No. 11-746

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

RICHARD FRAME, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. THE "SIDEWALKS/FACILITIES" ISSUE MERITS REVIEW

The en banc majority held that a city's sidewalks, curb ramps, and parking lots qualify as a "service," "program," or "activity" under the Americans with Disabilities Act (ADA) and Rehabilitation Act. That holding has far-reaching implications, exposing municipal governments to potential lawsuits over the accessibility of every public facility or piece of infrastructure regardless of its effect on the accessibility of the government's actual programs or services. This issue is exceptionally important to state and local governments throughout the country – a fact confirmed by the *amicus* briefs filed in this case. See Pet. 1-2, 12-14, 22-23; Huntsville/IMLA Br. 1; TML *et al.* Br. 4, 10-19. Moreover, the decision below exacerbates serious conflicts and confusion in the lower courts over the reach of Title II of the ADA and the Rehabilitation Act. Pet. 14-22. Finally, the en banc majority's conclusion that a sidewalk is a "service" that a citizen can "recei[ve]" or a "program" in which a citizen can "participate" (42 U.S.C. § 12131(2)) does violence to the ordinary meaning of language and ignores contrary evidence of Congress's intent. See Pet. 23-28. Respondents' efforts to rebut these points are unconvincing.

a. *The Conflicts and Confusion in the Lower Courts*. Although no other federal court of appeals has squarely ruled that sidewalks are *not* a "service, program, or activity," the vacated three-judge panel's amended opinion below and district courts have so ruled. Pet. 7-9, 14 & n.4; Opp. 14 n.22. And the

series of sharply divided decisions issued by the Fifth Circuit in this case certainly reflects a profound disagreement among the federal judges who have examined this issue. Beyond that, as we showed, the en banc majority's analysis and ruling is at odds with two lines of cases: (1) decisions of the First, Eighth, and Eleventh Circuits resting on the critical distinction between "services, programs, or activities" on the one hand and *facilities* or *infrastructure* on the other (a distinction this Court also recognized in *Tennessee* v. *Lane*, 541 U.S. 509 (2004)); and (2) decisions of the Fourth and Ninth Circuits and several state supreme courts holding that certain operations of state or local governments do *not* qualify as a "service," "program," or "activity." Pet. 16-22.

As for the second line of decisions, respondents acknowledge that it would be "unreasonabl[e]" (Opp. 2) to apply Title II of the ADA or the Rehabilitation Act to arrests, public employment actions, or proceedings involving the termination of parental rights. Yet as explained in the petition (at 19-22), each of those things obviously qualifies (to use the words of the Fifth Circuit majority) as an "operation" of government as well as a "dut[y], work or business performed or discharged by a public official" (Pet. App. 15a-16a). Respondents do not attempt to explain how these other circuits' holdings could be reconciled with the en banc majority's analysis.[1]

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[1] As explained in the petition (at 25), the Fifth Circuit's reliance on the Rehabilitation Act's definition of "program or activity" as including "all of the *operations* of" an "instrumentality of a State or . . . local government . . . any part of which" receives "Federal financial assistance" (29 U.S.C. § 794(b) (emphasis added)) ignored the genesis of that provision in Congress's desire to

As for the first line of decisions, respondents at least attempt to dispute the conflict (except for *Tennessee* v. *Lane*, which they ignore entirely). Respondents make three basic arguments. First, they hint that this argument is not properly before the Court. Opp. 13 n.21. But respondents stop short of saying so directly, and for good reason: The first question presented obviously encompasses this argument (and even makes specific mention of "physical infrastructure" as opposed to services, programs and activities). Pet. i.

Next, respondents say that the en banc majority's "holding is not based on an equation between facilities and services, but rather is a simple holding that sidewalks are within the statute's compass as a service, program or activity." Opp. 14. But the majority in interpreting the statutory text *specifically addressed and rejected* the City's argument based on this distinction. See Pet. App. 20a-22a (discussing 42 U.S.C. § 12131(2)), 31a-33a (discussing regulations of the Department of Justice ("DoJ")). And the seven dissenting judges relied heavily on the fact that "the statute suggests that sidewalks constitute either a barrier to transportation, or a facility, or both." Pet. App. 51a; see also *id.* at 53a-63a (discussing evidence of key distinction between facilities and services). There is no way to read the decision below other than as rejecting the critical distinction that other circuits have found dispositive.

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overturn *Grove City College* v. *Bell*, 465 U.S. 555 (1984). As that history makes clear, Congress's reference to "operations" was nothing more than shorthand for "program or activity" and was hardly intended to expand those terms. Respondents have no answer to this point.

Finally, respondents make a tepid attempt to distinguish some of the conflicting decisions of the First, Eighth, and Eleventh Circuits. Opp. 13-14 n.21. Contrary to their suggestion, however, it does not matter whether those opinions relied on the statutory text, the DoJ regulations, or both in recognizing the key distinction under the ADA – which is pervasive in both the statute and regulations (see TML Br. 3-12) – between "facilities" or "infrastructure" and "services, programs, or activities." Nor does it matter whether these cases involved "newly constructed or altered" structures. And whether a private right of action exists (see Opp. 10 n.15, 13 n.21) ultimately turns on the statutory text (since there is no private right of action to enforce regulatory duties that go beyond the statute's terms). What matters is that each of these conflicting circuit decisions relied on the critical distinction – squarely rejected below – between facilities and programs/services.

b. *The Importance and Scope of the "Sidewalks" Holding*. As respondents stated below, the questions raised by this case are of "exceptional importance." Resp. C.A. Pet. for Reh'g En Banc, at ii. Yet respondents now say that the majority's holding is in fact "narrow" and they claim we exaggerate its likely impact. Opp. 12-13. Respondents had it right the first time. As explained in the petition (at 2, 12-13, 22-23), and as acknowledged by the seven dissenting judges (Pet. App. 48a-49a), there is no logical basis for treating the sidewalks, curb ramps, and parking lots that are at issue in this case differently from other types of facilities or forms of infrastructure (such as streets, bridges, or buildings). If the en banc

majority is correct that the ADA and Rehabilitation Act cover every conceivable "operation" of government (Pet. App. 16a), and that "city sidewalks" qualify as a "service, program, or activity" because they are "benefits of 'all of the operations' and 'services' of a public entity" (*id.* at 13a), then there is no basis for treating other types of facilities or infrastructure differently. Respondents do not even attempt to offer a plausible basis for such differential treatment.

Next, respondents note that the burdens on the City are not "boundless" because the statute and regulations include certain limitations, including one that allows a public entity to avoid taking steps that it can prove would impose "an undue financial or administrative burden." Opp. 9 & n.14 (internal quotation marks and citations omitted); Pet. 12 (referring to "case-by-case defense of 'undue burden'"). But that provision provides scant relief, because state and local governments must shoulder that burden of proof and seldom have the desire or means to litigate such an indeterminate standard. In any event, respondents admit that "[m]ost of Arlington's sidewalks are alleged to have been built or altered by the City after July 26, 1992." Opp. 5-6. Any other city facility built after that date also logically falls within the purview of the decision below. Pet. App. 14a-18a.[2]

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[2] Respondents twice attribute to us a statement that "the decision below will compel the City to 'build sidewalks' over 'thousands of miles' in Arlington." Opp. 2, 12. We never said that. See Pet. 22.

Equally unavailing is respondents' suggestion that their claims and the relief they seek in this case are limited. Respondents' complaint broadly claimed that the City had violated the ADA by allegedly failing to *maintain* sidewalks, curb ramps, and parking lots throughout the City. It also articulated their objective of achieving "properly maintained pedestrian rights-of-way that are free from abrupt vertical changes in level of over 1/4 inch (1/2 inch if the change in level is beveled)." Fourth Amended Complaint at 4 (¶ 11) (Aug. 9, 2007). Respondents' far-reaching goal of citywide facility access underscores that their complaint has nothing to do with operating under the ADA's enacted dual structure under which program accessibility and facility accessibility are treated differently.

The breadth of the Fifth Circuit's en banc decision is confirmed, moreover, by the subsequent decision in *Bennett* v. *City of Dallas*, 2011 WL 5555661 (5th Cir. Nov. 11, 2011) (per curiam). See TML Br. 18. That case involved claims under the Rehabilitation Act and Title II of the ADA concerning the accessibility of a *parking garage* owned by the City of Dallas that "serves only adjacent public accommodations and not any governmental office or service." TML Br. 18; see also Appellee's Brief, 2011 WL 990277, at *1, *8.

It is not an overstatement, therefore, to say that the decision below affects all state and municipal facilities and infrastructure. Under the Fifth Circuit's far-reaching holding, it now becomes a matter for *judicial* determination whether removal of a ditch is reasonable to provide access to a sidewalk, or would impose an undue financial burden. Pet. App.

22a. In enacting the ADA, however, Congress intended to leave substantial discretion to state and municipal governments to make decisions about infrastructure and facilities, so long as municipal "services, programs, and activities" remained accessible to persons with disabilities. See TML Br. 12-14.

Respondents do not deny that DoJ for years provided guidance to municipal governments on the ADA's requirements that was consistent with the views expressed by the en banc dissenters. See Pet. 26-28. Indeed, until the Ninth Circuit decided *Barden* v. *City of Sacramento*, 292 F.3d 1073 (2002), cert. denied, 539 U.S. 958 (2003), this was the settled understanding relied on by state and local governments throughout the country.

The surpassing importance of the questions presented is underscored by the wide array of *amici* who have urged this Court to grant review, including municipal governments and organizations in multiple states as well as leading national organizations of municipalities and municipal officials. See Huntsville/IMLA Br. 1; TML Br. 1-3. These *amici* have documented the tremendous financial burdens and extensive ongoing litigation that have resulted from the Ninth Circuit's decision in *Barden* (and will flow from the decision below if it is permitted to stand). See TML Br. 15-18. State and local governments deserve an answer *from this Court* to the questions presented in this case before the massive obligations that will flow from the Fifth Circuit's decision are visited upon them.[3]

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[3] Although the Fourteenth Amendment issue is not raised as a separate question in the petition (Opp. 10-11), the canon of

II. THE ACCRUAL ISSUE ALSO WARRANTS REVIEW

We showed in the petition (at 28-35), that the proper accrual rule for construction-related federal anti-discrimination claims is an important and recurring question on which the lower courts have offered conflicting answers (including four different answers provided by judges in this case). We also showed that the en banc Fifth Circuit's answer is inconsistent with the answer given by the en banc Ninth Circuit in *Garcia* v. *Brockway*, 526 F.3d 456, 461 (2008) (per Kozinski, C.J.). Academic commentators have recognized this disarray in the lower courts and aptly described accrual as "a central and unsettled issue in ADA rights enforcement." Eve Hill & Peter Blanck, *Future of Disability Rights: Part Three, Statutes of Limitations in Americans With Disabilities Act "Design and Construction Cases,"* 60 SYRACUSE L. REV. 125, 126 (2009).

Respondents contend that review of the accrual issue is not warranted, however, "because this case is at the pleadings stage." Opp. 15-16. But the accrual issue has been exhaustively litigated, resulting in four judicial opinions and culminating in an en banc decision that finally and definitively expresses the Fifth Circuit's legal position. And contrary to respon-

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constitutional avoidance makes it directly relevant to the first question presented. See Pet. 11 n.2; see also Huntsville/IMLA Br. 2-26 (setting out constitutional avoidance argument in detail). If review of question one is granted, petitioners will brief the Fourteenth Amendment issue in making the constitutional avoidance argument (and, of course, the Solicitor General will have ample opportunity to present the government's views).

dents' suggestion, the proper accrual rule is a pure question of law that does not in any way depend on the facts of this case. To be sure, the *application* of the flawed accrual rule selected by the en banc court (which hinges on when a plaintiff knew or should have known certain facts) will depend on facts developed at trial, but the choice among competing accrual rules is *not* fact-dependent. What is more, if this Court were to adopt the date-of-completion accrual rule, a trial might be unnecessary. Applying that accrual rule, the district court dismissed the complaint. See Pet. 6; Pet. App. 158a-160a. Indeed, the absence of a complicated record makes this case ideal for resolving a threshold, potentially dispositive issue of statutory interpretation.

Next, respondents argue that review is unwarranted because the "Fifth Circuit had no difficulty with" the accrual question and "there is no inter-circuit conflict." Opp. 15. But respondents ignore the four different accrual rules that have been articulated by judges in this very case, including the date-of-completion accrual rule adopted by both the district court and the original three-judge panel majority. See Pet. App. 125a-129a, 158a-60a. And respondents' effort to explain away some of the confusion in the lower courts (including the circuit conflict with *Garcia*), compare Opp. 17-19 with Pet. 31-33 & n.11, rests on the mistaken premise that different accrual rules apply to construction-related disability-discrimination claims under Titles II and III of the ADA, the Rehabilitation Act, and the Fair Housing Act ("FHA"). Like Title II of the ADA, however, these other statutes do not specify an accrual rule by "'explicit command,'" and respondents

point to nothing in their "'structure and text'" that would suggest a different accrual rule. Pet. App. 125a-126a (quoting *TRW Inc.* v. *Andrews,* 534 U.S. 19, 27 (2001)). Respondents' effort (Opp. 18-19) to distinguish the FHA based on Congress's supposed "purpose" to limit the liability of designers and builders proves nothing: The purpose of *all* statutes of limitations (including those applicable to Title II and Rehabilitation Act claims) is to limit defendants' liability.

Next, respondents attempt to address the tension between the accrual rule adopted by the en banc court (which incorporates a discovery rule) and this Court's negative statements about a "default federal discovery rule" in *TRW*. See Pet. 30. Inexplicably, respondents first assert that this is not a "discovery rule" case at all because the en banc majority "specifically limits its decision to sidewalks constructed or altered within two years before its decision," citing footnote 17 of the Fifth Circuit's decision. Opp. 19. That footnote contains no such limitation. See Pet. App. 7a n.17. The accrual rule adopted by the en banc court plainly incorporates a discovery rule. See Pet. App. 41a-42a, 44a (plaintiffs' claims accrued when they "*knew or should have known* they were being denied the benefits of the City's newly built or altered sidewalks") (emphasis added). Nor can respondents avoid the tension with *TRW* because this Court there "declined to decide the question" whether there exists a general federal discovery rule. Opp. 19-20. That misses the content and context of the Court's views. See *TRW,* 534 U.S. at 27 (after noting the adoption by lower federal courts of a general discovery rule when a statute is

silent on the issue, stating: "But we have not adopted that position as our own"); *id.* at 37 (Scalia, J., concurring) ("injury-discovery rule" is "bad wine of recent vintage"). As we explained (Pet. 34), this Court has refused to adopt a federal discovery rule in cases other than those involving fraud, medical malpractice or other situations involving latent injuries. See also Pet. App. 127a.[4]

Finally, respondents anticipate the merits both by contending that the accrual rule adopted by the Fifth Circuit is correct and by faulting the "construction-completion" rule as barring claims of some future plaintiffs before they suffer injuries. That criticism was squarely and correctly rejected by Chief Judge Kozinski for the en banc court in *Garcia*: "Although the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct." *Garcia*, 526 F.3d at 463. Moreover, respondents

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[4] Respondents say that, if review is granted, they will press various alternative arguments for why their claims are not barred by (or even subject to) the two-year statute of limitations (such as "equitable tolling" and the "continuing violation" doctrine). Opp. 20; see also Pet. 30 n.9; Pet. App. 122a-124a, 159a. If accepted, those arguments would expand the Fifth Circuit's judgment, which did not reject the statute of limitations defense but merely adopted a particular accrual rule and remanded for its application at trial. Accordingly, they do not qualify as alternative grounds for affirmance and may not be raised in this Court in the absence of a cross-petition, which respondents did not file. See GRESSMAN ET AL., SUPREME COURT PRACTICE 489 (9th ed. 2007).

ignore the glaring anomaly created by Fifth Circuit's accrual rule, which ensures that there is *no end point* to a municipal government's liability on a construction or alteration claim, until the challenged sidewalk or parking lot is rebuilt or otherwise corrected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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