IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHERYL THURSTON, Plaintiff, v. LOCAL 20 IBEW FEDERAL CREDIT UNION, Defendant.	CIVIL ACTION NO. 3:18-cv-00133-S

BRIEF OF THE CREDIT UNION NATIONAL ASSOCIATION AND CORNERSTONE CREDIT UNION LEAGUE AS AMICI CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT

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I. INTEREST OF AMICI CURIAE

The Credit Union National Association ("CUNA") is the largest trade association in the United States serving America's credit unions. With its network of affiliated state credit union associations, CUNA serves nearly 6,000 credit unions, which are owned by 110 million members collectively. Defendant Local 20 IBEW Federal Credit Union ("IBEW") is a member of CUNA. Credit unions, which may be federally chartered or state chartered, are not-for-profit, tax-exempt organizations that are owned and operated by their members. CUNA and the credit unions it serves strongly support the goals of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq*.

IBEW is also a member of the Cornerstone Credit Union League ("Cornerstone"), which is the nation's largest regional credit union trade association, serving more than 500 credit unions in Arkansas, Oklahoma, and Texas. Cornerstone exists to advance the success of credit unions in the region through legislative and grassroots advocacy; regulatory and compliance support; training, educational, and networking opportunities; essential communications related to the news and information affecting the credit union industry; and other products and services that establish Cornerstone as the essential partner for credit unions.

CUNA and Cornerstone jointly submit this amicus brief because the member credit unions of CUNA and Cornerstone have recently become the subject of a wave of litigation brought by individuals alleging that they are being denied equal access, not to the credit unions' locations, but to their websites. The alleged lack of website access is asserted to be a violation of Title III of the ADA. To date, more than 100 credit unions have been sued and thousands have received demand letters in over two dozen states, with new lawsuits filed and demand letters

issued every day. The plaintiffs (often the same plaintiff in a judicial district) have taken a scattershot approach, filing suits against most, if not all, credit unions within a state or judicial district, without regard to whether the plaintiff is even eligible for membership in the defendant credit union. For example, one plaintiff sued approximately 27 credit unions in Virginia. The complaints typically were filed without regard to any of the credit unions' membership eligibility criteria or whether the plaintiff was within the field of membership the particular credit union is permitted to serve.

This wave of litigation is particularly concerning because the Department of Justice ("DOJ"), the federal agency charged by Congress to implement the ADA (*see* 42 U.S.C. § 12186 (b)), has not promulgated any rules or guidelines to inform businesses of the standards, if any, for website ADA compliance. The vacuum created by the DOJ's failure to act, despite having begun a proceeding in 2010 to provide clear guidance, is being filled by aggressive plaintiffs' attorneys seeking to capitalize on the private right of action and attorneys' fees provided by the ADA. 42 U.S.C. § 12188; *see also* 28 C.F.R. § 36.505. These lawsuits, however, violate credit unions' due process rights to have notice of the standards to which they are supposed to conform. Further, many of these cases are filed against small credit unions with limited resources to defend these suits, including potentially having to pay plaintiffs' attorneys' fees. Notwithstanding the lack of merit, many of CUNA's and Cornerstone's members have been entering into settlements to avoid litigation, notwithstanding that these settlements leave them exposed to further ADA lawsuits regarding website accessibility, given the lack of standards.

Given the number of suits, their geographic range, and the limited resources of many of the targeted credit unions, CUNA and Cornerstone have has a substantial interest in this case. As

noted, credit unions are not-for-profit financial cooperatives, whose members/consumers are also owners who have voting rights. There is thus a close and unique relationship between credit unions and their member-owners, who not only use their credit union's financial services but also participate in the governance of the credit union. As a result of this cooperative structure, litigation costs directly impact the pooled resources of the membership, resulting in settlements and attorneys' fees coming out of the pockets of the consumer-owners, who themselves may be protected by the ADA.

Already, case-by-case litigation has led to disparate holdings, resulting in different credit unions being subject to differing standards, or even the same credit union being subject to repeated lawsuits based on ever-evolving private sector technological developments. The members of CUNA and Cornerstone operate within this district and are targets and potential targets of similar litigation; thus this brief and the Court's ruling are vital to CUNA's and Cornerstone's membership.

II. BACKGROUND OF THE CREDIT UNION SYSTEM AND IBEW

Credit unions grew out of the Great Depression to address the difficulty Americans were having in obtaining credit to start a business, buy a home, or meet everyday financial needs. In response, Congress, in 1934, passed the Federal Credit Union Act ("FCUA"), which authorized the creation of federally chartered credit unions. 12 U.S.C. § 1752(1). Pursuant to the FCUA, membership in credit unions is limited to specific groups, defined in each credit union's charter, who must share a common bond of occupation or association, or be located within a well-defined neighborhood, community, or rural district, with the defined group eligible for membership referred to as the "field of membership." *Id.*, § 1759(b)(1)-(3). The FCUA bars credit unions

from serving the general public. *See id.* By law, therefore, credit unions serve specific populations, such as employees of a specific company, union or agency, individuals in specific occupations (such as law enforcement or health care), or specific geographic areas, and only those individuals who are within the field of membership may become members of the credit union. By filing these lawsuits against so many different credit unions, the plaintiffs in these cases are making the implausible claim that they can simultaneously meet vastly different field of membership restrictions.

Moreover, many credit unions are small businesses with extremely limited staff and resources, and they often serve smaller or rural local communities that may otherwise have limited options for financial services. In the United States, nearly half of all credit unions employ five or fewer full time employees. More than half have assets of less than $50 million. Moreover, credit unions with less than $20 million in assets account for over 40% of all U.S. credit unions. IBEW falls within these parameters. It is a small credit union whose field of membership is limited, as described in detail in IBEW's Motion to Dismiss.

III. SUMMARY OF ARGUMENT

Plaintiff lacks standing. She has not suffered concrete and particularized harm because she has not alleged that she meets the eligibility requirements for membership in IBEW as set forth in its charter, nor would any remedial action regarding the website cure her lack of eligibility to become a member. *See Carroll v. Nw. Fed. Credit Union*, No. 1:17-cv-01205, slip op. at 3-5 (E.D. Va. Jan. 26, 2018) (dismissing plaintiff's ADA claim that the credit union's website was inaccessible because the plaintiff was not a member of the credit union nor had he

"alleged any facts in his Complaint [regarding field of membership] to suggest" he was "eligible to become a member.")

Moreover, the case should be dismissed because websites are not "places of public accommodation" covered by the ADA as they are not physical spaces. Additionally, applying the ADA to websites would render the statute impermissibly vague as applied and violate IBEW's due process rights. Specifically, the DOJ has not formally issued a rule that the ADA applies to websites, let alone promulgated implementing regulations, leaving a fractured legal landscape in which courts have taken sharply different positions on the question. This is also a textbook case for the application of the primary jurisdiction doctrine, which allows courts to stay or dismiss actions that implicate questions of interpretation that Congress has delegated to an agency with specific expertise, such as whether websites must comply and if so, the highly technical determination of the applicable standards. Such an action would benefit both the disabled community, which would have explicit website accessibility standards on which they could rely, and businesses, which would have a clear guidepost to follow.

IV. ARGUMENT

A. Plaintiff Lacks Standing

The jurisdiction of federal courts is limited to actual cases and controversies, which requires a plaintiff to demonstrate standing. *See Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 2205 (1975). IBEW in its Motion to Dismiss addresses in detail Plaintiff's lack of standing to assert her claims; CUNA and Cornerstone will not reiterate those arguments here. However, it is particularly important in a case such as this, seeking a positive injunction to require remedial action, that the Court rigorously assess standing and avoid the concern articulated by those who

supported enactment of the ADA that the statute not "lead to an explosion of litigation, inflicting crippling uncertainties and costs on the small businesses." *Steger v. Franco, Inc.*, 228 F.3d 889, 895 (8th Cir. 2000) (Loken, J., concurring in part and dissenting in part). CUNA and Cornerstone have witnessed many of their affiliated credit unions being sued by the same plaintiff, including Plaintiff here. Yet each credit union has its own restricted field of membership. To gain standing in these cases, the plaintiff would have to implausibly claim that he or she could meet the specific and limited field of membership for each of the credit unions in order to be eligible for that credit unions services. The implausibility of such a claim underscores the need to curtail these types of lawsuits.

As described above, credit unions are membership organizations whose charters prescribe those who may become members. Without meeting these criteria, Plaintiff cannot avail herself of the credit union's financial services, and thus can suffer neither a concrete nor particularized injury due to any alleged lack of website access. *See Carroll v. Nw. Fed. Credit Union*, No. 1:17-cv-01205, slip op. at 3-5 (E.D. Va. Jan. 26, 2018) (dismissing plaintiff's ADA claim that credit union's website was inaccessible because plaintiff was not a member of the credit union, nor had he "alleged any facts in his Complaint [regarding field of membership] to suggest" he was "eligible to become a member."); *Griffin v. Dept. of Labor Fed. Credit Union*, No. 1:17-cv-1419, slip op. at 3-4 (E.D. Va. Feb. 21, 2018) ("Because plaintiff is not permitted to utilize [the credit union's] financial services, he has suffered no concrete injury as a result of being denied access to [its] website"); *Carroll v. ABNB Fed. Credit Union*, No. 2:17-cv-521, slip op. at 9 (E.D. Va. Mar. 3, 2018) (dismissing plaintiff's complaint because "Plaintiff has made no allegations showing that he falls within ABNB's membership field . . . he has not suffered a

concrete injury from being unable to access information about the services available to members of ABNB"). Just as courts have found a lack of ADA standing for plaintiffs who have not alleged that they would return to a nearby physical location, (*see id*. at 3 (citing ADA cases)), Plaintiff here has alleged no basis to assume that enhanced access to IBEW's website would permit her to avail herself of its services.

B. A Website is Not a Place of Public Accommodation

The ADA's ban on discrimination based on disability applies by its plain terms only to physical locations. The Act provides that no individual shall be discriminated against "on the basis of disability in the full and equal enjoyment . . . of any ***place*** of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). The common meaning of the term "place" refers to a "physical environment." *See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/place (last visited Feb. 1, 2018) (defining "place" as a "physical environment"' "a particular region, center of population, or location"; or "a building, part of a building, or area occupied."). DOJ regulations similarly define a "place of public accommodation" as a physical location, specifically, as a "facility," which in turn is defined as "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 36.104.

That the ADA is limited to physical locations is further confirmed by the exhaustive list of twelve categories of entities that are considered to be "public accommodations." 42 U.S.C. 12181(7); *see ADA Title III Technical Assistance Manual Covering Public Accommodations and Commercial Facilities*, ADA.GOV, https://www.ada.gov/taman3.html (last visited February 1,

2018) (stating that a facility cannot be considered "a place of public accommodation if it does not fall under one of these 12 categories," which are "an exhaustive list."). The categories themselves refer to either places or establishments, both of which connote physical locations. *See, e.g.,* 42 U.S.C. § 12181(7) (A) ("an inn, hotel, motel or other place of lodging"); *id.* § (7) (B) ("a restaurant, bar, or other establishment"); *id.* § (7)(E) ("a bakery, grocery store, clothing store hardware store, shopping center, or sales or rental establishment"); *id.* § (7)(F) ("a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service . . . office of an accountant or lawyer . . . insurance office . . . or other service establishment). Just as "place" refers to a physical location, the term "establishment" is limited to physical locations. *See Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 534-35 (5th Cir. 2016) (based on common definitions, principles of statutory construction and legislative history, the term "establishment" as used in Title III means a physical place), *cert. denied*, 138 S. Ct. 55 (Mem.) (2017).

Neither the term "website" nor the concept thereof appear anywhere in the ADA's exhaustive list of covered public accommodations. This omission alone is sufficient to conclude that websites cannot be considered a place of public accommodation. *Carroll*, slip op. at 4 ("Notably absent from the list is the term 'website.' Not only is 'website' not found on the list, but the statute does not list anything that is not a brick and mortar 'place'"). The Third and Sixth Circuits concur that Title III of the ADA unambiguously applies only to physical locations, as evidenced by the comprehensive list of public accommodations. *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998) ("[W]e do not find the term 'public accommodation' or the terms in 42 U.S.C. § 12187(7) to refer to non-physical access or even to be ambiguous as to their

meaning."); *Parker v. Metro Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997) ("As is evident by § 12187(7), a public accommodation is a physical place and this Court has previously so held.") (citing *Stoutenborough v. National Football League, Inc.*, 59 F.3d 580 (6th Cir. 1995)). The Fifth Circuit, with its decision in *Magee*, now joins these Circuits in confining the ADA to physical locations.

Other Circuits have held otherwise, but their reasoning is flawed, and this has resulted in a highly fractured legal landscape. *See, e.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000) (ADA applies to physical locations, but websites may be subject to ADA if there is a sufficient nexus to a physical location). One result of this analysis is that businesses providing the same goods or services are subject to disparate treatment depending on whether they also have brick and mortar locations, in which case their website is subject to the ADA, or if they provide services wholly online, in which case their websites are exempt. This has a particularly pernicious effect for credit unions that compete with purely online financial services.

A distinct minority of courts, those in the First and Seventh Circuit, have ruled even more expansively, finding that websites are places of public accommodation even if the business is conducted solely on line, completely severing any link to a physical location. *See Access Now v. Blue Apron, LLC*, No. 17-cv-116-JL, 2017 WL 5186354, at *4 (D.N.H. Nov. 8, 2017) (observing that "the majority of Courts of Appeals that have addressed this issue require a 'public accommodation' to be an actual, physical space or have a nexus to an actual, physical space" but concluding it was bound by First Circuit precedent in *Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New England, Inc.* 37 F.3d 12 (1st Cir. 1994)); *Nat'l Fed'n of the Blind v.*

Scribd Inc., 97 F. Supp. 3d 565, 573 (D. Vt. 2015); *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200 (D. Mass. 2012). The *Carparts* court's reasoning, however, is flawed. *Carparts* reasoned that by including "travel services" as one of the categories of public accommodations, Congress must have intended to include services that do not require actually going to a physical location because many travel services conduct business by telephone or mail. 37 F.3d at 19 ("It would be irrational to conclude that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same services over the telephone or by mail are not"). But this reasoning fails to give due consideration to principles of statutory construction that "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 1069 (1995). The particular category that includes "travel service," 42 U.S.C. § 12181(7)(F), is limited to "service establishment[s]," which, as noted above, connotes a physical place. Regardless, predicating a substantial expansion of the ADA to include websites on these concepts runs afoul of Justice Scalia's oft-repeated warning that Congress does not hide elephants in mouse holes. *See Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468, 121 S. Ct. 903, 910 (2001).

C. If the ADA Is Deemed to Apply to Websites, the Absence of Any Implementing Regulations by the DOJ Renders the Act Impermissibly Vague

Expanding Title III of the ADA to include websites as places of public accommodation would render the Act vague as applied and violate IBEW's due process rights to be fairly informed of the conduct to which it is expected to conform. It is "[a] fundamental principle in our legal system [] that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253, 132 S. Ct. 2307, 2317 (2012). A statute that is "so vague that men of common intelligence must necessarily

guess at its meaning and differ as to its application, violates the first essential element of due process of law." *Id.* (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126 (1926)). "This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment." *Fox Television Stations*, 567 U.S. at 253, 132 S. Ct. at 2317. "Liberty depends on no less: '[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972)). "Put more colloquially, '[t]hose regulated by an administrative agency are entitled to know the rules by which the game will be played.'" *AMC Entm't*, 549 F.3d at 768 (quoting *Ala. Prof'l. Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999)).

The Supreme Court has articulated a two-part test to determine whether a statute is unconstitutionally vague as applied: the court must first determine whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and then consider whether the law "provide[s] explicit standards for those who apply [it]." *Grayned*, 408 U.S. at 108, 92 S. Ct. at 2298-99. The Supreme Court has also articulated harms caused by vague laws. *See id.* Such laws "may trap the innocent by not providing fair warning," lead to "arbitrary and discriminatory enforcement," and "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108. All of these evils are attendant in this case.

The key terms of Title III are impermissibly vague in the absence of implementing regulations by the DOJ setting standards and guidelines explicating the actions entities must take to make their websites fully and equally accessible to those with disabilities. The statute was not intended to be self-effectuating, as it delegates authority to the DOJ to issue implementing regulations. *See* 42 U.S.C. § 12186(b). Although the DOJ has complied with its obligation by issuing literally thousands of detailed regulations regarding barriers to accessing physical locations (*see* 28 C.F.R. Part 36), the DOJ has repeatedly refrained over the years from promulgating any standards or guidelines pertaining to website accessibility.

The statute itself provides no applicable standards of conduct against which a private entity reasonably can assess whether its website is sufficiently accessible. Instead, the statute speaks in broad generalities. The general ban on discrimination requires covered entities to provide disabled individuals with "full and equal enjoyment" of "any place of public accommodation." 42 U.S.C. § 12182(a). The Act lists generally prohibited activities that require covered entities to refrain from denying those with disabilities "the opportunity … to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity," or bars covered entities from providing an unequal or separate benefit. *Id.* § 12182(b)(1)(A)(i). The statute then identifies examples of "specific prohibitions" related to discrimination, but these requirements provide no further elucidation on what an entity is required to do, particularly as those prohibitions may be applied to websites. *Id.* § (b)(2). These provisions require entities to "make reasonable modifications" to afford access, unless making such modifications would "fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations," or to ensure that disabled individuals are not treated

differently due to the "absence of auxiliary aids and services" unless providing such aids would result in fundamental alteration or create an "undue burden." *Id.* § (b)(2)(A)(ii-iii). Covered entities must also remove "communications barriers that are structural in nature" where such removal is "readily achievable." *Id*. § (b)(2)(A)(iv).

In litigation relating to physical barriers, these provisions have been saved from charges of impermissible vagueness only because the DOJ had issued detailed regulations giving them sufficient precision. *See Pinnock v. Int'l House of Pancakes Franchisee*, 844 F. Supp. 574, 581 (S.D. Cal. 1993) ("*When considered in conjunction with the Department of Justice guidelines,* these terms ["reasonable modifications", "readily achievable," "fundamentally alter", or "undue burden",] are not unconstitutionally vague.") (emphasis added); *see also Botosan v. Paul McNally Realty*, 216 F.3d 827, 836 (9th Cir. 2000) ("*Taken together with administrative regulations and interpretations*, the term ["readily achievable"], as it is used in Title III, is sufficiently specific to put the owner of a public accommodation on notice of what is required by Title III.") (emphasis added) (citing ADA Accessibility Guidelines for Buildings and Facilities, 28 C.F.R. ch. 1, app. A.); *see generally United States v. Schneiderman*, 968 F.2d 1564, 1568 (2d Cir. 1992) (administrative regulations and interpretations may provide sufficient clarification to save an otherwise vague statute).

There are no comparable DOJ regulations to salvage Title III as applied to website accessibility. Although the DOJ has informally pronounced in various statements and *amicus* filings its belief that websites are places of public accommodation, at least when there is a nexus between a physical location and the website, these pronouncements have not been rendered in Administrative Procedure Act ("APA") notice and comment rulemakings (*see, e.g.,* 5 U.S.C. §

553), and they have not been accompanied by any DOJ-adopted standards or guidelines. Courts have not afforded deference to these informal DOJ statements that websites are places of public accommodation. *See Robles v. Domino's Pizza LLC*, No. CV 16-06599 SJO, 2017 WL 1330216, at *6 (C.D. Cal. March 20, 2017) (concluding that "little or no deference is owed to statements made by the DOJ through documents filed in the course of litigation.")

The DOJ took an initial step toward adopting website regulations in 2010 when it released an Advance Notice of Proposed Rulemaking ("ANPRM"), a preliminary step toward an APA rulemaking. *See Nondiscrimination on the Basis of Disability: Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations*, 75 Fed. Reg. 43460 (proposed July 26, 2010) (to be codified at 28 C.F.R. pts. 35 & 36). The ANPRM gathers general information or views that can inform the agency when issuing a Notice of Proposed Rulemaking in which actual rules or guidance would be proposed subject to public comment and a cost/benefit analysis. The DOJ never progressed beyond this initial step, and recently announced it was withdrawing the ANPRM altogether.

At any rate, the DOJ's statements in the ANPRM leave no doubt that the two-pronged test articulated by the Supreme Court to identify when a statute is impermissibly vague as applied are readily met. First, "men of ordinary intelligence" – indeed, here, able jurists – "differ as to" whether websites are even covered by the ADA and if so, under what circumstances. As described above, some judges have concluded that all websites are subject to ADA, others say none are, and others say it depends on whether there is a nexus between the website and a physical location. This leaves companies with websites covering multiple jurisdictions subject to inconsistent obligations. *Compare Nat'l Ass'n of the Deaf v. Netflix*, Inc., 869 F. Supp. 2d 196

(D. Mass 2012) (applying ADA to Netflix's website) *with Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017 (N.D. Cal. 2012) (Netflix's website is not subject to the ADA because it has no nexus to a physical location). Within Circuits that utilize a nexus test, credit unions are subject to arbitrary and discriminatory treatment because their websites may be subject to the ADA, while competing providers of purely online financial services are not.

The second prong of the vagueness test – the lack of explicit guidelines – is also met. The DOJ concedes that "a clear requirement that provides the disability community consistent access to Web sites and covered entities clear guidance on what is required under the ADA ***does not exist.***" 75 Fed. Reg. at 43464 (emphasis added). At times, the DOJ has indicated that compliance with an evolving set of "voluntary" standards, the Web Content Accessibility Guidelines ("WCAG"), which were developed by a private group of internet stakeholders, should be followed. *See id.* at 43465. The DOJ, however, has never officially adopted those standards and, in the 2010 ANPRM, specifically asked if they should be adopted as the DOJ's website accessibility standard. *Id.* at 43465. Moreover, those standards are subject to modification over time. On other occasions, the DOJ has indicated that staffing a call-in telephone line might be sufficient. *See, e.g.*, *Robles*, 2017 WL 1330216, at *6 (DOJ's statement of interest "suggest[s] that Dominos' provision of a telephone number for disabled customers satisfies its obligations under the ADA.") The plaintiffs in the cases filed against credit unions throughout the country allege that far more than staffing a phone line is required to be ADA compliant, but the lack of definitive guidance leaves businesses and courts unsure of the requisite standard.

The *Robles* case is highly instructive. There, the plaintiff alleged that Dominos' website did not provide equal access because it was not compliant with WCAG standards. *Robles*, 2017 WL 1330216, at *8. The court ruled, however, that seeking to apply those standards "without the DOJ offering meaningful guidance on this topic . . . flies in the face of due process." *Id.* at *5. The court's primary concern was that the DOJ had never formally adopted the WCAG standards, and any suggestion in DOJ statements of interest or in filing *amicus* briefs in the context of specific litigation should be afforded no deference. *Id.* Even if it were to give some deference to such filings, the court found that the notice problem remained because the DOJ itself was inconsistent about which version of WCAG should apply or whether some other remedial effort could be sufficient. *Id.* at *7-8 (describing inconsistent DOJ positions on application of the WCAG guidelines and concluding that this inconsistency demonstrates that the "lack of formal guidance in this complex regulatory arena places those subject to Title III in the precarious position of having to speculate which accessibility criteria their websites and mobile applications must meet.")

Other courts, however, have distinguished *Robles* and rejected due process claims on the ground that the plaintiff in their case did not predicate a statutory violation on failure to implement WCAG guidelines, but rather simply asserted a violation of statutory requirements. *See Blue Apron*, 2017 WL 5186354, at *6 (where defendant failed to challenge the ADA as impermissibly vague, court rejected due process challenge where plaintiff's website access claim rested on a statutory violation and posited WCAG guidelines as one possible remedy, not a basis for liability). As outlined above, however, the ADA's general prescriptions as they may be applied to websites are impermissibly vague in the absence of implementing regulations.

Unfortunately, rather than dismissing lawsuits in light of the lack of explicit standards, some courts have assumed the role that Congress delegated to the DOJ, and they continue to exercise their own policy judgment as to what level of access is good enough, creating the very harm that the Supreme Court seeks to avoid.

D. The Court Should Dismiss the Complaint Pursuant to the Primary Jurisdiction Doctrine.

In light of the foregoing, referral by this Court to the DOJ pursuant to the primary jurisdiction doctrine, which allows courts to stay proceedings or dismiss a complaint without prejudice pending the resolution of an issue "within the special competence of an administrative agency," would be prudent and appropriate. *Northwinds Abatement, Inc. v. Emp'rs Ins. of Wausau*, 69 F.3d 1304, 1309 (5th Cir. 1995). Application of the doctrine lies within the sound discretion of the courts, which typically look to factors such as: (1) whether the court has original jurisdiction over the claim; (2) whether adjudication of that claim requires the resolution of predicate issues or the making of preliminary findings; and (3) whether the legislature has established a regulatory scheme whereby it has committed the resolution of those issues or the making of those findings to an administrative body. *Id.* at 1311.

All of these factors are met here. The issue of website accessibility must be resolved, but through the expert agency to which Congress delegated authority, the DOJ, not through piecemeal litigation throughout the country. Implementation of the ADA has been "placed by Congress" within the jurisdiction of the DOJ, clearly an "administrative body having regulatory authority." Most importantly, the development of appropriate standards and a uniform set of guidelines in a highly technical area such as this – website capabilities necessary to provide access to individuals suffering from various types of disabilities – requires special expertise.

Development of website accessibility requirements through piecemeal litigation is contrary to Congress's delegation of authority to the DOJ to promulgate standards through a rigorous APA rulemaking process in which all stakeholders may participate while ensuring that resulting rules are subjected to a cost/benefit analysis. *See Robles*, 2017 WL 1330216, at *8 (dismissing website accessibility complaint pursuant to primary jurisdiction in light of Congress's mandate to DOJ to issue regulations and render technical assistance "necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III."). The DOJ should not be allowed to sidestep its statutory obligations to issue implementing rules by merely filing statements that lack the force of law in pending cases. Dismissing cases such as this one without prejudice pursuant to primary jurisdiction will encourage the DOJ, with its particular expertise in the area, to fulfill its legislative mandate and provide needed guidance to businesses, the disabled community and the courts.

The lack of consistent, uniform website accessibility rules is fueling the current onslaught of litigation, creating the very type of harm that the original proponents of the ADA intended to avoid. They recognized that establishing a private right of action could lead to an "explosion of litigation, inflicting crippling uncertainties and costs on the small businesses." *Steger*, 229 F.3d at 895 (Loken, J., concurring in part and dissenting in part). There was particular concern that "unknown terms of art" in the ADA, such as "readily achievable," should not be applied by jurists in the first instance. *See* 135 CONG. REC. S10760-61 (daily ed. Sept. 7, 1989) (comments of Sen. Dale Bumpers). In response, Senator Tom Harkin, the ADA's chief sponsor in the Senate, allayed such concerns by predicting that "instances in which cases could be brought for

injunctive relief would be very few and will involve egregious cases of multiple types of discrimination." *Id.* at S10754 (statement of Senator Tom Harkin). That prediction clearly has not been borne out in the context of website accessibility. The tidal wave of litigation also leads to an inefficient use of judicial resources as courts throughout the country attempt to grapple with the same questions – does the ADA apply to websites, and if so, what standards of accessibility apply? Rather than enabling the DOJ to continue to abdicate its responsibility to develop comprehensive rules, this Court should join others that are exercising their prerogative to refer the case to the DOJ.

V. CONCLUSION

Amici curiae respectfully submit that the Court should dismiss this case for lack of standing and because the ADA does not apply to websites. Should the Court find that it does, it should dismiss the case on the ground that the DOJ's failure to adopt website accessibility standards renders Title III of the ADA impermissibly vague as applied. In the alternative, this Court should exercise primary jurisdiction and refer the case to the DOJ.

Respectfully submitted March 30, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2018, I electronically filed a true and correct copy of the foregoing **BRIEF OF THE CREDIT UNION NATIONAL ASSOCIATION AND CORNERSTONE CREDIT UNION LEAGUE AS AMICI CURIAE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT** with the clerk of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court, and the electronic case filing system sent a "Notice of Electronic Filing" to all attorneys of record, who have consented in writing to accept this Notice as service of this document by electronic means.

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