STANDING AND ORIGINALISM AFTER *LAUFER V. ARPAN*, 29 F.4TH 1268

JULIAN GREGORIO*

INTRODUCTION

As of late, Supreme Court standing doctrine has become contested,[1] including among originalists.[2] The Eleventh Circuit has jumped to the forefront of that standing-and-originalism debate, especially after Justice Thomas recently cited originalist Judge Kevin Newsom's *Sierra v. Hallandale Beach* concurrence.[3]

In *Sierra*, an Americans with Disabilities Act (ADA) case, the Eleventh Circuit had held that a deaf plaintiff suffered a concrete injury, albeit intangible and "stigmatic," when he couldn't hear and thus couldn't understand videos that a city posted on its official website without any closed captioning.[4] But the Supreme Court has since dealt with standing and original meaning in *TransUnion LLC v. Ramirez*.[5] There, it held—over Justice Thomas's dissent—that when *statutes* provide the basis for injury in fact (as opposed to "traditional" common-law bases such as physical or monetary harms), standing requires separate and individual concrete injury beyond a "bare procedural violation" of the act.[6] Thus, while Justice Thomas's dissent vindicated several of Judge Newsom's observations in *Sierra*, the *TransUnion* Court seemed to go a different direction.

---

* J.D. Candidate, Notre Dame Law School, 2023. Thank you to the excellent editors at the *Notre Dame Journal of Law, Ethics & Public Policy* for their assistance.

1. *Compare* TransUnion LLC v. Ramirez, 141 S. Ct. 2190 (2021) (the majority ruling that under the Court's precedents, thousands of class action litigants had no standing because they had no "injury in fact"), *with id.* at 2225 (Kagan, J., dissenting) (writing that standing jurisprudence "needs a rewrite").

2. *Compare id.* at 2215 (Thomas, J., dissenting), *with* Sierra v. City of Hallandale Beach, 996 F.3d 1110 (11th Cir. 2021) (Newsom, J., concurring). *See also* Julian Gregorio, Note, *What's Originalism After* TransUnion*?*, 98 NOTRE DAME L. REV. REFLECTION (Forthcoming Feb. 2023) (comparing Justice Thomas's originalist approach to standing with Judge Newsom's).

3. *TransUnion*, 141 S. Ct. at 2220 (citing *Sierra*, 996 F.3d at 1116–17 (Newsom, J., concurring)). For more Eleventh Circuit standing cases, *see* Muransky v. Godiva Chocolatier, Inc., 979 F.3d 917, 957–58 (11th Cir. 2020) (en banc) (Jordan, J., dissenting); Hunstein v. Preferred Collection and Management Services, Inc., 48 F.4th 1236 (11th Cir. 2022) (en banc) (the majority and dissent jousting over the implications of *TransUnion* for Eleventh Circuit cases).

4. *Sierra*, 996 F.3d at 1114.

5. 141 S. Ct. at 2190.

6. *TransUnion*, 141 S. Ct. at 2213 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016)).

I. STANDING SEQUEL IN THE ELEVENTH CIRCUIT

In an Eleventh Circuit "sequel" to *Sierra*, Judge Newsom writes both the majority opinion and a concurrence. In the majority opinion, he applies *TransUnion* as binding Supreme Court precedent, and in the concurrence, he expands upon his originalist views.[7]

A. Majority

Arpan involves a rather ubiquitous "tester" litigant named Laufer. Laufer is a disabled person who says she seeks to vindicate disabled people's rights as well as her own.[8] She filed a lawsuit under the ADA after she viewed a hotel's website that "omitted accessibility-related information required by federal regulations."[9] Under Supreme Court standing precedent, every plaintiff must allege (1) injury in fact ("concrete-and-particularized" injury), (2) redressable injury, and (3) causation.[10] Thus, the Eleventh Circuit asked, particularly with respect to concrete injury: What's it to Laufer?[11]

Laufer tried to show "what it is" to her. First, she refers to the ADA, which provides certain statutory rights for disabled persons.[12] In particular, the statute requires hotels to "[i]dentify and describe accessible features in the hotels . . . in enough detail to reasonably permit individuals with disabilities to assess independently whether a given hotel or guest room meets his or her accessibility needs."[13]

Next, Laufer says that while she did not intend to visit the hotel in question, the websites made her suffer "frustration," "humiliation," "isolation," and "segregation."[14]

The district court dismissed the case for lack of concrete and particularized injury, but writing for the majority, Judge Newsom reversed. He argued that a narrow reading of *Sierra* survives *TransUnion* and applies here: (1) Laufer's emotional injury still constitutes *concreteness*, and (2) the fact that the emotional injury affects Laufer in a "personal and individualized way" still constitutes *particularization*.[15]

Judge Newsom and the majority conceded that a broader reading of *Sierra* does not survive. That is, "[c]onstrued broadly, *Sierra* suggests that concrete

---

7. *See* Laufer v. Arpan LLC, 29 F.4th 1268, 1283 (11th Cir. 2022) (Newsom, J., concurring).

8. *Id.* at 1270; Catherine Cole, *A Standoff:* Havens Realty v. Coleman *Tester Standing and* TransUnion v. Ramirez *in the Circuit Courts*, 45 HARV. J.L. PUB. POL'Y 1033, 1035–41, 1043–46 (2022).

9. *Arpan*, 29 F.4th at 1270.

10. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

11. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 882 (1983) (explaining that standing inquiries ask, "What's it to you?").

12. Laufer v. Arpan LLC, 29 F.4th at 1271.

13. *Id.*

14. *Id.*

15. *Id.* at 1274–75 (quoting *Lujan*, 504 U.S. at 560 n.1).

injury exists whenever an individual experiences illegal discrimination, regardless of whether she suffers any discernible adverse effects"; however, "[f]or better or for worse, we can't do that."[16] Laufer only won here because she could show particularization as required by *Lujan v. Defenders of Wildlife*.[17] And she could only show particularization because she adequately pleaded emotional injuries: the hotel's procedural failure allegedly "frustrat[ed]," "humiliat[ed]," "isolat[ed]," and "segregat[ed]" her in a personal and individual way.

The court vacated and remanded to the district to make or clarify factual findings.

B. Concurrence

In concurrence, Judge Newsom suggests that while *Arpan* came out correctly under the Supreme Court's current Article III standing doctrine, it may not have come out correctly under his Article II theory.[18] That is, while Laufer's injury is concrete and particularized under Article III precedents, it might encroach on the Executive Branch under Article II. Judge Newsom previously advanced the Article II theory in his *Sierra* opinion.[19]

Laufer wanted "an injunction ordering the hotels to revise their websites," a benefit which would accrue to all disabled persons. Judge Newsom wrote that such a suit violates Article II because it allows a private plaintiff to exercise "the sort of broad-ranging enforcement discretion that the Constitution vests exclusively in Executive Branch officials."[20] In other words, when Laufer (like many tester plaintiffs) first chose to sue and *then* suffered an injury, thus "bringing herself to the source of her own injury," she illicitly exercised "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law."[21]

Judge Newsom thus implies that Laufer's suit "may" satisfy Article III standing yet "nonetheless constitute an impermissible exercise of 'executive Power' in violation of Article II."[22] But because the Supreme Court hasn't taken up the Article II limitation theory, he leaves it to them to decide that in future cases.

II. STANDING SEQUEL IN THE SUPREME COURT?

Laufer could well find herself in front of the Supreme Court soon. But it won't necessarily be on appeal from *Arpan*, or even out of the Eleventh Circuit.

---

16. *Id.*

17. 504 U.S. 555, 560–61 (1992).

18. *See Arpan*, 29 F.4th at 1295–97 (Newsom, J., concurring).

19. *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1133–39 (Newsom, J., concurring).

20. *Arpan*, 29 F.4th at 1296 (Newsom, J., concurring).

21. *Id.* at 1291 (quoting TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2207 (2021)).

22. *Id.* at 1284 (Newsom, J., concurring).

In a separate case Laufer filed, defendant Acheson Hotels has filed a petition for cert, which the Supreme Court has granted.[23]

The fundamental question may come down to *Lujan* and particularization. While concrete injury has proven difficult to apply, Judge Newsom calls *Lujan* perhaps "the quintessential example of a suit that ran afoul of Article II's vesting of executive authority."[24] And Laufer's petition identifies a circuit split, as three courts have come down against tester standing following the *TransUnion* decision. Meanwhile, two courts have come down for it: (1) the Eleventh Circuit in *Laufer v. Arpan*, and (2) the First Circuit in the Acheson Hotels case, *Laufer v. Acheson Hotels LLC*.[25]

Thus, as the Court expands on its standing doctrine, it is conceivable that Justice Thomas—and even other originalists on the Court—will seek inspiration from Judge Newsom's tidy "tester" case approach. But it is also conceivable that they will tread a different path. After all, Justice Thomas's *TransUnion* dissent did not explicitly echo the Article II limitation approach: he instead discussed it as an *Article III* limitation.[26]

CONCLUSION

We are yet to see whether the Supreme Court will stick with its tester standing precedent or continue with its recent clarifications of standing requirements. But now that the Supreme Court has taken up *Acheson Hotels v. Laufer*, *TransUnion* could soon get a sequel.

23. *See* Petition for Writ of Certiorari, Acheson Hotels, LLC v. Laufer, 2022 WL 16838117 (No. 22-429) (Nov. 15, 2022) [hereinafter Petition]; *see* Amy Howe, *Court takes up civil rights "tester" case*, SCOTUSBlog (Mar. 27, 2023, 10:52 AM), https://www.scotusblog.com/2023/03/court-takes-upcivil-rights-tester-case/.

24. *Arpan*, 29 F.4th at 1289 (Newsom, J., concurring).

25. *See* Petition, *supra* note 23, at 5; *see also Laufer v. Acheson Hotels LLC*, 50 F.4th 259, 275 (2022).

26. *See* TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2220 (2021).