No. 16-668

In the Supreme Court of the United States

EMMETT MAGEE, individually and on behalf of all others similarly situated,
Petitioner,

v.

COCA-COLA REFRESHMENTS USA, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Title III of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12181 *et seq*. ("Title III"), prohibits discrimination on the basis of disability "by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a). To constitute a "place of public accommodation" under Title III and its implementing regulations, a location must be (1) a facility that (2) falls within at least one of the twelve specifically enumerated categories. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104. In addition to the general non-discrimination provisions contained in § 12182, a separate section of Title III also requires that new construction and alterations to existing facilities be designed and constructed such that they comply with, among other things, the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"). 42 U.S.C. § 12183(a); 28 C.F.R. § 36.104; 28 C.F.R. § 36.406(a).

Here, Petitioner, who is allegedly visually impaired, sued Respondent Coca-Cola Refreshments USA, Incorporated ("Respondent") under Title III claiming that Respondent's glass front vending machines violate Title III because they are allegedly not accessible to individuals with visual impairments. The district court dismissed the case pursuant to Fed. R. Civ. P. 12(b)(6), holding that Respondent's glass front vending machines are "not akin to any of the twelve specific categories of places of public accommodation listed in the statute and federal regulations," and thus are not "places of public accommodation." (Pet. App. at 23a). The Fifth Circuit affirmed, adding, "[R]ather than falling within any of those broad categories of entities

[listed in 42 U.S.C. § 12181(7)], vending machines are essentially always found inside those entities along with the other goods and services that they provide." (Pet. App. at 11a).

The Questions Presented are:

1. Whether the glass front vending machines at issue in this case are, in and of themselves, "places of public accommodation" within the meaning of Title III of the ADA and its implementing regulations, separate and apart from the places of public accommodation in which the vending machines might be located. This question presents the following sub-questions:

a. Whether the glass front vending machines at issue in this case are "sales establishments" within the meaning of 42 U.S.C. § 12181(7)(E) and 28 C.F.R. § 36.104.

b. Whether the glass front vending machines at issue in this case are "facilities" within the meaning of 28 C.F.R. § 36.104.

2. If the glass front vending machines are determined to be "places of public accommodation" under Title III, whether Petitioner's claims were still properly dismissed because the accessibility features that he was demanding are not required by the specific – and exclusive – design requirements of the ADAAG, and hence are not required under the ADA.

CORPORATE DISCLOSURE STATEMENT

Respondent Coca-Cola Refreshments USA, Inc. is a wholly-owned subsidiary of The Coca-Cola Company, which is a publicly-held company that trades on the New York Stock Exchange under the ticker symbol KO.

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INTRODUCTION

Since the passage of the ADA in 1991, to Respondent's knowledge, there are no published or available decisions in which a plaintiff attempted to take the position under Title III that a vending machine, standing by itself and separate from the business in which it is located, is a place of public accommodation. Many of the same types of equipment that exist today – beverage vending machines, food vending machines, gum ball machines, newspaper vending machines, and cigarette machines – existed in 1991 when the ADA was passed. Yet, in 26 years, no one until now has tried to argue that a vending machine is itself a public accommodation. As such, this is a case of first impression regarding whether, under Title III, a free-standing piece of equipment is a place of public accommodation separate and apart from the hospital or bus station at which Petitioner allegedly encountered Respondent's glass front vending machines.

In an effort to create the illusion of a case warranting certiorari review, Petitioner Emmett Magee ignores the fact that this is a case of first impression and instead has attempted to fit this case into an invented circuit split regarding whether, under Title III, "public accommodations" are limited to "physical spaces that people can enter." (Pet. App. at I). This effort should be rejected for two reasons. First, there is no circuit split. The First, Second, and Seventh Circuits have held, based on varying levels of analysis, that the definition of "public accommodation" under Title III is not limited to physical structures. *See Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n*

of New England, Inc., 37 F.3d 12, 19 (1st Cir. 1994); *Doe v. Mut. of Omaha Ins. Co.*, 179 F.3d 557, 559 (7th Cir. 1999); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 32-33 (2d Cir. 1999). The Third, Sixth, and Ninth Circuits – the circuit courts that Petitioner claims are on the other side of the alleged split – have not held otherwise. *See Parker v. Metro Life Ins. Co.*, 121 F.3d 1006, 1010-11 (6th Cir. 1997); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 612-13 (3d Cir. 1998); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115 (9th Cir. 2000). Rather, all three decisions involved much narrower holdings that numerous courts have determined do not conflict with the broader holdings of the First, Second, and Seventh Circuits. *See Pallozzi*, 198 F.3d at 32 n.3; *Rendon v. Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1284 n.8 (11th Cir. 2002); *Nat'l Fed'n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 570-71 (D. Vt. 2015).

Second, even if there were a circuit split that deserves the Court's attention, the issues in this case do not implicate the alleged split because the vending machines at issue in this case are undisputedly physical in nature, and because the issues in this case of first impression are entirely different than the issues at the heart of the alleged circuit split. Deciding the broader question of whether or not "public accommodations" are limited to physical spaces would not resolve the specific issues before the Court in this case, because whether a physical vending machine located within an undisputed place of public accommodation is, in and of itself, a separate place of public accommodation does not turn on whether or not Title III requires that a public accommodation be a physical space. Similarly, resolving whether a physical

vending machine is, by itself, a public accommodation would not resolve the broader issue of Title III's applicability to non-physical spaces.

In apparent recognition of this critical disconnect, Petitioner is attempting to link the issues addressed in these prior cases to the issues actually presented by the vending machines here by improperly injecting the notion of physical spaces "that people can enter" into the analysis. (Pet. App. at I, 6). This so-called "physical-entry rule," as Petitioner describes it, was discussed by the district court in *Carparts* shortly after the passage of the ADA, but that decision was ultimately reversed by the First Circuit, which recast the issue in a way that did not focus on physical entry. 37 F.3d at 18-19. Since the First Circuit's decision in 1994, the concept of physical entry has not been a part of the analysis of subsequent decisions. Critically, Petitioner is flatly incorrect when he claims in the "Question Presented" that "the court of appeals held that 'public accommodations' are limited to physical spaces that people can enter." (Pet. App. at I). The Fifth Circuit made no such holding below. The Court should therefore ignore Petitioner's fatally flawed attempt to work around the complete disconnect between the issues presented in this case and the issues at the heart of the alleged circuit split.

In sum, this is no circuit split, and there is no connection between the issues presented by this case and the issues involved in the cases that Petitioner claims create the alleged split. In addition, the courts below correctly determined that the vending machines at issue here are not "public accommodations" under

Title III. For all of these reasons, the Court should deny the petition.

STATEMENT

1. The claims and allegations in this case concern glass front vending machines which Petitioner allegedly encountered at a hospital and a bus station in New Orleans, and specifically whether these vending machines are public accommodations under Title III of the ADA. The statute provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). Title III defines the term "public accommodation" by listing twelve specific categories of private businesses that are covered. 42 U.S.C. § 12181(7). The implementing regulations issued by the Department of Justice ("DOJ") combine these provisions and define the term "public accommodation" to mean "a private entity that owns, leases (or leases to), or operates a place of public accommodation," and then, in turn, define "place of public accommodation" to mean "a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the" categories specifically listed in § 12181(7). 28 C.F.R. § 36.104 (definitions of "public accommodation" and "place of public accommodation").

Thus, to constitute a "place of public accommodation" under Title III and its implementing

regulations, a location must be (1) a facility that (2) falls within at least one of the twelve specifically enumerated categories. 42 U.S.C. § 12181(7); 28 C.F.R. § 36.104. Importantly, a location must meet both of these requirements to be a place of public accommodation. *Id.* Moreover, the list of specific categories of places contained in 42 U.S.C. § 12181(7) and 28 C.F.R. § 36.104 is exclusive, meaning that a location that does not fall within any of the specific categories is *not* a place of public accommodation for purposes of Title III. *Sapp v. MHI P'ship, Ltd.*, 199 F. Supp. 2d 578, 584 (N.D. Tex. 2002); *Jankey v. Twentieth Century Fox Film Corp.*, 14 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998).

In addition to the general non-discrimination provisions contained in § 12182, a separate section of Title III also requires that new construction completed after January 26, 1993, and alterations to existing facilities after January 26, 1992, be designed and constructed such that they are "readily accessible to and usable by individuals with disabilities." 42 U.S.C. § 12183(a); *see also, e.g., Gaylor v. Greenbriar of Dahlonega Shopping Ctr., Inc.*, 975 F. Supp. 2d 1374, 1391 (N.D. Ga. 2013) (explaining new construction and alteration requirements of Title III); *MacClymonds v. IMI Invs., Inc.*, No. H-05-2595, 2007 WL 1306803, at *3 (S.D. Tex. Apr. 5, 2007) (same). Such new construction and alterations must also comply with the Standards for Accessible Design, which consist of subpart D of DOJ's Title III regulations (located at 28 C.F.R. pt. 36) and the ADAAG (located at 36 C.F.R. pt. 1191, Apps. B & D), which is issued by the Architectural and Transportation Barriers Compliance Board (the "Access

Board").[1] 28 C.F.R. § 36.104; 28 C.F.R. § 36.406(a); *see also, e.g., Gaylor*, 975 F. Supp. 2d at 1391 (explaining role of ADAAG in Title III's requirements for new construction and alterations); *MacClymonds*, 2007 WL 1306803, at *3 (same).

2. The glass front vending machines at issue in this case are "self-service, fully-automated machines that dispense bottles and cans of Respondent's sodas, juices, energy drinks, and waters." (Pet. App. at 31a). According to the Complaint, Respondent "owns, operates and/or maintains GFV [glass front vending] beverage vending machines at tens of thousands of locations throughout the United States." (Pet. App. at 34a). Petitioner, who is legally blind, claimed that he encountered one or more of Respondent's glass front vending machines at East Jefferson General Hospital in February 2014, and that he encountered other of Respondent's glass front vending machines at a bus station in New Orleans in April and May 2015. (Pet. App. at 34a, 45a-47a).

3. Petitioner sued Respondent in the U.S. District Court for the Eastern District of Louisiana (Judge Zainey), claiming that Respondent's glass front vending machines are, in and of themselves, places of public accommodation, and that the machines violate Title III of the ADA because they are not accessible to

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[1] Congress delegated to DOJ the responsibility for issuing regulations to enforce Title III. 42 U.S.C. § 12186(b); *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 786 (5th Cir. 2000). In addition, Title III required that the Access Board promulgate separate construction and design guidelines to implement the requirements of the statute. 42 U.S.C. § 12204; *Lara*, 207 F.3d at 786; *U.S. v. Hoyt Cinemas Corp.*, 380 F.3d 558, 562 (1st Cir. 2004).

individuals with visual impairments. (Pet. App. at 30a-55a). Notably, he did not claim that Respondent owned, leased, or operated the hospital or the bus station. Rather, he claimed that glass front vending machines, standing by themselves, were places of public accommodation. (Pet. App. at 50a). He alleged that the glass front vending machines were not accessible to visually impaired individuals, and that as a result, they violated the requirements of Title III contained in 42 U.S.C. § 12182. (Pet. App. at 50a-53a). He claimed that Respondent should be required to implement various technological solutions, such as tactile controls, audio cues, and smartphone apps, to assist visually impaired customers. (Pet. App. at 42a-45a).

Respondent moved to dismiss the complaint, and the district court granted the motion, holding that Respondent's glass front vending machines are not places of public accommodation, and that as a result, Respondent is not subject to suit under Title III. (Pet. App. at 17a-23a). The district court based this conclusion on its determination that the glass front vending machines did not fit within any of the twelve specific categories of places of public accommodation under 42 U.S.C. § 12181(7). (Pet. App. at 22a-23a). The court did not reach Respondent's alternative arguments that the vending machines are not facilities within the meaning of 28 C.F.R. § 36.104, and that Petitioner's claims were also subject to dismissal because the accessibility features he was demanding are not required by the ADA.

4. Petitioner appealed, and a panel of the Fifth Circuit unanimously affirmed. The court agreed that

the glass front vending machines are not "public accommodations" under Title III because they are not "sales establishments" under 42 U.S.C. § 12181(7)(E). (Pet. App. at 1a-16a). The court based its conclusion on the plain language of the statute, supported by dictionary definitions, prior guidance from this Court, the legislative history of the ADA, and interpretative guidance from DOJ. (Pet. App. at 8a-15a). In reaching this conclusion, the court noted that "rather than falling within any of those broad categories of entities [listed in 42 U.S.C. § 12181(7)], vending machines are essentially always found inside those entities along with the other goods and services that they provide." (Pet. App. at 11a).

REASONS FOR DENYING THE PETITION

I. There is No Circuit Split.

Petitioner bases his request for certiorari largely on the existence of an alleged circuit split regarding the appropriate scope of the term "public accommodation" under Title III of the ADA. As he articulates the alleged split, the First, Second, and Seventh Circuits have interpreted "public accommodation" as covering more than just physical structures, while the Third, Sixth, and Ninth Circuits have allegedly held that the term only applies to physical structures. (Pet. App. at 6-9). All of the cases cited by Petitioner involve insurance companies and questions about whether Title III applies to insurance policies in several different contexts. A careful review of the relevant cases, however, reveals that the Third, Sixth, and Ninth Circuit opinions all addressed very narrow factual scenarios that did not result in holdings at odds

with the broader views of the First, Second, and Seventh Circuits.

A. The Broad Interpretations of "Public Accommodation" by the First, Second and Seventh Circuits.

In the first appellate case to address the breadth of the definition of "public accommodation" under Title III, the First Circuit reversed a district court decision that "public accommodations" are limited to actual physical structures and instead held that "the phrase is not limited to actual physical structures." *Carparts*, 37 F.3d at 19. Given the sparse record before it, however, the court expressly declined to provide any further guidance about the implications and applications of its holding: "We think that at this stage it is unwise to go beyond the *possibility* that the plaintiff may be able to develop some kind of claim under Title III…." *Id*. at 20 (emphasis in original). Rather, the court remanded the case to the district court "to allow plaintiffs the opportunity to adduce further evidence supporting their view that the defendants are places of 'public accommodation' within the meaning of Title III of the ADA." *Id.* at 19.

Several years later, in a case challenging an insurance policy that provided lower insurance benefits caps for AIDS-related conditions than for other medical conditions, the Seventh Circuit took as a given that Title III extended beyond just physical spaces. *Mut. of Omaha*, 179 F.3d at 559. As the court explained, "The core meaning of this provision, plainly enough, is that the owner or operator of a store,… Web site, or other facility (whether in physical space or in electronic space…) that is open to the public cannot exclude

disabled persons from entering the facility and, once in, from using the facility in the same way that the nondisabled do." *Id.* The court provided no discussion of the issue, but rather simply cited to *Carparts* in support of this statement.[2] *Id.*

Shortly after the Seventh Circuit's opinion in *Mutual of Omaha*, the Second Circuit addressed whether Title III covered an insurance company's underwriting practices when it allegedly refused to sell a life insurance policy to a couple based on their alleged disability. *Pallozzi*, 198 F.3d at 30. The court ultimately concluded that Title III does regulate insurance underwriting, and that "an entity covered by Title III is not only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability," citing both *Carparts* and *Mutual of Omaha* in support of this conclusion. 198 F.3d at 32-33.

Taken together, these opinions stand for the proposition that the term "public accommodation" within the meaning of Title III covers more than actual physical structures. While the Third, Sixth, and Ninth Circuit opinions discussed below touched, to some extent, on this distinction between physical structures and non-physical entities, the ultimate holdings in

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[2] The Seventh Circuit made a similarly pithy statement in *Morgan v. Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) without any analysis beyond citations to *Carparts* and *Mutual of Omaha*: "An insurance company can no more refuse to sell a policy to a disabled person over the Internet than a furniture store can refuse to sell furniture to a disabled person who enters the store." *Id.*

those cases were very narrow and are not at odds with the interpretations of the statute discussed above.

B. The Narrow Holdings of the Third, Sixth, and Ninth Circuits.

The applicable cases from the Third, Sixth, and Ninth Circuits all addressed the exact same, very narrow question: "whether an insurance company…that administers an employer-provided disability plan is a 'place of public accommodation.'" *Weyer*, 198 F.3d at 1114. In all three cases, the courts were called upon "to determine whether Title III of the ADA prohibits an employer from providing to its employees a long-term disability plan issued by an insurance company which contains longer benefits for employees who become disabled due to a physical illness than for those who become disabled due to a mental illness." *Parker*, 121 F.3d at 1008; *see also Ford*, 145 F.3d at 612; *Weyer*, 198 F.3d at 1114.[3]

The Sixth Circuit addressed the narrow issue as follows:

> While we agree that an insurance office is a public accommodation as expressly set forth in § 12181(7), plaintiff did not seek the goods and services of an insurance office. Rather, Parker accessed a benefit plan provided by her private

[3] Indeed, the claims in *Parker* and *Ford* were brought against the exact same employer (Schering-Plough Corporation) and insurance company (Metropolitan Life Insurance Company) based on the same long-term disability policy. *See Parker*, 121 F.3d at 1008; *Ford*, 145 F.3d at 603; *Pallozzi*, 198 F.3d at 32 n.3 (noting that *Parker* and *Ford* reached the same result with respect to identical plans).

> employer and issued by MetLife. A benefit plan offered by an employer is not a good offered by a place of public accommodation.

Parker, 121 F.3d at 1010-11. The court went on to explain that because the plaintiff obtained the benefits in question from her employer rather than an insurance office open to the public, there was "no nexus between the disparity in benefits and the services which MetLife offers to the public from its insurance office." *Id.* at 1011. Thus, the *Parker* court held that "the provision of a long-term disability plan by an employer and administered by an insurance company does not fall within the purview of Title III."[4] *Id.* at 1014.

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[4] *Parker* does include a statement that a public accommodation must be a physical space, *Parker*, 121 F.3d at 1010-11, but this portion of the decision does not create a circuit split for two reasons. First, because the court's ultimate holding was based on the fact that the insurance coverage in question was obtained through the plaintiff's employer and not through an avenue that was available to the public, the court's discussion of the physicality requirement was not necessary to its decision and was therefore dicta. *See*, *e.g.*, *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 334 n.10 (D.C. Cir. 2015) (noting dicta from Fourth Circuit potentially conflicted with prior holding from D.C. Circuit, but explaining, "But dicta does not a circuit split make."); *Fed. Home Loan Bank of Boston v. Moody's Corp.*, 821 F.3d 102, 118 (1st Cir. 2016) (finding no circuit split where allegedly contrary statements were contained in dicta). Second, in addressing an argument raised in the dissent, the court explicitly stated that it was "express[ing] no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation." *Parker*, 121 F.3d at 1011 n.3. Thus, as the Second Circuit has noted, *Parker* did not hold "that Title III ensures only physical access to places of public accommodation." *Pallozzi*, 198 F.3d at 32 n.3.

The Third Circuit reached the same conclusion, explaining that the plaintiff was not discriminated against in connection with a public accommodation because she received the disability benefits in question from her employer and therefore lacked any nexus to MetLife's insurance office. *Ford*, 145 F.3d at 612-13. The court thus held that the plaintiff had failed to state a claim under Title III because "the provision of disability benefits by MetLife to Schering's employees does not qualify as a public accommodation."[5] *Id.* at 614. Several years later, the Ninth Circuit followed suit and in doing so emphasized the reliance of the Third and Sixth Circuits on the lack of any nexus between the disability benefits in question and the services offered by the insurance company to the public. *Weyer*, 198 F.3d at 1115.

C. The Holdings from the Third, Sixth, and Ninth Circuits are Not at Odds with the Holdings of the First, Second, and Seventh Circuits.

Although the Fifth Circuit below indicated in a footnote that it believed it was adopting one side of a perceived circuit split by following the Third, Sixth, and Ninth Circuits (Pet. App. at 11a n.23), the court was mistaken in its reading of the cases. Rather, this trilogy of cases from the Third, Sixth, and Ninth Circuits stands for a very narrow proposition that is not in conflict with the broader holdings of the First,

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[5] As in *Parker*, the *Ford* court discussed the physicality requirement with respect to the definition of "public accommodation," *Ford* 145 F.3d at 612, but this discussion does not create a circuit split for the same reasons noted above with respect to *Parker*. *See Pallozzi*, 198 F.3d at 32 n.3.

Second, and Seventh Circuits in different factual contexts. Indeed, in *Pallozzi*, the Second Circuit expressly noted that it did not believe it was creating a split with the Third and Sixth Circuits. 198 F.3d at 32 n.3. The court explained that the holdings in *Parker* and *Ford* were not contrary to the holding reached in *Pallozzi*, because the narrow issue addressed in those cases was different than the issue before the Second Circuit, and because neither case "held that Title III ensures only physical access to places of public accommodation." *Id.*; *see also Leonard F. v. Israel Discount Bank of New York*, 199 F.3d 99, 107 n.8 (2d Cir. 1999) ("While we have recently held in [*Pallozzi*] that an insurance office in its dealings with the public is a 'place of public accommodation' and is regulated by Title III, it does not necessarily follow that Title III is implicated when an insurance company issues a disability policy to an employer for the benefit of its employees.") (citing *Parker* and *Ford*). Rather, the Second Circuit correctly characterized the holdings of the Third and Sixth Circuits as simply requiring "a plaintiff [to] have a nexus to a place of public accommodation in order to claim the protections of Title III." *Pallozzi*, 198 F.3d at 32 n.3.

Other courts have similarly noted the narrowness of the holdings in these three cases, and that they do not stand for the broad proposition that Title III only applies to physical places. For example, the Eleventh Circuit characterized the holdings of *Parker*, *Ford*, and *Weyer* as follows:

> These cases indicate that, to the extent that a plaintiff intends to raise a claim of disability discrimination based on the kind of insurance

> offered, the plaintiff must demonstrate that the policy was offered to the plaintiff directly by the insurance company and was connected with its offices, as opposed to its being a privilege provided by the plaintiff's employer…. [T]hey do not stand for the broad proposition that a place of public accommodation may exclude persons with disabilities from services or privileges performed within the premises of the public accommodation so long as the discrimination itself occurs off site or over the telephone.

Rendon, 294 F.3d at 1284 n.8; *see also Scribd*, 97 F. Supp. 3d at 570-71 ("Neither *Parker* nor *Ford* held that Title III ensures only physical access…. In those two cases, as well as *Weyer*, the Circuit Courts all considered the same facts: an employer providing insurance benefits to its employees through a third party rather than an insurance company offering policies directly to the public. This distinction is crucial. *The fact that no goods or services were offered to the public means that the Third, Sixth, and Ninth Circuits did not consider facts that justified a finding that Title III requires some connection to a physical place.*") (emphasis added).[6]

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[6] The issue in *Scribd* was whether Title III covers websites that do not make their goods or services available through physical locations open to the public. Indeed, many of the recent cases discussing the alleged circuit split involve websites, which unlike vending machines, were not prevalent when the ADA was passed in 1991. To the extent the Court believes that it needs to provide guidance to the lower courts regarding the physicality issues raised by the cases discussed above, a case regarding Title III coverage for websites would be a much more appropriate vehicle for providing such guidance than the instant case, which, as

As *Pallozzi*, *Rendon*, and *Scribd* make clear, when this collection of cases is analyzed carefully, there is not a split among the circuits regarding the question presented by Petitioner, "whether 'public accommodations' under Title III of the ADA are limited to physical spaces that people can enter." (Pet. App. at 6). Rather, one line of cases has addressed a very narrow question regarding insurance policies offered by employers to their employees, while the other line has addressed broader questions about the definition of "public accommodation" under Title III. As such, there is not a conflict among the circuits that the Court needs to resolve.

The Fifth Circuit's belief that it was weighing in on an issue that had split other circuit courts is, respectfully, mistaken for three reasons. First, the court did not need to introduce the concept of physicality into its analysis of whether a vending machine is an "establishment." Given that vending machines are unquestionably physical in nature, there was no need for the court to wade into the question of whether "the term 'public accommodation'… extend[s] beyond physical places." (Pet. App. at 11a n.23). As a result, the court's discussion of the alleged circuit split and the physicality question must be viewed as nothing more than dicta.

Second, the Fifth Circuit cited to *Parker* and *Ford* to support the view that a circuit split exists (Pet. App. at 11a n.23), but the discussions in those cases indicating a belief that they were deviating from the First Circuit's holding in *Carparts* must similarly be viewed

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discussed below, does not even implicate the issues at the heart of the alleged circuit split.

as dicta, because resolving the physicality question was not necessary to the ultimate holdings in *Parker* and *Ford*, both of which ultimately relied on the fact that the insurance coverage at issue was offered through an employer and not available to the public. *Parker*, 121 F.3d at 1013-14; *Ford* 145 F.3d at 613-14. Indeed, *Parker* specifically indicated that it was "express[ing] no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation," thus making clear that any discussion of the physicality issue was not necessary to the court's holding. 121 F.3d at 1011 n.3.

Finally, the Fifth Circuit was simply incorrect in finding there to be a circuit split on the physicality question. As the analysis above and the discussions in *Pallozzi*, *Rendon*, and *Scribd* demonstrate, there is no conflict between these two lines of cases, and the Fifth Circuit's statement regarding the alleged circuit split is based on a mistaken reading of the applicable cases.

II. Even if There is a Circuit Split, the Issues in this Case do Not Implicate the Split.

Even if the Court were to determine that there is a circuit split that needs to be resolved, the issues that must be addressed to resolve the instant case do not implicate the alleged split. The issue addressed by the prior appellate decisions at the heart of the alleged circuit split is whether "public accommodations" are limited only to physical places. Because the vending machines at issue in this case are undisputedly physical in nature, however, they do not implicate *any* of the cases at the heart of the alleged circuit split. Rather, the central question presented by this case is whether a piece of equipment that exists *within* a place of public accommodation (such as a bus station or a hospital) is, standing by itself, a "sales establishment" within the meaning of 42 U.S.C. § 12181(7)(E) *and* a "facility" within the meaning of 28 C.F.R. § 36.104, and therefore a place of public accommodation separate and apart from the public accommodation in which it is located. As the Fifth Circuit explained below, "rather than falling within any of those broad categories of entities [listed in 42 U.S.C. § 12181(7)], vending machines are essentially always found inside those entities along with the other goods and services that they provide." (Pet. App. at 11a). This is an issue of first impression in any circuit, rather than merely another entry in the alleged circuit split discussed above. Indeed, despite the fact that the ADA has been in existence for more than 25 years, and despite the fact that vending machines were in existence well before the passage of the statute, Respondent has not located any other case in which a plaintiff attempted to take the position that Petitioner is taking here – that

a free-standing piece of equipment such as a vending machine is, in and of itself, a place of public accommodation.[7]

The issue of first impression presented by this case could have a wide-reaching impact on many different types of machines, which underscores the need for a body of considered decisions from lower courts before this Court takes up the issue. Taken at face value, Petitioner's arguments in this case would mean that, for example, arcade-style video game machines, skee ball machines, billiards tables, pinball machines, and air hockey machines themselves would qualify as "a motion picture house, theater, concert hall, stadium, or *other place of exhibition or entertainment*" under 42 U.S.C. § 12181(7)(C), or as "a park, zoo, amusement park, *or other place of recreation*" under 42 U.S.C. § 12181(7)(I) (emphasis added). Many of these self-contained entertainment machines sit side by side with vending machines in public accommodations such as bus stations or restaurants. The same logic would make a simple gum ball machine, as well as a traditional beverage vending machine (not just the glass front variety) an "establishment serving food or drink" or a "sales or rental establishment." *See* 42 U.S.C. §§ 12181(7)(E), (F). All of these equipment and machines existed at the time the ADA was passed, yet

[7] While the absence of litigation over this issue does not, standing by itself, necessarily mean that Respondent's position is correct, the passage of 25 years without litigation over the issue is certainly instructive. Moreover, even though it is possible that the issue raised in this case may one day warrant Supreme Court review, any such review here would be premature, given that the issue has not yet been analyzed and fleshed out by the lower courts.

Congress did not address them in the definition of "public accommodation."

Accepting Petitioner's argument would have the absurd but inevitable consequence of finding that *all* vending machines, such as glass front snack machines and newspaper vending machines, as well as all of the other types of machines discussed above and many others, are themselves places of public accommodation, separate and apart from the actual public accommodations in which they might be located. This, in turn, would subject the *suppliers* of these machines to Title III obligations and potential liability, in addition to the Title III obligations that already exist on the places of public accommodations where the machines are located, which is plainly not what Congress intended.

Because this central question does not implicate the issue at the heart of the alleged circuit split, this case does not offer an appropriate vehicle for resolving the circuit split (assuming that one actually exists), nor would resolving the circuit split resolve this critical question in the case. Deciding the broader question of whether "public accommodations" are limited to physical spaces would not resolve the specific issues before the Court in this case, because whether a physical machine located within an undisputed place of public accommodation is, in and of itself, a separate place of public accommodation does not turn on whether or not Title III requires that a public accommodation be a physical space. Similarly, resolving whether a physical piece of equipment is, by itself, a public accommodation would not resolve the

broader issue of Title III's applicability to non-physical spaces.

In apparent recognition of this fatal disconnect, Petitioner is attempting to link the issues addressed in these prior cases to the issues actually presented by the vending machines here by improperly injecting the notion of physical spaces "that people can enter" into the analysis. (Pet. App. at I, 6). The concept of *physical entry into* a physical space was discussed by the district court in *Carparts*, which "interpreted the term 'public accommodation' as 'being limited to actual physical structures with definite physical boundaries which a person physically enters for the purpose of utilizing the facilities or obtaining services therein.'" *Carparts*, 37 F.3d at 18. While the First Circuit's discussion of the issue followed the district court's example by discussing the notion of entry into a space, in reversing the district court, the First Circuit ultimately reframed the issue as simply whether "public accommodations" are limited to physical structures and concluded that "the phrase is not limited to actual physical structures." *Id.* at 19. Neither the Second Circuit in *Pallozzi* nor the Seventh Circuit in *Mutual of Omaha* framed the question in terms of a physical space "that people can enter." Moreover, in *Parker*, the Sixth Circuit specifically stated that it was "express[ing] no opinion as to whether a plaintiff must physically enter a public accommodation to bring suit under Title III as opposed to merely accessing, by some other means, a service or good provided by a public accommodation." *Parker*, 121 F.3d at 1011 n.3. Most importantly, the Fifth Circuit below did *not* hold "that 'public accommodations' limited to physical spaces that people can enter," as

Petitioner states in his "Question Presented." (Pet. App. at I).

This so-called "physical-entry rule" (a term coined by Petitioner, not by a prior court) has been improperly injected into the analysis by Petitioner in an attempt to manufacture a link between the broader issue of the scope of the definition of "public accommodation" and the much narrower – and entirely distinct – issue at the heart of this case. However, even if the Court were to address and answer the question articulated by Petitioner – whether a public accommodation is limited to physical places that people can enter – that answer would not necessarily resolve either the broad question posed by the alleged circuit split or the narrow questions presented here.

There is also a second critical issue here that further underscores the disconnect between this case and the alleged circuit split on which Petitioner attempts to rely. Even if the Court were to determine that a vending machine could, in and of itself, be a place of public accommodation, the Court would also need to determine whether Petitioner's claims were nonetheless properly dismissed because the accessibility features that he was demanding are not required by the specific – and exclusive – design requirements of the ADAAG, and hence are not required under the ADA. Neither the district court nor the Fifth Circuit reached this issue because both found that the vending machines at issue were not places of public accommodation. But this issue and its implications – whether courts should be in the business of imposing additional design requirements beyond those specifically contained in the ADAAG – further

demonstrate why this case really has no connection to the alleged circuit split that is at the heart of Petitioner's request for certiorari.

III. The Courts Below Correctly Dismissed Petitioner's Claims.

A. The Courts Below Correctly Found that Respondent's Glass Front Vending Machines are Not Places of Public Accommodation.

In the Complaint, Petitioner alleged that Respondent is subject to suit under Title III because its glass front vending machines are places of public accommodation. (Pet. App. at 32a, 50a-52a). Both courts below, however, correctly held that Petitioner's claims in this lawsuit failed because Respondent's glass front vending machines are not places of public accommodation within the meaning of Title III. (Pet. App. at 13a, 22a-23a). This conclusion was correct for two reasons.

1. The Courts Below Correctly Found that the Glass Front Vending Machines Do Not Fall Within Any of the Categories Specifically Enumerated in Title III.

Respondent's glass front vending machines are not "places of public accommodation" because they do not fall within any of the twelve categories specifically enumerated in 42 U.S.C. § 12181(7) and 28 C.F.R. § 36.104. As the district court correctly explained, "the coin-operated [glass front vending machine] is not akin to any of the twelve specific categories of places of public accommodation listed in the statute and federal

regulations." (Pet. App. at 23a). The district court went on to note, "[Petitioner] is attempting to expand the term 'place of public accommodation' well beyond its statutory definition in order to sue a defendant amenable to nationwide relief." *Id.* The Fifth Circuit similarly added, "[R]ather than falling within any of those broad categories of entities [listed in 42 U.S.C. § 12181(7)], vending machines are essentially always found inside those entities along with the other goods and services that they provide."[8] (Pet. App. at 11a).

Of the twelve categories in § 12181(7), Petitioner is attempting to travel under only subsection (E), "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." (Pet. App. at 10). It is beyond dispute that a vending machine is not a bakery, grocery store, clothing store, hardware store, or shopping center.

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[8] Much of Petitioner's argument as to why the decision below was wrong is based on his contention that the Fifth Circuit adopted what he refers to as the "physical-entry rule" and dismissed his claims on this basis. (Pet. App. at 9-14). His reliance on this argument as a basis for reversing the Fifth Circuit is misplaced for two reasons. First, as discussed above, Petitioner has manufactured what he refers to as the "physical-entry rule" in an unsuccessful effort to link the issues in this case to the issues underlying the alleged circuit split. Neither the district court nor the Fifth Circuit below imposed a "physical-entry rule," nor did any of the other circuit cases discussed herein create such a rule. Second, the narrow issues that would be before the Court if certiorari were granted would be whether a freestanding piece of equipment such as a vending machine is an "establishment" within the meaning of Title III, and a "facility" within the meaning of the implementing regulations. The propriety of a so-called "physical-entry rule" would in no way be an issue in front of the Court, because neither the courts below nor any of the appellate decisions discussed above implemented or relied upon such a rule.

Thus, the question is only whether the glass front vending machines fit within § 12181(7)(E) as "sales establishments."

Neither the statute nor the regulations define the term "establishment." However, several sources of authority support the notion that an "establishment" is an actual place of business, and not simply an unstaffed machine that can be moved from one place to another. First, as the Fifth Circuit noted below, this Court has recognized that Congress uses the term "establishment" "as it is normally used in business and in government…as meaning a distinct physical place of business." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496 (1945). (Pet. App. at 13a).

Second, the DOJ's regulations make clear that vending machines are not establishments in and of themselves, but rather are simply objects that can exist within an establishment. Specifically, the regulations list "[r]earranging tables, chairs, vending machines, display racks, and other furniture" as an example of steps to remove architectural barriers. 28 C.F.R. § 36.304(b)(4); *see also* 28 C.F.R. § 36.304(c)(3) (measures to provide access to restrooms include "removal of obstructing furniture or vending machines"). These statements clearly indicate that DOJ views vending machines *not* as establishments in and of themselves, but rather simply as discrete items that may be placed into a business establishment.

These statements also directly refute Petitioner's claim that "it is far from clear that vending machines are readily distinguishable from 'stores.'" (Pet. App. at 11). Indeed, DOJ authority makes very clear that vending machines are pieces of equipment that reside

within a store or other place of public accommodation, and not establishments in and of themselves. Moreover, Petitioner's own allegations in the Complaint undermine his contention that the glass front vending machines are themselves "establishments." As the district court noted, "[t]he disconnect between [Petitioner's] ADA claim and the defendant that he chose to sue is exemplified in the allegation that he makes in order to establish standing." (Pet. App. at 23a n.4). Specifically, Petitioner alleged that, on multiple occasions, he visited the hospital and bus station at which he encountered the glass front vending machines. (Pet. App. at 46a-47a). Thus, he himself essentially conceded that the "establishments" at the heart of his claim were the hospital and bus station, not the vending machines that he encountered there.

Third, as the Fifth Circuit noted (Pet. App. at 14a), the legislative history of the ADA demonstrates that the liberal construction to be afforded to the statute – and on which Petitioner relies (Pet. App. at 2, 12) – has limits. Various House Reports explain that the intended liberal construction of "public accommodation" should encompass other types of stores not expressly referenced in the statute, but not that the term should be stretched beyond its breaking point. *See*, *e.g.*, H.R. Rep. 101–485 (II), 100, 1990 U.S.C.C.A.N. 303, 383; H.R. Rep. 101-485 (III), 54, 1990 U.S.C.C.A.N. 445, 477. As the Fifth Circuit correctly explained, "Congress's own examples of such liberal construction confine the term 'sales establishment' to actual stores." (Pet. App. at 14a).

Fourth, the ordinary and natural meaning of "establishment" demonstrates that an unstaffed vending machine is, standing alone, *not* an establishment, but instead is simply a part of a larger place of business that is an "establishment." Webster's Third New International Dictionary (2002) defines "establishment" as "a more or less fixed and usually sizable place of business or residence together with all the things that are an essential part of it (as grounds, furniture, fixtures, retinue, employees)" or "a public or private institution (as a school or hospital)." *See also* American Heritage Dictionary (5th ed. 2011) (defining "establishment" as "[a] place of business, including the possessions and employees"); Black's Law Dictionary (10th ed. 2014) (defining "establishment" to mean "[a]n institution or place of business").

For all of the reasons discussed above, Respondent's glass front vending machines cannot be considered "establishments" for purposes of Title III. As a result, the vending machines do not fall within any of the enumerated categories in the definition of "public accommodation," and they therefore cannot be considered a "place of public accommodation." Accordingly, the courts below were correct in holding that Petitioner failed to state a claim under Title III for this reason.

2. The Glass Front Vending Machines Are Not "Facilities" Within the Meaning of the Title III Regulations.

To be "places of public accommodation," glass front vending machines must also be "facilities" under Title III's implementing regulations. 28 C.F.R. § 36.104. Although the courts below did not reach the issue,

Respondent's glass front vending machines also cannot be "places of public accommodation" because they are not "facilities."

The implementing regulations define "facility" to mean "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. In *American Association of People with Disabilities v. Harris*, 647 F.3d 1093, 1107 (11th Cir. 2011), the Eleventh Circuit engaged in a thorough analysis of whether voting machines were "facilities" within the meaning of this definition. In that case, the voting machines at issue – like the vending machines here – were movable and were not permanently attached to the buildings in which they were located. *Id.* The court specifically analyzed whether the terms "equipment" or "personal property" in the regulatory definition should be read to include freestanding equipment. *Id.* at 1102.

The *Harris* court concluded that "only physical structures, and the permanent objects affixed to those structures, are 'facilities' covered by the regulations." *Id.* In reaching this conclusion, the court emphasized that DOJ's regulations are "replete with terms that apply only to physical structures, and not to temporary, movable objects such as voting machines." *Id.* at 1103. *Harris* also examined prior cases addressing the definition of "facility" under the ADA as it applies to various types of machines and equipment, differentiating between, on the one hand, objects that were moveable and did not impact the physical setup of

a physical location, and, on the other hand, machines that were hard-wired into the electrical and communications systems of the physical space in which they were located. *Id*. at 1105-07. The court explained that these cases, taken together, make clear that "'facilities' include objects that, while movable in the abstract, are placed in a fixed location and connected to broader infrastructure." *Id.* at 1107. It then concluded that the voting machines, which were movable and not hard-wired into the physical spaces where they were located, were not "facilities" under the ADA. *Id.*

The same analysis applies to Respondent's glass front vending machines. Petitioner did not allege that the glass front vending machines are hard-wired into the locations he visited or otherwise permanently affixed to those premises, nor could he have done so. In this regard, the vending machines are akin to the simple gum ball machines frequently found in grocery stores and other retail locations, and to the voting machines at issue in *Harris*. As a result, the vending machines are not "facilities" within the meaning of the Title III regulations, which provides another independent basis for affirming the lower courts' conclusion that the vending machines are not "public accommodations."

B. Petitioner Also Failed to State a Claim Because the Accessibility Features He Demanded Are Not Required Under the ADA.

Even if the Court were to find that the glass front vending machines are public accommodations, Petitioner's Title III claim was still properly dismissed because he impermissibly demanded that the district

court impose on vending machines the visual accessibility requirements that the ADAAG imposes only on automatic teller machines ("ATMs") and fare machines. Specifically, he contended, among other things, that the vending machines should be "retrofitted with an audio interface system and a tactile alphanumeric keypad." (Pet. App. at 45a). The ADAAG contains specific requirements for certain vending machines, but these requirements address only certain mobility-related disabilities and do not require the types of features that Petitioner was demanding in this lawsuit (*see* Pet. App. at 43a-45a), or any features relating to vision impairments at all.[9] *See*

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[9] By its terms, the ADAAG only applies to "fixed or built-in elements" of buildings and structures. 28 C.F.R. § 36.406(b); *see also* "Title III Technical Assistance Manual 1994 Supplement," DOJ Civil Rights Division, https://www.ada.gov/taman3up.html (1994), at § III-5.3000. As noted, Respondent's glass front vending machines are *not* fixed, and Petitioner did not present any allegations to the contrary. The Court need not resolve that issue here because the accessibility features Petitioner demands are not required regardless of whether the vending machine is fixed or specifically covered by the ADAAG. If the vending machines at issue are, in fact, fixed, then they are specifically covered by the ADAAG. If the vending machines are not fixed, then they are not subject to the heightened obligations under the ADAAG, but rather are subject only to Title III's lower-burden obligation of readily achievable barrier removal. *See Colo. Cross-Disability Coal. v. Too (Del.), Inc.*, 344 F. Supp. 2d 707, 709-10 (D. Colo. 2004) (finding moveable equipment subject only to lower "readily achievable" standard under § 12182, and not to higher "readily accessible" standard under § 12183); "Title III Technical Assistance Manual 1994 Supplement," at § III-4.42000 ("Does the requirement for readily achievable barrier removal apply to equipment? Yes. Manufacturers are not required by Title III to produce accessible equipment. Public accommodations, however, have the obligation, if readily achievable, to take measures, such as altering the height

36 C.F.R. pt. 1191, App. D at 228.1, 309. By contrast, the ADAAG contains specific provisions relating to vision impairments that apply to ATMs and fare machines. *See* 36 C.F.R. p. 1191, App. D at 407, 707.4-707.8. Petitioner is asking the courts to re-write these provisions and apply the vision-related requirements to vending machines.

In *West v. Moe's Franchisor, LLC*, No. 15cv2846, 2015 WL 8484567, at *3 (S.D.N.Y. Dec. 9, 2015), the plaintiff made a similar claim that a soda dispenser violated the ADA because it lacked technology such as the tactile controls required for ATMs. Granting a motion to dismiss, the court held as follows:

> Nothing in the ADA or its implementing regulations supports Plaintiffs' argument that Moe's must alter its Freestyle machines in a way that allows blind individuals to retrieve beverages without assistance. Reasonable businesses, aided by counsel, could navigate through all of the ADA's relevant regulations and never reach the conclusion that Freestyle machines violate federal law. And given the labyrinth of city, state, and federal regulations,

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of equipment controls and operating devices, to provide access to goods and services."); "Title III Technical Assistance Manual," DOJ Civil Rights Division, https://www.ada.gov/taman3.html (1993), at § III-4.42000 (explaining that "readily achievable" barrier removal standard is lower than standard for new construction to comply with ADAAG). Given that vending machines that *are* subject to the ADAAG are not required to implement the accessibility features that Petitioner demanded (as explained below), Title III cannot possibly require vending machines *not* subject to the higher requirements of the ADAAG be equipped with such features.

> it is not appropriate for this Court to announce new ones.

Id.; *see also West v. Five Guys Enters., LLC*, No. 15-CV-2845 (JPO), 2016 WL 482981, at *1 (S.D.N.Y. Feb. 5, 2016) (agreeing with *Moe's* opinion); *DiCarlo v. Walgreens Boot All., Inc.*, No. 15-CV-2919 (JPO), 2016 WL 482982, at *2 (S.D.N.Y. Feb. 5, 2016) (same).

To impose a design requirement not specifically required by the ADAAG "would require district courts to interpret the ADA based upon the subjective and undoubtedly diverse preferences of disabled [patrons]." *Lara*, 207 F.3d at 789 (internal citations omitted); *see also Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1220 (10th Cir. 2014) (holding that Title III claim challenging design of an element "must be evaluated through the lens of the Design Standards; were it otherwise, an entity's decision to follow the standards and build an 'accessible' facility would have little meaning"); *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1012 (9th Cir. 2009) ("The courts are ill-equipped to evaluate such claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable.") (internal quotation omitted); *U.S. v. Nat'l Amusements, Inc.*, 180 F. Supp. 2d 251, 259 (D. Mass. 2001) (explaining that "compliance with [the ADAAG] is sufficient to satisfy both sections [12183] and [12182] of the ADA.... To hold otherwise would render compliance with these regulations meaningless, because a fully compliant structure would always be subject to a claim under ADA § [12182]."); *Indep. Living Res. v. Or. Arena Corp.*, 982 F. Supp. 698, 746 (D. Or. 1997) ("The

interpretation of the ADA proposed by DOJ and plaintiffs is very problematic. It would allow any person to file an action contending that, in the opinion of this particular plaintiff, a design feature ought to have been included in…some…new structure. The courts are ill-equipped to evaluate such claims and to make what amount to engineering, architectural, and policy determinations as to whether a particular design feature is feasible and desirable.…[T]he courts often would have no way of knowing whether the Access Board had considered enacting such a requirement, but decided against it. It also would be difficult for anyone to design a new arena or other structure if the design requirements are subject to being changed retroactively.").[10]

Here, Petitioner was unequivocally demanding that the glass front vending machines be altered to include accessibility features that are not required by the

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[10] DOJ's enforcement activity with respect to establishments with vending machines is consistent with this statutory and regulatory scheme, imposing only requirements specifically included in the ADAAG. *See*, *e.g.*, *Settlement Agreement between the U.S.A and the City of Kansas City, Missouri*, DJ 204-43-195, Attachment I (July 25, 2012), http://www.ada.gov/Kansas_city_pca/kansas_city_pca_sa.htm and http://www.ada.gov/Kansas_city_pca/kansas_city_pca_atti.htm (access issues for vending machines limited to mobility-related requirements of ADAAG, *e.g.*, "Lobby: The Pepsi vending machine is inaccessible because it is mounted with the controls 59½ inches high."); *Project Civic Access Agreement between the U.S.A. and Arlington County, Virginia*, DJ 204-79-252, Attachment K (March 30, 2006), http://www.ada.gov/arlingsa.htm and http://www.ada.gov/arlingatK.htm; *Settlement Agreement under the Americans with Disabilities Act between the U.S.A. and the Owners and Operators of Oceanview Motel*, DOJ No. 202-48-97 (January 6, 2003), http://www.ada.gov/oceanv.htm.

ADAAG, and thus that the courts apply to vending machines the vision accessibility requirements in the ADAAG that apply only to ATMs and fare machines. (Pet. App. at 43a-45a, 54a). This tactic has been rejected by many circuit courts and district courts, and it should similarly be rejected here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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