**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MATTHEW CARELLO, an individual

Plaintiff,

v.

AURORA POLICEMEN CREDIT UNION, a credit union

Defendant.

Case No. 1:17-cv-09346

Hon. Judge Thomas M. Durkin

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

Stephen R. Olson, ARDC No. 2108143
(Admitted *Pro Hac Vice*)
Illinois Credit Union League
1807 W Diehl Road
Naperville, IL 60563
Telephone: 630-983-3405
Fax: 630-983-4284
Email: solson@icul.com

*Counsel for Amicus Curiae
Illinois Credit Union League*

Christine A. Samsel, CO State Bar No. 42114
(Admitted *Pro Hac Vice*)
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 Sandler , CA State Bar No. 227532
(Admitted *Pro Hac Vice*)_________
2049 Century Park East, Suite 3550
Los Angeles, CA 90067
Telephone: 310-500-4600
Fax: 310-500-4602
Email: jsandler@bhfs.com

James Branit, ARDC No. 6191555
Patrick Ruberry, ARDC No. 6188844
Brian Norkett, ARDC No. 6195461
Litchfield Cavo LLP
303 West Madison Street, Suite 300
Chicago, IL 60606
Telephone: 312-781-6675
Fax: 312-781-6630
Email: branit@litchfieldcavo.com
Email: ruberry@litchfieldcavo.com
Email: norkett@litchfieldcavo.com
*Counsel for Amicus Curiae
Credit National Association*

TABLE OF CONTENTS

Page

I. INTEREST OF AMICI CURIAE 1

II. BACKGROUND OF THE CREDIT UNION SYSTEM 2

III. SUMMARY OF ARGUMENT 3

IV. ARGUMENT 4

A. Plaintiff Lacks Standing 4

B. A Website is Not a Place of Public Accommodation 6

C. If the ADA Is Deemed to Apply to Websites, the Absence of Any Implementing Regulations by the DOJ Renders the Act Impermissibly Vague 9

D. The Court Should Dismiss the Complaint Pursuant to the Primary Jurisdiction Doctrine 13

V. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Botosan v. Paul McNally Realty,
216 F.3d 827 (9th Cir. 2000) 11

Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New England, Inc.,
37 F.3d 12 (1st Cir. 1994) 7, 8

Carroll v. Nw. Fed. Credit Union,
No. 1:17-cv-01205, slip op. (E.D. Va. Jan. 26, 2018) 5, 7

Cullen v. Netflix, Inc.,
880 F. Supp. 2d 1017 (N.D. Cal. 2012) 12

Doe v. Mutual of Omaha Ins. Co.,
179 F.3d 557 (7th Cir. 1999) 8, 11

FCC v. Fox Television Stations, Inc.,
567 U.S. 239, 132 S. Ct. 2307 (2012) 9

Ford v. Schering-Plough Corp.,
145 F.3d 601 (3d Cir. 1998) 7

Grayned v. City of Rockford,
408 U.S. 104, 92 S. Ct. 2294 (1972) 9

Griffin v. Dept. of Labor Fed. Credit Union,
No. 1:17-cv-1419, slip op. (E.D. Va. Feb. 21, 2018) 5

Gustafson v. Alloyd Co.,
513 U.S. 561, 115 S. Ct. 1061 (1995) 8

Magee v. Coca-Cola Refreshments USA, Inc.,
833 F.3d 530 (5th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017) 7

Morgan v. Joint Admin. Bd.,
268 F.3d 456 (7th Cir. 2001) 8

Nat'l Ass'n of the Deaf v. Netflix, Inc.,
869 F. Supp. 2d 196 (D. Mass 2012) 12

Parker v. Metro Life Ins. Co.,
121 F.3d 1006 (6th Cir. 1997) 7

Pinnock v. Int'l House of Pancakes Franchisee,
844 F. Supp. 574 (S.D. Cal. 1993) 11

Robles v. Domino's Pizza LLC,
No. CV 16-06599 SJO, 2017 WL 1330216 (C.D. Cal. March 20, 2017) 11, 13, 14

Ryan v. Chemlawn Corp.,
935 F.2d 129, 131 (7th Cir. 1991) 13, 14

Steger v. Franco, Inc.,
228 F.3d 889 (8th Cir. 2000) 5, 14

Warth v. Seldin,
422 U.S. 490, 95 S. Ct. 2197 (1975)....................5

Whitman v. Am. Trucking Ass'n,
531 U.S. 457, 121 S. Ct. 903 (2001)....................9

Statutes

205 ILCS 305/1.1....................3

5 U.S.C. § 553....................11

12 U.S.C. § 1752(1) 3

42 U.S.C. § 12181(7) 6, 8

42 U.S.C. § 12182(a) 6, 10

42 U.S.C. § 12186 (b) 1, 9

42 U.S.C. § 12187(7) 7

42 U.S.C. § 12188....................2

Administrative Procedure Act....................11, 14

Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* .... *passim*

Other Authorities

28 C.F.R. Part 36....................2, 6, 10, 12

135 CONG. REC. S10,760-61 (daily ed. Sept. 7, 1989) 14, 15

75 Fed. Reg. 43460 ....11, 12

38 Ill. Adm. Code § 190.10....................3

2017 Inactive Regulations, OFFICE OF INFORMATION AND REGULATORY AFFAIRS,
https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Up
date.pdf....................12

MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/place 6

Technical Assistance Manual Covering Public Accommodations and Commercial Facilities, ADA.GOV, https://www.ada.gov/taman3.html....................6

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. One of its affiliated state associations is the Illinois Credit Union League ("ICUL"), which is the primary trade association for nearly 300 state and federal credit unions doing business in Illinois, serving approximately 3.4 million members. CUNA and ICUL provide legislative and regulatory advocacy, compliance assistance and information, and a wide range of educational and training services to their member credit unions. Defendant Aurora Policemen Credit Union ("APCU") is a member of CUNA and ICUL, which jointly submit this brief.

Credit unions, which may be federally- or state-chartered, are not-for-profit, tax-exempt organizations owned and operated by their consumer members. CUNA and ICUL and the credit unions they serve strongly support the goals of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq*. However, their member credit unions have recently become the subject of a wave of litigation brought by individuals claiming that they are being denied equal access not to the credit unions' locations, but to their websites, allegedly in violation of Title III of the ADA. To date, more than 100 credit unions have been sued and thousands have received demand letters in at least 20 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 eligible for membership in any of the defendant credit unions.[1]

This wave of litigation is particularly concerning because the Department of Justice

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[1] In fact, so many suits have been filed by the same law firm that a Florida court has denied the *pro hac vice* application of plaintiff's counsel, Scott Ferrell, due to his "frequent Florida filings" constituting an abuse of the "*pro hac vice*" privilege. *See* Ex. A.

("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 is being filled by aggressive plaintiffs' attorneys seeking to capitalize on the private right of action and attorneys' fee recovery 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 required to conform. Notwithstanding the lack of merit, many of CUNA's and ICUL's members have been entering into settlements to avoid the cost of litigation, even though these settlements leave them exposed to further ADA lawsuits regarding website accessibility.

Given the number of suits, their geographic range, and the limited resources of many of the targeted credit unions, CUNA and ICUL have a substantial interest in this case. As not-for-profit financial cooperatives, credit unions' members/consumers are also owners with 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, with litigation and settlements costs ultimately borne by the consumer-owners, who may themselves be protected by the ADA.

The nationwide, piecemeal ADA website litigation has led to disparate holdings and differing standards based on ever-evolving private sector technological developments. The members of CUNA and ICUL 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 ICUL's member credit unions.

II. 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 passed the Federal Credit Union Act, 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). States have also enacted legislation governing credit unions. Pursuant to Illinois law, members of a credit union must share a "common bond" of occupation, association, or community. *See* 205 ILCS 305/1.1; 38 Ill. Adm. Code § 190.10. By law, credit unions serve specific populations, such as employees of a specific company, union or agency, individuals in specific occupations or specific geographic areas, or members of associations, churches, clubs or societies, and their immediate family members, 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, including individuals with disabilities. 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. Nearly half of all credit unions employ five or fewer full-time employees; more than half have assets of less than $50 million; and over 40% have less than $20 million in assets. Defendant in this case, Aurora Policemen Credit Union ("APCU") falls within these parameters. It is a small credit union whose field of membership is limited, as described in detail in APCU's Motion to Dismiss.

III. SUMMARY OF ARGUMENT

Plaintiff has not alleged that he meets the eligibility requirements for membership in APCU as set forth in its charter. Plaintiff's inability to partake in the services of APCU is in no way affected by or caused by the alleged inability to access the credit union's website, but rather by his 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. Plaintiff thus lacks standing.

Moreover, websites are not "places of public accommodation" covered by the ADA. Specifically, Title III of the ADA is limited to barriers to access at physical locations, as evidenced by the Act's exhaustive and exclusive list of public accommodations. Websites are not physical places, and thus are beyond the scope of the ADA. Additionally, applying the ADA to websites would render the statute impermissibly vague as applied and violate APCU's due process rights. Despite extensive amendments to the ADA, it has never been amended to include websites. Moreover, the DOJ, which Congress directed to promulgate implementing regulations, has not formally issued a rule that the ADA applies to websites, let alone implemented guidelines for website compliance, in sharp contrast to its voluminous rules and guidance on physical spaces and barriers, including thousands of detailed implementing regulations. This has left a fractured legal landscape in which courts have taken sharply different positions on the question, rendering the ADA impermissibly vague as Plaintiff is attempting to apply it.

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 and businesses, which would have explicit website accessibility standards on which they could rely.

IV. <u>ARGUMENT</u>

A. <u>Plaintiff Lacks Standing</u>

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). APCU's Motion to Dismiss addresses in detail Plaintiff's lack of standing to assert his claims; CUNA and ICUL will not reiterate those arguments here. However, it is particularly important in a case such as this, seeking an 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 ICUL have witnessed many of their members being sued by the same plaintiffs, including Plaintiff here. The same plaintiff suing multiple credit unions is making the implausible assertion that he or she can meet the differing fields of membership of the various defendant credit unions.

As described above, credit unions are membership organizations whose charters prescribe those who may become members. Without meeting these criteria, Plaintiff 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. *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"). 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 APCU's website would permit him to avail himself of its services.

B. A Website is Not a Place of Public Accommodation

The ADA by its plain terms applies only to physical locations. Specifically, it 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. 26, 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, 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 26, 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"). 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'").

Courts are split over whether the ADA is limited to physical locations or whether it can apply to non-physical spaces such as websites. *Compare Magee,* 833 F.3d at 535-57 (Title III is limited to physical places), *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.") *and 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. NFL, Inc.*, 59 F.3d 580 (6th Cir. 1995)), *with 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 sufficient nexus to physical location) [2] and *Carparts Distrib. Ctr., Inc. v. Auto Wholesaler's Ass'n of New England, Inc.,* 37 F.3d 12, 19-20 (1st Cir. 1994)

[2] 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 on credit unions that compete with purely online financial services.

(Title III not limited to access of goods and services at a physical location). The result is a highly fractured legal landscape.

CUNA and ICUL recognize that the Seventh Circuit is generally identified as among those Circuits that do not limit the ADA to physical 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 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").

Moreover, both *Morgan* and *Mutual of Omaha* relied on the First Circuit's decision in *Carparts*, 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 at 19. But this 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 connotes a physical place. To cite Justice Scalia's oft-repeated warning, Congress does not hide elephants in mouse holes. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468, 121 S. Ct. 903, 910 (2001).

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

Expanding Title III to include websites as places of public accommodation would render the Act vague as applied and violate APCU'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)).

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, 92 S. Ct. 2294, 2298-99 (1972). Vague 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.* All of these evils are attendant in this case.

The ADA 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 thousands of detailed regulations regarding barriers to accessing physical locations (*see* 28 C.F.R. Part 36), it has repeatedly refrained from promulgating any

standards or guidelines whatsoever pertaining to website accessibility, rendering Title III impermissibly vague as applied to websites.

The statute itself provides no applicable standards of conduct against which a private entity reasonably can assess whether its website is required to be accessible under Title III and, if so, whether it is sufficiently accessible. Title III's 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.* § (b)(1)(A)(i). The statute then identifies examples of "specific prohibitions" related to discrimination, but they provide no further elucidation on what an entity is required to do, particularly as those prohibitions might apply 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.).

There are no comparable DOJ regulations to salvage Title III as applied to website accessibility. Although the DOJ has informally pronounced in various statements of interest 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; they therefore are not entitled to deference *See Mutual of Omaha*, 179 F.3d at 563; *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.").

In 2010, the DOJ released an Advance Notice of Proposed Rulemaking ("ANPRM"), a preliminary step toward an APA rulemaking, regarding website accessibility issues. *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). However, the DOJ never

progressed beyond this, and recently withdrew the ANPRM altogether. *2017 Inactive Regulations*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf (last visited Feb. 26, 2018).

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 outlined above, courts are split over this fundamental question. 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).

The second prong of the vagueness test – the lack of explicit guidelines – also is 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). The DOJ has on occasion suggested that compliance with an evolving set of "voluntary" standards developed by a private group of internet stakeholders, the Web Content Accessibility Guidelines ("WCAG"), might be appropriate. *See id.* at 43465. But the DOJ has never officially adopted those standards and, in the 2010 ANPRM, sought comments on whether they should be formally adopted as the applicable standard. *Id.* at 43465. 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 (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.") The plaintiffs suing credit unions throughout the country allege that far more than staffing a phone line is required, but the lack of any guidance leaves businesses and courts unenlightened as to 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 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 (relying on, among other things, DOJ's lack of adoption of WCAG standards and inconsistency of DOJ's position regarding which version of WCAG would apply or whether other remedial efforts could be sufficient; affording no deference to DOJ statements of interest or *amicus* briefs). The *Robles* court concluded 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." *Id.* at *7-8. The ADA, if applied to websites, is impermissibly vague in the absence of implementing regulations.

D. <u>The Court Should Dismiss the Complaint Pursuant to the Primary Jurisdiction Doctrine</u>.

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 body," is appropriate. *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991). Application of the doctrine lies within the sound discretion of the courts, which typically look to factors such as: (1) the promotion of consistency and uniformity, particularly where the development of the law is dependent to some degree upon administrative policy; (2) the unique qualifications of an

administrative agency to resolve the complexities of certain areas which are outside the conventional experience of the courts; and (3) the interests of judicial economy, because the dispute may be decided within the agency, thus obviating the need for the courts to intervene. *Id.*

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." Standards should be promulgated as contemplated by Congress, through a rigorous APA rulemaking process in which all stakeholders may participate, and ensuring that resulting rules are subjected to a cost/benefit analysis. *See Robles*, 2017 WL 1330216, at *8. Most importantly, whether websites are covered by Title III, and if so, the development of appropriate standards in this highly technical area – *i.e.,* website capabilities necessary to provide access to individuals suffering from various types of disabilities – requires special expertise that the DOJ possesses. 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.

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*, 228 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. S10,760-61 (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 754. 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 abdicate its responsibility to develop comprehensive rules, this Court should join others that are exercising their prerogative to refer the case to the DOJ to provide needed guidance to businesses, the disabled community, and the courts.

V. CONCLUSION

CUNA and ICUL 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 the ADA impermissibly vague as applied. Defendant's fundamental due process rights would otherwise be violated, as it has no reasonable notice of the website accessibility standards, if any, with which it should comply. In the alternative, this Court should exercise primary jurisdiction and refer the case to the DOJ.

Dated: February 28, 2018.

Respectfully submitted,

By: *_/s/ Stephen R. Olson_*
Stephen R. Olson

ILLINOIS CREDIT UNION LEAGUE

ATTORNEY FOR AMICUS CURIAE
ILLINOIS CREDIT UNION LEAGUE

By: *_/s/ Christine A. Samsel_*
Christine A. Samsel
Jonathan C. Sandler

BROWNSTEIN HYATT FARBER SCHRECK, LLP

ATTORNEYS FOR AMICUS CURIAE CREDIT UNION NATIONAL ASSOCIATION

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, a true and correct copy of the foregoing document was electronically filed with the clerk of the U.S. District Court, Northern District of Illinois, using the electronic case filing system of the Court, and 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.

/s/ Patrick J. Ruberry