No. _____

In The
# Supreme Court of the United States

THE CITY OF TRINIDAD,

*Petitioner,*

v.

STEPHEN HAMER,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the repeated violations doctrine extends the statute of limitations for claims under Title II of the Americans with Disabilities Act and the Rehabilitation Act.

## PARTIES TO THE PROCEEDING

Petitioner, defendant below, is the City of Trinidad.

Respondent, plaintiff below, is Stephen Hamer.

The Colorado Municipal League is an amicus curiae in support of the City.

## RELATED PROCEEDINGS

United States District Court (D. Colo.):

*Stephen Hamer v. City of Trinidad*,
No. 16-cv-02545-NYW (Dec. 1, 2017)

United States Court of Appeals (10th Cir.):

*Stephen Hamer v. City of Trinidad*,
No. 17-1456 (May 15, 2019)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Trinidad respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-35a) is published at 924 F.3d 1093. The Tenth Circuit's order denying rehearing *en banc* (Pet. App. 73a-74a) is unpublished. The order of the district court (Pet. App. 36a-72a) is unpublished, but is available at 2017 WL 5969815.

## JURISDICTION

The judgment of the court of appeals was entered on May 15, 2019. Pet. App. 1a. The court of appeals denied a timely petition for rehearing *en banc* on June 12, 2019. Pet. App. 73a-74a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

42 U.S.C. § 12132 provides in pertinent part: "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."

In similar language, the Rehabilitation Act ("RA") provides in pertinent part: "No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a).

## STATEMENT OF THE CASE

This case concerns how the statute of limitations should be applied to claims under Title II of the Americans with Disabilities Act ("ADA"). While the plain text of Title II prohibits discrimination in the context of a public entity's services, programs, and activities, the circuit courts are in disagreement as to when a plaintiff's claim is timely under an applicable state statute of limitations. In conflict with other circuits, the Tenth Circuit adopted the "repeated violations doctrine," which in essence vitiates the statute of limitations for claims under Title II. Given the near limitless liability governmental entities face in light of the Tenth Circuit's opinion, this case presents an issue of exceptional importance that should be reviewed by this Court.

Respondent Stephen Hamer is a resident of the City of Trinidad ("City") and utilizes a motorized wheelchair due to what he characterizes as "severe bilateral ankle problems." Pet. App. 4a. Almost immediately after moving to the City in early 2014, Mr. Hamer began raising complaints about the state of the sidewalks and curb cuts throughout the City. *Id*. 4a, 41a. By April 2014, Mr. Hamer had already attended a City Council meeting to voice his grievances and filed a formal complaint with the Department of Justice ("DOJ") about the City's sidewalks and curb cuts. *Id*. 4a-5a. Throughout the summer months, Mr. Hamer continued to lodge informal complaints about the state of the sidewalks with City staff. *Id*. 5a. In response to Mr. Hamer's complaints and communications with the DOJ, the City began efforts to raise funding to repair sidewalks and address other infrastructure, as directed by the DOJ. *Id*.

The City's efforts continued for a period of over two years (and continue to this day), during which time Mr. Hamer did not seek relief under Title II of the ADA or the RA. *Id*. Apparently dissatisfied with the City's ongoing efforts to address sidewalks under the DOJ's direction, Mr. Hamer filed suit on October 12, 2016, some two years and five months after he first complained to the City Council and the DOJ. *Id*. In his complaint, he sought a declaratory judgment that the City's sidewalks and curb cuts are not in compliance with Title II and the RA. *Id*. He also sought injunctive relief requiring repair to all of the City's sidewalks and curb cuts,

as well as monetary damages, attorney's fees, and costs. *Id*.

At summary judgment, among other defenses, the City asserted Colorado's two-year statute of limitations as a complete bar to Mr. Hamer's lawsuit.[1] *Id*. 38a. Mr. Hamer raised two legal theories in response. First, he alleged that the continuing violation doctrine espoused in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) was applicable to certain regulatory claims under Title II. Pet. App. 56a. Second, he argued that owing to Title II's "affirmative obligation" to remove barriers to individuals with disabilities who access the services, programs, and activities of a public entity, the City violated the ADA each and every day any sidewalks or curb cuts went un-remedied in the City. *Id*. 56a, 68a-69a.

The district court granted summary judgment to the City. The court found that Mr. Hamer had raised discrete acts of discrimination, which rendered his claims ineligible for revival by the continuing violations doctrine. *Id*. 63a-64a. As to Mr. Hamer's "affirmative obligation" argument, the district court held that while "the continued inaccessibility of the City's sidewalks and curb cuts satisfied the injury requirement for prospective relief . . . Plaintiff fails to address the requirement that a specific injury occurred within the

[1] The City also asserted that, contrary to Mr. Hamer's position, sidewalks are not a standalone service, program, or activity of a public entity. That issue, which neither the district court nor the Tenth Circuit addressed, is currently before the district court on remand.

applicable two-year statute of limitations." *Id*. 69a. Put another way, "[i]t is insufficient to rely solely on the continued ill effects of the City's original acts of discrimination to satisfy his burden on summary judgment." *Id*. Under federal principles governing accrual of claims, the district court held that Mr. Hamer knew of the accessibility issues raised in his complaint by April 2014, or at least no later than August 2014 when he reasserted his complaint before the City Council. *Id*. 68a. As such, his October 2016 filing was beyond the two-year statute of limitations governing ADA claims. *Id*. 70a-71a.

On appeal, the Tenth Circuit focused solely on Mr. Hamer's second argument, having found that he waived any argument under the continuing violations doctrine. *Id*. 13a. In rejecting both the district court's rationale and the rationale of other courts, the Tenth Circuit held that Title II's "affirmative obligation" mandates that the statute of limitations be applied in a different manner than as to most other claims pled in the civil rights context. *Id*. 18a, 26a-27a. Because, according to the Tenth Circuit, the City has an ongoing duty to make its services, programs, and activities accessible to individuals with disabilities, it violates the ADA each and every day any of its sidewalks and curb cuts go unrepaired.[2] *Id*.

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[2] The Tenth Circuit assumed, albeit without deciding, that sidewalks and curb cuts constitute a service, program or activity of a public entity. Pet. App. 20a n.7.

In what it coined the "repeated violations doctrine," the Tenth Circuit held that Mr. Hamer has a timely claim for all noncompliant services, programs, and activities that he encountered in the two years prior to suit, regardless of whether he was aware of those discrete accessibility issues more than two years prior to filing suit. *Id*. 27a. As the Tenth Circuit acknowledged, its ruling "will manifest itself by keeping public entities on the hook for injunctive relief as the years go by." *Id*. 30a. The City agrees with this last statement, as it has 154 miles of sidewalks and 1300 curb cuts. *Id*. 41a.

The Tenth Circuit then remanded the case for the district court to analyze whether Mr. Hamer could establish any violations during the two years prior to filing suit and, if he could, which sidewalks and curb cuts he had actually encountered in the requisite period, as well as address other dispositive issues raised at summary judgment. *Id*. 34a-35a.

## REASONS FOR GRANTING THE PETITION

The federal courts of appeals have failed to reach a consensus on how to apply the statute of limitations to Title II claims. In reaching its conclusion that individuals should have a near-perpetual cause of action under Title II, the Tenth Circuit applied a doctrine that directly conflicts with other courts of appeals.[3] Indeed, other circuits have reached the opposite conclusion:

[3] Moreover, the Tenth Circuit's holding is inconsistent with its own prior precedent, *see infra* p. 13.

claims under Title II accrue and expire in the same manner as other civil rights claims. The Tenth Circuit's adoption of the repeated violations doctrine is especially harmful in the context of Title II, as it creates near limitless liability (in an area where lawsuits are already on the rise) and interferes with the ability of public entities to consult with the DOJ and reach a consensus on how to allocate limited resources towards increasing accessibility to individuals with disabilities. As this case demonstrates, the doctrine allows an otherwise untimely claim to disrupt a multi-year process of prioritizing repairs consistent with the DOJ's guidance. Given the disagreement among the circuits, the inconsistency within the Tenth Circuit, and the far-reaching implications of the Tenth Circuit's opinion, this Court should take the opportunity to review this important aspect of claims brought under Title II.

## I. The courts of appeals are divided on how to apply the statute of limitations to claims under the ADA.

The Fourth Circuit's opinion in *A Society Without a Name v. Virginia* ("*ASWAN*"), 655 F.3d 342 (4th Cir. 2011) presents the sharpest contrast to the Tenth Circuit's decision in this case. In *ASWAN*, an advocacy group challenged Virginia's decision to relocate homeless services outside of downtown Richmond, which the advocacy group alleged was done to reduce the visibility of the homeless population. *Id*. at 345. Because of the strong link between homelessness and persons with disabilities, the advocacy group alleged that the

relocation of services was done in violation of Title II of the ADA. *Id*.

It was undisputed in *ASWAN* that the new homeless center began operating outside of Richmond in February 2007. *Id*. Upon application of Virginia's one-year statute of limitations, the Fourth Circuit held that the plaintiff's Title II claim, filed in February 2009, was barred as a matter of law. *Id*. at 348.

In an effort to overcome the applicable statute of limitations, the advocacy group argued that Virginia's continued operation of the center outside of the city represented an ongoing violation of the ADA. In other words, "the illegal act did not occur just once, but rather in a series of separate acts. . . ." *Id*. (internal citations and quotations omitted). Because a new "violation" occurred each day the center was open, it was alleged that the statute of limitations began anew on each passing day. *Id*.

The Fourth Circuit disagreed, holding that the "fact that the Conrad Center is still located on Oliver Hill Way and continues to offer services to the homeless . . . does not amount to a continuing violation, but rather amounts to the continuing effect of the original decision to locate the Conrad Center on Oliver Hill Way." *Id.* at 349. The Fourth Circuit's decision stemmed from long-standing circuit precedent, whereby "[a] continuing wrong theory should not provide a means of relieving [a] plaintiff from its duty of reasonable diligence in pursuing its claims." *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 189 (4th Cir.

1999) (internal citations and quotations omitted). As the advocacy group was well aware of the state's decision to move homeless services out of town in 2007, its decision to delay filing suit for over two years meant it could not maintain a cause of action under Title II. *ASWAN*, 655 F.3d at 349.

Beyond the Fourth Circuit, a divided Fifth Circuit indicated a similar conclusion in *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011). As here, the Fifth Circuit considered whether a group of plaintiffs' claims for noncompliant sidewalks were barred by the applicable statute of limitations. *Id*. at 237-40. While the court did not directly analyze the continuing or repeated violation doctrines, it did make two relevant holdings. First, the court unequivocally held that "the City will have an opportunity to prove that these plaintiffs knew or should have known they were being denied the benefits of the City's newly built or altered sidewalks more than two years before they filed their claims." *Id*. at 239. Although the Tenth Circuit attempted to dismiss this holding when adopting the repeated violations doctrine in this case (*see* Pet. App. 17a n.6), the only reasonable interpretation of the Fifth Circuit's language is that Title II claims can accrue and expire in the same manner as other civil rights claims. To read the Fifth Circuit's opinion in any other manner would negate the public entity's right to assert the statute of limitations as a defense on remand (which, incidentally, is exactly what the Tenth Circuit did in this case).

The second takeaway from *Frame* is more nuanced, but the City would argue is equally important to the differing rationales of the Fourth, Fifth, and Tenth Circuits. In *Frame*, the Fifth Circuit emphasized that the expiration of the statute of limitations for each *individual* plaintiff would differ, and thus while some plaintiffs' claims would be timely, others may not. *See id*. at 239 ("As for the plaintiffs other than Updike, the City will have an opportunity to prove that these plaintiffs knew or should have known that they were being denied the benefits of the City's newly built or altered sidewalks. . . ."). Without breaking new ground, the Fifth Circuit merely confirmed that, much like with other civil rights statutes, the rights conferred under Title II are personal and may be extinguished if a particular individual does not seek timely relief. Thus, while a public entity may have an ongoing obligation to comply with Title II, a specific individual or group may lose the right to enforce Title II if they sit on their rights.

Interestingly, even the Tenth Circuit seems to be in disagreement as to the statute of limitations for Title II claims. In an unpublished opinion, the court considered a student's Title II claim regarding inaccessibility of university classrooms. *Rhodes v. Langston Univ.*, 462 Fed. App'x 773 (10th Cir. 2011) (unpublished). While the student first learned of campus inaccessibility issues in 2006, he alleged that such barriers continued well into 2007, and even resulted in a surgery in the spring of 2008. *Id*. at 780. He argued that his lawsuit, filed in 2009, was timely because "none of

Langston's discriminatory acts can be tied to specific dates as all were on-going events which only concluded after he was forced out of the nursing program in 2008." *Id*. The Tenth Circuit disagreed, holding that "[t]hese complaints represent discrete accessibility issues rather than a continuation by Langston of related and repetitive unlawful acts or practices." *Id*.

Mr. Hamer advanced an identical theory to what the plaintiff argued in *Rhodes*, *i.e.*, the City's alleged failure to remediate sidewalks cannot be tied to a specific date for purposes of the statute of limitations since the City's actions constitute an "ongoing event." The Tenth Circuit agreed with Mr. Hamer, holding that a "new violation" is present each day that a noncompliant service, program, or activity goes un-remedied, regardless of how long a plaintiff has sat on his rights. Pet. App. 26a-27a. The Tenth Circuit's opinion in *Hamer* cannot be squared with its own prior opinion in *Rhodes*.

Perhaps recognizing this tension, the court in *Hamer* acknowledged its prior opinion in *Rhodes* but then dismissed it, commenting that *Rhodes* considered application of the continuing violation doctrine and not the newly minted repeated violations doctrine. Pet. App. 15a-16a. This is despite the fact that the Tenth Circuit made no mention of the continuing violation doctrine in *Rhodes*, nor did it cite to *Nat'l R.R. Passenger Corp. v. Morgan*. To the contrary, the court in *Rhodes* directly considered the student's claim that the violations of the ADA were "on-going events" and dismissed such legal theory, ruling that the plaintiff's

claims accrued prior to 2007, which is when he *first* learned of program inaccessibility at the university. 462 Fed. App'x at 780. So for a period of time, the Tenth Circuit too was in agreement with the Fourth and Fifth Circuits in reaching the conclusion that claims under Title II could expire under the statute of limitations if not pursued in a timely fashion, *even if* such accessibility issues constituted ongoing events.

Beyond the Fourth, Fifth, and Tenth Circuits, both the Ninth and Seventh Circuits have considered this legal issue, albeit in the context of Title III suits. In *Pickern v. Holiday Quality Foods Inc.*, the Ninth Circuit held that so long as an individual with disabilities can allege a denial of access based upon a present barrier, it is of no importance that the individual knew of the barrier for longer than the statute of limitations would ordinarily permit him to delay filing suit. 293 F.3d 1133, 1137 (9th Cir. 2002). The Seventh Circuit adopted the Ninth Circuit's rationale in *Scherr v. Marriott Int'l, Inc.*, permitting a wheelchair bound individual to sue over alleged ADA violations that she had encountered more than four years prior to filing suit. 703 F.3d 1069, 1076 (7th Cir. 2013). Although neither court devoted the level of attention to the statute of limitations as the Tenth Circuit did, both courts adopted a similar rationale: "Because the violations Scherr alleges are continuing, the applicable statute of limitations does not bar her claim." *Id*. at 1076.

## II. The Tenth Circuit's holding is inconsistent with its own prior holdings and sows confusion on how to apply the statute of limitations.

In parsing Mr. Hamer's arguments, the Tenth Circuit held that while the continuing violation doctrine did not apply, a related, albeit distinct, "repeated violations" doctrine could be invoked to reconstitute Mr. Hamer's otherwise untimely claims. Not only was the court's reasoning inconsistent with its opinion in *Rhodes*, it was also inconsistent with its own prior jurisprudence on extension of the statute of limitations.

To explain, the use of the phrase "repeated violations doctrine" was actually a misnomer, as the Tenth Circuit had already attached a different label to this exact legal theory. In *Tiberi v. Cigna Corp.*, 89 F.3d 1423 (10th Cir. 1996), the court adopted the continuing wrong doctrine, whereby a "cause of action accrues at, and limitations begin to run from, the date of the last injury." *Id*. at 1430 (internal citation and quotation omitted). Put another way, "the statute of limitations does not begin to run until the wrong is over and done with." *Id*. at 1430-31 (internal citation and quotation omitted). The holding from *Tiberi* is a perfect match for the Tenth Circuit's opinion in this case. It held that Mr. Hamer is subject to a repetitive injury each and every time he encounters a sidewalk that is not compliant with the ADA and the City's failure to take corrective action extends the statute of limitations until such barrier is abated, *i.e.*, the "wrong" under Title II has been cured. Pet. App. 25a-27a, 31a.

If the Tenth Circuit was going to reconstitute Mr. Hamer's otherwise untimely cause of action, it should have labeled the City's conduct as a continuing wrong to maintain consistency with its prior jurisprudence on the extension of the statute of limitations. While the exact reason the Tenth Circuit did not employ such consistency is unknown,[4] the application of the continuing wrong doctrine would have changed the outcome of the decision. In *Matson v. Burlington N. Santa Fe R.R.*, 240 F.3d 1233 (10th Cir. 2001), the Tenth Circuit applied the continuing wrong doctrine to a case with similar characteristics to the present matter. In *Matson*, the plaintiff alleged that he suffered back injuries each and every day he rode trains for his employer. *Id*. at 1234. Recognizing that his claim was untimely under the relevant statute of limitations, the plaintiff argued that his claim should not have accrued until he retired (and thus stopped suffering the injuries inflicted by his employer). *Id*. But the Tenth Circuit rejected application of *Tiberi*, holding that the "doctrine is inapplicable when the injury is 'definite and discoverable, and nothing prevented the plaintiff from coming forward to seek redress.'" *Id*. (quoting *Tiberi*, 89 F.3d at 1431). Thus, despite being subject to a tort each day he rode his employer's train, the Tenth Circuit nonetheless held that his claim was

[4] The Tenth Circuit's inconsistency in *Hamer* is particularly troublesome in light of its citation in footnote 3 of its opinion to the law review article located at 43 Gonz. L. Rev. 271 (2008), which refers in its own footnote 1 to the "continuing wrong doctrine."

time-barred because he had the ability to assert his rights and failed to do so timely. *Id*.

The second half of the continuing wrong doctrine should have been applied to Mr. Hamer's claims. As the district court found, and Mr. Hamer did not challenge on appeal, he was fully aware of the City's alleged violations of the ADA/RA more than two years before he filed suit. Pet. App. 70a-71a. There is nothing within the record to support a claim that he was "prevented . . . from coming forward to seek redress" within the appropriate time period. *Tiberi*, 89 F.3d at 1431.

The Tenth Circuit is not the only court to have adopted some form of the continuing wrong doctrine, which, as the Third Circuit noted, focuses on the defendant's affirmative acts and whether they continued within the applicable statute of limitations period. *287 Corp. Ctr. Assocs. v. Twp. of Bridgewater*, 101 F.3d 320, 324 (3d Cir. 1996). And consistent with the Tenth Circuit's own prior jurisprudence, other circuits have held that the continuing wrong doctrine may not be invoked "where the harm is definite and discoverable, and nothing prevented the plaintiff from coming forward to seek redress." *Wilson v. Giesen*, 956 F.2d 738, 743 (7th Cir. 1992); *see also Jersey Heights Neighborhood Ass'n*, 174 F.3d at 189 ("A continuing wrong theory should not provide a means of relieving [a] plaintiff from its duty of reasonable diligence in pursuing its claims.").

As the City noted in its request for rehearing *en banc*, the number of multiplying and different doctrines and labels for doctrines affecting the statute of

limitations has become cumbersome and difficult to apply. By adopting the newly minted "repeated violations" label, the Tenth Circuit has created uncertainty for not only public entities subject to Title II within its jurisdiction, but also public entities nationwide, which must struggle in ascertaining which of several competing doctrines apply to claims under Title II. The lack of clarity in how such doctrines alter operation of the statute of limitations (or perhaps a more fundamental question – should they be adopted in the first instance) is thus a question of exceptional importance. This Court should take the opportunity to clarify for all public entities whether and how these doctrines affect the statute of limitations for Title II claims.

## III. The liability of public entities under Title II of the ADA is of exceptional importance and should be reviewed by this Court.

As the Tenth Circuit itself conceded, its ruling will keep the City "on the hook for injunctive relief as the years go by." Pet. App. 30a. More bluntly, its opinion functionally eliminates the statute of limitations for the nearly 11,000 municipalities, special districts, and public authorities that fall within its jurisdiction. It also sows uncertainty for public entities in other circuits, which must contend with the possibility that courts will adopt the Tenth Circuit's holding and revive otherwise untimely Title II claims. Thus, review of the Tenth Circuit's ruling is essential to the economic well-being of public entities not only in Colorado and the Tenth Circuit, but across the entire United States.

### A. The Tenth Circuit's opinion upends the strong public policy considerations inherent in statutes of limitation.

The Tenth Circuit's ruling gave little consideration to the long-standing policy justifications for statutes of limitation. As this Court has previously articulated, "[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Bd. of Regents of Univ. of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980). The Tenth Circuit's opinion provides a near perpetual cause of action for plaintiffs to sue governmental entities under Title II, regardless of whether such individuals have been dilatory in pursuing their rights.

In so doing, the Tenth Circuit seems to have been solely concerned that the City could avoid liability "forever." Pet. App. 25a-26a. This was not what the City was advocating, nor is it remotely close to the outcome that would result if the statute of limitations were properly applied. First, the DOJ has the ongoing ability to address Title II compliance, regardless of whether an individual plaintiff has asserted a cause of action in federal court. (Indeed, that is exactly what occurred here). Second, as the Tenth Circuit itself noted, other individuals may have a private cause of action and their claims would not be similarly barred by the statute of limitations where they did not sit on their rights or delay in filing.

The City is merely advocating for the well-established and non-controversial position that an *individual* plaintiff may lose the right to seek damages and injunctive relief if they fail to comply with the statute of limitations. This seems to be the exact conclusion reached by the Fifth Circuit in *Frame v. City of Arlington*, wherein the court held that "the City will have an opportunity to prove that these plaintiffs knew or should have known that they were being denied the benefits of the City's newly built or altered sidewalks." *Frame*, 657 F.3d at 239. This is also consistent with all manner of civil rights statutes, wherein individuals may only challenge an unconstitutional act or policy of a governmental entity to the extent their claims are brought within the statute of limitations.

It's difficult to state how impactful the Tenth Circuit's failure to apply the statute of limitations will be to the City and its fellow public entities. Not only does the Tenth Circuit's opinion revive Mr. Hamer's otherwise untimely claims, it revives every claim from every disabled individual since the inception of the ADA, so long as the individual can point to a single injury on a single day within the statute of limitations. This includes, for example, an individual who has lived in the same Denver neighborhood for twenty years and who has chosen not to attempt to remedy a cracked sidewalk or ramp near his post office. Long gone are the records evidencing when that sidewalk or ramp was built (a key determination for purposes of establishing liability – *see* 28 C.F.R. §§ 35.150; 35.151), who built or maintained it, and any city employees who could opine

on its construction. But under the Tenth Circuit's ruling, this individual, and countless others like him, can now seek damages, injunctive relief, and attorney's fees for *any* accessibility issue. This is regardless of the lack of urgency demonstrated by the complaining party or the fact that the plaintiff's dilatory actions have placed the public entity at a complete disadvantage in defending itself.

The Tenth Circuit provides no safety valve for public entities to triage or otherwise mitigate the effects of its ruling. Under the Tenth Circuit's holding, public entities are subject to extensive litigation that may result not only in the possibility of a damages award, but significant attorney fees and exorbitant costs associated with injunctive relief. Indeed, the costs of repairing each and every sidewalk or curb cut within the City of Trinidad that was cracked or deficient at any point in the past two years (and at every point in the future), as demanded by Mr. Hamer, will cripple the City.

The Tenth Circuit also erroneously stated that "even if a qualified individual still suffers an injury after many years, we note that at some point the doctrine of laches may come into play." Pet. App. 32a. Yet laches cannot be invoked to bar a claim timely brought within the statute of limitations. *See generally SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S. Ct. 954 (2017). Since according to the Tenth Circuit every claim is now timely under the ADA, assuming a single injury can be alleged within the two-year statute of limitations, the Tenth Circuit also unwittingly

eviscerated the equitable defense of laches when it gutted the statute of limitations.

The City is not adopting a hyperbolic position in terms of overall cost and strain on taxpayer resources. The DOJ's promulgation of the 2010 Standards for Title II and Title III facility accessibility all but guarantees that a municipality will not be in compliance with every regulatory mandate for every service, program, activity, and facility at all times. *See* 28 C.F.R. § 35.151(c).[5] The statute of limitations serves the important purpose of reasonably balancing a disabled individual's right to initiate a personal lawsuit to seek relief for those regulatory infractions, whilst simultaneously affording municipalities the right to be free from stale claims. Will that balance result in the loss of otherwise valid claims for relief? Of course, but such is the case in application of any statute of limitations, including, for example, the enforcement of civil rights in actions brought under 42 U.S.C. § 1983.

### B. The opinion interferes with Title II audits conducted by the Department of Justice, ultimately leading to a strain on the resources of public entities.

The Tenth Circuit's opinion will also have the effect, albeit unintendedly, of making it harder for municipalities to remove barriers for disabled citizens in

[5] This would be in conjunction with the 395% increase in ADA filings in the federal courts from 2005 to 2017. *See* https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act.

their communities. Mr. Hamer's case presents the prototypical example of what will happen when future public entities are subjected to otherwise untimely claims that are saved by the Tenth Circuit's repeated violations doctrine.

In response to Mr. Hamer's complaint to the DOJ in April 2014, the DOJ conducted an audit of the City's infrastructure and the accessibility of its services, programs, and activities. The City also set to work amassing between $500,000 and $1,000,000 to address what the DOJ perceived to be the most critical repairs needed to sidewalks and curb cuts utilized by the public. Pet. App. 42a-43a. The City ultimately allocated $800,000 for repairs to sidewalks and curb cuts in its 2017 budget. *Id*. at 43a. Yet Title II does not merely concern curb cuts and sidewalks;[6] rather, it (and the DOJ agreement) encompasses a wide range of municipal services, including voting accessibility, protocols for accommodation of individuals with disabilities in natural disasters, and perhaps even web-based services, all of which demand significant financial and other resources. As the City noted in its briefing to the district court, it set aside an additional $600,000 to address other areas of ADA compliance (essentially everything but sidewalks and curb cuts). *Id*. That $600,000 was obviously in addition to the $800,000 already earmarked just for 2017.

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[6] Again, the City has not conceded that sidewalks constitute a standalone service under the ADA. *See Frame*, 657 F.3d at 243 (Jolly, J., dissenting).

Municipal budgets are not particularly elastic and what is expressed in the City's financial planning is what it can reasonably afford to spend before it must divert funds away from other essential municipal services, such as police and fire protection. Trinidad is a 140-year-old city and it must contend with all of the strains faced by other Colorado municipalities, including sidewalk cracking due to Colorado's freeze/thaw climate and swelling soils, the costs of snow removal, and the danger presented by spring floods.

The City's negotiation with the DOJ regarding its audit and enforcement of the ADA thus reflected a careful balance between increasing Title II accessibility to the maximum extent feasible, while also ensuring that the City has sufficient funds to operate and promote critical services on behalf of all of its constituents. This is a negotiation that occurred over a matter of months, not weeks, and for which the City devoted substantial time and effort to confirm that its general fund could sustain over a period of years. And certainly part of that negotiation *could have* included the specific accessibility requests of Mr. Hamer, either informally with the DOJ's assistance or formally had there been *timely* litigation. Such continuity in municipal planning, however, was thwarted by Mr. Hamer's own decision to let his rights under Title II lapse while the City was negotiating with the DOJ.

The City is now faced with competing demands between what the DOJ determined were the most critical accessibility issues for *all* disabled individuals, versus the unique and often separate accessibility complaints

of Mr. Hamer. And this is not a matter of thousands or even tens of thousands of dollars. According to the City's unrebutted expert, remediating just a fraction of what Mr. Hamer has requested in the form of injunctive relief would cost the City an additional $900,000. Pet. App. 43a. Where this extra $900,000 will come from in a city with a per capita income of $23,000 is a question to which no one has the answer.

In this regard, the Tenth Circuit's suggestion on how the City could minimize the costs associated with injunctive relief under the repeated violations doctrine is not particularly helpful. In merely restating Mr. Hamer's argument, the Tenth Circuit noted that the City can simply make all of its services, programs, and activities accessible, which to Mr. Hamer means repairing every sidewalk and curb cut within municipal limits and constantly renovating them as weather and other natural occurrences degrade them. Pet. App. 31a. Obviously, the City cannot engage in a carefully negotiated agreement with the DOJ, only to turn around and scrounge up millions more dollars in municipal funding to meet Mr. Hamer's specific demands. And yet because the repeated violations doctrine keeps the City "on the hook" for injunctive relief as the years go by, Mr. Hamer can sue each and every year for any ADA barrier that he alleges he encounters, including those that he has known about for five, ten, or even twenty years.

The end result of this unending liability is a diversion of limited taxpayer resources away from those accessibility projects deemed most important by the DOJ

or, alternatively, the elimination of certain municipal services. At the very least, municipalities must push harder to reject certain projects requested by the DOJ so they have contingent funds available to address private lawsuits (and the attorney's fees that come with them) sprung upon them by litigants who lie in wait for years before initiating suit. Such perpetual liability will ultimately cut against Title II's mandate to provide greater accessibility to *all* individuals with disabilities.

## IV. Because Mr. Hamer concedes that his case is untimely absent application of the repeated violations doctrine, this case presents an ideal vehicle for review by this Court.

Mr. Hamer's delay in filing suit against the City ensures that this case is properly framed for the Court's review. There is a well-developed factual record detailing Mr. Hamer's knowledge of alleged ADA violations more than two years prior to him filing suit. Indeed, as the district court found (and Mr. Hamer did not challenge on appeal), his claims most likely accrued in April 2014, but at the very latest in August 2014 when he spoke to City Council for the final time. Pet. App. 68a. Mr. Hamer never raised any issue of tolling or other disability that would have prevented him from seeking timely relief before his October 2016 filing. Furthermore, according to the Tenth Circuit, Mr. Hamer has abandoned any argument that his claims may be saved by the continuing violation doctrine.

What's left before this Court is the sole issue of whether the newly created, or at least newly labeled, repeated violations doctrine can resurrect otherwise untimely claims under Title II. This case thus presents the Court with a purely legal question, the answer to which would have general applicability to all other courts that consider Title II claims (including those that have diverged from the reasoning of the Tenth Circuit). Seldom does a case present itself with such a clearly delineated legal inquiry, especially in the context of Title II, where compliance with the DOJ's extensive regulations often creates a myriad of factual disputes and other complexities.

Perhaps more importantly, this case also demonstrates the negative consequences that flow from an untimely ADA suit. Because the City acted diligently in negotiating repairs with the DOJ, Mr. Hamer's lawsuit, if permitted to survive, will interrupt an otherwise well-thought-out and executed remediation plan for the City's services, programs, and activities (in a plan expressly endorsed by the DOJ, no less). In the City's opinion, the Tenth Circuit afforded too little weight to the DOJ's own oversight, and in so doing crafted the repeated violations doctrine to permit individuals with disabilities a near-perpetual cause of action. Yet, as the facts of this case show, resurrection of untimely claims did more harm than good (and will continue to do more harm absent review by the Court). The unique posture of this case thus allows the Court to consider each of the competing interests in

application of the statute of limitations to claims under Title II.

It is unlikely that the Court will be presented with a future petition that considers all of the relevant viewpoints *and* presents this narrow legal question under Title II of the ADA. The Court should thus take this opportunity to settle how the statute of limitations should be applied to claims under Title II.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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