No.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Americans with Disabilities Act of 1990 prohibits public accommodations from discriminating on the basis of disability. In this case, the court of appeals held that "public accommodations" are limited to physical spaces that people can enter. In so doing, the Fifth Circuit "acknowledge[d] [its] departure from the precedents of the First, Second, and Seventh Circuits" and stated that it was "following the Third, Sixth, and Ninth Circuits." The question presented is:

Whether Title III applies only to physical spaces that people can enter.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 833 F.3d 530. The district court's Order and Reasons granting respondent's motion to dismiss (Pet. App. 17a–23a) is reported at 143 F. Supp. 3d 464.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2016. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 12181(7)(E) of Title 42, United States Code, defines "public accommodation" to include: "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment."

Other pertinent statutory and regulatory provisions are set out at Pet. App. 24a–29a.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA) was "a milestone on the path to a more decent, tolerant, progressive society." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001) (quoting *Bd. of Trs. of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) (internal quotation marks omitted). After lengthy consideration,

"Congress concluded that there was a 'compelling need' for a 'clear and comprehensive national mandate' to eliminate discrimination against disabled individuals, and to integrate them 'into the economic and social mainstream of American life.'" *Ibid.* (quoting S. Rep. No. 116, 101st Cong., 1st Sess. 20 (1989); H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. 50 (1990)). "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in * * * employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *Ibid.* (footnotes omitted).

This case involves the scope of Title III. It defines "public accommodation" as any "private entit[y]" whose operations "affect commerce" and falls within one of twelve categories. 42 U.S.C. §§ 12181(7)(A)–(L). Each category begins with a list of examples (*e.g.*, "a restaurant, bar,"), followed by a catchall provision ("or other establishment serving food or drink"). 42 U.S.C. § 12181(7)(B). This Court has stated that these catchall provisions "'should be construed liberally' to afford people with disabilities 'equal access' to the wide variety of establishments available to the nondisabled." *Martin*, 532 U.S. at 676–677 (citations omitted). "In fact, one of the [ADA's] most impressive strengths" is "its comprehensive character." *Id.* at 675 (internal quotation marks and citation omitted).

Congress directed the Department of Justice to issue regulations implementing Title III of the ADA. 42 U.S.C. § 12186(b). Those regulations define "place of public accommodation" as any "facility operated by a private entity whose operations affect commerce and fall within at least one of" the twelve categories

listed in Section 12181(7) of the statute. 28 C.F.R. § 36.104. "Facility," 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." *Ibid.*

2. Petitioner is legally blind. Pet. App. 34a. In February 2014, petitioner visited a family member at East Jefferson General Hospital in Metarie, Louisiana. *Id.* at 45a–46a. While there, he attempted to use a Coca-Cola vending machine but was unable to do so because the machine's design required users to be able to see. *Ibid.* Petitioner faced the same problem at a New Orleans bus station in April and May of 2015. *Id.* at 47a.[1]

Respondent is a subsidiary of the multinational beverage company, The Coca-Cola Company. Pet. App. 34a. Respondent owns and operates the vending machines at the hospital and bus station. *Id.* at 45a–47a. It also owns, operates, or leases three million other vending machines throughout the United States. *Id.* at 35a.

The vending machines that petitioner encountered are called glass-front vending machines. Pet. App. 36a, 46a–47a. The glass fronts allow sighted consumers to view products for sale inside the machine. *Id.*

[1] The district court stated that petitioner did "not take issue with [respondent's] assertion that a claim based on" the February 2014 incident would be time-barred. Pet. App. 18a n.1. Respondent makes no such claim, however, about the April 2015 and May 2015 incidents.

at 36a. These computerized machines accept payment from debit and credit cards, have wireless capability, can interact with nearby smartphones, and feature touchscreens and LCD displays. *Id.* at 31a, 35a–36a.

Notwithstanding their technological sophistication, respondent's current machines provide no way for a blind person to determine which products the machine contains or for what price. Pet. App. 41a. The products and the selection codes are behind the glass and cannot be perceived by touch. *Id.* at 41–42a. Nor are prices displayed in a format that is accessible to the blind. *Id.* at 43a. And the machines' selection-keypads lack tactile letter and number indicators. *Ibid.*

There are several ways to make the machines accessible to a blind person. Pet. App. 44a. Respondent could install an audio interface and a tactile keypad. *Id.* at 45a. It could attach a braille placard indicating a toll-free hotline that people could call for assistance. *Ibid.* Or it could develop a smartphone application to relate price and product information to blind people. *Ibid.*

3. Petitioner sued respondent under Title III of the ADA. Pet. App. 50a–53a. Respondent moved to dismiss petitioner's complaint for failure to state a claim. *Id.* at 183–19a. The district court granted the motion, concluding that a vending machine "is not akin to any of the twelve specific categories of places of public accommodation listed in the statute and the federal regulations." *Id.* at 22a.

The court of appeals affirmed. Pet. App. 16a. The court reasoned that a vending machine is not a "pub-

lic accommodation" because "[e]very term listed in § 12181(7) * * * is a physical place open to public access." *Id.* at 10a (alterations in original) (internal quotation marks and citation omitted). In adopting this position, the Fifth Circuit "acknowledge[d] [its] departure from the precedents of the First, Second, and Seventh Circuits, which have interpreted the term 'public accommodation' to extend beyond physical places." *Id.* at 11a n.23. The court stated that it was instead "following the Third, Sixth, and Ninth Circuits," which have rejected that interpretation. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents a straightforward question of law: Does Title III of the ADA apply only to physical spaces that people can enter? As judges, commentators, and the court below have recognized, the circuits are deeply divided on this issue. See*, e.g.*, *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 615 (3d Cir. 1998) (Alito, J., concurring in the judgment) ("These issues have divided the circuits * * * ."); see also Pet. App. 11a n.23; Diane Murley, *Web Site Accessibility*, 100 Law Libr. J. 401, 402 (2008) ("There is a circuit split on whether the definition of public accommodation is limited to physical facilities."). Disagreement among the lower courts about the scope of the ADA's coverage is particularly troubling given the statute's express purpose of "provid[ing] a clear and *comprehensive national mandate* for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) (emphasis added). The happenstance of geography should not determine the

scope of Title III's protection for 56.7 million disabled Americans.[2] This case presents a clean vehicle for resolving an entrenched conflict and warrants this Court's review.

A. This Case Deepens an Acknowledged Conflict

The circuits are sharply divided over whether "public accommodations" under Title III of the ADA are limited to physical spaces that people can enter. See *Peoples* v. *Discover Fin. Servs., Inc.*, 387 Fed. Appx. 179, 183 (3d Cir. 2010) ("The Courts of Appeals are split on whether the term 'public accommodation' * * * refers to an actual physical structure or whether it has some broader meaning."), cert. denied, 562 U.S. 1180 (2011). In the opinion below, the Fifth Circuit deepened the conflict, acknowledging that "[i]n following the Third, Sixth, and Ninth Circuits," it was "depart[ing] from the precedents of the First, Second, and Seventh Circuits * * *." Pet. App. 11a n.23. Seven circuits have weighed in, and the reach of an important civil rights statute now turns on where a claim is filed.

1. As the First, Second, and Seventh Circuits have explained, "public accommodations" are *not* limited to "actual physical structures * * * which a person physically enters." *Carparts Distribution Ctr., Inc.* v. *Auto. Wholesaler's Ass'n*, 37 F.3d 12, 18 (1st Cir. 1994) (second internal quotation marks omitted). In *Carparts*, the First Circuit noted that "[t]he plain meaning" of

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[2] See Matthew W. Brault, *Americans with Disabilities: 2010*, at 4, U.S. Census Bureau (2012), http://www.census.gov/prod/2012pubs/p70-131.pdf.

Section 12181(7) imposes no such limitation; in fact, the court observed that "[n]either Title III nor its implementing regulations make any mention of physical boundaries or physical entry." *Id.* at 19–20. To the contrary, Congress's decision to include terms like "travel service" demonstrates that it "clearly contemplated that 'service establishments' include providers of services which do not require a person to physically enter an actual physical structure." *Id.* at 19 (first internal quotation marks omitted). "It would be irrational," the First Circuit explained, to say "that persons who enter an office to purchase services are protected by the ADA, but persons who purchase the same service over the telephone or by mail are not." *Ibid.* Such a result also would "severely frustrate Congress's intent that individuals with disabilities fully enjoy the goods, services, privileges, and advantages available indiscriminately to other members of the general public." *Id.* at 20.

The Second and Seventh Circuits agree. The Second Circuit has endorsed *Carparts*, explaining that "the statute was meant to guarantee * * * more than mere physical access." *Pallozzi* v. *Allstate Life Ins. Co.*, 198 F.3d 28, 32 (2d Cir. 2000). And the Seventh Circuit has specifically rejected the argument that a public accommodation "denot[es] a physical site, such as a store or a hotel." *Morgan* v. *Joint Admin Bd.*, 268 F.3d 456, 459 (7th Cir. 2001) (Posner, J.). As the court said, "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." *Ibid.*

Physical entry is irrelevant: "What matters is that the good or service be offered to the public." *Ibid.*

2. In contrast, the Third, Sixth, Ninth, and now Fifth Circuits limit Title III of the ADA to physical spaces that people can enter (the physical-entry rule). The first court to do so, the Sixth Circuit, stated that it "disagree[d] with the First Circuit's decision in *Carparts*." *Parker* v. *Metro. Life Ins. Co.*, 121 F.3d 1006, 1013 (6th Cir. 1997) (en banc), cert. denied, 522 U.S. 1084 (1998). Instead, it concluded that a public accommodation must be a "physical place open to public access." *Id.* at 1014. Judge Merritt dissented, explaining that the majority had created an "unnecessary conflict * * * [that] will now have to be resolved by the Supreme Court." *Id.* at 1022 (Merritt, J., dissenting).

The Third and Ninth Circuits have adopted the Sixth Circuit's interpretation. The Third Circuit concluded that "public accommodations" are limited to "places with resources utilized by physical access." *Ford*, 145 F.3d at 614. In so doing, the court acknowledged that "by aligning ourselves with the Sixth Circuit's *Parker* decision * * * we part company with the First Circuit." *Id.* at 613–614. Concurring in the judgment, then-Judge Alito argued that the court should not have reached "whether Title III's public accommodation provision guarantees anything more than physical access," noting that this "difficult issue[ ]" has "divided the circuits." *Id.* at 615 (Alito, J., concurring in the judgment). The Ninth Circuit "agree[s] with the Third and Sixth Circuits" that Section 12181(7) applies only to "physical places where goods or services are open to the public." *Weyer* v.

Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114–1115 (9th Cir. 2000).

The question presented by this split goes directly to the scope of protection under Title III. With two incompatible tests operating across seven circuits, it is time for the Court to resolve the issue.[3] Indeed, "[a]s the modern economy increases the percentage of goods and services available through a marketplace that does not consist of physical structures, the protections of Title III will become increasingly diluted." *Parker*, 121 F.3d at 1020 (Martin, C.J., dissenting).

B. The Decision Below Is Wrong

Title III of the ADA is not limited to physical spaces that people can enter. This Court has said that one of the ADA's "most impressive strengths" is "its comprehensive character." *Martin*, 532 U.S. at 675 (internal quotation marks and citation omitted). Yet under the physical-entry rule, Title III would apply to a brick-and-mortar store or restaurant but not a kiosk or food truck. Such arbitrary limitations do not comport with the statute's text, purpose, or implementing regulations.

1. The ADA's text does not support the physical-entry rule. The statute prohibits discrimination "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

[3] The Seventh Circuit's decision in *Morgan*, the Third Circuit's decision in *Ford*, the Ninth Circuit's decision *Weyer*, and the Fifth Circuit's decision in this case all post-date this Court's nearly 20-year-old denial of certiorari in *Parker*.

accommodation." 42 U.S.C. § 12182(a).[4] Under Title III, "private entities are considered public accommodations * * * if the operations of such entities affect commerce" and fall into any of the twelve categories in Section 12181(7). It is undisputed that respondent is a "private entit[y]" whose operations "affect commerce." The only issue is whether vending machines fall into one of the enumerated categories.

They do. Vending machines are within Section 12181(7)(E), which covers a "bakery, grocery store, clothing store, hardware store, shopping center, *or other sales or rental establishment*." 42 U.S.C. § 12181(7)(E) (emphasis added). Like other "sales establishments," a vending machine is a "place of business" where people "transfer * * * property or title for a price." Black's Law Dictionary (10th ed. 2014) (defining "establishment" and "sale," respectively); see also Webster's New World Dictionary of the American Language (2d ed. 1980) (defining establishment as a "place of business"); Funk & Wagnalls Standard College Dictionary (1973) (same).

The Fifth Circuit's contrary analysis had two steps. Step one: All the enumerated examples in Subsection (7)(E) are "retailers occupying physical stores." Pet. App. 10a. Step two: Therefore, the catchall phrase "other sales or rental establishment" must likewise be limited to physical spaces that a

[4] Although the statute defines "public accommodation," 42 U.S.C. § 12181(7), it never defines the word "place," and this Court has used the terms "place of public accommodation" and "public accommodation" interchangeably, see *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 676–677 (2001).

person can enter. See *id.* at 9a–11a. (citing the canons of *ejusdem generis* and *noscitur a sociis*).

This analysis is flawed at both steps. At step one, it is far from clear that vending machines are readily distinguishable from "stores." Like any "store," a vending machine is a "place where goods are deposited for purchase or sale." Black's Law Dictionary (10th ed. 2014) (defining "store"); accord Oxford English Dictionary (2d ed. 1989) (defining "store" as a "place where merchandise is kept for sale"). In fact, respondent's corporate parent describes "Coca-Cola Vending" as "the retail *store* of the world's most loved beverage brands." Derek Myers, *Coca-Cola Vending, SXSW and the Internet of Things,* Coca-Cola Journey (Apr. 4, 2016), http://tinyurl.com/z8oempc (emphasis added).

As for step two: Limiting Title III to physical spaces people can enter undermines the ADA's "clear and comprehensive national mandate for the elimination of discrimination." 42 U.S.C. § 12101(b)(1). When Congress first drafted the twelve categories of "public accommodations," only eight of the twelve included catchall provisions and six of those eight provisions contained the word "similar." See S. 933, 101st Cong., 1st Sess. 31–32 (as passed by Senate, Sept. 7, 1989). The final version, in contrast, added catchalls to all twelve categories and removed the word "similar" from the six categories in which it had appeared. H.R. Rep. No. 596, 101st Cong., 2d Sess. 30, 75 (1990) (Conf. report). For example, and most relevant here, Congress changed what had been "other *similar* retail sales establishment" to "other sales and rental

establishment." Compare S. 933 at 31 (emphasis added), with 42 U.S.C. § 12181(7)(E).

At each stage, Congress crafted the ADA to ensure that "the [catchall] terminology [would] be construed liberally," so that people with disabilities would "have equal access to the array of establishments that are available to others." S. Rep. 116, 101st Cong., 1st Sess. 59 (1989). As the House Report explained, "[a] person alleging discrimination does not have to prove that the entity being charged with discrimination is similar to the examples listed in the definition." H.R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. 54 (1990). The lower court's wooden reliance on canons of statutory construction frustrates that instruction. See *Chickasaw Nation* v. *United States*, 534 U.S. 84, 94 (2001) (stating that because canons "are designed to help judges determine the Legislature's intent as embodied in particular statutory language[,] * * * other circumstances evidencing congressional intent can overcome their force.").

The arbitrary results produced by the physical-entry rule further illustrate the court of appeals' error. Under the physical-entry rule, food trucks, hot dog carts, and roadside produce stands would not be "establishment[s] serving food and drink." 42 U.S.C. § 12181(7)(B). Traditional brick-and-mortar Best Buy stores would be "sales or rental establishment[s]," § 12181(7)(E), while fully automated Best Buy kiosks offering the same goods for sale would not. Such results make little sense and would prevent the ADA from achieving its "sweeping purpose." *Martin*, 532 U.S. at 675.

2. The ADA's implementing regulations also do not support the physical-entry rule. Like the statute, the regulations are designed to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2); see 73 Fed. Reg. 34,466, 34,466–34,467 (July 17, 2008) (discussing regulations codified at 28 C.F.R. pt. 36). The regulation defines "public accommodation" as "a facility operated by a private entity whose operations affect commerce and fall within at least one of the [enumerated] categories." 28 C.F.R. § 36.104. This definition mirrors the statutory language. See 42 U.S.C. § 12181(7). The only material difference is the addition of the word "facility."

But the addition of the term "facility" does not limit "public accommodations" to physical spaces that people can enter. To the contrary, the regulation defines "facility" in strikingly broad terms: "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 (emphases added). The physical-entry rule is incompatible with the regulation. How could one physically enter a "portion of * * * equipment"? As both "personal property" of and "equipment" operated by a private entity whose operations affect commerce, vending machines fit comfortably into the regulatory definition of "public accommodation."

3. Some courts that have adopted the physical-entry rule have relied on the analogy that the ADA was meant to reach a bookstore, not the books it stocks. See, *e.g.*, *Ford*, 145 F.3d at 613 (citing 28 C.F.R. pt. 36 app. B at 640 (1997)); *Parker*, 121 F.3d at 1012–1013 (same). But the right analogy here is not bookstores versus books; it is bookstores versus sidewalk book vendors (or, for that matter, book vending machines[5]). And neither the statute nor the regulations provides any evidence that Congress intended the sweeping protections of Title III to exclude sidewalk book vendors or other businesses that operate independently of physical spaces people can enter.

4. The district court suggested that petitioner sued the wrong plaintiff. See Pet. App. 22a–23a. On this view, petitioner should have brought his problem with the vending machines to the attention of the hospital or bus station. But even stating that position identifies its fundamental flaw. The vending machines are *respondent*'s vending machines. The owners of the property on which those vending machines sit did not design them and are powerless to modify them. Accordingly, the vending machines are them-

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[5] Some libraries are supplementing physical branches with automated lending machines. *Library-A-Go-Go: Contra Costa County Library*, Urban Libraries Council, http://tinyurl.com/gprbw39 (last visited Nov. 9, 2016). Book vending machines are also replacing some traditional physical retail outlets. *Bookstore Offers Supplies in New Vending Machine*, Univ. of Houston Bookstore, http://tinyurl.com/zncba89 (last visited Nov. 9, 2016); Adam Boult, *Vending Machines That Sell Books—The Perfect Solution For People Too Busy To Visit a Book Shop?*, Telegraph (June 3, 2016), http://tinyurl.com/zya82az.

selves "public accommodations" covered by Title III of the ADA.

C. This Issue Is Important And Recurring

As this Court has recognized, the ADA's purpose is to "integrate [people with disabilities] 'into the economic and social mainstream of American life.'" *Martin*, 532 U.S. at 675 (citations omitted); accord 42 U.S.C. § 12101(a)(1) (stating that people with disabilities have "a right to fully participate in all aspects of society"). Yet the court of appeals' physical-entry rule fails to guarantee people like petitioner the right to purchase goods from 6.9 million vending machines in the United States alone. Maki Shiozawa, *16 Things You Didn't Know About Vending Machines in Japan and Around the World*, Coca-Cola Journey (Feb. 20, 2015), http://tinyurl.com/h6jc8ol.

Respondent's vending machines are by themselves a significant part of the economy. But this case has implications beyond one company and beyond the sale of beverages and snacks. Modern vending machines offer a variety of prepared foods, including daily-made salads,[6] freshly brewed coffee,[7] cupcakes,[8] lobster,[9] caviar,[10] hot pizzas,[11] burritos,[12] and

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[6] *The Kiosk*, Farmer's Fridge, http://tinyurl.com/pvd9dxw (last visited Nov. 9, 2016).

[7] *Seattle's Best Coffee Expands to 50,000 Places Where Consumers Can Enjoy a Cup of Its Coffee*, Starbucks Newsroom (May 11, 2011), http://tinyurl.com/j2ln6e6.

[8] *Sprinkles Cupcake ATM*, Sprinkles, http://tinyurl.com/jchvvyc (last visited Nov. 9, 2016).

[9] The Maine Lobster Game, http://www.lobstergame.com (last visited Nov 9, 2016).

hotdogs.[13] Further, many large commercial retailers have turned to vending machines to sell consumer products. Diapers and formula,[14] cosmetics,[15] acne treatment,[16] emergency contraception,[17] shoes,[18] beachwear,[19] bicycle parts,[20] tech products,[21] and

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[10] *Local Beverly Hills Caviar Automated Boutique*, Beverly Hills Caviar, http://tinyurl.com/j5x29db (last visited Nov. 9, 2016).

[11] Jenn Harris, *This Pizza Vending Machine Bakes Fresh, Not Frozen Pies, In Less Than 3 Minutes*, L.A. Times (April 4, 2014), http://tinyurl.com/j5ewlww.

[12] Burrito Box, http://tastetheburritobox.com (last visited Nov. 9, 2016).

[13] LHD Vending Systems, http://tinyurl.com/zloy6ba (last visited Nov. 9, 2016).

[14] WeGoBabies, http://www.wegobabies.com (last visited Nov. 9, 2016).

[15] *Benefit Cosmetics*, ZoomSystems, http://tinyurl.com/zw4hu3j (last visited Nov. 9, 2016).

[16] *Proactiv*, ZoomSystems, http://tinyurl.com/js3bh2b (last visited Nov. 9, 2016).

[17] Julie Cannold, *Vending Machine Dispenses Emergency Contraception*, CNN (Feb. 9, 2012), http://tinyurl.com/zkxx6js.

[18] *Vending*, Rollasole, http://tinyurl.com/zqcfw3h (last visited Nov. 9, 2016).

[19] *The Standard, New York + Quiksilver Launch Second Boardhort/Bikini Vending Machine*, Quiksilver: Surf (Oct. 20, 2009), http://tinyurl.com/zr6etuv.

[20] *Machine*, Bikestock, http://tinyurl.com/h3vhueb (last visited Nov. 9, 2016).

[21] Stephanie Rosenbloom, *The New Touch-Face of Vending Machines*, N.Y. Times (May 25, 2010), http://tinyurl.com/ogzmdm8 ("In the last few years, Best Buy, Sephora, Apple, and Proactiv have put their products in vending machines.").

even cars[22] are now available for purchase through vending machines.

Modern vending machines provide important services to the public. People can use vending machines to fill doctors' prescriptions,[23] check out library books,[24] and rent videos.[25] Vending machines also can perform the same function as thrift stores by allowing people to swap used items for something new.[26] Because vending machines generate more revenue-per-square-foot than traditional retailers[27] and do not require employees, some businesses have abandoned their storefront operations in favor of vending machines; others that have failed to adapt have gone out of business.[28]

As retailers increasingly rely on vending machines, they exclude people with disabilities from a part of our economy that already extends far beyond snacks and sodas. This Court's review is necessary to ensure that economic and technological changes do not leave people with disabilities without access to an increasingly important component of "the economic

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[22] Carvana, http://tinyurl.com/zxgu33l (last visited Nov. 9, 2016).

[23] *Overview*, Instymeds, http://tinyurl.com/zvnwlvv (last visited Nov. 9, 2016).

[24] *Library-A-Go-Go*, supra note 5.

[25] Redbox, http://www.redbox.com (last visited Nov. 9, 2016).

[26] The Swap-O-Matic, http://www.swap-o-matic.com (last visited Nov. 9, 2016).

[27] Rosenbloom, supra note 21.

[28] See, *e.g.*, Shan Li, *Vending Machines Going Gourmet for Upscale Customers*, L.A. Times (July 6, 2014), http://tinyurl.com/zatulfx; Scott Mendelson, *Why I Mourn Blockbuster Video*, Forbes (Nov. 6, 2014), http://tinyurl.com/j6aqtu3.

and social mainstream of American life." *Martin*, 532 U.S. at 675 (internal quotation marks and citation omitted).

D. This Case Presents An Ideal Vehicle

This case presents a clean vehicle for clarifying the meaning of "public accommodations" under Title III of the ADA. Petitioner's standing is uncontested. The lower courts' jurisdiction is not in dispute. Because this is an appeal from an order dismissing petitioner's complaint for failure to state a claim, there are no disputed factual questions. Petitioner raised and preserved all relevant issues on appeal. A single question of law was squarely presented, and the court of appeals gave no alternative grounds of decision to support its judgment.

Title III's definition of public accommodation has been debated in the lower courts for more than two decades. Seven circuits have considered the issue. The court below acknowledged the conflict, see Pet. App. 11a n.23, as have numerous other courts, see, *e.g.*, *Parker*, 121 F.3d at 1013; *Ford*, 145 F.3d at 613–614. The conflict is fully developed, fairly presented, and free from any threshold questions. It warrants this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-31018

EMMETT MAGEE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF–APPELLANT

v.

COCA–COLA REFRESHMENTS USA, INCORPORATED, DEFENDANT–APPELLEE

Decided: Aug. 15, 2016

Before: WIENER, CLEMENT, and COSTA, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff–Appellant Emmett Magee brought this action on behalf of himself and others similarly situated against Defendant–Appellee Coca–Cola Refreshments USA, Inc. ("Coca–Cola"), asserting claims under Title III of the Americans with Disabilities Act ("ADA"). Specifically, Magee alleges that Coca–Cola owns and operates glass-front vending machines in public spaces and that those machines are not acces-

sible to him and others who are blind. Coca–Cola moved to dismiss Magee's complaint, contending that the vending machines it operates are not "places of public accommodation" as required by the applicable provisions of the ADA. The district court agreed and dismissed Magee's complaint, holding that Coca–Cola's vending machines are not themselves "places of public accommodation." We affirm.

I.

Magee alleges the following facts, which we assume to be true at this stage.[1] Coca–Cola's glass-front vending machines are self-service, fully automated machines that dispense bottles and cans of Coca–Cola sodas, as well as juices, energy drinks, and waters. According to Magee, Coca–Cola unveiled these particular machines in 2000. They are equipped with an array of different features, including the ability to accept payment from smart phones and other near-field communication devices, wireless internet capabilities, credit and debit card processing, motion sensing technology, and onboard computer systems.

Magee claims that, despite having these features, Coca–Cola's vending machines lack any meaningful accommodation for use by the blind. This, he says, is because the machines are equipped with an entirely

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[1] *See Chrissy F. by Medley v. Miss. Dep't of Pub. Welfare*, 883 F.2d 25, 26 (5th Cir. 1989).

visual interface: The machines use an alphanumeric keypad—which does not contain tactile indicators differentiating between letters and numbers—that requires users to identify and input selection codes of the beverage they wish to purchase. Those selection codes are printed and placed below each beverage inside the machine and are visible through the machine's glass front. According to Magee, this system renders the blind (1) unable to ascertain the products available inside the machines, (2) unable to identify the selection code of any available products, (3) unable to input knowingly a selection into the alphanumeric keypad, and (4) ultimately unable to purchase products.

Magee further contends that Coca–Cola's machines could be made accessible to the blind in several ways: (1) retrofitting them with an audio interface system and a tactile alphanumeric keypad; (2) developing a smartphone application capable of displaying a non-visual representation of the contents and corresponding prices for each vending machine; or (3) imprinting a non-visually displayed toll-free hotline that the visually-impaired could call for assistance in purchasing a beverage.

Magee suffers from macular degeneration, a condition that has rendered him legally blind. He encountered one of Coca–Cola's vending machines at East Jefferson General Hospital in Metairie, Louisiana, in February 2014. He was unable to use the ma-

chine because it did not offer a non-visual means of operation. He states that he visited that hospital multiple times before and that he reasonably expects to visit it again in the future. Magee adds that, in April and May 2015, he was unable to use Coca–Cola's vending machines at a bus station in New Orleans, Louisiana. He regularly uses that bus station and reasonably expects to use it in the future.

In suing Coca–Cola on behalf of himself and others similarly situated, Magee asserts that Coca–Cola discriminates against blind individuals by denying them access to its products in the glass-front vending machines, in violation of Title III of the ADA. According to Magee, the vending machines are themselves "places of public accommodation" under the statute, making Coca–Cola liable as the owner and operator of those machines. Magee has not filed claims against the hospital or bus station where he encountered the vending machines.

Coca–Cola moved to dismiss Magee's complaint, arguing that it is not subject to the ADA because the vending machines that it owns and operates are not themselves "places of public accommodation." The district court agreed, and granted Coca–Cola's motion to dismiss. Magee now appeals.

II.

We review de novo a district court's grant of a motion to dismiss.[2] Magee maintains on appeal, and as he did in the district court, that Coca–Cola's vending machines are themselves "places of public accommodation" under Title III of the ADA. He does so because to be liable, Coca–Cola must own, lease, lease to, or operate a place of public accommodation.[3] Magee acknowledges that Coca–Cola's only connection to the hospital and bus station where the relevant vending machines are located is its ownership, operation, and maintenance of those vending machines. He contends initially that the vending machines are "places of public accommodation" under a plain reading of the statute. He asserts in the alternative that the Department of Justice's ("DOJ") regulations clarify that vending machines are "places of public accommodations" under Title III.

Title III of the ADA states:

> 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 accommo-

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[2] *Boyd v. Driver*, 579 F.3d 513, 515 (5th Cir. 2009).

[3] *See* 42 U.S.C. § 12182(a).

> dation by any person who owns, leases (or leases to), or operates a place of public accommodation.[4]

Thus, to be liable under the statute, Coca–Cola must be a "person who owns, leases (or leases to), or operates a place of public accommodation."[5] And Coca–Cola's vending machines must be places of public accommodation because Magee alleges no facts suggesting Coca–Cola has any other connection to the hospital or bus station where those machines are located.

The statute does not define "place of public accommodation," but it does define "public accommodation."[6] Under the statute, "private entities are considered public accommodations ... if the operations of such entities affect commerce" and fall into one of twelve enumerated categories.[7] Magee contends that Coca–Cola's vending machines fall under the category defined in subsection (E)—"a bakery, grocery store, clothing store, hardware store, shopping center, or *other sales* or rental *establishment*"—because, he insists, a vending machine is a "sales establishment."[8]

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[4] *Id.*

[5] *Id.*

[6] *See id.* § 12181(7).

[7] *Id.* § 12181(7)(A)–(L).

[8] *Id.* § 12181(7)(E) (emphasis added). In his complaint and before the district court, Magee also asserted that Coca–Cola's vending machines fall under the category of "a restaurant, bar,

The DOJ's regulations 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 twelve enumerated categories, substantially similar to those provided by 42 U.S.C. § 12181(7).[9] Accordingly, under those regulations, a vending machine is only a "place of public accommodation" if (1) it is a "facility," and (2) its operations fall within a category of public accommodation. Under those regulations, a "facility" is "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."[10] Magee contends that the vending machines are "equipment," "property," and "structures." He relies on that regulation's category of public accommodation—"A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment"—which category is identical to that in the statute.[11]

The district court acknowledged initially that the vending machines, "which [are] clearly personal

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or *other establishment serving food or drink*." *Id.* § 12181(7)(B) (emphasis added). On appeal, however, Magee has abandoned this argument, relying exclusively on § 12181(7)(E).

[9] 28 C.F.R. § 36.104.

[10] *Id.*

[11] *Compare* 28 C.F.R. § 36.104 *with* 42 U.S.C. § 12181(7)(E).

property or equipment at [the hospital and bus station], must comply with the ADA so that patrons with disabilities do not suffer discrimination."[12] Magee's complaint failed, according to the district court, because "the defendant he chose to sue for [the] purposes of [pursuing] a nationwide class action, does not own, lease, or operate the place of public accommodation where he encountered" the vending machines.[13] The district court concluded that, because the vending machines are "not akin to any of the twelve specific categories of places of public accommodation listed in the statute and the federal regulations," Magee "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."[14]

Magee contends on appeal that Coca–Cola's vending machines are "places of public accommodation" because they are "sales establishments" under 42 U.S.C. § 12181(7)(E), so we begin with the text of that statute. Neither it nor the regulations define the term "sales establishment." We therefore turn to that term's plain meaning.[15]

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[12] *Magee v. Coca–Cola Refreshments USA, Inc.*, 143 F.Supp.3d 464, 467 (E.D. La. 2015).

[13] *Id.*

[14] *Id.*

[15] *See Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005) ("The appropriate starting point when interpreting any statute is its plain meaning.").

Title 42 U.S.C. § 12181(7) uses the term "establishment" six times:

> **(A)** an inn, hotel, motel, or other place of lodging, except for an *establishment* located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such *establishment* as the residence of such proprietor;
>
> **(B)** a restaurant, bar, or other *establishment* serving food or drink;
>
> ...
>
> **(E)** a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental *establishment*;
>
> **(F)** a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service *establishment*;
>
> ...
>
> (**K)** a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center *establishment*[.][16]

Magee invokes only subsection (E): "a bakery, grocery store, clothing store, hardware store, shopping

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[16] *See* 42 U.S.C. § 12181(7) (A), (B), (E), (F), & (K) (emphasis added).

center, or other sales or rental establishment [.]"[17]

Under the principle of *noscitur a sociis*, "a word is known by the company it keeps."[18] Similarly, the canon of *ejusdem generis* instructs that "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."[19] Applying these principles, we are convinced that Coca–Cola's vending machines are not "sales establishments" under 42 U.S.C. § 12181(7)(E). The relevant portion of that statute uses the term "sales establishment" following a list of retailers occupying physical stores.[20] Other courts, including the Third, Sixth, and Ninth Circuits, have recognized that "[e]very term listed in § 12181(7) ... is a physical place open to public access."[21] "They are actual, physical places where goods or services are open to the public, and places where

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[17] *Id.* § 12181(7)(E).

[18] *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307, 81 S.Ct. 1579, 6 L.Ed.2d 859 (1961).

[19] *Ejusdem generis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[20] *See* 42 U.S.C. § 12181(7)(E).

[21] *Parker v. Metro. Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997); *see also Ford v. Schering–Plough Corp.*, 145 F.3d 601, 613–14 (3d Cir. 1998) ("[W]e do not find the term 'public accommodation' or the terms in 42 U.S.C. § 12181(7) to refer to non-physical access or even to be ambiguous as to their meaning."); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114–15 (9th Cir. 2000).

the public gets those goods or services."[22] Although the term "establishment" could possibly be read expansively to include a vending machine, a vending machine is not akin to any of the listed examples. Indeed, rather than falling within any of those broad categories of entities, vending machines are essentially always found inside those entities along with the other goods and services that they provide.[23]

The common meaning of the term "establishment" also supports Coca–Cola's view that a "sales establishment" includes not only a business but also the physical space that it occupies. *Merriam–Webster's Collegiate Dictionary* defines "establishment" as "a place of business or residence with its furnishings and staff."[24] It relevantly defines "place" as "a build-

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[22] *Weyer*, 198 F.3d at 1114.

[23] In following the Third, Sixth, and Ninth Circuits, we acknowledge our departure from the precedents of the First, Second, and Seventh Circuits, which have interpreted the term "public accommodation" to extend beyond physical places. *See Carparts Distribution Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 18–20 (1st Cir. 1994); *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d 28, 31–33 (2d Cir. 1999); *Morgan v. Joint Admin. Bd., Ret. Plan of Pillsbury Co. & Am. Fed. of Grain Millers, AFL–CIO–CLC*, 268 F.3d 456, 459 (7th Cir. 2001). As the Third and Sixth Circuits have explained, that interpretation ignores the doctrine of *noscitur a sociis*. *See Ford*, 145 F.3d at 614; *Parker*, 121 F.3d at 1014.

[24] *Establishment*, MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999).

ing or locality used for a special purpose."[25] *Webster's Third New International Dictionary* defines "establishment" as a "sizable place of business or residence together with all the things that are an essential part of it (as grounds, furniture, fixtures, retinue, employees)."[26] It too defines "place" as "a building or locality used for a special purpose."[27] The *American Heritage Dictionary of the English Language* defines "establishment" as "[a] place of business, including the possessions and employees."[28] The *New Shorter Oxford English Dictionary* defines "establishment" as "[a]n institution or business; the premises or personnel of this."[29] *Webster's Encyclopedic Unabridged Dictionary of the English Language* defines "establishment" as "a place of business together with its employees, merchandise, equipment, etc."[30] *Black's Law Dictionary* defines an "establishment" as "[a]n institution or

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[25] *Place*, MERRIAM–WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999).

[26] *Establishment*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986).

[27] *Place*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986).

[28] *Establishment*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1976).

[29] *Establishment*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY (1993).

[30] *Establishment*, WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1989).

place of business."[31] It in turn defines "place of business" as "[a] location at which one carries on a business."[32] Finally, the Supreme Court has recognized that the term "establishment" is "normally used in business and in government ... as meaning a distinct physical place of business."[33]

Based on the unambiguous language of 42 U.S.C. § 12181(7)(E), we conclude that Coca–Cola's vending machines are not "sales establishments" under the plain meaning of that term and therefore are not "places of public accommodation" under Title III of the ADA. We therefore need not consider whether the vending machines are "facilities" under 28 C.F.R. § 36.104.

Although we could end our analysis here, we further note that our conclusion comports with the statute's legislative history and the DOJ's guidance.[34]

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[31] *Establishment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[32] *Place of Business*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[33] *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496, 65 S.Ct. 807, 89 L.Ed. 1095 (1945).

[34] The Supreme Court instructs that the DOJ's guidance in reference to the ADA is entitled to deference. *See Bragdon v. Abbott*, 524 U.S. 624, 646, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) ("As the agency directed by Congress to issue implementing regulations, see 42 U.S.C. § 12186(b), to render technical assistance explaining the responsibilities of covered individuals and institutions, § 12206(c), and to enforce Title III in court, §

The statute's legislative history acknowledges that 42 U.S.C. § 12181(7)'s categories are "exhaustive," but cautions that they "should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities."[35] As an example of such liberal construction, a House Report instructs that "although not expressly mentioned, book*stores*, video *stores*, stationery *stores*, pet *stores*, computer *stores*, and other *stores* that offer merchandise for sale or rent are included as retail sales establishments."[36] Likewise, another House Report notes that the category including "a bakery, grocery *store*, clothing *store*, hardware *store*, shopping *center*, or other sales or rental establishment" is "only a representative sample" and that "[o]ther retail or wholesale establishments selling or renting items, such as a book *store*, videotape rental *store*, or pet *store*, would be a public accommodation under this category."[37] Notably, Congress's own examples of such liberal construction confine the term "sales establishment" to actual stores.

Likewise, the DOJ has acknowledged that the cat-

12188(b), the Department's views are entitled to deference.").

[35] H.R. Rep. 101–485 (II), 100, 1990 U.S.C.C.A.N. 303, 383.

[36] *Id.* (emphasis added).

[37] H.R. Rep. 101 485 (III), 54, 1990 U.S.C.C.A.N. 445, 477 (emphasis added).

egories of "public accommodations" in its regulations "are an exhaustive list," but, like Congress, cautions that the "examples given are just illustrations."[38] As an example, the DOJ notes that "the category 'sales or rental establishments' would include many facilities other than those specifically listed, such as video *stores*, carpet showrooms, and athletic equipment *stores*."[39] Consistent with the statute's legislative history, all the examples provided by the DOJ are actual stores.

In the context of defining the term "shopping center or mall," the DOJ has also shed light on the meaning of the term "sales establishment." The DOJ instructs that "[a] building with five or more 'sales or retail establishments' " qualifies as a "shopping center or mall."[40] Under Magee's interpretation of "sales establishment," any building that contains five vending machines would qualify as a "shopping center or mall," clearly not the intent of the various drafters. That DOJ guidance also, by example, refers to "counters and large windows and check-out aisles" as "special features for sales or rental establishments."[41]

In deciding that Coca–Cola's vending machines in

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[38] Americans with Disabilities Act Title III Covering Public Accommodations and Commercial Facilities, § III–1.2000, *available at* https://www.ada.gov/taman3.html.

[39] *Id.* (emphasis added).

[40] *Id.* at § III–5.4100.

[41] *Id.*

the instant case are not places of public accommodation, we acknowledge the limits of our holding. As the district court recognized, those vending machines may very well be subject to various requirements under the ADA by virtue of their being located in a hospital or a bus station, both of which are indisputably places of public accommodation.[42] Here, however, Magee sued only Coca–Cola, an entity that does not own, lease (or lease to), or operate a place of public accommodation.[43]

Accordingly, the district court's dismissal of Magee's complaint is AFFIRMED.

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[42] *See* 42 U.S.C. § 12181(7)(F) (identifying a "hospital" as a "public accommodation"); *id.* § 12181(7)(G) (identifying "a terminal, depot, or other station used for specified public transportation" as a "public accommodation"); *id.* § 12181(10) (identifying "specified public transportation" as, *inter alia*, "transportation by bus").

[43] 42 U.S.C. § 12182(a).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil No. 15–1939.

EMMETT MAGEE

v.

COCA–COLA REFRESHMENTS USA, INC.

Signed: Oct. 28, 2015.
Filed: Oct. 30, 2015.

ORDER AND REASONS

JAY C. ZAINEY, District Judge.

Before the Court is a **Motion to Dismiss for Failure to State a Claim (Rec. Doc. 5)** filed by Defendant, Coca–Cola Refreshments USA, Inc. Plaintiff, Emmett Magee, opposes the motion. The motion, submitted to the Court on September 9, 2015, is before the Court on the briefs without oral argument.

Plaintiff is legally blind. Plaintiff's complaint alleges that Defendant's latest generation of vending machine, the Glass Front Vendor ("GFV"), is inaccessible to the visually impaired. (Rec. Doc. 1 ¶ 28). The GFV does not display the availability of the products

that it sells in any non-visual manner, nor does it offer any non-visual interface for the purchase of the products that it sells. (*Id.* ¶ 33). Plaintiff alleges that in April and May of 2015 he encountered one of Defendant's GFVs at a bus station in New Orleans and that he was unable to independently use the machine.[1] (*Id.* ¶ 47).

Based on this encounter Plaintiff filed this action for violations of Title III of the Americans with Disabilities Act. Plaintiff seeks to represent a nationwide class defined as

> All legally blind individuals who have been and/or are being denied access to glass front vending machines located in the United States and owned and/or operated and/or leased by Coca–Cola Refreshments USA, Inc.

(Rec. Doc. 1 ¶ 51). Plaintiff seeks declaratory and injunctive relief as well as attorney's fees and costs.[2]

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[1] Plaintiff also alleges a similar encounter with one of Defendant's GFVs in the East Jefferson General Hospital in February 2014. (Rec. Doc. 1 ¶ 43). Plaintiff does not take issue with Defendant's assertion that a claim based on this particular encounter would be prescribed given that he filed his complaint more than one year later.

[2] The ADA statutory scheme only allows for equitable relief and attorney's fees. The district court's opinion in *Gilkerson v. Chasewood Bank,* 1 F.Supp.3d 570, 574–75 (S.D.Tex.2014), rec-

Defendant now moves to dismiss the complaint arguing that Plaintiff cannot state a claim against Coca–Cola Refreshments under Title III of the Americans with Disabilities Act. Specifically, Coca–Cola argues that its GFV machines are not places of public accommodation under the Act.

42 U.S.C. § 12182 of the Americans with Disabilities Act ("ADA") states:

> 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.A. § 12182(a) (West 2013) (emphasis added). The following private entities are considered "public accommodations" for purposes of this subchapter, if the operation of such entities affect commerce—

(A) an inn, hotel, motel, or other place of lodging ...;

(B) a restaurant, bar, or other establishment serv-

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ognizes the proliferation of putative ADA class actions around the country driven in some cases by unscrupulous attorneys whose sole interest is the recovery of attorney's fees.

ing food or drink;
(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;
(D) an auditorium, convention center, lecture hall, or other place of public gathering;
(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;
(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;
(G) a terminal, depot, or other station used for specified public transportation;
(H) a museum, library, gallery, or other place of public display or collection;
(I) a park, zoo, amusement park, or other place of recreation;
(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
(L) a gymnasium, health spa, bowling alley golf course, or other place of exercise or recreation.

42 U.S.C.A. § 12181(7)(A)-(L) (West 2013); 28 C.F.R. § 36.104. A "facility" means 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 (Definitions).

In the context of a motion to dismiss the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Lormand v. U.S. Unwired, Inc.,* 565 F.3d 228, 232 (5th Cir.2009) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007); *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Lovick v. Ritemoney, Ltd.,* 378 F.3d 433, 437 (5th Cir.2004)). However, the foregoing tenet is inapplicable to legal conclusions. *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Thread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.* (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

The central issue in a Rule 12(b)(6) motion to dismiss is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief. *Gentilello v. Rege,* 627 F.3d 540, 544 (5th Cir.2010)

(quoting *Doe v. MySpace, Inc.,* 528 F.3d 413, 418 (5th Cir.2008)). To avoid dismissal, a plaintiff must plead sufficient facts to "state a claim for relief that is plausible on its face." *Id.* (quoting *Iqbal,* 129 S.Ct. at 1949). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The Court does not accept as true "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Id.* (quoting *Plotkin v. IP Axess, Inc.,* 407 F.3d 690, 696 (5th Cir.2005)). Legal conclusions must be supported by factual allegations. *Id.* (quoting *Iqbal,* 129 S.Ct. at 1950).

It is undisputed that the bus station where Plaintiff encountered the GFV machine in May 2015 was a place of public accommodation under § 12181(7)(G), *supra.* The GFV, which is clearly personal property or equipment at that public facility, must comply with the ADA so that patrons with disabilities do not suffer discrimination.[3] The problem with Plaintiff's complaint, however, is that the defendant he chose to sue for purposes of pursing a nationwide class action, does not own, lease, or operate the place of public accommodation where he encountered the difficulty

[3] The Court does not consider Defendant's argument that the ADA Accessibility Guidelines contain specific requirements for vending machines that do not include the accommodations that Plaintiff seeks.

with the GFV. Section 12182(a), *supra,* requires this nexus on its face which is why Plaintiff goes to great lengths to argue that the GFV itself is a place of public accommodation. But the coin-operated GFV is not akin to any of the twelve specific categories of places of public accommodation listed in the statute and the federal regulations. Plaintiff 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.[4]

Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion to Dismiss for Failure to State a Claim (Rec. Doc. 5)** filed by Defendant, Coca–Cola Refreshments USA, Inc. is **GRANTED.** Plaintiff's complaint against Defendant is **DISMISSED** with prejudice.

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[4] The disconnect between Plaintiff's ADA claim and the defendant that he chose to sue is exemplified in the allegation that he makes in order to establish standing: "Plaintiff regularly uses ***the bus station*** where he encountered the GFVs ***and he reasonably expects to visit there again.***" (Rec. Doc. 1 Complaint ¶ 48) (emphasis added).

APPENDIX C

1. 42 U.S.C. § 12181 provides in pertinent part:

Definitions

As used in this subchapter:

* * * * *

(7) Public accommodation

The following private entities are considered public accommodations for purposes of this subchapter, if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or

rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

(H) a museum, library, gallery, or other place of public display or collection;

(I) a park, zoo, amusement park, or other place of recreation;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and

(L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

* * * * *

2. 42 U.S.C. § 12182 provides in pertinent part:

Prohibition of discrimination by public accommodations

(a) General rule

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.

* * * * *

3. 28 C.F.R. § 36.104 provides in pertinent part:

Definitions.

* * * * *

Facility means 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.

* * * * *

Place of public accommodation means a facility operated by a private entity whose operations affect commerce and fall within at least one of the following

categories—

(1) Place of lodging, except for an establishment located within a facility that contains not more than five rooms for rent or hire and that actually is occupied by the proprietor of the establishment as the residence of the proprietor. For purposes of this part, a facility is a "place of lodging" if it is—

(i) An inn, hotel, or motel; or

(ii) A facility that—

(A) Provides guest rooms for sleeping for stays that primarily are short-term in nature (generally 30 days or less) where the occupant does not have the right to return to a specific room or unit after the conclusion of his or her stay; and

(B) Provides guest rooms under conditions and with amenities similar to a hotel, motel, or inn, including the following—

(1) On- or off-site management and reservations service;

(2) Rooms available on a walk-up or call-in basis;

(3) Availability of housekeeping or linen service; and

(4) Acceptance of reservations for a guest room type without guaranteeing a particular unit or room until check-in, and without a prior lease or security deposit.

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, lecture hall, or other place of public gathering;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(7) A terminal, depot, or other station used for specified public transportation;

(8) A museum, library, gallery, or other place of public display or collection;

(9) A park, zoo, amusement park, or other place of recreation;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;

(11) A day care center, senior citizen center, homeless

shelter, food bank, adoption agency, or other social service center establishment; and

(12) A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

EMMETT MAGEE Individually and on Behalf of All Others Similarly Situated, Plaintiff v. Coca-Cola Refreshments USA, Inc., Defendant No. 15-1939	COMPLAINT FOR: 1. Violations of Title III of Americans With Disabilities Act, 42 U.S.C. §§ 12181 et seq.,; 2. Declaratory Judgment DEMAND FOR JURY TRIAL CLASS ACTION

Plaintiff Emmett Magee ("Plaintiff" or "Plaintiff Magee") alleges the following based upon personal knowledge as to himself and his own acts, and upon information and belief and the investigation by Plaintiff's counsel, which included, among other things, a review of public documents, marketing materials, and announcements made by Coca-Cola Refreshments USA, Inc. ("Defendant" or "CCR") as to all other matters. Plaintiff believes that substantial additional evidentiary support exists for the allegations set forth

herein and will be available after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This class action seeks to put an end to systemic civil rights violations committed by Defendant CCR against blind persons in the United States. Defendant is denying blind individuals equal access to the goods and services that Defendant provides at glass front vending machines ("GFVs" or "glass front vendors") at tens of thousands of locations throughout the United States.

2. Defendant's glass front vendors are self-service, fully-automated machines that dispense bottles and cans of CCR sodas, juices, energy drinks, and waters. They are highly complex and technologically advanced machines that were first developed by CCR's parent company, The Coca-Cola Company, at the turn of the 21st century. GFVs were specifically designed and implemented by Defendant in order to increase the sales of their products by making their products more accessible to would be consumers.

3. GFVs come equipped with a wide array of different technologies and/or features, including the ability to accept payment from smart phones and other near-field communication devices, wireless internet capabilities, credit and debit card processing,

motion sensing technology, and onboard computer systems.

4. Despite the many advanced features of Defendant's GFVs, they still lack any meaningful accommodation for the blind. While Defendant's sighted customers can independently browse, select, and pay for beverages at Defendant's GFVs without the assistance of others, blind people must rely on sighted companions or strangers to assist them in selecting and purchasing beverages. This lack of accessibility to the blind is particularly offensive given the sophistication of the GFVs and the advanced technological society in which we live today.

5. By failing to make its GFVs accessible to blind persons, Defendant is violating basic equal access requirements under federal law. Congress provided a clear and national mandate for the elimination of discrimination against individuals with disabilities when it enacted the Americans with Disabilities Act. Such discrimination includes barriers to full integration, independent living, and equal opportunity for persons with disabilities, including those barriers created by self-service retail machines and other public accommodations that are inaccessible to blind and visually impaired persons.

JURISDICTION

6. This Court has subject matter jurisdiction of this action pursuant to 28 U.S.C. § 1331 and 42

U.S.C. § 12188 for Plaintiffs' claims arising under the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq*.

VENUE

7. Venue is proper in the Eastern District pursuant to 28 U.S.C. §§ 1391 (b)-(c) and 1441(a).

8. Defendant maintains thousands of GFVs in Louisiana, including several hundred in the Eastern District of Louisiana. Defendant is registered to do business in Louisiana and has been doing business in Louisiana, including the Eastern District of Louisiana. Defendant is subject to personal jurisdiction in this District. Defendant has been and is committing the acts alleged herein in the Eastern District of Louisiana; Defendant has been and is violating the rights of consumers in the Eastern District of Louisiana; and Defendant has been and is causing injury to consumers in the Eastern District of Louisiana. A substantial part of the acts and omissions giving rise to Plaintiff's claims have occurred in the Eastern District of Louisiana.

Members of the class reside throughout the United States, including Louisiana and the Eastern District of Louisiana. Plaintiff Magee is a Louisiana citizen and resides in the Eastern District of Louisiana. Plaintiff experienced injury in this District as a result of Defendant's inaccessible GFV machines that were located in both Metairie and New Orleans, Louisiana.

PARTIES

10. Plaintiff Emmett Magee is a citizen of Louisiana and resident of Metairie, Louisiana. Plaintiff Magee's eyesight has been compromised by a condition known as macular degeneration. This condition renders him legally blind and as such he is a member of a protected class under the Americans with Disabilities Act. Plaintiff uses the terms "blind person" or "blind people" and "the blind" to refer to all persons with visual impairments who meet the legal definition of blindness in that they have a visual acuity with correction of less than or equal to 20 x 200.

11. Defendant CCR is an Atlanta-based, for-profit corporation organized under the laws of the State of Delaware and domiciled in the State of Georgia. Defendant owns, operates and/or maintains GFV beverage vending machines at tens of thousands of locations throughout the United States. Plaintiffs seek full and equal access to the accommodations, advantages, facilities, privileges, and services provided by Defendant CCR at its GFVs throughout the United States.

FACTUAL ALLEGATIONS

12. Plaintiff incorporates by reference the foregoing allegations as if set forth fully herein.

13. Defendant CCR is a fully owned subsidiary of the multinational beverage company and manufac-

turer, The Coca-Cola Company. CCR bottles and distributes Coca-Cola products, such as Coke, Sprite, Fanta and Dasani, in retail environments throughout the United States and Canada.

14. One of CCR's primary channels for the distribution of its eponymous beverages is through an immense fleet of vending machines. CCR owns and/or operates and/or leases approximately 3 million vending machines in the United States.

15. Defendant's vending machines are valuable assets that provide the dual functions of revenue generation as well as raising and/or maintaining awareness of the Coca-Cola brand. As such, CCR employs an army of personnel specifically devoted to fixing, testing, and supplying each of their vending machines. Defendant manages and/or regulates its vending machines in accordance with strict performance standards so as to maintain the consistency of the experience of each Coca-Cola product vended to every customer. For example, each Coca- Cola machine is precisely calibrated to vend sodas or other beverages at a pre-determined temperatures and carbonation levels. CCR also scrupulously moderates the income generated by each of its millions of vending machines on a daily, weekly, and/or monthly basis by means of an internet inventory network.

16. CCR is constantly developing and implementing new technology with which to outfit and improve

the sales and marketing abilities of its vending machines. Defendant's vending machines, and specifically its GFVs, are increasingly more complex and technologically advanced than their predecessors. Not surprisingly, much of the technological advancement of Defendant's vending machines has kept pace with the 21st century developments in wireless internet and mobile phone technology. In the last fifteen years CCR has equipped its vending machines with the following non-exclusive list of abilities: (1) debit and credit card processing (2) wireless connectivity (3) the ability to process payment from smart phone 'apps' and other forms of 'near field communication' (4) motion sensing technology (5) advanced, onboard 'microprocessors' or 'microcontrollers' (6) touchscreens and (7) LCD displays.

17. In addition to outfitting its vending machines with new technology, CCR has developed an entirely new vending machine with an eye towards increasing the sales and availability of its products to the public. That machine is the GFV.

CCR and the Glass Front Vendor ("GFV")

18. Defendant's GFVs represent the next generation of Coca-Cola vending machines. They are structurally distinguished from traditional soda vending machines by their glass front design. As shown in ***Figure 1***, GFVs provide the consumer with a view into the machine itself, whereby one can peruse a se-

lection of the Defendant's merchandise available for purchase at a given machine.

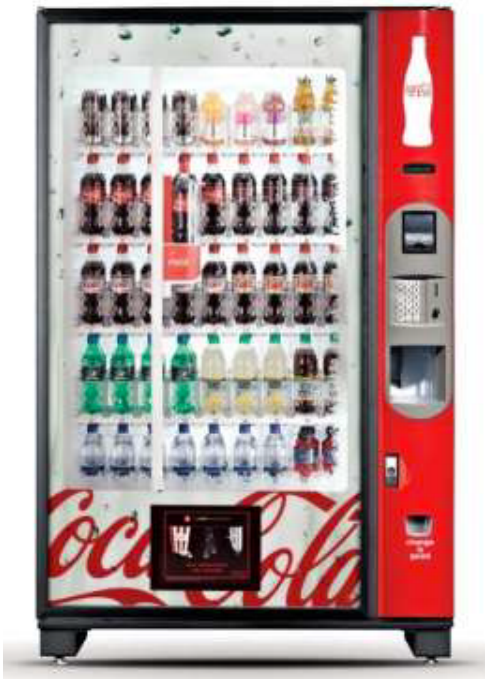

Figure 1

19. Defendant's parent company, The Coca Cola Company, pioneered the use of GFVs in the arena of soft drinks and beverages. The GFV concept was first developed by The Coca Cola Company and it was unveiled in the year 2000[1].

[1] "New dispenser may boost sales for Coke" Tuscaloosa News, 9/17/2000 (Exhibit 1)

20. The GFV's main advantage over the Defendant's older vending machines is in its ability to evolve. GFVs are specifically built with the ability to accommodate different drink sizes and shapes (including, *inter alia*, 10 ounce juice bottles, 10 ounce soda cans, 12 ounce soda cans, 16 ounce energy drink cans, 16.9 ounce fruit drinks, 16.9 ounce water bottles, 18.5 ounce tea bottles, 20 ounce soda bottles, and 20 ounce sport drinks.) As such, GFVs are capable of adapting to accommodate the full spectrum of constantly changing CCR beverage products. ***Figure 2***.

Figure 2

21. GFVs are able to hold different sized and shaped CCR products by virtue of their adjustable shelving and "x/y axis technology" beverage retrieval mechanism. The shelving in every GFV can be adjusted to different widths and/or heights so as to accommodate a given CCR product. After a user makes their drink selection, a conveyor box attached to a mechanical arm that operates on an x/y axis fetches the product and brings it back to the drop slot. Like the GFV's shelving, the conveyor box that transports

the beverages can accommodate all types of CCR products.

22. In the way GFVs can accommodate differently shaped and sized CCR products they allow the Defendant to more readily innovate and/or evolve its handheld beverages product line.

23. Prior to the advent of GFVs, Defendant's vending machines were limited to dispensing only one size and shape of product per machine. So-called "stacker style" vending machines typically dispense either 12 ounce cans or 20 ounce plastic bottles.

24. The increased functionality of GFVs means that Defendant does not need to refurbish or re-engineer the GFV every time CCR brings newly shaped or sized products to market.

25. The ability of GFVs to evolve alongside Defendant's new product offerings comes at a very important time for Defendant. As the beverage market becomes more eclectic and consumers become more health conscious, CCR has a heightened interest in bringing diversity and new alternatives to their selection of beverage products.

26. Even the casual observer can acknowledge that the variety of different sized and shaped handheld beverage products offered to the typical American consumer has increased exponentially in the last two decades. Beverage manufacturers no longer confine

themselves to the canned or bottled soda or corn syrup-infused fruit juice. Defendant and its competitors increasingly find themselves involved in alternate markets in order maintain any possible advantage. In the last ten years alone, CCR's parent company, The Coca Cola Company, has acquired ownership interests in businesses that manufacture: energy drinks,[2] organic juices[3], vitamin waters[4], organic teas[5], coconut waters[6], as well as others[7].

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[2] http://www.coca-colacompany.com/press-center/press-releases/the-coca-cola-company-and-monster-beveragecorporation-enter-into-long-term-strategic-partnership (last accessed June 4, 2015)

[3] http://money.cnn.com/2001/10/30/deals/coke_odwalla/ (last accessed June 4, 2015)

[4] http://www.nytimes.com/2007/05/26/business/26drink-web.html?_r=0 (last accessed June 4, 2015)

[5] http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030106057.html (last accessed June 4, 2015)

[6] http://www.coca-colacompany.com/press-center/press-releases/zico-8482-beverages-joins-the-coca-cola-family (last accessed June 4, 2015)

[7] http://www.forbes.com/sites/greatspeculations/2014/05/16/coca-cola-keurig-green-mountain-deal-a-win-winsituation-for-both-2/ (last accessed June 4, 2015)

http://www.forbes.com/sites/greatspeculations/2014/01/14/coca-cola-eyes-growth-in-the-sparkling-bottled-watermarket/ (last accessed June 4, 2015)

http://www.wsj.com/articles/SB117034638924495048 (last accessed June 4, 2015)

27. Because vending machines provide the Defendant with an important avenue for the sale of their merchandise, Defendant has a continuing interest in making sure their GFVs can keep up with the evolutions of the handheld beverage market. Unfortunately for the blind, the Defendant is less interested in updating its GFVs to accommodate their disabilities.

The Blind and Glass Front Vendors ("GFVs")

28. Defendant's GFVs are inaccessible to blind in two major ways: (1) blind individuals are unable to independently select or purchase their beverage of choice; and (2) blind individuals are unable to make an informed decision about whether to purchase a Coca-Cola product from a GFV because the price is always inaccessible to them.

29. Coca-Cola's GFVs make use of an alphanumeric keypad that requires users to identify and input selection codes of the beverage they wish to purchase. See ***Figure 3***. The selection codes are printed and placed below each beverage inside the machine. See ***Figure 4.***

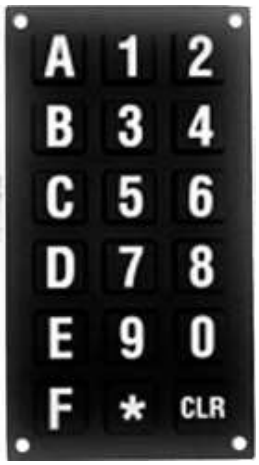

Figure 3

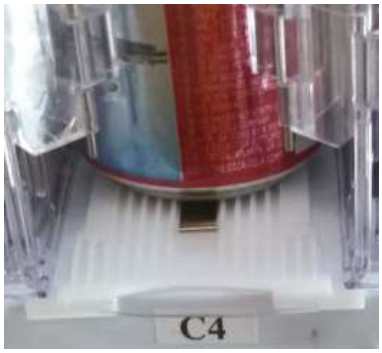

Figure 4

30. The only way for a GFV user to select their beverage of choice is by looking through the glass front of the machine and identifying the selection code for the corresponding beverage. For example, in ***Figure 4***, the selection code is "C4."

31. After determining their beverage of choice and identifying its corresponding selection code, the user then inputs the selection code into the alphanumeric keypad.

32. The GFV machine poses multiple barriers to the blind in this process. (1) The blind are unable to ascertain which of the myriad Coca-Cola products are available inside a given machine; (2) the blind are unable to identify the selection code of any of the available products inside a given machine, nor are they able to identify the format of the selection code

(e.g. letter- number, letter-letter, number-number); and (3) the blind are unable to knowingly input a selection into the alphanumeric keypad because the keypads on Defendant's GFVs do not have any tactile indicators that differentiate between the letters and/or numbers that are available to press.

33. In short, GFVs do not display the availability of the products that it sells in any non-visual manner, nor do GFVs offer any non-visual interface for the purchase of the products that it sells.

34. Not only are blind people unable to choose, select and purchase a beverage from GFVs, they are also unable to decide whether or not to purchase a beverage for the advertised price at a particular GFV. The blind are unable to evaluate the product prices on GFVs because Defendant's GFVs do not display prices in a format accessible to the blind—and the prices of Defendant's products are not uniform across all GFVs. For example, Plaintiff Magee encountered a GFV at one location where a 20-ounce beverage cost $1.50; and yet the same beverage at another GFV he encountered at another location cost $2.00. As a result, the blind are unable to make a basic consumer decision about whether they are willing to pay the advertised price for one of the Defendant's products.

35. In short, GFVs do not display the prices to the products which it sells in any non- visual manner.

36. Despite the existence of readily available accessible technologies which make use of tactile controls, audio cues, phone apps, and/or other non-visual means of accommodation, Defendant has chosen to rely on an exclusively visual interface. As a result, all of the services and features provided at Defendant's GFVs are only available to sighted customers.

37. Sighted customers who use Defendant's GFVs have access to a variety of accommodations, advantages, facilities, privileges, equipment, and services, including the ability to browse, select, and pay for beverages privately and independently, without the assistance of a third party.

38. In contrast, blind customers must seek the assistance of companions, strangers, or other third parties in order to use Defendant's GFVs at all. Additionally, blind individuals are unable to independently determine the cost of beverages at one of Defendant's GFVs without the assistance of others.

39. The inaccessibility of Defendant's GFVs is all the more intolerable because of the abundance of cheap technological solutions that would make the machines accessible to the blind. The reasonableness of possible alternatives that would remove barriers to the visually impaired take on a starker contrast when viewed against the backdrop of the advanced technology within each GFV.

40. Removing the barriers blind people face at GFVs would cost the Defendant but a small percentage of a percentile of the hundreds of millions dollars which they earn on an annual basis from their vending machines. Removing the barriers that blind people face at GFVs is highly feasible and it would not alter, subvert, or change the essence and/or function of the Defendant's GFVs.

41. GFVs could easily be retrofitted with an audio interface system and a tactile alphanumeric keypad. Defendant could develop a smartphone app capable displaying to its user a non-visual representation of the contents and the prices of a particular GFV. GFVs could be imprinted with a non-visually displayed toll-free hotline which the visually-impaired could call for assistance in purchasing a beverage from a particular machine. These types of solutions would render Defendant's GFVs accessible to blind customers and they are examples of technology already in use by other sales establishments throughout the country.

42. Defendant has long been aware of means by which its GFVs can be made accessible to blind individuals. Nevertheless, Defendant has refused to make its GFVs accessible.

Mr. Magee's Experience

43. Plaintiff Magee encountered Defendant's GFVs while visiting a family member at his local hospital,

East Jefferson General Hospital ("EJGH") in February of 2014.

44. Mr. Magee visited EJGH multiple times prior February 2014 and he reasonably expects to visit there again in the future.

45. In connection with his February 2014 visit to EJGH, Mr. Magee noticed several of Defendant's GFVs on the hospital premises. Mr. Magee approached one of the machines and quickly determined that he was unable to use the GFVs because they did not offer a non-visual means of operation.

46. Counsel for Plaintiff visited EJGH and confirmed Mr. Magee's allegations that there were inaccessible GFVs on the premises. GFVs with the following asset numbers[8]are located on the EJGH premises as of May 1, 2015:

DN14006628

DN11003771

DN05000818

DN11003776

DN11003777

RY06014146

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[8] "Asset Number" is the unique two-letter, eight-number combination that identifies every one of Defendant's vending machines.

DN10004242

DN10004393

DN13002316

47. In April and May of 2015, Plaintiff Magee again encountered Defendant's GFVs, this time at a bus station in New Orleans. Plaintiff's experience with the GFVs at the bus station was identical to his experience with the GFVs at EJGH—he was unable to independently use the machines.

48. Plaintiff regularly uses the bus station where he encountered the GFVs and he reasonably expects to visit there again.

49. Counsel for Plaintiff was able to confirm that as of May 1, 2015, GFVs with the following assent numbers are located at the New Orleans bus station visited by the Plaintiff :

RY08011386

RY08003197

50. Defendant thus provides accommodations, advantages, facilities, privileges, and services to customers that contain access barriers. These barriers deny full and equal access to Plaintiff, who would otherwise use the Defendant's glass front vendors and who would otherwise be able to fully and equally enjoy the benefits and services of vending machines.

CLASS ACTION ALLEGATIONS

51. Plaintiff seeks certification of the following Class pursuant to Fed. R. Civ. P. 23(a), 23(b)(2), and, alternatively, 23(b)(3):

> **"All legally blind individuals who have been and/or are being denied access to glass front vending machines located in the United States and owned and/or operated and/or leased by Coca-Cola Refreshments USA, Inc."**

52. The persons in the class are so numerous that joinder of all such persons is impractical and the disposition of their claims in a class action is a benefit to the parties and to the Court.

53. This case arises out of Defendant's common policy and practice of denying blind persons access to the goods and services of its GFVs. Due to Defendant's policy and practice of failing to remove access barriers, blind persons have been and are being denied full and equal access to Defendant's GFVs and the goods and services they offer.

54. There are common questions of law and fact involved affecting the parties to be represented in that they all are legally blind and have been and/or are being denied their civil rights to full and equal

access to, and use and enjoyment of the accommodations, advantages, facilities, privileges, and services provided at Defendant's GFVs due to the lack of accessible features at such facilities, as required by law for persons with disabilities.

55. The claims of the named Plaintiff are typical of those of the class. Plaintiff will fairly and adequately represent and protect the interests of the members of the Class. Plaintiff has retained and are represented by counsel competent and experienced in complex and collective action litigation.

56. Class certification of the claims is appropriate pursuant to Fed. R. Civ. P. 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to the Class, making appropriate both declaratory and injunctive relief with respect to Plaintiff and the Class as a whole.

57. Alternatively, class certification is appropriate under Fed. R. Civ. P. 23(b)(3) because questions of law and fact common to Class members predominate over questions affecting only individual class members, and because a class action is superior to other available methods for the fair and efficient adjudication of this litigation.

58. References to Plaintiff in this complaint include the named Plaintiff and each member of the class, unless otherwise indicated.

FIRST CAUSE OF ACTION

(Violation of 42 U.S.C. §§ 12181, *et seq.* Title III of the Americans with Disabilities Act) (on behalf of Plaintiff and the Class)

59. Plaintiffs incorporate by reference the foregoing allegations as if set forth fully herein.

60. Section 302(a) of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.,* (hereinafter "ADA") 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. [Emphasis added by Plaintiff]

61. Defendant's GFVs are establishments serving drink and therefore places of public accommodation within the definition of Title III of the ADA. 42 U.S.C. §§12181(7)(B)

62. Defendant's GFVs are sales establishments and therefore places of public accommodation within the definition of Title III of the ADA. 42 U.S.C. §§12181(7)(E)

63. Under Section 302(b)(I) of Title III of the ADA, it is unlawful discrimination to deny individuals with disabilities or a class of individuals with disabilities the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

64. Under Section 302(b)(I) of Title III of the ADA, it is unlawful discrimination to deny individuals with disabilities or a class of individuals with disabilities an opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation, which is equal to the opportunities afforded to other individuals.

65. Under Section 302(b)(2) of Title III of the ADA, unlawful discrimination also includes:

> a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations; and a failure to take such steps as may be

> necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden…

66. The acts alleged herein constitute violations of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq*. Patrons of Defendant's GFVs who are blind (including the Plaintiff and the Plaintiff Class) have been denied full and equal access to those public accommodations; and they have not been provided services that are provided to other patrons who are not disabled and/or they have been provided services that are inferior to the services provided to non-disabled patrons. Defendant has failed to take any steps to remedy their discriminatory conduct. These violations are ongoing. Unless the Court enjoins Defendant from continuing to engage in these unlawful practices, Plaintiffs and members of the class will continue to suffer irreparable harm.

67. The acts alleged herein constitute violations of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq*.

68. The actions of Defendant were and are in violation of the Americans with Disabilities Act 42 U.S.C. §§ 12181, *et seq.,* and therefore Plaintiffs are entitled to injunctive relief to remedy the discrimination.

SECOND CAUSE OF ACTION

(Declaratory Relief)
(On behalf of Plaintiff and the Class)

69. Plaintiff incorporates by reference the foregoing allegations as if set forth fully herein.

70. An actual controversy has arisen and now exists between the parties in that Plaintiff contends, and that Defendant denies, that Defendant, by providing inaccessible glass front vending machines throughout the United States, fails to comply with applicable laws including, but not limited to, Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181, *et seq*.

71. A judicial declaration is necessary and appropriate at this time in order that each of the parties may know their respective rights and duties and act accordingly.

WHEREFORE, Pursuant to 42 U.S.C. §§ 12181, *et seq*. and the remedies, procedures, and rights set forth and incorporated therein Plaintiffs request relief as set forth below.

RELIEF REQUESTED

Plaintiff prays for judgment as follows:

1. A permanent injunction to prohibit Defendant from violating the Americans with Disabilities Act, 42 U.S.C. §§ 12181, *et seq*.;

2. A permanent injunction requiring Defendant to take the necessary steps to make Defendant's GFVs that are provided throughout the United States readily accessible and usable by blind and visually impaired individuals;

3. A declaration that Defendant Coca-Cola is owning, maintaining and/or operating its GFVs in a manner which discriminates against the blind and visually impaired and which fails to provide access for persons with disabilities as required by the Americans with Disabilities Act, 42 U.S.C. §§ 12181, *et seq*.

4. An order certifying this case as a class action under Fed. R. Civ. P. 23(a) & (b)(2) and/or (b)(3), appointing Plaintiff as Class Representative and his attorneys as Class Counsel;

5. Plaintiff's reasonable attorneys' fees, expenses, and costs as provided by law;

6. Such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs demand trial by jury on all issues for which a jury trial is allowed.

June 5, 2015

Respectfully Submitted,

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