

A STANDOFF: *HAVENS REALTY V. COLEMAN* TESTER STANDING AND *TRANSUNION V. RAMIREZ* IN THE CIRCUIT COURTS

CATHERINE COLE*

INTRODUCTION

Two lines of Article III standing law are at odds with each other. Forty years ago, in *Havens Realty Corp. v. Coleman*,¹ the Supreme Court held that a tester had standing for a stigmatic injury due to the violation of a statutory right.² Scores of testers have since gotten into federal court for claims of discrimination under laws like the Civil Rights Act, the Americans with Disabilities Act (ADA), and the Fair Housing Act (FHA). This type of tester standing seemed like settled law. But in last term's decision in *TransUnion v. Ramirez*,³ the Court reframed Article III standing. Under *TransUnion*, violations of statutory law are justiciable in federal court only if the violated rights have "a close historical or common-law analogue."⁴ Additionally, plaintiffs must have suffered a real, not just

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1. 455 U.S. 363 (1982).

2. *Id.* at 374. A tester is someone who pretends to be interested in a good or service to investigate whether a protected class's legal rights are being upheld. For instance, in *Havens Realty*, a black tester and a white tester separately solicited information about an apartment building, with no intent to purchase or rent, to determine whether they would receive the same truthful information. *Id.* at 368, 373.

3. 141 S. Ct. 2190 (2021).

4. *Id.* at 2204.

legal, harm.⁵ *Havens Realty's* tester standing seems irreconcilable with *TransUnion's* standing redefinition, yet both remain good law. Now what?

The courts of appeal have begun to venture their guesses. In four near-identical cases in the year following *TransUnion*, all involving a tester plaintiff suing for online disability accommodations required by the ADA, the circuit courts reached different conclusions.⁶ The Second, Fifth, and Tenth Circuits denied standing to their tester plaintiffs, though for different reasons. The Eleventh Circuit concluded the tester plaintiff had standing. While these cases strained to follow both *Havens Realty* and *TransUnion* (along with *TransUnion's* predecessor case, *Spokeo v. Robins*⁷), none presented a satisfactory theory of standing doctrine that accommodates them both.

This Note analyzes the circuit court split on tester stigmatic injury standing and concludes that the conflict between *Havens Realty* and *TransUnion* is untenable. One must bend to the other, if standing law is to be coherent. Part I looks at the circuit court cases that have taken on this conflict, summarizing their decisions and evaluating each court's rationale on its own terms. Part II argues that this collective body of decisions, in failing to harmonize *Havens Realty* and *TransUnion*, presents a meaningful problem for standing law. Part III considers options for resolution. Until this conflict is resolved, it will remain unclear what is left standing of tester stigmatic injury claims.

5. *Id.* at 2205.

6. *Harty v. West Point Realty*, 28 F.4th 435 (2d Cir. 2022); *Laufer v. Mann Hospitality, L.L.C.*, 996 F.3d 269 (5th Cir. 2021); *Laufer v. Looper*, 22 F.4th 871 (10th Cir. 2022); *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022). As an exception, the Fifth Circuit decision was handed down two months before *TransUnion*. Nonetheless, this Note includes it in the discussion because (a) it is factually identical to the Tenth and Eleventh Circuit cases and (b) the Fifth Circuit's holding derives from an understanding of Article III standing law based on *Spokeo* that mirrors *TransUnion's* understanding in all ways relevant. In other words, this Note's selection of cases errs on the side of inclusivity rather than exclusivity.

7. 578 U.S. 330 (2016).

I. TESTER STIGMATIC INJURY STANDING IN THE SECOND, FIFTH,
TENTH, AND ELEVENTH CIRCUITS

Four cases decided on the grounds of standing for tester stigmatic injuries represent circuit courts' different interpretations of *TransUnion*. The facts of the cases are remarkably alike. In the Fifth, Tenth, and Eleventh Circuits, serial plaintiff Deborah Laufer, a woman with vision, dexterity, and ambulation problems, alleged that various hotels failed to provide online information about accessible rooms and features for disabled people in violation of the ADA and its regulations.⁸ In the Second Circuit, plaintiff Owen Harty, a wheelchair-bound man, alleged the same thing of a hotel in New York.⁹ While the plaintiffs hinted at possible plans to book rooms for themselves,¹⁰ both self-identified as testers whose primary aim was to verify the hotels' ADA compliance. Both plaintiffs were also represented by the same lawyers.¹¹ Such are the similarities among these cases that, for the purposes of this Note, they can be considered factually indistinct, which throws the rationales of the four circuit courts into relief. This Part describes and evaluates the reasoning used by each circuit court in turn, beginning with the three circuit courts that did not award standing to their tester plaintiffs.

All three of the circuits that denied standing for tester stigmatic injury grappled with the tension between *Havens Realty* and *TransUnion*, though they split roughly into two camps in terms of

8. See, e.g., *Arpan*, 29 F.4th at 1270.

9. *Harty*, 28 F.4th at 439.

10. These plans were decidedly vague. In her complaint in the Western District of Texas, Ms. Laufer said that despite never having stepped foot in Texas before, she "intend[ed] to travel all throughout the State" after the pandemic and would "need to stay in hotels when [she goes]." *Mann Hospitality*, 996 F.3d at 272. And in contrast to her other cases, in her Northern District of Florida complaint, Ms. Laufer did not even go that far, declaring no intention whatsoever of visiting the defendant's hotel in Marianna, Florida. *Arpan*, 29 F.4th at 1290 (Newsom, J., concurring).

11. *Arpan*, 29 F.4th at 1295 (Newsom, J., concurring).

how they resolved it. The Tenth Circuit confronted the conflict head-on. It framed *TransUnion*'s main innovation as the repudiation of statutory rights-based standing and thereby concluded that "a violation of a legal entitlement alone is insufficient under *Spokeo* and *TransUnion* to establish that Ms. Laufer suffered a concrete injury."¹² Per the Tenth Circuit, Ms. Laufer's complaint alleged only that she was unable to enjoy ADA-created entitlements—that is, that she suffered exactly the sort of mere statutory violation contemplated and rejected by *TransUnion*.¹³ Without more, this deprivation was inadequate to get her into federal court, and Ms. Laufer's case was rightly dismissed.

The Tenth Circuit then engaged the *Havens Realty* problem, concluding that *Havens Realty* was still good law but that it did not apply in Ms. Laufer's case. It stated that the *Havens Realty* plaintiff was given false information due to her race—a concrete and particularized harm sufficient for Article III standing—whereas Ms. Laufer was simply denied information.¹⁴ As such, the Tenth Circuit concluded that although a *Havens Realty*-style injury, narrowly defined, would merit standing even after *TransUnion* because that injury constitutes something more than a statutory violation, the *Havens Realty* and Laufer cases were distinguishable due to the relative offensiveness of the injuries experienced. On these bases, the Tenth Circuit affirmed the dismissal of Ms. Laufer's claims.

As a matter of law, this is mystifying. There is no perceptible legal difference between the harms suffered by the *Havens Realty* plaintiff and Ms. Laufer. The *Havens Realty* plaintiff was guaranteed "truthful information concerning the availability of housing" by the Fair Housing Act—and was denied it.¹⁵ Ms. Laufer was guaranteed information "[i]dentify[ing] and describ[ing] accessible features in . . . hotels and guest rooms" by ADA regulations—and was denied

12. *Looper*, 22 F.4th at 878.

13. *Id.*

14. *Id.* at 879 ("Ms. Laufer has not alleged that the Loopers gave her false information. Nor has she alleged they denied her information because of her disability.")

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

it.¹⁶ Both denials are straightforward statutory violations. To avoid the parallel, the Tenth Circuit invented a distinction. It reported that the *Havens Realty* injury “was grounded in misrepresentation and racial animus,” which was somehow worse than Ms. Laufer’s injury in a way that gave rise to Article III standing.¹⁷ It is not evident why this distinction mattered. Is the reason that the offenses of “misrepresentation and racial animus” parallel a historical or common-law harm, which is the plus factor demanded by *TransUnion*? Probably not, as the purpose of much of the 20th Century’s civil rights legislation was to penalize racial animus where historical causes of action had not.¹⁸ Is it that discriminatory or racist intent creates a real, not just legal, injury? No, because the injury inquiry focuses on effect, not intent.¹⁹ Statutory law makes intent relevant,²⁰ but considerations of statutory law without more are verboten under the Tenth Circuit’s interpretation of *TransUnion*. Is it something else? If so, the Tenth Circuit did not say. It declared that the injury in *Havens Realty* was worse and moved on, without any clear legal foundation.

The Second and Fifth Circuits arrived at the same destination as did the Tenth Circuit by a different route. Both circuits denied standing due to features of the plaintiffs that were intrinsic to their identities as testers and thus seemed to invalidate post-*TransUnion* tester standing altogether. In contrast to the Tenth Circuit with its

16. *Looper*, 22 F.4th at 874.

17. *Id.* at 879.

18. See 88 Cong. Rec. 22839 (1963) (address of President Johnson to joint session of Congress about the proposed Civil Rights Act) (“We have talked long enough in this country about equal rights. We have talked for 100 years or more. It is time now to write the next chapter—and to write it in the books of law.”).

19. See *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2214 (2021).

20. See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801–02 (1973) (noting the importance of intent for discrimination under statute by observing that because “Title VII [of the Civil Rights Act] tolerates no racial discrimination,” a Title VII complaint requires an inquiry into an employer’s motives).

focus on *TransUnion*'s overall standing redefinition, the Second Circuit emphasized that *TransUnion* rejected speculative harm as a possible standing basis. In the Second Circuit's view, the key to the case was that "*TransUnion* now makes clear that . . . mere risk of future harm, standing alone, cannot qualify" as an injury in a suit over a statutory right.²¹ The tester plaintiff's lack of plans to visit the hotel himself, a subject which seemed to preoccupy the Second Circuit, thus foreclosed his pathway to standing.²² Rather than entangle itself with *Havens Realty*, the Second Circuit relegated *Havens Realty* to a footnote and ignored the consequences of its *TransUnion* interpretation for testers as a class.

The Fifth Circuit similarly jumped on the idea that Ms. Laufer's injury, due to characteristics inherent to tester injuries, was insufficient to get Ms. Laufer into federal court.²³ The court listed Ms. Laufer's fatal flaw as having "visited the [Online Reservation System website] to see if the motel complied with the law, and nothing more."²⁴ This, of course, is exactly what a tester does. No matter, to the Fifth Circuit. Because Ms. Laufer, like the Second Circuit plaintiff, could not demonstrate that she "even intended to [book a room]," the Fifth Circuit concluded that she had suffered no real injury and that her case was rightly dismissed for lack of standing. In this way, both the Second and Fifth Circuits denied plaintiffs standing due to their natures as testers who court injury for purposes of legal monitoring rather than for their own purposes.

Mirroring the Second Circuit, the Fifth Circuit dispensed of *Havens Realty* quickly. It answered the question of whether *Havens Re-*

21. *Harty*, 28 F.4th at 443 (emphasis added) (internal quotation marks omitted).

22. *Id.* ("Because Harty asserted no plans to visit West Point or the surrounding area, he cannot allege that his ability to travel was hampered by West Point Realty's website in a way that caused him concrete harm.").

23. *Mann Hospitality*, 996 F.3d at 272 ("Article III standing requires a concrete injury even in the context of a statutory violation. . . . Laufer fails to show how the alleged violation affects her in a concrete way." (quoting *Spokeo v. Robins*, 578 U.S. 330, 332 (2016))).

24. *Id.*

alty controlled in the case at issue in a short paragraph with an unsurprising “no.” From the Fifth Circuit’s perspective, the *Havens Realty* plaintiff had standing because “the [FHA] forbade misrepresenting [information] to ‘any person,’ quite apart from whether the tester needed it for some other purpose.”²⁵ In this view, *Havens Realty* did not recognize standing for testers generally. It recognized standing for the specific *Havens Realty* plaintiff because she demonstrated the concrete harm of an FHA violation, with her tester status merely incidental to the analysis.

The Fifth Circuit’s reasoning here was erroneous for at least two reasons. For starters, the *Havens Realty* plaintiff’s injury, the misrepresentation, was a statutory violation. If violation of the FHA alone gave rise to Article III standing in *Havens Realty*, then the hotels’ violation of the ADA by withholding accessibility information should have given rise to Ms. Laufer’s standing under the same theory. Furthermore, *Havens Realty* does stand for the general principle of tester standing, or at least the courts have long thought it does.²⁶ So too have legal scholars.²⁷ The Fifth Circuit’s attempt at reconciling *Havens Realty* and Ms. Laufer’s case distorted logic and the law alike, further demonstrating the challenges of applying *Havens Realty* in the post-*TransUnion* era.

Although neither the Second nor the Fifth Circuit rejected *Havens Realty* explicitly, the upshot of both decisions is that the path

25. *Id.* at 273 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)).

26. *See, e.g.*, *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 297 (7th Cir. 2000) (“Although we thought the standing of the testers, as an original matter, to be dubious, we acknowledged *Havens*’ holding that testers have standing” (internal quotation marks and citation omitted)); *Houston v. Marod Supermarkets*, 733 F.3d 1323, 1332 (11th Cir. 2013) (“Thus, the tester motive . . . does not preclude [the plaintiff’s] having standing” (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–75 (1982))).

27. *See, e.g.*, Shannon E. Brown, *Tester Standing Under Title VII*, 49 WASH. & LEE L. REV. 1117, 1127 (1992) (“*Havens* establishes a strong precedent for federal courts to hold that employment testers have standing under Title VII.”); Michael E. Rosman, *Standing Alone: Standing Under the Fair Housing Act*, 60 MO. L. REV. 547, 576 (1995) (“As interpreted in *Havens Realty*, [the Fair Housing Act] eliminates that requirement [of factual injury].”).

to standing used by the *Havens Realty* tester plaintiff is now foreclosed in both circuits. To be sure, the circuits paid lip service to tester stigmatic injury standing. In a footnote, the Second Circuit stated that “[t]he law is clear that testers can have standing,”²⁸ while the Fifth Circuit hyped up *Havens Realty* as “the Supreme Court’s seminal tester case.”²⁹ But it is a mystery how the *Havens Realty* plaintiff—or, indeed, any tester—could survive the standing gauntlet that the Second and Fifth Circuits imposed on their plaintiffs here, which they considered compulsory because of *Spokeo* and *TransUnion*. Both denials of standing turned on the fact that, in the context of a statutory violation, neither plaintiff demonstrated a personal plan to go to the tested hotels. If that is enough to bar a plaintiff from having standing under the Second and Fifth Circuit’s interpretations of *Spokeo* and *TransUnion*, then these circuits have quietly shut down any avenue for a tester to get into federal court. The difference between the Tenth Circuit, on the one hand, and the Second and Fifth Circuits, on the other hand, is that the former circuit’s theory at least contemplates that the *Havens Realty* door to tester standing remains open after *TransUnion*.

That leaves the Eleventh Circuit. It departed from its peers by awarding Ms. Laufer standing. In an opinion by Judge Newsom, the Eleventh Circuit posed the central issue as whether a tester’s injury can qualify as a “concrete *intangible* injury” after *TransUnion*. Concluding that it can, the Eleventh Circuit vacated the dismissal of Ms. Laufer’s case for lack of standing in the absence of physical, property, monetary, or similar harms.³⁰ The inquiry took several steps. The Eleventh Circuit acknowledged that *TransUnion* had rearticulated standing law in a way that diminished the materiality of legal injury. Next, the circuit determined that, without consideration of legal injury alone, what remains after *TransUnion* is a test

28. *Harty*, 28 F.4th at 444 n.3.

29. *Mann Hospitality*, 996 F.3d at 273 (internal quotation marks omitted).

30. *Arpan*, 29 F.4th at 1272.

in which a concrete intangible injury derives from (1) a close relationship to a traditional common-law cause of action and (2) a free-standing concrete injury—in which satisfying only the second part of the test is enough for standing.³¹ Then, the court concluded that Ms. Laufer’s claim satisfied this second part, because Ms. Laufer suffered real emotional pain after she tested the hotel. The Eleventh Circuit stated, “Even if it’s clear after *TransUnion* that a violation of an antidiscrimination law is not alone sufficient to constitute a concrete injury, we think that the emotional injury that results from illegal discrimination is.”³² Ms. Laufer experienced “frustration and humiliation and a sense of isolation and segregation” when she learned that the hotel did not make accessibility information available.³³ This turmoil was real, so the Eleventh Circuit held that Ms. Laufer had alleged standing sufficient to pursue her claims of an ADA entitlement violation.

Though it came out the opposite way of the Second, Fifth, and Tenth Circuit opinions, the Eleventh Circuit opinion suffered from its own defects. In developing a theory of standing based on stigmatic injury due to emotional harms, the Eleventh Circuit identified a pathway to standing for Ms. Laufer that had nothing to do with her status as a tester. It sidestepped, rather than reconciled, *Havens Realty*. The Eleventh Circuit’s majority opinion did not mention *Havens Realty*; there was no need, because the emotional pain that gave rise to standing was tangential to Ms. Laufer’s tester role. Further, the Eleventh Circuit’s workaround may not work so well in practice. The appellate court concluded that Ms. Laufer’s emotional suffering was facially adequate for Article III standing, but it remains to be seen whether district courts will find that testers experience sufficient turmoil as a question of fact.³⁴ Concededly,

31. *See id.* at 1272–73.

32. *Id.* at 1274.

33. *Id.* (internal quotation marks omitted).

34. *Id.* at 1298–99 (Carnes, J., concurring).

TransUnion kept open the possibility that a plaintiff might feel sufficient emotional pain at the prospect of her own exposure to future harms.³⁵ However, testers worry not about their own future injury but about the generalized prospect of future injury (or perhaps about the imperfect rule of law itself). Will district courts find that testers suffer sufficient personal pain due to speculative, and impersonal, harm? Maybe, or maybe not. And it is not obvious that the emotional pain that arises from a stigmatic injury due to discrimination is even a permissible ground for tester standing at all.³⁶ The Eleventh Circuit's pathway to standing does not reliably provide for tester standing under *TransUnion* and therefore, like the other circuits' opinions, does not fully harmonize *TransUnion* with *Havens Realty*.

Ultimately, all four opinions suffer from the same weakness, which is that *Havens Realty* tester stigmatic injury standing is a square peg that does not want to fit into the round hole of modern standing doctrine. *Havens Realty* provided for standing based on a statutory violation alone in the absence of real harm. This is precisely what *TransUnion* forbids. Thus, the cases seem incompatible. To overcome this incompatibility presumption, the law would need to accommodate a nuanced legal theory that incorporates *Havens Realty* and *TransUnion*. Over the course of four paradigmatic tester cases, four circuit courts tried and failed to do this. The shortcomings of their resolutions lend strong support to the notion that the tension cannot be resolved satisfactorily right now.

35. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 n.7 (2021).

36. See, e.g., *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that this sort of [stigmatizing] noneconomic injury is one of the most serious consequences of discriminatory government action Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." (quoting *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984))).

II. SIGNIFICANCE OF THE CIRCUIT COURT SPLIT OVER *HAVENS REALTY* AND *TRANSUNION*

As illustrated by the circuit court split, there is little consensus about whether tester standing survives *Spokeo* and *TransUnion*. To be sure, a circuit court split does not always pose a serious problem for the law. As Judge Wilkinson put it, “Circuit splits are often more apparent than real, and at any rate, the world will not end because a few circuit splits are left unresolved.”³⁷ For example, when the legal issues giving rise to the split are minor,³⁸ or when uniformity can be attained via legislative instead of judicial action,³⁹ the Supreme Court may prudently decline to intervene. In some splits, the lower courts can work through their inconsistencies themselves, making meaningful contributions to the country’s legal discourse along the way. This is not such a split. As this Part argues, the *Havens Realty* and *TransUnion* circuit court split is an important problem that the Supreme Court should resolve soon for at least three reasons.

First, this circuit court split creates real-world problems because it acutely affects a discrete circle of actors involved in civil rights testing whose work is jeopardized by the legal status quo. Chief among these actors is Congress, which has heretofore passed civil rights (and similar) legislation under the assumption that the rights introduced would be broadly enforceable in federal court.⁴⁰ Now,

37. J. Harvie Wilkinson III, *If It Ain't Broke . . .*, 119 YALE L.J. ONLINE 67, 69 (2010).

38. See U.S. Sup. Ct. R. 10(a) (stating the Supreme Court’s internal rule that, when granting review on certiorari, priority should be given to court of appeal splits on “important federal question[s]” and “important matter[s]”). See, e.g., Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1569 (2008) (suggesting “whether a signature on a notice of appeal could be typed” and “whether a complaint delivered by facsimile had been properly served” as examples of trivial issues in circuit court splits that did not demand resolution).

39. Frost, *Overvaluing Uniformity*, *supra* note 38, at 1607–08.

40. E.g., Senator Bob Dole, Address on the Passage of Americans with Disabilities Act (July 12, 1990) (“The tough but fair enforcement remedies of ADA, which parallel

TransUnion establishes that this is true only when those rights have a common-law analogue.⁴¹ The rights protected by testing—freedom from discrimination, freedom from emotional suffering, guaranteed statutory compliance, and so on—do not boast obvious historical analogues.⁴² Such is *TransUnion*'s catch-22: because historical laws did not protect parties from discrimination, Congress created laws; because Congress created the laws, the Court will not allow parties alleging discrimination to enforce their protections. Yet *Havens Realty* suggests that the Court still must allow it. This stalemate handicaps Congress, along with the agencies that develop nationwide regulations under congressional mandate, because the extent to which its created rights will carry weight is now unclear. More directly, the circuit court split also impacts testers themselves. This includes not only litigious lone wolves, like Ms. Laufer, but also a multitude of civil rights organizations that have sprung up across the country to train and employ professional testers.⁴³ This cottage industry's existence turns on the circuit court split's resolution.⁴⁴ Last but not least, disabled people, members of other protected classes, and the companies they patronize enjoy less certainty about

the Civil Rights Act of 1964, are time-tested incentives for compliance and disincentives for discrimination.”). At the time of the ADA's passage, testing had been legitimized by the Supreme Court for eight years.

41. Erwin Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 283 (2021).

42. *But see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2211 n.7 (2021) (observing, though explicitly not taking a position on, the idea that litigants could make analogies to tort law).

43. As a sampling, organizations include the University of Illinois Chicago Law Fair Housing Legal Support Center; the Equal Rights Center in Washington, DC; the Disability Law Center in Salt Lake City; the Equal Housing & Opportunity Council in St. Louis; the Boston Fair Housing Initiative; the Housing Rights Center in Los Angeles; the Seattle Office for Civil Rights Testing; the U.S. Department of Justice's Fair Housing Testing Program; and more.

44. Additionally, in the meantime, the status quo encourages testers to forum shop, bringing their claims in the more hospitable Eleventh Circuit until the circuit court split is resolved. This comes with its own drawbacks; courts tend to view forum shopping as inefficient and deleterious to the rule of law. *See, e.g., Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73–75 (1938).

their legal rights and obligations due to the split. In circuits where testers have standing, testers will operate, and companies may adhere to a higher standard of legal compliance.⁴⁵ Where there is no standing, they may not. This turns the country into a patchwork quilt of discrimination protection standards, leaving protected classes unable to predict where their rights can best be enjoyed. The circuit court split, while still new, already puts these actors in an uncertain position.

Second, unlike with splits that make circuit court judges choose among many credible resolutions, the uncertainty about *TransUnion* and *Havens Realty* leaves judges with no good options at all. This forces even the most faithful judges to improvise. For instance, Judge Newsom opened the Eleventh Circuit opinion by declaring that the court's grant of standing was "require[d]" by the Eleventh Circuit's "recent decision in *Sierra v. City of Hallandale Beach*."⁴⁶ In that case, handed down one month before *TransUnion* last year, Judge Newsom laid out a comprehensive theory of what he believed standing law should be⁴⁷—a theory that stands in opposition to *TransUnion*.⁴⁸ For one thing, he proposed that statutory causes of

45. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 3 (6th ed. 2011) ("[P]eople also respond to more severe legal sanctions by doing less of the sanctioned activity.").

46. *Arpan*, 29 F.4th at 1270 (citing 996 F.3d 1110 (11th Cir. 2021)); see also *Arpan*, 29 F.4th at 1283 (Newsom, J., concurring) ("This is a sequel of sorts to my concurring opinion in *Sierra*.").

47. Judge Newsom has delved deeply into the issue of standing. In *Arpan*, he used the facts of Ms. Laufer's case to defend his alternative standing theory from *Sierra*, which would award standing whenever a plaintiff has a legal cause of action, except when that action stems from a congressionally created public right that a private plaintiff seeks to vindicate. He also keenly observed that *TransUnion*'s "'history-and-judgment-of-Congress' standard . . . can't comfortably accommodate the sort of 'stigmatic' injury that this case involves and that the Court has consistently acknowledged." *Arpan*, 29 F.4th at 1284 (Newsom, J., concurring).

48. See *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1115–40 (11th Cir. 2021) (Newsom, J., concurring). The *Sierra* opinion was favorably cited in Justice Thomas's dissent in *TransUnion*, see *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2219 (2021)

action should be enough for standing, “regardless of whether [a plaintiff] can show a separate, stand-alone factual injury.”⁴⁹ Had *TransUnion* definitively closed the door to tester standing, the Eleventh Circuit’s mandate would have been clear. Instead, because *TransUnion* left a gap, the Eleventh Circuit had the leeway to hew more closely to the inclusive theory of standing it had already espoused. Is this what the Supreme Court ordered in *TransUnion*? As Judge Newsom said in his *Arpan* concurrence, “The majority opinion in this case reflects our best effort to apply *Sierra*’s binding precedent in light of *TransUnion*, . . . but I suspect that the law concerning ‘stigmatic injury’ will remain deeply unsettled until the Supreme Court steps in to provide additional guidance.”⁵⁰ Quite. The stigmatic injury confusion has made it hard, if not impossible, for faithful judges to interpret the law with exactitude.

Third, this circuit court split demands resolution because it concerns an important matter of constitutional law. Article III standing is not a trivial issue; it impacts every single case in every federal court. Moreover, Article III standing is a judge-made doctrine.⁵¹ The Supreme Court is the only body that can clarify its meaning. To put a finer point on it, if *TransUnion* standing was meant to override *Havens Realty*, the Supreme Court is the only actor that can say so. All the circuit court majority opinions discussed in this Note started from that premise—that *TransUnion* is binding law and *Havens Realty* must conform to its new order.⁵² It is a reasonable premise. But while *Havens Realty* remains on the books, it is not an obviously

(Thomas, J., dissenting), demonstrating the chasm between the *TransUnion* majority holding and Judge Newsom’s standing theory.

49. *Arpan*, 29 F.4th at 1283 (Newsom, J., concurring) (quoting *Sierra*, 996 F.3d at 1115 (Newsom, J., concurring)).

50. *Id.* at 1287.

51. See Richard H. Fallon et al., *Hart and Wechsler’s The Federal Courts and The Federal System* 49 (7th ed. 2015).

52. Even the Eleventh Circuit, which awarded standing, did not do so because of *Havens Realty*. The holding relied wholly on *TransUnion* and its vague definition of a “factual” injury, bringing the tester’s emotional suffering under that definition. *Arpan*, 29 F.4th at 1274.

correct premise. Without resolution of the split, this field of constitutional law will remain unsupported, forcing the lower courts to barrel ahead blindly.

One judge departed from this premise. In the Eleventh Circuit, Judge Jordan wrote a concurrence that discussed the importance of *Havens Realty* as precedent.⁵³ He recognized the threat posed by *TransUnion* to tester stigmatic injury standing but wrote that until the Supreme Court disposed of it formally, “lower courts must continue to recognize and apply the old with the new.”⁵⁴ He then put forward a straightforward rationale for Ms. Laufer’s tester standing. It demonstrates how this case might have been decided in a pre-*Spokeo* and -*TransUnion* world:

For standing purposes, then, Ms. Laufer is not different than [*Havens Realty* plaintiff] Ms. Coleman. Indeed, in cases after *Havens Realty* the Supreme Court has held that the deprivation of information to which one is legally entitled constitutes cognizable injury under Article III. . . . If resulting stigmatic harm is the necessary adverse (and downstream) consequence of informational injury, Ms. Laufer’s “frustration and humiliation” — which was caused by the hotel’s failure to provide accessibility information — suffices. . . . I also think Ms. Laufer has standing as a tester for her Title III ADA claim based on the informational injury she suffered, [as in *Havens Realty*].⁵⁵

While Judge Jordan agreed with the majority opinion that the emotional consequences suffered by Ms. Laufer were probably enough for standing under *TransUnion*, he also believed that Ms. Laufer independently had standing due to an informational injury under *Havens Realty*. Not just that, Judge Jordan also seemed to propose that *Havens Realty*’s controlling effect took priority: “*Havens Realty* may be endangered, but . . . it governs here.”⁵⁶ Judge Jordan

53. *Id.* at 1275 (Jordan, J., concurring).

54. *Id.*

55. *Id.* at 1280, 1283.

56. *Id.* at 1283.

eyed the conflict between the equally binding *Havens Realty* and *TransUnion* decisions and declined to endorse the idea that *TransUnion* necessarily took precedence.

The Supreme Court left confusion in *TransUnion*'s wake. Whether Judge Jordan was correct that *Havens Realty* still prevails after *TransUnion* is difficult to say, because the Supreme Court has not articulated what "correct" looks like in this dispute. This is a problem for an area of the law as integral to federal court operations as justiciability. Due to the real-world implications, the judicial leeway afforded, and the importance of the *Havens Realty* and *TransUnion* problem, the Supreme Court should clarify the doctrine of tester stigmatic injury standing in explicit terms, freeing judges from guesswork.

III. POSSIBLE RESOLUTIONS

The Supreme Court should act, but how? The conflict between *Havens Realty* and *TransUnion* is multifaceted, implicating questions of informational injury, stigmatic injury, civil rights, statutory rights-based standing, tester status, and more. In that sense, there are numerous ways for the Court to approach the conflict. However, the central issue confronted by the Second, Fifth, Tenth, and Eleventh Circuits can be distilled to this question: *Do testers have Article III standing, when their claims allege stigmatic injury because of a statutory violation and nothing more?*

This Part proposes five ways that the Supreme Court could justifiably answer that question. Any of these answers would help resolve the circuit court split discussed in this Note. The options are ranked in order from least to most disruptive to current standing law.

1. Yes, because the injury experienced by testers is factual, not just legal, under *TransUnion*.

The Eleventh Circuit's majority opinion is a species of this option. This choice addresses one of the main theoretical obstacles to

tester standing under *TransUnion*, which is that “[o]nly those plaintiffs who have been *concretely harmed* by a defendant’s statutory violation may sue that private defendant over that violation in federal court”⁵⁷ and that testers incur only abstract harm, for the purpose of preventing (someone else’s) concrete harm. But the force of this obstacle depends on what constitutes concrete harm. The Eleventh Circuit concluded that Ms. Laufer’s specific “frustration and humiliation” after her failed test qualified. A court could go broader, determining that testers are so inherently invested in the outcome of their tests that they presumptively experience suffering when a tested statutory right is not upheld. The concrete harm could be something other than emotional pain; it could be the affront to the dignity of a tester member of a marginalized class whose rights were violated. To make this option work, the Court would also need to endorse the Eleventh Circuit’s interpretation of the *TransUnion* test, which allows for injury where there is a legal violation plus a concrete harm, even without a common-law analogue⁵⁸—an endorsement that may be unlikely.

By and large, though, this option relies on *TransUnion* without overturning *Havens Realty*’s core holding, making it relatively harmonious with existing precedent. *TransUnion*’s definition of concrete harm imagined two lawsuits over the illegal pollution of land in Maine and distinguished a Maine neighbor plaintiff’s harm as concrete where a Hawaiian observer’s harm would not be.⁵⁹ Under this option, a tester would be more like the Maine neighbor, because he personally would experience the bad result of the illegal tested behavior—through the test itself. This would hold true even if the plaintiff never contracted for a good or service with the tested company. However, this option is still imperfect, not least because

57. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (majority opinion).

58. *Arpan*, 29 F.4th at 1273 (“Despite the absence of a close common-law comparator, we conclude that under existing precedent—both our own and the Supreme Court’s—Laufer has alleged a concrete intangible injury.”).

59. *TransUnion*, 141 S. Ct. at 2205.

it is something of a pretense. A tester sues because a statutory law was violated, not because the violation made him sad. Adopting this standard would incentivize tester plaintiffs to play up, even seek out, a negative emotional response. It would bring standing law further from, not closer to, the truth. This theory works, but, like the tester plaintiffs it would encourage, it does not feel great.

2. Yes, because the harm experienced by testers is analogous to a common-law harm under *TransUnion*.

This option avoids the other major obstacle to standing under *TransUnion*, which is that intangible statutory harms may be considered concrete if they are “injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts.”⁶⁰ The Court nodded to an array of permissible historical or common-law harms, including “reputational harms” and “harms specified by the Constitution.”⁶¹ The question is how close the relationship between one of these harms and the statutory violation must be. For instance, the Eleventh Circuit shrugged off the idea that depriving a tester of a statutorily guaranteed right was akin to the torts of intentional infliction of emotional distress (IIED), which requires extreme or reckless conduct, or the negligent infliction of emotional distress, which usually requires that the inflicted party be near physical danger.⁶² But perhaps the Eleventh Circuit was too hasty. As *TransUnion* observed, “*Spokeo* does not require an exact duplicate in American history and tradition.”⁶³ Under this option, even if the hotels’ behavior did not reach the level of recklessness, the courts could still determine that it irresponsible enough as to have a relationship to the common-law IIED claim—something that the Court openly contemplated in a *TransUnion* footnote.⁶⁴ In

60. *Id.* at 2204.

61. *Id.*

62. *Arpan*, 29 F.4th at 1272–73 (“But neither intentional nor negligent infliction of emotional distress is a sufficiently close analogue.”)

63. *TransUnion*, 141 S. Ct. at 2204.

64. *See id.* at 2211 n.7.

the alternative, perhaps injury resulting from discrimination is sufficiently analogous to the harms barred by the Fourteenth Amendment's Equal Protection Clause.⁶⁵ Although this option might require the Court to define the "traditional harms" test more expansively than it currently does, this accommodation would work with post-*TransUnion* standing law's overall framework instead of against it. Unfortunately, it would still depart from the most obvious interpretation of a "close relationship" from *TransUnion*. This option fits, depending on the Court's willingness to accept attenuated relationships to common-law harms.

3. Yes, because *Havens Realty*'s theory of standing represents an exception to the broad *TransUnion* rule.

Arguably, Judge Jordan hinted at something like this option in his concurrence in the Eleventh Circuit. *TransUnion* laid out a rule for standing. In his concurrence, Judge Jordan considered that "*Havens Realty* may be inconsistent (in whole or in part) with current standing jurisprudence" but conducted its standing analysis anyway, proceeding as though *Havens Realty* existed independently, and fell outside, of the *TransUnion* umbrella rule. The Court could adopt this approach in a future case by holding that when a plaintiff self-identifies as a tester, her suit automatically slots into a *Havens Realty* analysis instead of a *TransUnion* analysis. This would sustain both rules, by making the former an exception to the latter.

This option has its own advantages and weaknesses. On the one hand, it is supported by Supreme Court practice. There is a rich tradition of the Court carving out exceptions to a general constitutional rule when confronted with scenarios that render the rule senseless.⁶⁶ This option is also attractive because it would allow

65. U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

66. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (recognizing an exception to the Fourth Amendment's warrant and probable cause requirement when a seizure is minimally

TransUnion to control in its unadulterated form except in the very narrow category of tester cases, thereby allowing the core holdings of both *TransUnion* and *Havens Realty* to live on. On the other hand, narrow exceptions have a way of becoming broad exceptions. The Court may justifiably worry that chopping up its standing doctrine, especially so soon after the Court comprehensively articulated it, would undermine the doctrine's legitimacy, leading to an even less intelligible rule governing the federal court gateways.

4. No, because *TransUnion* overrules *Havens Realty*.

The Second and Fifth (and to an extent, the Tenth) Circuits selected this option, though they did not put it in such blunt terms. This option has the distinct advantage of allowing the Court to double down on *TransUnion*'s theory of standing, in which Congress's creation of a cause of action is "instructive" but not dispositive to the injury inquiry.⁶⁷ Given the Court's persistence with this theory from *Spokeo* through to *TransUnion*, this is perhaps the likeliest option in a near-future Supreme Court case. Yet the principle of *stare decisis* would generally counsel against throwing *Havens Realty* overboard and taking tester standing along with it. And sticking to *TransUnion*'s narrow standing doctrine would likely impede Congress's ability to create rights that can be reliably and broadly enforced in federal court, which conceivably transgresses against the constitutional design.⁶⁸ Even so, in support of this option from a policy perspective, the absence of standing would not leave testers without redress entirely. Testers could pursue their claims in state courts,⁶⁹ bring employment complaints to the Equal Employment

intrusive and a police officer has reasonable suspicion of criminal activity); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (recognizing an exception to the First Amendment's Free Exercise Clause analysis under *Smith* for the hiring and firing of church ministers).

67. *TransUnion*, 141 S. Ct. at 2204.

68. *E.g.*, Article I's Vesting Clause exclusively gives Congress all legislative powers therein granted, which *TransUnion* arguably impairs. U.S. CONST. art. I, § 1. A fuller discussion of *TransUnion*'s constitutional footing is outside the scope of this Note.

69. *See TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting).

Opportunity Commission,⁷⁰ and print studies publicizing their findings. Many tester organizations already do all three of these things and more. If the Supreme Court overruled *Havens Realty*, those testers would lack a remedy only in federal courts. Thus, while this option would represent a formal shift in the law by requiring the Court to overturn *Havens Realty*, it might not significantly impact testing on the ground.

5. Yes, because *Havens Realty* endures, and *TransUnion* does not.

Far and away, this option would be the most disruptive to standing law and is the most unlikely to be adopted. It would require the Court to turn its back on *TransUnion* and articulate a new conception of the standing doctrine altogether. Per this option, *Havens Realty* would continue to exist as it has since 1982. *TransUnion's* requirements of an injury in fact, not “an injury in law,” and of a common-law analogue would give way to an as-yet-unknown version of standing law, which would presumably be more encompassing of legal injuries. While it would represent a break, this option has plenty of supporters. Since *TransUnion* was handed down, many scholars have objected on legal and practical grounds. For example, Erwin Chemerinsky expressed concern that *TransUnion* has placed “a potentially drastic limit on the ability of Congress to create rights,” which “undermines separation of powers by greatly constraining congressional power.”⁷¹ In addition to echoing these concerns, Cass Sunstein lamented that “the new understanding of standing (and of Articles III and II) has no roots in the Constitution, and it is disconnected from standard sources of constitutional

70. See Steven G. Anderson, Comment, *Tester Standing Under Title VII: A Rose by Any Other Name*, 41 DEPAUL L. REV. 1217 (1992).

71. Chemerinsky, *What's Standing After TransUnion LLC v. Ramirez*, *supra* note 41, at 270, 272.

law.”⁷² The appeal of this option probably depends the level of one’s agreement with such scholars. Regardless, the inability of the circuit courts to parse out *TransUnion*’s meaning with consistency means that the Supreme Court will likely have to clarify it further at some point. This option proposes that the Court does so in a way that lends itself to standing based on a statutory violation alone.

The best choice among these five options turns on legal and historical questions outside the scope of this Note (though this is a subject undoubtedly worthy of further scholarly discussion). This Note’s conclusion is more limited: as a matter of law, the endurance of both *Havens Realty* and *TransUnion* in their present form, without clarification, is untenable, as evidenced by the circuit courts’ inability to reconcile them consistently and comfortably. These five options represent ways in which the Supreme Court could engage the conflict presented by this precedential dissonance. Regardless of the option chosen, Supreme Court clarification would be a victory for the rule of law in that it would prevent further contradictory readings like those seen in the Second, Fifth, Tenth, and Eleventh Circuits.

CONCLUSION

Havens Realty and *TransUnion* are in a standoff, each case representing a theory of Article III standing incompatible with the other. *Havens Realty* permitted the finding that a tester could have standing due to her stigmatic injury under the FHA. *TransUnion* rejected the notion that a statutory violation could be a foundation for standing where the plaintiff’s injury was not analogous to an injury at common law and where the plaintiff suffered merely legal harm. Since *TransUnion* was decided last year, the circuit courts have been straining to harmonize the two precedents in cases with a tester plaintiff. The unsatisfactory and contradictory resolutions of the

72. Cass Sunstein, *Injury In Fact, Transformed* (Mar. 11, 2022), at 1, available at <https://ssrn.com/abstract=4055414>.

Second, Fifth, Tenth, and Eleventh Circuits show that the two precedents probably cannot be harmonized well without further Supreme Court intervention. The courts heard near-identical cases involving a plaintiff alleging stigmatic injury due to hotels not providing online information about their disability accessibility features. That their resolutions diverged so widely reveals the depths of the Supreme Court's error in not resolving this conflict in *TransUnion* or elsewhere already. The Supreme Court should take up this problem, resolve the standoff, and decide one way or another whether tester standing endures in American law.

