No. 07-15004

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, DANIEL W. O'CONNOR, KENT BELL, BETH BOWEN, on behalf of themselves and others similarly situated,

Plaintiffs-Appellees

v.

JERRY HOLLAND, as Supervisor of Elections in Duval County, Florida,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITION FOR REHEARING

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

JESSICA DUNSAY SILVER
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Civil Rights Division
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-0714

Case No. 07-15004
American Association of People with Disabilities v. *Holland*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for *amicus curiae* United States of America certifies that the following persons may have an interest in the outcome of this case:

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

2. 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);

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

4. Bagenstos, Samuel R., Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States;

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

6. Bell, Kenton, Appellee;

7. Bowen, Elizabeth H., Appellee;

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

9. Bruskin, Robert, co-counsel for Appellees;

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

11. Dickson, James C., on behalf of AAPD;

12. Diebold Election Systems;

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

14. Duval County Supervisor of Elections' Office;

15. Election Systems & Software, Inc.;

16. Florida Division of Elections;

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

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

19. Gardner, Elizabeth Elaine, co-counsel for Appellees;

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

21. Holland, Jerry, Appellant;

22. Howie, Brian, counsel for Appellees;

23. Howrey LLP;

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

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

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

27. Mueller, Ernst, counsel for Appellant;

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

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

30. Perez, Thomas E., Assistant Attorney General, Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States;

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

32. Samberg-Champion, Sasha, Civil Rights Division, United States Department of Justice, lead counsel for *amicus curiae* United States;

33. Sequoia Voting Systems;

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

35. Silver, Jessica, Civil Rights Division, United States Department of Justice, counsel for *amicus curiae* United States;

36. Teal, Jason, counsel for Appellant;

37. Thomas, Milo Scott, counsel for Appellees;

38. Tuck, Amy, as Director, Florida Division of Elections;

39. United States, as *amicus curiae*;

40. Verrochio E., Vincent, counsel for Appellees;

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

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

43. Williams, Lois G., co-counsel for Appellees;

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

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

STATEMENT REGARDING NECESSITY OF EN BANC REHEARING

I 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 or 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)
Tennessee v. *Lane*, 541 U.S. 509 (2004)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

Whether the private right of action to enforce Title II of the Americans with Disabilities Act encompasses a claim for violation of the Department of Justice regulations that permissibly implement that statute, including 28 C.F.R. 35.151, which mandates that any "facility" altered by a public entity, "to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible and usable by individuals with disabilities."

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

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IN THE UNITED STATES COURT OF APPEALS
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QUESTION PRESENTED

The United States urges this Court to grant panel rehearing or rehearing *en banc* on the following question:

Whether the private right of action to enforce Title II of the Americans with Disabilities Act encompasses a claim for violation of the Department of Justice

regulations that permissibly implement that statute, including 28 C.F.R. 35.151, which mandates that any "facility" altered by a public entity, "to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible and usable by individuals with disabilities."

INTEREST OF THE UNITED STATES

The United States has a direct interest in effective enforcement of its regulations implementing Title II of the Americans with Disabilities Act, 42 U.S.C. 12131 *et seq.* Title II of the ADA bars public entities from various forms of disability discrimination, 42 U.S.C. 12132, and confers upon individuals the right to bring private enforcement actions, 42 U.S.C. 12133. It also requires the Attorney General to promulgate regulations construing its broad nondiscrimination mandate, 42 U.S.C. 12134, and the Attorney General has done so, 28 C.F.R. Pt. 35.

At issue here is one of the regulations promulgated pursuant to that authority, 28 C.F.R. 35.151, which sets forth public entities' duties when constructing a new facility or altering an existing one. The United States has an interest in ensuring that this regulation, like others implementing Title II, is effectively enforced through private actions as well as those brought by the United States.

STATEMENT OF THE CASE

Plaintiffs are citizens with visual or manual impairments, who are registered to vote in Duval County, Florida. They sued various state and local officials, including the County's Supervisor of Elections, the only defendant remaining in this litigation. Plaintiffs contended that the County's failure to acquire voting machines that permitted them to vote unassisted violated Title II of the ADA and its implementing regulations. Following a bench trial, the district court found that the County had violated the statute and one of its regulations, 28 C.F.R. 35.151(b), and granted plaintiffs a declaratory judgment to that effect. A panel of this Court reversed. Although the parties did not brief the question, the panel held that no private right of action lies to enforce 28 C.F.R. 35.151(b).

1. Title II of the ADA broadly prohibits disability-based discrimination by state and local governments. The statute sets forth that prohibition in a single, general statement that "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Title II contains no provisions that specifically apply this general prohibition to the wide array of activities performed by public entities. *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1179 & n.26 (11th Cir. 2003). Rather, Congress

left it to the Attorney General to make those specific rules in regulations "that implement" the statute. 42 U.S.C. 12134(a). Congress directed the Attorney General, in writing those regulations, to incorporate the specific rules the Department of Justice and the Department of Health, Education, and Welfare had adopted in earlier regulations to implement Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134(b). Congress also created a private right of action to enforce Title II. See 42 U.S.C. 12133; *Barnes* v. *Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100 (2002).

2. At issue here is one of the regulations the Attorney General promulgated pursuant to this congressional mandate to implement Title II, 28 C.F.R. 35.151(b). That regulation, which closely tracks a Rehabilitation Act regulation that existed when Congress adopted the ADA, provides that any public entity altering a "facility" must do so, "to the maximum extent feasible * * * in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities."[1] The district court held that a voting system is a "facility" such that this requirement applied to the County's purchase of new voting equipment in 2002. See *American Ass'n of People with Disabilities* v. *Stafford*, 310 F. Supp. 2d 1226, 1235 (M.D. Fla. 2004). It further found, after a bench trial, that it was

[1] The corresponding Rehabilitation Act regulation provided then, and still provides, that "[a]ny alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner." 28 C.F.R. 42.522(a).

feasible for the County to purchase different voting equipment that was more accessible to people with the plaintiffs' disabilities, and so the County violated 28 C.F.R. 35.151(b). *Id.* at 1235-1236. The district court additionally found that the County violated 42 U.S.C. 12132, which broadly forbids discrimination on the basis of disability by a public entity. *Id.* at 1240. As applied to the County's conduct, it held, the statute's reach was "coterminous" with the implementing regulations, and so no further analysis was needed. *Ibid*. The district court entered an order requiring the County "to have at least one voting machine that permits visually impaired voters to vote without assistance at 20% of the polling places in Duval County." Docket # 216 (March 26, 2004). The County appealed.

While its appeal was pending, the County acquired voting machines that satisfied the district court's order.[2] Accordingly, this Court dismissed the County's appeal as moot. Order, *American Ass'n of People with Disabilities* v. *Stafford*, No. 04-11566 (11th Cir. Aug. 15, 2007). The district court entered final judgment in plaintiffs' favor and plaintiffs moved for attorney's fees, whereupon the defendants again appealed. They raised a variety of issues, including whether this Court's

[2] The County contends that it did so not because of the district court's order, but to comply with the very similar requirements of the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666. HAVA required that, by January 1, 2006, voting equipment used in federal elections "be accessible for individuals with disabilities * * * in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." 42 U.S.C. 15481(a)(3), (d).

previous mootness order barred a final judgment or attorney's fees for plaintiffs, see Br. for Appellant 27-31; whether the ADA or its regulations bar a state from assisting persons with disabilities in voting in a manner that requires them to disclose their vote to a third party, *id.* at 31-37; and whether voting machines are "facilities" subject to the requirements of 28 C.F.R. 35.151(b), *id.* at 38-41. They did not present the question whether 28 C.F.R. 35.151(b) is enforceable through a private right of action.

3. Nonetheless, a panel of this Court, in a precedential opinion, held that no private right of action lies to enforce the requirements of 28 C.F.R. 35.151(b). See Slip Op. 22-24. It stated that the regulations implementing Title II are meant to "provide standards for compliance with the ADA, not to give individuals a right to sue if compliance with those standards is not met." *Id.* at 21-22 (internal citation omitted). The panel confined its direct holding to whether the plaintiffs could sue directly under the regulation, as opposed to the ADA itself, because in its view the district court dismissed the plaintiffs' statutory claim in 2002 and the plaintiffs were required to cross-appeal to challenge that decision. *Id.* at 27. However, it also stated that the two circuits that have held that the standards set forth in 28 C.F.R. 35.151(b) are privately enforceable are mistaken, because the regulation's "particular standards for new and altered construction do not appear in the general language of the ADA." *Id.* at 23 n.24. For that reason, not only does no right of

action lie to enforce the regulation itself, but *Alexander* v. *Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001), "forecloses reliance on the ADA Title II cause of action to enforce the regulation." *Ibid.*

The panel also reversed on the independent ground that plaintiffs had failed to show a violation of 28 C.F.R. 35.151(b). This was so for two reasons: (1) voting machines are not "facilities" within the scope of the regulation, which "addresses building standards for physical facilities," and not "inadequate, undersupplied voting machines," Slip Op. 25, and (2) even if the regulation could apply to voting machines, no machines or any other facilities were "altered" such as to trigger the obligations of 28 C.F.R. 35.151(b), *id.* at 26.

SUMMARY OF ARGUMENT

This Court should rehear the panel's erroneous decision that the requirements of 28 C.F.R. 35.151(b) are not enforceable through a private right of action.[3] The panel decision misreads the Supreme Court decision in *Alexander* v. *Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001). *Sandoval* held that there was no private right of action to enforce a regulation where the regulation did not construe a statutory provision that itself gives rise to such a cause of action. *Sandoval* specifically states that, where a regulation *does* authoritatively construe such a

[3] The United States takes no position with respect to the plaintiffs' request that this Court also rehear the panel's determination that plaintiffs failed to make out a violation of 28 C.F.R. 35.151(b).

statutory provision, the regulation is enforceable in the same manner as the statutory text. And to the extent that the panel believed 28 C.F.R. 35.151(b) does not authoritatively construe Title II of the ADA, it was mistaken. The regulation is fully consistent with, and gives specific content to, the broad non-discrimination mandate of Title II. Moreover, it was promulgated pursuant to express statutory command to set forth public entities' specific duties under Title II. Accordingly, *Sandoval* dictates precisely the opposite conclusion from the one reached by the panel. Moreover, the panel decision – reached without briefing from the parties as to this issue – creates a conflict in the circuits on a question that is critical to effective enforcement of the ADA and its implementing regulations.

ARGUMENT

THIS COURT SHOULD REHEAR THE PANEL DECISION THAT THE REQUIREMENTS OF 28 C.F.R. 35.151(b) ARE NOT ENFORCEABLE THROUGH A PRIVATE RIGHT OF ACTION

1. The panel misread *Sandoval*, which held that a regulation cannot, by itself, confer a private right of action not found in the statutory provision it interprets. *Alexander* v. *Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522 (2001). However, *Sandoval* also states that, where a statute does contain a private right of action to enforce its requirements, regulations validly interpreting those requirements are as enforceable as the statutory language itself. *Id.* at 284, *Id.* at 1518. Indeed, because such regulations "authoritatively construe" the statute, it is

"meaningless to talk about a separate cause of action to enforce the regulations apart from the statute." *Ibid.* There can be no independent analysis of the enforceability of the regulations, because "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." *Ibid.*

Sandoval thus instructs that 28 C.F.R. 35.151(b), which authoritatively construes the requirements of Title II of the ADA, is as enforceable through a private right of action as Title II itself. Title II broadly provides that "no 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. It provides a private cause of action to enforce its requirements, by conferring upon any person alleging a violation of Title II the "remedies, procedures, and rights" of the Rehabilitation Act of 1973. 42 U.S.C. 12133.[4] And it instructs the Attorney General to implement Title II by promulgating regulations that set forth public entities' specific duties pursuant to Title II's broad mandate. 42 U.S.C. 12134(a). The regulation at issue here, 28 C.F.R. 35.151(b), was

[4] The Rehabilitation Act, in turn, incorporates the rights and remedies of Title VI of the Civil Rights Act. 29 U.S.C. 794a(a)(2). It is well settled that private parties may sue to enforce the requirements of Title VI, and thus by extension the requirements of Title II. See *Barnes* v. *Gorman*, 536 U.S. 181, 185, 122 S. Ct. 2097, 2100 (2002).

promulgated pursuant to that authority, and so it is as enforceable through a private right of action as is Title II itself.

This case is nothing like *Sandoval*, which barred private enforcement of a regulation that did not authoritatively construe the statute giving rise to a private right of action. At issue in *Sandoval* were Title VI regulations adopted pursuant to Section 602 of the Civil Rights Act that banned disparate-impact discrimination. The regulations thus exceeded the prohibitions of Section 601 of the Civil Rights Act, which bans only intentional discrimination, rather than authoritatively construing them. Accordingly, it was irrelevant that Section 601's requirements are enforceable through a private right of action. 532 U.S. at 280-281, 121 S. Ct. at 1516-1517. Instead, the disparate-impact regulations could be enforced only if Section 602, the separate statutory provision authorizing the promulgation of those regulations, similarly conferred a private right of action, and *Sandoval* held that it did not. 532 U.S. at 288-289, 121 S. Ct. at 1520-1521. Here, however, 28 C.F.R. 35.151(b) is fully consistent with the statutory provision that is enforceable through a private right of action, and so *Sandoval* itself provides that the regulation similarly is enforceable.[5]

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[5] Also inapplicable, despite the panel's heavy reliance upon it, is *Lonberg* v. *City of Riverside*, 571 F.3d 846 (9th Cir. 2009), petition for cert. pending, No. 09-1259 (filed Apr. 15, 2010). *Lonberg* held that no private right of action lies to enforce 28 C.F.R. 35.150(d), which requires public entities to develop a transition

(continued…)

2. To the extent that the panel decision suggests that 28 C.F.R. 35.151(b) imposes obligations not found in Title II and thus fails to authoritatively interpret the statute, it is mistaken. The Attorney General promulgated this regulation, along with others, in accordance with Congress's mandate to construe and give specific content toTitle II's broad guarantee of access to "the services, programs, or activities of a public entity." 42 U.S.C. 12132. As this Court has observed, "Congress expressly authorized the Attorney General to make rules with the force of law interpreting and implementing the ADA provisions generally applicable to public services." *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003). Moreover, Congress specifically provided that Title II's implementing regulations be consistent with those implementing the similarly worded Section 504 of the Rehabilitation Act.[6] 42 U.S.C. 12134(a), (b). Accordingly, 28 C.F.R.

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plan within a certain time period. It reasoned, in accord with the decisions of two other circuits, that this procedural rule does not guarantee the substantive rights that Title II confers on individuals, and thus is not enforceable through Title II's private right of action. See *Lonberg*, 571 F.3d at 852; accord *Iverson* v. *City of Boston*, 452 F.3d 94, 101 (1st Cir. 2006); *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 913-914 (6th Cir. 2004). Whether or not *Lonberg* was correctly decided, it has no application here, since 28 C.F.R. 35.151(b) does guarantee the individual right of access to facilities conferred by Title II.

[6] Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability * * * shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be

(continued…)

35.151(b) mirrors its Rehabilitation Act analogue, which provided in 1990 and still provides today that "[a]ny alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner." 28 C.F.R. 42.522(a).

Thus, not only is the text of 28 C.F.R. 35.151(b) consistent with Title II's broad guarantee of access to public services and programs, but Congress specifically instructed the Attorney General to promulgate a similar regulation to implement Title II. Moreover, Congress made clear that among the bill's intended effects was remedying "the discriminatory effects of architectural, transportation, and communication barriers," including the "failure to make modifications to existing facilities." 42 U.S.C. 12101(a)(5); see *Tennessee* v. *Lane*, 541 U.S. 509, 531, 124 S. Ct. 1978, 1993 (2004) ("Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility."). While the regulation's "particular standards for new and altered construction" may not "appear in the general language of the ADA," Slip Op. 23 n.24, Congress's mandate that such standards be promulgated to implement Title II's general language gives those standards the force of law, just as if Congress had written them into the statute. See *Helen L.* v. *DiDario*, 46 F.3d 325, 332 (3d Cir.) (regulations implementing Title II's integration mandate have "the force of law"

(continued…)
subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a).

because Congress "voiced its approval of" Rehabilitation Act regulations and ordered the Attorney General to write regulations consistent with them), cert. denied, 516 U.S. 813, 116 S. Ct. 64 (1995); accord *Shotz*, 344 F.3d at 1179.

3. For these reasons, even following *Sandoval*, both other circuits to address this issue have held that the requirements of 28 C.F.R. 35.151(b) are enforceable through a private right of action. See *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 910 (6th Cir. 2004); *Chaffin* v. *Kansas State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003). The panel thus created a circuit split as to a question vital to effective enforcement of the ADA, and did so without the benefit of briefing from the parties.

The panel directly held only that no private right of action may enforce 28 C.F.R. 35.151(b) itself. By so doing, it left open the possibility of a future panel permitting a substantively identical claim to be brought under Title II as interpreted by the regulation, limiting this panel's erroneous reading of *Sandoval* to the peculiar procedural circumstances of this case. However, this distinction between a claim under Title II and one under Title II's implementing regulations is a "meaningless" one. *Sandoval*, 532 U.S. at 284, 121 S. Ct. at 1518. The panel's reliance on such a distinction thus is itself a serious misreading of controlling

Supreme Court precedent that should be corrected.[7] Additionally, while the panel limited its holding to the narrow question of whether a suit can be brought directly under the implementing regulations, its opinion contains considerable language suggesting that the regulations' requirements are not enforceable under Title II's cause of action, either. See, *e.g.*, Slip Op. 23 n.24 (stating that *Sandoval* "forecloses reliance on the ADA Title II cause of action to enforce the regulation"). Unless this Court grants rehearing now, such language will cause confusion in the district courts, which may well believe that the panel's clear but erroneous statements represent the law of this Circuit.

[7] As the plaintiffs point out, it is far from clear whether the procedural circumstances on which the panel relies to draw the distinction are present even in this case. See Pet. for Rehearing at 6-7.

CONCLUSION

This court should grant the plaintiffs' petition for rehearing by the panel or en banc.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

JESSICA DUNSAY SILVER
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-0714

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation required by 11th Circuit Rule 35-6. This brief was prepared using Word 2007 and contains no more than 3,207 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney

Date: June 11, 2010

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2010, the original and 14 copies of the BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITION FOR REHEARING were served by overnight mail, postage prepaid, on the Clerk of the Court for the Court of Appeals for the 11th Circuit. In addition, I certify that an electronic copy of the brief was served through the EDF system.

I also certify that one copy of the foregoing brief was served by overnight mail, postage prepaid, on the following:

Ernst D. Mueller
Office of City Attorney
117 W. Duval St., Ste 480
Jacksonville, FL 32202

Jerrold J. Ganzfried
Howrey Simon Arnold & White, LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004

Elaine Gardner
Robert M. Bruskin
Washington Lawyers' Committee for
Civil Rights and Urban Affairs
11 Dupont Circle NW, Suite 400
Washington, DC 20036

s/ Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney