No. 19-283

In the
Supreme Court of the United States

CITY OF TRINIDAD, COLORADO,
Petitioner,

v.

STEPHEN HAMER,
Respondent.

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

BRIEF FOR *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND COLORADO MUNICIPAL LEAGUE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

International Municipal Lawyers Association ("IMLA") is a non-profit organization dedicated to advancing the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts. Established in 1935, IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters for its more than 2,500 members across the United States and Canada.

Colorado Municipal League ("CML") was formed in 1923 and is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 102 home rule municipalities, 168 of the 170 statutory municipalities, and the lone territorial charter city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

IMLA's and CML's participation as *amici* is intended to provide a broad governmental perspective

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[1] *Counsel for amici* provided timely notice of intent to file this brief to counsel of record for the parties under Supreme Court Rule 37.2(a), and all parties granted consent. As required by Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel, party, or person other than *amici* and their members or counsel made a monetary contribution intended to fund the preparation or submission of this brief.

to the Court on the application of the statute of limitations under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 ("ADA") and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("RA") (collectively, "the Acts").[2] The petition raises a significant and timely issue impacting public entities nationwide, including states, counties, cities, towns, and each of their instrumentalities that are subject to the Acts' requirements. For this reason, *amici* do not distinguish between municipalities and other public entities as the impacts are the same for all public entities subject to the Acts.

SUMMARY OF ARGUMENT

The Tenth Circuit's adoption of the repeated violations doctrine substantially conflicts with other circuits concerning broad, federal anti-discrimination statutes applicable to every public entity across the nation. The circuit split harms public entities in their efforts to comply with the Acts, and it harms individuals with disabilities asserting claims under the Acts. At a time when accessibility lawsuits against public entities are increasing exponentially,[3] clear, consistent, and workable standards regarding when ADA claims accrue benefit everyone and are of utmost importance.

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[2] The ADA and the RA provide nearly identical rights, procedures, and remedies. *Hainze v. Richards*, 207 F.3d 795, 79 (5th Cir. 2000). For simplicity, *amici* uses the term "ADA" throughout the remainder of this brief to include both the ADA and the RA unless otherwise indicated.

[3] *See* Pet. at n.5.

In addition to the circuit split, the Tenth Circuit's extraordinary application of the repeated violations doctrine to the statute of limitations ignores important policy considerations and drastically increases liability for public entities within the Tenth Circuit and other circuits that may follow it, sowing confusion for local governments around the country in the process. The Tenth Circuit's decision delays accessibility improvements for individuals with disabilities and exacerbates the already large fiscal and operational burdens faced by public entities regarding their facilities, streets, and other infrastructure, putting essential government services at risk.

ARGUMENT

A. Clear, Consistent, and Workable Standards Regarding Application of the Statute of Limitations to ADA Claims Benefit Everyone

The implications of this case are broad-reaching and significant. The ADA applies to "public entities" regardless of population or size and includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131. The RA applies to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A "program or activity" includes "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." *Id.* § 794(b). Every state and all 90,000-plus local

governments nationwide,[4] therefore, are subject to the ADA. Thus, the point when an individual's Title II claims become time-barred undisputedly affects every public entity and every individual with a disability in the country.

The petition demonstrates how the Tenth Circuit's lone adoption of the repeated violations doctrine for ADA claims has further contributed to a split in the five circuits that have weighed in on this issue. Unless this Court resolves the split, any or all of the remaining six circuits risk following the Tenth Circuit's erroneous decision. Indeed, the circuit split harms everyone involved. It creates confusion and inconsistency for those trying to comply with the Acts and also for those seeking redress under the Acts.

1. Public Entities Benefit In Their Efforts to Comply With the Acts

Public entities, and thus, taxpayers nationwide, benefit from having clear, consistent, and workable guidance on broad issues affecting them. ADA issues, particularly removal of architectural barriers, are a "highly technical" area of law. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 732 n.5 (9th Cir. 2007) ("The issues involved [in accessibility cases] are, to be frank, mind-numbingly boring; the ADA Accessibility Guidelines regulate design elements down to the minutest detail . . . [and] the ADA's requirements are 'highly technical . . . .'") (citation omitted). Public entities must

[4] United States Census Bureau, 2017 Census of Governments – Organization, Table 2 (Apr. 25, 2019), *available at* https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.

often look to the United States Department of Justice or Access Board to guide decisions about what complies under the Acts because of the limited number of court decisions on these issues. Organizations like *amici* can attest that public entities also look to each other and to *amici* for guidance on how to address common issues and comply with common requirements under the Acts.

No one argues that the Acts' requirements are unimportant. Still, public entities nationwide struggle in their efforts to comply due to equally important operational and fiscal responsibilities discussed more fully below. As the number of ADA lawsuits against public entities rises,[5] public entities must be able to evaluate their potential liability, which is directly tied to when the limitations period starts to run. The availability of workable guidance on ADA issues reduces uncertainty and promotes efficiency for public entities. Clarity about application of the statute of limitations to ADA claims is especially helpful for entities in jurisdictions without a binding circuit opinion to guide them.

Indeed, it makes no sense for the law concerning something as important as the application of statutes of limitations to claims under broad federal statutes to vary by circuit. Although public entities can have differing issues in complying with the Acts and the applicable limitations periods under state law may vary, the point in time when ADA claims accrue is not geographically significant. The Acts' requirements apply equally to all public entities. Allowing some circuits to calculate the statute of limitations based on

[5] *Supra* note 3.

the more forgiving repeated violations or continuing violation doctrines will make those circuits even more of a target for trending ADA lawsuits.[6] There is also the risk that other circuits will follow the Tenth Circuit's erroneous decision, leading only to more confusion among public entities and claimants alike as to when an ADA claim is time-barred.

Recognizing these same potential consequences, this Court adopted uniform limitations periods for federal RICO and § 1983 claims, stating:

> [A] uniform statute of limitations is required to avoid intolerable "uncertainty and time-consuming litigation." This uncertainty has real-world consequences to both plaintiffs and defendants . . . . "Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."

Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150 (1987) (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 & 275 n.34 (1985); internal citations omitted). The Court's reasoning supports petitioner's and *amici*'s arguments for uniform accrual of the limitations period under the Acts.

Moreover, inconsistent application of the statute of limitations uniquely burdens *amici* in their respective

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[6] *Id.*

missions to educate their local government members on important issues of state and federal law. Differences in the application of the statute of limitations based purely on geography undermines *amici*'s important educational and training objectives.

2. Individuals with Disabilities Benefit By Knowing When and How to Raise Accessibility Issues Effectively

The circuit split also raises questions for claimants of when and how they must assert ADA claims to be timely and the extent of potential damages available. Individuals with disabilities moving from one circuit to another or visiting multiple circuits know or should know soon thereafter whether the jurisdiction is accessible. Individuals in circuits following the usual application of statutes of limitations under other federal civil rights laws must assert their claims soon after moving to or visiting the new jurisdiction and acquiring this knowledge to avoid their claims being time-barred. These same individuals in circuits adopting the repeated violations or continuing violation doctrine, however, can wait to assert their claims for years or even decades. A clear, consistent, and workable rule of law as to when the limitations period runs prevents unsuspecting plaintiffs who move from one jurisdiction to another from having their claims barred because they were operating under the more lenient law of another jurisdiction.

Thus, everyone benefits when there is clear, consistent, and workable jurisprudence guiding decisions under the Acts. Accrual of ADA claims ought to be the same for all parties involved.

B. The Tenth Circuit's Decision Effectively Eliminates the Statute of Limitations in Abrogation of Important Policy Considerations and Ultimately Delays Accessibility

1. Statutes of Limitations Have a Necessary Purpose

Statutes of limitations serve an important public interest. As the Court has explained:

> Statutes of limitation, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments . . . protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

U.S. v. Kubrick, 444 U.S. 111, 117 (1979) (internal citations and quotations omitted). Indeed, the Court has long instructed lower courts not to construe a statute of limitations "so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Id.* at 117. Instead, statutes of limitations should be regarded as a "'meritorious defense, in itself serving a public interest.'" *Id.* (quoting *Guaranty Trust*

Co. v. United States, 304 U.S. 126 (1938)). Although "statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims, . . . that is their very purpose." *Id.* at 125.

2. The Repeated Violations Doctrine Eliminates Any Statute of Limitations for ADA Claims, Prejudicing Public Entities and Increasing Litigation and Risk

The Tenth Circuit's adoption of the repeated violations doctrine has broad and substantial impacts well beyond saving Mr. Hamer's claims. Mr. Hamer did not miss the statutory deadline by years or decades. He missed it by six months or less. Especially when a statute of limitations bars a claim based on a narrow window of time, it can be compelling to consider exceptions which may provide the claimant relief. However, and to be clear, the Tenth Circuit's decision opens the door for the assertion of other claims against public entities for barriers claimants have possibly known about for *decades* since the ADA's passage in 1990 and the RA's passage in 1973. Like the continuing violation doctrine, the Tenth Circuit's repeated violations doctrine is tantamount to eliminating the statute of limitations on any claims for as long as the alleged barrier to public access was constructed, installed, or improved. Neither of these doctrines "encourage[s] the prompt presentation of claims." *Id.* at 117.

As in *Kubrick*, allowing plaintiffs to bring claims long after the actionable conduct occurred prejudices the judicial system and parties because, over time, witnesses are less likely to be available to testify,

memories fade, and important documentary evidence may become unavailable. *Id*. Public entity defendants especially are prejudiced by witness unavailability and faded memories due to employee and elected official turnover. Now, public entities in the Tenth Circuit (and possibly elsewhere) must expend considerable resources to retain and store otherwise inconsequential records in perpetuity to defend against ADA claims possibly decades after the claims first arose. Beyond the impossible task of defending decades' old decisions and facts, an open-ended claims period will likely increase lawsuits against public entities, adding to their risk exposure. The Tenth Circuit's decision opens the floodgates and invites claimants otherwise deterred by the usual application of the statute of limitations from asserting claims first discovered years ago to come forward now years later.

Much like governmental immunity statutes aim to reasonably limit public entities' potential liability, statutes of limitations enable public entities to manage risk and provide effective and efficient government services. *See, e.g.*, *Lee v. Dep't of Health*, 718 P.2d 221, 227-28 (Colo. 1986) (Colorado Governmental Immunity Act's limitation of liability "proceeds from actual differences in the magnitude and character of the functions assumed by public entities and in the effect of greater potential liability exposure on the public entity's ability to continue its governmental functions" and "is reasonably related to the governmental objective of providing fiscal certainty in carrying out the manifold responsibilities of government"). When liability is limited to barriers first encountered within the limitations period, public entities can reasonably

evaluate their exposure for ADA claims based on the number of existing barriers. The continuing violation and repeated violations doctrines, however, remove the certainty a statute of limitations necessarily brings public entities to establish procedures, priorities, and appropriations to address risk exposure, improve access, and continue the business of government at the same time.

Although the Tenth Circuit claims the repeated violations doctrine "serves the interests of efficiency" because non-parties may benefit from a favorable ADA or RA ruling, Pet. App. at 26 n.12, those individuals are not necessarily precluded from bringing their own suits against the public entity for damages. Multiple lower court judges could also order different injunctive relief, varying either the scope or the timeline for achieving compliance.

Unfortunately, contrary to the Tenth Circuit's opinion, application of the repeated violations doctrine will likely increase rather than reduce the number of accessibility suits and potential damages against public entities. Attorney's fees and injunctive relief are commonly awarded for ADA claims. This model already incentivizes plaintiffs and attorneys to sue for even minor violations and has resulted in an increasing number of ADA lawsuits being filed across the country. Pet. at n.5; *see also infra* note 6. But plaintiffs are further incentivized under the repeated violations doctrine to delay bringing their claims so they can allege intentional discrimination and recover monetary damages as well.

Moreover, the limitations defense is no longer a meritorious defense for public entities in the Tenth Circuit (and possibly elsewhere). Now, assuming that sidewalks and curb ramps are a service, which is a legal issue yet to be decided in this case, an entity with even a single non-compliant curb ramp could be subject to as many lawsuits for damages and attorneys' fees as there are individuals with disabilities who intend to someday access the area the ramp serves. *See* Pet. App. at 31 (intent to access the facility or activity all that is required for injury under the ADA).

The burden on public entities to defend themselves in these lawsuits further reduces their already limited resources for ADA improvements within their jurisdiction and, thus, actually *reduces* accessibility. This case provides a poignant example where petitioner was already in the process of working with the Department of Justice to improve accessibility when Mr. Hamer sued, distracting petitioner from the business of improving accessibility and partnering with the federal government. The Court should not allow this result to persist. Instead, to increase accessibility and to remain consistent with the important purpose of statutes of limitations, plaintiffs and their attorneys should be incentivized to assert ADA claims sooner rather than later.

3. The Repeated Violations Doctrine Increases Liability for Public Entities Unnecessarily

The petition demonstrates how the repeated violations doctrine creates near perpetual liability for public entities for ADA claims. Perhaps knowing this, the Tenth Circuit tries to justify its extraordinary

decision by asserting that public entities will be "incentivized to remedy non-compliant services, programs, or activities in a *reasonable yet efficient* manner." Pet. App. at 31 (emphasis added). But the Tenth Circuit also requires public entities to achieve complete compliance to avoid the increased liability its decision causes. The two cannot be reconciled.

First, complete compliance with the Acts is nearly impossible because of the various fiscal and operational constraints imposed on public entities discussed below. Recognizing this, Congress, in enacting the ADA, did not require complete accessibility. 28 C.F.R. § 35.150 (every "public entity shall operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is *readily* accessible") (emphasis added). Indeed, the ADA "does not . . . [n]ecessarily require a public entity to make each of its existing facilities accessible" or "[r]equire any public entity to take any action that it can demonstrate would result in a fundamental alteration . . . or in undue financial administrative burdens." *Id*. Other exceptions to complete compliance exist too. *See id.* § 35.151 ("Full compliance . . . is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements."); 2010 ADA Standards for Accessible Design § 202.3 (Dep't of Justice, Sept. 15, 2010) ("In *alterations*, where compliance with applicable requirements is *technically infeasible*, the *alteration* shall comply with the requirement to the maximum extent feasible.") (orig. emphasis), *available at* https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm.

This is perhaps because the ADA's technical requirements are quite rigid. *See Molski*, 481 F.3d at 732 n.5 ("the ADA Accessibility Guidelines regulate design elements down to the minutest detail . . . [and] the ADA's requirements are 'highly technical . . . .'") (citation omitted). As an example, a newly installed ramp may have a cross slope of 2.1% instead of 2.0% because of an unsteady hand on the concrete finish work, use of different measuring levels, or placement of the same measuring level in approximately the same but not identical place. *See, e.g., Kirola v. City and County of San Francisco*, 74 F. Supp. 3d 1187, 1227 (N.D. Cal. 2014) ("[u]se of a short level . . . 'gives exaggerated readings because it's so short [that] it picks up minor fluctuations;'" citation omitted); *Indep. Living Res. v. Oregon Arena Corp.*, 1 F. Supp. 2d 1124, 1147 (D. Or. 1998) ("[slope] measurement can be affected by a number of variables, including the precise location where the measurement is taken"). The ramp may be just as accessible in the broad sense of the word as a ramp with a 2.0% cross slope, yet claimants can (and do) sue to enforce the strict language of the ADA.[7]

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[7] In fact, a handful of disability rights advocates have obtained multi-million dollar class action settlements against public entities across the country for allegedly defective or missing ramps and sidewalks at an increasing pace. *See, e.g.*, settlement agreements filed in *King et al. v. City of Colorado Springs*, No. 1:19-cv-00829-JLK (D. Colo. Mar. 21, 2019) (requiring 15,400 new or retrofitted ramps over 14-year period); *Center for Independence of the Disabled, New York et al. v. City of New York et al.*, No. 1:14-cv-05884-GBD-KNF (S.D.N.Y. Mar. 19, 2019) (17+ year agreement covering all New York City corners); *Hines v. City of Portland*, 3:18-cv-00869-HZ (D. Or. Sept. 27, 2018) (18,000 ramps over 12 years); *Reynoldson v. City of Seattle*, No. 2:15-cv-01608-BJR (W.D. Wash. Nov. 1, 2017) (22,500 ramps over 18 years); *Ochoa et al. v.*

The ADA's implementing regulations, first promulgated in 1991, also did not require public entities to remove all existing barriers overnight as the Tenth Circuit suggests entities must do here. Public entities were instead directed to evaluate and prepare a transition plan for removing barriers, which could be accomplished over multiple years. 28 C.F.R. §§ 35.105 & 35.150(d) ("if the time period of the transition plan is longer than one year, [public entity must] identify steps that will be taken during each year of the transition period"). In fact, some barriers are not required to be

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City of Long Beach et al., No. 2:14-cv-04307-DSF-FFM (C.D. Cal. Mar. 10, 2017) ($200 million for barrier removal over 30 years); *Denny v. City and County of Denver*, No. 2016CV030247 (Denv. Dist. Ct. Sept. 9, 2016) (1,500 ramps per year until all are compliant); *Willits et al. v. City of Los Angeles*, No. 2:10-cv-05782-CBM-MRW (C.D. Cal. Jan. 8, 2016) ($1.37 billion over 30 years for ramps and sidewalks). These settlements typically require the entity to survey its existing infrastructure to identify all noncompliant ramps or sidewalks and then obligate the entity to install or remediate ramps and sidewalks that do not meet the agreed upon specifications. The settlements also require payment of hundreds of thousands of dollars, and even millions of dollars as in the *Willits* case, for attorneys' fees over multi-year terms. Sometimes the parties agree to a tolerance above what the ADA requires (*e.g.*, 3% cross slope as being acceptable rather than requiring 2%), but sometimes a 0.1% difference might be actionable under the settlement. Widespread suits involving public entity websites and parking facilities may be next on the horizon. *See, e.g.*, Martin E. Comas, *Local Governments on Alert Over Lawsuits Targeting ADA Violations Over Website Documents*, ORLANDO SENTINEL, Jan. 4, 2019, *at* https://www.orlandosentinel.com/news/os-ne-ada-lawsuits-blind-local-governments-20190104-story.html; Tad Vezner, *ADA Lawsuit Targets Minnesota Local Government Sites*, GOV'T TECH., Oct. 8, 2018, *at* https://www.govtech.com/computing/ADA-Lawsuit-Targets-Minnesota-Local-Government-Sites.html.

removed until the facility containing the barrier is altered. *Id.* § 35.151(b). Public entities have relied on these regulations to plan for and phase barrier removal for almost 30 years.

Multi-year plans are simply necessary due to the budgetary and operational constraints explained below. With the cost of a single curb ramp averaging several thousand dollars, it is easy to imagine that most public entities will not have sufficient, unobligated financial resources to remove all barriers overnight.[8] Even if they did, maintaining compliant infrastructure also requires substantial resources. Indeed, the Department of Justice reconfirmed in its 2010 guidance the intent that "public entities have flexibility in addressing accessibility issues." 28 C.F.R. Part 35 app. A (analyzing § 35.150).

Under the Tenth Circuit's decision, however, public entities can only limit their liability and defend against claims that may have originated years or decades earlier by removing each and every barrier immediately and completely and in disregard of the necessary iterative and dialectic dynamic between public entities and the public. Still, liability may continue after all barriers are fixed where plaintiffs can prove injury – such as simply an intent to access an area served by a former barrier – during the limitations period.

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[8] *Amici* submit this is a primary factor public entities consider when threatened with class action litigation. It is a factor that often forces the entity to settle because they can negotiate the time allowed for remediation rather than risk a court ordering that all barriers be removed in a shorter time period. *See supra* note 6.

Further, applying either the repeated violations or continuing violation doctrines to ADA claims assumes an omniscient viewpoint exists from which public facilities and infrastructure may be evaluated at one point in time. This contradicts the reality of public life in America: there is no state of perfection. Rather, government must constantly update its services and infrastructure to make government meaningful and accessible to the public. This will be extremely challenging for public entities of all sizes.

The Tenth Circuit's application of the repeated violations doctrine to the statute of limitations is neither reasonable nor efficient. Although some new technologies are being used to measure public infrastructure assets, the most reliable method for collecting curb ramp and sidewalk data is to physically visit each location, place a level multiple times in multiple places, and record the numerous measurements required by the ADA. *See* 2010 ADA Standards for Accessible Design § 405 (listing ramp standards such as running slope, cross slope, counter slope, width, location, condition, and existence of external features impacting accessibility). These surveys can take years to complete even for an average-sized jurisdiction. *See* cases cited *supra* note 6 (allowing multiple years to perform required surveys). Even then, measurements will vary by individual and over time as concrete naturally heaves and cracks. In *Independent Living Resources v. Oregon Arena Corporation*, for example, the parties obtained differing measurements at the very same time:

> The parties initially disagreed on many of the slope measurements, at least in part because the measurement can be affected by a number of variables, including the precise location where the measurement is taken. At the conclusion of the court trial, the parties made a site visit in which they took additional measurements together and submitted those to the court along with charts and photographs showing the location where each measurement was taken. There were still occasional discrepancies between the measurements, which most likely are attributable to the different surveying instruments that the parties used.

1 F. Supp. 2d 1124, 1147 (D. Or. 1998) (footnote omitted).

Certainly very few, if any, public entities have the resources to survey their public infrastructure daily to ensure nothing happened overnight to a particular ramp or sidewalk section making it non-compliant under the ADA. Yet the Tenth Circuit requires exactly this (in addition to completely remediating all existing infrastructure as an initial matter) to avoid near perpetual liability. The Tenth Circuit's suggestion that public entities should "simply mak[e] their programs, services, and activities accessible"[9] is easier said than done and completely removed from reality.

The Tenth Circuit's decision also fails to acknowledge that an award of injunctive relief and attorneys' fees is the same for barriers encountered

[9] Pet. App. at 31.

inside the limitations period as it would be for barriers encountered outside the limitations period. Moreover, limiting damages to, here, the two-year period prior to filing suit does not change the public entity's compliance responsibilities under the Acts. Instead, claimants whose claims would have been stale under the usual application of statutes of limitations (and the lawyers representing them) now have an incentive to sue, and in some circumstances, an incentive to sit on claims for an extended period of time to try to create a claim of intentional discrimination to obtain monetary damages in addition to remediation.

C. The Repeated Violations Doctrine Exacerbates Already Significant Fiscal and Operational Burdens on Public Entities

Even before now, public entities have faced heavy fiscal and operational burdens regarding ADA compliance. As stewards of taxpayer dollars, public entities are necessarily risk adverse. They are accountable for utilizing finite (and often insufficient) financial resources to the greatest extent possible, while balancing a plethora of competing needs and priorities. Indeed, citizens expect their tax dollars to be budgeted and spent appropriately to provide necessary services to the community and maintain the public entity's assets and infrastructure. Public entities must predict and prioritize their community's needs to ensure limited funds are maximized. For this reason, the budget process is and must be forward-looking, not just to the immediate budget year, but to several budget years in the future.

Due to limited funding, public entities must be able to prioritize, plan for, and complete accessibility improvements in a manner that is both resource- and time-efficient. It is more efficient and effective to do this by identifying and removing barriers within specific geographical areas or by importance based on effect to the largest number of citizens and by bidding out larger projects or groups of smaller projects, rather than running work crews and cement trucks back and forth across the entire jurisdiction, installing and repairing ramps and sidewalks in piecemeal fashion.

Unfortunately, dwindling tax revenues or unexpected liabilities can quickly derail even the most robust transition plan. Aside from budget shortfalls, unpredictable catastrophes such as wildfires or floods can force public entities to shift funds from planned accessibility improvements to essential services such as police and fire protection. Weather conditions like disastrous, unavoidable, and unpredictable freeze-thaw cycles can wreak havoc on public entities' streets, sidewalks, and curb ramps, requiring more frequent repair, increasing materials and maintenance costs, and further contributing to the backlog of accessibility improvements. Actual labor and materials costs beyond budgeted amounts also significantly impede a public entity's ability to perform planned improvements. And unanticipated lawsuits can sometimes have a crippling effect on local governments.[10]

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[10] For example, with the advent of DNA testing and organizations like the innocence project, more people are having their decades-old convictions overturned and then suing local governments for tens of millions of dollars. In some cases, an unanticipated and unbudgeted lawsuit like this can result in the local government

It is not surprising that funding shortages and constraints in operating budgets have caused many public entities to fall behind on the construction, operation, and maintenance of their infrastructure. The maxim is true: America's public infrastructure is deteriorating due to a paucity of capital budget resources. This reality impacts public entities' ability to comply with the ADA and undercuts the Tenth Circuit's misunderstanding that the only financial impact of its decision on public entities concerns the (currently) infrequent award of monetary damages. *See* Pet. App. at 32-33. Setting aside whether public entities can bear the financial impact of monetary damages, litigation costs, and attorneys' fees regarding ADA claims in a time when such claims are increasing, the financial impact of having to install or remediate infrastructure in a piecemeal manner across the entire jurisdiction is not something they can bear.

The Tenth Circuit's decision allowing claimants to file suit to remove barriers spanning years and vast geographical areas will disrupt public entities' ability to perform accessibility improvements in a strategic, resource- and time-efficient manner, and thus, do more with the money available. Instead, public entities subject to the decision are now required to remove possibly long lists of barriers spread out across entire jurisdictions immediately to avoid never-ending liability, monetary damages, and high attorneys' fees

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facing bankruptcy. *See, e.g.*, Joe Duggan, *Faced with $28 Million Judgment in Beatrice Six Case, Gage County Has No Easy Options*, OMAHA WORLD-HERALD, Jun. 13, 2018, *at* https://www.omaha.com/news/nebraska/faced-with-million-judgment-in-beatrice-six-case-gage-county/article_8222aed2-142f-548a-ac65-d98bbe792268.html.

awards, which further increases the operational and financial burdens public entities face and jeopardizes funding for essential public services.

CONCLUSION

This case presents a compelling vehicle to resolve the three-way circuit conflict caused by the Tenth Circuit's decision and provide clear, consistent, and workable guidance to public entities and claimants around the country on an important issue of federal law. Public entities and claimants alike will benefit from clear, consistent authority as to when the statute of limitations begins to run on ADA claims. Moreover, subjecting public entities to near limitless liability ultimately borne by taxpayers as the Tenth Circuit's adoption of the repeated violations doctrine does goes against the important public interest served by statutes of limitations, delaying accessibility and threatening to disrupt essential public services.

For the reasons stated above and in the petition, *amici* urge the Court to grant a writ of certiorari to the Tenth Circuit to resolve the circuit split and reject the repeated violations doctrine for ADA claims.

Respectfully submitted,

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