No. 19-283

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a challenge to a government entity's violation of its ongoing barrier removal obligations under the Americans with Disabilities Act and the Rehabilitation Act is timely even if suit was filed more than two years after the plaintiff learned of the existence of the barriers.

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Relevant provisions of the Americans with Disabilities Act, the Rehabilitation Act, and implementing regulations appear in the Appendix, *infra*.

STATEMENT OF THE CASE

Both Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, impose on municipalities an ongoing obligation to remove barriers to disability access in their services, programs, and activities. Respondent Stephen Hamer alleges that Petitioner the City of Trinidad has violated that obligation by operating a sidewalk system that contains numerous access barriers. For more than two years, Mr. Hamer sought to resolve the dispute without litigation, by complaining directly to the city council and seeking the assistance of the United States Department of Justice. When those efforts did not eliminate the barriers, he filed this lawsuit. But because Mr. Hamer sued more than two years after he brought the barriers to the city council's attention, the City now argues that his action is untimely. The Tenth Circuit correctly rejected that argument. It held that Mr. Hamer may sue to stop the City's ongoing violation and to obtain damages for harm suffered during the two-year limitations period.

1. This case involves two related statutes. Title II of the ADA applies to every entity of state and local government. See 42 U.S.C. § 12131(1). It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of" such an entity. 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act applies to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). It provides that "[n]o otherwise qualified individual with a disability" 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" such a program or activity. *Id.*

Physical barriers to access are a key focus of both statutes. In adopting the ADA, Congress found that "individuals with disabilities continually encounter various forms of discrimination," including "the discriminatory effects of architectural, transportation, and communication barriers." 42 U.S.C. § 12101(a)(5). Congress directed the Attorney General to issue substantive regulations to implement Title II. 42 U.S.C. § 12134(a). It specifically required those regulations to "be consistent with" earlier regulations implementing Section 504, including those governing physical accessibility. 42 U.S.C. § 12134(b) (requiring the Attorney General to follow the Department of Health, Education, and Welfare's 1978 "coordination regulations" for

all matters "[e]xcept for 'program accessibility, existing facilities', and 'communications'.").

The Attorney General's regulations implementing Title II contain extensive provisions regarding physical accessibility and barrier removal. See 28 C.F.R. §§ 35.149-35.151. Those regulations draw a crucial distinction between old and new facilities. For facilities that were built or altered after January 26, 1992, the regulations impose stringent requirements: Each of these new facilities, or any new parts of them, must be "readily accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.151(a), (b), as measured by the highly detailed ADA Standards for Accessible Design, 28 C.F.R. § 35.151(c).

For "existing facilities"—those that were built before January 26, 1992, and have not been altered since—the regulations impose the less stringent requirement of "program accessibility." The program-accessibility regulation states that government entities must "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (emphasis added). It emphasizes that a government entity need not necessarily "make each of its existing facilities accessible to and usable by individuals with disabilities," 28 C.F.R. § 35.150(a)(1), nor need it disregard important historic preservation interests or make changes that "would result in a fundamental alteration in the nature of a service, program, or activity or in undue

financial and administrative burdens," 28 C.F.R. § 35.150(a)(2), (3). See generally *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004) (summarizing the differences between the stringent rules Title II imposes on new facilities and the more generous standards it applies to existing facilities).

The Attorney General's regulations also impose an ongoing duty to maintain accessible facilities. A state or local government must "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." 28 C.F.R. § 35.133(a).

2. Stephen Hamer lives in the City of Trinidad, Colorado. Pet. App. 4. As a result of a disability, he uses a power wheelchair for mobility. *Id.* Because he does not drive, and Trinidad has no public transportation, Mr. Hamer relies on the City's public sidewalks to get around. *Id.*

Unfortunately, many of those sidewalks—and the curb cuts leading to them—are inaccessible. "Upon inspection of approximately 178 curb ramps and 55 sidewalks in 'high use' areas, Plaintiff's engineering expert" testified "that approximately 67 percent of the surveyed curb ramps were noncompliant" with federal accessibility standards, and "that 'large areas of sidewalks . . . were found to be non-compliant' " as well. *Id.* at 42. Because so many of the City's sidewalks are inaccessible, Mr. Hamer has often been forced to ride his wheelchair in the street, risking serious injury. DCt

Dkt. 1 at 6. Mr. Hamer has twice fallen from his wheelchair as a result, and he has been close to being hit by passing traffic. C.A.J.A. 58.

Mr. Hamer diligently informed city officials about these problems. In April 2014, he addressed a city council meeting and informed them "that he had personally counted seventy-nine non-compliant sidewalks and curb cuts throughout the city." Pet. App. 4-5. He "continued to lodge informal ADA and RA complaints at City Council meetings over the next few months." *Id.* at 5.

He also sought the intervention of the United States Department of Justice. After the April city council meeting, Mr. Hamer filed an ADA complaint with the Department. *Id.* at 5; see 28 C.F.R. § 35.170 *et seq*. (setting forth process for filing administrative complaints with DOJ for violations of Title II). Investigating the complaint, DOJ "discovered multiple non-compliant sidewalks and curb ramps." Pet. App. 5. The City took some remedial steps in response, *id.*, but "many of the issues plaintiff identified remain uncorrected," *id.* at 70.

3. Having failed to obtain removal of the barriers about which he had complained, Mr. Hamer filed this lawsuit on October 12, 2016. *Id.* at 5. The suit claims that the City's operation of inaccessible sidewalks and curb cuts violates Title II and Section 504, including the requirements of program accessibility and maintenance of accessible features. See DCt Dkt. 1. The action seeks "a declaratory judgment that the City's

sidewalks and curb cuts violate the ADA and RA, injunctive relief requiring City officials to remedy the City's non-compliant sidewalks and curb cuts, monetary damages, attorneys' fees, and costs." Pet. App. 5.

The district court granted summary judgment to the City on statute of limitations grounds. *Id.* at 56. Because neither Title II nor Section 504 includes its own limitations period, the court borrowed Colorado's two-year statute of limitations. *Id.* at 55. It concluded that this action was not timely, because Mr. Hamer knew of the violations no later than April 29, 2014 (the date of his DOJ complaint) and filed his lawsuit more than two years later. *Id.* at 56. Although Mr. Hamer argued that program-accessibility and maintenance-of-accessible-features regulations imposed ongoing duties that the City continued to breach each day, the court rejected that argument. It held that "the construction and alleged lack of maintenance of noncompliant sidewalks and curb cuts constitute discrete acts of discrimination, [and] any subsequent injury caused by the City's failure to remediate these issues are continual ill effects of that original violation." *Id.* at 60.

The Tenth Circuit reversed. *Id.* at 4. The court concluded that "a qualified individual with a disability is excluded from the participation in, denied the benefits of, and subjected to discrimination under the service, program, or activity each day that she is deterred from utilizing it due to its non-compliance." *Id.* at 18. It held that "once the individual sues under Title II or section 504, the statute of limitations bars recovery only for those injuries she incurred outside of the limitations

period immediately preceding the day of suit; it does not, however, bar recovery for injuries she incurred within that limitations period or after she files suit." *Id.* The court remanded for the district court to determine which inaccessible sidewalks Mr. Hamer had used, or been deterred from using, within the limitations period. *Id.* at 34.

The court denied rehearing *en banc*, with no judge requesting a vote on the City's petition. *Id.* at 73-74.

REASONS FOR DENYING THE WRIT

Mr. Hamer brought this case to enforce the requirements of Title II of the ADA, 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). These statutes require local governments to build and maintain accessible facilities, and to operate each program so that, "when viewed in its entirety," it "is readily accessible to and usable by individuals with disabilities." 28 C.F.R. §§ 35.133, 35.150(a). These requirements are not discharged at a discrete moment in time. Rather, they impose continuing duties. If a local government's breach of those duties places a barrier in the way of a disabled individual, that is a "present *violation*" of the law, not merely an "effect[] of earlier . . . decisions." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980) (internal quotation marks omitted).

The Tenth Circuit correctly held that Mr. Hamer could challenge the City of Trinidad's ongoing breach

of its continuing duties, even though he sued more than two years after he first discovered that breach. The contrary cases cited by the City did not involve such an ongoing breach. This case implicates no conflict in the circuits, and there is no basis to grant certiorari.

A. This Case Does Not Implicate Any Conflict in the Circuits

Petitioner asserts that the decision below conflicts with decisions from the Fourth and Fifth Circuits. But those cases involved different sorts of ADA claims than those at issue here. In particular, those claims did not implicate the type of continuing duties imposed by the program-accessibility and maintenance-of-accessible-features requirements.

Consider *A Society Without A Name v. Virginia*, 655 F.3d 342 (4th Cir. 2011). Petitioner asserts that the Fourth Circuit's decision there "presents the sharpest contrast to the Tenth Circuit's decision in this case." Pet. 7. But the claim was very different than Mr. Hamer's claim. In *A Society Without A Name*, the plaintiff alleged that the defendant government officials had moved a homeless services center to a remote location in order to "make the homeless less visible to, and segregate them from, Richmond's downtown community and the VCU campus"—and that they had done so, at least in part, due to "disability prejudice." *Id.* at 345.

A Society Without A Name thus was a disparate-treatment case. Intentional discrimination claims based on disparate-treatment focus on a discrete decision to "treat[] [a] particular person less favorably than others because of a protected trait." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (internal quotation marks omitted). As this Court has made clear, claims of disparate-treatment generally accrue at the time that the defendant takes an act motivated by the forbidden intent. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007) (claim accrues at moment defendant "acted with actual discriminatory intent").[1] Subsequent effects may increase the *harms* attributable to that discriminatory act, but they do not work a new legal wrong. See, *e.g.*, *Ricks*, 449 U.S. at 258 ("In sum, the only alleged discrimination occurred—and the filing limitations periods therefore commenced—at the time the tenure decision was made and communicated to Ricks. That is so even though one of the effects of the denial of tenure—the eventual loss of a teaching position—did not occur until later.") (footnote omitted).

"For disparate-treatment claims—and others for which discriminatory intent is required—that means the plaintiff must demonstrate deliberate discrimination within the limitations period." *Lewis v. City of Chicago*, 560 U.S. 205, 214-15 (2010). And that is precisely what *A Society Without A Name* held. Because the plaintiff filed its case more than one year after the

[1] Congress subsequently overturned *Ledbetter*'s holding in the context of pay discrimination. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (Jan. 4, 2009).

defendants relocated the homeless services center, the Fourth Circuit held that the ADA claim was not timely. *A Society Without A Name*, 655 F.3d at 348.[2] The plaintiff argued that the violation was ongoing because the defendants continued to direct homeless people and service providers to the center's new location. But the court concluded that those were just additional (and predictable) effects of the earlier allegedly discriminatory decision: "The fact that the Conrad Center is still located on Oliver Hill Way and continues to offer services to the homeless—including new services that are added from time to time—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.

Unlike *A Society Without A Name*, this is not a disparate-treatment case. And that makes all the difference. See *Lewis*, 560 U.S. at 215 (when "the charge is disparate impact, which does not require discriminatory intent," adverse effects within the limitations period are constitutive of an ongoing violation rather than mere present effects of past discrimination); *Ledbetter*, 550 U.S. at 640-41 (distinguishing claims under the Equal Pay Act and the Fair Labor Standards Act because those statutes do not require proof of discriminatory intent). The claim here is based on the ongoing existence of barriers on the City's sidewalks,

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[2] The court borrowed Virginia's one-year statute of limitations for claims brought under the state's disability discrimination law. See *id.* at 347-48.

combined with Petitioner's continuing failure to remove them.

To make out his claim, Mr. Hamer need not show that Petitioner committed disparate-treatment against him. He need only show that he was "excluded from participation in" and "denied the benefits of" the City's services, programs, and activities, 42 U.S.C. § 12132, because Petitioner continues to breach its duties to (a) operate its sidewalks so that, taken as a whole, they are readily accessible to people with disabilities, 28 C.F.R. § 35.150, and (b) maintain required accessible features in its sidewalks, 28 C.F.R. § 35.133. The ongoing barriers, and the City's failure to remove them, constitute the violation; they are not a mere effect of a previous violation. As the Tenth Circuit explained, "if sidewalks and curb cuts actually do constitute a service, program, or activity of a public entity," disabled individuals "would still 'be excluded' from utilizing any given sidewalk or curb cut each day that it remained noncompliant." Pet. App. 20. They thus "suffer[] new discrimination and a new injury *each day*." *Id.* That is very different from the claim at issue in *A Society Without A Name*.

The Petition for Certiorari also points to *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (*en banc*), as creating a potential conflict—though Petitioner recognizes that the Fifth Circuit there "did not directly analyze the continuing or repeated violation doctrines." Pet. 9. As the Tenth Circuit explained, *Frame* never squarely considered the question whether ongoing barriers constitute a present violation of the law.

Pet. App. 17 n.6. The plaintiffs there alleged that the defendant city had violated Title II by constructing or altering sidewalks without making them "readily accessible" as required by 28 C.F.R. § 35.151. The defendant said the claim was untimely because it was brought more than 2 years after the sidewalks were built or altered. See *Frame*, 657 F.3d at 238.[3] In response, the plaintiffs argued that the cause of action did not accrue until they discovered the inaccessible features of the sidewalks: "An ADA plaintiff suffers the injury when s/he learns of the barrier." Brief for Appellants at 13, *Frame v. City of Arlington*, 2008 WL 7680004 (5th Cir.). The Fifth Circuit accepted the plaintiffs' argument that the discovery rule tolled the statute of limitations. *Frame*, 657 F.3d at 238-40. But it had no occasion to consider the question whether the ongoing barriers themselves created fresh violations triggering a new limitations period. *Frame* thus does not present a square conflict with the Tenth Circuit's decision here.

And there is another key respect in which *Frame* differs from this case. The plaintiffs there did not claim, as Mr. Hamer does here, that the defendant violated its ongoing obligations under 28 C.F.R. §§ 35.150 and 35.133 to ensure accessibility in *existing* facilities. Indeed, they "unequivocally abandoned any claims with respect to sidewalks built on or before (and not altered after) January 26, 1992." *Frame*, 657 F.3d at 222. That concession is crucial. Even if one concludes

[3] The parties in *Frame* agreed that Texas's two-year personal-injury statute of limitations applied. See *id.* at 237.

that Section 35.151's requirements for new construction and alterations focus on the discrete moment of construction or alteration, the claims here for accessibility of existing facilities are fundamentally different. In *Frame*, the plaintiffs argued only that the city "designed," "constructed," and "altered" its sidewalks in violation of the stringent requirements for new construction and renovations, 28 C.F.R. § 35.151. Here, Mr. Hamer also argues that the city "operated" its sidewalk program in a way that was not, taken as a whole, accessible to people with disabilities, 28 C.F.R. § 35.150(a), and that it failed to "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible," 28 C.F.R. § 35.133(a). These are ongoing obligations that are not discharged at a discrete moment. The Fifth Circuit did not resolve—and had no occasion to resolve—when a disabled individual may sue for breach of those ongoing obligations.

A Society Without A Name and *Frame* thus address fundamentally different claims than Mr. Hamer's claim here. The decisions in those cases do not conflict with the decision below.[4]

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[4] Petitioner also asserts that the Tenth Circuit's decision below conflicts with that court's earlier decision in *Rhodes v. Langston University*, 462 F. App'x 773 (10th Cir. 2011). See Pet. 10-12. But this Court does not grant certiorari to resolve *intra*-circuit conflicts—particularly when the asserted conflict is created by an unpublished decision. In any event, the plaintiff in *Rhodes* alleged specific accessibility and heating problems that occurred at particular moments in 2006 and 2007; the court concluded that the allegations "represent discrete accessibility issues rather than a

Far from creating a conflict, the Tenth Circuit's decision here finds support in the most closely analogous out-of-circuit cases. In *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1135-36 (9th Cir. 2002), the Ninth Circuit addressed a claim against a private place of public accommodation under Title III of the ADA. Like Title II of the statute, Title III imposes ongoing obligations to remove barriers to access. See 42 U.S.C. § 12182(b)(2)(A)(iv) (requiring businesses "to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities," where "such removal is readily achievable"). The *Pickern* plaintiff sought injunctive relief against such barriers at a grocery store, but he sued more than a year after he learned of them. *Pickern*, 293 F.3d at 1136. Although the parties agreed that a one-year limitations period applied, see *id.* at 1137 n.2, the Ninth Circuit concluded that the claim was timely. The "barriers to access that now exist at the Paradise store," the court held, represented an ongoing violation that entitled the plaintiff to injunctive relief. *Id.* at 1137. In a subsequent Title III case, the Seventh Circuit endorsed *Pickern*'s holding and concluded that continuing barriers to access represent "ongoing violations" that can be challenged until they are removed. *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1076 (7th Cir. 2013).

The Tenth Circuit's holding directly follows from analogous cases in the Seventh and Ninth Circuits.

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continuation by Langston of related and repetitive unlawful acts or practices." *Id.* at 780. As we demonstrate in text, this case is very different.

And it does not at all conflict with the Fourth and Fifth Circuit decisions to which Petitioner points. There is no basis for this Court to grant certiorari.

B. The Decision of the Court of Appeals is Correct

The Tenth Circuit concluded that "a public entity repeatedly violates" Title II and Section 504 "each day that it fails to remedy a non-compliant service, program, or activity." Pet. App. 18. Thus, it held, "the statute of limitations bars recovery only for those injuries [a plaintiff] incurred outside of the limitations period immediately preceding the day of suit; it does not, however, bar recovery for injuries she incurred within that limitations period or after she files suit." *Id.* That holding is fully consistent with this Court's precedents and general statute-of-limitations principles.

1. For a suit to be timely, this Court has held, the plaintiff "must show a 'present violation' within the limitations period." *Lewis*, 560 U.S. at 214 (quoting *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977)). If such a "present violation" exists, the suit will not be barred, even if the plaintiff was *also* injured by an identical violation that occurred outside of the limitations period. As this Court has emphasized, "a free-standing violation may always be charged within its own charging period regardless of its connection to other violations." *Ledbetter*, 550 U.S. at 636.

Whether there is a present violation "depends on the claim asserted." *Lewis*, 560 U.S. at 214. To

determine the time at which a violation occurs, courts must examine the authoritative legal text creating the cause of action. See *id.* at 213 (examining Title VII's text and concluding that a violation occurs whenever "an employer 'uses' an 'employment practice' that 'causes a disparate impact' ") (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

The Tenth Circuit correctly concluded that the text of Title II and Section 504, and of the regulations implementing these statutes, imposes ongoing obligations to remove barriers to access. Pet. App. 19-21 & n.8. These statutes provide that disabled persons may not "be excluded from participation in or be denied the benefits of" a covered entity's services, programs, or activities. 42 U.S.C. § 12132 (Title II); accord 29 U.S.C. § 794(a) (virtually identical language in Section 504). They do not merely prohibit discrimination at discrete points in time but demand "the removal of architectural, communication, or transportation barriers." 42 U.S.C. § 12131(2). As this Court has explained, Title II in particular imposes an "affirmative obligation" on state and local governments "to take reasonable measures to remove architectural and other barriers to accessibility." *Lane*, 541 U.S. at 531, 533.

This affirmative obligation is one that exists every day. And each day's failure to conform to that obligation is a fresh violation. Cf. 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS 605 (1991) ("A continuing nuisance need not result from an active wrongdoing but may arise from inaction when a legal duty to act exists."). As the Tenth Circuit explained (quoting the statutory

text), a disabled individual "would still 'be excluded' from utilizing any given sidewalk or curb cut each day that it remained noncompliant"—and "that same individual would still 'be denied' the benefits of that sidewalk or curb cut when she encountered it a day ago just as much as when she first encountered it a year ago." Pet. App. 20.

The text of the relevant implementing regulations underscores the point. The program-accessibility regulation requires state and local governments to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). In that provision, "operate" denotes an ongoing process. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (defining "operate" as, *inter alia*, "to manage and put or keep in operation whether with personal effort or not," as in "operated a grocery store"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (defining "operate" as, *inter alia*, "[t]o conduct the affairs of; manage: operate a business"). So long as the underlying "service, program, or activity" lasts, this provision requires the government entity to operate it so that it is accessible. Similarly, the maintenance-of-accessible-features regulation requires state and local governments to "maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act or this part." 28 C.F.R. § 35.133(a). "Maintain" denotes an ongoing process of keeping these features

in their accessible state. See WEBSTER'S THIRD, *supra* (defining "maintain" as, *inter alia*, "to keep in a state of repair, efficiency, or validity: preserve from failure or decline"); AMERICAN HERITAGE DICTIONARY, *supra* (defining "maintain" as, *inter alia*, "[t]o keep up or carry on; continue"). These regulations do not simply require particular conduct at discrete moments in time. Rather, they impose ongoing obligations on government entities. Each day's breach of these obligations is a new present violation.

2. This result also follows from general statute-of-limitations principles. This Court "start[s] from the premise that when Congress creates a federal tort it adopts the background of general tort law." *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011). As the Tenth Circuit noted, the failure to remove barriers to access is analogous to a continuing trespass or nuisance. Pet. App. 23 n.11. A continuing trespass exists when an actor "fail[s] to remove from land in the possession of another a structure, chattel, or other thing which he has tortiously erected or placed on the land." RESTATEMENT (SECOND) OF TORTS § 161, cmt. b (1965). Such a tort "confers on the possessor of the land an option to maintain a succession of actions based on the theory of continuing trespass." *Id.* A continuing trespass, this Court has long held, involves not just a "particular wrong occurring on a particular occasion" but also "other wrongs of like character that would occur almost every hour of each day." *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 305 (1905) (Harlan, J.).

A continuing nuisance "exists '[w]here the injury from the alleged nuisance . . . is of a continuing or recurring character.'" Pet. App. 23 n.11 (quoting 58 AM. JUR. 2D NUISANCES § 221 (2018)). The rule, going back to Blackstone, is that "every continuance of a nuisance is held to be a fresh one." 3 WILLIAM BLACKSTONE, COMMENTARIES *220. As Story put it, a continuing nuisance is "a constantly recurring grievance, which cannot be otherwise prevented, but by an injunction." 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 204 (2d ed. 1839). Pursuant to this settled rule, if a structure that caused a nuisance was built outside of the limitations period, a plaintiff will not be able to recover the harms caused by the act of construction. But the plaintiff will be able to recover for the harms caused by the continued presence of the structure during the limitations period.[5]

Under either of these doctrinal rubrics, "for continuing wrongs the injured person can ordinarily bring

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[5] See H.G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY 371 (1883) (stating that "every continuance is a new nuisance for which a fresh action will lie, so that, although an action for the damage from the original nuisance may be barred, damages are recoverable for the six years preceding the bringing of the action"); HENRY F. BUSWELL, THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION 299-300 (1889) ("Every continuance of that which was originally a nuisance the law considers a new nuisance, and, therefore, though the party complaining cannot, in an action on the case, recover upon the original cause of action after the expiration of six years, he may recover for its continuance at any time before the right of entry is barred, and recover, not nominal damages merely, but such actual damage as has accrued at any time within six years.").

successive actions for the invasions or series of invasions as they occur." RESTATEMENT (SECOND) OF TORTS § 930, cmt. a (1979). "The practical effect is that 'a new statute of limitations begins to run . . . after *each* new injury.' " Pet. App. 23 n.11 (quoting 58 AM. JUR. 2D NUISANCES § 253 (2018)) (emphasis in Tenth Circuit's opinion). The Tenth Circuit's decision directly follows from these settled principles.

3. Petitioner argues that the Tenth Circuit attached the wrong doctrinal "label" to its analysis. See, *e.g.*, Pet. 13 ("[T]he 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."); *id.* at 14 (Tenth Circuit "should have labeled the City's conduct as a continuing wrong to maintain consistency with its prior jurisprudence"); *id.* at 16 (Tenth Circuit created uncertainty "[b]y adopting the newly minted 'repeated violations' label"). Such literary criticism is not a basis for certiorari. "This Court 'reviews judgments, not statements in opinions.' " *California v. Rooney*, 483 U.S. 307, 311 (1987) (*per curiam*) (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)). The Tenth Circuit's judgment follows directly from this Court's cases and general principles.

C. None of the City's Policy Arguments Justify a Grant of Certiorari

Petitioner raises a number of policy arguments against the Tenth Circuit's decision. None warrants certiorari.

1. Petitioner asserts that the decision below "functionally eliminates the statute of limitations." Pet. 16. Not so. The Tenth Circuit simply applied the well settled principle that "a freestanding violation may always be charged within its own charging period regardless of its connection to other violations." *Ledbetter*, 550 U.S. at 636. The ongoing failure to maintain accessible features and remove barriers creates a "present *violation*" of Title II and Section 504. *United Air Lines*, 431 U.S. at 558. The Tenth Circuit's decision allows a plaintiff to sue to stop that violation, and to get retrospective relief for injuries experienced within the limitations period. But it bars relief for injuries experienced outside of that period. Pet. App. 18, 28.

A disabled individual whose last encounter with one of Petitioner's inaccessible sidewalks occurred more than two years ago is thus barred from bringing suit under the ruling below. See Pet. App. 28 n.13. And a disabled individual who *has* encountered one of those sidewalks within the past two years is limited to recovering for harms that occurred during that two-year period. See *id.* at 29. Petitioner is simply incorrect to say that the Tenth Circuit's holding "revives every claim from every disabled individual since the inception of the ADA." Pet. 18. The statute of limitations continues

to impose significant restrictions on ADA claims under that holding.

2. Petitioner argues that the Tenth Circuit's rule will not give municipalities sufficient repose. Pet. 17-19. But a municipality can obtain repose "whenever it chooses simply by building sidewalks right the first time, or by fixing its original unlawful construction. In other words, the City is not liable forever; it is responsible only for correcting its own mistakes. This is not too much to ask, even when the City's mistakes have gone unchallenged for two years." *Frame*, 657 F.3d at 239.

In any event, the City is hardly in a position to criticize the Tenth Circuit for denying municipalities repose—for Petitioner's own argument would not grant them repose, either. Attempting to reassure the Court that the City will not be able to "avoid liability 'forever,'" the Petition for Certiorari acknowledges that, even if a particular plaintiff's claim against an inaccessible sidewalk is time-barred, that sidewalk can still be challenged in a suit by the Department of Justice or another disabled individual. Pet. 17. That concession fatally undermines the City's argument for repose. Under Petitioner's position, municipalities would still face the prospect of a large number of suits for longstanding accessibility problems. But particular individuals with disabilities, who continue to be excluded by unlawfully inaccessible sidewalks, will be unable to vindicate their rights simply because they have experienced that exclusion for a long period of time.

This Court has previously rejected such an arbitrary result. In *Lewis*, *supra*, this Court rejected a reading of Title VII's statute of limitations that would permit an employer to "continue using [an unlawful] practice indefinitely, with impunity, despite ongoing disparate impact," simply because "no timely charge [was] brought" after the practice was adopted. *Lewis*, 560 U.S. at 216. The Court recognized that "[e]quitable tolling or estoppel" might nonetheless "allow some affected employees or applicants to sue"—just as the discovery rule might allow some disabled people to sue under Petitioner's position. *Id.* at 216-17. But the Court emphasized that "many others will be left out in the cold"—an unacceptable result. *Id.* at 217.

Indeed, Petitioner's position would have the perverse effect of encouraging too-hasty litigation. See *id.* ("[T]he City's reading may induce plaintiffs aware of the danger of delay to file charges upon the announcement of a hiring practice, before they have any basis for believing it will produce a disparate impact."). Here, for example, Mr. Hamer chose not to run immediately to court. Instead, he first spoke at a city council meeting to inform them "that he had personally counted seventy-nine non-compliant sidewalks and curb cuts throughout the city." Pet. App. 4-5. He then filed a complaint with the United States Department of Justice. Pet. App. 5. And he lodged several more complaints at city council meetings over the next few months. *Id.* In response to these complaints and the DOJ investigation, Petitioner took some remedial action—though not enough to fully address the violations

Mr. Hamer identified. *Id.* It was only when the limits of the City's response became clear that he filed this lawsuit.

Mr. Hamer thus diligently pursued this matter while seeking to avoid unnecessary litigation. Under Petitioner's position, however, he should have run to court without waiting to see how the DOJ investigation was proceeding. Like the copyright doctrines this Court discussed in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 682-83 (2014), the Tenth Circuit's holding "avoids such litigation profusion." The "limitations period . . . , coupled to the separate-accrual rule," allows a disabled individual "to defer suit until she can estimate whether litigation is worth the candle." *Id.* The individual "will miss out on damages for periods prior to the [limitations period], but her right to prospective injunctive relief should, in most cases, remain unaltered." *Id.* at 683.

3. Petitioner suggests that some disabled individuals (unlike Mr. Hamer) will unduly delay filing a lawsuit. If relevant records are unavailable by the time of the suit, it asserts, the delay will impose serious prejudice. Pet. 18-19. But it is implausible that a city will, for example, lack "records evidencing when [a particular] sidewalk or ramp was built." Pet. 18. Cf. *Ledbetter*, 550 U.S. at 631 (noting that it is evidence of intent, rather than of concrete actions, that "may fade quickly with time"). Should such an unlikely situation arise, the Tenth Circuit was correct to note that "the doctrine of laches may come into play." Pet. App. 32.

Petitioner asserts that "laches cannot be invoked to bar a claim timely brought within the statute of limitations." Pet. 19. But that is true only where the plaintiff seeks legal as opposed to equitable relief. See *Petrella*, 572 U.S. at 678. As the Tenth Circuit noted, it is "the unusual case" in which plaintiffs can recover money damages under Title II or Section 504. Pet. App. 29. In the typical sidewalk accessibility case, injunctive relief—to which a laches defense would fully apply—is all that is likely to be at issue in practice. Moreover, the rule against using the laches doctrine applies only where there is "a federal statute of limitations," *Petrella*, 572 U.S. at 679, because "courts are not at liberty to jettison Congress' judgment on the timeliness of suit," *id.* at 667. Here, Congress has not specified the statute of limitations; the limitations period is borrowed from an analogous state statute. See *id.* at 681 n.16 ("When state law was the reference, federal courts sometimes applied laches as a further control."). Laches thus remains fully available should a defendant be prejudiced by undue delay.

4. Petitioner asserts that the Tenth Circuit's decision interferes with the ADA enforcement program of the Department of Justice. Pet. 20-24. It suggests that suits by private plaintiffs will disrupt the compromises that DOJ strikes with local governments, because those plaintiffs may sue to seek removal of barriers that DOJ chooses not to include in its agreements with those governments. Pet. 22-23. Petitioner complains that full compliance with Title II will be costly and draw resources from "other essential municipal services." Pet. 22.

Whether or not Petitioner's complaints are well taken, it is hard to see how they follow from the Tenth Circuit's decision. So long as there is a private right of action to enforce Title II, private plaintiffs will be able to displace DOJ's enforcement priorities by filing their own lawsuits. The Tenth Circuit's statute-of-limitations holding has nothing to do with it. As this Court has recognized, Congress specifically included a private right of action to enforce both Title II and Section 504. See *Lane*, 541 U.S. at 517; *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002). If anything, Petitioner's proposed rule would *discourage* individuals with disabilities from allowing the DOJ investigation and enforcement process to play out, because they would lose their ability to protect their own rights if they waited until that process concluded. See p. 23, *supra*.

If Petitioner objects to the ability of private plaintiffs to override DOJ enforcement priorities, or to the intrusiveness of Title II's substantive requirements, that "is a complaint more properly directed to Congress." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 n.51 (2001). It would be especially inappropriate for this Court to respond to Petitioner's policy concerns by rejecting the Tenth Circuit's holding on the statute of limitations—a holding that implicates those concerns in only the most tenuous way.

In any event, the requirements imposed by Title II are much less onerous than Petitioner suggests. "Recognizing that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion, Congress required the States to

take reasonable measures to remove architectural and other barriers to accessibility." *Lane*, 541 U.S. at 531. But the statute does not require state and local governments "to employ any and all means" to that end. *Id.* Particularly "in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures." *Id.* at 532. "And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service." *Id.* Congress has balanced the relevant interests here. This Court has no warrant to displace that balance.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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