No. 16-668

In the Supreme Court of the United States

EMMETT MAGEE, PETITIONER

v.

COCA-COLA REFRESHMENTS USA, INC.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
T.E. WHEELER, II
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
MORGAN L. GOODSPEED
Assistant to the Solicitor General
TOVAH R. CALDERON
FRANCESCA L. PROCACCINI
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a beverage vending machine is a "place of public accommodation" under Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12181 *et seq.*

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The Americans with Disabilities Act of 1990 (ADA or the Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). "To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act), public services (Title II), and public accommodations (Title III)." *PGA Tour,*

Inc. v. *Martin*, 532 U.S. 661, 675 (2001) (footnotes omitted).

This case concerns the third area, public accommodations. See 42 U.S.C. 12181-12189. Title III of the ADA provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. 12182(a). The ADA enumerates twelve categories of "private entities" that "are considered public accommodations for purposes of [the Act], if the operations of such entities affect commerce." 42 U.S.C. 12181(7). Those twelve categories span a wide array of establishments, including hotels, restaurants, movie theaters, hospitals, banks, museums, bus stations, schools, and gymnasiums. *Ibid.* The category at issue in this case encompasses "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." 42 U.S.C. 12181(7)(E).

The Act authorizes the Attorney General to issue implementing regulations. 42 U.S.C. 12186(b). Pursuant to that authority, the Department of Justice has defined the term "place of public accommodation" to include 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). 28 C.F.R. 36.104 (capitalization and emphasis omitted). The term "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.* (emphasis omitted).

2. Petitioner is an individual who is legally blind. Pet. App. 34a. He alleges that on three occasions—once at his local hospital and twice at a New Orleans bus station—he encountered a glass-front vending machine that was owned, operated, or leased by respondent. *Id.* at 5a, 35a, 45a-47a. The relevant vending machines are self-service, fully automated machines that dispense respondent's sodas, juices, energy drinks, and waters. *Id.* at 31a. Petitioner alleges that the vending machines are inaccessible to him because they do not offer a non-visual means of operation or of conveying the beverage options and prices. *Id.* at 41a-43a.

3. Petitioner filed this action against respondent, alleging violations of Title III of the ADA. Pet. App. 30a. He contended that respondent's glass-front vending machines are "place[s] of public accommodation" under the Act and that individuals who are blind, including petitioner and a putative class of similarly situated people, have been denied full access to those public accommodations. *Id.* at 48a-53a. Petitioner sought declaratory and injunctive relief and attorney's fees. *Id.* at 48a, 54a. He did not seek relief from the hospital or the bus station in which he had encountered the machines. *Id.* at 34a.

Respondent moved to dismiss the suit for failure to state a claim. Pet. App. 17a. Respondent argued, and the district court agreed, that respondent's vending machines are not themselves "place[s] of public accommodation" under Title III. *Id.* at 22a-23a. The court stated that vending machines "must comply with the ADA," but it concluded that the bus station where petitioner

had encountered the machines, not respondent, was the responsible party. *Ibid.*

4. The court of appeals affirmed. Pet. App. 16a. The court rejected petitioner's argument that respondent's vending machines are "sales * * * establishments" under 42 U.S.C. 12181(7)(E). Pet. App. 8a-15a. The court explained that, although the ADA does not define the term "sales establishment," that catch-all category "follow[s] a list of retailers occupying physical stores." *Id.* at 10a. Applying the interpretive canons of *ejusdem generis* and *noscitur a sociis*, the court concluded that vending machines are not "sales establishments" because they are "not akin to any of the listed examples." *Id.* at 10a-11a. Rather, the court stated, "vending machines are essentially always found inside those entities along with the other goods and services that they provide." *Id.* at 11a.

The court of appeals further observed that a "sales establishment" is not simply a business but is also "the physical space that it occupies." Pet. App. 11a. The Fifth Circuit believed that it had aligned itself with the Third, Sixth, and Ninth Circuits in concluding that Title III applies only to "actual, physical places where goods or services are open to the public." *Id.* at 10a (quoting *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000)); see also *id.* at 10a & n.21 (citing *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 613-614 (3d Cir. 1998), and *Parker* v. *Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1114 (6th Cir. 1997), cert. denied, 522 U.S. 1084 (1998)). The court noted, however, that the First, Second, and Seventh Circuits "have interpreted the term 'public accommodation' to extend beyond physical places." *Id.* at 11a n.23 (citing *Morgan* v. *Joint Admin. Bd.*, 268 F.3d 456, 459 (7th Cir. 2001);

Pallozzi v. *Allstate Life Ins. Co.*, 198 F.3d 28, 31-33 (2d Cir. 1999), amended on denial of reh'g by 204 F.3d 392 (2d Cir. 2000); *Carparts Distribution Ctr., Inc.* v. *Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 18-20 (1st Cir. 1994)).

The court of appeals declined to consider whether a vending machine is a "facilit[y]" within the meaning of the Department of Justice regulations that implement the ADA. Pet. App. 13a; see 28 C.F.R. 36.104. The court also "acknowledge[d] the limits of [its] holding," agreeing with the district court that the vending machines at issue "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." Pet. App. 16a. The court explained, however, that petitioner had "sued only [respondent], an entity that does not own, lease (or lease to), or operate a place of public accommodation," as the court had construed that term. *Ibid.*

DISCUSSION

This case does not warrant the Court's review. The court of appeals correctly held that the beverage vending machines at issue are not "place[s] of public accommodation" under Title III of the ADA. 42 U.S.C. 12182(a). Beverage vending machines are not generally perceived as discrete businesses, and they lack the other hallmarks of the statutorily enumerated "sales or rental establishment[s]." 42 U.S.C. 12181(7)(E). Instead, as the court below explained, the public accommodation in which a vending machine is located bears responsibility for ensuring the machine's accessibility in accordance with the ADA.

The Fifth Circuit is the only court of appeals that has addressed whether a vending machine is a "place of public accommodation" under Title III. Although the Fifth Circuit believed that its decision implicated an existing circuit split, the decisions that the court below cited addressed the application of the ADA to a fundamentally different type of transaction. And no court, including the Fifth Circuit, has adopted the physical-entry rule described in petitioner's question presented (Pet. I). The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Held That The Vending Machines At Issue Here Are Not "Place[s] Of Public Accommodation" Under The ADA

Title III forbids 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 accommodation." 42 U.S.C. 12182(a). The Act identifies, as one type of "public accommodation," "a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment." 42 U.S.C. 12181(7)(E).[1] Although respondent's beverage vending machines are not bakeries, grocery stores, clothing stores, hardware stores, or shopping centers, petitioner contends (Pet. 10) that the machines fall into the catch-all category of "other sales or rental establishment[s]." 42 U.S.C. 12181(7)(E). The court of appeals correctly rejected that contention.

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[1] To constitute a public accommodation under Title III, an entity must also be open to the public. See 28 C.F.R. Pt. 36, App. C. As a result, sales establishments are not public accommodations if they sell exclusively to other businesses, rather than to individuals. *Ibid.*

1. a. The ADA does not define the term "sales or rental establishment." Petitioner contends that a vending machine is a sales establishment because it "is a 'place of business' where people 'transfer * * * property or title for a price.'" Pet. 10 (alteration in original) (quoting *Black's Law Dictionary* 664, 1537 (10th ed. 2014)). Respondent's vending machines, which offer goods in exchange for money, arguably fall within the outer bounds of that definition—as do gumball machines, newspaper stands, or other coin-operated pieces of equipment. But the "ordinary, contemporary, common meaning" of the term "sales establishment" is not so sweeping. *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 876 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)). In particular, the word "establishment" suggests a substantial, standalone place of business. See *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 496 (1945) (construing "establishment" to mean "a distinct physical place of business," such as a retail store or a wholesale warehouse). That is why an ordinary English speaker who purchases a soda from a vending machine would not typically describe the act as a quick visit to a sales establishment. See *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2003 (2012) ("That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense.").

Dictionary definitions of the word "establishment" likewise emphasize the various accoutrements of a business, not its bare ability to facilitate a commercial transaction. Pet. App. 11a-12a; see, *e.g.*, *The American Heritage Dictionary of the English Language* 609 (4th ed. 2000) ("[a] place of residence or business with its pos-

sessions and staff"); *Merriam-Webster's Collegiate Dictionary* 427 (11th ed. 2005) ("a place of business or residence with its furnishings and staff"); *The Random House Dictionary of the English Language* 663 (2d ed. 1987) ("a place of business together with its employees, merchandise, equipment, etc."); *Webster's Third New International Dictionary* 778 (1993) ("a more or less fixed and usu[ally] sizable place of business or residence together with all the things that are an essential part of it (as grounds, furniture, fixtures, retinue, employees)"). Those definitions, like the ordinary English speaker's intuition, suggest that a beverage vending machine is not a "sales establishment" because it has no employees, furnishings, or other commercial trappings.

The canons of *ejusdem generis* and *noscitur a sociis* reinforce that conclusion. The open-ended category of "other sales or rental establishment[s]" appears at the end of a list of enumerated examples. 42 U.S.C. 12181(7)(E). When a broad catch-all phrase follows a list of specific examples, the *ejusdem generis* canon teaches that "the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001) (quoting 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.17, at 166 (4th ed. 1991)). The related canon of *noscitur a sociis* similarly "counsels that a word is given more precise content by the neighboring words with which it is associated." *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012) (quoting *United States* v. *Williams*, 553 U.S. 285, 294 (2008)).

Section 12181(7)(E) lists five specific examples of a "sales or rental establishment": "a bakery, grocery store,

clothing store, hardware store, [and] shopping center." 42 U.S.C. 12181(7)(E). Those are all retail businesses that (1) sell goods to the public; (2) have a discrete, standalone location or identity; and (3) are typically operated by an on-site proprietor or employees. A bakery, for example, sells bread and muffins from a physical location that visitors would identify as a bakery; the proprietor or employees perform the sales and assist customers. The other enumerated stores are similar, while a shopping center covers a grouping of several such stores into a single physical space. Most of the other types of establishments listed elsewhere in Section 12181(7) also tend to share the second two characteristics outlined above. Inns, hotels, restaurants, bars, banks, barber shops, gas stations, pharmacies, hospitals, day care centers, and so on are all standalone commercial entities with a proprietor or employees. See 42 U.S.C. 12181(7)(A), (B), (F), and (K).

Although vending machines sell goods to the public, they lack the other features that are characteristically associated with the enumerated sales establishments. First, they typically do not have a standalone location or identity. To the contrary, vending machines are ordinarily located within a larger establishment, often a business that itself qualifies as a Title III public accommodation, as a courtesy to the business's customers. Pet. App. 11a. A vending machine therefore is generally thought of as a furnishing, amenity, or piece of equipment, rather than as a discrete business. Consistent with that usual understanding, petitioner's complaint alleges that he encountered respondent's vending machines "at his local hospital" and "at a bus station in New Orleans," *id.* at 45a, 47a, and that those are the

destinations that he "reasonably expects to visit * * * again," *id.* at 46a, 47a.

Second, vending machines can operate without the assistance or oversight of a proprietor or employees. Respondent's vending machines are unstaffed pieces of equipment that perform a basic, fully automated task: exchanging a few quarters or dollar bills for a beverage. Pet. App. 38a; see Pet. 17. Without a proprietor, employees, or any of the other typical trappings of a distinct sales establishment, respondent's vending machines have little in common with the specific examples listed in Section 12181(7)(E).

b. This does not mean that the ADA phrase "sales or rental establishment" is categorically limited to operations that possess all three of the foregoing characteristics. Although the *typical* "sales establishment" is a standalone entity, one public accommodation may sometimes be located inside another without forfeiting its distinct identity. A coffee shop, for example, could remain a place of public accommodation even when it is located within a hotel or a department store.

The term "sales or rental establishment" likewise is not categorically limited to businesses that are staffed by human proprietors or employees. Congress's inclusion of a catch-all provision serves in part to facilitate the ADA's application to new businesses that utilize technologies or methods of operation that were unknown when the statute was enacted in 1990. In particular, businesses may develop sophisticated automation capable of performing complex transactions that closely resemble—or fully replace—the traditional establishments listed in Title III. See, *e.g.*, Leena Rao, *Amazon Go Debuts as a New Grocery Store Without Checkout Lines*, Fortune (Dec. 5, 2016), http://fortune.com/2016/

12/05/amazon-go-store/ (describing automated grocery-store concept). In that situation, a store could qualify as an ADA "sales establishment" even though automated devices perform functions that human employees would have performed when the ADA was enacted.[2]

The characteristics traditionally associated with the enumerated businesses, however, provide useful points of reference in determining the catch-all provision's coverage. The stark differences between respondent's beverage vending machines and the enumerated sales establishments are particularly significant because vending machines had long been in operation when the ADA was enacted. See Kerry Segrave, *Vending Machines: An American Social History* 7-8 (2002) (describing the creation of bubble-gum vending machines in the late 1800s and vending machines' subsequent proliferation); see also Pet. 15 (asserting that there are now almost 7 million vending machines in the United States). If Congress had intended to include vending machines among the many entities it listed as places of public accommodation, "one would have expected a clearer indication of that intent." *Yates* v. *United States*, 135 S. Ct. 1074, 1083 (2015) (opinion of Ginsburg, J.). Congress's failure to identify any enumerated category of "public accommodation" that meaningfully resembles vending machines, at a time when such machines were a familiar feature of the commercial landscape, indicates that Congress did not intend to include them within the ADA's definition of that term.

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[2] By the same token, an automated business of the sort described in the text might fall within one of Section 12181(7)'s enumerated categories (*e.g.*, as a "grocery store," 42 U.S.C. 12181(7)(E)), even though such automated businesses were not familiar to the Congress that enacted the ADA.

As the court of appeals recognized, moreover, the ADA can protect access to most vending machines for persons with disabilities even if the machines themselves are not treated as distinct public accommodations. See Pet. App. 16a (explaining that the vending machines at issue here "may very well be subject to various requirements under the ADA by virtue of their being located in a hospital or a bus station"). And in the usual case where (as here) vending machines are located within a place of public accommodation, it makes good practical sense for the operator of the public accommodation to be responsible for ensuring that the machines are accessible to persons with disabilities. Petitioner contends (Pet. 4, 14) that several technological features could be added to respondent's vending machines to make them accessible to blind customers, and that only respondent is positioned to make those changes. Whether or not that is correct, the more salient point is that the operator of a public accommodation in which the vending machines are located is better suited to determine whether such changes are the most efficient means of complying with the ADA. When buying or leasing vending machines, some business owners might insist upon the inclusion of accessible features. Others, however, might choose instead to install the machines at locations within their establishments where their employees will be available to assist customers with disabilities. The business owner is better positioned than is the seller or lessor of the machines to determine what method of ensuring accessibility will be most effective at a particular location.

2. Department of Justice regulations state that "[a] public accommodation shall remove architectural barriers in existing facilities * * * where such removal

is readily achievable." 28 C.F.R. 36.304(a). As one "[e]xample[] of steps to remove barriers" that a public accommodation may take, 28 C.F.R. 36.304(b), the regulations refer to "[r]earranging tables, chairs, vending machines, display racks, and other furniture." 28 C.F.R. 36.304(b)(4). The regulations thus treat vending machines as one type of furnishing that may appear *within* a public accommodation.

The agency's 2010 ADA Standards for Accessible Design reflect the same understanding. That document states: "Where provided, at least one of each type of depository, vending machine, change machine, and fuel dispenser shall comply with" certain accessibility requirements for individuals with mobility restrictions. Dep't of Justice, *2010 ADA Standards for Accessible Design* § 228.1 (Sept. 15, 2010); see 75 Fed. Reg. 56,319 (Sept. 15, 2010). If each vending machine were a distinct place of public accommodation, Title III's accessibility requirements would apply to each machine individually. The agency's regulatory approach, which instead imposes the less stringent requirement that "at least one of each type of" machine be made accessible, makes sense if (but only if) the relevant public accommodation is the larger establishment in which the machines are located.

Contrary to petitioner's contention (Pet. 13), the agency's regulations do not suggest that a vending machine is a "place of public accommodation." Petitioner relies on the fact that the regulations' broad definition of "facility" encompasses vending machines. See 28 C.F.R. 36.104 (defining "facility" to include, *inter alia*, "equipment" and "personal property"). But the regulations do not suggest that *every* "facility" as so defined is a discrete "place of public accommodation." Rather, the

regulations define the term "place of public accommodation" to mean "a facility operated by a private entity *whose operations* affect commerce and *fall within at least one of the following categories*." *Ibid.* (emphasis added). The "categories" that "follow[]" track the list of public accommodations that appears in the ADA itself. Compare *ibid.*, with 42 U.S.C. 12181(7)(A)-(L). Because a vending machine does not fall within any of the enumerated categories—and, in particular, because it is not a "sales * * * establishment" as that term is properly understood—it is not a "place of public accommodation" under the regulatory definition.[3]

3. Consistent with the statutory text and agency regulations, plaintiffs have historically obtained relief for Title III violations involving traditional vending machines by suing the persons who own or operate the places of public accommodation in which those vending machines are located. See, *e.g.*, *Access for the Disabled, Inc.* v. *First Resort, Inc.*, No. 11-cv-2342, 2012 WL 4479005, at *5 (M.D. Fla. Sept. 28, 2012) (owner of hotel); Compl., *Esposito* v. *RLJ Medford Hotel, L.L.C.*, No. 06-cv-12010 (D. Mass. Nov. 2, 2006) (owner of hotel); Compl., *Styperk* v. *John Carroll Univ.*, No. 04-cv-1820 (N.D. Ohio Sept. 8, 2004) (university); Compl., *Access 4 All, Inc.* v. *Amazonia, Inc.*, No. 02-cv-61725

[3] The Department of Justice has defined the term "shopping center or shopping mall" as "[a] building housing five or more sales or rental establishments." 28 C.F.R. 36.401(d)(1)(ii)(A), 36.404(a)(2)(i). Under petitioner's theory, that definition would treat as a "shopping center" any cafeteria or break room that houses five vending machines. The implausibility of that result further undermines petitioner's contention that a vending machine is a "sales establishment" within the meaning of the regulations.

(S.D. Fla. Dec. 9, 2002) (owner of gas station); see also *West* v. *Five Guys Enters., LLC*, No. 15-cv-2845, 2016 WL 482981 (S.D.N.Y. Feb. 5, 2016) (restaurant with touch-screen soda dispenser); *West* v. *Moe's Franchisor, LLC*, No. 15cv2846, 2015 WL 8484567 (S.D.N.Y. Dec. 9, 2015) (same).

Similarly here, petitioner is not without redress. As the court of appeals recognized, both the hospital and the bus station in which petitioner encountered respondent's vending machines are "indisputably places of public accommodation." Pet. App. 16a; see 42 U.S.C. 12181(7)(F) (identifying "hospital" as a public accommodation); 42 U.S.C. 12181(7)(G) (identifying "a terminal, depot, or other station used for specified public transportation" as a public accommodation); 42 U.S.C. 12181(10) (defining "specified public transportation" to include "transportation by bus"). Petitioner may seek relief for the discrimination that he alleges by suing either entity to enforce Title III's non-discrimination mandate. See 42 U.S.C. 12182(a).[4]

B. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of Another Court Of Appeals

The court of appeals' narrow holding does not conflict with any decision of another court of appeals. No other circuit has confronted the question whether a vending machine is a "place of public accommodation" within the meaning of the ADA. And no court of appeals —including the Fifth Circuit here—has adopted the

[4] The United States takes no position on whether petitioner could make out all of the elements of a Title III claim, or whether the hospital or bus station could successfully assert any of the defenses available to Title III defendants.

"physical-entry rule" that petitioner describes (Pet. 8, 9).

Several courts of appeals have disagreed about Title III's application to non-physical places offering goods or services, in the specific context of discrimination in the provision of insurance coverage or retirement benefits. Notwithstanding their divergent views, however, those courts have reached consistent outcomes. And in any event, this case does not involve insurance or retirement plans. More broadly, it does not implicate the question whether a Title III plaintiff must allege discrimination with a nexus to a physical location. The Fifth Circuit did not conclude that a vending machine lacks a physical identity; it merely recognized that not every physical object is a "place of public accommodation." This case would therefore be an unsuitable vehicle for resolving the division over Title III's application to goods or services without a nexus to a physical place.

1. Petitioner contends (Pet. 9, 12) that the court of appeals adopted a "physical-entry rule" that distinguishes, for example, a "restaurant" from a "food truck." That contention is unfounded. Neither the Fifth Circuit nor any other court of appeals has held, as petitioner asserts (Pet. 5, 6, 8), that Title III of the ADA is limited "to physical spaces that people can enter."

The Fifth Circuit concluded that the "sales establishments" described in Section 12181(7)(E) are limited to "physical stores." Pet. App. 10a; see *id.* at 11a (describing the "physical space that [a business] occupies"). The court construed Section 12181(7)(E) as limited to "actual stores," *id.* at 14a; see *id.* at 15a (same), and concluded that respondent's vending machines are not "akin to" such stores, *id.* at 11a. But the court's opinion did not use the word "enter" or "entry," and the court

did not suggest that a patron's ability to "enter" is the salient feature of an "actual" or "physical" store. Nothing in the opinion below would foreclose the Fifth Circuit from concluding in a future ADA suit that a food truck is "akin to" the statutorily enumerated "establishment[s] serving food or drink," 42 U.S.C. 12181(7)(B), and is thus a "public accommodation" under the Act.

Nor has any other court of appeals adopted a physical-entry rule. Petitioner identifies (Pet. 6) a First Circuit decision stating that Title III is *not* limited to "actual physical structures * * * which a person physically enters." *Carparts Distribution Ctr., Inc.* v. *Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 18 (1994) (*Carparts*). Although petitioner is correct (Pet. 8) that other courts of appeals have disagreed with the First Circuit's analysis in *Carparts*, see pp. 19-20, *infra*, those courts have not viewed the potential for physical *entry* as essential to ADA coverage. Rather, those other courts have focused on whether the asserted discrimination relates to "resources utilized by physical access." *Ford* v. *Schering-Plough Corp.*, 145 F.3d 601, 614 (3d Cir. 1998). The businesses that petitioner discusses (Pet. 12)—such as "food trucks, hot dog carts, and roadside produce stands"—are physical structures at which patrons access physical goods. No court has suggested that it matters whether patrons must cross a threshold to enter those businesses.

2. The courts of appeals have divided over Title III's application to non-physical places offering goods or services. In particular, different circuits have employed different analyses in determining whether Title III reaches discrimination in the provision of insurance coverage or retirement benefits. Even in that context,

however, the *outcomes* of the various cases are potentially reconcilable. In any event, this case does not implicate any circuit division.

a. As petitioner notes (Pet. 6-9), the First and Seventh Circuits have refused to limit Title III to actual physical structures. The First Circuit in *Carparts* was the first court of appeals to address the question, in a case involving a Title III claim against an insurance association for administering an allegedly discriminatory plan. 37 F.3d at 14. The court held that the term "public accommodation" is not "limited to actual physical structures," and it remanded the case so that the plaintiff could attempt to develop its claim against the insurance association. *Id.* at 19.

The Seventh Circuit took the same approach in a case involving an allegedly discriminatory employer-sponsored retirement plan. See *Morgan* v. *Joint Admin. Bd.*, 268 F.3d 456 (2001). It concluded that a public accommodation need not be "a physical site," and that an insurance company could not "refuse to sell a policy to a disabled person over the Internet." *Id.* at 459. The court further held, however, that the plan at issue did not qualify as a good or service of a public accommodation because "[t]he retirement plan was not offered to the public," but instead "was negotiated between the employer and the representative of its employees." *Ibid.*[5]

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[5] Relying on *Pallozzi* v. *Allstate Life Insurance Co.*, 198 F.3d 28 (2d Cir. 1999), amended on denial of reh'g by 204 F.3d 392 (2d Cir. 2000), petitioner contends (Pet. 7) that the Second Circuit has adopted the same approach as the First and Seventh Circuits. But while the court in *Pallozzi* clearly understood the defendant insurance company to be a place of public accommodation, see 198 F.3d at 31-32, it addressed whether "an entity covered by Title III is not

In cases involving employer-administered disability plans, the Third, Sixth, and Ninth Circuits have taken a different approach. The en banc Sixth Circuit addressed the question first, in *Parker* v. *Metropolitan Life Insurance Co.*, 121 F.3d 1006 (1997), cert. denied, 522 U.S. 1084 (1998). Although the court "agree[d] that an insurance office is a public accommodation" under the ADA, it explained that the plaintiff in that case "did not seek the goods and services of an insurance office," but instead "accessed a benefit plan provided by her private employer." *Id.* at 1010. It concluded that a disability "benefit plan offered by an employer is not a good offered by a place of public accommodation." *Ibid.* The court construed the ADA term "public accommodation" to refer to "a physical place," *id.* at 1014, and it found "no nexus" between the allegedly discriminatory terms of the plaintiff's policy and "the services which [the defendant] offers to the public from its insurance office," *id.* at 1011. The court stated that it "disagree[d] with the First Circuit's decision in *Carparts*." *Id.* at 1013.

Shortly thereafter, the Third Circuit confronted a case nearly identical to *Parker* and came to the same result. See *Ford*, 145 F.3d at 612-614. It concluded that disability benefits received through a plaintiff's employer have "no nexus to [the defendant's] 'insurance

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only obligated by the statute to provide disabled persons with physical access, but is also prohibited from refusing to sell them its merchandise by reason of discrimination against their disability." *Id.* at 33; see *id.* at 32 n.3 (stating that "[t]here is no dispute that Plaintiffs in this case" have a "nexus to a place of public accommodation"). The court thus focused on what Title III requires of covered entities, not on what entities are covered in the first place.

office,'" *id.* at 613, and that the term "public accommodation" does not "refer to non-physical access," *id.* at 614. It therefore held that the plaintiff had failed to state a claim under Title III of the ADA. *Ibid.* The Ninth Circuit later joined the Third and Sixth Circuits. It concluded that Title III requires "some connection between the good or service complained of and an actual physical place," *Weyer* v. *Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000), and that "an insurance company administering an employer-provided disability policy is not a 'place of public accommodation' under Title III," *id.* at 1115.

b. Even with respect to the provision of insurance coverage, the *results* in the cases that petitioner cites (Pet. 6-9) are potentially reconcilable. The Third, Sixth, and Ninth Circuits each concluded that an *employer-sponsored* insurance plan was not a good or service offered by a place of public accommodation. Those holdings rested at least in part on the fact that the defendants in those cases did not offer the relevant product to the public. See *Weyer*, 198 F.3d at 1115; *Ford*, 145 F.3d at 612-613; *Parker*, 121 F.3d at 1010. The Seventh Circuit reached the same result with respect to an employer-sponsored retirement plan. See *Morgan*, 268 F.3d at 459. And the First Circuit did not grapple with whether the insurance plan at issue had been made available to the public, concluding merely that the plaintiffs should be permitted "to adduce further evidence supporting their view that the defendants are places of 'public accommodation.'" *Carparts*, 37 F.3d at 19.

Petitioner identifies no court of appeals decision holding either (i) that discrimination in the terms of an employer-sponsored insurance plan can violate Title III of the ADA, or (ii) that discrimination in the provision

of insurance to the public cannot. And some courts have commented that the employer-plan cases can be read narrowly, eliminating any conflict among the courts of appeals. See, *e.g.*, *Rendon* v. *Valleycrest Prods., Ltd.*, 294 F.3d 1279, 1284 n.8 (11th Cir. 2002) ("These cases indicate that * * * the plaintiff must demonstrate that the policy was offered to the plaintiff directly by the insurance company and was connected with its offices, as opposed to its being a privilege provided by the plaintiff's employer.").

c. Although their ultimate holdings can be reconciled, the courts of appeals in the insurance cases described above have disagreed about whether a place of public accommodation must be an actual physical site. The Third, Sixth, and Ninth Circuits have construed Title III to impose that limitation. See *Ford*, 145 F.3d at 614 (stating that a public accommodation does not "refer to non-physical access"); *Parker*, 121 F.3d at 1014 (stating "that a public accommodation is a physical place"); *Weyer*, 198 F.3d at 1114 (requiring "some connection between the good or service complained of and an actual physical place"). The First and Seventh Circuits have rejected that interpretation. See *Carparts*, 37 F.3d at 19 (stating that the statute is "not so limited"); *Morgan*, 268 F.3d at 459 (rejecting the argument that a public accommodation "denot[es] a physical site").

In this case, the court below stated that it had chosen to "follow[] the Third, Sixth, and Ninth Circuits" and to "depart[] from the precedents of the First, Second, and Seventh Circuits." Pet. App. 11a n.23. As respondent explains (Br. in Opp. 18), however, the question presented here is quite different from the issues that those other courts confronted. The court below correctly held

that respondent's vending machines are not sufficiently "akin to" the statutorily enumerated sales establishments to qualify as ADA "public accommodations." Pet. App. 11a; see pp. 6-15, *supra*. But the court did not base that holding on the (implausible) view that a vending machine lacks a physical identity. The court simply recognized that not every physical object is a distinct public accommodation. That proposition would remain correct and central to the ADA's proper application, even if (as the First and Seventh Circuits have concluded) the term "place of public accommodation" extends beyond physical structures.

Questions concerning Title III's application to nonphysical establishments—including websites or digital services—may someday warrant this Court's attention.[6] This case is not a suitable vehicle for addressing those emerging issues, however, since petitioner encountered respondent's machines in person, not by telephone or over the Internet. Pet. App. 45a-47a. And the insurance-coverage decisions that petitioner cites provide no sound basis for concluding that any other circuit would have found respondent's vending machines to be places

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[6] Several district courts have grappled with the question whether Title III applies to goods or services offered over the Internet. Some decisions hold that Title III applies only if the alleged online discrimination has a sufficient nexus to a physical place, while others hold that the Act does not require any such nexus. Compare *Young* v. *Facebook, Inc.*, 790 F. Supp. 2d 1110, 1115-1116 (N.D. Cal. 2011); *National Fed'n of the Blind* v. *Target Corp.*, 452 F. Supp. 2d 946, 951-956 (N.D. Cal. 2006); *Access Now, Inc.* v. *Southwest Airlines, Co.*, 227 F. Supp. 2d 1312, 1317-1321 (S.D. Fla. 2002), with *National Fed'n of the Blind* v. *Scribd Inc.*, 97 F. Supp. 3d 565, 569-576 (D. Vt. 2015); *National Ass'n of the Deaf* v. *Netflix, Inc.*, 869 F. Supp. 2d 196, 200-202 (D. Mass. 2012).

of public accommodation. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
T.E. WHEELER, II
Acting Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
MORGAN L. GOODSPEED
Assistant to the Solicitor General
TOVAH R. CALDERON
FRANCESCA L. PROCACCINI
Attorneys

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