IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

VASHAUN JONES, Plaintiff, v. FAMILY FIRST CREDIT UNION, Defendant.	Case No: 1:17-CV-04592-SCJ

BRIEF OF THE CREDIT UNION NATIONAL ASSOCIATION AND GEORGIA CREDIT UNION LEAGUE AS AMICI CURIAE IN SUPPORT OF DEFENDANT FAMILY FIRST CREDIT UNION'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Bret Thrasher
Thompson O'Brien Kemp & Nasuti, PC
40 Technology Parkway South, Ste. 300
Peachtree Corners, GA 30092
Telephone: 770-925-0111
Fax: 770-925-8597
Email: bthrasher@tokn.com

Counsel for Georgia Credit Union League and Credit Union National Association

Christine A. Samsel
Attorney-in-Charge
(Admitted *Pro Hac Vice*)
CO State Bar #42114
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4432
Telephone: 303-223-1100
Fax: 303-223-1111
Email: csamsel@bhfs.com

Jonathan C. Sandler
(Admitted *Pro Hac Vice*)
CA State Bar #227532
Brownstein Hyatt Farber Schreck, LLP
2049 Century Park East, Suite 3550
Los Angeles, CA 90067
Telephone: 310-500-4600
Fax: 310-500-4602
Email: jsandler@bhfs.com

Michael H. Pryor
(Admitted *Pro Hac Vice*)
DC Bar #425400
Brownstein Hyatt Farber Schreck, LLP
1155 F Street N.W., Suite 1200
Washington, DC 20004
Telephone: 202-296-7353
Fax: 202-296-7009
Email: mpryor@bhfs.com

Counsel for Credit Union National Association

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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 5,600 credit unions, which are owned by 114 million members collectively. Defendant Family First Credit Union ("Family First") 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*. CUNA provides a wide range of education information to its credit union members, including information on the ADA.

Family First is also a member of the Georgia Credit Union League ("GCUL"), which is the trade association serving 105 credit unions in Georgia. The GCUL is an advocate for credit union issues in the state of Georgia and assists credit unions in meeting the constant challenges that cooperative financial institutions face in today's economic and regulatory environment.

By law, Family First's services are only available to employees of the Fulton County Board of Education, Atlanta Public Schools ("APS"), City of Johns Creek, Customary Advisory, Sodexo contracted employees at APS, Safebuilt and CH2

contracted employees at Johns Creek Municipality, Kelly Services contracted employees at Fulton County Schools, and employees of certain private, charter, and independent schools.

The member credit unions of CUNA and the GCUL have become the subject of waves of litigation brought by a handful of individuals represented by the same California-based counsel alleging that they are being denied equal access to their websites. The alleged deficient website accessibility is asserted to be a violation of Title III of the ADA. The complaints typically are being filed without regard to any of the credit unions' membership eligibility criteria or whether the plaintiff was within the credit union's legally required restricted field of membership.

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 CUNA's and GCUL'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.

Moreover, case-by-case litigation leads to disparate accessibility standards being imposed and disparate holdings, potentially 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 the GCUL 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 the GCUL's membership, and this *amicus* brief is appropriately interposed and considered.

II. BACKGROUND ON CREDIT UNIONS AND ADVERSE EFFECTS OF ADA WEBSITE LITIGATION

Plaintiffs' counsel seeks to position these cases as integral to the ability of the disabled community to participate in our increasingly online culture. But that is not what these cases are really about. Credit unions are not open to the general

public, and their websites are virtually useless to non-members. With rare exception, the plaintiffs in these actions, for reasons having nothing to do with any disability, are legally ineligible to use the services offered by the credit unions they are suing. The vast majority of court opinions to date have thus found that plaintiffs lack standing to assert website accessibility claims due to their ineligibility to join the credit union. The litigation exercise is patently not designed to enable the plaintiffs to access credit union financial services, but to extract settlements in the form of attorneys' fees. Credit unions, the vast majority of which are small businesses with limited resources to engage in protracted litigation on these unsettled issues, have become an attractive target.

Credit unions are member-owned institutions and they exercise tremendous care and pride in meeting their members' financial needs, including members with disabilities. Indeed, CUNA has been in communication with disability groups to address any legitimate concerns they may have with respect to accessing credit unions' services or websites.

A. Credit Unions' Services Are Not Available to the General Public

Credit unions are a curious choice for testing whether websites should fall within the ambit of a law designed to ensure nondiscriminatory access to places of public accommodations. This is because credit unions' services are not available

to the general public.[1] In fact, credit unions share many of the features of private clubs that are exempt from the ADA. 42 U.S.C. § 12187; *Tawan v. APCI Federal Credit Union*, No. 5:18-cv-00122, 2018 WL 3723367, at *6 n.5 (E.D. Pa. Aug. 6, 2018 (noting credit unions could "feasibly argue" that they are private clubs).

Courts have adopted various factors to identify "private clubs," all of which are met by credit unions. First and foremost, to qualify as an exempt private club, membership must be "genuinely selective on some reasonable basis."[2] Also critical is that members must have some measure of control over the operation of the enterprise.

These are the core characteristics of credit unions. They are, by federal or state law, required to 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. Those eligible to become members and whose application to join is accepted contribute capital to the credit union. Members exercise democratic control through the one-member/one-vote principle in credit union policy setting and

[1] Credit unions are not specifically identified in the list of "places of public accommodations" in the ADA. 47 U.S.C. § 12181 (7)(F). Although the list includes banks, *id.*, credit unions differ substantially from banks, which are open to the general public and are not member-owned.

[2] *See, e.g., United States v. Landsdowne Swim Club*, 713 F. Supp. 785, 796-97 (E.D. Pa 1989) (listing factors and identifying genuine selectivity as the "most important factor"), *aff'd*, 894 F.2d 83 (1990); *see also* NTS Am. Jur. 2d Americans with Disabilities Act, § 651; 1 Fed. Civil Rights Act (3d Ed.) § 7:11.

decision making. *See* 12 U.S.C. § 1760. Credit union members elect unpaid, volunteer officers and directors who establish the credit union's policies, and officials and directors must themselves be credit union members. *See* 12 U.S.C. §§ 1761, 1761b(1). This membership structure creates strong incentives for credit unions to ensure that their members are well served. This, of course, includes individuals with disabilities, who are valued members.

Other indicia of private club status include the establishment's unique existence, distinct purpose and non-profit status.[3] Credit unions comfortably fall within these criteria as well. Credit unions are non-profit, tax-exempt organizations. *See* 26 U.S.C. § 501(c)(1); 12 U.S.C. §§ 1752, *et seq.* The government confers tax exempt status in light of the credit union's unique history and distinct role in the county's financial 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

[3] *Roman v. Cocharty Council of Girl Scouts, Inc.*, 195 Supp. 2d 1377, 1379 (M.D. Ga. 2002) (citing *Walsh v. Boy Scouts of America*, 993 F.3d 1267 (7th Cir. 1993)); *see also Huene v. Landings Club, Inc.*, No. CV411-282, 2012 WL 515674, at *3 (S.D. Ga. Feb. 15, 2012) (member-controlled non-profit restricting membership to certain homeowners was a private club exempt from the ADA).

provident or productive purposes." 12 U.S.C. § 1752(1). Credit unions are often the only source of credit and financial stewardship in smaller communities.

B. ADA Website Litigation Against Credit Unions

Notwithstanding their decidedly non-public nature, plaintiffs and their aggressive counsel have now filed well over a hundred lawsuits against credit unions throughout the country, and thousands more have received demand letters, 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 suits against most, if not all, credit unions within a state or judicial district, without regard to whether the plaintiff is 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. And it is, of course, impossible for a single plaintiff to meet the often mutually-exclusive fields of membership of each of the targeted credit unions.

The suits are filed on behalf of visually impaired plaintiffs who jump from website to website looking for deficiencies based not on any federal set of standards – there are none – but on the privately developed, ever evolving website guidelines that companies are encouraged, but nowhere mandated, to use. 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 and the pleas of the business community and lawmakers to step in. *See, e.g.*, Letter from United States Senators to Jeff Sessions (September 4, 2018), available at https://www.grassley.senate.gov/news/news-releases/grassley-senators-seek-clarity-website-accessibility-under-ada (last accessed September 15, 2018) (requesting clarity as to whether the ADA applies to websites).

The complaints allege virtually the same set of departures from these voluntary privately-set website guidelines, such as the failure to adequately verbally describe a picture on the website, or the alleged presence of redundant links that might cause annoyance for all website users, not just the disabled. The complaints are accompanied by a demand to upgrade the website to comply with some version of the voluntary website guidelines and a settlement payment in the form of attorneys' fees (damages are not available under the ADA) pegged at levels below the anticipated costs of litigation to entice payment. Settlement does not, however offer protection against future ADA lawsuits regarding website accessibility, given the lack of definitive standards.

The relentless pursuit of credit unions is having a deleterious effect. The vast majority of credit unions are small institutions with limited resources. 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. Family First has 36 employees and manages $101 million in assets.

III. ARGUMENT

A. An Alleged Lack of Website Accessibility Is Not a Cognizable Injury Conferring Standing to Bring a Claim Under the ADA Where Plaintiff is Legally Ineligible to Avail Himself of the Credit Union's Services

1. There is No Concrete and Particularized Harm

Plaintiffs suffer no concrete and particularized injury due to any alleged lack of website access where they are lawfully ineligible to ever avail themselves of the services of the credit union. In these cases, the claimed reason to access a credit union's website is to learn about the services that credit unions offer and where offices are located, presumably to facilitate a visit to the physical site at some future date and apply for the credit union's services. Obtaining such information, however, is useless to a plaintiff that is not within the credit union's field of membership because he can never actually obtain those services. Lack of website access in these circumstances becomes nothing more than an abstract, "bare procedural violation, divorced from any concrete harm." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *see also Carello v. Aurora Policemen Credit Union*, No. 17 C 9346, 2018 WL 3740545 (N.D. Ill. Aug. 7, 2018) (being ineligible for membership, the plaintiff has no plausible material reason to visit the website,

"[a]ll the information on the Credit Union's website is only useful for people who can become members of the Credit Union.")

Conferring standing based solely on an alleged inability to access some of the information on a website would be wholly inconsistent with the only cognizable and actionable harm for which plaintiff could seek relief in this type of case, *i.e.*, that the website has a strong nexus to the services available at the credit union's physical location. To state an ADA claim for lack for website access, assuming such a claim exists at all in this Circuit,[4] the inaccessible information must be "heavily integrated" with physical locations and operate "as a gateway" to such locations."[5] In other words, lack of access to the website creates an ADA violation ***only if*** it deprives the plaintiff of the ability to obtain services or benefits of the physical place of public accommodation.[6]

The inability to peruse a website, by itself, is not a sufficiently concrete and particularized injury to confer standing to bring an ADA claim where, as in this Circuit, there must be a nexus between the allegedly inaccessible website information and the enjoyment of the services of the physical credit union. The

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[4] The Eleventh Circuit has not determined whether a website is a place of public accommodation. *Gil v. Winn-Dixie Stores, Inc.*, 257 F. Supp. 3d 1340, 1348 (S.D. Fla. 2017), *appeal docketed,* No. 17-13467 (11th Cir. Aug. 1, 2017).

[5] *Winn-Dixie,* 257 F. Supp. 3d at 1348-49.

[6] *See Nat'l Fed'n of the Blind v. Target*, 4521 F. Supp. 2d 946, 954-955 (N.D. Cal. 2006 (finding plaintiffs stated an ADA Title III claim where website inaccessibility denied plaintiffs the ability to enjoy the services "of Target stores.").

vast majority of courts that have addressed this issue of standing have readily concluded that plaintiffs who are ineligible to join a particular credit union do not suffer a concrete injury due to alleged lack of access to that credit union's website.[7]

Nor can plaintiffs outside the credit union's field of membership satisfy the causation or redressability prongs of the standing analysis. Plaintiff's inability to enjoy the credit union's services is not caused by his disability, but by the lawful operation of the credit union's restricted field of membership. Modifying a website to enable such a plaintiff to learn about services of which he or she cannot take advantage in any event also does not redress the injury actionable under the ADA, *i.e.*, that an inaccessible website may deprive a person of access to the services of the place of public accommodation. The legal inability to use the credit union's services readily distinguishes this case from those where the plaintiff lawfully could purchase or use the defendant's services, such as in *Winn-Dixie*.

[7] *See, e.g.*, *Carello*, 2018 WL 3740545; *Carroll v. 1st Advantage Fed. Credit Union*, No. 4:17-cv-00129, slip op. at 6 (E.D. Va. April 9, 2018); *Carroll v. Wash. Gas Light Fed. Credit Union*, No. 1:17-cv-01201, slip op. at 1 (E.D. Va. April 4, 2018); *Carroll v. ABNB Fed. Credit Union*, No. 2:17-cv-00521, slip op. at 1 (E.D. Va. Mar. 14, 2018); *Griffin v. Dept. of Labor Fed. Credit Union*, No. 1:17-cv-1419, slip op. at 3-4 (E.D. Va. Feb. 21, 2018); *Carroll v. Nw. Fed. Credit Union*, No. 1:17-cv-01205, slip op. at 3-5 (E.D. Va. Jan. 26, 2018) (hereinafter "Northwest FCU II").

2. Standing to Seek Injunctive Relief Requires a Plausible Assertion that Plaintiff Will Return to the Physical Location

In order to have standing to obtain injunctive relief, which is the only form of relief available under Title III of the ADA, the plaintiff must show a "real and immediate threat of repeated injury." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In the ADA context, this requires a plausible allegation that the plaintiff has concrete plans to visit the complained-about place of public accommodation again – "someday' intentions" do not suffice. *See, e.g., Kennedy v. Solano*, No. 18-10250, 2018 WL 2411761, at *2 (11th Cir. May 29, 2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).

It is important to recognize that, in the absence of a finding that a website is itself a place of public accommodation, which it is not, the place that must be visited again in the future is the physical place of public accommodation.[8] *See, e.g., Carroll v. Famers and Miners Bank ("FMB")*, No. 2:17CV00049, slip op. at 5 (W.D. Va. April 5, 2018) [hereinafter "FMB"] ("Although Carroll could certainly visit FMB's website at any point in time from the comfort of his home, it seems implausible that he would travel hundreds of miles now or in the future to visit the physical locations of the bank."); *Winn-Dixie*, 257 F. Supp. 3d at 1347-48 (assessing standing to obtain injunctive relief for inaccessible website based on

[8] In the vast majority of cases, including this case, the plaintiffs have never visited the credit unions' physical location.

statements that plaintiff plans to visit Winn-Dixie's stores again). Any other interpretation would eviscerate standing limitations for injunctive relief, because a website may be visited at any time from a person's home.

In ADA cases, the courts assess the likelihood that the plaintiff will visit the physical location again based on factors such as number of previous visits, reasons for visiting the location, and the plaintiff's proximity to the physical location. *See, e.g.*, *Kennedy v. Solano*, No. 18-10250, 2018 WL 2411761, at *2 (11th Cir. May 29, 2018) (finding that ADA plaintiff did not have standing when she lived 170 miles away from the establishment, had only patronized the establishment once, and did not allege a definitive time to return to the establishment). Although such factors play a role in determining standing to seek injunctive relief in the credit union cases, an equally if not more significant factor in assessing the plausibility of visiting the credit union's location is whether the plaintiff is eligible to avail himself of the credit union's services. It is implausible that a plaintiff would make the effort to visit a location where he or she can purchase nothing and cannot partake of the establishment's services. In credit union ADA website cases, plaintiffs outside the field of membership cannot show a likelihood of visiting the credit union's location in the future (no matter what modifications are made to the website) because they have no plausible reason to do so. *See Carroll v. Washington Gas Light Fed. Credit Union*, No. 1:17-cv-1201, slip op. at 5 (E.D. Va

April 4, 2018) (no likelihood of future injury where plaintiff is ineligible to become a member of the credit union); *Carroll v. 1st Advantage Credit Union*, No. 4:17-cv-00129, slip op. at 6 (E.D. Va. April 9, 2018) ("any plans to visit [the credit union location] in the future would be immaterial unless Plaintiff could demonstrate he would be eligible to use 1st Advantage's services."); *Carroll v. ABNB Fed. Credit Union*, No. 17-cv-00521, slip op. at 11 (E.D. VA. March 5, 2018) (implausible that plaintiff would want to return to the credit union's locations or website "in order to obtain information about services for which he is ineligible."). And the websites themselves do not – and legally cannot – offer any services to non-members.

B. Plaintiff's Efforts to Sidestep Standing Requirements Are Unavailing

Having had a number of cases against credit unions dismissed for lack of standing, plaintiffs and their counsel have become ever more creative in attempting to devise grounds to maintain suit. They have argued that the ADA itself does not have a patron or customer limitation, that they are "testers," and/or that they have suffered dignity harm by encountering an inaccessible website. None of these arguments provide grounds for standing by plaintiffs who do not fall within a credit union's field of membership. Courts have therefore rejected these arguments as well.

1. Plaintiff Confuses the Scope of the ADA with Standing

In numerous cases, plaintiffs have sought to avoid dismissal on the ground that they are not eligible to use the credit unions' services by arguing that the ADA protects "persons" and does not impose a patron or customer limitation.[9] Assuming this is true, the argument confuses a statutory right to sue with requirements of standing. *See Carello*, 2018 WL 3740545, at *2 (noting this argument is "relevant to the statutory scope of the ADA and has nothing to say about whether Carello has alleged an injury in fact."). Congress cannot "erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 251 U.S. 811, 820 n.3 (1997). As the Supreme Court further noted in *Spokeo*, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory rights and purports to authorize that person to sue to vindicate that right." 136 S. Ct. at 1549. Thus, whether the ADA includes a patron or customer requirement is irrelevant to the question of whether an ADA litigant has suffered a concrete or particularized harm or has standing to obtain injunctive

[9] Plaintiffs often will cite *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), and *Molski v. M.J. Cable Inc*, 481 F.3d 724 (9th Cir. 2007). Neither case, however, reached the question of whether the ADA incorporated a patron requirement, because the courts found that plaintiffs were patrons or customers. *Martin*, 532 U.S. at 661; *Molski*, 481 F.3d at 727.

relief. As described above, plaintiffs who are outside the field of membership cannot show concrete harm.

2. "Tester" Status and Dignity Harm Alone Do Not Confer Standing

Plaintiffs have also begun to include allegations in their complaints that they have standing because of their status as testers. Although tester status does not destroy standing, neither does it confer standing. *FMB*, No. 2:17CV00049, slip op. at 7-9 (citing *Norkunas v. Park Rd. Shopping Ctr., Inc.*, 777 F. Supp. 2d 998, 1005 (W.D.N.C. 2011)). A tester must still satisfy the three-prong standard for standing, and a plaintiff who cannot show a concrete and particularized injury and a right to seek an injunction because of that plaintiff's circumstances cannot automatically gain standing by intoning that he or she is testing websites. *See FMB*, No. 2:17CV00049, slip op. at 8-9.

Courts should be particularly cautious in finding standing based on tester status in the context of website accessibility lawsuits, which are inherently different than the testing of physical barriers typically at issue in ADA lawsuits. A website tester can be located anywhere. If tester status is, in and of itself, sufficient to confer standing, a person in California could test all of websites of the credit unions in Georgia and file suit against any that he or she deems insufficiently accessible. *See FMB*, No. 2:17CV00049, slip op. at 8-9 (noting tester status would allow plaintiff to sue every bank in the country under the

ADA.). Such a result would "effectively eliminate standing requirements altogether in the context of the Internet." *Id.*[10]

Nor is dignity harm a sufficient concrete and particularized harm. Although intangible harm can, in some cases, constitute a concrete injury, *e.g.*, *Spokeo*, 136 S. Ct. at 1549, concluding that a person's dignity is sufficiently harmed based on website deficiencies would again eviscerate the standing requirement. *FMB*, No. 2:17CV00049, slip op. at 6 (quoting *Griffin v. Dep't. of Labor Fed. Credit Union*, No. 1:17-cv-1419 (E.D. Va. Feb. 21, 2018) (if dignity harm were sufficient to confer standing in a website case, then "any disabled person who learned of a barrier to access . . . would automatically have standing . . . thereby essentially eliminating the injury-in-fact requirement). Moreover, dignity harm has thus far largely been limited to claims of employment discrimination under Title I of the ADA. *See, e.g.*, *Scherr v. Marriott Int'l Inc.*, 703 F.3d 1069, 1075 (7th Cir. 2013).

C. 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 ADA 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).

[10] Notably, the concerns expressed about eviscerating standing occur in commercial bank cases, in which any member of the public can become a customer, unlike credit unions with their restricted fields of membership.

The common meaning of the term "place" refers to a "physical environment." *See* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/place (last visited Sept. 15, 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 Sept. 15, 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. 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'").[11]

The Eleventh Circuit has not addressed the ADA's applicability to websites, but its analysis in *Rendon v. Valleycrest Productions, Ltd.* is instructive. 294 F.3d 1279 (11th Cir. 2002). In *Rendon*, the court held that a telephonic selection process inaccessible to certain disabled persons that was the sole method used to

[11] In *Northwest FCU II*, the court reaffirmed its ruling that "a website is not a place of public accommodation under Title III of the ADA. *Northwest FCU II*, slip op. at 3. The court rejected the plaintiff's nexus argument that a website may be a "privilege" of a brick and mortar facility even if the website itself is not a place of public accommodation. The court stated that the cases proceeding on this theory "do so only where the use of the website is necessary to obtain some privilege, advantage, or accommodation that is not available from the brick-and-mortar facility." *Id.* at 3 (citing *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946 (N.D. Cal. 2006), and *Andrews v. Blick Art Materials LLC*, 2017 WL 3278898 (E.D.N.Y. Aug. 1, 2017)). The court readily distinguished such cases finding that nothing on the credit union's website "was necessary to enjoy the benefits of the brick-and-mortar facilities." *Id.* at 4. Similarly, here the plaintiff, Mr. Jones, has not identified in his complaint anything on the credit union's website necessary to enjoy the benefits of its brick-and-mortar locations.

screen contestants for a show recorded in a studio violated the ADA. 294 F.3d at 1280-81. In other words, because the telephonic selection process was inaccessible, disabled persons had no way to apply to participate in the game show. *Rendon* has been viewed as requiring a strong nexus between an intangible offsite barrier and a physical location that has the effect of precluding use of a privilege (participating in a game show) held at that physical place of public accommodation (the studio). *See Access Now, Inc. v. Southwest Airlines Co.*, 227 F. Supp. 2d 1312, 1321 (S.D. Fla. 2002) (dismissing ADA complaint where plaintiff failed to demonstrate that a website impeded access to a "specific, physical, concrete space.").

Thus, to prevail in this Circuit, Mr. Jones must show, assuming he were even eligible to use Family First's services, which he is not, that the website somehow precludes his ability to access the services and advantages available at the credit unions physical location. *Rendon*, 294 F.3d at 1283 (to state a valid ADA claim, plaintiff must allege that "Defendants' imposition or application of unnecessary eligibility criteria has screened them out or tended to screen them out from accessing a privilege or advantage of Defendants' public accommodation [the studio]."). Allegations that he is denied the services, privileges, advantages and accommodations of the website itself would not constitute an ADA violation in the

Eleventh Circuit, because the website itself is not a place of public accommodation.

D. 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 the defendant credit union'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, (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 (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.

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 v. City of Rockford*, 408 U.S. 104, 108 (1972). 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 108-09. 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), it has repeatedly refrained over the years from promulgating any standards or guidelines pertaining to website accessibility.

In litigation relating to physical barriers, the statute's general ban on discrimination has been saved from charges of impermissible vagueness only because the DOJ had issued detailed regulations providing 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," and "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.); *Botosan*, 216 F.3d at 837 (the term "disability" is not impermissibly vague in light DOJ regulations that provide specific examples of disabilities).

There are no comparable DOJ regulations to salvage Title III as plaintiffs seek to apply it to websites. 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. *Robles v. Domino's Pizza LLC*, No. CV 16-06599 SJO, 2017 WL 1330216, at *6 (C.D. Cal. March 20, 2017).

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 ever-evolving set of "voluntary" guidelines, the Web Content Accessibility Guidelines ("WCAG"), which were developed by a private group of internet stakeholders, should be followed.[12] *See id.* at 43465. The DOJ, however, has never officially adopted those standards, despite seeking public comments to determine whether those standards should be adopted as the DOJ's web-site accessibility standard. *Id.* at 43465. On other occasions, the DOJ has indicated that staffing a call-in telephone line might be sufficient rather than having all aspects of a website be accessible. *See, e.g.*, *Robles*, 2017 WL 1330216, at *6 (noting that DOJ's statement of interest "suggest[s] that Dominos' provision of a telephone number for disabled customers satisfies its obligations under the ADA.")

[12] Indeed, 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 Sept. 15, 2018).

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 *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 (concluding 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.").

IV. CONCLUSION

Plaintiffs who are ineligible to join a credit union lack cannot demonstrate that they suffer a concrete and particularized injury plausibly allege future harm. On the merits, websites are not places of public accommodation subject to Title III ADA claims. Alternatively, ADA claims violate due process because there are no definitive standards by which to gauge compliance.

/s/ Bret Thrasher
Bret Thrasher
Thompson O'Brien Kemp & Nasuti, PC
40 Technology Parkway South, Ste. 300
Peachtree Corners, GA 30092
Telephone: 770-925-0111
Fax: 770-925-8597
Email: bthrasher@tokn.com

Counsel for Georgia Credit Union League and Credit Union National Association

/s/Christine A. Samsel
Christine A. Samsel
Attorney-in-Charge
(Admitted *Pro Hac Vice*)
CO State Bar #42114
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4432
Telephone: 303-223-1100
Fax: 303-223-1111
Email: csamsel@bhfs.com

Jonathan C. Sandler
(Admitted *Pro Hac Vice*)
CA State Bar #227532
Brownstein Hyatt Farber Schreck, LLP
2049 Century Park East, Suite 3550
Los Angeles, CA 90067
Telephone: 310-500-4600
Fax: 310-500-4602
Email: jsandler@bhfs.com

Michael H. Pryor
(Admitted *Pro Hac Vice*)
DC Bar #425400
Brownstein Hyatt Farber Schreck, LLP
1155 F Street N.W., Suite 1200
Washington, DC 20004
Telephone: 202-296-7353
Fax: 202-296-7009
Email: mpryor@bhfs.com

Counsel for Credit Union National Association

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief, including footnotes, has been prepared in Times New Roman 14 font and is in compliance with Local Rule 5.1.

/s/ Bret T. Thrasher
GA State Bar # 710682

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September, 2018, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court, as Attachment 1 to the MOTION OF CREDIT UNION NATIONAL ASSOCIATION AND **GEORGIA CREDIT UNION LEAGUE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF DEFENDANT FAMILY FIRST CREDIT UNION'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT**, using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Bret T. Thrasher
GA State Bar # 710682

Thompson O'Brien Kemp & Nasuti, PC
40 Technology Parkway South, Ste. 300
Peachtree Corners, GA 30092
Telephone: 770-925-0111
Fax: 770-925-8597
Email: bthrasher@tokn.com