CASE NO. 07-15004-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, *et al.*,
Plaintiffs-Appellees,
Versus
JERRY HOLLAND, As Supervisor of Elections in Duval County,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION, NO. 3:01-cv-01275-J-99 HTS

Brief of *Amici Curiae* National Federation of the Blind, Advocacy Center for Persons with Disabilities, Inc., Alabama Disabilities Advocacy Program, American Council of the Blind, American Diabetes Association, American Foundation for the Blind, Blinded Veterans Association, Disability Rights Advocates, Disability Rights Education and Defense Fund, Epilepsy Foundation of America, Georgia Advocacy Office, Inc., Independent Living Resources of Greater Birmingham, Inc., Judge David L. Bazelon Center for Mental Health Law, The Legal Aid Society -- Employment Law Center, National Association of the Deaf, National Council on Independent Living, National Disability Rights Network, National Senior Citizens Law Center, National Spinal Cord Injury Association, Paralyzed Veterans of America, Statewide Independent Living Council of Georgia, Inc., and World Institute on Disability in Support of Petition for Rehearing and Rehearing *En Banc*

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ATTORNEYS FOR *AMICI CURIAE*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 *Amici Curiae* National Federation of the Blind, Advocacy Center for Persons with Disabilities, Inc., Alabama Disabilities Advocacy Program, American Council of the Blind, American Diabetes Association, American Foundation for the Blind, Blinded Veterans Association, Disability Rights Advocates, Disability Rights Education and Defense Fund, Epilepsy Foundation of America, Georgia Advocacy Office, Inc., Independent Living Resources of Greater Birmingham, Inc., Judge David L. Bazelon Center for Mental Health Law, The Legal Aid Society -- Employment Law Center, National Association of the Deaf, National Council on Independent Living, National Disability Rights Network, National Senior Citizens Law Center, National Spinal Cord Injury Association, Paralyzed Veterans of America, Statewide Independent Living Council of Georgia, Inc., and World Institute on Disability submit the following Certificate of Interested Persons:

1. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* state that they are private 501(c)(3) non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or

more of any *Amicus* organization.

2. The following individuals have an interest in the outcome of this appeal:

   a. The Honorable Henry L. Adams, United States District Judge for the Middle District of Florida;

   b. The Honorable Wayne E. Alley, Senior Judge, United States District Court for the Western District of Oklahoma (presiding by special designation on the United States District Court for the Middle District of Florida, Jacksonville Division);

   c. Arpen, Tracey I., counsel for Appellant;

   d. Baldridge, J. Douglas, counsel for Appellees;

   e. Bell, Kenton, Appellee;

   f. Blanck, Peter, counsel for *Amici Curiae*;

   g. Bowen, Elizabeth H., Appellee;

   h. Browning, Kurt S., Secretary of State of Florida;

   i. Bruskin, Robert, counsel for Appellees;

   j. Craft, Paul, Chief, Florida Bureau of Systems Certification;

   k. Dickson, James C., on behalf of Appellee American Association of People with Disabilities;

   l. Diebold Election Systems;

m. Dimitroff, Sashe D., counsel for Appellees;

n. Duval County Supervisor of Elections' Office;

o. Election Systems & Software, Inc.;

p. Florida Division of Elections;

q. Foley, Danielle R., counsel for Appellees;

r. Fox & Robertson, P.C., counsel for *Amici Curiae*;

s. Gardner, Elizabeth Elaine, counsel for Appellees;

t. Ganzfried, Jerrold J., counsel for Appellees;

u. Hill, Eve, counsel for *Amici Curiae*;

v. Hodge, Pamela Ann, visually impaired trial witness;

w. Holland, Jerry, Appellant;

x. Howie, Brian, counsel for Appellees;

y. Howrey LLP, counsel for Appellees;

z. Keeling, Kevin A., counsel for Appellees;

aa. Khassian, Heather M., counsel for Appellees;

bb. Lawrence, Gregory A., counsel for Appellees;

cc. Mueller, Ernst, counsel for Appellant;

dd. O'Connor, Daniel W., Appellee;

ee. Oddo, Danielle R., counsel for Appellees;

ff. Robertson, Amy, counsel for *Amici Curiae*;

gg. Rothman, Ari N., counsel for Appellees;

hh. Sequoia Voting Systems;

ii. Sigler, R. William, counsel for Appellees;

jj. Teal, Jason, counsel for Appellant;

kk. Thomas, Milo Scott, counsel for Appellees;

ll. Tuck, Amy, Director, Florida Division of Elections;

mm. Vincent Verrochio E., counsel for Appellees;

nn. Waas, George L., counsel for the Florida Secretary of State and Division of Elections;

oo. Washington Lawyers' Committee for Civil Rights and Urban Affairs;

pp. Williams, Lois G., counsel for Appellees; and

qq. Wiseman, Alan M., counsel for Appellees.

STATEMENT OF COUNSEL FOR *EN BANC* CONSIDERATION

We express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

Alexander v. Sandoval, 532 U.S. 275 (2001);

Alexander v. Choate, 469 U.S. 287 (1985);

Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984);

Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001);

Shotz v. City of Plantation, 344 F.3d 1161 (11th Cir. 2003); and

Tennessee v. Lane, 541 U.S. 509, 531-32 (2004);

We express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether people with disabilities who have been the victims of discrimination have a private right of action to enforce section 35.151 of the regulations enforcing Title II of the Americans with Disabilities Act? The panel's conclusion that they do not conflicts with the decisions of every other circuit that has addressed the availability of Title II's private right of action to enforce section 35.151.

2. Whether regulations that implement the express mandate of the Americans with Disabilities Act prohibit state and local officials from discriminating against people with disabilities in the provision of voting systems and voting equipment?

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici Curiae[1] are organizations that represent and advocate for the rights and interests of people with disabilities. *Amici* have an interest in this case because the panel's decision would unduly narrow the civil rights of people with disabilities under the Americans with Disabilities Act and make disability rights enforcement more difficult, in violation of clear congressional mandate. Each *amicus* and its specific interests are described in the accompanying motion of *Amici Curiae* for leave to file the present brief in support of Appellees' petition for rehearing and rehearing *en banc*.

STATEMENT OF ISSUES MERITING *EN BANC* CONSIDERATION

1. Whether section 35.151 of the regulations implementing Title II of the Americans with Disabilities Act is enforceable through that statute's private right of action, as held by the Sixth and Tenth Circuits?

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[1] National Federation of the Blind, Advocacy Center for Persons with Disabilities, Inc., Alabama Disabilities Advocacy Program, American Council of the Blind, American Diabetes Association, American Foundation for the Blind, Blinded Veterans Association, Disability Rights Advocates, Disability Rights Education and Defense Fund, Epilepsy Foundation of America, Georgia Advocacy Office, Inc., Independent Living Resources of Greater Birmingham, Inc., Judge David L. Bazelon Center for Mental Health Law, The Legal Aid Society -- Employment Law Center, National Association of the Deaf, National Council on Independent Living, National Disability Rights Network, National Senior Citizens Law Center, National Spinal Cord Injury Association, Paralyzed Veterans of America, Statewide Independent Living Council of Georgia, Inc., and World Institute on Disability.

2. Whether voting machines are "facilities," as defined in the ADA and its implementing regulations?

ARGUMENT

I. Section 35.151 Is Enforceable through Title II's Private Right of Action and the Panel's Holding to the Contrary Conflicts with Precedent of the Supreme Court, this Court, and Sister Circuits.

Title II of the Americans with Disabilities Act ("Title II") provides that

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 35.151 of the Title II regulations specifies that (with certain limitations) new and altered facilities be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.151(a) & (b) ("§ 35.151"). Based on the express intent of Congress and decisions of this Court and the Supreme Court, this regulation is an authoritative interpretation of Title II.

The panel stated that § 35.151 cannot be enforced through Title II's private right of action because that regulation's "particular standards for new and altered construction do not appear in the general language of the ADA." Slip op. at 23 n.24.[2] This statement conflicts with:

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[2] Rehearing is especially appropriate in light of the fact that this issue was not preserved by Appellant and as a result was not briefed or argued by the parties. *See Autery v. United States*, 992 F.2d 1523, 1526 (11th Cir. 1992). In (continued...)

- *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001), which held that a regulation that authoritatively interprets a statute is enforceable through the statute's private right of action;
- *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004), which recognized that § 35.151 falls within the mandate of Title II;
- *Alexander v. Choate*, 469 U.S. 287, 297 (1985), which recognized that "one of the central aims" of section 504 the Rehabilitation Act ("§ 504")[3] -- on which Title II was based -- is "elimination of architectural barriers;"
- *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 n.15 (1984), which confirmed congressional endorsement of the § 504 regulations that are expressly incorporated into Title II;
- *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001), which held that physical inaccessibility can constitute a violation of Title II;
- *Shotz v. City of Plantation*, 344 F.3d 1161, 1174 (11th Cir. 2003), which recognized that Title II incorporates the § 504 regulations; and
- *Ability Center of Greater Toledo v. City of Sandusky*, 358 F.3d 901, 907

[2](...continued)
addition, as noted in Section I of the Petition for Rehearing and Rehearing *En Banc*, the panel decision is based on a misperception of the district court's decision. *Amici* join Appellees' position that rehearing is appropriate to correct this oversight.

[3] 29 U.S.C. § 794.

(6th Cir. 2004), and *Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 859 (10th Cir. 2003), which held that Title II provides a private right of action to enforce § 35.151.

A. *Alexander v. Sandoval* Mandates that an Authoritative Interpretation of a Statute Is Enforceable through the Statute's Private Right of Action.

The Supreme Court held, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), that while a regulation cannot itself create a private right of action, a regulation that authoritatively interprets a statute is enforceable through the statute's private right of action. *Id.* at 284. Because § 35.151 is an authoritative interpretation of Title II, *see infra*, it is enforceable through Title II's private right of action.[4] The panel's decision to the contrary is thus in conflict with *Sandoval*.

B. Section 35.151 -- Regulating Physical Accessibility of Facilities -- Is an Authoritative Interpretation of Title II.

The panel's conclusion that Title II's general language prohibiting disability discrimination does not encompass discriminatory physical barriers fundamentally conflicts with the way Congress structured Title II and the way the Supreme Court and this Court have long understood Title II and its predecessor, § 504.

Section 35.151 is an authoritative interpretation of Title II because (1) Congress expressly intended Title II's general language to incorporate the

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[4] *See Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (recognizing a private right of action to enforce Title II).

specific discrimination prohibited by § 504 regulations and Title III of the ADA[5] and instructed the Attorney General to promulgate regulations consistent with those of § 504; (2) § 504 and Title III both contain provisions addressing physical barriers just as § 35.151 does; and (3) Congressional findings and decisions of this Court and the Supreme Court underscore that general language prohibiting disability discrimination prohibits discriminatory architectural barriers.

These sources demonstrate that § 35.151 is an authoritative interpretation of Title II; as such, § 35.151 is enforceable through Title II's private right of action.

1. Congress Intended Title II's General Language to Incorporate the Specific Provisions of the § 504 Regulations and Title III.

The linchpin of *Sandoval*'s analysis is congressional intent. *See Sandoval,* 532 U.S. at 286. The panel's conclusion rejecting the enforceability of § 35.151 because its "particular standards . . . do not appear in the general language of" Title II, slip op. at 23 n.24, is directly contrary to the intent of Congress.

In structuring Title II, Congress intentionally "chose[] not to list all the types of actions that are included within the term 'discrimination,'" but rather incorporated by reference the more detailed provisions of the § 504 regulations and Title III of the ADA. H.R. Rep. No. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367 ("House Report"). For that reason, instead of listing

[5] 42 U.S.C. § 12181 - 12189 ("Title III").

all of the requirements in the statutory text, Congress stated that Title II was intended "to make applicable the prohibition against discrimination on the basis of disability, *currently set out in regulations implementing section 504 of the Rehabilitation Act* . . . to all programs, activities, and services provided or made available by state and local governments . . .." *Id.* at 366 (emphasis added), *quoted in Shotz v. City of Plantation*, 344 F.3d 1161, 1174 (11th Cir. 2003).

The statute itself makes Congress's intent clear by requiring the Attorney General to promulgate regulations that are "consistent with" the § 504 regulations. 42 U.S.C. § 12134. Congressional intent, as evidenced by both the legislative history and the statutory language, was not to limit Title II's requirements to those specifically contained in the text, but to incorporate the pre-existing requirements of § 504 and the simultaneously-enacted requirements of Title III.

Furthermore, the Supreme Court has recognized that the § 504 regulations -- which Congress intended to incorporate into Title II -- were essentially reenacted by Congress when it amended the § 504 in 1978. *See Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 634 n.15 (1984) ("In adopting [42 U.S.C. § 794a(a)(2)] in the amendments of 1978, Congress incorporated the substance of the [§ 504] regulations into the statute.") Similarly, both this Court and the Third Circuit have recognized that the Title II regulations have a similar status. *See Shotz v. Cates*, 256 F.3d 1077, 1980 n.2 (11th Cir. 2001) ("Because Congress explicitly

authorized the Attorney General to promulgate regulations under the ADA, . . . the regulations 'must [be given] legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute.'" (citation omitted)); *Helen L. v. DiDario*, 46 F.3d 325, 332 (3d Cir. 1995) ("[B]ecause Congress mandated that the ADA regulations be patterned after the [§ 504] coordination regulations, the former regulations have the force of law.") These holdings provide further support for the proposition that the Title II regulations are an authoritative interpretation of Title II. The panel's conclusion that the regulation at issue was not enforceable through the statutory right of action because its precise language was not found in the statutory language is contrary to congressional intent and to the weight and status of the regulations recognized by the Supreme Court and this Court.

2. The § 504 Regulations and Title III Include Provisions Governing New And Altered Construction, Demonstrating that § 35.151 Is an Authoritative Interpretation of Title II.

As noted, Congress intended Title II to prohibit the forms of discrimination barred by the § 504 regulations and Title III. House Report at 84. The Department of Justice's § 504 regulations contain -- and contained at the time the ADA was passed -- language very similar to § 35.151, *see* 28 C.F.R. § 41.58(a) (1990) (requiring new facilities and (to the maximum extent feasible) alterations to be "readily accessible to and usable by" people with disabilities), as does the

statutory language of Title III, *see* 42 U.S.C. § 12183(a)(1) & (2) (same). Section 35.151 was thus required by statute to be included in the regulations and, accordingly, constitutes an authoritative interpretation of Title II, enforceable through Title II's right of action. *See Sandoval*, 532 U.S. at 284.

3. Decisions of the Supreme Court and this Court and the Statutory Findings Underscore that § 35.151 Is an Authoritative Interpretation of Title II.

Further confirmation that § 35.151 is an authoritative interpretation of Title II comes in language from the statute's findings, from the Supreme Court, and from this Court to the effect that Title II and § 504 were intended to address physical inaccessibility.

In passing the ADA, Congress explicitly recognized -- in the statutory language -- that "individuals with disabilities continually encounter various forms of discrimination, including . . . the discriminatory effects of architectural . . . barriers." 42 U.S.C. § 12101(a)(5). Section 35.151 addresses this specific form of discrimination.

In the legislative history, Congress stated its "intent that [Title II] . . . be interpreted consistent with *Alexander v. Choate*, 469 U.S. 287 (1985)." House Report at 84. That case was one of the first to address the parameters of § 504 and although physical access was not at issue, the Supreme Court made clear that "elimination of architectural barriers was one of the central aims of the

[Rehabilitation] Act, ..." *Choate*, 469 U.S. at 297 (citing S. Rep. No. 93-318, at 4 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2079). In *Tennessee v. Lane*, 541 U.S. 509 (2004), the Supreme Court held that Title II validly abrogated Eleventh Amendment sovereign immunity when applied to physical access to courthouses. In so doing, it recognized that "Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility," *id.* at 531, and that § 35.151 was the method used to apply that requirement to "facilities built or altered after 1992," *id.* at 532. Finally, this Court recognized in *Shotz v. Cates* that Title II requires that programs be "readily accessible," including provision of facilities that are usable by people with disabilities. *Id.*, 256 F.3d at 1080.

Choate, *Lane*, and *Cates* provide further confirmation that § 35.151 -- requiring accessible facilities -- is an authoritative interpretation of Title II. The panel's holding to the contrary conflicts with precedent of the Supreme Court and this Court.

C. The Panel's Conclusion Conflicts with the Decisions of Every Other Circuit that Has Addressed the Availability of Title II's Private Right of Action to Enforce § 35.151.

The two circuits to have addressed the question both concluded that § 35.151 is enforceable through Title II's private right of action. The Sixth Circuit held that § 35.151 "effectuates a mandate of Title II and is therefore enforceable through the private cause of action available under the statute." *Ability Center of*

Greater Toledo v. City of Sandusky, 385 F.3d 901, 907 (6th Cir. 2004). It reached that conclusion after an exhaustive review of the authorities on which *Amici* rely, including *Sandoval*, *Lane*, *Choate*, the text of Title II, its legislative history, and its relationship to § 504. *See Ability Center*, 385 F.3d at 905-13. The Tenth Circuit held that the discrimination prohibited by the physical access standards invoked by § 35.151[6] "[fell] squarely within the type of discrimination prohibited by the ADA itself." *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 859 (10th Cir. 2003). The panel decision thus conflicts with both *Ability Center* and *Chaffin*.

The panel cited *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009), and *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006), for support, but both are distinguishable. Neither addresses § 35.151, but rather a separate Title II regulation, 28 C.F.R. § 35.150(d). *Lonberg*, 571 F.3d at 847; *Iverson*, 452 F.3d at 96. The panel's decision here involves a question of exceptional importance because it conflicts with the authoritative decisions of the only Circuits to have addressed the availability of Title II's private right of action to enforce § 35.151.

II. The Panel's Error in Holding that Voting Equipment Is not a "Facility or Part of a Facility" Covered by the ADA Regulations is a Question of Exceptional Importance.

The panel incorrectly stated that equipment used to record votes, as opposed

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[6] *See* 35.151(c) (requiring compliance with the Uniform Federal Accessibility Standards, 41 C.F.R. pt. 101-19.6, app. A, or the Americans with Disabilities Act Accessibility Guidelines, 28 CFR pt. 36, app. A).

to polling places themselves, are not covered by the physical access provisions of Title II of the ADA. *See* slip op. at 24-27. The panel read the ADA regulations as if their requirements for physical accessibility applied only to buildings' structures, and not to other types of facilities, including equipment and other elements within buildings. The panel's view is unsupported by the statutory language, legislative history, regulations, or judicial interpretations of the ADA.

The panel's view, if followed to its logical conclusion, could affect access to more than just voting machines. Many public services are provided through equipment, such as municipal parking meters, trash receptacles, and pedestrian signals. In addition, more and more public services are being provided via automated equipment, including vehicle registration,[7] library services,[8] jury service,[9] building permits,[10] university services,[11] and even health care.[12]

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[7] Michigan Expands License-Renewal Kiosks, Kiosk Marketplace (May 21, 2010), at http://kioskmarketplace.com/article.php?id=24554&na=1

[8] Automatic Pay Machines, San Mateo County Library, http://smcl-main.php.isitedesign.us/content/automatic-payment-machines.

[9] Online Kiosk, CIRCUIT COURT FOR BALTIMORE CITY, at http://www.baltocts.state.md.us/kiosk.htm (visited June 1, 2010).

[10] Office of the Chief Technology Officer, District of Columbia Opens Virtual Permit Center in Ward 5, DC.gov (Oct. 15, 2008), at http://octo.dc.gov/DC/OCTO/About+OCTO/Who+We+Are/Photo+Galleries/October+15,+2008:+District+of+Columbia+Opens+Virtual+Permit+Center+in+Ward+5.

[11] State & Local Government Kiosks, Kiosk Information Systems,

(continued...)

This Court should grant rehearing *en banc* to correct the panel's misinterpretation of the question of exceptional importance of the coverage of the ADA's physical accessibility requirements.

The ADA was intended to address Congress's finding that "individuals with disabilities continually encounter various forms of discrimination, including … the discriminatory effects of architectural, transportation, and communication barriers." 42 U.S.C. § 12101(A)(5). In order to address architectural discrimination, Congress authorized the Attorney General to promulgate regulations to implement Title II, and specifically required those regulations to include "standards applicable to facilities." 42 U.S.C. § 12134.

The regulations promulgated by the Attorney General require accessibility of newly constructed, altered, and existing "facilities:" All facilities, whether new, altered, or existing, must -- subject to certain limitations -- be accessible. *See* 28 C.F.R. §§ 35.150(a); 35.151. New facilities must be "designed and constructed" to be "readily accessible to and usable by individuals with disabilities," virtually without exception. *Id.* § 35.151(a). Altered facilities must be "altered in such a manner that the altered portion" is accessible "to the maximum extent feasible."

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[11](...continued)
http://www.kiosk.com/market/government-kiosk-experience.php.

[12] Fujitsu Highlighting Health Care Self-Service Kiosks at e-Health 2010, KIOSK MARKETPLACE (May 28, 2010), at http://kioskmarketplace.com/article.php?id=24596&na=1&s=2.

Id. § 35.151(b). Existing facilities must be "operate[d] so that" they are accessible, unless doing so would "result in a fundamental alteration . . . or in undue financial and administrative burdens." *Id.* § 35.150(a). For existing facilities, methods of compliance include "redesign of equipment," "alteration of existing facilities and construction of new facilities." *Id.* § 35.150(b).

A "facility" 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*." *Id.* § 35.104 (emphasis added). Thus, equipment, including voting equipment, is covered by the requirements for physical accessibility, whether it is new, altered, or existing.

The Title II regulation references the ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG"), 28 C.F.R. pt. 36, app. A, as a standard for physical accessibility. 28 C.F.R. § 35.151(c). As its title implies, ADAAG covers much more than building structures. ADAAG provides separate definitions of "building" and "facility" and states that it "contains scoping and technical requirements for accessibility to buildings *and facilities*." ADAAG § 1 (emphasis added). The term "facility" in ADAAG is thus necessarily broader than the definition of "building" and includes "equipment… or other real or personal property located on a site." *Id.* § 3.5. ADAAG provides accessibility standards for: drinking fountains and water coolers, *id.* §§ 4.1.3(10); 4.15; telephones, *id.*

§§ 4.1.3(17), 4.31; automated teller machines, *id.* §§ 4.1.3(20), 4.34; vending machines, *id.* § 5.8; magazine displays in libraries, *id.* § 8.4; ticket machines, *id.* § 10.3.1(7); clocks in transportation facilities, *id.* § 10.3.1(15); and appliances in hotels, *id.* § 9.2.2(7). Nor is accessibility limited to permanent facilities. ADAAG specifically provides that, "[t]hese guidelines cover temporary buildings or facilities as well as permanent facilities." *Id.* § 4.1.1(4).

The panel cited no cases, in this Circuit or elsewhere, to support its conclusion that only building structures are covered by Title II accessibility requirements. In fact, courts have found that various types of equipment are facilities subject to the ADA requirements for physical access. *See, e.g.*, *Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996) (ticket vending machines may be covered as alterations); *Massachusetts v. E-Trade Access, Inc.*, 464 F.Supp.2d 52, 56-57 (D. Mass. 2006) (ATMs covered as alterations or new construction); *Civic Ass'n. of the Deaf of New York City, Inc. v. Giuliani*, 970 F.Supp. 352, 359-60 (S.D.N.Y. 1997) (emergency alarm boxes covered as alterations). *See also Nat'l Org. on Disability v. Tartaglione*, 2001 WL 1231717, *6 (E.D.Pa. 2001) ("The definition of facility, as used in section 35.151, plainly includes equipment and personal property and does not specify any exclusion for transportable equipment or personal property such as voting machines." (citing 28 C.F.R. § 35.104)).

This Court should grant rehearing *en banc* to clarify that voting machines constitute facilities covered by the ADA's requirements for physical accessibility.

CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court grant rehearing *en banc* to address the questions set forth above.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of *Amici Curiae* National Federation of the Blind, Advocacy Center for Persons with Disabilities, Inc., Alabama Disabilities Advocacy Program, American Council of the Blind, American Diabetes Association, American Foundation for the Blind, Blinded Veterans Association, Disability Rights Advocates, Disability Rights Education and Defense Fund, Epilepsy Foundation of America, Georgia Advocacy Office, Inc., Independent Living Resources of Greater Birmingham, Inc., Judge David L. Bazelon Center for Mental Health Law, The Legal Aid Society -- Employment Law Center, National Association of the Deaf, National Council on Independent Living, National Disability Rights Network, National Senior Citizens Law Center, National Spinal Cord Injury Association, Paralyzed Veterans of America, Statewide Independent Living Council of Georgia, Inc., and World Institute on Disability in Support of Petition for Rehearing and Rehearing En Banc were served on June 10, 2010, via Federal Express upon:

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