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 *AMICI CURIAE*, FAIR HOUSING ORGANIZATIONS AND TESTERS, INCLUDING THE ORGANIZATIONAL PLAINTIFF FROM *HAVENS REALTY*, IN SUPPORT OF RESPONDENT

Diane L. Houk
Sara Luz Estela
EMERY CELLI ABADY BRINKERHOFF WARD & MAAZEL LLP
600 5th Ave., 10th Floor
New York, NY 10020

Reed Colfax
Counsel of Record
Lila Miller
Gemma Donofrio
RELMAN COLFAX, PLLC
1225 19th Street NW, Suite 600
Washington, DC 20036
(202) 728-1888
rcolfax@relmanlaw.com

Daniel Woofter
GOLDSTEIN RUSSELL & WOOFTER
1701 Pennsylvania Ave. NW, Suite 200
Washington, DC 20006

Counsel for Amici Curiae

TABLE OF CONTENTS

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Injuries Recognized in *Havens Realty* Remain Cognizable Under Current Law 5

II. Discrimination Causes Actionable Injuries Whether or Not the Victim Is a Tester 10

A. Discrimination Causes Dignitary Harm .. 10

B. Testers Experience "Real and Palpable" Injury from Discrimination 12

C. Nothing About Being a Tester Undermines a Person's Article III Standing Stemming from Discrimination 15

III. Testing Is Integral to Federal Enforcement and Raises No Article II Concerns 18

A. Petitioner's Article II Argument Fails Because It Ignores Testers' Injuries 18

B. The Executive Branch Expressly Relies on Testers for Enforcement 20

C. Tester and Organizational Enforcement Is Vital to Achieving Full Realization of Civil Rights Statutes 22

CONCLUSION 26

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Cases **Page(s)**

Allen v. Wright,
468 U.S. 737 (1984) 7, 11, 19

Anderson v. United Fin. Co.,
666 F.2d 1274 (9th Cir. 1982) 11

Baker v. Carr,
369 U.S. 186 (1962) 11

Baltimore Neighborhoods, Inc. v. LOB,
92 F. Supp. 2d 456 (D. Md. 2000)..... 14

Cabrera v. Jakabovitz,
24 F.3d 372 (2d Cir. 1994)..... 14

Casillas v. Madison Ave. Assocs., Inc.,
926 F.3d 329 (7th Cir. 2019) 8

City of Chicago v. Matchmaker Real Est. Sales Ctr., Inc., 982 F.2d 1086
(7th Cir. 1992) 12

Coel v. Rose Tree Manor Apartments, Inc.,
1987 U.S. Dist. LEXIS 9212
(E.D. Pa. Oct. 13, 1987)..... 12

Davis v. Mansards,
597 F. Supp. 334 (N.D. Ind. 1984) 13, 15

Fair Hous. Justice Ctr., Inc. v. Broadway Crescent Realty, Inc., 2011 WL 856095
(S.D.N.Y. Mar. 9, 2011) 23

Fair Hous. Justice Ctr., Inc. v. Silver Beach Gardens Corp., 2010 WL 3341907
(S.D.N.Y. Aug. 13, 2010) 14

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 1, 5, 6, 9, 19, 22

Heckler v. Mathews,
465 U.S. 728 (1984) 11

Jancik v. Dep't of Hous. and Urban Dev.,
44 F. 3d 553 (7th Cir. 1995) 13

Memphis Cmty. Sch. Dist. v. Stachura,
477 U.S. 299 (1986) 11

Robins v. Spokeo, Inc.,
867 F.3d 1108 (9th Cir. 2017) 7

Saunders v. Gen. Servs. Corp.,
659 F. Supp. 1042 (E.D. Va. 1987)..... 13

Seaton v. Sky Realty Co.,
491 F.2d 634 (7th Cir. 1974) 11

Spokeo, Inc. v. Robins,
578 U.S. 330 (2016) 3, 5, 6, 9

Staples v. Wickesberg,
122 F.R.D. 541 (E.D. Wis. 1988) 13

Steele v. Title Realty Co.,
478 F.2d 380 (10th Cir. 1973) 11

Trafficante v. Metro. Life Ins. Co.,
409 U.S. 205 (1972) 20

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021) 3, 5–8, 19

United States v. Balistrieri,
981 F.2d 916 (7th Cir. 1992) 2, 12, 13, 20

United States v. Sec. Mgmt. Co.,
96 F.3d 260 (7th Cir. 1996) 20, 21

United States v. SSM Props., LLC,
619 F. Supp. 3d 602 (S.D. Miss. 2022) 21

Zuch v. Hussey,
394 F. Supp. 1028, 1051 (D. Mich. 1975) 23

Zuch v. John H. Hussey Co.,
547 F.2d 1168 (6th Cir. 1977) 23

Statutes

Americans with Disabilities Act of 1990,
42 U.S.C. § 12101 *et seq.* 1, 19, 20, 25

Civil Rights Act of 1866,
42 U.S.C. § 1981a 11
42 U.S.C. § 1983 11

Civil Rights Act of 1964,
42 U.S.C. § 2000e–5 11

Equal Credit Opportunity Act,
15 U.S.C. § 1691e. 11

Fair Credit Reporting Act,
15 U.S.C. § 1681 *et seq.*..... 6, 7

Fair Debt Collection Practices Act,
15 U.S.C. § 1692 *et seq.*..... 8

Fair Housing Act,
42 U.S.C. § 3601 *et seq.* 1, 5, 8, 11, 15, 19–25
42 U.S.C. § 3604(f)(C)(i) 24
42 U.S.C. § 3613(c)(1) 11
42 U.S.C. § 3616a(b)(2)(A)..... 20

U.S. CONST. art. II.....4, 18, 19, 20

U.S. CONST. art. III 3, 4, 6–10, 14, 16–19, 25

Other Authorities

Community and Culture - Frequently Asked Questions, National Association of the Deaf, https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/..... 16

Fair Hous. Justice Ctr., *Guide for Fair Housing Testers* (2012), https://static1.squarespace.com/static/5277d8d3e4b057c7282d75d8/t/54f604e0e4b0eaa8361e4437/1425409248250/GuideForTesters-portfolio.pdf 16

Fair Housing Organizations Announce $7.1 Million Dollar Settlement of Disability Discrimination Claims Against Senior Housing Provider; Agreement Requires an Estimated $6.3 Million to be Spent on Accessibility Improvements at 50 Properties, Fair Housing Center of Central Indiana, https://www.fhcci.org/wp-content/uploads/2022/08/8-10-22-Clover-settlement.pdf..... 25

HUD, Fair Housing and Equal Opportunity, *Fair Housing Initiative Program - Education and Outreach Initiative - Test Coordinator Training* (2022), https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo/fundingopps/fy22_fhip_ed..... 21

HUD, Off. Pol'y Dev. & Rsch., *Fair Housing Enforcement Organizations Use Testing to Expose Discrimination*, Evidence Matters, Spring/Summer 2014, https://www.huduser.gov/portal/periodicals/em/spring14/highlight3.html 23

HUD, Off. Pol'y Dev. & Rsch., *Paired Testing and the Housing Discrimination Studies*, Evidence Matters, Spring/Summer 2014, https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html#title 21

John Obee, *The Importance of Testing Evidence in Housing Discrimination Sales Transactions: Two Case Studies*, 41 Urban Lawyer 309 (2009) 23

Nat'l Fair Hous. Alliance, *Are You Listening Now: A National Investigation Uncovers Housing Discrimination Against the Deaf and Hard of Hearing* (2013) 16

Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) 15

STATEMENT OF INTEREST[1]

Amici include the National Fair Housing Alliance (NFHA) and 50 of its member organizations ("Organizational *Amici*").[2] NFHA is the only national organization dedicated solely to ending discrimination and ensuring equal opportunity in housing for all people. Founded in 1988, NFHA is a consortium of private, non-profit fair housing organizations, state and local civil rights agencies, and individuals throughout the United States. Among the Organizational *Amici* is Housing Opportunities Made Equal (HOME) of Virginia, the organizational plaintiff that administered the testing in *Havens Realty Corporation v. Coleman*, 455 U.S. 363 (1982).

The Organizational *Amici* use a variety of means to accomplish the Fair Housing Act's goals of ensuring equal and fair access to housing. Those means include education and outreach, research, public policy initiatives, investigations, and, where appropriate, enforcement actions. As part of their investigative activities, the Organizational *Amici* routinely work with testers to evaluate whether landlords, lenders, and other housing providers are complying with applicable law, including the Fair Housing Act (FHA) and the Americans with Disabilities Act (ADA). Fair housing organizations like *Amici* are thus keenly aware of the harm testers suffer when their work uncovers housing

---

[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici*, their members, and their counsel has made a monetary contribution to support the brief's preparation or submission.

[2] A list of the Organizational *Amici* is compiled in the appendix.

discrimination. Because testing investigations are essential to the work of the Organizational *Amici*, they have a strong interest in ensuring that their testers remain able to seek redress for discrimination-related harm.

Amici Carla Herbig, Lisa Darden, and Richard Strode ("Tester *Amici*") are individuals with decades of experience conducting fair housing tests. They have collectively performed hundreds of tests for non-profit organizations. Together, they have been plaintiffs in approximately twenty housing discrimination suits. Tester *Amici* have experienced the real and lasting harm caused by housing discrimination. They file this brief to shine light on the testing process and to dispel misconceptions about testers' injuries. Discrimination inflicts concrete injuries on individuals, regardless of their intent to rent or buy real estate. As testers in the twenty-first century, they expect compliance with the law, not discrimination; they neither volunteer for nor inflict discrimination upon themselves.

Amicus Carla Herbig is a Black and Asian woman who has personally conducted approximately fifteen tests and, as an Equal Opportunity Specialist for the U.S. Department of Justice for sixteen years, coordinated another roughly 1,500 tests. The United States sought and obtained damages on her behalf, and that of four additional testers, in *United States v. Balistrieri*, 981 F.2d 916 (7th Cir. 1992), a housing discrimination case described in this brief. *Amicus* Lisa Darden is a Black woman who has conducted over 300 tests for NFHA member Fair Housing Justice Center (FHJC) over a twelve-year period. She has been a plaintiff in fifteen fair housing suits and currently serves on FHJC's Board of Directors. *Amicus* Richard Strode is a Black man who began

testing for NFHA-member Metropolitan Milwaukee Fair Housing Council (MMFHC) in the early 1980s. He has performed over 200 tests and filed four lawsuits. Mr. Strode is a retired Regional Director for the U.S. Social Security Administration and currently serves as MMFHC's Board President.

SUMMARY OF ARGUMENT

The testing injuries that this Court recognized in *Havens Realty* remain actionable: Discrimination causes testers concrete and particularized harm, and the Constitution permits such harm to be redressed in the courts.

In the years since this Court pronounced the cognizability of tester injuries in *Havens Realty*, it has clarified that bare procedural violations do not alone give rise to standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). But those holdings do not implicate the tester injuries recognized in *Havens Realty* and alleged by Ms. Laufer here, which are categorically different because they stem from discrimination.

Discrimination because of a protected status—whether race, gender, or disability—inherently inflicts dignitary and stigmatic harm, which alone is sufficient for Article III standing. Many federal statutes expressly provide for remedies that redress this kind of harm, including compensatory, punitive, and nominal damages. For decades, the judges and juries who have benefitted firsthand from tester evidence have determined that testers, like other plaintiffs, should receive such damages for the pain, suffering, and humiliation flowing from discrimination, and the dignitary harm it causes.

To deny a tester's injury because of the context in

which it arose is to ignore the practical and legal realities of testing. Testers are not inviting or anticipating discrimination; they have no more reason to foresee discrimination than any other home seeker entering the marketplace. Rather, testers endeavor and expect to confirm compliance with fair housing laws—the most common outcome of their tests. When testers encounter discrimination instead, this is not self-injury; the harm is visited on testers by whomever discriminates against them on an unlawful basis. In any event, requiring courts to determine whether a plaintiff truly sought to use the services discriminatorily denied to them is unadministrable. Article III has never required a court, for example, to ask whether those who sat at a lunch counter truly wanted to buy lunch when they bring suit for being denied service based on the color of their skin. Yet that is the radical shift in standing doctrine Petitioner and its *amici* seek.

In attempting to undermine Ms. Laufer's standing, Petitioner and its *amici* ring the separation of powers alarm. They contend that permitting tester litigation creates Article II concerns by allowing testers to encroach upon the Executive Branch's enforcement authority. This red herring rests on the faulty assumption that testers are uninjured, as though their suits are nothing more than *qui tam* actions brought in the government's stead. But this assumption is plainly untrue for testers who have experienced discrimination. Petitioner's encroachment argument is further eroded by the Executive Branch's longstanding and public reliance on testers, whom it recognizes as aggrieved parties within the meaning of anti-discrimination statutes.

This Court should reaffirm its tester jurisprudence

to ensure that testers can continue to audit compliance and be made whole in the unfortunate event they face discrimination in the course of such work.

ARGUMENT

I. The Injuries Recognized in Havens Realty Remain Cognizable Under Current Law

Petitioner argues that the Court's decisions in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, and *Spokeo, Inc. v. Robins*, 578 U.S. 330, limit the injuries recognized in *Havens Realty*. Pet. Br. 26–28. This is incorrect: *Havens Realty* concerned discrimination, not arguments about document formatting or the accuracy of online data profiles. The injuries at issue in *TransUnion* and *Spokeo* were both conceptually and legally distinct. The harm alleged in *Havens Realty* remains cognizable and gives rise to claims that are wholly consistent with the principles set forth in those two cases.

1. In *Havens Realty*, the plaintiffs included two testers who investigated whether apartment complexes were complying with the FHA. 455 U.S. at 368. The defendant's employees told Sylvia Coleman, a Black tester, that there were no available units, but told the white tester "that there were vacancies." *Id.* at 367–68. This Court held that Coleman had standing as the person who was allegedly provided "discriminatory misinformation" by the employee. *Id.* at 373–75. Coleman's status as a tester, who lacked "any intention of buying or renting a home," the Court explained, did "not negate the simple fact of injury." *Id.* at 375. The injury flowed from the defendant's discriminatory conduct; it did not turn on Coleman's

intent or motivation. *Ibid.*[3]

Neither *TransUnion* nor *Spokeo* undermines the tester injury articulated in *Havens Realty*. Rather, those cases hold that "bare procedural violations, divorced from any concrete harm," are not enough to establish harm for purposes of Article III's injury-in-fact requirement. *TransUnion*, 141 S. Ct. at 2213 (internal quotation marks and brackets omitted) (quoting *Spokeo*, 578 U.S. at 341). *TransUnion* and *Spokeo* expressly recognize that dignitary or stigmatic harms—like those inflicted by discrimination—are the very kind of intangible injuries sufficient to establish standing.

Spokeo, like the Court's opinion in *TransUnion*, involved alleged violations of the Fair Credit Reporting Act of 1970 (FCRA). 578 U.S. at 333. The plaintiff alleged that the defendant violated the FCRA by disseminating false information about him to third parties. *Ibid.* This Court held that although the alleged violation of his statutory right to accurate reporting was "particularized," the Ninth Circuit overlooked whether the alleged injury was also "concrete." *Id.* at 334. The Court thus remanded the case to the Ninth Circuit to consider whether the plaintiff sufficiently alleged a concrete harm. *Id.* at 343. In doing so, this Court affirmed that even "intangible harms"—and indeed, the mere "risk" of intangible harms—may give rise to a concrete injury. *Id.* at 341–42.[4]

---

[3] The Court also confirmed that organizational injuries are cognizable under Article III, *Havens Realty*, 455 U.S. at 378–79, though such injuries are not at issue in this case.

[4] On remand, the Ninth Circuit again held that the plaintiff had suffered an injury-in-fact. The court of appeals interpreted this

In *TransUnion*, this Court affirmed that plaintiffs whose false "credit reports were provided to third-party businesses suffered a concrete harm" for purposes of Article III. 141 S. Ct. at 2214. In contrast, the Court held, the class members whose reports had not been given to third parties did not. *Ibid.* The Court also held that the latter group did not have standing to pursue claims that certain "TransUnion mailings" sent to them "were formatted incorrectly and deprived them of their right to receive information in the format required by statute." *Id.* at 2213. Such "bare procedural violations," according to the Court, do "not suffice for Article III standing," *id.* at 2213 (quoting *Spokeo*, 578 U.S. at 341) (internal quotation marks and brackets omitted), where "plaintiffs have identified no 'downstream consequences,'" *id.* at 2214 (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 1004 (11th Cir. 2020)).

Still, the Court specifically reaffirmed that "discriminatory treatment" is a legally cognizable injury. *TransUnion*, 141 S. Ct. at 2205. The Court did so by citing with approval its prior opinion in *Allen v. Wright*. *Ibid.* (citing 468 U.S. 737, 757 n.22 (1984)). In *Allen*, the Court explained that "stigmatic injury … is judicially cognizable to the extent that" the plaintiff is "personally subject to discriminatory treatment." 468

Court's decision in *Spokeo* to mean that "the dissemination of false information in consumer reports *can* itself constitute a concrete harm." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114 (9th Cir. 2017). The Ninth Circuit then held that falsely reporting the plaintiff's age, marital statute, professional degree, and wealth to potential employers, in violation of the FCRA, was a sufficiently concrete injury for purposes of Article III. *Id.* at 1111, 1117. This Court denied the certiorari petition that followed. 138 S. Ct. 931 (2018) (mem.).

U.S. at 757 n.22.

TransUnion also cited with approval then-Judge Barrett's opinion in *Casillas v. Madison Avenue Associates, Inc.*, 926 F.3d 329 (7th Cir. 2019). *See TransUnion*, 141 S. Ct. at 2205. That case involved allegations that the defendant violated the Fair Debt Collection Practices Act by failing "to specify that [the plaintiff] had to communicate in writing to trigger the statutory protections," but the "only harm [the plaintiff] claimed to have suffered … was the receipt of an incomplete letter"—nothing else. *Casillas*, 926 F.3d at 331–32. Then-Judge Barrett expressly distinguished the technical violations at issue in *Casillas* from the injuries that gave rise to standing in *Havens Realty*, where the tester "claimed the harm of being lied to because of her race" and asserted "an invasion of the very interest that the Fair Housing Act protects: freedom from racial discrimination in the pursuit of housing." *Id.* at 338.

2. Given the nature of the injury suffered by testers like Ms. Laufer, this is not the kind of technical, procedural violation that requires alleging some other "downstream consequence" to create Article III standing. *See TransUnion*, 141 S. Ct. at 2214 (quoting *Trichell*, 964 F.3d at 1004) (internal quotation marks omitted). Discrimination alone causes concrete injury.

When a tester brings a discrimination claim, she redresses not a lack of information, though that may sometimes be the discriminatory method employed, but a lack of equal treatment. Even if the *TransUnion* plaintiffs had been outright denied the information to which they were entitled, there was no allegation that the denial was accomplished in a stigmatizing, discriminatory manner. *Cf. TransUnion*, 141 S. Ct. at

2208–14. A discriminatory denial of information, as opposed to the denial of information that anyone in the public may wish to have, is itself sufficient to inflict constitutionally cognizable injury. *See infra* pp. 11–12. Such intangible yet real harm does not require "any *additional* harm beyond the one Congress has identified." *Spokeo*, 578 U.S. at 342. And any suggestion that testers are in the same position as someone who invokes a general right to information ignores the nature of anti-discrimination laws and what they are trying to achieve.

Petitioner recognizes that discrimination "may well … [be] a stigmatic injury that satisfies Article III's concreteness requirement, separate and apart from any deprivation of information." Pet. Br. 28. But as the Government explains, Petitioner errs in believing "that no discrimination occurs when a defendant provides the same information to all comers," because "Title III defines 'discrimination' to include a failure to make reasonable modifications as necessary to afford equal access to individuals with disabilities." Gov't Br. 23. Ms. Laufer was denied information in a discriminatory manner. That is, she was denied information necessary to determine whether she, as a person with a disability, could reserve a room she could physically access at Petitioner's hotel—information freely provided to non-disabled persons. That discriminatory harm is enough to establish a concrete injury for purposes of Article III. Neither *Spokeo* nor *TransUnion* says otherwise.

As fair housing organizations and testers, *Amici* are precisely the parties whose injuries were at issue in *Havens Realty*, where this Court first recognized that testers suffer actionable injuries when they encounter discrimination. 455 U.S. at 373–74. Indeed,

the Organizational *Amici* include HOME of Virginia, the fair housing organization that prevailed in *Havens Realty*. Over forty years later, *Amici* continue to assert claims when they face harm because of discrimination. *Amici* are thus a throughline from *Havens Realty* to the present, and their injuries remain cognizable under this Court's more recent standing precedent.

II. Discrimination Causes Actionable Injuries Whether or Not the Victim Is a Tester

This Court's precedents confirm that discrimination is harmful and that the injuries it causes are sufficient for Article III standing purposes. Many federal statutes expressly contemplate relief for discrimination-related harm, including emotional distress. This relief remains available when the person who experiences discrimination is a tester. Indeed, the factfinders who have heard directly from testers have awarded them damages for their injuries. Testers more often confirm legal compliance than encounter discrimination, but in the latter instances, their injuries are no less worthy of redress than those suffered by an ordinary consumer. Article III has never required courts to consider whether a party injured by discriminatory treatment actually intended to use the service or facilities they were denied, and requiring such drastic shift in standing doctrine would be unadministrable.

A. Discrimination Causes Dignitary Harm

This Court has long recognized that "discrimination itself, by perpetuating 'archaic and stereotypic notions' or by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community, can cause

serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984) (internal quotation marks and citations omitted); *see also Baker v. Carr*, 369 U.S. 186, 206–08 (1962). In other words, discrimination causes dignitary harm, which alone constitutes actionable injury. *Allen*, 468 U.S. at 755 (denial of equal treatment because of race discrimination is a cognizable injury).

Many anti-discrimination statutes provide for compensatory damages, reflecting this settled principle. The FHA, for example, provides for damages for emotional distress and humiliation stemming from discriminatory housing practices. 42 U.S.C. § 3613(c)(1); *see also, e.g.*, *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974) (FHA damages are appropriate to compensate for "racial indignity"); *Steele v. Title Realty Co.*, 478 F.2d 380, 384 (10th Cir. 1973) (FHA damages are appropriate for "emotional distress and humiliation"). Similarly, compensatory damages are available in actions for employment discrimination under the Civil Rights Acts, *see* 42 U.S.C. § 2000e–5; 42 U.S.C. § 1981a, as well as for credit discrimination under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691e(a). *See, e.g.*, *Anderson v. United Fin. Co.*, 666 F.2d 1274, 1277 (9th Cir. 1982) (ECOA damages can be awarded for "mental anguish, humiliation or embarrassment"). Damages are also available for constitutional deprivations under 42 U.S.C. § 1983 to remedy "impairment of reputation," "personal humiliation," and "mental anguish and suffering." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)) (internal quotation marks omitted).

Together, this Court's precedents and these remedial schemes confirm that injuries caused by discrimination can be rectified through legal process.

B. *Testers Experience "Real and Palpable" Injury from Discrimination*

The long-recognized dignitary injury caused by discrimination is equally cognizable where a person is a tester. Indeed, "testers have the same rights as anyone else," and while they may not intend to purchase or lease the units they see, or stay at the hotels whose websites they visit, there is no doubt that "[t]esters' injury is real and palpable." *Coel v. Rose Tree Manor Apartments, Inc.*, 1987 U.S. Dist. LEXIS 9212, at *17 (E.D. Pa. Oct. 13, 1987) (awarding damages to two testers "for having been subjected to racial discrimination"); *see also City of Chicago v. Matchmaker Real Est. Sales Ctr., Inc.*, 982 F.2d 1086, 1095 (7th Cir. 1992) ("[T]he testers were treated in a 'racially discriminatory fashion, even though they sustained no harm beyond the discrimination itself.'" (quoting *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990))).

Testers themselves have articulated these injuries, and the resulting compensable damages, in both pleadings and testimony. It is thus unsurprising that finders of fact—those closest to the record and best situated to evaluate harm—have credited testers' injuries and awarded damages to testers who suffer dignitary harm caused by discrimination.

For example, *Amicus* Herbig was an aggrieved person in *Balistrieri*. 981 F.2d at 916. There, the Seventh Circuit upheld compensatory damages of $2,000 to each fair housing tester when, "[i]n each test, the black person was treated less favorably: he or she was either shown fewer apartments, quoted

higher rents, or quoted later dates of availability; in some cases, all those occurred on the same test." *Id.* at 929. Because of this "less favorable" treatment, the *Balistrieri* court recognized that each tester felt "upset, humiliated, embarrassed or shamed." *Id*. at 931. *Amicus* Herbig, for example, "felt nauseous, embarrassed, and ashamed that she had been treated differently." *Ibid*. And the other testers described similar injuries. Kim Davis testified that when she learned she had been discriminated against, she became "angry and upset," and "cautious and on edge." *Ibid*. Carl Hubbard felt "anger and frustration at the knowledge that he had been treated differently," and a "sense of helplessness and fear that someday he would again be judged because of his race instead of his merits as a person." *Ibid*. (internal quotation marks omitted). Sheryl Sims-Daniels felt "disbelief," and Greg Thompson felt "worrie[d] about how his children will be treated." *Ibid.*

In affirming the jury awards to these testers, the Seventh Circuit explained that "emotional distress caused by housing discrimination is a compensable injury," *ibid.*, and the trial testimony had sufficiently established that "[t]he testers did suffer the indignity of being discriminated against because of their skin color," *id*. at 933.[5]

---

[5] For these reasons, judges and juries across the country have awarded testers compensatory damages for decades. *See, e.g.*, *Jancik v. Dep't of Hous. and Urban Dev.*, 44 F. 3d 553, 555 (7th Cir. 1995) (awarding compensatory damages to a tester); *Staples v. Wickesberg*, 122 F.R.D. 541 (E.D. Wis. 1988) (same); *Saunders v. Gen. Servs. Corp.*, 659 F. Supp. 1042, 1054–55 (E.D. Va. 1987) (awarding damages to Black fair housing organization employee who viewed discriminatory advertisement); *Davis v. Mansards*, 597 F. Supp. 334, 347 (N.D. Ind. 1984) (tester damages for emotional distress and humiliation). In other cases, courts have

The allegations of *Amicus* Darden similarly demonstrated harm experienced during a fair housing test in *Fair Housing Justice Center, Inc. v. Silver Beach Gardens Corp.*, 2010 WL 3341907 (S.D.N.Y. Aug. 13, 2010). There, the FHJC and two Black testers sued two co-ops and a real estate broker. *Id.* at *1–2. The complaint alleged that the co-ops "strictly enforced" a reference requirement for Black buyers and "effectively waived" the policy for white buyers. *Silver Beach Gardens Corp.*, Compl., ECF No. 1, ¶ 2. The broker allegedly told white testers that they would be well-liked in the co-ops, which were "very nice … mostly ethnic Irish, German, Italian … there's some Puerto Rican [*sic*], not many." *Id.* ¶ 25. In contrast, the broker allegedly refused to show *Amicus* Darden a home and told her that the developments were "not wonderful for everybody" and that there were very few residents of "any kind of, you know, ethnic color." *Id.* ¶ 30. *Amicus* Darden alleged that she suffered not only a loss of civil rights, but "other damages including emotional distress, humiliation, and harassment." *Id.* ¶ 45. In a so-ordered settlement agreement, the broker permanently gave up her license and agreed to pay the Black testers $2,000 each in damages. *Silver Beach Gardens Corp.*, Settlement Agreement, ECF No. 55, ¶ 7.

These outcomes show that when factfinders are presented with evidence of discrimination and the harm it causes, they award appropriate relief for

---

awarded testers nominal damages, as well as injunctive relief. *See, e.g.*, *Cabrera v. Jakabovitz*, 24 F.3d 372, 379 (2d Cir. 1994) (affirming nominal damages to two testers and injunctive relief); *Baltimore Neighborhoods, Inc. v. LOB*, 92 F. Supp. 2d 456, 464 (D. Md. 2000) (affirming nominal damages to tester and ordering equitable relief).

testers, just as they do for other plaintiffs.

C. *Nothing About Being a Tester Undermines a Person's Article III Standing Stemming from Discrimination*

In 2023, 55 years after the passage of the federal FHA, it is reasonable for individuals inquiring about housing for rent or purchase, including testers, to expect compliance with anti-discrimination laws. Prior to the Civil Rights Movement and enactment of laws prohibiting housing discrimination, racial discrimination was commonplace and understandably expected by consumers. At that time, it was lawful to base housing transactions on racial considerations, and in many instances, this was required by federal, state, and local governments. *See generally* Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017) (documenting the history of government-sponsored housing segregation). However, with anti-discrimination laws and their enforcement, courts began to recognize that racial discrimination should not be the expected norm. *See Davis*, 597 F. Supp. at 347 ("In 1984, no one should have to toughen themselves to racial discrimination—a tester has no reason to expect mistreatment at the hands of ostensibly fair-minded businesspeople.").

Fair housing testers have no more reason to expect or anticipate that they will be discriminated against when conducting a test than an actual home seeker. Housing organizations conducting investigations and instructing individuals to perform a test typically do not inform a tester of the reason for the test. For example, the New York City-based FHJC—an organization that *Amicus* Darden has conducted tests for since at least 2008, *see supra* pp.2—instructs

testers in its training manual that the selection of an entity to be tested "does not necessarily mean that the entity is suspected of violating fair housing laws." FHJC, *Guide for Fair Housing Testers* (2012), https://static1.squarespace.com/static/5277d8d3e4b057c7282d75d8/t/54f604e0e4b0eaa8361e4437/1425409248250/GuideForTesters-portfolio.pdf. The manual additionally provides that the testers should "keep an open mind about the test results" and "not jump to conclusions" about the outcome of a test. *Ibid.* This general practice puts testers in a similar posture as ordinary consumers inquiring about an apartment to rent or a home to buy. In fact, the experiences of *Amici* Strode and Darden bear this point out: Both have conducted hundreds of tests but have filed under 20 housing discrimination lawsuits combined.[6]

Amicus NFHA's auditing work also illustrates that testers largely confirm compliance. In 2013, NFHA and many of its members coordinated an investigation into how Deaf or hard-of-hearing persons were treated in comparison to hearing persons in the apartment housing search.[7] After testing 117 rental firms in 98 cities and 25 states, the investigation showed differential treatment of Deaf testers by about a quarter of the rental agencies. NFHA, *Are You Listening Now: A National Investigation Uncovers*

---

[6] A tester's choice to vindicate their rights in court in the limited instances in which they encounter discrimination does not impact the Article III analysis. *See infra* pp.19–20.

[7] Consistent with the practice of the National Association of the Deaf, *Amici* use "Deaf" with a capital "D" to refer to people who share a language (American Sign Language) and a belief in the importance of Deaf Community. *See, e.g.*, *Community and Culture – Frequently Asked Questions*, National Association of the Deaf, https://www.nad.org/resources/american-sign-language/community-and-culture-frequently-asked-questions/.

Housing Discrimination Against the Deaf and Hard of Hearing (2013). In other words, discrimination was not the predominant outcome.

Nor is the dignitary harm caused by discrimination "self-inflicted" because the target of discrimination is a tester. The ultimate responsibility for inflicting harm lies with the landlord, real estate agent, developer, or lender who discriminated. Moreover, discrimination is directed at a person because of a protected characteristic, not because that person is a tester. A landlord who lies to a family with children about whether apartments are available to rent, a real estate agent who racially steers a Black person away from a predominantly white neighborhood, a developer who builds inaccessible multi-family housing, and a lender who offers less favorable mortgage terms to a pregnant woman are each engaging in discriminatory conduct without regard to whether they are dealing with an actual home seeker or a tester. In each instance, neither the home seeker nor the tester has inflicted any injury on themselves.

Even if tester injuries could be construed as self-inflicted, the Article III standing analysis has never required factfinders to inquire into plaintiffs' true motivations to determine whether they have inflicted the discriminatory harm on themselves. And such rule would be untenable, especially at the pleading stage. Take, for example, a Black person who hears that a certain restaurant turns away non-white diners, nevertheless asks to be seated, and is denied a table. As Petitioner and its *amici* would have it, the court must ask whether the person truly intended to dine at the restaurant in question or whether, instead, they were motivated simply to see if they *would* be treated

differently. That has never been the rule, and for good reason. There is no question that the would-be diner suffered discriminatory treatment that caused particularized and concrete harm. It matters not a whit that the person chose to visit the restaurant simply to see whether that would actually be the case. The same is true for testers.

III. Testing Is Integral to Federal Enforcement and Raises No Article II Concerns

Ms. Laufer's work as a tester does not create Article II concerns because she suffered a concrete and particularized injury and therefore has Article III standing. The same is true of other testers who encounter discrimination. *See supra* pp.15–17. Petitioner attempts to characterize Ms. Laufer and her tester peers as infringing on the Executive Branch's discretion to enforce anti-discrimination laws, but that argument fails because it is premised on the erroneous belief that testers do not suffer an individualized injury. The incongruity of Petitioner's Article II concerns is made even more apparent by the Executive Branch's well-established reliance on testers, like Ms. Laufer, to enforce anti-discrimination laws. Testers, whether working on their own or in concert with Organizational *Amici* or the Executive Branch, remain essential to fully realizing civil rights statutes.

A. Petitioner's Article II Argument Fails Because It Ignores Testers' Injuries

Acheson and its *amici* contend that reaffirming tester standing necessarily implicates Article II by permitting individuals to encroach on the Executive Branch's enforcement authority. Pet. Br. 48–49. But this Court has explained that such Article II concerns

exist only where "*unharmed* plaintiffs [attempt] to sue defendants who violate federal law." *TransUnion*, 141 S. Ct. at 2207 (emphasis in original). As described above, testers who face discrimination suffer harm and thus cannot be "unharmed plaintiffs." On the contrary, properly alleged claims of discrimination by testers address their "distinct and palpable injuries." *Havens Realty*, 455 U.S. at 376; *see also Allen*, 468 U.S. at 755 (injury caused by discrimination can give rise to standing).

The Government also makes clear that testers who "are subject to the real-world harm of discrimination" have Article III standing to vindicate their own rights, and they do so without infringing on the Executive Branch's Article II authority. *See* Gov't Br. 26. That is precisely what Ms. Laufer did in this case: She alleged that she was injured by Petitioner's noncompliance with the ADA and its implementing regulations. Resp. Br. 10. Testers are not attempting to pursue a generalized grievance or vindicate the public interest; instead, they assert their own rights after suffering an individual, particularized, and concrete injury.

That Ms. Laufer recognizes the potential for her claims to benefit others does not somehow eliminate her own injury. A plaintiff's general interest in enforcing civil rights laws like the ADA or the FHA does not alone give rise to standing, but neither does it eliminate an actionable injury that has already occurred. It is entirely possible for any plaintiff—whether a tester or not—to use litigation both to be made whole and to promote compliance more generally. That is what separates suits like Ms. Laufer's from *qui tam* actions in which an individual proceeds in the government's stead. Indeed, this Court has long recognized these parallel goals, noting

"the important role" of private litigants to "act not only on their own behalf but also 'as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Lawrence G. Wallace, Deputy Solicitor Gen.). Neither a person's acknowledgement of her important role, nor her choice to sue after being injured, makes her injury any less worthy of vindication in court. This holds true for testers and non-testers alike.

B. *The Executive Branch Expressly Relies on Testers for Enforcement*

Petitioner's Article II arguments are especially unpersuasive because the statutory and regulatory schemes of civil rights statutes such as the ADA and the FHA expressly contemplate the use of testers to ensure compliance. As the Government explained, testers provide "an essential complement to the federal government's limited enforcement resources." Gov't Br. 9. Testers help assess the extent of compliance with civil rights statutes, and in fact, Congress allocates funding to fair housing enforcement organizations to engage in testing to ensure compliance with the FHA. *See* 42 U.S.C. § 3616a(b)(2)(A). And of course, it is the Executive Branch who then administers those allocated funds.

Both the U.S. Department of Justice (DOJ) and the U.S. Department of Housing and Urban Development (HUD) incorporate testers into their enforcement activities. The DOJ has long deemed testers to be "aggrieved persons" within the meaning of the FHA and will accordingly seek damages for testers when the government brings suit. *See, e.g.*, *Balistrieri*, 981 F.2d at 924, 929; *United States v. Sec. Mgmt. Co.*, 96 F.3d 260, 262–63 (7th Cir. 1996); *United States v.*

SSM Props., LLC, 619 F. Supp. 3d 602 (S.D. Miss. 2022). The DOJ has expressly recognized that fair housing testers who experienced housing discrimination during testing "suffered injury," and thus "have a statutory right" to bring an action under the FHA. *SSM Props.*, 3:20-cv-729-CWR-LGI, ECF No. 25 at 1–2 (S.D. Miss., Feb. 18, 2021). In considering these enforcement actions, courts have likewise recognized that discrimination against testers can cause "psychological injury." *Sec. Mgmt. Co.*, 96 F.3d at 268.

HUD similarly supports the use of testers to evaluate compliance with the FHA. For example, in 2022, HUD set aside $500,000 "to support fair housing test coordinator training courses in general/basic fair housing testing as well as advanced/complex fair housing testing." HUD, Fair Housing and Equal Opportunity, *Fair Housing Initiative Program – Education and Outreach Initiative – Test Coordinator Training* (2022), https://www.hud.gov/program_offices/spm/gmomgmt/grantsinfo/fundingopps/fy22_fhip_ed. This program has been administered by a member of *Amicus* NFHA for over ten years and provides training for test coordinators designing and implementing testing investigations in over 100 local non-profit organizations. *Ibid.* Moreover, HUD has spent decades using testers to research and track how housing discrimination manifests in a changing marketplace. *See* HUD, Off. Pol'y Dev. & Rsch., *Paired Testing and the Housing Discrimination Studies*, Evidence Matters, Spring/Summer 2014, https://www.huduser.gov/portal/periodicals/em/spring14/highlight2.html#title.

It would be absurd to find that testers encroach upon the Executive Branch's enforcement authority

when many testers act at the behest of a federal agency that funds the efforts of testers doing the very work Ms. Laufer has done to address the discrimination she and other people with disabilities suffer on a daily basis. Critically for this case, the injury a tester endures when she encounters discrimination exists regardless of whether she acts on her own initiative or as part of a federally funded program—she is an aggrieved party either way.

C. *Tester and Organizational Enforcement Is Vital to Achieving Full Realization of Civil Rights Statutes*

The Executive Branch's reliance on testers confirms something *Amici* know to be true from their own work: Testers are vital to full realization of anti-discrimination statutes because, unlike individual plaintiffs, testing can both detect and remedy systemic discrimination.

Individuals typically experience a violation of their civil rights on an isolated basis, and as such, either they will not know that their rights have been violated, or they will not possess the requisite information to recognize a policy or practice indicating lack of compliance with applicable law. On the other hand, as demonstrated in *Havens Realty*, testers and fair housing organizations like the Organizational *Amici* can evaluate whether a discriminatory act is part of a larger pattern of discrimination. *See* 455 U.S. at 368 (describing testers' experiences with defendant housing provider that exposed racial steering and violations of the FHA). Where there is broader harm, organizations can then obtain relief that ensures widespread compliance with such statutes.

As HUD's Office of Policy Development and Research has noted, "[m]any victims of discrimination

encounter deceptive barriers that can be hard to detect, such as false information, neighborhood steering, and the application of different standards." HUD, Off. Pol'y Dev. & Rsch., *Fair Housing Enforcement Organizations Use Testing to Expose Discrimination*, Evidence Matters, Spring/Summer 2014, https://www.huduser.gov/portal/periodicals/em/spring14/highlight3.html. Trial courts, which sit on the frontlines of enforcement actions, have therefore long recognized that "evidence gathered by a tester may, in many cases, be the only competent evidence available to prove that the defendant has engaged in unlawful conduct." *Zuch v. Hussey*, 394 F. Supp. 1028, 1051 (D. Mich. 1975), *aff'd sub nom.*, *Zuch v. John H. Hussey Co.*, 547 F.2d 1168 (6th Cir. 1977); *see also* John Obee, *The Importance of Testing Evidence in Housing Discrimination Sales Transactions: Two Case Studies*, 41 Urban Lawyer 309 (2009).

The same holds true today. For example, in *Fair Housing Justice Center, Inc. v. Broadway Crescent Realty, Inc.*, Black testers and one of the Organizational *Amici* sued a building superintendent and his wife, a management company, and the landlord of a New York City apartment building for race discrimination under the FHA. 2011 WL 856095 (S.D.N.Y. Mar. 9, 2011). White and Black testers inquired about the availability of rental units in the building and were allegedly met with different treatment based on their race. *Id.* at *7–8. While the superintendent's wife provided white testers with information about apartments for rent and arranged for the testers to meet her husband and see apartments, she treated Black testers less favorably. *Id.* at *7. When Black testers asked, she did not offer to call her husband, "volunteered little information," and even refused when a Black tester specifically

asked if she would call her husband. *Ibid*. This subtle form of discriminatory conduct would otherwise go virtually undetected by consumers who have no knowledge of how others are being treated absent testing.

Amici—organizations and testers together—are thus able to detect systemic misconduct in ways that individual borrowers and renters cannot. Fair housing organizations' capacity to synthesize information across violations and victims permits them to discern when an instance of discrimination is part of a larger pattern, which is often apparent only once a critical mass of harm has been revealed.

This is the difference between making one unit accessible for a specific individual with disabilities and making the whole complex accessible; between correcting the wrongful denial of one loan and ensuring that a financial institution will make credit available to an entire community; between granting a single exception to a policy and enacting one that is equitable. This form of relief depends on the combined efforts of testers and organizations like *Amici*. For example, the FHA defines disability discrimination in housing to include a failure to design and construct dwellings in a manner such that "the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons," among other requirements. 42 U.S.C. § 3604(f)(C)(i). If an individual with a disability visited one apartment complex and found that the hallways to apartments were not accessible, they might just look for an apartment elsewhere, assuming that this singular building is not accessible to individuals with physical disabilities. By contrast, together with fair housing organizations, testers could view several

apartment complexes run by the same property management and development company. If several of the company's properties were also inaccessible, testers could notify that company of their obligations under the FHA and the ADA and, if necessary, bring suit to ensure that all current and future tenants of those properties are able to live in accessible apartment buildings.[8]

* * *

Petitioner and its amici ask this Court to hold, for the first time, that a tester's injuries are not "concrete" even for purposes of pleading Article III standing. Doing so would profoundly diminish enforcement of anti-discrimination statutes. This result would send a clear message that the Constitution does not recognize discrimination as a separately actionable injury. Perhaps worse, Petitioner's position rests on the hurtful and offensive notion that testers seek to be treated in a discriminatory manner. Testers expect to confirm legal compliance—namely, equal treatment—and generally do just that. In situations where they instead discover that they have been treated in a discriminatory manner, there is nothing "self-inflicted" about the pain that the unlawful treatment has caused them—a harm that has long been recognized as particularized and concrete by courts across the country, including this one.

This Court should reject the sea change in

[8] For one exemplar of testing that led to aggregate relief, see *Fair Housing Organizations Announce $7.1 Million Dollar Settlement of Disability Discrimination Claims Against Senior Housing Provider; Agreement Requires an Estimated $6.3 Million to be Spent on Accessibility Improvements at 50 Properties*, Fair Housing Center of Central Indiana, https://www.fhcci.org/wp-content/uploads/2022/08/8-10-22-Clover-settlement.pdf.

standing doctrine that Petitioner seeks. It fails to recognize real world harms. It is unworkable as a practical matter. And it has no founding in the Constitution or this Court's precedents.

CONCLUSION

For the foregoing reasons, if this Court does not dismiss the petition on grounds of mootness, then it should affirm the opinion of the First Circuit.

Respectfully submitted,

Diane L. Houk
Sara Luz Estela
EMERY CELLI ABADY
BRINKERHOFF WARD
& MAAZEL LLP
600 5th Ave., 10th Floor
New York, NY 10020

Reed Colfax
Counsel of Record
Lila Miller
Gemma Donofrio
RELMAN COLFAX, PLLC
1225 19th Street NW, Suite 600
Washington, DC 20036
(202) 728-1888
rcolfax@relmanlaw.com

Daniel Woofter
GOLDSTEIN RUSSELL &
WOOFTER
1701 Pennsylvania Ave. NW, Suite 200
Washington, DC 20006

Counsel for Amici Curiae

August 9, 2023

APPENDIX

APPENDIX TABLE OF CONTENTS

List of *Amici Curiae*.....App. 1

App. 1

List of *Amici Curiae*

1. Access Living of Metropolitan Chicago
2. Center for Fair Housing, Inc.
3. Connecticut Fair Housing Center
4. CNY Fair Housing
5. Fair Housing Advocates Association
6. Fair Housing Advocates of Northern California
7. Fair Housing Center for Rights & Research
8. Fair Housing Center of Central Indiana
9. Fair Housing Center of Metropolitan Detroit
10. Fair Housing Center of NE-IA
11. Fair Housing Center of Northern Alabama
12. Fair Housing Center of Southeast & Mid Michigan
13. The Fair Housing Center of Southwest Michigan
14. Fair Housing Center of the Greater Palm Beaches
15. Fair Housing Center of Washington
16. Fair Housing Center of West Michigan
17. Fair Housing Continuum
18. Fair Housing Council of Orange County
19. Fair Housing Council of Oregon
20. Fair Housing Council of South Texas
21. Fair Housing Justice Center, Inc.
22. Fair Housing Napa Valley
23. Fair Housing Partnership of Greater Pittsburgh
24. Fair Housing Rights Center in Southeastern Pennsylvania
25. Fair Housing Resource Center, Inc.
26. Greater Houston Fair Housing Center, Inc.

27. High Plains Fair Housing Center, North Dakota
28. HOPE Fair Housing Center
29. Housing Equality Center of Pennsylvania
30. Housing Opportunities Made Equal of Greater Cincinnati
31. Housing Opportunities Made Equal of Virginia
32. Housing Opportunities Project for Excellence, Inc.
33. Housing Rights Center
34. Intermountain Fair Housing Council
35. Long Island Housing Services, Inc.
36. Louisiana Fair Housing Action Center
37. Metro Fair Housing Services, Inc.
38. Metropolitan Milwaukee Fair Housing Council
39. Metropolitan St. Louis Equal Housing Opportunity Council
40. Miami Valley Fair Housing Center, Inc.
41. Montana Fair Housing
42. North Texas Fair Housing Center
43. Northwest Fair Housing Alliance
44. Open Communities
45. Savannah-Chatham County Fair Housing Council
46. South Suburban Housing Center
47. Southwest Fair Housing Council
48. Tennessee Fair Housing Council
49. The Fair Housing Center
50. Westchester Residential Opportunities, Inc.