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

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

INTRODUCTION

Plaintiffs Richard Frame, and several other individuals, all Arlington, Texas residents, sued the City of Arlington on July 22, 2005 for injunctive relief claiming, as relevant here, that the City violated Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act when it constructed or altered public sidewalks, curb ramps and parking lots.

The district court dismissed the suit on a motion under F.R.Civ.P. 12(b)(6) on statute of limitations grounds. Following two panel decisions, the Fifth Circuit Court of Appeals *en banc*, 8-7, reversed and remanded.

Petitioner City of Arlington presents two questions for review. The first asks whether a city's sidewalks, curb ramps and parking lots are a service, program or activity of a public entity under the Americans with Disabilities Act and the Rehabilitation Act. The second asks when a cause of action under these provisions accrues.

On the first question, the *en banc* Fifth Circuit decision held that Title II of the ADA and § 504 unmistakably apply to newly built and altered public sidewalks. The court based this unsurprising conclusion on the unambiguous provisions of the statute. It looked to the particular statutory language at issue, as well as the language and design of the statute as a whole. The court

acknowledged, but did not rely on, the legislative history and purpose, and the Department of Justice regulations, which all support the court's holding.

Only by describing the decision below in unjustifiably broad and *reductio ad absurdum* terms does petitioner predict such far-fetched results as that the decision below will compel the City to "build sidewalks" over "thousands of miles" in Arlington. That is simply not the holding of the court below. Similarly, contrary to petitioner's argument, there is nothing in the decision below suggesting that the ADA holding might be unreasonably applied to arrests, employment or proceedings on termination of parental rights.

On the sidewalk issue, after obtaining the views of the United States, this Court in 2003 denied certiorari in a Ninth Circuit case. *Barden v. City of Sacramento*, 292 F.3d 1073, 1074, 1076 (9th Cir. 2002), *cert. den.*, 539 U.S. 958 (2003). There is no reason to grant certiorari in this case. Although petitioner argues that "the issue is not going away," Pet. 15, n. 5, neither was it wrongly decided. There is no conflict among the courts below.

On the second question, the City asks this Court to decide when a cause of action accrues where plaintiffs allege that the public entity ignored its legal obligations when it newly built or altered sidewalks after the ADA's effective date. The *en banc* Fifth Circuit had no difficulty with this question. Not one of the 15 judges on the *en banc* court questioned the court's opinion on this point. The Court of

Appeals adopted the familiar and reasonable rule that a cause of action accrues when a plaintiff first knew or should have known that he or she was being denied the benefits of the City's newly built or altered sidewalks.

Review of the accrual ruling is not appropriate at this time because this case is at the pleadings stage, there is no inter-circuit conflict, the courts below are having no difficulty with the question, and the court of appeals applied the proper standard.

The *en banc* Fifth Circuit majority correctly concluded the district court should not have dismissed that the amended complaint. The allegations that the City of Arlington, Texas violated the Americans with Disabilities Act and the Rehabilitation Act by newly building or altering sidewalks after the 1992 ADA effective date were sufficient to withstand dismissal. That decision does not merit review here.

STATEMENT

I. Background

A. Respondents Richard Frame, Wendell Decker, Scott Updike, JN, a minor, by his next friend and mother, Gabriela Castro, Joey Salas, and Mark Hamman, all of Arlington, Texas,[1] sued the City of

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[1] Plaintiff Mark Hamman died March 31, 2008. Court Dkt. #126 (October 26, 2011) (suggestion of death filed by current counsel of record), Civil Action No. 4:05-cv-00470-Y

Arlington, Texas, petitioner here, on July 22, 2005 for injunctive relief claiming, as relevant here, that the City violated Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act when the City constructed or altered public sidewalks and parking lots after the effective date of the ADA.[2]

Respondents, some of whom have no motorized transportation besides their wheelchairs, need safe and clear sidewalk and curb cut pathways in their daily lives as citizens, family members and community participants. As the complaint alleges, Mr. Frame and Mr. Updike are both quadriplegic and require a wheelchair for mobility. Mr. Decker has diabetic neuropathy and by prescription must limit his driving time and walking distance. Juan Nunez was 13 when the suit was filed, has Duchenne Muscular Syndrome and requires a motorized wheelchair. Mr. Salas has cerebral palsy and also requires a wheelchair for mobility.[3]

Several allegations from the ample complaint illustrate the experiences which prompted the suit. Juan Nunez is active in the school choir at the nearby high school but there are no curb cuts along the way, impeding his safely getting to the school. Mr. Salas, a student at the University of Texas at Arlington, has no transportation aside from his

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[2] As in the decision below, in this brief, "references to 'sidewalks' refer to public sidewalks and parking lots." App. at 2a.

[3] Fourth Amended Complaint at 5-6, ¶¶ 18-23 (Dist. Ct. Docket #94, filed Aug. 9, 2007) ("Complaint").

wheelchair, and travels an average of 8 miles daily. When he drives his wheelchair in the street due to inaccessible sidewalks, the police have been called regularly, about twice a month, to get him off the street. Richard Frame's destinations include the Medical Center of Arlington for testing, Arlington Memorial Hospital, medical supply store, restaurants, a barbershop, and downtown Arlington, as well as his polling location. Sidewalk obstacles prevent or limit his access to these locations as well as the Post Office, courthouses and his attorney's office.[4]

Mr. Updike is a U.S. Army veteran discharged in 1985 after two years of service. He became quadriplegic on September 8, 2003, after a tragic automobile accident. His wheelchair is his only motorized vehicle. Mr. Updike has two school-age daughters and the absence of ADA-compliant sidewalks and curb ramps force him to travel, dangerously, in the street to attend his daughters' school events.[5]

B. The ADA, enacted in 1990, became effective July 26, 1992, and its Title II forbids discrimination by a public entity in its services, programs and activities. [6] Most of Arlington's

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[4] Complaint at 8, ¶27 (Nunez); 11-14, ¶¶30-31 (Salas); 14-18, ¶¶32-40 and 19-23, ¶¶44-50 (Frame).

[5] Complaint at 23-24, ¶¶51-52.

[6] P.L. No. 101-336, § 205(a), 104 Stat. 327, 338 (1990), codified as amended at 42 U.S.C. §§ 12131-12165.

Sections of the ADA statute are at App. G, 165a-171a, with implementing regulations, *id.* at 172a-183a.

sidewalks are alleged to have been built or altered by the City after July 26, 1992. App. at 3a. "The plaintiffs allege that they were denied the benefits of the City's sidewalks "[w]ithin the last two years, if not also longer." App. at 45a. [7] The inaccessible sidewalks "make it dangerous, difficult or impossible for them to travel to a variety of public and private establishments throughout the City." App. at 3a.

II. The Decision Below

The petition sets forth the statutory framework and the proceedings below. Pet. at 2 *et seq*. Here, we summarize salient elements of the decision below which are insufficiently addressed in, or omitted from, the petition.

A. The suit was dismissed by the district court on a motion under F.R.Civ.P. 12(b)(6) on statute of limitations grounds.[8] After two conflicting panel decisions, the Fifth Circuit Court of Appeals *en banc*, 8-7, reversed and remanded. That decision is before this Court.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, is at App. G, 163-165.

[7] The complaint's allegations, for example, included that, "Many, if not all, of the streets at issue, including relevant portions of Abram, Border, Bowen, South, and Mesquite, were substantially resurfaced, reconstructed, repaved, and otherwise altered by or on behalf of Defendant either within the last two years or after 1992." Complaint, at 4, ¶13 (Dist. Ct. Docket #94, filed Aug. 9, 2007).

[8] App. at 151a *et seq*.

The court below first looked to the plain meaning of Title II to determine whether it extends to newly built and altered sidewalks. Based on the principles in *Pennsylvania Department of Corrections v. Yeskey,* 524 U.S. 206, 212-213 (1998), the court in a lengthy analysis concluded that the statute itself applies to such sidewalks, finding that they are covered as "services, programs, or activities of a public entity." App. at 12a-22a. "Title II unambiguously requires this result," the court held. App. at 25a (with same holding extending to the Rehabilitation Act).[9] The court explained that this conclusion was supported whether the *actions of building and altering* sidewalks are services, programs or activities, or the *city sidewalk itself* is a service, program or activity. *Id.*

Analyzing in depth "the particular statutory language at issue, as well as the language and design of the statute as a whole,"[10] the court of appeals concluded that sidewalks (both the physical structures and a city's activities in planning, constructing, altering and providing them) are a service, program and activity of public entities. App. at 12a-22a.

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[9] The Americans with Disabilities Act and the Rehabilitation Act are interpreted *in pari material*; the court below stated that, although it focuses on Title II, its "analysis is informed by the Rehabilitation Act, and our holding applies to both statutes." App. at 9a (and citations *id*. at notes 20-21).

[10] Quoting *K Mart Corp. v. Cartier, Inc*., 486 U.S. 281, 291 (1988).

The court below held: "Based on statutory text and structure, we hold that Title II and § 504 unambiguously extend to newly built and altered public sidewalks." App. At 7a.

It was "unnecessary to resolve this case" to look to legislative purpose and history. After review of the laws' background and purposes, the court noted, however, that "it would have come as no surprise to the Congress that enacted the ADA that Title II and its implementing regulations were being used to regulate newly built and altered city sidewalks." App. at 25a.

Similarly, the court of appeals did not rely on the Department of Justice's regulations for its holding. The court noted that "On their face, DOJ's regulations governing new and altered facilities are congruous with Title II's reasonable modification requirement." App. at 27a. The regulations are not ambiguous. App. at 34a.[11]

Title II itself requires that:

> . . .when a city decides to build or alter a sidewalk but makes that sidewalk inaccessible to individuals with disabilities without adequate justification, the city discriminates within the meaning of Title II.

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[11] The United States had filed a brief, and argued, before the *en banc* court in support of the plaintiffs below. Because the "DOJ's amicus brief corroborates our own analysis, we need not determine precisely how much deference it deserves." App. at 34a.

> Such a sidewalk benefits persons without physical disabilities, yet that benefit is unnecessarily denied to similarly situated persons with physical disabilities. Continuing to build inaccessible sidewalks without adequate justification needlessly perpetuates the "isolation and segregation" of disabled individuals, and is the type of discrimination the ADA prohibits.[12]

The court below found that the obligation with regard to new or altered sidewalks is not "boundless" and is subject to a "reasonable modification requirement" under the statute itself.[13] Both Title II and the regulations require the "same thing." App. at 28a. Department of Justice regulations provide that a public entity is not required to undertake measures which "would impose an undue financial or administrative burden, threaten historic preservation interest, or effect a fundamental alteration in the nature of the service."[14]

The Fifth Circuit further noted at "at least three other circuits have upheld a private right of action to enforce DOJ's regulations governing newly built and altered sidewalks," citing *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901,

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[12] App. at 25a-26a, citing *Tennessee v. Lane*, 541 U.S. 509 (2004); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999); and *Alexander v. Choate*, 469 U.S. 287 (1985).

[13] Citing *Lane* and *Olmstead*, both *supra*. App. 26a-28a.

[14] 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(2)-(3), (b)(1), 35.151(b), (d), cited App. at 27a, n. 76.

906-07 (6th Cir. 2004); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002), *cert. den.*, 539 U.S. 958 (2003), and *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 (3d Cir. 1993). The Tenth Circuit's decision in *Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 861 (10th Cir. 2003), was cited for its consistent holding with regard to other facilities of public entities.[15]

Finally, the court of appeals decided, drawing on the text of 42 U.S.C. § 12132, that "an injury occurs (and a complete and present cause of action arises) under Title II when a disabled individual has sufficient information to know that he has been denied the benefits of a service, program or activity of a public entity." App. at 42a. Here, that trigger is when the person "knew or should have known that they were being denied the benefits of the City's newly built or altered sidewalks." *Id*. at 42a-43a.

B. Two other issues addressed by the court below are not encompassed in the questions presented here. The first is Article III standing; the court held that plaintiffs have standing. App. 35a-37a.

The second issue is the City's "half-hearted attack on Title II's constitutionality;" the City argued that a requirement to maintain and "retrofit" all existing sidewalks would exceed Congress' enforcement power under § 5 of the Fourteenth

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[15] App. at 29a-30a. In the case at bar, the existence of a private right of action is conceded by the City and its *amici* below in this case. App. at 7a, n. 17.

Amendment. App. at 37a. The court declined to address this question because the narrowness of its holding appeared to satisfy the constitutional objection. App. at 37a. In addition, if the constitutional issue were to be reached, the United States would need to be provided the opportunity to exercise its statutory right to intervene to defend that statute's constitutionality. 28 U.S.C. § 2403(a). The constitutional question was raised in the district court and in the court of appeals. However, it is not raised in the City's petition and is not ripe for review here, notwithstanding the urging of the brief *amicus curiae* City of Huntsville, Alabama and the International Municipal Lawyers Association.

REASONS FOR DENYING THE PETITION

I. There is no reason to review the *en banc* holding that sidewalks are a "service, program or activity" of a public entity.

A. The *en banc* Fifth Circuit decision is based on the unambiguous provisions of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. The court did not rely on the legislative history or purpose or the Department of Justice regulations. It looked to "the particular statutory language at issue, as well as the language and design of the statute as a whole."[16]

[16] *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). To be sure, the legislative purpose (forbidding public entities' discrimination against people with disabilities, based on a record of such discrimination, including denial of constitutional

The court's conclusion derives from the statutes' language: "Based on statutory text and structure, we hold that Title II and § 504 unambiguously extend to newly built and altered public sidewalks." App. At 7a.

Respondents do not reiterate the careful, well-reasoned, and narrow exposition of the *en banc* majority, which is summarized in detail in in the Statement above.

B. Petitioner's critique of the *en banc* decision is of the "straw man" variety. Describing the decision in unjustifiably broad and *reductio ad absurdum* terms, petitioner argues, for example, that the court of appeals' holding transforms all municipal infrastructure into a "service," "program," or activity,"[17] and that every road, bridge, building or other physical facility or infrastructure of a public entity would be treated the same as sidewalk.[18] Similarly flawed is petitioner's assertion that the decision below will compel the City to "build sidewalks" over "thousands of miles" in Arlington.[19] The court below did not so hold; all the court required is that, if the City builds or repairs

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rights) and the regulations (narrowly implementing the statute) corroborate the court's statutory holding.

[17] Pet. at 12.

[18] Pet. at 13.

[19] Pet. at 22. See text at notes 13 and 14 above for the court's recognition of the limits on the City's obligations.

sidewalks, it do so in a way which makes them accessible.

It is also far afield from the narrow holding here to suggest that certiorari is appropriate because the sidewalks holding might be applied to arrests, employment or proceedings on termination of parental rights.[20]

Stretching to claim an inter-circuit conflict, petitioner asserts that the Fifth Circuit equated "facilities" with "services" and that this equation is error. [21] However, the Fifth Circuit's statutory

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[20] Pet. at 19-22.

[21] Pet. at 17-18. Significantly, the "facilities" equation issue is absent from petitioner's Question Presented.

In any event, the cited First, Eighth and Eleventh Circuit decisions do not conflict with the Fifth Circuit's decision here:

- *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, (1st Cir. 2000), was a damages case based on a wheelchair flipping over at a botanical garden, resulting in physical injury to its user. Based on interpretation of the DOJ regulations (not the statutory language, as in the case before this Court), the circuit held that the botanical garden had to have at least one accessible route. The case does not concern "newly constructed or altered" structures.
- In *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006), the issue was whether the DOJ regulations were enforceable in a private right of action, in a case involving sidewalk and other access in the city. In the case at bar, petitioners concede there is a private action.
- *Shotz v. Cates*, 256 F.3d 1077 (11th Cir. 2001), challenged certain wheelchair ramps and bathrooms as a barrier to attending trials at a courthouse. Again, the court looked to the regulations' authority, and held that plaintiffs had no standing based on one-time courthouse visits.

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.

C. This Court in 2003 denied certiorari in a Ninth Circuit case involving the same issue. *Barden v. City of Sacramento*, 292 F.3d 1073, 1074, 1076 (9th Cir. 2002), *cert. den.*, 539 U.S. 958 (2003). To be sure, as petitioner points out, the denial of certiorari in *Barden* followed the Court's request to the United States for its views. Pet. at 15, n. 5. Although petitioners argue that "the issue is not going away," *id.*, neither is it wrongly decided here.[22]

- *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998), upheld an injunction that, considering the "leeway" under the regulations, a courthouse must be made acceptable. It did not address the newly built or altered issue.

[22] Other decisions are consistent with the court of appeals decision here. *Culvahouse v. City of LaPorte, Indiana,* 679 F.Supp.2d 931 (N.D. Ind. 2009) (city sidewalks are a service, program or activity under the ADA statute; summary judgment for plaintiffs on liability); *Procurador de Personas Impedimentos v. Municipality of San Juan*, 541 F.Supp.2d 468 (D. Puerto Rico 2008 (suit on sidewalk accessibility for people with disabilities sufficiently well-pled under ADA; motion to dismiss on that ground denied); *See also Fortyune v. City of Lomita*, 2011 U.S. Dist. LEXIS 125194 (C.D. Cal. 2011) (denying Rule 12(b)(6) motion to dismiss ADA claim that city failed to provide handicap-accessible public parking in on-street stalls). *Cf., Geiger v. City of Upper Arlington*, 2006 U.S. Dist. LEXIS 48284 (S.D. Ohio, May 3, 2006) (when city has no sidewalks, the ADA does not require city to build sidewalks; *Barden* does not hold that cities must build new sidewalks under ADA).

D. The *en banc* Fifth Circuit majority correctly concluded the district court should not have dismissed that the amended complaint. There is no inter-circuit conflict or confusion among the lower courts. There is no reason to consider this issue on certiorari.

II. There is no reason to review the *en banc* court's application of established law on accrual of a cause of action.

Petitioner City of Arlington asks this Court to decide when a cause of action accrues where the complaint alleges that the City flouted the law and constructed and altered sidewalks which are inaccessible to people with disabilities who use wheelchairs and similar mobility devices. There is no dispute that "plaintiffs *have* a private right of action to enforce Title II with respect to newly built and altered sidewalks," the only sidewalks at issue in this case.[23] At issue is solely the time of accrual.

A. The Fifth Circuit had no difficulty with this question. Not one of the 15 judges on the *en banc* court questioned the court's holding or discussion on this point.[24] Review here is not appropriate because this case is at the pleadings stage, there is no inter-circuit conflict, the courts below are having no difficulty with the question, and

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[23] App. at 7a, n. 17 (emphasis in original).

[24] See App. at 46a ("This dissent challenges only the majority's conclusion that a sidewalk constitutes a service under 42 U.S.C. § 12132;" footnote 1 to the dissent).

the court of appeals applied the standard and familiar rule (applying the closest relevant state law rule) when a federal statute has no accrual rule of its own.[25]

B. This litigation is at the pleadings stage, an early moment for this Court to take up potentially complex questions regarding alternative accrual dates for the statutory causes of action. Important relevant facts are unresolved, such as when sidewalks were constructed or altered in relation to the City's compliance deadline, whether and when each plaintiff discovered impediments to access, and the manner in which the City approached its compliance obligations. The court of appeals stated that application of the standard it set "must be resolved through discovery and summary judgment or trial" because this is an affirmative defense.[26] There will be time enough after that point, if it comes, for the Court to consider the accrual question.[27]

C. The Court of Appeals adopted the familiar and reasonable rule that a cause of action accrues when a plaintiff first knew or should have known that he or she was being denied the benefits of the City's newly built or altered sidewalks.

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[25] The parties agree that Texas' two year statute of limitations applies. App. at 39a.

[26] App. at 45a.

[27] Certainly, there are situations in which an accrual defense can be resolved on a Rule 12(b)(6) motion based solely on application of the law to allegations in a complaint. The court of appeals, however, found that this is not one of those situations.

Consistent with established jurisprudence, the court below held that accrual "occurs when a plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." Pet. 41a (quoting *Wallace v. Kato*, 549 U.S. 384, 388, and citing *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997)). A disabled person has no standing to sue until he or she can show "actual" plans to use a sidewalk and the cause of action does not accrue until that time, the court held. App. at 42a (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

D. Petitioner is simply wrong that the lower federal courts are "sharply divided over the proper accrual rule in this setting," citing just four cases and a single law review article.[28] The cases do not demonstrate any division at all; one involves private housing under another statute; one involves a city's supervision of contractors; one involves a private bank under a different title of the ADA; and one citation is to a decision reversed on appeal. *Moeske v. Miller & Smith, Inc.,* 202 F.Supp.2d 492 (E.D. Va. 2002) (private housing and whether a discrimination claim was filed "within the FHA's [Fair Housing Act's] two year statute of limitations period); *Deck v. City of Toledo*, 56 F.Supp.2d 886 (N.D. Ohio 1999) (held that a city's "failure to supervise various contractor's compliance with the ADA can amount to a discriminatory system;" "failing to oversee" constituted a continuing violation of the ADA); *Speciner v. NationsBank, N.A.*, 215

[28] Pet. at 31.

F.Supp.2d 622 (D.Md. 2002) (access to a private bank building under Title III of the ADA, not Title II as in the case at bar). The fourth citation is to a decision reversed on appeal.[29]

Further, there is no inter-circuit conflict on the accrual issue. The petition does not claim that there is a conflict. The petition makes much of *Garcia v. Brockway,* 526 F.3d 456 (9th Cir. 2008), adopting as opinion of en banc court, the three-judge panel decision in *Garcia v. Brockway*, 503 F.3d 1092 (9th Cir. 2007), *cert. den. sub. nom. Thompson v. Turk*, 555 U.S. 1069 (2008), and its treatment of an apartment building construction claim under the Fair Housing Act. The petition's effort to contrast the statutory rule in the *Garcia* private housing case with the Fifth Circuit's rule in the case at bar (which involves city sidewalks) is unpersuasive in any event. The FHA prohibits the design and construction of inaccessible housing. The purpose of the FHA's statute of limitations was to limit the liability for specific violations of the designers and builders, unless there was a continuing violation. In the case at bar, the issue is an inaccessible program or service of a governmental entity from the inception of the newly constructed or altered sidewalks, and continuing that inaccessibility. *See Garcia*, 503 F.3d at 1101 (unfair to impose liability to require compliance regarding "buildings defendants no

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[29] Petitioner cites *Disabled in Action v. Southeastern Pennsylvania Transportation Authority,* 2006 WL 3392733 (E.D. Pa. 2006). This decision was reversed on appeal at 539 F.3d 199 (3d Cir. 2008).

longer own and cannot fix without the cooperation of the current owners.")

E. The Fifth Circuit's approach in this case is unspectacular and correct. In the absence of a federal statutory mandate, applied the familiar approach that the clock begins to run when one "knew or should have known" that he or she was injured by the City's violation of the law. Until that time, a disabled person has no standing to sue. The rule urged by the City would mean that the City's violations of the ADA could not effectively be remedied by persons with disabilities who were never able to challenge the violation, such as newly disabled individuals (like Respondent Updike), soldiers returning from battle, or people whose travels had not previously taken them on an inaccessible route.[30]

F. This is not a "discovery rule" case, despite the City's effort to so characterize it. The opinion of the court below does not discuss that exception to the two-year statute of limitations. The court specifically limits its decision to sidewalks constructed or altered within two years before its decision, App. at 7a, n. 17, and it thus affects only individuals harmed by City actions in contravention of the ADA.

To bolster its weak argument on the discovery rule, Petitioner cites *TRW, Inc. v. Andrews*, 534 U.S. 19, 27 (2001), referencing the Court's purported

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[30] App. at 42a-45a.

"refusal" there to adopt a default federal discovery rule. Pet. 34. However, this Court in *TRW* explicitly declined to decide that question; *TRW* involved a precise statutory limitations provision, so it was not necessary to decide the question petitioner urges upon this Court or whether there is a default federal discovery rule.

G. To be sure, alternative or additional supports for the *en banc* court's accrual decision exist, under such doctrines as the discovery rule, continuing violation, various equitable tolling principles, and the like, but at the petition stage, these need not be addressed, given the correctness of the holding below.[31] Similarly, there is nothing in the statutes to suggest that Congress intended the "odd result" that the plaintiffs' action accrue before they could file suit.[32] Should certiorari be granted, respondents would be free to urge any alternative or additional ground.

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[31] *See, e.g., Californians for Disability Rights, Inc. v. Cal. DOT,* 2009 U.S. Dist. LEXIS 91490, *14-15 (N.D. Cal. Sept. 14, 2009) (certified class of persons with mobility and vision impairments alleging denial of access to sidewalks; "ongoing violations of federal disability laws directly attributable to Caltrans' design policies and guidelines" permit discovery on construction/ alteration more than two or three years prior to suit) *Deck v. City of Toledo*, 56 F. Supp.2d 886, 893 (N.D. Ohio 1999) (in sidewalk case under ADA, continuing violations doctrine permits look-back to earlier than two years if at least one ramp was constructed within two years).

[32] *See* App. at 41a, note. 118.

H. This case is not about every sidewalk in the City of Arlington or the Nation.[33] The petition incorrectly asserts that the Fifth Circuit held that a court may compel rebuilding or repairing any sidewalk, regardless of when it was built. That is not the case. The decision below is limited to a city's actions in violation of the ADA and the Rehabilitation Act, when the city has made a decision to ignore the law and, after 1992, to build or alter sidewalks which violate the law. This case has nothing to do with the City's "originally built" sidewalks before the 1990 ADA to do it right.[34]

I. Given the scope and purpose of the disability rights statutes involved, it would be unreasonable to adopt a rule which mandates that a person with disabilities must file his or her suit within two years of the construction or alteration of a sidewalk. This would mean, for example, that Plaintiff Updike, who became paralyzed in 2003 after a car accident, could never challenge the City's pre-2001 non-compliance with the ADA.

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[33] *Cf.,* Pet. at 23 ("There are approximately 447,170 miles of roads in the Fifth Circuit alone, and more than 3,981,670 miles of roads nationwide.").

[34] The court below repeats the phrase "newly built and altered public sidewalks" three times in the first two paragraphs of the opinion. App. at 2a-3a. Nothing in the remaining text expands that limitation. To the contrary, the court below notes that "plaintiffs unequivocally abandoned any claims with respect to sidewalks built on or before (but not altered after) January 26, 1992." App. at 6a.

Following upon the Rehabilitation Act, the Americans with Disabilities Act is intended to provide a "clear and comprehensive national mandate" to eliminate disability discrimination and to set "clear, strong, consistent, enforceable standards" to address this pervasive discrimination. 42 U.S.C. § 12101(b)(1), (2). This is a "broad mandate" to "integrate [people with disabilities] into the economic and social mainstream of American life." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599 (1999) (secure opportunities "to enjoy the benefits of community living").

Petitioner seeks to end-run the statutes' mandate, and to avoid further litigation of a case seeking an injunction to remedy the City's failure to newly construct and alter sidewalks which are accessible to people with disabilities. If the City failed to do it right the first time around, despite its ADA obligations, then there is no harm done in requiring the City to fix its mistake.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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