No. 22-429

IN THE
Supreme Court of the United States

ACHESON HOTELS LLC,
Petitioner,

v.

DEBORAH LAUFER,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE BUCKEYE INSTITUTE, MAINE POLICY INSTITUTE, JOB CREATORS NETWORK FOUNDATION, NATIONAL REAL ESTATE INVESTORS ASSOCIATION, AND OHIO HOTEL AND LODGING ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a self-appointed Americans with Disabilities Act "tester" have Article III standing to challenge a place of public accommodation's failure to provide disability accessibility information on its website, even if she lacks any intention of visiting that place of public accommodation?

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and education institution—a "think tank"—to formulate and promote free-market public policy in the States. The staff at The Buckeye Institute accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Ohio and replication across the country. Through its Legal Center, The Buckeye Institute engages in litigation in support of the rights and principles enshrined in the United States Constitution.

The Buckeye Institute has a strong interest in preserving the principles embodied in the Constitution, including the separation of powers. This case raises important questions about the requirements for Article III standing, including the requirement that a plaintiff suffer an injury in fact to justify the exercise of a federal court's powers on her behalf. The Buckeye Institute believes that Article III's standing requirements are key to protecting the Constitution's separation of powers and preventing judicial overreach.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

The Maine Policy Institute (MPI) is a nonprofit organization dedicated to freeing people from dependency, creating prosperity, and redefining the role of government in Maine. Founded in Portland in 2003 by a handful of passionate citizens concerned about the direction the state was headed, MPI has become a leading conservative public policy voice in Maine. MPI seeks to create an exemplary State where a compassionate but prudent government lets flourish the prosperity, liberty, and instincts of independent citizens.

Job Creators Network Foundation (JCNF) is a 501(c)(3) nonpartisan organization founded by entrepreneurs committed to educating employees of Main Street America about government policies that harm economic freedom. Through its Legal Action Fund, JCNF defends against government overreach to ensure that America's free market system is not only protected but is allowed to thrive.

The National Real Estate Investors Association (National REIA) is a 501(c)(6) trade association. National REIA is made up of local associations or investment clubs throughout the United States. It represents local investor associations, property owner associations, apartment associations, and landlord associations on a national scale. It represents the interests of approximately 40,000 members across the United States.

The Ohio Hotel and Lodging Association (OHLA) represents hotel and lodging owners, managers and

operators throughout Ohio. It represents hundreds of individual hotels, many additional unique lodging properties, and those who work in and do business with those enterprises. OHLA communicates with more than 1,600 licensed hotels in the State of Ohio. It helps educate the industry about the importance of access issues impacting all guests, as well as how to comply with legal requirements such as the Americans with Disabilities Act (ADA). OHLA's members consistently identify litigation as one of their greatest challenges. OHLA supports efforts to resolve legitimate problems of access, but not litigation or demands designed to capitalize on businesses' fear of litigation costs and business disruption.

Amici curiae support a regulatory environment that is conducive to economic growth. *Amici* believe that the frequent litigation brought by "tester" plaintiffs harms the economy and is unnecessarily burdensome, particularly on small businesses. *Amici* therefore have an interest in ensuring that Article III's standing requirements are followed and that federal lawsuits are limited to cases and controversies in which a plaintiff has suffered an actual injury in fact.

SUMMARY OF ARGUMENT

Respondent Deborah Laufer describes herself as an Americans with Disabilities Act (ADA) "tester." She frequently visits hotel, motel and bed-and-breakfast websites in order to see if those websites contain information that she believes is required by the ADA. If she determines that a website lacks such

information or is sufficiently unclear, she files a federal lawsuit. Laufer is a frequent litigant. The First Circuit recognized that she "has filed *hundreds* of other ADA-related suits in federal courts from coast to coast." Pet. App. 6a (emphasis added). Critically, in this case Laufer does not allege that she actually intended to use Petitioner's hotel. *See* Pet. Br. at 7 (citing J.A. 17a, ¶ 5). It appears that her purpose for visiting the hotel's online reservation system was simply to manufacture the predicate for filing a lawsuit.

Amici curiae agree with Petitioner that Respondent's "abstract interest in enforcing the law does not confer standing." Pet. Br. at 47. This Court has consistently held that the "irreducible constitutional minimum" of standing requires three elements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, a plaintiff must allege an "injury in fact" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* (citations omitted). Second, there must be a causal connection between the alleged injury in fact and the conduct of the defendant. *See id.* at 560–61. Finally, it must be "likely" that the plaintiff's injury would be "redressed by a favorable decision." *Id.* at 561 (citation omitted). Respondent here does not allege a concrete or particularized injury in fact. The allegations are therefore insufficient to support Article III standing.

Amici curiae write separately to highlight the significant constitutional problems posed by the First Circuit's decision. Article III's limits on federal

jurisdiction are a key part of the Constitution's separation of powers. Allowing federal courts to resolve complaints when a plaintiff has not suffered an actual injury, as the First Circuit did below, runs afoul of those constitutional principles.

Article III limits federal courts' jurisdiction to resolving actual "Cases" or "Controversies." U.S. CONST., art. III, § 2, cl. 1; *see TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Here, however, Respondent does not allege a genuine case or controversy sufficient to invoke the federal courts' jurisdiction. Respondent does not allege that she actually intended to use Petitioner's hotel. *See* Pet. Br. at 7 ("She stated that she hoped to travel to Maine in the future, although she did not express any intention to visit Coast Village.") (citing J.A. 17a, ¶ 5). Her lack of concrete allegations undermines any potential federal court jurisdiction over her claim. *See Lujan,* 504 U.S. at 564 (holding that "'some day' intentions—without any description of concrete plans" do not support federal jurisdiction).

The District Court specifically found that Laufer "lacked any intention to actually access Defendant's place of public accommodation" when she visited its online reservation system. Pet. App. 46a. Nor is there a genuine factual dispute about Respondent's intentions. To the contrary, the First Circuit recognized that on appeal Respondent disclaimed any intent to travel to Maine. *See* Pet. App. 11a n.3.

Respondent did not suffer an injury in fact and does not allege a sufficient case or controversy to

support federal jurisdiction. This deficiency is no small matter. The case-or-controversy requirement is key to preserving the separation of powers. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). This requirement ensures that the federal judiciary "respects the proper—and properly limited—role of the courts in a democratic society." *Id.* (quotations omitted).

This Court has repeatedly explained that no principle "is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Id.* (quotations omitted); *see also Raines v. Byrd*, 521 U.S. 811, 818 (1997) (same) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976)). Simply put, if a plaintiff does not present a proper case or controversy, "the courts have no business deciding [the dispute], or expounding the law in the course of doing so." *Cuno*, 547 U.S. at 341.

The ADA's antidiscrimination principles advance a laudable goal. *See generally* 42 U.S.C. § 12101, *et seq*.; *see id.* at §§ 12181–12189 (provisions regarding public accommodations and services operated by private entities). In this case, however, Respondent has asked the federal courts to adjudicate a non-existent controversy. Article III does not countenance jurisdiction where a plaintiff has not suffered an actual injury and no injury is "*certainly impending*." *See Clapper v. Amnesty International, USA*, 568 U.S. 398, 409 (2013) (emphasis in original) (quotations

omitted). Here, Respondent is an "uninjured plaintiff" who merely seeks to ensure that Petitioner is complying with the law. *TransUnion LLC*, 141 S. Ct. at 2206. That is not a basis for Article III standing. *Id.*

ARGUMENT

I. The First Circuit's Holding Is Inconsistent With The Constitution's Separation Of Powers.

Amici curiae agree with Petitioner that Respondent's "abstract interest in enforcing the law does not confer standing." Pet. Br. at 47. *Amici* write separately to emphasize the significant constitutional problems posed by the Court of Appeals' decision. Article III's limits on federal jurisdiction are vital to protecting the Constitution's separation of powers. Allowing federal courts to resolve complaints when a plaintiff has not suffered an actual injury, as is the case here, runs afoul of those constitutional principles.

The requirements for Article III standing are well known. This Court has consistently held that the "irreducible constitutional minimum" of standing requires three elements. *Lujan*, 504 U.S. at 560; *see also Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180–81 (2000); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982). First, a plaintiff must allege an "injury in fact" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan,*

504 U.S. at 560 (citations omitted); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 (1998); *Sierra Club v. Morton*, 405 U.S. 727, 740–41 & n.16 (1972). Second, there must be a causal connection between the alleged injury in fact and the conduct of the defendant. *Lujan,* 504 U.S. at 560–61; *Simon*, 426 U.S. at 41–42. Finally, it must be likely that the injury would be redressed by a favorable decision by the court. *Lujan,* 504 U.S. at 561; *Simon*, 426 U.S. at 38.

Respondent here falls far short of meeting these standards. She visited the online reservation system of a business that she did not intend to visit. *See* Pet. App. 46a. On appeal, she disclaimed any intent to actually travel to Maine, let alone to stay at Petitioner's hotel. *See* Pet. App. 11a n.3. She simply does not allege the type of concrete and actual injury in fact that is required by Article III.

Allowing federal jurisdiction under such circumstances cannot be squared with the requirements of Article III or the limitations imposed on federal courts by the separation of powers.

A. Article III's Standing Requirements Protect and Maintain the Separation of Powers.

"The 'law of Art. III standing is built on a single basic idea—the idea of separation of powers.'" *TransUnion LLC*, 141 S. Ct. at 2203 (quoting *Raines,* 521 U.S. at 820); *see also Clapper*, 568 U.S. at 408 (stating that the law of Article III standing "is built on separation-of-powers principles"). Congress looks for societal problems to solve and passes laws; the

executive branch enforces those laws; and the courts resolve actual controversies between specific individuals and they redress wrongs imposed by one party upon another.[2] The decision below intrudes on these principles by finding standing for a plaintiff who seeks to solve a societal problem, but who suffered no injury and who therefore has no personal harm to be redressed. This Court should correct the Court of Appeals' jurisdictional error.

The constitutional underpinnings of standing requirements are well established. This Court has explained that limiting federal court jurisdiction to actual cases or controversies is "fundamental to the judiciary's proper role in our system of government." *Cuno*, 547 U.S. at 341 (quoting *Raines*, 521 U.S. at 818 (quoting *Simon*, 426 U.S. at 37)); *see also TransUnion LLC*, 141 S. Ct. at 2203 ("Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'").

The federal judiciary's authority to provide judicial review is grounded in the necessity of "carrying out the judicial function of deciding cases." *Cuno*, 547 U.S. at 340. Judicial intervention is essentially a byproduct of the need to resolve disputes, and federal courts may resolve only "genuine, live dispute[s] between adverse

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[2] *See Lujan*, 504 U.S. at 559 (noting that "the Constitution of the United States divides all power conferred upon the Federal Government into 'legislative Powers,' Art. I, § 1, '[t]he executive Power,' Art. II, § 1, and '[t]he judicial Power,' Art. III, § 1").

parties." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020).[3] As Chief Justice Marshall explained in *Marbury v. Madison*, judges "who apply the rule to particular cases, must of necessity expound and interpret that rule." 5 U.S. (1 Cranch) 137, 177 (1803); *see also Cuno*, 547 U.S. at 340–41 (quoting *Marbury*).

Determining that a matter presents a proper case or controversy under Article III is therefore central to ensuring that the federal judiciary respects "the proper—and properly limited—role of the courts in a democratic society." *Cuno*, 547 U.S. at 341 (quotations omitted); *Allen v. Wright*, 468 U.S. 737, 750 (1984) (same) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The case-or-controversy requirement helps maintain the Constitution's "tripartite allocation of power" between the distinct branches of government. *Cuno*, 547 U.S. at 341 (quoting *Valley Forge*, 454 U.S. at 474 (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968))).

Without the case-or-controversy requirement, federal courts could essentially provide advisory opinions at the request of parties who, without alleging a concrete injury, merely argue that the government is not following or adequately enforcing the law. *See Carney*, 141 S. Ct. at 501. The requirement of an injury in fact prevents this. It

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[3] *See also* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 300 (1979) (describing federal judicial review as "a necessary byproduct of the resolution of particular disputes between individuals").

ensures that judicial power is not exercised merely to vindicate a plaintiff's policy preferences, or to satisfy a plaintiff's generalized desire to enforce the law even though she is not directly affected by a defendant's actions. *See Sierra Club*, 405 U.S. at 740; *TransUnion LLC*, 141 S. Ct. at 2206 (seeking to ensure a defendant's compliance with the law is not grounds for Article III standing); *Steel Co.*, 523 U.S. at 106 (finding no standing where a plaintiff sought "vindication of the rule of law" rather than "remediation of its own injury").

If the requirements for standing were otherwise, the judiciary would intrude on the policymaking and enforcement responsibilities of the legislative and executive branches. *See* U.S. CONST., art. I, § 1; U.S. CONST., art. II, § 1, cl. 1. Indeed, Chief Justice Marshall explained this in an early speech to the United States House of Representatives, as recounted by this Court in *DaimlerChrysler Corp. v. Cuno*:

> If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary.

Cuno, 547 U.S. at 341 (quoting 4 Papers of John Marshall 95 (C. Cullen ed. 1984)).

The usual standing requirements safeguard against the harm that Chief Justice Marshall warned of, that is, the courts "swallow[ing] up" the responsibilities of the legislature and executive. *See id.* The case-or-controversy requirement—and more specifically, the requirement of an injury in fact—prevents federal courts from exceeding their authority and usurping the powers of the other branches. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *Clapper*, 568 U.S. at 408.

Lest there be any doubt, this Court has made clear that federal courts may only decide a question if it is presented in a case or controversy which is, "in James Madison's words, 'of a Judiciary nature.'" *Cuno*, 547 U.S. at 342 (quoting 2 Records of the Federal Convention of 1787, at 430 (M. Farrand ed. 1966)). If a dispute does not present a proper case or controversy, the federal courts "have no business deciding it, or expounding the law in the course of doing so." *Id.* at 341. Such is the case here.

B. The Court of Appeals Erred in Finding Jurisdiction Where Respondent—a "Tester" Plaintiff—Does Not Allege a Case or Controversy Under Article III.

Article III grants federal courts the power to redress a plaintiff's actual injuries. It does not, however, grant courts "a freewheeling power to hold defendants accountable for legal infractions" in the absence of an actual injury. *TransUnion LLC*, 141 S. Ct. at 2205 (quoting *Casillas v. Madison Avenue Assocs., Inc.*, 929 F.3d 329, 332 (7th Cir. 2019)

(Barrett, J.)). Here, Respondent does not adequately allege an injury in fact and therefore does not present this Court with a case or controversy sufficient to invoke federal jurisdiction.

As discussed *supra*, Respondent's purpose in visiting Petitioner's website (and third-party reservation systems) appears to have been simply to create the predicate for filing this lawsuit. In both her Amended Complaint and her declaration that she is an ADA "tester," Respondent describes her process for visiting online reservation systems, including the website for Petitioner's hotel, the Coast Village Inn and Cottages. *See* J.A. 6a-9a, ¶ 11; *id.* at 17a–18a, ¶¶ 5–6. She conspicuously fails to allege that she actually intended to use Petitioner's hotel. *See id;* Pet. Br. at 7. The District Court found that Laufer "lacked any intention to actually access [Petitioner's] place of public accommodation" when she visited its online reservation system. Pet. App. 46a. Although she amended her complaint to allege a general intent to travel to Maine, on appeal she "disclaim[ed] any such intent." Pet. App. 11a n.3. Respondent simply does not allege a cognizable injury. It was reversible error for the Court of Appeals to hold otherwise.

The First Circuit panel determined that the denial of accessibility-related information is an Article III injury, notwithstanding Respondent's lack of intent to use Petitioner's facilities or even travel to the State of Maine. *See* Pet. App. 19a (concluding that the fact "[t]hat Laufer had no intent to use the information for anything but a lawsuit doesn't change things"). The court held that Respondent's alleged "feelings of

frustration, humiliation, and second-class citizenry" are "'downstream consequences' and 'adverse effects' of the informational injury she experienced." *Id.* at 26a (quoting *TransUnion LLC*, 141 S. Ct. at 2214).

The First Circuit's analysis suffers from several fatal errors. First, Respondent does not allege an injury in fact that is concrete and particularized and actual or imminent. *See Lujan,* 504 U.S. at 560; *Steel Co.*, 523 U.S. at 103. On appeal, she disclaimed an intent to visit Maine, let alone to use Petitioner's facilities when doing so. *See* Pet. App. 11a n.3. Although the First Circuit relegated this fact to a footnote, it should be dispositive of Respondent's claim. Indeed, elsewhere in its opinion, the court itself recognized that other circuits had found a lack of standing for Respondent under similar circumstances. *See* Pet. App. 18a.[4]

This Court has repeatedly held that to establish standing, a plaintiff must have concrete plans to

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[4] *See Laufer v. Looper*, 22 F.4th 871, 883 (10th Cir. 2022) (holding that where Laufer "disclaimed any interest in booking a room" at the defendant's facilities, she "has no concrete interest in the information required … and has not suffered an injury in fact"); *Laufer v. Mann Hosp., L.L.C.*, 996 F.3d 269, 273 (5th Cir. 2021) (holding that Laufer lacked standing because she failed to allege that the information she sought "had 'some relevance' to *her*") (emphasis in original) (quoting *Brintley v. Aeroquip Credit Union*, 936 F.3d 489, 493 (6th Cir. 2019) (citation omitted)). *But see Laufer v. Arpan LLC*, 29 F.4th 1268, 1270 (11th Cir. 2022) (finding that Laufer alleged an "Article-III-qualifying 'stigmatic' injury" despite admitting she had "no intention to personally visit the hotel").

engage in the activity allegedly giving rise to the injury. *See Carney*, 141 S. Ct. at 502 ("an injury in fact requires an intent that is concrete"); *see also Lujan*, 504 U.S. at 563–64. For example, in *Lujan v. Defenders of Wildlife*, this Court recognized that having to view a species-impoverished habitat *could* constitute a cognizable injury. 504 U.S. at 562–63. The Court emphasized, however, that the plaintiffs had not described any concrete plans to visit those habitats, nor had they said when they would do so. *Id.* at 563–64. Rather, the Court found that the plaintiffs had set forth only "some day" intentions. *Id.* at 564. This Court was clear that "'some day' intentions … do not support a finding of the 'actual or imminent' injury" that precedent requires. *Id.*

"Some day" intentions like those in *Lujan* would not be enough to constitute an injury in fact. Here, however, Respondent alleges *even less*. She does not allege an actual intent to use Petitioner's hotel at all. This is plainly insufficient to establish an injury in fact. *Compare with Carney*, 141 S. Ct. at 501–02; *Lujan*, 504 U.S. at 562–64.

The First Circuit's attempt to save Respondent's claim is equally flawed. The court relies on the alleged downstream consequences of the "informational injury" that Respondent experienced. Pet. App. 26a. Yet none of these alleged consequences provide a basis for standing under this Court's precedents. "An 'asserted informational injury that causes no adverse effects cannot satisfy Article III.'" *TransUnion LLC*, 141 S. Ct. at 2214 (quoting *Trichell v. Midland Credit*

Mgmt., Inc., 964 F.3d 990, 1004 (11th Cir. 2020)). Nor are "feelings of frustration" the kind of adverse effects necessary to support federal jurisdiction. To the contrary, this Court has held that "psychic satisfaction is not an acceptable Article III remedy because *it does not redress a cognizable Article III injury*." *Steel Co.*, 523 U.S. at 107 (emphasis added).

Where a plaintiff fails to identify a personal injury suffered by her as a consequence of the alleged violation, "other than the psychological consequence presumably produced" by the alleged violation, she does not allege an injury sufficient to confer standing under Article III. *Valley Forge*, 454 U.S. at 485. Yet that is precisely the type of "injury" that the First Circuit relied on here. *See* Pet. App. 26a. The First Circuit erred in allowing jurisdiction on such a basis and should therefore be reversed.

Importantly, the First Circuit's error would allow the specific type of harm to the separation of powers that Chief Justice Marshall warned Congress about two centuries ago. *Cf. Cuno*, 547 U.S. at 341 (quoting 4 Papers of John Marshall 95). When a court decides actual disputes between individuals, it "is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive's* responsibility of taking care that the laws be faithfully executed." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) (emphasis in original). Here, however, there is no real case or controversy to justify the courts' displacement of the executive branch. *See id.* Respondent is instead asking the

courts to intrude on that branch's purview when she has suffered no injury.

It bears emphasizing that the case-or-controversy requirement does not prevent legitimate interests from being protected through the judicial process. Rather, it "put[s] the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome." *Sierra Club*, 405 U.S. at 740. If someone is actually injured, *that person* may allege an injury sufficient to support federal jurisdiction. Respondent here does not meet that standard, and the federal courts are not a vehicle for vindicating "the value interests of concerned bystanders." *Valley Forge*, 454 U.S. at 472 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)); *see also Carney*, 141 S. Ct. at 498.

Respectfully, Respondent is an "uninjured plaintiff" who is "merely seeking to ensure a defendant's 'compliance with regulatory law.'" *TransUnion LLC*, 141 S. Ct. at 2206 (quotations omitted); *see also Steel Co.*, 523 U.S. at 106–07. She is effectively asking the courts to intrude on the function of the other branches without a "real need to exercise the power of judicial review" to protect her interests. *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009) (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974)). This is not a sufficient basis for Article III standing. *See TransUnion LLC*, 141 S. Ct. at 2206.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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