) to rule out.

Complying with the law here is no excessive burden. It is not hard to offer an online reservation service that people with disabilities can use to obtain accessibility information and book an accessible room. Especially because the rule does not require hotels to describe every detail of a room that might be essential for every kind of disability; it requires businesses only to take "reasonable" steps. *Id.*

Providing the information that allows people with disabilities to comparison shop and plan can thus be done with a few small steps that surveys of hoteliers suggest would take a mere few hours. One hotel operator reported that it took just two hours to pull together the information on accessibility and add a "Frequently Asked Questions" section to the hotel website. Denise Brodey, *Free and Easy: The DIY Hotel Accessible Landing Page of the Future*, TravelAbility

Insider (Apr. 28, 2020), <https://tinyurl.com/mwrfx4ek>. Another hotel operator reported that they were able to use a template to pull together accessibility information, including pictures, in about three and a half hours. Jake Steinman, *Following the Worst Year in History for the Travel Industry, Why Would Anyone Want to Focus on Accessibility?*, TravelAbility Insider (Feb. 23, 2021), <https://tinyurl.com/5xwf2z7z>. That hotel was prompted to do so in part because of the possibility of ADA litigation, but also to “reduce guest disappointment.” *Id.*

For these affirmative steps to make a difference, however, they must be completed *before* the service is needed; otherwise, it’s too late. An online reservation service to book an accessible room cannot materialize instantly when your flight is canceled at midnight, any more than a non-existent elevator can be built as you arrive at the dentist’s office. That is why one of the ADA’s central innovations is to prompt businesses providing services to the public to think of disabled people as part of their community and customer base *before* a disabled person tries to use their services and learns, too late, that they are inaccessible.

Return to the hypothetical hotelier from the beginning. Although it had not occurred to her that disabled people might be booking her hotel online, she reads press coverage of this case and realizes two things: disabled people cannot effectively use her online booking service, and this inaccessibility violates the ADA, something she could be sued for. Together, these facts prompt her to spend a few hours one afternoon updating the hotel’s online booking page to make clear that no accessible rooms are available

(given the building's age and the difficulty of architectural modifications). This small step for the hotel easily brought it into compliance with the ADA, avoiding the harms to members of the disabled community that Congress sought to remedy.

II. A Disabled Person Excluded from the Planning Phase of Booking Online Is Harmed by Both Practical and Expressive Exclusion.

Now imagine you are a person who acquired a disability requiring wheelchair use in middle age, or perhaps you are married to someone who uses a wheelchair. Either way, you now need an accessible room to be able to travel anywhere overnight. You'd like to plan a seaside trip, but you aren't sure where you want to go, and you begin researching lodging options in different locales. It's hard work. Hotel websites frequently fail to mention whether they are or are not accessible, which means you also can't use search engines to identify locations with accessible options, or compare prices of rooms that you could actually use. You'd prefer that all the hotels are accessible, but quickly accessing information online indicating that a hotel is not accessible helps too, because it cuts down on the time and energy you spend researching options.

Careful research and planning are essential because above all else, you want to avoid going to the hotel, finding it or your chosen room inaccessible, and having to scramble to try and find alternative accommodations on the spot. You've learned the hard way that you really need a back-up plan, which

requires identifying locations with multiple good accessible options if something goes awry. And apart from the practicalities, a website telling you the hotel is not accessible still acknowledges you as part of the community of travelers who need information about their rooms. Many hotels instead treat you as invisible or nonexistent by neglecting to include any information about accessibility or inaccessibility.

Because of those failures (and despite a legal obligation under the ADA to provide the information you need), your planning process requires many calls to many hotels to try to find out if they have accessible rooms. Often you are routed to a call center where they know nothing relevant about the specifics of the hotel. Making these calls takes so much time. And the calls expose you to more personal interactions that are sometimes awkward (or worse, hostile) and express the hotels' exclusion of you from the clientele they seek.

All of this occurs before you can even get to the point of making a choice, deciding to travel to a hotel, and actually booking a room. In fact, as a person who cannot travel without accessible lodging, you likely need this information before you can even decide on a destination for travel. Eventually, you find that you plan fewer and fewer trips, even missing out on meaningful work or family events.

The harm you suffer just wading through unusable online booking services—whether or not you ever manage to make a reservation—is real and compounding, inflicting practical and dignitary harms in ways the ADA was designed to prevent and remediate.

A. A Disabled Person Who Must “Pick up the Phone” to Plan a Trip Has Suffered Concrete Harm from the Denial of an Online Booking Service.

There is a reason why nearly nine out of ten Americans prefer to research and book hotel rooms online: it’s generally a better experience than other methods. *See* Alexander Kunst, *Distribution of adults in the United States by their preference of hotel booking online or offline in 2017*, Statista (Sep. 3, 2019), <https://tinyurl.com/3tzu8vrc>. Many people find the planning phase of online booking enjoyable, as they compare price, location, amenities, quality, and so on effortlessly using online booking services, pleasurably scroll through lists, and daydream while picturing themselves enjoying the settings that are beautifully photographed and displayed online. *See* Elizabeth F. Emens, *Admin*, 103 GEO. L. J. 1409, 1423 (2015); ELIZABETH DUNN & MICHAEL NORTON, HAPPY MONEY: THE SCIENCE OF SMARTER SPENDING 80-83 (2013). *See also* U.S. Travel Assoc., *The Power of Vacation Planning*, at 1, 7 (Jan. 29, 2018), <https://tinyurl.com/yv6bt6yc> (explaining the benefits of vacation planning for personal well-being and health). Very few among us would say the same about navigating phone trees.

A person who cannot select a destination, choose among various accessible room options, and then reserve that accessible room online—because the information making it possible to compare and choose accessible rooms is unavailable—has been denied the service of booking online that virtually everyone prefers. Obtaining that information and booking over

the phone—which Acheson backhands as a “two-minute phone call” (Pet. Br. at 6)—is not the same service, nor even a comparable one. It feels very different and takes vastly more time, if it can even be done at all.

In Acheson’s view (Pet. Br. at 11), only a person who intends to visit a particular hotel has standing to sue. Certainly, Acheson is right that a person who has already made up their mind about a certain hotel, and simply wants to be able to reserve there, is harmed by the denial of the online booking service available to nondisabled travelers. It is no easy task to reserve an accessible room over the phone (if there is even one available). Many hotels won’t answer a phone call on the first try. In one study where researchers made 600 phone calls to hotels lacking online accessibility information, nearly one-fifth could not be reached by phone due to busy phone lines or incorrect contact information. Global Hotel Insights, *supra*, at 11.

And even if the hotels do answer, many calls will be routed to call centers with employees who may have little to no experience with accessibility at particular sites and no easy or reliable way of getting that information. Such calls are unlikely to produce accurate information, necessitating a second or even third call. And even when the phone calls do produce information, it takes time, with one study reporting that phone calls to book accessible rooms took three minutes on average and as long as twenty-two minutes. *Id.*

Being forced to make even a single three-minute call, when a nondisabled person can book online, is a concrete harm that should not be minimized. Small

burdens add up and can affect behavior. For example, a study of mail-in forms (e.g., for rebates) found that less than a third were redeemed, but when the process was simplified by eliminating the requirement to print and sign a page, over half were sent in. Joshua Tasoff & Robert Letzler, *Everyone Believes in Redemption: Nudges and Overoptimism in Costly Task Completion*, 107 J. ECON. BEHAV. & ORG. 107, 108, 115 (2014). The difference may seem trivial when the subject is a consumer discount. Less so when the mail-in form is required to maintain one's right to vote. See Cass R. Sunstein, *Sludge and Ordeals*, 68 DUKE L. J. 1843, 1856-58 (2019). "Administrative burdens can make it difficult or impossible for people to enjoy fundamental rights, . . . to obtain licenses and permits, to obtain life-changing benefits, or to avoid crushing hardship." *Id.* at 1849; see also Emens, *Admin, supra*, at 1446-50 (describing "efficiency costs" of administrative requirements). Here, the extra time burdens the right of disabled people to travel freely.

There are many situations, moreover, when the need to make a phone call will be far from a small burden: for instance, when flights have been canceled and every hotel near the airport has a busy signal or an hours-long phone queue. In addition, asking questions about accessibility may require revealing sensitive, private information such as how one transfers from a wheelchair to use the restroom. See, e.g., Popham et al., *supra*, at 17-18 (Lia's narrative). And all of this assumes that an individual's disability allows for making a phone call, which some disabilities, in fact, prevent.

These harms accrue even for the single "two-

minute phone call” scenario that Acheson would accept as sufficient harm to count for standing for a plaintiff who intends to travel to a single hotel. But what Acheson’s narrow conception of injury misses—hinging as it does on the intent to visit a particular hotel—is that a person with disabilities cannot know if they want to visit a particular hotel, and form the intent to travel there, until they have made many, many such calls. Stated another way, a hotel’s denial of its online booking service to disabled people at the planning phase causes harm well before any traveler might form the intent to visit. In fact, the denial makes it impossible to form that intent to visit. In addition, the need to repeat the elaborate phone call process to plan a single trip magnifies the burden and harm.

As one person described it, the burden of repeated planning just to live in the world isn’t about “not being able to go into one restaurant on one day.” Andrew Pulrang, *5 Ways To Avoid an Accessibility Fail*, *Forbes* (July 31, 2020), <https://tinyurl.com/67njvy8p>. Rather,

It’s never really knowing what will and won’t be accessible to your particular type of disability. It’s having to revise and re-revise your daily plans at a moment’s notice. It’s watching the dominoes of your carefully arranged plans and coping techniques topple one after another, triggered by a single step, or a door that’s an inch too narrow. It’s all of these things happening week after week, month after month, year after year.

Id. The injury from being required to undertake this

labor, when a nondisabled person can simply review beautiful promotional materials and click a button, is real and sets in long before a disabled traveler chooses to visit a particular hotel, or even settles on a specific vacation location.

The injury is also significant because it is likely to deter people with disabilities from traveling, perhaps even more so than it might deter nondisabled people, because it is added to already heavy burdens. “[D]isability steals time.” Walter Y. Oi, *Work for Americans with Disabilities*, 523 ANNALS AM. ACAD. POL. & SOC. SCI. 159, 166 (1992). “Though admin plays a role in every life, some lives are unusually burdened by admin. Disability in particular can provoke admin onslaughts from multiple directions.” Elizabeth F. Emens, *Disability Admin: The Invisible Costs of Being Disabled*, 105 MINN. L. REV. 2329, 2331 (2021); *id.* at 2341-54 (describing three categories of oft-ignored administrative labor that disabled people must do, including medical admin, benefits admin, and discrimination admin); *see also* Popham et al., *supra*, at 44 (quoting a survey respondent, traveling for her grandmother’s funeral, who said, “It took at least 13 emails and 8-9 phone calls to ensure there would be a shower seat for my disabled child”).

The standard of injury proffered by the Government comes much closer to capturing the full spectrum of harm. It rightly recognizes that a person is denied use of an online reservation service if she plans to use it to “*consider* making a reservation,” Pet. Br. at 9 (emphasis added), not only if she intends to make a reservation—much less intends to travel. But depending on how narrowly it is defined, the

Government's proposed test could still miss a large part of the harm caused by exclusionary online reservation services. That is because online reservation services are used well before the point of making a decision about booking a particular hotel.

Consider the traveler we imagined at the outset, who wants to go to the seaside, but isn't sure where. As she researches the accommodations in different towns, she might not yet be at the point of being able to say that she is considering making a reservation in Bethany Beach, Delaware, versus Ocean City, Maryland, much less that she is considering making a reservation at a particular hotel. She is nonetheless denied the ability to "review and reserve available rooms through websites," which is the service the Reservation Rule addresses, U.S. Br. at 19.

If she were a parent searching for a destination with lots of lodging options offering adjoining rooms for her older children and a crib for her youngest, she very likely would be able to pin down her destination using online booking services, even though there is no legal requirement that hotels make such services usable for parents. The same goes for finding hotel rooms that allow pets. But she likely will not be able to find out about accessibility at several hotels (even though that information is required by law, while the other two types of commonly provided information are not), meaning she can't compare the two potential destinations without making several phone calls. Each denial of the online service is a concrete injury even if she has not yet reached the point that she is considering booking at a particular hotel, at least if "consideration" is narrowly construed.

Given the time it takes to file a suit and obtain injunctive relief, moreover, the only effective chance to remedy her injury is if she can sue at the very earliest stage. Being forced to take on the extra work of phone call after phone call if she wants to keep moving forward with trip planning—which she cannot accomplish without the requisite information—is a concrete harm that suffices for standing.

Most hotels likely don't appreciate how much work it takes for a disabled person (or anyone) to just "make a call" rather than booking online, and they aren't trying to inflict extra burdens on disabled people. But they nonetheless do so by limiting usage of their online reservation services to people who are indifferent to whether a room is accessible—*i.e.*, nondisabled people. The ADA aims to ensure that disabled people don't have to do this extra labor just to participate fully in community activities.

B. Denial of Online Booking Services Inflicts Dignitary Harms.

Beyond the practical burdens of making many phone calls, the disabled person who discovers she cannot research usable hotel rooms online, much less book one—though a nondisabled person can—suffers discrimination and the associated dignitary injury that the ADA is meant to protect against.

Although Acheson insists (Pet. Br. at 40) anyone who visits a website and receives the same information, disabled or nondisabled, is treated the same, that is not so. Only disabled people are precluded from reviewing and booking rooms online if

there is no accessibility information. Providing an online reservation service that lacks an essential element necessary for disabled people to use it excludes them from a service offered to others—precisely what the Reservation Rule seeks to prevent and remedy.

This exclusion discriminates against every disabled person who discovers they cannot use a hotel’s online booking service. Whether they are planning an imminent trip or are in the earliest stage of reviewing hotel information to select a destination, they personally suffer—and do not merely witness—that discrimination when they visit a hotel’s online reservation service and find it unusable. That “discrimination itself, by perpetuating ‘archaic and stereotypic notions’ or by stigmatizing members of the disfavored group[,] ... can cause serious non-economic injuries.” *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). Such dignitary injury inflicts meaningful harm.²

² It appears that the Government would limit the cognizable dignitary injury to that experienced by someone who “attempt[s] to use the reservation service,” not someone who “merely visits the hotel’s website.” U.S. Br. at 19. But someone who visits the website and finds no accessibility information has necessarily attempted to “review ... available rooms,” *id.*—i.e., attempted to “use” the online reservation system—and been denied. They have thereby suffered discrimination, with all the associated dignitary harms. If standing were to require a person to attempt to make a reservation through a service that she already knows does not provide the information needed to permit accessible rooms to be booked, it would put completely

Learning that if you're disabled, you cannot review and book a hotel room by the most common and straightforward way that nearly everyone else uses (online), but only if you do so by phone, itself signals inequity. This injury to a person's dignity is present regardless of any coalesced travel plans. The absence of online information underscores that you are excluded from a hotel's potential clientele, you are not someone who uses or could use their services, and they did not even consider that you might be.

If a disabled person does make one phone call (or more likely, many such calls) to obtain information that, by law, should have been already provided, she might face further rejection and exclusion. The person answering the phone may also not have the requisite information, not know how to get it, or may question why she would need it. And that's all without any discriminatory animus on the part of the hotel or its in-house or call-center staff. This harm is only multiplied, not diminished, at the earlier stages of planning, when she faces the specter of multiple difficult conversations for each hotel she wishes to evaluate.

Research shows that people subject to widespread exclusion experience those interactions differently. *See, e.g.,* Geoffrey Cohen, *Understanding and Overcoming Belonging Uncertainty*, Behavioral Scientist (Oct. 10, 2022), <https://tinyurl.com/ytj5ucx9>.

unwarranted (and disproportionate) burdens on disabled people. The ADA expressly disclaims any requirement for people with disabilities to “to engage in a futile gesture” when they have notice that a business “does not intend to comply with” the Act. 42 U.S.C. § 12188(a)(1).

“[T]hreats to belonging need not be overt. The little sins of omission ... can add up to a vague feeling of ‘I don’t belong here.’” GEOFFREY L. COHEN, *BELONGING: THE SCIENCE OF CREATING CONNECTION AND BRIDGING DIVIDES* 27 (2022). So what seems like a trivial presence or absence of information to a person who isn’t implicated by it (here, a nondisabled person) is both practically relevant and emotionally significant for a disabled person. Repeated experiences of exclusion make the institutional signal from denial of services even more significant, because it can remind a disabled person of many past experiences of exclusion. *See id.* at 30 (“When we perceive threats to our sense of belonging, our horizon of possibility shrinks We more readily infer that we are incapable or that we aren’t meant to be there, that we will not understand or be understood.”).

The dignitary harm of being denied the use of online booking services at the planning phase exists independently of whether there are accessible rooms available to book. If the online booking service is usable by a disabled person because it includes accessibility information, then even if the service indicates that there are no accessible rooms, a disabled person encountering that service understands that she has been considered as part of the traveling community. The inclusive norm embodied in the accessibility information matters.

Inclusive signals likewise matter for an online reservation service that provides a substantial amount of accessibility information, but not a particular detail important to a particular person. That person may need to make a phone call, because

the Reservation Rule requires sufficient information, not exhaustive information. *See* 28 C.F.R. Pt. 36, app. A at 804. But even so, the signal sent by the online reservation service will be inclusive, because the hotel has shown that it considers people with disabilities as welcome members of the community.

Conversely, a hotel that has accessible rooms but does not make it possible for disabled people to review or book them online sends a signal that disabled people are not considered full members of the community. That causes injury even though the hotel is physically accessible.

Nondisabled people who review rooms through an online booking service do not experience this harm, because nothing signals that they are not full members of the community, so they would not have standing to sue. *Contra* Pet. Br. at 21. They would be bystanders witnessing discrimination, but not suffering it, in Acheson's analogy (Pet. Br. at 39-41). But a disabled person like Ms. Laufer, who visits a website and discovers that she cannot review accessible rooms, when nondisabled people can—and is thereby denied the use of an online reservation service at the planning stage because of her disability—has been personally discriminated against. The resulting dignitary harm is a cognizable injury.

III. Testers Suffer Cognizable Harm from the Denial of Online Reservation Services and Are Essential to ADA Enforcement.

Ms. Laufer suffered both types of harm described above: she was denied the ability to review rooms in a

convenient, online way, and she suffered the dignitary harm of being excluded from the online reservation service. True, she sought to “test” the hotel’s compliance with the ADA. But as Respondent and the Government explain, such a motivation does not negate a tester’s cognizable injury and deprive them of standing. Resp. Br. at 23-28; U.S. Br. at 10-17. Ms. Laufer’s decision to take up the fight against disability discrimination does not erase the harm she suffers through her testing activities. Nor do testers spur over-enforcement. On the contrary, ADA enforcement would be severely undermined without private enforcement, including by testers like Ms. Laufer.

Most people can’t take on a fight every time they are trying to plan a trip or book a hotel. Who wouldn’t find it exhausting enough to have to call ten hotels to ask awkward questions just to find out if they can even use the services? These hurdles discourage many people with disabilities from even trying to travel, especially for leisure. See Shu Cole et al., *The Influence of Accessibility and Motivation on Leisure Travel Participation of People with Disabilities*, 36 J. TRAVEL & TOURISM MKTG. 119, 126 (2019) (study finding “the lower demand of tourism from people with mobility impairment is in part due to motivation hindered by inaccessible services”); see also Popham et al., *supra*, at 31 (quoting one disabled survey respondent, Sheila, “It’s really frustrating to spend hours on the phone explaining what you need”); cf. 117 Cong. Rec. 45974 (1971) (statement of Rep. Charles A. Vanik, speaking in support of the Rehabilitation Act of 1973, a precursor to the ADA) (“Only the most daring and brave risk the dangers and suffer the humiliations

they encounter when they try to live normal, productive lives.”).

Ms. Laufer experienced that discouragement firsthand. She found she couldn’t travel safely anymore after acquiring multiple sclerosis as an adult, and was deterred from making travel plans by hotels’ widespread ADA noncompliance. *See* Resp. Br. at 7-8. She decided to do something about it, becoming an advocate by necessity for the public good. *See* Resp. Suggestion of Mootness, app. at 1a-2a. She has now taken on the fight—on behalf of all disabled people as well as herself.

In taking up this struggle, Ms. Laufer is enduring harms that are no more self-inflicted than those suffered by first responders. They take up the risk of injury for the greater good. Although first responders chose their profession, no one would call their on-the-job injuries “self-inflicted.” So, too, for those who choose to protect the public by preventing and remedying disability discrimination as testers—though they, like Ms. Laufer, are also vested in remedying discrimination that harms them personally.

Unlike first responders, however, Ms. Laufer is not compensated. *See* Resp. Br. at 12-13. Contrary to Acheson’s theory that the ADA’s limited remedies prompt over-enforcement, Pet. Br. at 50-51, just the opposite is true. Samuel R. Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of “Abusive” ADA Litigation*, 54 UCLA L. REV. 1, 6 (2006) (“The ADA’s public accommodations title is massively underenforced, and the limitations on remedies for violations of that title are the most likely culprit.”);

Jasmine Harris & Karen Tani, *Debunking Disability Enforcement Myths*, *The Regulatory Review* (Oct. 25, 2021), <https://tinyurl.com/82z4fs4c>.

Enforcement through private litigation is essential to securing the ADA's objectives. *Amici* understand that some hotels, especially smaller ones, simply may not have considered disabled travelers and may be unaware of their obligations. But that does not mean a phone call reminding a hotel of their ADA obligations would be enough (as Acheson claims, Pet. Br. at 49). Businesses often do not comply without the realistic threat of litigation. *See* Bagenstos, *supra*, at 17-19. Moreover, if a hotel were likely to comply based on a simple phone call, they would likely also remedy the problem immediately upon a complaint being filed—especially where, as here, a fix requires at most a few hours—which would make any attorneys' fees and litigation cost to the hotel de minimis.

On the other side of the equation, however, the benefit is large. The easy fix is a structural one that helps everyone, including not only the plaintiff but also other people with disabilities. Moreover, the ADA aims to encourage hotels not to wait for lawsuits to make needed changes. The statute places an affirmative duty on businesses to remember that people with disabilities are part of the community and to include them, not exclude them. Hotels like Acheson have access to the most accurate information about the hotel's accessibility at the least cost, and are thus best positioned to make the changes needed to accommodate disabled people—a small step here. Substantial public and private resources are dedicated to helping them get it right. *See id.* at 18 ("Though the

statute's accessibility requirements are complex, the federal government offers businesses a number of free technical assistance resources to help them comply."); Jim Butler & Martin Orlick, JMBM Global Hospitality Group, *The ADA Compliance & Defense Guide*, at 26 (Jan. 2015), <https://tinyurl.com/5n6dm68z> (describing ADA access specialists who can conduct "ADA audits").

Because hotels often do not take the proactive steps the ADA requires, however, private enforcement of the Act is critical. Such private enforcement efforts would be stymied in the absence of testers like Ms. Laufer. Contrary to Acheson's theory (Pet. Br. at 49-50), the government could not marshal sufficient resources to review hotel compliance nationwide and make phone calls to remind operators of their decades-old obligations. The government "has undertaken relatively few ADA Title III compliance reviews" unprompted by a complaint. Nat'l Council on Disability, *National Disability Policy: A Progress Report*, at 32 (2019), <https://tinyurl.com/3m8jwrps>. The most prominent example is a 2005 review of 60 hotels in New York City—less than a tenth of the city's hotels. N.Y. Comptroller, *The Hotel Industry in New York City* (June 2016), <https://tinyurl.com/6x7d6k2n>. And even with the government making phone calls, some hotels refused to comply, and the government had to sue. Progress Report, *supra*, at 32.

Understanding these resource limitations, Congress designed the ADA to rely on private enforcement, including by testers. U.S. Br. at 16-17; Harris & Tani, *supra*; Bagenstos, *supra*, at 9-10. Congress knew that disabled people like Ms. Laufer

were ideally positioned to detect discrimination, and deputized them to do so.

Testers are particularly essential for meaningful relief in the travel sector. Because the only remedy here is an injunction, it is impossible for disabled people to wait until they need to book a trip to bring suit. *See* Resp. Br. at 45. Nor can individuals postpone travel planning indefinitely while they sue to force a hotel to put accessibility information on their website. If (atextually) the requirement for standing were imminent plans to visit a particular hotel, very few would ever meet the test, and much harm would go unremedied.

* * * * *

Ms. Laufer is not a “bounty hunter” any more than Acheson’s website design was necessarily driven by anti-disability animus. She is a disabled person who found her travels deterred by widespread ADA noncompliance, and she decided to do something about it. She makes this effort to promote compliance with the ADA even though she suffers harm each time she is denied use of an online reservation service and is sent the signal that she, as a disabled person, is not welcome. That personal and concrete harm confers standing, regardless of whether she also seeks to help others. The ADA would not meet its objectives without individuals like Ms. Laufer who identify the gaps in business owners’ understanding and follow-through, put them on notice about ways their services are inaccessible, and require them to fix it by complying with the obligations that Congress enacted in the ADA.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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APPENDIX

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2a

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