No. 18-2887

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MATTHEW CARELLO,
Plaintiff-Appellant,

v.

AURORA POLICEMEN CREDIT UNION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
DISTRICT JUDGE THOMAS M. DURKIN
CIVIL ACTION NO. 1:17-CV-09346

BRIEF OF *AMICI CURIAE* CREDIT UNION NATIONAL ASSOCIATION, ILLINOIS CREDIT UNION LEAGUE, AND WISCONSIN CREDIT UNION LEAGUE IN SUPPORT OF DEFENDANT-APPELLEE SEEKING AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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Short Caption: Matthew Carello v. Aurora Policemen Credit Union

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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Litchfield Cavo LLP

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Attorney's Printed Name: Christine A. Samsel

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Attorney's Printed Name: Stephen R. Olson

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The Wisconsin Credit Union League

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: s/ John C. Engel Date: December 20, 2018

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FED. R. APP. P. 29(a) DISCLOSURE STATEMENT

Amici Curiae Credit Union National Association ("CUNA"), Illinois Credit Union League ("Illinois CUL"), Wisconsin Credit Union League ("WCUL") (collectively, the "Associations") hereby furnish the following information in accordance with Federal Rule of Appellate Procedure 29(a). Counsel for the Associations authored this amicus brief in whole. CUNA contributed money that was intended to fund preparing or submitting this brief. No other person contributed money that was intended to fund preparing or submitting this brief.

NOTICE OF CONSENT RECEIVED FROM ALL PARTIES

Counsel for *Amici Curiae* sought and obtained consent from all parties for the filing of this brief. Appellant's consent was conditioned upon obtaining an extension of time to file a reply, which the Court granted on November 21, 2018.

INTEREST OF AMICUS CURIAE

The Associations submit this *amicus* brief pursuant to Federal Rule of Appellate Procedure 29(a). 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. One of its affiliated state associations is the Illinois CUL which is the primary trade association for nearly 300 state and federal credit unions doing business in Illinois, serving approximately 3.4 million

members. Another one of its affiliated associations is the WCUL which is the dues-supported trade association for Wisconsin's credit unions. WCUL represents 129 credit unions in Wisconsin and more than 3 million credit union members.

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. The Associations and the credit unions they serve strongly support the goals of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq*. The Associations provide a wide range of educational information to its members, including information on the ADA.

The member credit unions of the Associations have become subjected to threats of legal action brought by a handful of individuals alleging that they are being denied equal access, not to the credit unions' physical locations, but to their websites. The alleged deficient website accessibility 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 more than two dozen states, with new lawsuits filed and demand letters issued regularly. The plaintiffs (often the same plaintiff in a judicial district), have taken a scattershot approach, filing cookie-cutter complaints 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 any of the defendant credit unions, each of which has specific membership criteria

with which it is required by law to comply. 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 legally required restricted field of membership that the 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, even in the face of the deluge of claims being asserted against a wide range of industries. The vacuum created by the DOJ's failure to act, despite having begun a proceeding in 2010 to provide clear guidance, is increasingly 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 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 and pay any resulting attorneys' fees to the plaintiffs' counsel. Notwithstanding the lack of merit of the claims, many of *amici curiae*'s members have been forced to enter into settlements to avoid immediate litigation, even though these

settlements provide them with no protection against future ADA lawsuits regarding website accessibility, given the lack of definitive standards.

Due to the number of suits, their geographic range, and the limited resources of many of the targeted credit unions, *amici curiae* have a substantial interest in this case. As noted, credit unions are not-for-profit financial cooperatives, whose members 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 member-owners, who themselves may be protected by the ADA. Thus, the Court's ruling is vital to the membership of *amici curiae*, and this *amicus* brief is appropriately interposed and considered.

BACKGROUND OF THE CREDIT UNION SYSTEM

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 "for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes." 12 U.S.C.

§ 1752(1). Pursuant to the FCUA, members of a credit union must share a "common bond." *Id.* § 1759. States have also enacted legislation governing credit unions. Pursuant to Illinois law, members of a credit union must also share a "common bond" of occupation, association, or community. See 205 ILCS 305/1.1; 38 Ill. Adm. Code § 190.10. Thus, membership in federal or state-chartered credit unions is legally restricted to specific groups, defined in the 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. 12 U.S.C. § 1759(b)(1)-(3); 205 ILCS 305/1.1(2). The FCUA and Illinois law thus bar credit unions from serving the general public. *See* 12 U.S.C. § 1759(b)(1)-(3); 205 ILCS 305/1.1(2). The restricted group eligible for membership in a particular credit union is called a "field of membership."

By law, therefore, credit unions serve specific populations, such as employees of a specific company, union or agency, or specific geographic areas, and only those individuals who are within the field of membership may become members of the credit union. This membership structure creates strong incentives for credit unions to ensure that their members are well served. This, of course, includes valued members with disabilities. Yet, by filing these lawsuits against so many different credit unions, the plaintiffs in these cases are ignoring the membership requirements altogether, or making the implausible claim that the

same plaintiff can simultaneously meet vastly different and often mutually exclusive 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. Some credit unions are the only federally-regulated financial institutions in underserved areas with high poverty rates. In the United States, nearly half of all credit unions employ five or fewer full time employees. Over one-quarter of credit unions have less than $10 million in assets, and credit unions with less than $100 million in assets account for over 72% of all U.S. credit unions.

SUMMARY OF ARGUMENT

The district court correctly held that Appellant lacks standing. Appellant has not suffered concrete and particularized harm because he has not alleged that he meets the eligibility requirements for membership in Defendant-Appellee Aurora Policemen Credit Union ("APCU") as set forth in its charter. Appellant's inability to enjoy the benefits, or partake in the services, of APCU is in no way affected or caused by the alleged inadequacies of APCU's website, but rather by Appellant's apparent ineligibility for membership in APCU's restricted field of membership. Nor would any remedial action regarding the website cure his lack of eligibility to become a member. The vast majority of courts that have addressed this issue have

reached the same conclusion – plaintiffs lack standing to assert ADA website claims against credit unions where they do not qualify for membership. The minority of cases in which district courts have denied motions to dismiss on standing grounds confuse the statutory right for "any person" to sue with the Constitutional requirement of standing.

Courts have also specifically rejected dignity harm or tester status as grounds for standing. Permitting Appellant to circumvent credit unions' membership restrictions by asserting standing on these grounds would eviscerate constitutional limitations if extended to ADA website claims. Appellant's arguments completely divorce allegations of harm from any tie to a physical, brick-and-mortar location and would subject credit unions and other businesses to lawsuits from any disabled person located anywhere in the country, no matter how far removed from brick-and-mortar sites. Most courts, however, have refused to extinguish the need to tie ADA relief to a physical location.

Although the Seventh Circuit has not definitively ruled on whether Title III of the ADA applies to websites, it is consistent with prior Seventh Circuit precedent to require a nexus to a physical location to invoke standing a website accessibility case.

ARGUMENT

I. Appellant Lacks Standing Because He Has Not Pled That He Is Within The Field Of Membership.

The jurisdiction of federal courts is limited to actual cases and controversies, which requires a plaintiff to demonstrate standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It is particularly important in a case such as this, where the plaintiff seeks a positive injunction to require remedial action on the part of smaller businesses, 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 has witnessed many of its affiliated credit unions being sued by the same plaintiff, including Appellant here. Yet each credit union has its own restricted field of membership that the plaintiff cannot meet, a fact that is often ignored in these complaints. To gain standing in these cases, the plaintiff would have to implausibly claim that he or she can meet the limited and often mutually exclusive field of membership for each of the credit unions in order to be eligible for that credit union's services.[1] The improbability of such a claim underscores the need to curtail these types of lawsuits.

[1] As noted, fields of membership are often defined by places of employment or residence. The same plaintiff filing suits against multiple credit unions would thus have the courts believe they are simultaneously employed by multiple enterprises or reside in multiple locations.

As described above, credit unions such as APCU are membership organizations whose charters prescribe exactly who is eligible to become a member. Without meeting the prescribed criteria, Appellant cannot avail himself 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. A conclusion confirmed by the vast majority of courts that have addressed the issue. *See, e.g.*, *Griffin v. Dep't. of Labor Fed. Credit Union*, 293 F. Supp. 3d 576, 580 (E.D. Va. 2018), appeal docketed, No. 18-1312 (4th Cir. Mar. 20, 2018); *Mitchell v. Toledo Metro Credit Union*, No. 3:18CV784, 2018 WL 5435416, at *3 (N.D. Ohio Oct. 29, 2018); *Jones v. Savannah Fed. Credit Union*, No. CV417-228, 2018 WL 3384310, at *5 (S.D. Ga. July 10, 2018); *Mitchell v. Dover-Phila Fed. Credit Union*, No. 5:18CV102, 2018 WL 3109591, at *5 (N.D. Ohio June 25, 2018); *Carroll v. 1st Advantage Fed. Credit Union*, No. 4:17-cv-129, 2018 WL 2933411, at *3-4 (E.D. Va. April 9, 2018); *Carroll v. Wash. Gas Light Fed. Credit Union*, No. 1:17-cv-1201, 2018 WL 2933412, at *4 (E.D. Va. April 4, 2018); *Carroll v. ABNB Fed. Credit Union*, No. 2:17-cv-521, 2018 WL 1180317, at *4 (E.D. Va. Mar. 5, 2018); *Carroll v. Nw. Fed. Credit Union*, No. 1:17-cv-01205, 2018 WL 2933407, at *2 (E.D. Va. Jan. 26, 2018); *Scott v. Family Sec. Credit Union*, No. 5:18-cv-00154, slip op. at 6 (N.D. Ala. June 25, 2018).

A. Appellant's Argument Regarding the Scope of the ADA Does not Resolve the Question of Article III Standing.

Appellant argues at length that he need not qualify for membership in the credit union to have standing because the ADA does not require a complainant to be a customer or patron of the business.[2] Appellant Br. at 11-29. Even assuming the statute in relevant part does not have a patron requirement in order to bring a lawsuit, a statutory right to sue does not automatically confer Article III standing. *Spokeo*, 136 S. Ct. at 1547-48 ("Injury in fact is a constitutional requirement and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing") (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)); *Spokeo*, 136 S. Ct. at 1549 (a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right."). Under the *Spokeo* analysis, simply being among the class of persons entitled to bring a suit does not, without an additional showing of particularized and concrete harm, suffice to confer Article III standing. Applying *Spokeo* to ADA website suits, Courts have found that simply alleging an inability to access a credit union website where the plaintiff is ineligible for membership constitutes a "bare procedural violation" of the ADA

[2] Appellant characterizes the lower court's analysis regarding the customer or patron requirement as going to the merits. Appellant Br. 12-14. The court, however, was simply addressing the issue of standing in light of *Spokeo's* instruction that a statutory right to sue does not necessarily confer Article III standing.

that is insufficient to demonstrate an injury in fact. *See Dep't of Labor Fed. Credit Union*, 293 F. Supp. 3d at 579-80; *Carroll v. Roanoke Valley Cmty. Credit Union*, No. 7:17cv00469, 2018 WL 2921106, at *2 (W.D. Va. June 11, 2018) (finding that inability to access website is a "bare procedural violation" insufficient to constitute injury-in-fact) (quoting *Spokeo*, 136 S. Ct. at 1549); *ABNB Fed. Credit Union*, 2018 WL 1180317, at *4 ("While Plaintiff asserts that he has suffered a statutory injury by being denied access to the ABNB website, this is not sufficient to establish injury-in-fact.") (internal citation omitted). The district court was thus correct in concluding that Appellant's client and customer argument, while relevant to the "scope of the ADA," has "nothing to say about whether Carello has alleged an injury-in-fact." *Carello v. Aurora Policemen Credit Union*, No. 17 C 9346, 2018 WL 3470545, at *2 (N.D. Ill. Aug. 7, 2018), appeal docketed, No. 18-2887 (7th Cir. Aug. 29, 2018).

The cases cited by Appellant on this point are unavailing. In each of those cases, the plaintiff was a customer, ***could become*** a customer or otherwise had a personal interest in or strong connection with the defendant facility's physical premises, such as being on the medical staff of a hospital or being able to play in a golf tournament. *See, e.g.*, *PGA Tour Inc., v. Martin*, 532 U.S. 661, 679-80 (2001) (even if Title III of the ADA were limited to clients and customers, which the court did not decide, plaintiff, a professional golfer, would qualify as a customer or

client potentially able to compete in the golf tournament); *Houston v. Marod Supermarkets*, 733 F.3d 1323, 1326 (11th Cir. 2013) (addressing access to a supermarket open to the public); *Molski v. M.J. Cable, Inc.* 481 F.3d 724, 733 (9th Cir. 2007) ("Molski was plainly a 'customer' of Cable's Restaurant"); *Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113, 116-123 (3d Cir. 1998) (determining whether the ADA grants a cause of action to a medical doctor with staff privileges at a hospital).[3] Conversely, here, Appellant does not plead that he is – or has the qualifications to become – a member of the credit union and thus avail himself of the credit union's services.

B. Appellant's Theories Of Standing, If Applied In The Context Of Website Accessibility Claims, Would Effectively Eviscerate Constitutional Limitations.

Appellant has proffered different purported bases for standing to circumvent the field of membership restrictions: He asserts standing based on his alleged role as a "tester," and claims that he has suffered a concrete and particularized injury based on harm to his dignity. These "tester" and dignitary arguments are made in the abstract without relation to what Appellant actually pled in his underlying Complaint. Accordingly, the assertion of these arguments should give the Court

[3] Neither *Molski* nor *Menkovitz*, which Appellant discusses extensively, addressed the question of standing. Although *Houston* addressed standing, the issue was whether plaintiff's tester motive deprived the plaintiff of standing. There was no question that the plaintiff could enjoy the goods and services of the supermarket. Moreover, each of these cases pre-date *Spokeo*.

pause, as they highlight the expansive risk of divorcing access to physical facilities from allegations of ADA injury.

1. Dignitary Harm Is Not a Sufficiently Concrete Harm To Confer Standing In These Types of Cases

To demonstrate an injury in fact, the "'[f]irst and foremost' of standing's three elements," *Spokeo*, 136 S. Ct. at 1547 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)), the plaintiff must suffer a concrete as opposed to abstract harm. *Spokeo*, 136 S. Ct. at 1548. Appellant argues that he has suffered a concrete injury because of the indignity of being unable to access and use the website. Courts have rejected this dignitary harm claim where the plaintiff is ineligible to join the credit union. *Dep't. of Labor Fed. Credit Union*, 293 F. Supp. 3d at 579 ("[P]laintiff does not cite a single ADA case where dignitary harm alone was sufficient to confer standing on a plaintiff who otherwise was not allowed to patronize a particular public accommodation."); *Toledo Metro Credit Union*, 2018 WL 5435416, at *3 (Having failed to allege eligibility to be a member of the credit union, "the dignitary harm he suffered when trying unsuccessfully to use the website does not confer standing"); *Roanoke Valley Cmty. Credit Union*, 2018 WL 2921106, at *4 ("[D]ignitary harm would be insufficient to confer standing when Carroll does not allege plausibly that he plans, or is even eligible, to use [the credit union's] services or visit a physical [Roanoke] location."). These courts have equated harm to dignity, without more, as simply asserting a bare statutory

violation insufficient to confer standing under *Spokeo*. *See, e.g.*, *Dep't of Labor Fed. Credit Union*, 293 F. Supp. 3d at 579; *Toledo Metro Credit Union*, 2018 WL 5435416, at *3; *Roanoke Valley Cmty. Credit Union*, 2018 WL 2921106, at *4. Similarly, the district court found no support for the proposition that dignitary harm without more confers standing in a Title III ADA case. *Aurora Policemen Credit Union*, 2018 WL 3470545, at *2-3.

2. Tester Status, Even if Pled, Does Not Confer Standing

Confronted with the lower court's eminently reasonable conclusion that, given his ineligibility to become a member of the credit union, Appellant has no plausible material reason to return to the website in the future, Appellant attempts to manufacture such a reason by claiming (although not plead in the Complaint) that he intends to return to the website to test its compliance. Appellant Br. at 48. Appellant attempts to rely on the Eleventh Circuit's holding in *Houston v. Marod Supermarkets, Inc.* to support his position that his proclaimed status as a tester under Title III of the ADA confers standing. Appellant Br. at 48.

Houston is distinguishable. Although finding that tester status did not destroy standing, the court made clear that plaintiff also had to make a plausible showing that he intended to return to the supermarket in order to demonstrate standing to seek injunctive relief. *Houston*, 733 F.3d at 1337. The plaintiff in *Houston* was an eligible customer of a public marketplace, to which he plausibly

intended to return, unlike Appellant in this case, who does not allege that he meets the field of membership criteria for APCU and has never visited the credit union's location nor proffers any basis to assume he will visit in the future. *See id.* at 1326.

Courts have devised mechanisms to test the validity of a litigant's claim that he or she will return to the offending location. These mechanisms primarily turn on the proximity of the litigant's residence to the place of public accommodation and the factors indicating a likelihood to return in light of that proximity. *See, e.g.*, *Houston*, 733 F.3d at 1328 (noting plaintiff lived 30 miles from the store and that store was on the route to the plaintiff's attorney's office which he visited often); *Nanni v. Aberdeen Marketplace, Inc.*, 878 F.3d 447, 453 (4th Cir. 2017) (plausibility of returning to location premised on proximity).

The appellant here claims that he needs to merely revisit the website, the alleged "location" of the discriminatory barrier. Appellant's assertion that the offending location that he intends to revisit is a website leaves the court with no limiting standards to assess the plausibility of future harm. Unlike a physical location that requires some effort to visit, and where plausibility can be assessed based on factors such as proximity, any person with Internet access can visit any website at any time from any location and test its accessibility. Under Appellant's approach, a website tester will always have standing because it is trivial to pull up a website. This is not a theoretical concern. CUNA member credit unions in

Texas, with fields of membership limited to residents of or workers located in certain counties in Texas, have been sued by a California resident claiming unequal access to those credit unions' websites, with no indication/allegation that the plaintiff could satisfy the field of membership requirements, or that they would ever be in Texas. *See, e.g., Thurston v. Local 20 IBEW Fed. Credit Union*, 3:18-cv-00133-S (N.D. Tex. April 11, 2018) (voluntarily dismissed after motion to dismiss and *amicus* brief filed); *Thurston v. BCM Fed. Credit Union*, No. 3:17-cv-3391-N (N.D. Tex. Mar. 16, 2018) (voluntarily dismissed after motion to dismiss and *amicus* brief filed).

The district court injected some limiting factor by assessing whether the appellant can make use of website information in light of his legal inability to utilize any of the credit union's services. Being unable to use the credit union's services, the district court correctly concluded that appellant had no material reason to revisit the website. Appellants argument that he need have no reason to visit the website other than to test compliance eliminates standing as a meaningful restraint on court jurisdiction.

Appellant cites to several unpersuasive cases on pages 42 through 43 of his brief to support his argument that he should have standing to sue despite being legally barred from joining the APCU. He specifically relies upon both opinions issued in *Aeroquip* and *Belle River*, which were both written by the same judge

(Judge Tarnow) and were quickly appealed at Judge Tarnow's recommendation in light of the novel issue of whether standing existed after the court denied the defendant-credit union's motion to dismiss in each case. *See Brintley v. Aeroquip Credit Union*, No. 17-13912, 2018 WL 4178338, at *1 (E.D. Mich. Aug. 30, 2018), appeal docketed, No. 18-2326 (6th Cir. Nov. 14, 2018) ("this case presents legal issues of first impression in this District which are suitable for immediate review by the Sixth Circuit"); *Brintley v. Belle River Cmty. Credit Union*, No. 17-13915, 2018 WL 4178339, at *1 (E.D. Mich. Aug. 30, 2018), appeal docketed, No. 18-2328 (6th Cir. Nov. 14, 2018) (same). Appellant also relies on two cases from the Northern District of Georgia. *See Jones v. Family First Credit Union*, No. 1:17-CV-4592-SCJ, 2018 WL 5045231, at *5 (N.D. Ga. Aug. 6, 2018); *Jones v. Lanier Fed. Credit Union*, No. 2:17-CV-00282-RWS, 2018 WL 4694363, at *4 (N.D. Ga. Sept. 26, 2018).

These cases are wrongly decided because they conflate that right to file a lawsuit under the ADA with Article III standing. *Family First Credit Union*, 2018 WL 5045231, at *4-5; *Lanier Fed. Credit Union*, 2018 WL 4694363, at *3. As set forth above, however, having a right to sue does not necessarily confer standing. The cases cited by Appellant effectively eviscerate the concept of standing.

Standing to assert injury based on tester status or dignity harm due to alleged inequalities of website access would be unbounded for another reason. Unequal

access to physical locations typically involves one-time corrections. Widening aisles, building wheelchair ramps, constructing accessible restrooms are the type of one-time architectural corrections that the ADA was intended to foster, and the applicable specifications are set forth in painstaking detail in DOJ regulations. *See e.g.*, 28 C.F.R. Part 36. Companies have little doubt what they are required to do. Once remedied, businesses can feel secure that they will be relatively free of further litigation. It is unlikely that the wheelchair ramp specifications will continually evolve, and even if they do evolve, companies would not be held to the new standards unless they construct new facilities or perform substantial modifications as contemplated by the regulations.

Not so for websites. Technology is constantly evolving, as are the voluntary and non-binding standards outlined in the Web Content Accessibility Guidelines ("WCAG") that the DOJ, in the absence of its own regulations, and some courts have adopted in litigation as the standards to attain website accessibility.[4] This is

[4] This is not a hypothetical concern. In fact, on June 19, 2018, the 11th Circuit issued its opinion in *Haynes v. Hooters of America, LLC*. 893 F.3d 781 (11th Cir. 2018). In that case, the issue on appeal was whether the plaintiff's claims for declaratory and injunctive relief pursuant to Title III of the ADA were moot due to the fact that, in settlement of a similar lawsuit brought by another plaintiff, the defendant had undertaken a remediation plan that addressed all of the same alleged deficiencies in its website. *Id.* at 782. In vacating and remanding the judgment to the district court, the Court of Appeal noted that the relief being sought in *Haynes* included a request for an order directing Hooters "to continually update and maintain its website" going forward, which was different from the relief sought in the prior matter. *Id.* at 783.

despite the fact that these are third-party-created guidelines that have never been subject to administrative review or adoption, and do not have the force of law.[5] Moreover, these standards are not static. The World Wide Web Consortium's Web Accessibility Initiative just released Version 2.1 of the Guidelines, which contains seventeen (17) new criteria. *What's New in WCAG 2.1*, Web Accessibility Initiative, https://www.w3.org/WAI/standards-guidelines/wcag/new-in-21 (last visited Nov. 5, 2018). This means, applying Appellant's theories, that a Virginia credit union that has just updated its website to comply with existing Version 2.0 Guidelines may now find itself subject to new litigation based on the results of a tester sitting in California who has found some failure to adhere to Version 2.1 of the Guidelines, and/or alleges a new or further harm to dignity. The Web Accessibility Initiative has announced that an even more thorough overhaul of "voluntary" website access guidelines will be released in the next few years. *See Accessibility Guidelines Working Group (AG WG Project Plan)*, Website Accessibility Initiative, https://www.w3.org/WAI/GL/project (last visited Nov. 5, 2018) (targeting the release of WCAG Version 2.2 for February 2020). The cycle

[5] Additionally, the DOJ endorsement of the WCAG in court proceedings and other venues violates the Administrative Procedure Act because it effectively constitutes a substantive change to the ADA regulations without engaging in formal rulemaking. *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100, 115 S. Ct. 1232, 1239 (1997) (explaining that APA rulemaking would be required if a new agency position effected substantive change in the regulations). The DOJ has also been abdicating its responsibility to promulgate guidelines, as required by Title III.

is likely unending and cries out for guidance from Congress or the DOJ on how industries will be expected to comply if websites are, in fact, deemed to be subject to the ADA.

II. Appellant's Standing Argument Implicitly Assumes Websites Are Places of Public Accommodation, An Issue the Seventh Circuit Has Not Decided.

The lower court did not reach the question of whether websites are places of public accommodation and it is a question that has not been resolved in the Seventh Circuit.[6] Appellant's standing argument, however, is predicated on the assumption that a website is a place of public accommodation. He argues that he has standing because he "encountered" discrimination at a place of public accommodation and has been deterred from visiting a place of public accommodation, in each instance referring to the website as the place of public accommodation.[7] Appellant Br. 46-53.

The Seventh Circuit has not definitively ruled on whether Title III of the ADA applies to websites, but CUNA recognizes that the Seventh Circuit is generally identified as among those Circuits that do not limit the ADA to physical

[6] As noted in APCU's brief, the court may affirm a district court's dismissal on any ground supported in the record. *See Slaney v. Int'l Amateur Ath. Fed'n*, 244 F.3d 580, 597 (7th Cir. 2001).

[7] To obfuscate matters, Appellant refers to the website as the "location" of the alleged discrimination, but as Appellant's own cases demonstrate, a plaintiff must encounter discrimination at, or be deterred from, "patronizing," a place of public accommodation." Appellant Br. at 47 n.17.

locations. *See, e.g.*, *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (*citing Doe v. Mutual of Omaha Ins. Co.*, 179 F.3d 557, 558-59 (7th Cir. 1999)); *Carparts*, 37 F.3d at 19. However, neither *Morgan* nor *Mutual of Omaha* involved allegedly discriminatory websites; rather, both cases primarily addressed the question of whether the goods or services of the public accommodation at issue were offered on a nondiscriminatory basis, not whether the means of access were discriminatory. *See Morgan*, 268 F.3d at 459 (whether retirement plan discriminated against the disabled); *Mutual of Omaha*, 179 F.3d at 559-60 (ADA does not regulate the "content of the goods or services offered by a place of public accommodation").

The question in *Morgan* was whether a retirement plan discriminated against the disabled. 268 F.3d at 457-58. The court noted that Title III applied to sellers of goods and services, regardless of the site of the sale, including sales over the Internet, but held that the Title III did not apply because the retirement plan at issue in that case was not offered to the public, it was private plan. *Id.* at 459. (In that sense *Morgan* does not help Appellant as it would appear to require at a minimum that a website offer services available to the public, which is not the case here as the credit union's website did not offer anything for sale to the general public.) *Morgan* relied entirely on the Seventh Circuit's precedent in *Mutual of Omaha*, but that case hardly addressed the issue at all. Almost in passing, the court

observed that that owner or operator of a "store, hotel, restaurant, dentist's office, travel agency, theater, *Web site*, or other facility (whether in physical space or in electronic space) . . . cannot exclude disabled persons from entering the facility, and, once in, from using the facility in the same way that the nondisabled do." *Mutual of Omaha*, 179 F.3d at 559. (citation omitted) (emphasis added). It is not entirely clear what the court means as the "facility" as the court then provides examples only of physical locations such as camera store or dentist office.[8] It is certainly not clear from this brief discussion that the Seventh Circuit has found that a website is itself a place of public accommodation.

Moreover, both *Morgan* and *Mutual of Omaha* relied on the First Circuit's decision in *Carparts Distribution Center v. Automotive Wholesaler's Association of New England*, the reasoning of which is flawed. *Morgan*, 268 F.3d at 459; *Mutual of Omaha*, 179 F.3d at 559. Specifically, *Carparts* reasoned that by including "travel services" as one of the categories of public accommodation, 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 12, 19 (1st Cir. 1994). But this fails to give due consideration to

[8] Department of Justice regulations define a place of public accommodation to mean a facility, and in turn define facility as a physical location or thing. *Magee v. Coca-Cola Refreshments USA, Inc.*, 833 F.3d 530, 533 (5th Cir. 2016) (Facility is "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.") (quoting 21 C.F.R. 36.104)

principles of statutory construction that "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, (1995). The particular category that includes "travel service" (42 U.S.C. § 12181(7)(F)) is limited to "service establishment[s]," which connotes a physical place.

Other circuits that have addressed whether non-physical locations are places of public accommodations have concluded that they are not. *See, e.g.*, *Magee*, 833 F.3d at 534-35; *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)). Some courts have simply concluded that the ADA does not apply to websites. *See, e.g.*, *Dep't. of Labor Fed. Credit Union*, 293 F. Supp. 3d at 579-80; *Robles v. Domino's Pizza LLC,* No. CV 16-06599 SJO, 2017 WL 1330216, at *8 (C.D. Cal. March 20, 2017).

Others circuits have found that the ADA only applies to physical locations, but have permitted ADA suits where there was a strong and verifiable nexus between any deficiencies in the website and an actual physical place of accommodation such that the website's infirmities prevented equal enjoyment of

the physical location. *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); *Rendon v. Valleycrest Prods. Ltd.*, 294 F.3d 1279, 1283-84 (11th Cir. 2002) (requiring a strong nexus between the intangible offsite barrier and a physical location that has the effect of precluding use of a privilege held at that physical place of public accommodation); *Menkovitz,* 154 F.3d at 122 (requiring some nexus between the services or privileges denied and physical place of the hospital as a public accommodation).[9]

Seventh Circuit's precedent does not preclude a nexus requirement. Bringing the discussion back to the issue of standing, requiring a nexus between the website and website owner's physical location would assure some vitality to the analysis of future harm by obligating a plaintiff to plausibly demonstrate a visit to the physical location to which the website has a nexus in the future.

Considered in the context of standing, the summary provided above reinforces that need to demonstrate concrete and particularized injury from lack of equal enjoyment of the physical location, and not merely abstract injuries based on

[9]A minority of courts have concluded that websites themselves are places of public accommodation – a holding that seems divorced from the statutory language and intent. *See, e.g.*, *Andrews v. Blick Art Materials, LLC*, 268 F. Supp. 3d 381, 393 (E.D.N.Y. 2017); *Markett v. Five Guys Enters. LLC*, No. 17-cv-788-KBF, 2017 WL 5054568, at *2 n.3 (S.D.N.Y. July 21, 2017).

alleged deficiencies of a company's website. And in the particular context of credit unions with very specific, discrete fields of membership, a concrete and particularized injury must be suffered by an individual who is actually eligible to enjoy the goods and service of the credit union, which requires going to the physical location of the credit union; otherwise, there is simply no injury, and no standing to assert a claim.

CONCLUSION

For the foregoing reasons, the district court correctly held that Appellant lacks standing to bring an ADA claim against APCU. Appellant is not within APCU's field of membership, and is not eligible to become a member of APCU in the future. Therefore, *amici curiae* respectfully request that this Court affirm the district court's ruling dismissing Appellant's complaint against APCU on standing grounds.

Respectfully submitted, this 20th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7) and Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,227 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: December 20, 2018 By: */s/ Christine A. Samsel*
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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 20, 2018 By: */s/ Christine A. Samsel*
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