

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ACHESON HOTELS, LLC,)

4 Petitioner,)

5 v.) No. 22-429

6 DEBORAH LAUFER,)

7 Respondent.)

8 - - - - -

9

10 Washington, D.C.

11 Wednesday, October 4, 2023

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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19 behalf of the Petitioner.

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25 of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 22-429, Acheson Hotels versus Laufer.

Mr. Unikowsky.

ORAL ARGUMENT OF ADAM G. UNIKOWSKY

ON BEHALF OF THE PETITIONER

MR. UNIKOWSKY: Mr. Chief Justice, and may it please the Court:

Respondent does not face an imminent injury from the absence of accessibility information at the website of a hotel she has no interest in visiting. Respondent faces neither an informational injury nor a stigmatic injury. She does not face an informational injury because she has no use for the information she seeks. She's not interested in going to the hotel, so she has no reason for information about whether it is accessible. Nor does she face a stigmatic injury.

This Court has held that a person is injured when she is personally subject to unequal treatment. But that requirement is not satisfied by a plaintiff who searches for hotel

1 websites on the internet to check whether they
2 comply with her interpretation of the ADA.

3 Finally, the Court should decide the
4 question presented in this case. The circuits
5 are divided. The question is important. The
6 arguments are fully aired. And if the Court
7 doesn't decide the question here, it may not
8 have another opportunity to do so.

9 The Court should not bless a legal
10 strategy of filing large numbers of lawsuits,
11 settling almost all of them, and abandoning the
12 rare case that threatens to create adverse
13 precedent so as to facilitate the filing of
14 another round of lawsuits.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: But Respondent says
17 that she has withdrawn her suit. So why should
18 we decide this? I -- it seems as though it's
19 -- it's finished.

20 MR. UNIKOWSKY: Well, Respondent has
21 withdrawn her suit. I mean, she hasn't
22 promised not to bring new suits in the future.
23 And if she doesn't, another plaintiff
24 presumably will.

25 Respondent's position is that any

1 person with a disability with accessibility
2 needs in America who visits a website can bring
3 a lawsuit, so, presumably, another plaintiff
4 will come forward and -- and start bringing the
5 same claims.

6 JUSTICE THOMAS: Well, do you admit,
7 though, that it would be easier to simply moot
8 this out and wait on a suit that is still
9 pending for another round to discuss standing?

10 MR. UNIKOWSKY: I'm actually not
11 really sure it would be easier because I think
12 that even if the Court does what Respondent
13 asked, it would still be a significant
14 precedential decision.

15 I mean, the Court would essentially be
16 -- be blessing the legal strategy over our
17 objection of filing large numbers of lawsuits
18 and -- and abandoning them at the last minute,
19 and that, I think, would create a template
20 for -- for future plaintiffs to rely upon.

21 So --

22 JUSTICE SOTOMAYOR: I'm sorry, I -- I
23 don't understand. You admit that this
24 plaintiff is not entitled to monetary relief.

25 MR. UNIKOWSKY: Yes.

1 JUSTICE SOTOMAYOR: The hotel is owned
2 by a different entity now, correct?

3 MR. UNIKOWSKY: Correct.

4 JUSTICE SOTOMAYOR: And so you would
5 need a new plaintiff and you would need a new
6 defendant --

7 MR. UNIKOWSKY: Well, Your Honor --

8 JUSTICE SOTOMAYOR: -- to get a
9 precedential -- to get a decision that's not
10 advisory, because what you're saying to us, the
11 issue is important. This plaintiff gets
12 nothing. The defendant has to be different
13 because it's a different entity running it.

14 So tell me why it's not moot and tell
15 me why we wouldn't be just giving an advisory
16 opinion.

17 MR. UNIKOWSKY: So, if there was ever
18 a live controversy, it's definitely moot at
19 this point. We're not disputing that, Your
20 Honor.

21 What we're simply saying is that there
22 was never a live controversy in the first place
23 and the Court should therefore so hold. In
24 other words, the Court should say that whether
25 it's moot is sort of immaterial because, from

1 day one, there wasn't a case or controversy.

2 JUSTICE SOTOMAYOR: I -- I'm sorry, I
3 don't know why you haven't answered my
4 question. Why isn't this purely advisory once
5 there's no longer a live controversy between
6 the parties before us?

7 MR. UNIKOWSKY: I don't think it's an
8 advisory opinion at all, Your Honor. Both
9 parties agree that the correct disposition of
10 this case is to hold that there's no Article
11 III case or controversy. We simply disagree on
12 the reasoning for that.

13 JUSTICE SOTOMAYOR: Well, there's
14 prudential doctrines. Standing is one of them.
15 Mootness is another. But I'm -- I'm unaware of
16 any case where this Court had a standing and
17 mootness issue and decided standing rather than
18 mootness first.

19 MR. UNIKOWSKY: Your Honor, I'm -- I'm
20 not sure there's been a case in this particular
21 configuration that's arrived at the Court
22 before, but I don't think that there is a
23 dispute in this case that the Court has the
24 jurisdiction to decide either of the Article --

25 JUSTICE SOTOMAYOR: Well, we had a --

1 yes, we can decide either --

2 MR. UNIKOWSKY: Yes. It --

3 JUSTICE SOTOMAYOR: -- and so I'm
4 asking you in what case have we ever done this
5 before, decided standing, which is a
6 substantive question, when there's no live
7 controversy before us?

8 MR. UNIKOWSKY: So I don't think the
9 Court has decided on this particular
10 constellation of facts a standing issue. But,
11 again, both parties agree that there's no case
12 or controversy. The only question is why.

13 CHIEF JUSTICE ROBERTS: I -- I suppose
14 logically standing is an antecedent question to
15 mootness, right? You can't have something moot
16 until you have a case.

17 MR. UNIKOWSKY: That's correct, Your
18 Honor. I think that the first question the
19 Court should decide in the case is whether
20 there is a case or controversy in the first
21 place.

22 The concept of mootness almost
23 presupposes that at some point it was wasn't
24 moot. And we think that this case -- there was
25 no case or controversy in this case from day

1 one. That's the question the Court granted
2 certiorari.

3 JUSTICE JACKSON: Right. But we've
4 never done that before is what I understood
5 your answer to Justice Sotomayor to be. So, if
6 it's sort of a logical antecedent, why -- why
7 hasn't this Court set it up in that way?

8 It would seem to me the question is
9 which is the easier resolution, and so, to the
10 extent that you both agree that this is moot,
11 why isn't that just the end of it?

12 MR. UNIKOWSKY: Well, Your Honor, in
13 terms of have -- not having done it before,
14 it's -- it's very unusual for a plaintiff to --
15 for a respondent to prevail in the court of
16 appeals to abandon her claim in the Supreme
17 Court. That comes up very rarely.

18 And I don't think I've ever seen a
19 case quite like this one where the seeming
20 purpose of the abandonment of the case is to
21 allow other plaintiffs to --

22 JUSTICE JACKSON: No, I understand
23 that. But, when it happens -- you know, cases
24 do get mooted, and when it happens, the
25 defendants' ordinary course of affairs is to

1 argue mootness, please dismiss the case, it's
2 over. And you're saying that, that -- that the
3 case is moot. You agree the case is moot.

4 So I guess I -- with at least circling
5 back to Justice Thomas's question, why doesn't
6 that just resolve it? You're -- you're asking
7 us to take on extra work to end a case when
8 we've all agreed it has to be ended, and,
9 ordinarily, that would be all.

10 MR. UNIKOWSKY: I -- I think the
11 Court, with apologies, should take on the extra
12 work, Your Honor.

13 (Laughter.)

14 MR. UNIKOWSKY: I think the --

15 CHIEF JUSTICE ROBERTS: What -- I'm
16 sorry to -- well, go ahead.

17 MR. UNIKOWSKY: I -- I --

18 (Laughter.)

19 MR. UNIKOWSKY: -- I think the reason
20 it should decide the standing question in this
21 case is that I think the Court should have
22 institutional concerns about the strategy of
23 abandoning cases at the last minute, especially
24 if it's going to set a template for future
25 plaintiffs to do the same thing.

1 JUSTICE JACKSON: Isn't the remedy for
2 that Munsingwear, though? I mean, shouldn't
3 your -- shouldn't your answer be moot the case
4 and vacate the lower court ruling to the extent
5 there is one against us?

6 MR. UNIKOWSKY: I don't think that's
7 good enough, Your Honor, because, first of all,
8 the First Circuit's case is still going to be
9 persuasive authority to all district courts in
10 the First Circuit, who are going to know that
11 if the case goes back up, then, presumably --

12 JUSTICE JACKSON: Yeah, but that's
13 what the Munsingwear remedy is about, isn't it?
14 I mean, it's -- it's so that you don't suffer
15 any harm, we vacate the lower court opinion
16 because, if you're right, there was some kind
17 of tactical strategy here, and then we all go
18 home.

19 MR. UNIKOWSKY: Well, remember that
20 Ms. Laufer's victory in the Fourth Circuit
21 remains binding precedent in that court. And I
22 just think this case is different because it's
23 part of a broader litigation program of
24 bringing hundreds and hundreds of lawsuits.
25 That's what I think makes this case unique.

1 JUSTICE ALITO: May I follow --

2 CHIEF JUSTICE ROBERTS: Which --

3 JUSTICE ALITO: -- up on -- I'm sorry.

4 Go ahead.

5 CHIEF JUSTICE ROBERTS: I was just
6 going to say I'm as concerned as anybody about
7 our workload, but --

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: -- why -- why
10 are you sure that which one's easier?

11 I mean, on the one hand, you have the
12 standing question. Maybe people will think
13 that's easy or maybe not.

14 The mootness question of whether or
15 not a plaintiff can moot a case to manipulate
16 the jurisdiction of this Court, I mean, the
17 mootness papers weren't filed until after the
18 Petitioner's opening brief.

19 And we certainly have the authority
20 under our precedent to decide, if you have two
21 jurisdictional issues, which one to do first.
22 And in terms of, you know, I think it's a
23 difficult question as to whether or not
24 somebody, particularly when you have a program
25 of litigation like this around the country by

1 people who may or may not have standing, can
2 manipulate the Court's jurisdiction by, after
3 the Court's granted cert, mooting out the case.

4 MR. UNIKOWSKY: I agree with that,
5 Your Honor. And I think that if the Court were
6 to write a precedential decision addressing
7 or -- or, you know, agreeing with Respondent's
8 theory of how this case should be resolved,
9 presumably, the Court would address our
10 objections as well --

11 JUSTICE SOTOMAYOR: Counsel --

12 MR. UNIKOWSKY: -- and that would --

13 JUSTICE SOTOMAYOR: -- in this case,
14 this plaintiff has dropped all her actions.
15 The lawyer who did this strategy has suffered
16 disciplinary proceedings. She's represented
17 she's not going to use him anymore.

18 So, yes, there may have been a bad
19 tactic in place, but you're ascribing a motive
20 to other people before it's happened. And in
21 every other case, I don't think every case
22 suffers from this same set of failings.

23 MR. UNIKOWSKY: I agree 100 percent,
24 Your Honor. We are not suggesting that all
25 testers or all testers' counsel have acted

1 unethically. The only person who was subject
2 to a sanctions order in this is Mr. Gillespie,
3 who's the -- the local counsel in the District
4 of Maryland.

5 I think that in other cases with other
6 plaintiffs, I'm not suggesting there's going to
7 be false statements to courts and opposing
8 counsel, but the fundamental program here is to
9 -- to file large numbers of lawsuits and settle
10 almost all of them. Even, you know, ethical
11 ADA lawyers do that.

12 And I think the Court should be
13 concerned that whether that's permissible will
14 not see the -- the bright lights of appellate
15 review if the Court blesses a strategy of
16 abandoning these cases in the rare situation
17 where the defendant decides to litigate the
18 case all the way up and there's a possibility
19 of adverse precedent.

20 JUSTICE BARRETT: Mr. Unikowsky, I
21 mean -- I'll return to our workload for a
22 minute. I mean, often, when we're in the
23 district court -- I mean, I see this as a
24 prudential issue and I've thought a lot about
25 it because, I mean, I think it's a difficult

1 prudential call.

2 But, in the district court, when you
3 have two -- you know, if you have a more
4 difficult issue and an easier issue -- and I'll
5 just assume for present purposes that mootness
6 is easier -- you know, the district court
7 doesn't know if the issue's going to arise
8 again.

9 You know, when, in Pearson, we got rid
10 of the Saucier two-step, we said, well, listen,
11 you know, he doesn't know, a higher court may
12 be considering the issue, the district court is
13 delving in and expending all these resources on
14 something that may never come up.

15 Institutionally, if we're thinking
16 about allocation of resources, it seems to me
17 that that might be different here because I
18 take it what you're saying is that there's an
19 entrenched split that we're going to have to
20 decide at some point, and significant resources
21 have already been invested in this case, and
22 you filed your opening brief before the
23 suggestion of mootness was filed, thereby
24 investigating -- sorry, investing resources,
25 and that we're going to have to do this all

1 over again.

2 MR. UNIKOWSKY: That is correct, Your
3 Honor. And just to add one additional point on
4 to the table, I mean, there's a lot of judicial
5 resources expended just by these lawsuits. I
6 mean, when you have, you know, 200 lawsuits
7 being filed in federal district courts, the
8 judges are expending resources on that. They
9 -- they -- individual judges may be deciding
10 the standing question on their own without
11 guidance from this Court.

12 So it seems to me that if the goal is
13 to save judicial resources, of course, as Your
14 Honor said, this Court's resources might be
15 saved if it just decides the question presented
16 one way or another. If we think of the entire
17 federal judiciary, I think --

18 JUSTICE KAGAN: I wonder whether --

19 JUSTICE ALITO: Well, the -- suppose
20 that there's a case that involves an issue that
21 has divided the courts of appeals. There is an
22 entrenched split. It would be helpful to
23 provide guidance on this issue and not allow
24 the split to persist. But the case before us
25 is dead as a doornail and is not going to arise

1 again between these parties.

2 Would you say there that for the
3 prudential reasons that have been mentioned, it
4 would be permissible for us to decide the
5 issue?

6 MR. UNIKOWSKY: I don't think the
7 Court could decide the merits. I think that
8 under Article III, that's just flatly banned.
9 But this case is different because the question
10 presented is a question of Article III, so the
11 Court has the jurisdiction to decide that
12 jurisdictional question.

13 JUSTICE KAGAN: But even --

14 JUSTICE ALITO: Well, but doesn't that
15 look just like an advisory opinion?

16 MR. UNIKOWSKY: I don't think it's an
17 advisory --

18 JUSTICE ALITO: I mean, we're not --
19 we're not -- we would not be addressing
20 anything that is of relevance to the case that
21 is before us. We would be addressing an issue
22 that should be resolved. It's an advisory
23 opinion. There are arguments in favor of
24 advisory opinions. They just happen not to be
25 consistent with Article III of the

1 Constitution.

2 MR. UNIKOWSKY: I disagree, Your
3 Honor. I think that the judgment of this Court
4 is going to be that there is no case or
5 controversy. That's not an advisory opinion.
6 That's disposing of the case in front of the
7 Court.

8 And I think the Court is free to state
9 the reasoning that we are advocating in this
10 case as part -- in this case, excuse me, as
11 part of its judgment that there isn't a case or
12 controversy under Article III.

13 JUSTICE KAGAN: I mean, it still feels
14 a bit unjudicial, if I may say, so that the
15 question is not just resources but something
16 broader than that. And I take the point that
17 each of these is a jurisdictional issue and
18 that there's nothing jurisdictionally
19 precluding us, that this is a matter of
20 prudence. But, when you look at a case that's
21 dead as a doornail several times over, you
22 know, the -- the -- the case has been dismissed
23 by the plaintiff. The defendant is totally
24 different. The defendant's website, everybody
25 agrees, is now in compliance with the ADA.

1 So this is, like, dead, dead, dead in
2 all the ways that something can be dead. And
3 to use that case as the vehicle for deciding an
4 important issue, an issue that probably is
5 going to need to be decided at some point but
6 surely could come up in a live case, I -- I --
7 I -- I guess it just doesn't seem like
8 something that a court should -- should be
9 anxious to do.

10 MR. UNIKOWSKY: Well, just to address
11 some of the subsidiary issues Your Honor
12 mentioned, the question of whether the updates
13 to the website made the case dead is actually
14 disputed among the parties. The First Circuit
15 held and Respondent continues to argue that
16 that didn't moot the case. So I think that
17 that would be a difficult -- maybe not
18 difficult, but the Court would have to --

19 JUSTICE KAGAN: Well, it's not
20 disputed that the hotel's website is in
21 compliance. The only thing that's in dispute
22 is what the issue is with respect to, like,
23 hotels.com. But the hotel is now owned by
24 somebody else, the hotel is in compliance in
25 terms of its own website, and, you know, most

1 importantly, the plaintiff has dropped this
2 case.

3 MR. UNIKOWSKY: Right. So, in -- in
4 terms of the sale of the hotel, so Acheson
5 Hotels remains the defendant in this case. It
6 would be the subject of any hypothetical
7 injunction and fee award. So we don't think
8 that moots the case unless there's a court
9 order substituting the new defendant, which
10 never happened. So I'm not sure that's a
11 reason not to decide the question presented.

12 But, look, I --

13 JUSTICE KAGAN: Yeah, I think you're
14 avoiding the main --

15 MR. UNIKOWSKY: Okay. I understand
16 Your -- Your Honor's argument that if they've
17 dropped the case, why are you deciding this big
18 question. And, yes, that is certainly a
19 discretionary consideration that the Court
20 should consider in deciding how to dispose of
21 this case. It is a weight on one side of the
22 balance.

23 And I just think that the weights are
24 greater on the other side of the balance when
25 you consider the institutional considerations

1 that should lead the Court to decide the
2 question presented, such as a concern about
3 blessing the legal strategy in this case of
4 Respondent, which will be invoked in future
5 cases by other litigants because the same thing
6 is going to happen. A plaintiff is going to
7 file a large number of lawsuits, and in the
8 rare case that goes up, the plaintiff will
9 abandon the case at the last minute, and if
10 there's push-back from either the court or the
11 defendant, the plaintiff is going to say look
12 at what happened in the Acheson case; the
13 Supreme Court said it was perfectly fine to
14 adopt that legal strategy.

15 JUSTICE JACKSON: But, if it's going
16 to happen again, why don't we wait until it
17 happens again, and then we have the pattern
18 you're talking about? What you're saying is
19 resolve it now because you can foresee that
20 that will occur, and I guess I just don't
21 understand why that's so convincing.

22 It seems to me in tension to suggest
23 that this issue will come up again and that we
24 should take it now --

25 MR. UNIKOWSKY: No, I -- I think --

1 JUSTICE JACKSON: -- because we should
2 just wait until it comes up again.

3 MR. UNIKOWSKY: Well, I think what's
4 going to happen, Justice Jackson, is that, you
5 know, in the court of appeals, a plaintiff will
6 drop the case, and then the plaintiff will cite
7 this Court's decision in this case to say
8 that's fine, and then the court of appeals will
9 follow this Court's precedent in this case and
10 allow the plaintiff to drop the case.

11 And then I guess, theoretically, a
12 petition for certiorari could be filed, but
13 it's not clear that the -- the defendant has --
14 has standing to even file that petition for
15 certiorari when the defendant actually won in
16 the court of appeals. And so it's actually not
17 clear to me this question will come back if
18 future claims follow this -- this template.

19 And, again, in the Court -- in Your
20 Honors' -- in this case, the Court's going to
21 write an opinion. Even if it resolves this
22 case on the ground Respondent has advocated, I
23 would guess it's going to --

24 JUSTICE JACKSON: Why would --
25 wouldn't our opinion on mootness be both

1 parties have agreed that this case is moot;
2 therefore, we have no live controversy, period?

3 MR. UNIKOWSKY: Well, I mean, we've
4 opposed that disposition, and so I -- I don't
5 know, but --

6 JUSTICE JACKSON: I'm sorry.

7 JUSTICE GORSUCH: Counsel --

8 JUSTICE JACKSON? Did you say it's not
9 moot?

10 MR. UNIKOWSKY: No. We're saying it's
11 moot. We just don't think the Court should
12 resolve the case on that ground. And so I
13 would -- I would guess the Court would address
14 our arguments.

15 I'm sorry, Your Honor.

16 JUSTICE GORSUCH: With respect to
17 standing, would it be sufficient if a plaintiff
18 were to allege in -- in her complaint that she
19 does intend to visit the hotel, period?

20 MR. UNIKOWSKY: Yes, that would be
21 enough for standing, Your Honor. Then the
22 person -- then there's a downstream consequence
23 from being deprived of the information. We
24 haven't disputed that if there's a person with
25 concrete travel plans who says, look, I want to

1 --

2 JUSTICE GORSUCH: Well, concrete
3 travel. I'm talking about an allegation in a
4 complaint, just I -- I -- I -- I may someday
5 visit this hotel.

6 MR. UNIKOWSKY: I don't think "I may
7 someday" is enough. That kind of sounds like
8 the allegations --

9 JUSTICE GORSUCH: "I will someday."

10 MR. UNIKOWSKY: "I will" -- I think "I
11 will" -- "someday" probably is not enough
12 either.

13 JUSTICE GORSUCH: "Someday" not good
14 enough?

15 MR. UNIKOWSKY: I don't think -- under
16 the Lujan case, the Court held that someday
17 plans aren't good enough for standing.

18 JUSTICE GORSUCH: In the next decade?

19 (Laughter.)

20 MR. UNIKOWSKY: I think it's got to be
21 concrete plans. If you're -- if you're going
22 to Wells next summer and you're trying to make
23 a reservation at Coast Village, I think that's
24 enough for standing.

25 JUSTICE SOTOMAYOR: But that's not --

1 CHIEF JUSTICE ROBERTS: With --

2 JUSTICE SOTOMAYOR: -- the way people
3 travel, counselor. When people travel, or at
4 least when I do, and I think I'm not abnormal
5 in this sense, I look at a place, I look at
6 various sites to decide where I want to stay, I
7 look at price points, I look at the level of
8 accessibility, whatever. All right?

9 So what you're saying is that there's
10 no stigmatic harm to a disabled person in their
11 ability to do what I do, look at a place and
12 say: I may want to visit Venice, I may want to
13 visit Florida, I may want to visit California,
14 and I want information about all the sites
15 there so I can decide what suits me best.

16 And you're saying you need something
17 much more concrete than that?

18 MR. UNIKOWSKY: So --

19 JUSTICE SOTOMAYOR: I've been deprived
20 of my ability to make an informed choice about
21 where to visit and I'm not harmed
22 stigmatically?

23 MR. UNIKOWSKY: Well, so it seems to
24 me that if the person is traveling and is
25 checking a few hotels and is trying to decide

1 where to stay, but the person's planning to
2 travel, then I think that there would be
3 standing. Like, if you're saying I want to go
4 to Ocean City and I'm looking at two or three
5 hotels, not sure which one to stay at --

6 JUSTICE SOTOMAYOR: But the person who
7 says, I want to find the place to visit --
8 Ocean City, Atlantic City, whatever other city
9 -- and now I'm doing my investigation of all
10 three cities and I decide against your city
11 because I couldn't find enough accessible
12 places, I'm not harmed?

13 MR. UNIKOWSKY: No, I don't -- I don't
14 think so. I mean, I don't think that if you
15 have no idea where you're going to go and
16 you're just going to a hotel website for some
17 randomly picked hotel in a city and see it's
18 not accessible, but you don't have any --

19 JUSTICE SOTOMAYOR: But why aren't I
20 -- I don't understand. Discrimination, I
21 thought, meant that I'm being treated
22 differently than other people. If I go on a
23 drive to a place and there's a sign up that
24 says "No disabled person is welcome," I've been
25 discriminated against, correct?

1 MR. UNIKOWSKY: Yes.

2 JUSTICE SOTOMAYOR: What's different
3 than my going to a website and the website
4 saying nothing about disability, so I know I'm
5 not welcome there?

6 MR. UNIKOWSKY: Well, Your Honor, if
7 you see the sign that says "No disabled people
8 welcome," I actually don't think that there's
9 standing unless you want to enter the business.
10 So, if you -- if you're on the internet and you
11 see a sign of some business and --

12 JUSTICE SOTOMAYOR: So it's just --
13 oh, so in -- the people who used to go to lunch
14 counters and wanted to just sit down, they
15 didn't necessarily want to try the food
16 there --

17 MR. UNIKOWSKY: No, no.

18 JUSTICE SOTOMAYOR: -- those people
19 weren't discriminated against?

20 MR. UNIKOWSKY: They were definitely
21 discriminated against because they were
22 prevented from sitting at the lunch counter.
23 That's the discrimination.

24 JUSTICE KAGAN: Could I -- could I
25 just go back to what you think would be enough?

1 So, if a person said, I'm checking out -- I'm
2 trying to find a fully accessible hotel in a --
3 a small, great beach town.

4 MR. UNIKOWSKY: Mm-hmm.

5 JUSTICE KAGAN: So they're looking at
6 a bunch of things, trying to find a fully
7 accessible hotel in the kind of beach town that
8 they want to go to.

9 That would be enough?

10 MR. UNIKOWSKY: May I answer the
11 question, Your Honor?

12 JUSTICE KAGAN: Please.

13 MR. UNIKOWSKY: Because I -- I --

14 CHIEF JUSTICE ROBERTS: Yes.

15 JUSTICE KAGAN: Please.

16 (Laughter.)

17 MR. UNIKOWSKY: I think that would be
18 enough, Your Honor, yes.

19 JUSTICE KAGAN: Okay. So not concrete
20 travel plans, but, you know, some indication
21 that you're seeking this information for a
22 purpose?

23 MR. UNIKOWSKY: Well, I think it has
24 to be a little more just than a generalized
25 purpose. If you're planning to travel, you

1 know, if you're not decided whether to go to
2 Ocean City or Rehoboth or Bethany Beach, you're
3 checking your options in all three of them,
4 then I think that probably is enough. I don't
5 think you have to say that you're going to this
6 specific stretch of road in -- in Ocean City.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 If -- how many hotels did Ms. Laufer
10 contact in how many different places?

11 MR. UNIKOWSKY: Depending on how you
12 count, because sometimes lawsuits can count as
13 two or one, it's definitely more than 500 and
14 perhaps more than 600.

15 CHIEF JUSTICE ROBERTS: So, if she
16 alleges that she may well go to this particular
17 hotel, you would be able to challenge the
18 veracity of that allegation, right?

19 MR. UNIKOWSKY: Yes, Your Honor.
20 That -- that happened in this case, in fact.
21 There's a declaration in which Respondent said
22 she would take this long road trip to Maine and
23 other places, and the court basically found
24 that not plausible.

25 CHIEF JUSTICE ROBERTS: Okay. Thank

1 you.

2 Justice Thomas?

3 Justice Alito?

4 JUSTICE SOTOMAYOR: In fact, she did,
5 however. She did take a long trip.

6 MR. UNIKOWSKY: Ultimately, the record
7 shows that she took a road trip to Maine, yes,
8 Your Honor.

9 JUSTICE KAGAN: You -- you have a
10 statement a -- a couple of times in your brief,
11 you say you're not challenging the use of
12 testers in ADA litigation, and principally
13 distinguish this case to one where there's an
14 attempt to enter a building.

15 So I guess I'd like to hear what you
16 mean by that, what you think would be
17 permissible, and why it's different from this
18 case.

19 MR. UNIKOWSKY: That's right. So
20 we've distinguished the scenario where someone
21 is actually trying to physically enter a
22 building and, but for the accessibility
23 barrier, the person couldn't enter. And that's
24 because we understand the inability to access a
25 building as a traditional Article III injury

1 regardless of the motive for entering the
2 building.

3 JUSTICE KAGAN: So suppose that you
4 were trying to enter a hotel --

5 MR. UNIKOWSKY: Mm-hmm.

6 JUSTICE KAGAN: -- but you didn't
7 really want to stay at the hotel.

8 MR. UNIKOWSKY: I think that probably
9 would be if you, like, were physically
10 prevented from that.

11 JUSTICE KAGAN: But you want to -- but
12 you want to go in.

13 MR. UNIKOWSKY: Yeah. That's right.
14 But that --

15 JUSTICE KAGAN: Same, like you want to
16 enter a concert venue, even though you don't
17 want to stay for the concert.

18 MR. UNIKOWSKY: So every court of
19 appeals to have addressed the question Your
20 Honor just described has found standing on
21 those facts, and so we haven't contested that
22 in on our briefing.

23 JUSTICE KAGAN: And I presume that
24 that's similar -- I mean, tell me if you think
25 this is wrong -- to -- let's say that there's a

1 blind person who, you know, can't access a
2 website at all because there aren't the --
3 there's not the appropriate technology for the
4 visually impaired to make use of the website.

5 Would you say also that that's sort of
6 like the person who wants to enter a building?

7 MR. UNIKOWSKY: So --

8 JUSTICE KAGAN: That, you know -- and
9 the visually impaired person is, in fact, a
10 tester and is just checking out different
11 websites?

12 MR. UNIKOWSKY: So we -- we actually
13 haven't taken that position. There's --
14 there's three courts of appeals decisions, one
15 of which -- one of which was written by then
16 Judge Barrett, involving visually impaired
17 testers who go to websites of credit unions
18 that they weren't even statutorily eligible to
19 join, and those courts held that the plaintiffs
20 did not have standing, and we actually think
21 those are correctly decided.

22 JUSTICE KAGAN: Yeah, I -- I
23 understand that. But, if a -- if a person
24 is -- is, you know, just, you know, checking
25 out websites in the way that, you know, not --

1 it's not like I'm eligible to join the website
2 of a particular company, but just in the way we
3 all check out websites and can't do that,
4 whether the fact that he was a tester could
5 prevent the person from making a claim.

6 MR. UNIKOWSKY: So I don't think the
7 person has standing, but, even if you disagree,
8 our case is different from that. So the first
9 part of my answer is I don't think so. I think
10 that, as in the case with the credit unions,
11 merely trying to seek information about a
12 service you don't want, I don't think that's an
13 Article III injury under TransUnion's
14 discussion of informational harm.

15 But the second part of my answer is
16 that even if you think I'm completely wrong on
17 that, I think that's distinguishable because,
18 in that case, the plaintiff was prevented from
19 using the website.

20 In this case, we think what really
21 happened here was that there was a bar to
22 accessing the hotel, which doesn't become
23 relevant until the plaintiff tries to do that.

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 JUSTICE BARRETT: I have a question
5 about some of Justice Sotomayor and Justice
6 Kagan's hypotheticals. I mean, it does seem
7 like they're all meaningfully different in the
8 injury sense, and I'm wondering whether -- I
9 mean, I'm -- I'm thinking about a plaintiff who
10 tries to make a reservation at Acheson Hotel
11 and then just gets frustrated because she's
12 disabled and she can't get the information, so
13 she says, I'm not giving this place my
14 business, but I want to sue. Like, I would
15 never go say -- stay there because -- and I'm
16 not going to go back to the website because I'm
17 offended. You know, this isn't -- this isn't a
18 place that I want to frequent.

19 Do you think that person suffered an
20 Article III injury?

21 MR. UNIKOWSKY: Yes, but they couldn't
22 sue because you can only get an injunction.

23 JUSTICE BARRETT: Injunctive relief.

24 MR. UNIKOWSKY: Yeah.

25 JUSTICE BARRETT: Okay. So that --

1 that's my question. You're not taking the
2 position that my plaintiff hasn't suffered an
3 Article III injury, but you're saying here that
4 the forward-looking piece of it is because you
5 have to show that you have standing for the
6 relief that you seek, and the ADA only permits
7 an injunction?

8 MR. UNIKOWSKY: Correct. The injury
9 has to be in the future. Correct.

10 JUSTICE BARRETT: Okay. Thanks.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: So I guess I'm
14 trying to figure out the difference between
15 your argument in saying that you want to
16 preserve tester standing, that testers you
17 understand are okay and Ms. Laufer is not. And
18 I know that you say that she is a
19 self-appointed tester.

20 Is that because -- are you trying to
21 distinguish her from the testers that you think
22 have standing and don't? And what's the
23 difference?

24 MR. UNIKOWSKY: No, I -- I -- I --

25 JUSTICE JACKSON: Okay.

1 MR. UNIKOWSKY: -- I'm not -- that's
2 not -- I mean, she is self-appointed in the
3 sense --

4 JUSTICE JACKSON: Yes.

5 MR. UNIKOWSKY: -- that she doesn't
6 work for the government. That's all I meant by
7 that.

8 JUSTICE JACKSON: I see. I see.

9 MR. UNIKOWSKY: But other testers who
10 themselves are self-appointed would have
11 standing. It depends on the particular facts.

12 JUSTICE JACKSON: I guess I'm trying
13 to -- I -- I'm trying to ferret out whether
14 there -- whether what's really hard here is
15 drawing the distinction between a tester who
16 actually experiences discrimination even if
17 they don't really want the service
18 subjectively, right?

19 So this is -- Justice Sotomayor talked
20 about the people going to lunch counters. They
21 aren't hungry. They're not actually there for
22 the sandwich. They're going in because they
23 are putting themselves into a discriminatory
24 situation in order to be able to challenge the
25 policy.

1 Ms. Laufer says, I'm challenging the
2 policy. But I guess the question is, is she
3 really experiencing discrimination? Is that
4 what we're supposed to be kind of thinking
5 about?

6 MR. UNIKOWSKY: Yeah. So, first of
7 all, I just want to put on the table we
8 definitely think the person at the lunch
9 counter has standing, okay?

10 JUSTICE JACKSON: Okay. And that's
11 not -- and that's because it doesn't matter
12 that his motivation is, I didn't want the
13 sandwich, right?

14 MR. UNIKOWSKY: That's right. That's
15 the facts of the Havens Realty case
16 essentially, which we haven't asked the Court
17 to -- to overturn.

18 JUSTICE JACKSON: So it doesn't matter
19 that she's doing this to sue. That's -- I
20 mean, I know you keep talking about her -- her
21 motivation, she wants to do this to sue.

22 In the same way as it doesn't matter
23 that the person's subjective motivation is to
24 set up circumstances by which they can
25 challenge the discriminatory lunch counter, it

1 doesn't matter that her subjective motivation
2 is to sue. There must be something about
3 whether she's actually experiencing
4 discrimination --

5 MR. UNIKOWSKY: I --

6 JUSTICE JACKSON: -- that is the
7 difference in your argument, right?

8 MR. UNIKOWSKY: -- I -- I -- I think
9 that's right. I don't think that subjective
10 intent matters when there has been a concrete
11 Article III harm, such as, in the Cruz case,
12 being banned from speaking --

13 JUSTICE JACKSON: Right.

14 MR. UNIKOWSKY: -- such as, in the
15 tester case, not entering a business.

16 And I do think that being the victim
17 of intentional racial discrimination, as in the
18 facts of the Havens Realty case, where the
19 hypotheticals Your Honor has described may
20 inflict in certain circumstances an Article III
21 stigmatic injury. We just don't think that
22 these facts are comparable to those.

23 JUSTICE JACKSON: That she has
24 actually been the victim of an injury and is
25 that -- that's because you say she never -- she

1 disclaimed her interest in going to Maine?

2 MR. UNIKOWSKY: So I think there's --
3 there's several differences between this case
4 and the lunch counter hypothetical.

5 JUSTICE JACKSON: Hmm.

6 MR. UNIKOWSKY: So, first of all, I
7 think this is more of a generalized grievance
8 like in the lunch counter or Ms. Coleman in
9 Havens Realty. Like, the person was personally
10 the victim of racial discrimination.

11 I think that when you just go to a
12 website to check ADA compliance, that's more of
13 a generalized grievance.

14 There's also no intent to discriminate
15 in this case. I do realize that the ADA
16 considers the disparate effect of facially
17 neutral policies to be discriminatory just as
18 disparate treatment is discriminatory.

19 But, in this case, there's no
20 disparate effect either because she's not using
21 the information. So there's no -- the
22 disrespect of intentional discrimination --

23 JUSTICE JACKSON: But that's all --

24 MR. UNIKOWSKY: -- is absent too.

25 JUSTICE JACKSON: -- on the merits.

1 I'm talking about --

2 MR. UNIKOWSKY: No, I don't --

3 JUSTICE JACKSON: -- injury, right? I
4 mean, those that -- that's whether or not she
5 could actually win the case. You're saying she
6 can't even bring it.

7 MR. UNIKOWSKY: Yes.

8 JUSTICE JACKSON: And I'm trying to
9 understand why you think she's not injured.
10 And I think -- I think I get it. I just wanted
11 to be clear --

12 MR. UNIKOWSKY: Well --

13 JUSTICE JACKSON: -- on the difference
14 between her and a tester.

15 MR. UNIKOWSKY: -- I mean, on -- on
16 the -- on the question Your Honor described
17 about being subject to discrimination, I do
18 think this case is properly understood as
19 discrimination against people who are limited
20 from accessing the building, like the purpose
21 of accessibility information on the website is
22 to facilitate accessibility of the building.

23 And so not --

24 JUSTICE JACKSON: No, isn't it -- I'm
25 sorry, isn't it -- isn't it to facilitate their

1 assessment of whether or not this building
2 offers services that they can use?

3 MR UNIKOWSKY: Yeah, but --

4 JUSTICE JACKSON: So what she's trying
5 -- the reason why there's discrimination is
6 because an able-bodied person can get on the
7 website and it shows that there are 15 rooms
8 available at this hotel, and so they know that
9 there are 15 rooms available and they could go
10 there, whereas a disabled person, unless the
11 hotel identifies that it actually has
12 accessible rooms, can't look on the website and
13 assess the availability of those rooms. I
14 thought that was the discriminatory issue.

15 MR. UNIKOWSKY: Yeah, but the problem
16 is that looking at the website is not an end in
17 itself. I think it's a means to the end of
18 accessing the hotel. Like the reason you want
19 to know whether there's a wheelchair ramp is to
20 know if you show up at the hotel whether you
21 can enter it.

22 JUSTICE JACKSON: Maybe. I mean,
23 there could be a lot of reasons, right? I
24 mean, the point is you're being discriminated
25 against because you can't -- you don't have the

1 same access to information about the status of
2 the hotel and whether rooms are available.

3 MR. UNIKOWSKY: I guess I just don't
4 view -- I mean, there's no argument that
5 Respondent couldn't use the website, unlike in
6 the hypothetical with the visually impaired
7 plaintiff that Justice Kagan asked about. I
8 think that her ability to use the website was
9 not constrained. She just didn't get
10 information that she needed to know whether she
11 could access the building, which I just don't
12 think is an injury, unless you're going to use
13 that information somehow.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Ross.

18 ORAL ARGUMENT OF ERICA L. ROSS
19 FOR THE UNITED STATES, AS AMICUS CURIAE,
20 SUPPORTING NEITHER PARTY

21 MS. ROSS: Mr. Chief Justice, and may
22 it please the Court:

23 As the questions this morning make
24 clear, this is an unusual case. At the time we
25 filed our brief, we flagged serious concerns

1 about whether the case was moot.

2 Now, as I take my friend to agree,
3 it's clearly moot. We have not only a
4 plaintiff who no longer seeks to litigate her
5 claims, a defendant who no longer owns the
6 hotel, but also a website that is no longer
7 lacking the relevant information.

8 Rather than decide the more difficult
9 standing question in this highly artificial
10 posture, the Court should exercise its
11 discretion to vacate the First Circuit's
12 decision and dismiss the case as moot under
13 Munsingwear.

14 At a minimum, if the Court exercises
15 its discretion to address standing, it should
16 hold that Respondent lacks standing for a
17 narrow reason. Her claim to standing depends
18 on her view that Title III and the Reservation
19 Rule give her a freestanding right to
20 information, akin to the right to information
21 about housing in Havens.

22 But the ADA and the Reservation Rule
23 are narrower. They give individuals with
24 disabilities a right to information in
25 connection with the equal enjoyment of a

1 hotel's reservation service. Because
2 Ms. Laufer has not alleged that she would use
3 that service in the future, she lacks standing.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: You're not saying
6 that we don't have jurisdiction over the case
7 as I understand you. You're simply saying that
8 we should exercise our discretion not to decide
9 the standing issue?

10 MS. ROSS: That's correct, Justice
11 Thomas. When the government was on the
12 receiving end of this type of a dismissal of a
13 complaint in district court after the grant --
14 Court had granted certiorari in Carnahan, we
15 specifically laid out our -- our thoughts on
16 this issue, specifically, that the Court does
17 have discretion to decide either the standing
18 or the mootness question first, but, there, we
19 said, you know, it makes sense, given the
20 artificial nature of the case once the
21 plaintiff has dismissed her claims, to decide
22 mootness while leaving on the table, you know,
23 the possibility that in a future case you might
24 choose to decide standing.

25 But I think for the reasons I was just

1 explaining that this is not that future case
2 because it's not just sort of artificial in the
3 way that any case in which a plaintiff who has
4 dismissed her claims will be artificial. It's
5 -- it's sort of extra-artificial for the
6 reasons that Justice Kagan was -- was pointing
7 out.

8 CHIEF JUSTICE ROBERTS: You're
9 confident that the mootness question is easy.
10 Is the government at all concerned about the
11 manipulation of this Court's jurisdiction when
12 you have -- because Ms. -- Ms. Laufer, I
13 gather, is not the only person doing this,
14 bringing hundreds of cases around the country,
15 and then, when the Court gets interested in her
16 case, it's all gone. It's moot.

17 It doesn't stop any of the other
18 dozens of people, however many there are, who
19 are doing the same thing. So we may have to
20 come up with another case as soon as this --
21 this one, if it's -- if it's not addressed, and
22 then they will -- that one will be mooted.

23 And, you know, we can't sort of keep
24 granting cert and having it constantly being
25 mooted with never a determination of whether

1 there's standing in those variety of cases.

2 I mean, you may think that that's not
3 necessarily easier or harder than the standing
4 question, but it's certainly not one that we
5 can just, you know, toss off with the back of
6 our hand, is it?

7 MS. ROSS: So I certainly understand
8 the institutional concern, and that is why,
9 among other reasons, we think the -- the Court
10 can and should leave on the table this option
11 of actually deciding the standing question
12 rather than the mootness question in a future
13 case should this actually become a pattern. I
14 just think, again, that this is a particularly
15 poor case to do it in.

16 And I think, beyond that, you know, on
17 the more specific question of whether this case
18 will -- or a case like this will come to the
19 Court again, I think this has already been
20 covered, but the circuit split actually looks
21 quite different now than it did when the Court
22 granted certiorari. It's not just that the
23 parties agree that under *Munsingwear* the First
24 Circuit decision would have to be vacated in
25 this case, but it's also that the Eleventh

1 Circuit decision has since been vacated, and so
2 now there's only one circuit decision on
3 Petitioner's side -- excuse me, Respondent's
4 side of the split.

5 And so I think parties may -- may
6 adjust their behavior in -- in light of this,
7 but, again, we, for the institutional reasons
8 you note, think the Court can reserve this
9 option in future cases.

10 CHIEF JUSTICE ROBERTS: How -- reserve
11 the option. How many times does this -- do we
12 have to do this? The next case that comes up
13 in the same posture as this, should we let that
14 one go too because maybe it'll be the last one,
15 or should we address it here?

16 MS. ROSS: So I certainly understand
17 the concern, Mr. Chief Justice. Again, you
18 know, I think it's not just that this is the
19 first case. It's really that this is sort of
20 moot to the third. I mean, it has a plaintiff
21 who has dismissed her claims, a defendant who
22 no longer owns the hotel in question, and a
23 website that everyone agrees has been updated.

24 And if you look at the First Circuit's
25 decision, the reason why the First Circuit

1 thought this case was not moot was this
2 third-party issue with respect to hotels.com
3 and other third-party websites. But, under the
4 regulation, it's the hotel owner whose job it
5 is to inform those third parties about
6 accessibility information, and we don't even
7 have that party before the Court to tell us --

8 JUSTICE KAVANAUGH: I think --

9 MS. ROSS: -- whether that has
10 happened.

11 JUSTICE KAVANAUGH: -- I think the --
12 I think the Chief's question was, next time, we
13 shouldn't do this, do you agree?

14 MS. ROSS: You know, I think certainly
15 I would have to know more about what it looks
16 like next time, but I think the whole point,
17 obviously, of the Court reserving this ability
18 would be -- or recognizing this ability,
19 really, because they're both jurisdictional
20 questions, would be to allow you to say yes,
21 we're going to go to standing in the next case.

22 JUSTICE BARRETT: Do you think it's
23 relevant that the reason the split looks
24 different too is also perhaps strategic
25 behavior on the part of the Respondent?

1 Because didn't she go to those other circuits
2 and then dismiss her claims and ask for the
3 decisions to be vacated?

4 MS. ROSS: So, you know, I don't want
5 to sort of import -- or impart a motive to any
6 of the parties on -- on either side of this
7 case. I think the Eleventh Circuit decision is
8 actually a little bit more complicated than
9 that because it was actually that the defendant
10 not only -- or had not just sold the hotel at
11 the time of the decision, it actually had
12 dissolved and had not told the court that at
13 the time, and so it wasn't sort of just on
14 Ms. Laufer's side of the v.

15 JUSTICE BARRETT: It was at her
16 request, is all I'm saying.

17 MS. ROSS: Yes.

18 JUSTICE BARRETT: Yeah.

19 MS. ROSS: I think it was at her
20 request. You know, again, I -- I think the
21 question really is, given how much more
22 difficult at least we think the standing
23 question is than the mootness question, whether
24 it makes sense in this case, where we have
25 these additional complications, to go ahead and

1 decide that.

2 JUSTICE KAGAN: I'm wondering, just to
3 turn to the standing question --

4 MS. ROSS: Certainly.

5 JUSTICE KAGAN: -- how you would
6 distinguish your position from Mr. Unikowsky's
7 views and why it matters.

8 MS. ROSS: Sure. So I -- I think
9 there are sort of many differences, but I guess
10 I'll hit three main ones.

11 The first one is that Mr. Unikowsky,
12 in his brief and then again this morning,
13 expressed the view that the Reservation Rule is
14 really about access to the facility under the
15 ADA.

16 We -- we understand it a little bit
17 differently. There's, of course, some element
18 of access to the facility in there, but the
19 statute says --

20 JUSTICE KAGAN: When you say "the
21 facility," meaning the hotel?

22 MS. ROSS: The hotel, the physical
23 place of public accommodation. The -- the
24 statute also guarantees people with
25 disabilities the equal enjoyment of the

1 services of a place of public accommodation,
2 and so I think how this cashes out is that in
3 -- on Mr. Unikowsky's view, I think, if you
4 have a hotel like this one that has no
5 accessible -- no accessible rooms, then a
6 plaintiff can never have standing based on the
7 fact that they didn't tell you that on their
8 website because you couldn't go there anyway.

9 We think that actually is an injury.
10 If -- if you're trying to figure it out and you
11 can't because they don't have the information,
12 you're not having the equal enjoyment of the
13 service in the way that the ADA provides.

14 JUSTICE ALITO: Is your argument
15 really a standing argument, an Article III
16 argument, or is it a merits argument? You're
17 saying that when Title III and the Reservation
18 Rule are properly interpreted, then Ms. Laufer
19 doesn't have a claim. That's a merits
20 argument.

21 MS. ROSS: So, Justice Alito, I
22 appreciate that the -- the analyses sort of
23 overlap in this area, and I think the reason
24 why that is so is that this Court has
25 specifically recognized that congressional --

1 what Congress does in terms of creating rights
2 and causes of action is relevant.

3 I think the -- the phrase this Court
4 used in *TransUnion* was, you know, due respect
5 to obviously *Havens*, other cases. And so I do
6 think there's some overlap. But we do think
7 the way this comes to the Court is that
8 discrimination is an Article III injury when
9 somebody personally experiences it with respect
10 to her rights. And --

11 JUSTICE ALITO: Well, let -- let me
12 ask -- let me give you a hypothetical of the
13 sort that our former colleague, Justice Breyer,
14 might have asked. So --

15 (Laughter.)

16 JUSTICE ALITO: -- let's say I am -- I
17 am driving to a dog show and I am transporting
18 my champion Saint Bernard and I want to check
19 in to a hotel with my dog, and they ask me: Is
20 it a service dog? I say no, it's not a service
21 dog. Is it an emotional support dog? No, it's
22 not an emotional support dog. Well, they say,
23 you can't check into the hotel because either
24 we don't allow dogs at all or we don't allow
25 dogs that weigh more than a hundred pounds.

1 And I say, well, you're violating the ADA. And
2 I sue under the ADA.

3 Now do I lack standing? Have I not
4 suffered an injury in fact because I can't get
5 this hotel room and I can't have my dog, my
6 champion Saint Bernard, with me in my room? Or
7 do I just lose because the dog isn't covered --
8 having the dog without it being a service dog
9 or an emotional support dog is not covered by
10 the ADA?

11 MS. ROSS: So I think you might just
12 have a merits problem there if I'm following it
13 correctly, but I think it's a little bit
14 different because the harm that you're alleging
15 in that case is the -- just the -- the harm
16 from -- you know, maybe the person was mean to
17 you, you just really wanted to bring your dog,
18 whatever it is.

19 I think the way that this case is
20 pitched is that the right that -- that
21 Ms. Laufer claims gives her standing is the
22 violation of the statutory right to information
23 or the -- the violation of the regulation. And
24 so we sort of have to know what the statute or
25 the regulation provide to decide whether she

1 is -- if I could just finish the -- the
2 sentence --

3 CHIEF JUSTICE ROBERTS: Sure.

4 MS. ROSS: -- in an analogy to sort of
5 an Allen versus Wright case, you know, we have
6 to -- we have to know whether she is the person
7 who's personally experiencing the
8 discrimination or she's the person who's sort
9 of across the country hearing about it, and to
10 know that, we have to know what the right to
11 the non-discrimination right is.

12 CHIEF JUSTICE ROBERTS: Thank you.

13 Justice Thomas, a question about your
14 dog?

15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: I'm -- I'm a
17 little confused. In your brief, you say,
18 "Ms. Laufer has not alleged that she used,
19 attempted to use, or planned to use the Inn's
20 reservation service." That's your brief at
21 page 19 to 20.

22 I don't know, and you differentiated
23 yourself from your colleague by saying he
24 thinks that if she wasn't going to use the
25 place at all, she doesn't have standing, and

1 he'll answer that, okay?

2 But does that mean that you're saying
3 no tester could ever have standing?

4 MS. ROSS: Certainly not, Justice
5 Sotomayor. We just think that you have to look
6 at the service that's being alleged rather than
7 the -- the -- so if I could give you a physical
8 analogy --

9 JUSTICE SOTOMAYOR: Yes.

10 MS. ROSS: -- I do think it makes it a
11 little bit easier.

12 Here, you know, if you had two people
13 who drive up to a store and they find that
14 there's only stairs, no ramp, and one of them
15 drives away and the other says, you know, I'd
16 really like to go into this store, but I can't,
17 I think that first person has standing --
18 excuse me, the -- the person who -- who says,
19 I'd really like to go into this store, but I
20 can't, has standing. The person who drives
21 away does not have standing. Neither of them
22 actually has to say, I would buy something.

23 JUSTICE SOTOMAYOR: So is -- was her
24 problem that she didn't say, I didn't go into
25 the website? She says, I'm surfing to see how

1 many websites I can find information in. Is
2 that what her problem was, that she didn't try
3 to make a reservation --

4 MS. ROSS: So I --

5 JUSTICE SOTOMAYOR: -- or that she
6 didn't look at the reservation? I -- I don't
7 understand. When do we get to that point?

8 MS. ROSS: Sure. So I think when we
9 get to the point where she has an injury is
10 when she says, just as the physical tester
11 says, I would go inside, when she says, I would
12 make a reservation or I would use this
13 information to consider making a reservation,
14 because, you know, we certainly take the points
15 that were expressed earlier about people who
16 are -- are considering whether they're going to
17 go to the place and are trying to figure it
18 out.

19 But I think the difference here is
20 that Ms. Laufer was doing this, she -- she had
21 no use for the reservation service itself. She
22 had no interest in actually even completing
23 that transaction.

24 JUSTICE SOTOMAYOR: I -- I find this
25 so hard because I think what we're trying to do

1 is to say that the website somehow is different
2 than the physical entry or attempted entry,
3 because we agree in Blue Haven that the couple
4 wasn't intending to rent, they just went and
5 asked for information and -- not Blue Haven,
6 I'm sorry, Haven Realty, and they got turned
7 away, and you're saying that we shouldn't write
8 this to overturn Haven Realty.

9 MS. ROSS: Certainly not, Justice
10 Sotomayor.

11 JUSTICE SOTOMAYOR: All right. So
12 what's different than my going to -- the black
13 couple went to the door of the place, asked for
14 information. A disabled person goes to a
15 website, which is, in my mind, the door to the
16 hotel or at least a telephone to the hotel, and
17 is being told, no, you're not welcomed here
18 because we're not -- we don't have accessible
19 rooms here?

20 MS. ROSS: So --

21 JUSTICE SOTOMAYOR: Basically, it --
22 it's almost a negative, which is, if you don't
23 give me the information, you're telling me that
24 it's not accessible to me.

25 MS. ROSS: So I -- I agree with a lot

1 of what you've said, Justice Sotomayor. I
2 think the distinction comes between the way
3 that the statute at issue in Havens was
4 written, which was it is unlawful to falsely
5 tell any person that there is no housing
6 available for a discriminatory reason,
7 essentially, whereas the -- the reservation --
8 and so it doesn't matter whether you're going
9 to -- to rent the apartment, it does not matter
10 at all.

11 I think, here, the Reservation Rule is
12 much narrower than that. It does provide a
13 right to information but in connection with
14 actually making a reservation. So, if you go
15 to pages 9A to 10A of our statutory appendix,
16 where the regulation is laid out in full, the
17 title of it is Reservations Made by Places of
18 Lodging. The requirements apply with respect
19 to reservations made by any means, and all the
20 way through to, you know, the exceptions and
21 the effective date are based on reservations.
22 And so I think it's not this sort of anybody in
23 the world gets information in quite the same
24 way that it was in Havens.

25 But, again, completely agree that

1 Havens I should not be overruled. I heard my
2 friend to agree with that. And also that, you
3 know, we're not suggesting that -- that the --
4 the person who actually does want to make a
5 reservation doesn't have standing.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: I -- I wanted to give
8 you an opportunity if you hadn't completed your
9 list of things that are different between you
10 and Mr. Unikowsky to do that.

11 But I also want to ask whether the
12 first difference that you mentioned, which is
13 you're focusing on the reservation service and
14 he's focusing on the hotel or other facility,
15 might introduce a kind of gamesmanship with
16 respect to tester plaintiffs, you know, that
17 you go into the website and you make the
18 reservation and two days later you cancel the
19 reservation, and you said: Hey, I made a
20 reservation, what's your problem? Of course, I
21 have standing.

22 MS. ROSS: Sure. So I'll take those
23 in order. I think, to finish the list -- and I
24 appreciate the opportunity -- the second one is
25 that I heard Mr. Unikowsky to suggest both in

1 the papers and today that there might be sort
2 of a particularization problem simply because
3 this is on the website.

4 We disagree with that. I mean, I
5 think, if an individual experiences the
6 discrimination on a website because they are
7 actually trying to make a reservation, as this
8 Court has said in other contexts, the fact that
9 a -- an injury is widely shared does not mean
10 that it's not particularized.

11 And then the third point was, again,
12 about this question about, you know, what
13 counts as discrimination. I think -- I -- I --
14 more so in the brief, and so I don't want to
15 attribute too much of a difference here, but I
16 think in -- we think it's very clear that
17 Congress defined discrimination to include the
18 failure to make reasonable modifications.

19 And so the fact that, you know,
20 someone can say: Well, my website has, you
21 know, the same information for all comers and
22 she wasn't sort of personally picked out to
23 have different information, I think is no
24 answer to the idea that this is real
25 discrimination under the ADA.

1 And I think this -- that's a concept
2 that this Court has recognized in other areas.
3 So, for example, in the religion context,
4 obviously, in cases like Abercrombie, the Court
5 has made clear that, you know, it's not enough
6 to just have a neutral no head covering policy.
7 You need to make an accommodation to treat
8 people equally.

9 To the gamesmanship point, I think
10 that our test for standing will be narrower
11 than the one that the court of appeals adopted.
12 I think there will be fewer testers.

13 I don't think there will be no
14 testers, and I think that's just a -- a
15 consequence of the fact that this statute does
16 provide a -- a right to anyone who's trying to
17 use the service, and we don't take a step back
18 and look to their motive.

19 But I do think, to some of the
20 questions that came earlier, the -- the lower
21 courts will have ways to ferret some of that
22 gamesmanship out. For example, you know, if
23 you say, I would have made a reservation on
24 this website, but it turns out that when you
25 see compliant websites you never make a

1 reservation, then a court might say that's not
2 a credible allegation.

3 Similarly, I think hotels will have an
4 ability to change how difficult it is to make a
5 reservation and then cancel it. And so it
6 might not be credible to say, I would have made
7 a reservation if, in fact, I would have had to
8 put down my deposit upfront and I couldn't get
9 it back if I canceled it later.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: Just in the wake
14 of your discussion with Justice Alito, I just
15 want to make sure I'm clear on your position
16 under Article III and our precedents.

17 You agree that one could have a cause
18 of action but no standing, correct?

19 MS. ROSS: I think that flows clearly
20 from this Court's decision in TransUnion and --
21 and Spokeo, among others.

22 JUSTICE KAVANAUGH: Okay. And you
23 agree that one could have standing but no cause
24 of action?

25 MS. ROSS: That's also correct.

1 JUSTICE KAVANAUGH: Okay.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: So I just want to
5 make sure that I understand your colloquy with
6 Justice Kagan.

7 What if I am not disabled and I don't
8 need any accommodation, but I prefer, because I
9 care a lot about the issue, to only stay at
10 hotels that do post the information on websites
11 and also make accommodations?

12 So I go to the website and I try to
13 make a reservation, and I could make a
14 reservation at a room, you know, that's not
15 handicap-accessible.

16 But would I have standing then because
17 the website -- and -- and, in fact, I do make
18 the reservation, but would I have standing
19 then? I used the service. I guess I'm just
20 trying to figure out, so you're saying that
21 it's plaintiffs who intend to use the service
22 who would have standing.

23 And I'm trying to -- to narrow down,
24 does that just mean anyone who would use the
25 service, or does that just mean the subset of

1 people who would use the service and who it's
2 actually relevant for them to know whether the
3 room is accessible?

4 MS. ROSS: So I -- I appreciate the --
5 the chance to clarify, and I apologize if I was
6 unclear on this.

7 I think it is certainly true that you
8 need to be suffering discrimination within the
9 meaning of the ADA, and so the person who
10 doesn't need the accessibility information, I
11 think, would not have standing.

12 JUSTICE BARRETT: So it's tied in.
13 It's not just -- and I honestly think some of
14 the confusion in these cases is just by using
15 "informational injury" with no additional
16 explanation.

17 It's -- it's not just kind of a bald
18 informational injury. It's informational
19 injury because -- and you're saying it's tied
20 here to discrimination -- because she lacked
21 information, she was discriminated against
22 because she couldn't access the service, the
23 reservation service online?

24 MS. ROSS: Exactly.

25 JUSTICE BARRETT: Okay.

1 MS. ROSS: I think both Havens and
2 this case are really better understood as
3 discrimination cases that happened to involve
4 information rather than --

5 JUSTICE BARRETT: Yeah.

6 MS. ROSS: -- informational cases for
7 precisely the reasons you note, Justice
8 Barrett.

9 JUSTICE BARRETT: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: So my thought has
13 been that we need to distinguish between the
14 person who's getting online and they're a
15 documentarian, a passionate observer, a person
16 who's going there just to see, are you
17 following the rules, Hotel X, Hotel B, et
18 cetera, and a person who, I think you're
19 saying, is trying to use the service.

20 Is that the relevant line in terms of
21 establishing injury?

22 MS. ROSS: Yes, Justice Jackson.

23 JUSTICE JACKSON: All right. So, if
24 the -- and so then the question becomes, what
25 does it mean to use the service? And do I have

1 to actually make -- express an intention to
2 make a reservation, or could I be looking at
3 this because there's a possibility that I might
4 want to, you know, go to this area in the way
5 some of the hypotheticals have talked about,
6 and I want to see could I go there? Is that
7 enough?

8 MS. ROSS: So I think that probably is
9 enough. I mean, I think, you know, this gets
10 complicated because we're talking about both
11 what's enough under the Reservation Rule but
12 also what's enough for forward-looking relief.
13 And so I think you sort of have to tease those
14 things out. But it seems like, if you are, you
15 know, comparison-shopping because you want to
16 go either -- you're thinking about three
17 different hotels or three different cities and
18 you're trying to figure out, you know, is this
19 a place that I could make a reservation, then I
20 do think that you would have standing under our
21 conception of the -- the rule.

22 JUSTICE JACKSON: Right. And that
23 seems like it's a little bit different than
24 what -- what Acheson Hotels is saying. They're
25 saying you have to know that you're going to go

1 to that hotel or you have to have pretty
2 imminent plans or something like that, right?

3 MS. ROSS: I think that's right. And,
4 you know, I -- again, as I said earlier, I
5 think this cash -- one of the ways this cashes
6 out is when the hotel actually has no
7 accessibility information, the person --

8 JUSTICE JACKSON: Right.

9 MS. ROSS: -- is still being
10 discriminated against because they can't use
11 the service in the same way that somebody else
12 can.

13 JUSTICE JACKSON: And your bottom line
14 in this case is you put Ms. Laufer in the other
15 bucket because she disclaims any interest in
16 actually possibly going to this hotel?

17 MS. ROSS: So --

18 JUSTICE JACKSON: Or in Maine or
19 whatever?

20 MS. ROSS: So -- so I think it's the
21 disclaiming or the -- the failure to allege
22 that she would make a reservation, because we
23 are focused on the service, not sort of the
24 downstream question of whether she ultimately
25 would keep the reservation.

1 And I think the -- part of the reason
2 for that is that, you know, when I'm travel
3 planning, when other people who don't have
4 disabilities are travel planning, I have an
5 ability to look at different websites, even if
6 I'm ultimately not going to go to that place.

7 And so I think part of the
8 antidiscrimination -- or part of the
9 discrimination here is -- is being treated
10 differently with respect to that ability to --
11 to gather the information necessary to make the
12 decision.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Ms. Corkran.

17 ORAL ARGUMENT OF KELSI B. CORKRAN

18 ON BEHALF OF THE RESPONDENT

19 MS. CORKRAN: Mr. Chief Justice, and
20 may it please the Court:

21 There is no serious dispute that at
22 the time Ms. Laufer filed suit, Acheson
23 provided no accessibility information on its
24 reservation website, thereby excluding disabled
25 people from using its online reservation

1 services and engaging in unlawful
2 discrimination under the ADA.

3 As Congress recognized, when places of
4 public accommodation fail to take reasonable
5 steps to make their services available to
6 people with disabilities, they signal that
7 disabled people are unwelcome participants in
8 the marketplace and contribute to their
9 day-to-day experience of being isolated,
10 invisible, and ignored.

11 If the Court reaches the standing
12 question presented by Acheson, it should reject
13 Acheson's argument that a disabled person does
14 not experience that dignitary harm when she
15 encounters the accessibility barrier on
16 Acheson's website, unless she also has travel
17 plans that are thwarted by the discriminatory
18 treatment.

19 For over six decades and most notably
20 in *Havens Realty*, this Court has recognized
21 that discrimination inflicts Article III injury
22 regardless of whether the plaintiff experiences
23 any harm beyond the unequal treatment.

24 What it means to personally experience
25 discrimination on the internet is a novel

1 question, but whether the answer is the one
2 we've offered or the one the government
3 proposes, Havens requires a test that focuses
4 on what the plaintiff experiences on the
5 website, not her underlying motive in that
6 experience or whether any downstream injuries
7 result.

8 Finally, I want to return to the issue
9 the Court started with today. Mr. Unikowsky
10 and I are both arguing before the Court on
11 behalf of clients that have no legal interest
12 in the outcome of this case: Ms. Laufer
13 because she has dismissed her complaint with
14 prejudice and will not be bringing any more ADA
15 suits and Acheson because it no longer owns the
16 hotel whose reservations service the suit
17 challenged.

18 These circumstances render the case,
19 at minimum, a poor vehicle for reaching the
20 standing question.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: You started with the
23 standing question, and you spoke of dignitary
24 injury, and in your briefs, I think you focus
25 on stigmatic injury. The government seems to

1 focus on informational injury. And there seems
2 to be a -- a difference in your
3 characterization of the injury here.

4 Would you spend a few minutes and
5 explain which injury are we talking about?

6 MS. CORKRAN: Here, we're talking
7 about a discriminatory denial of information,
8 so it's not a pure informational injury. The
9 discrimination aspect of it is important
10 because, as in Havens, it's not just that
11 you're not getting the information; you're not
12 getting the information for a reason that
13 conveys that you have inferior status in
14 society. So it's inflicting a dignitary harm
15 that you wouldn't have from a purely
16 informational injury.

17 JUSTICE THOMAS: I guess I could think
18 of cases in which a denial of injury doesn't go
19 to one's dignity or to -- doesn't create this
20 sort of a stigmatic --

21 MS. CORKRAN: Yeah.

22 JUSTICE THOMAS: Deprivation.

23 And it -- but it seems as though the
24 government doesn't make that second step to the
25 injury that you're talking about. It simply --

1 it's talk -- it focuses more on the information
2 that you are deprived of in order to be able to
3 use or to make a decision about using a hotel.

4 MS. CORKRAN: I -- I think the
5 government's brief does talk about this Court's
6 jurisprudence on dignitary harm and
7 discrimination and the fact that the Court has
8 never required any downstream consequence for a
9 discriminatory injury.

10 And that's certainly the approach the
11 Eleventh Circuit took on this issue.

12 JUSTICE KAVANAUGH: I agree with you
13 that discriminatory treatment is itself an
14 injury under our precedents and Article III,
15 certainly in Havens Realty.

16 The discriminatory treatment here, I
17 think Mr. Unikowsky is saying, would have
18 occurred at the hotel or in and that there was
19 no discrimination in the information provided
20 because everyone was provided the same
21 information. I just want to give you an
22 opportunity to respond to that.

23 MS. CORKRAN: Yeah, thank you, Your
24 Honor. I think that's wrong for the reasons
25 Ms. Ross said. Under 12182, places of public

1 accommodation cannot discriminate in the
2 provision of services. So it's not just in
3 access to their building. The service itself
4 has to be provided in a way that allows people
5 with disabilities to use it in the same way as
6 non-disabled people.

7 I also think this argument, when it's
8 framed that way, really is a merits question
9 and, under Steel Co., isn't part of the
10 standing inquiry. I think, under Steel Co. and
11 Lexmark and if you combine those with
12 TransUnion and Spokeo, the Court assumes as
13 valid Ms. Laufer's cause of action here, so you
14 assume that the allegations in her complaint
15 state a claim of unlawful discrimination under
16 12182, and then you also assume that Congress
17 conferred a cause of action to her.

18 And then the question is, did Congress
19 act within its constitutional authority when it
20 provided a cause of action here?

21 JUSTICE KAVANAUGH: Well, I think the
22 -- Mr. Unikowsky's saying, particularly in the
23 briefs, this is an Allen versus Wright kind of
24 case, not a Havens Realty kind of case. And
25 the distinction between those two cases --

1 Allen versus Wright, as you know, someone in
2 Hawaii can't complain about discrimination
3 that's occurring in Maine. Havens Realty, you
4 actually personally experienced the
5 discrimination yourself when you're, as Judge
6 Barrett, then Judge Barrett said in Casillas,
7 when you're lied to because of your race.

8 So why isn't this case more like what
9 Allen versus Wright described there?

10 MS. CORKRAN: The -- the plaintiffs in
11 Allen v. Wright were challenging the IRS's
12 failure to enforce a provision of the Internal
13 Revenue Code that required it to withhold
14 tax-exempt status from discriminatory schools.
15 The plaintiffs in that case had no private
16 right to the IRS complying with the law. They
17 were seeking to enforce a public right. And in
18 those circumstances, they had to show that they
19 were personally injured by the IRS's
20 non-compliance.

21 JUSTICE KAGAN: But I wonder whether
22 there isn't a broader principle at stake in a
23 case called -- like Havens. I mean, here, your
24 client has disclaimed, has said, I'm not
25 intending to go on vacation at all, I'm not

1 intending to go to any hotel, I'm not intending
2 to use the reservations service at all to look
3 for accessible hotels, to reserve accessible
4 hotels, to go to accessible hotels. I'm not
5 doing any of that.

6 So tell me how she is discriminated
7 against by -- by the inaccuracies on this
8 website.

9 MS. CORKRAN: The reason the case
10 comes to the Court in -- in that posture is
11 because injunctive relief is so elusive when
12 you're talking about concrete travel plans. As
13 was noted earlier, Ms. Laufer did amend her
14 complaint in this case to say that she was
15 going on this long road trip, but when the case
16 was on appeal, she had already gone on the road
17 trip.

18 And so that's why, when we say she's
19 disclaimed any intent of going on a trip, it's
20 because, by the time the case was on appeal,
21 she had already gone on the trip --

22 JUSTICE KAGAN: Well, but that's the
23 --

24 MS. CORKRAN: -- and it could be a
25 basis --

1 JUSTICE KAGAN: -- case that's before
2 us.

3 MS. CORKRAN: Right.

4 JUSTICE KAGAN: It's a case before us
5 with a stipulation that she's not using the
6 website for any vacation purposes --

7 MS. CORKRAN: But --

8 JUSTICE KAGAN: -- that -- that she's
9 -- and I think that your brief reads like --
10 like this too, that the harm is -- well, I'm
11 not sure. You tell me. The harm is just, I'm
12 a person with a disability, and I see that
13 there is inaccurate information about
14 accessibility, and that itself harms me, even
15 if I have no plans or less than plans, I have
16 -- I -- I'm just not thinking about vacations
17 at all.

18 MS. CORKRAN: Yeah. So I'll start by
19 saying the reason all of these tester cases or
20 really any of these Reservation Rule cases are
21 going to be in that posture is because you
22 can't have concrete or even, you know, somewhat
23 concrete travel plans and get an injunction in
24 time. So -- so that's why these cases have
25 been just generally litigated in this way in

1 this pure tester posture.

2 But the injury here, again, it's not
3 just a denial of information. The day-to-day
4 experience of being a disabled person is to
5 have your world be very small because our
6 marketplace, our places of public -- public
7 accommodation, just ignore you. They don't see
8 you. They don't recognize you as a potential
9 customer or as a member of the marketplace.

10 And so, when -- when Ms. Laufer goes
11 to the website and she sees that she's
12 invisible, that they are not even acknowledging
13 her --

14 JUSTICE KAGAN: Well, suppose she goes
15 to --

16 MS. CORKRAN: -- as someone who might
17 stay there --

18 JUSTICE KAGAN: -- the website and
19 rather than look at accessibility information,
20 she goes to the website and she looks at lots
21 of pictures of places and -- and -- and says:
22 Oh, this one doesn't have the required ramps.
23 And, again, she's not going to those places,
24 she has no intent of going to those places, but
25 she sees that they don't have the required

1 ramps and she brings suit then.

2 Does -- does she have standing to do
3 that?

4 MS. CORKRAN: So --

5 JUSTICE KAGAN: Because I think that
6 that's pretty similar to what is going on in
7 this case.

8 MS. CORKRAN: So she does not have
9 standing based on the pictures because she's
10 not encountering the accessibility barrier
11 herself. She's seeing --

12 JUSTICE KAGAN: Well, I don't know,
13 it's, like, right there. I mean, if you're
14 saying it's how you experience discrimination,
15 and I can understand that, but I'm experiencing
16 that sense of being excluded when I see that
17 all these hotels are set up to exclude me and
18 others like me.

19 MS. CORKRAN: There might be some sort
20 of Article III argument there, but Congress
21 certainly hasn't provided a cause of action
22 there, unless you actually have plans to go to
23 the hotel.

24 And I want to go back to what Justice
25 --

1 JUSTICE GORSUCH: Well, then -- then
2 just to pause there for a moment, it sounds to
3 me like you're edging right up to the Solicitor
4 General's test. Am I missing something?

5 MS. CORKRAN: I -- I see the intuitive
6 appeal of the government's test. I think the
7 government -- and -- and we are both asking
8 this question of, how do you encounter
9 discrimination on a website? And -- and this
10 goes to the analogy Justice Sotomayor was
11 making.

12 Our position is, well, in the physical
13 barrier context, you experience, you encounter
14 that accessibility barrier when you visit the
15 hotel regardless of whether you want to stay at
16 the hotel or what your underlying motive is.
17 So, when we translate that into the internet
18 context, we say you encounter the accessibility
19 barrier when you go to the website and click
20 around. I think --

21 JUSTICE GORSUCH: Well, so maybe
22 that's the difference. Just -- I just want to
23 make sure I understand what the difference is
24 is all I'm trying to do. The government says,
25 yes, informational -- lack of information can

1 be a form of discrimination --

2 MS. CORKRAN: Yes.

3 JUSTICE GORSUCH: -- when you have
4 some plans. Now how concrete that is, good
5 luck, all right --

6 MS. CORKRAN: Yeah.

7 JUSTICE GORSUCH: -- but some interest
8 in making a reservation.

9 And the -- the extreme position -- the
10 other end of the spectrum, and I think that --
11 I don't know, I don't know where you are on
12 this -- is I'm just clicking around to see and
13 I'm -- I'm looking for an absence of
14 information. I'm going to seek out this
15 discrimination without any plans, without any
16 interest. It's just what I do.

17 Is -- is that standing in your view?

18 MS. CORKRAN: Yeah. So I think that
19 is the distinction between our position and the
20 -- and the government's position. So the
21 government says --

22 JUSTICE GORSUCH: Yeah. So what's
23 wrong with the government's position?

24 MS. CORKRAN: So I -- I think -- so --
25 so just to articulate what I think the

1 government would say about your hypothetical is

2 --

3 JUSTICE GORSUCH: Yeah.

4 MS. CORKRAN: -- the government says
5 you have to use --

6 JUSTICE GORSUCH: Not my hypothetical.

7 MS. CORKRAN: Yeah. The government
8 says you have to use the website in some way.
9 So they would, I think, say our position is
10 akin to driving by the website, and they want
11 you to engage with it and actually make a
12 reservation or -- or engage with it in a way
13 that shows you're considering making a
14 reservation.

15 We say in our brief, I'm not sure that
16 distinction holds as a practical matter. Judge
17 Newsom made this --

18 JUSTICE GORSUCH: Well, I'm --

19 MS. CORKRAN: -- point as well.

20 JUSTICE GORSUCH: -- not sure that
21 it's going to be much of a pleading barrier if
22 you were to adopt --

23 MS. CORKRAN: Yeah.

24 JUSTICE GORSUCH: -- the government's
25 position versus your -- your client's, I think,

1 but I'm just trying to understand what the real
2 difference is --

3 MS. CORKRAN: Yeah.

4 JUSTICE GORSUCH: -- if there is any
5 or whether you're comfortable with the
6 government's position.

7 MS. CORKRAN: I'm comfortable with the
8 government's position so long as it's
9 understood as an inquiry into what you
10 experience on the website and not your
11 underlying motive for being on the website --

12 JUSTICE GORSUCH: Right. We put that
13 aside.

14 MS. CORKRAN: -- and not whether you
15 experience any downstream injury as a result of
16 being on the website.

17 And I think that's the real problem
18 with Acheson's position. They are attempting
19 to upend, I think, how this Court has always
20 defined discriminatory injury, which is the
21 injury is in the dignitary harm. You don't
22 have to show some sort of downstream
23 consequence, like --

24 JUSTICE GORSUCH: And I appreciate --
25 I appreciate that.

1 MS. CORKRAN: Yeah.

2 JUSTICE GORSUCH: But -- but just to
3 -- just so I've really got it, the government
4 doesn't -- says the motive is irrelevant. We
5 don't care --

6 MS. CORKRAN: Yes.

7 JUSTICE GORSUCH: -- why you walk in.
8 But we have to have some further engagement
9 rather than just I'm spending the afternoon
10 clicking through these things for -- for --
11 because I'm -- that's what I do.

12 MS. CORKRAN: Yes, I think that's
13 right. They think our clicking around is
14 equivalent to driving by --

15 JUSTICE GORSUCH: Yeah.

16 MS. CORKRAN: -- and that making the
17 reservation is -- is visiting --

18 JUSTICE GORSUCH: Something a little
19 bit more.

20 MS. CORKRAN: Yeah, I think that's
21 right.

22 JUSTICE GORSUCH: Okay. And -- and --

23 JUSTICE KAVANAUGH: So --

24 JUSTICE GORSUCH: -- you're
25 comfortable with that?

1 MS. CORKRAN: I'm comfortable -- I
2 think it's -- I think it's compatible with
3 Havens.

4 JUSTICE GORSUCH: Okay. Thank you.

5 MS. CORKRAN: Right?

6 JUSTICE GORSUCH: Yeah.

7 MS. CORKRAN: Yeah.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Well, that --

10 JUSTICE KAVANAUGH: So --

11 CHIEF JUSTICE ROBERTS: -- that's what
12 I'm wondering, and this, I think, is Mr.
13 Unikowsky's argument, and you've said it
14 several times, that it's the discrimination you
15 experience when you go to the website, when you
16 -- there's the encounter on the website.

17 And I think that distinguishes it from
18 Havens, where the discrimination was right
19 there. And what I understand Mr. Unikowsky and
20 I think perhaps the government says, you can't
21 add on, as if it made no difference, later
22 discrimination on the website because she
23 really doesn't need the information on the
24 website, she's not going to use it.

25 And so, to me, that's a key

1 distinction between this case and -- and
2 Havens.

3 MS. CORKRAN: Well, in Havens,
4 Ms. Coleman didn't need the information either.

5 CHIEF JUSTICE ROBERTS: Well, but, I
6 mean, the -- the actual discrimination was
7 against her.

8 MS. CORKRAN: Yes.

9 CHIEF JUSTICE ROBERTS: Right? And
10 that -- that's all you needed. It was the
11 information that was given there at her
12 request. That's the end of the case.

13 Here, there's more. It -- it -- it --
14 it is, as you say, discrimination on the
15 website. We don't have that when she just goes
16 in, calls the -- the hotel. She's not on the
17 website. And it seems to me that that takes it
18 out of the initial -- the initial encounter.

19 MS. CORKRAN: Yeah. I think the
20 question then becomes, how do you -- how do you
21 translate that Havens in-person encounter to
22 the digital realm? And I think, if you -- you
23 know, if there had been a sign on the door at
24 the realtor that said "If you're black, we have
25 no apartments available," we wouldn't say that

1 Ms. Coleman didn't personally experience that
2 discrimination because it was just a sign that
3 anyone would see if they came to the realtor's
4 --

5 CHIEF JUSTICE ROBERTS: Yeah, but
6 she's not on the website. She's talking to the
7 person in the -- in the hotel, right?

8 MS. CORKRAN: Well, right. So -- so,
9 under the -- the hypothetical I just gave with
10 Ms. Coleman, she isn't actually talking to
11 anyone. She's being told by a sign that there
12 are no apartments available to her.

13 CHIEF JUSTICE ROBERTS: Right. And
14 I'm challenging the hypothetical.

15 MS. CORKRAN: Okay.

16 CHIEF JUSTICE ROBERTS: Because I
17 think the hypothetical would say not the sign,
18 the sign is the website, and she's going there.
19 But she's not going to go there because she
20 doesn't want the information from the website.
21 She just needs to know from the conversation
22 that it's not there.

23 MS. CORKRAN: That -- sorry, you're
24 talking about Ms. Coleman now just needs to
25 know or Ms. Laufer?

1 CHIEF JUSTICE ROBERTS: Ms. Laufer.

2 MS. CORKRAN: So -- so I -- I think
3 that -- that what Ms. Laufer experienced on the
4 website is similar to Ms. Coleman confronting a
5 sign that says no apartments are available.

6 In both scenarios, Ms. Coleman had no
7 interest in -- in getting an apartment.

8 Ms. Laufer had no interest in --

9 JUSTICE JACKSON: But, Ms. --

10 MS. CORKRAN: -- staying at the hotel.

11 JUSTICE JACKSON: -- Ms. Corkran, can
12 I give you another hypothetical that I hope
13 will clarify things a little bit?

14 So suppose we have an African American
15 lawyer. This is back in the '60s, segregation
16 time, '50s, '60s, who is across the street from
17 a restaurant, and they see, they know, that the
18 restaurant is not serving black customers
19 through the front window, and at this time, the
20 law says you're supposed to be, and they're
21 not. They're making these people go around the
22 back. And he's obviously upset about this. He
23 feels the dignitary harm of seeing this happen.
24 But he somehow disclaims that he ever would
25 have gone to the restaurant, ever wanted to go

1 to the restaurant, et cetera.

2 Is it your view that he would have
3 standing to sue because he's aware of, he sees,
4 this discrimination occurring, but he's also
5 said, I would never have subjected myself to
6 that?

7 MS. CORKRAN: And he's seeking
8 injunctive relief, not damages?

9 JUSTICE JACKSON: Yes. Yes.

10 MS. CORKRAN: Yes. So -- so, under
11 those circumstances, if you're not going to
12 ever go up to the counter --

13 JUSTICE JACKSON: Yes.

14 MS. CORKRAN: -- and ask for food --

15 JUSTICE JACKSON: Yes.

16 MS. CORKRAN: -- then you don't have
17 standing.

18 JUSTICE JACKSON: So why isn't
19 Ms. Laufer that person?

20 MS. CORKRAN: Because Ms. Laufer has
21 alleged that -- or did allege that she would go
22 back to the website and confront the
23 accessibility barrier. The important thing
24 about the --

25 JUSTICE JACKSON: But she's not

1 confronting the barrier if she's not asking for
2 food. I mean, she sees the barrier. I think
3 this is where the breakdown is, I think, right?

4 She's not like a tester who actually
5 went to the counter. They didn't really want
6 the food. They were only doing it to
7 challenge. Motive is irrelevant. You -- we
8 all agree that that person would have standing
9 because they actually went there and they
10 experienced the discrimination.

11 I want to know why she isn't the
12 lawyer looking out the window across the street
13 seeing this happen. And how can you say that
14 he's confronting the barrier?

15 MS. CORKRAN: Because she went to the
16 website and she engaged with the website and
17 she --

18 JUSTICE JACKSON: So he goes down, he
19 goes out across the street, he's standing
20 there. He -- he goes. He's not just looking
21 from across the street. He's literally right
22 there at the counter because he wants to
23 document this happening because he has in his
24 mind: I really want to stop this, I'm going to
25 sue.

1 MS. CORKRAN: Right.

2 JUSTICE JACKSON: But he never goes to
3 the counter to ask himself for the food.

4 MS. CORKRAN: Yeah. So I think -- I
5 think Ms. Laufer is the -- is -- in her
6 circumstance, when she goes to the website and
7 she engages in the reservations service, she is
8 encountering that accessibility barrier.

9 JUSTICE JACKSON: All right.

10 MS. CORKRAN: But I think the
11 government's position -- if that doesn't -- if
12 that doesn't resonate, the government's
13 position, I think, works as well, again, and is
14 compatible with Havens.

15 JUSTICE KAVANAUGH: I think some of
16 the amicus briefs raise the concern that
17 everyone throughout the United States can sue
18 every inn and hotel throughout the United
19 States and use the phrase -- I'm not saying I
20 agree with this, but this is the phrase in the
21 amicus brief -- "online version of offended
22 observers."

23 And so I want you to respond to that.
24 Is that ultimately the effect of your position?
25 Not saying that means your position's wrong,

1 but is that the effect of your position?

2 MS. CORKRAN: No, it isn't, and I
3 think this goes back to our discussion about
4 Allen v. Wright. Here, a disabled plaintiff is
5 asserting a private right to equal treatment,
6 and the -- the cause of action is for
7 individuals who have experienced a violation of
8 that private right.

9 So, one, you can't -- you don't have a
10 cause of action under Title III unless --

11 JUSTICE KAVANAUGH: Put aside cause of
12 action.

13 MS. CORKRAN: Right.

14 JUSTICE KAVANAUGH: This is about
15 standing.

16 MS. CORKRAN: You don't -- you have to
17 be both disabled so that you're actually
18 experiencing a discriminatory denial of
19 information and you have to have encountered
20 the discrimination.

21 JUSTICE KAVANAUGH: So --

22 MS. CORKRAN: You can't just hear
23 about it.

24 JUSTICE KAVANAUGH: -- I think the --
25 some of the amicus briefs all -- also refer to

1 then could every disabled person throughout the
2 United States sue every inn and hotel
3 throughout the United States. Again, not
4 saying that means your position's wrong, but
5 following up, I guess, on Justice Gorsuch, I'm
6 trying to figure out where that leads.

7 MS. CORKRAN: I think any disabled
8 person who goes to the website, whether they
9 make a reservation under the government's rule,
10 but they're engaging with it and confronting
11 the accessibility barrier, would have
12 experienced a violation of their private right
13 under Title III, but that's not an -- that's
14 not an extension of Article III standing.
15 That's just an application of traditional
16 Article III principles to the digital realm.

17 JUSTICE KAVANAUGH: I think --

18 MS. CORKRAN: It's just everyone's
19 reach has been expanded for better or worse.

20 JUSTICE KAVANAUGH: Right. And I
21 think the interesting difficult question in
22 this case maybe on the standing side is, do you
23 actually experience discrimination when you go
24 to the website and you can get all the same
25 information anyone else can get, but you're

1 experiencing discrimination because what would
2 happen if you went to the hotel?

3 MS. CORKRAN: Well, so I don't think
4 it's -- it's -- the discrimination is what
5 would happen if you went to the hotel. The
6 discrimination is -- you know, we say in our
7 brief it's as if you went up to a reservation
8 desk in a wheelchair and the hotel had a
9 practice of just ignoring anyone in a
10 wheelchair or telling them to call a number.
11 There is a dignity harm --

12 JUSTICE KAVANAUGH: Mm-hmm.

13 MS. CORKRAN: -- in being treated as
14 invisible and not as a potential participant in
15 the marketplace.

16 JUSTICE KAVANAUGH: Mm-hmm. So
17 someone who didn't go on the website but was
18 aware of this --

19 MS. CORKRAN: Would not have
20 experienced that discrimination.

21 JUSTICE KAVANAUGH: It's the website
22 that's --

23 MS. CORKRAN: Yeah.

24 JUSTICE KAVANAUGH: -- in your view,
25 creating the discrimination?

1 MS. CORKRAN: Yeah.

2 JUSTICE KAVANAUGH: And then Justice
3 Gorsuch referenced, quite correctly in my view,
4 that pleading -- it might be easy to plead some
5 of this to get around this, but -- but, at
6 summary judgment, of course, the facts would
7 have to hold up that you intended to travel
8 somewhere, right?

9 MS. CORKRAN: Well, I don't think
10 there should be an intent to travel anywhere.

11 JUSTICE KAVANAUGH: Right. No, I
12 know. But --

13 MS. CORKRAN: Right. If there's an
14 intent-to-travel requirement, no one is going
15 to ever have standing to bring these suits in
16 any meaningful --

17 JUSTICE KAVANAUGH: Right.

18 MS. CORKRAN: -- way because the trips
19 are going to happen before you get your relief.

20 JUSTICE KAVANAUGH: Mm-hmm. Okay.

21 MS. CORKRAN: I thought maybe we'd
22 return --

23 JUSTICE KAVANAUGH: Oh --

24 MS. CORKRAN: Oh, sorry.

25 JUSTICE KAVANAUGH: -- one other one.

1 In the reply brief -- and I just want to make
2 sure I have your answer on this. So U.S.
3 v. Richardson's kind of a landmark standing
4 case. In the reply brief, they say that U.S.
5 v. Richardson would come out the other way
6 under your theory if a plaintiff visited the
7 CIA's website and observed that the information
8 was absent.

9 Do you want to respond to that?

10 MS. CORKRAN: Yes. So I think that's
11 wrong for two reasons. One, again, that's a
12 public right case, and also it's a pure
13 informational injury. It doesn't involve a
14 discriminatory denial of information.

15 I was just going to return to the --
16 the mootness point and Your Honor's concerns
17 about manipulating the Court's docket. I don't
18 think that this is one of those cases. Of
19 course, it is well established that the Court
20 can exercise its discretion on what to do here
21 on a case-by-case basis.

22 Here, we don't have a respondent who
23 waited to hear what the Court was going to do
24 about granting review and then attempted to
25 moot out the case. Ms. Laufer acquiesced to

1 the Court's review, and then there was this
2 unexpected development that was deeply
3 upsetting to her.

4 She hasn't brought any of these suits,
5 I think, in close to two years and already
6 wasn't planning on bringing any more. The
7 allegations against Mr. Gillespie were pretty
8 devastating to her and she didn't want to
9 pursue these cases anymore, and that's why we
10 dismissed the complaint as moot.

11 We were completely transparent with
12 opposing counsel and the Court about the
13 disciplinary order and about Ms. Laufer's
14 reasoning, and we acknowledged in our
15 suggestion of mootness that we were not
16 manipulating the Court's jurisdiction, that
17 it's free to reach the standing question if it
18 thinks this case is still a good vehicle for
19 doing so.

20 And this is a highly unusual case in
21 that not only does Ms. Laufer not have an
22 interest in it anymore, neither does Acheson
23 because it doesn't own the hotel. Acheson has
24 relied on Rule 25(c), I think, in their
25 petition for the proposition that they're still

1 the right defendant.

2 But all that Rule 25(c) does is
3 provide that if an injunction issues that it
4 binds the new owners. If anything, that makes
5 it worse because the actual owners who are
6 going to be bound by any injunction in this
7 case aren't here, and we don't know what they
8 think.

9 But that injunction wouldn't apply to
10 Acheson in any meaningful way. They don't own
11 the reservations site or the hotel. And their
12 only alleged interest in this case at this
13 point is that Ms. Acheson now owns a different
14 hotel. I think she takes the position that
15 that hotel's reservations service is -- is in
16 compliance, and -- and she might hypothetically
17 get some lawsuit from someone else down the
18 road.

19 And I think this Court's cases,
20 *Camreta v. Greene* and *United States*
21 *v. Juvenile*, make clear that that sort of
22 hypothetical future litigation isn't enough to
23 avoid mootness.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 Justice Alito?

3 Justice Sotomayor?

4 JUSTICE SOTOMAYOR: I have one
5 question. Some amici say that the internet, as
6 you've been arguing, is an especially important
7 place for disabled people because they rely on
8 it more than -- than anything else because of
9 the physical barriers to get to places.

10 MS. CORKRAN: Right.

11 JUSTICE SOTOMAYOR: So the internet is
12 the way they travel to a lot of places to find
13 information ahead of time.

14 Are there any other common ADA claims
15 that occur largely in the context of the
16 internet?

17 MS. CORKRAN: Yeah.

18 JUSTICE SOTOMAYOR: Outside of the
19 Reservation Rule and the screen reader cases?

20 MS. CORKRAN: Oh, so I was going to
21 say the screen reader cases.

22 JUSTICE SOTOMAYOR: Yeah, those are
23 the two, aren't they?

24 MS. CORKRAN: Yeah, and the other --
25 the other circuit split has to do whether --

1 with whether freestanding internet services
2 that aren't attached to a place of public
3 accommodation are themselves places of public
4 accommodation subject to Title III, but that's
5 not implicated here.

6 JUSTICE SOTOMAYOR: That's sort of
7 different.

8 MS. CORKRAN: Yes.

9 JUSTICE SOTOMAYOR: Can you tell me
10 would or how our ruling here might have an
11 impact on the screen reader cases? What can we
12 say or not say that would address that split?

13 MS. CORKRAN: So I --

14 JUSTICE SOTOMAYOR: I haven't thought
15 of -- I thought of it, but I haven't delved
16 into whether I have an answer for that, so I'm
17 just --

18 MS. CORKRAN: I do think that the
19 credit union cases and, in particular, Carello
20 in the Seventh Circuit are distinguishable
21 because, there, you had a blind plaintiff who
22 couldn't access the website, but there was an
23 entirely independent reason that he couldn't
24 fully enjoy it, and that was because he wasn't
25 eligible to be a member.

1 So that's an objective reason. It
2 didn't have to do with his subjective motive or
3 any downstream consequences. He just -- he --
4 he wasn't able to enjoy it anyway and therefore
5 didn't experience the discriminatory injury
6 under Title III. So I don't think that what
7 the Court does here necessarily impacts what's
8 happening there.

9 And then, I guess -- yeah, I -- I do
10 think, if the Court adopts Acheson's position,
11 that -- in order to allege a discriminatory
12 injury under Title III, you have to allege some
13 sort of downstream injury, would have an
14 enormous consequence on the screen
15 accessibility cases too.

16 JUSTICE SOTOMAYOR: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 Justice Gorsuch?

19 Justice Kavanaugh?

20 Justice Jackson?

21 Thank you, counsel.

22 MS. CORKRAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.

24 Unikowsky.

25

1 REBUTTAL ARGUMENT OF ADAM G. UNIKOWSKY
2 ON BEHALF OF THE PETITIONER

3 MR. UNIKOWSKY: Thank you, Mr. Chief
4 Justice.

5 I'd just like to say a few words about
6 the mootness issue and then a few words on the
7 standing issue on which the Court granted
8 certiorari.

9 On the mootness issue, I just think
10 that in deciding whether to exercise its
11 discretion to decide the question presented,
12 the Court should think about what's going to
13 happen in the lower courts if it doesn't do
14 that.

15 So, first of all, in the Fourth
16 Circuit, where Ms. Laufer's lawsuit -- or the
17 decision finding standing is binding precedent,
18 it's essentially going to be impossible or
19 almost impossible for a hotel to ever challenge
20 standing because, in the district court, the
21 hotel would have to lose a motion to dismiss,
22 litigate the case all the way to judgment,
23 lose, appeal, lose based on binding circuit
24 precedent, and then file a petition for
25 rehearing en banc or a cert petition, and, of

1 course, if that happens, then the hotel will
2 abandon the case and cite this case for the
3 proposition that it's allowed to do that. So,
4 essentially, plaintiffs within that circuit
5 will be able to bring lawsuits forever.

6 In other circuits, like the First and
7 the Eleventh Circuit, okay, if the Court
8 Munsingwear's this case, it's going to be
9 persuasive rather than binding precedent, but,
10 of course, persuasive authority may prove
11 influential to the district courts.

12 And even assuming that courts ignore
13 it altogether, then you're going to have every
14 single district court deciding this standing
15 question in the first instance, which is going
16 to lead to a lot of judicial resources being
17 expended that would be saved if this case
18 currently before the Court is decided.

19 So I think that if the Court is
20 concerned about expending judicial resources,
21 they would ultimately be saved at the end of
22 the day if the Court decides the question
23 presented.

24 On the merits, just one word. I think
25 that Justice Kagan's question about a plaintiff

1 who observes an accessibility barrier on a
2 website is the right way to think about this
3 case. I think the lack of information about
4 accessibility is an accessibility barrier in
5 the same way as an actual architectural barrier
6 is an accessibility barrier.

7 In both cases, the -- the plaintiff is
8 deterred from going to the hotel. The lack of
9 information deters the plaintiff from going to
10 the physical building because the plaintiff
11 doesn't know if they'll be able to get in, just
12 as observing the accessibility barrier deters
13 the plaintiff from going to the hotel because
14 the plaintiff knows in that case that they
15 can't get into the building.

16 And so we think that those two cases
17 should be understood the same way for purposes
18 of standing. If going into the hotel is a
19 requirement for the actual barrier, it should
20 also be a requirement for lacking information
21 about the barrier.

22 So we're not seeking a far-reaching
23 ruling abolishing tester standing or anything
24 like that. We certainly haven't asked the
25 Court to overrule Havens Realty. We're simply

1 trying to ally -- align the law of standing in
2 this case with the law of standing in other --
3 in other cases involving architectural
4 barriers.

5 If the Court has no further questions,
6 we'd ask the Court to reverse.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 The case is submitted.

10 (Whereupon, at 11:28 a.m., the case
11 was submitted.)

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Official - Subject to Final Review

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