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

REPLY BRIEF FOR PETITIONER

MARNI NATHAN KLOSTER
Counsel of Record
J. ANDREW NATHAN
NICHOLAS C. POPPE
NATHAN DUMM & MAYER P.C.
7900 E. Union Avenue, Suite 600
Denver, CO 80237
Tel: (303) 691-3737
MKloster@ndm-law.com
Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF

The Tenth Circuit held that Title II's "affirmative obligation" fundamentally alters how the statute of limitations applies to accessibility claims under the ADA. Under the Tenth Circuit's opinion, an individual with a disability need not be timely in pursuing any form of relief under Title II, but rather may take advantage of the "repeated violations" doctrine to sue years (or even decades) after first experiencing alleged discrimination, so long as the individual can point to a single violation within the relevant statute of limitations period. This ruling conflicts with the reasoning espoused by other circuits over how claims accrue and expire under the ADA. As the Tenth Circuit itself admitted, "the repeated violations doctrine will manifest itself by keeping public entities on the hook for injunctive relief as the years go by." Pet. App. 30. Much more than that, the ruling functionally eliminates the statute of limitations for claims under Title II.

The decision below will put an inordinate strain upon public entities in the Tenth Circuit and make compliance with the ADA and defense of claims under it extremely difficult, if not potentially impossible. In apparently recognizing this substantial effect, the Tenth Circuit stated with almost casual reassurance that entities need simply comply with all aspects of the ADA to escape its ruling. While perhaps easy to claim on paper, the reality of the ADA's myriad of regulatory demands all but ensures that public entities cannot maintain perfection in every aspect of their compliance obligations. By permitting untimely suits, the Tenth

Circuit has unnecessarily exposed public entities to a flood of litigation that would otherwise be time barred as a matter of law. Because all parties are in agreement that Mr. Hamer knew of accessibility issues throughout the City for more than two years prior to filing suit, this case presents an ideal opportunity for this Court to resolve a circuit split and reverse the adverse effects brought on by the Tenth Circuit's ruling. The City, along with its amicus, believes this Court's immediate intervention is imperative.

ARGUMENT

I. The decision below sharpens a circuit conflict

The Tenth Circuit's adoption of the repeated violations doctrine has expanded a circuit split over how ADA claims should expire under the relevant statute of limitations. As evident in the opinions issued by each of the respective five circuits, lower courts have struggled to reach a consensus on whether ADA claims should expire in a manner different from other civil rights claims. Pet. 7-12.

1. Respondent denies that the decision below articulates a circuit split, arguing that claims of intentional discrimination under the ADA should accrue and expire in a manner different than claims alleging disparate impact. Opp. 8-11. Respondent relies on Title VII case law, and not cases under the ADA, to make his argument. Yet in his quest to find ways to distinguish

the Tenth Circuit's holding from other circuits, respondent loses sight of the basis for each court's differing rationales for how the statute of limitations should be applied. In none of the decisions compromising the circuit split on this issue did any court draw distinctions between claims of disparate treatment and disparate impact. (Indeed, the Tenth Circuit mentions neither phrase). Rather, the courts collectively reached different conclusions based upon the same legal authority – the ADA itself.

While the Tenth Circuit's decision was purportedly grounded in the text of Title II of the ADA, its ruling relied on what the City believes was an incorrect focus on this Court's statement in *Tennessee v. Lane*, 541 U.S. 509 (2004), wherein the Court noted that Title II imposes "an affirmative obligation to accommodate person with disabilities."[1] Pet. App. 21. The supposed presence to a duty to take *affirmative* action, as opposed to refraining from certain conduct, led the Tenth Circuit to conclude that "[t]his 'duty to accommodate,' *id*. at 532, solidifies that Title II (and, by extension, section 504) clearly and unambiguously conveys that a non-compliant service, program, or activity gives rise to repeated violations." *Id*. 21-22.

Notwithstanding consideration of the same statute and precedent, the Fourth Circuit in *A Society Without a Name v. Virginia*, 655 F.3d 342 (4th Cir.

[1] Albeit only in the context of "whether Title II exceeds Congress' power under § 5 of the Fourteenth Amendment." *Lane*, 541 U.S. at 513. *Lane* provides little direct support to the arguments germane to this case.

2011) reached the opposite conclusion, holding that a present violation of the ADA accrues and expires in the same manner as other civil rights claims. The Fourth Circuit even held that subsequent acts taken by the public entity were not actionable, as they represented merely the "continuing ill effects of an original violation." *Id*. at 348. As with the Tenth Circuit, no mention was made of parsing distinctions between claims of disparate treatment and disparate impact. Instead, the Fourth Circuit considered what amounts to the same argument made by respondent: "if the plaintiff can show that the illegal act did not occur just once, but rather 'in a series of separate acts[,] and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation.'" *Id*. (internal citations omitted). The Fourth Circuit rejected this line of thinking, upholding application of the statute of limitations despite plaintiff's attempt to claim ongoing violations of the ADA. *Id*. at 348-49.

Moreover, there can be no question as to the differing positions espoused by the two circuits, as the Tenth Circuit made its stance explicit. It declined to follow *ASWAN* "because it never factored in the mandate that Title II imposes an affirmative duty to accommodate." Pet App. 23, n.10. Again, no mention was made of the *type* of claim being asserted by the respondent.

As set forth in the City's petition, the Seventh and Ninth Circuits preceded the Tenth Circuit in ruling that present violations of the ADA, even if known about for years, are actionable given the plain language of

the ADA. *See Scherr v. Marriott Intern., Inc.*, 703 F.3d 1069, 1076 (7th Cir. 2013). Implicit in the holdings of the Seventh and Ninth Circuits is the same justification found in the court's opinion below: the presence of an ongoing violation, no matter how dated, eliminates almost any defense under an applicable statute of limitations. This conflicts directly with the Fourth Circuit, and to some, albeit a lesser extent, the Fifth Circuit's holding in *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (*en banc*). Thus, contrary to respondent's representations, a clear conflict among the circuits does exist.

2. Respondent further attempts to parse through the relevant circuit split by arguing that the statute of limitations should apply differently to individual regulations promulgated under the ADA. Opp. 12-13. He claims that the Fifth Circuit's opinion in *Frame*, 657 F.3d 215 was focused solely on newly constructed sidewalks, which are governed by 28 C.F.R. § 35.151. Although respondent too brought a claim under § 35.151, he argues that his assertion of claims under 28 C.F.R. § 35.150 ("existing facilities") and § 35.133 ("maintenance of accessible features") renders his case sufficiently distinguishable from the holding in *Frame.*

As before, respondent grafts an unwarranted distinction onto the relevant circuit split. While the Fifth Circuit in *Frame* noted that plaintiffs had abandoned their claims for existing facilities under 28 C.F.R. § 35.150, its ultimate holding was not uniquely isolated to claims alleging violations of the new construction standard under § 35.151. Instead, the Fifth Circuit

noted more broadly that "[d]rawing from the text of § 12132, an injury occurs (and a complete and present cause of action arises) under Title II when a disabled individual has sufficient information to know that he has been denied the benefits of a service, program, or activity of a public entity. *Frame*, 657 F.3d at 239. The court then concluded by holding that the public entity would have an opportunity on remand to assert the statute of limitations as a complete bar to certain plaintiff's claims. *Id*.

And although the Tenth Circuit reached the opposite conclusion, it too did not rely on the distinction between new and existing construction, as respondent urges and on which he places such great emphasis. Indeed, respondent's own theories of relief undermine his argument; he pled claims under both 28 C.F.R. § 35.150 and § 35.151, yet the Tenth Circuit remanded the case in its entirety. Pet. App. 34, 38. Again, respondent seeks to create a distinction in the relevant circuit split that simply does not exist.

II. The circuit court's opinion will have profound effects on public entities

Respondent follows solely the logic of the circuit court below, concluding that application of the repeated violations doctrine will have little effect because public entities need simply be "responsible only for correcting its own mistakes." Opp. 22 (citing *Frame*, 657 F.3d at 239). Petitioner notes that this quotation to *Frame* is somewhat misleading, because as explained

above, *Frame* dealt solely with sidewalk and curb construction after passage of the ADA. 657 F.3d at 222. For a public entity like the City of Trinidad, which is well over one hundred years old and thus has areas which were constructed long before the ADA's enactment, an order to simply "correct its own mistakes" from decades past seems hardly appropriate or fair.

While the Tenth Circuit acknowledged the harsh consequences that would ensue from its opinion (*see* Pet. App. 30-33), neither the circuit court nor respondent provided adequate remedies to the City and amicus' articulated and well-founded fears. As but one example, while the Tenth Circuit noted that "Title II and section 504 plaintiffs are able to recover damages only in the unusual case," it failed to account for the time and expense such litigation inevitably leads to in the first place. Indeed, as ADA litigation continues to rise, it is the threat of attorney's fees, injunctive relief, and the cost of defense that ultimately place a substantial burden on public entities. Similarly, respondent casually states that "it is implausible that a city will, for example, lack records evidencing when [a particular] sidewalk or ramp was built." Opp. 24 (internal citations and quotations omitted). He provides no support for that statement, nor would it be reasonable to assume that aging municipalities have such records. Yet because the circuit court's opinion functionally eliminates the statute of limitations, public entities that fail to maintain records and witnesses from decades past are left with essentially no defense to otherwise untimely claims.

Perhaps the greatest burden on public entities, and the one ignored by both the circuit court and respondent, is the practical elimination of a municipality's ability to plan for future financial expenditures. As set forth in the amicus brief in support of the petition, a long-term outlook for ADA repairs is almost always necessary because of municipal budgetary and operational constraints. Amicus at 16. While a public entity can approximate those repairs that will provide the greatest access to its services, programs, and activities, only *timely* assertion of claims by individuals with disabilities will ensure that the necessary funds and efforts are expended towards meaningful accessibility. The Tenth Circuit's adoption of the repeated violations doctrine robs public entities of the ability for such continuity in planning, however, as the only way to avoid perpetual liability is to ensure that every service, program, and activity is compliant at all times and for all individuals, regardless of whether any such barrier has existed for two days, two years, or two decades. The result is inevitable: public entities will spend their time jumping from one untimely ADA suit to the next, lacking any ability to draft a cohesive approach to ADA repairs. A necessary effect is a decrease in overall compliance with the ADA and elimination or decrease of the other essential services public entities provide.[2]

---

[2] Nor is such result a hyperbolic reaction to the Tenth Circuit's opinion. The repeated violations doctrine provides an additional, yet significant, armament to an already bourgeoning field of ADA litigation. *See* Pet. at n.5.

III. The circuit court's opinion is wrong

In reaching its conclusion that the repeated violations doctrine should apply, the circuit court placed considerable emphasis on the City's "affirmative obligation" to seek ADA compliance. Yet the term "affirmative obligation" does not appear in the statutory text of Title II of the ADA, but rather originated with this Court's opinion in *Lane*, 541 U.S. at 533. In *Lane*, however, this Court did not grapple with what constitutes the timely assertion of a claim; rather, the sole question was whether Title II of the ADA was a valid exercise of congressional authority under the Fourteenth Amendment. *Id*.

As the district court held, the proper analysis focuses on when an individual with a disability is presented with a complete cause of action (such that the failure to pursue such cause of action may present a public entity with the affirmative defense of the statute of limitations). Pet. App. 68-69. Under Title II of the ADA, a plaintiff has knowledge that his rights have been allegedly violated when: "(1) [s]he is a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of a disability." *See*, *e.g.*, *Cohon ex rel. Bass v. New Mexico Dept. of Health*, 646 F.3d 717, 725 (10th Cir. 2011) (internal citations omitted).

As respondent admits in his own brief, he was fully aware of his alleged exclusion from what he contends

constituted certain programs, services, and activities as early as April 2014.[3] Opp. 5. He further admits that owing to a perceived failure by the City to remedy certain barriers, he filed a complaint alleging discrimination with the DOJ. *Id*. The district court correctly determined that once all three elements of respondent's prima facie claim had been met, he was required to initiate suit within two years. Pet. App. 68 ("At this point, Mr. Hamer was aware of the nature and extent of the City's discrimination."). In other words, once a public entity either refuses or is unable to meet its alleged obligations under the ADA, a cause of action accrues and must be timely pursued by an individual plaintiff. *See Frame*, 657 F.3d at 239. And finally, as the district court also found, any further injury suffered due to a plaintiff's exclusion is insufficient to reconstitute an otherwise untimely claim, as a plaintiff cannot "rely solely on the continued ill effects of the City's original acts of discrimination to satisfy his burden on summary judgment." Pet. App. 69. In contrast, the Tenth Circuit's opinion wrongly strayed from respondent's obligations to seek timely relief, and in so doing adopted a doctrine that puts the onus on public entities to maintain perfect ADA compliance at all times (and maintain in perpetuity all records and witnesses related to any matter which is or could be the basis for an ADA claim). Such opinion is in conflict with how other circuits have treated the statute of limitations

[3] As noted throughout the briefing and the circuit court's opinion, whether sidewalks and curb cuts constitute a standalone service, program, or activity under Title II remains in dispute.

defense under the ADA and it is imperative that the Court correct the mistake here.

CONCLUSION

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

Respectfully submitted,

MARNI NATHAN KLOSTER
Counsel of Record
J. ANDREW NATHAN
NICHOLAS C. POPPE
NATHAN DUMM & MAYER P.C.
7900 E. Union Avenue, Suite 600
Denver, CO 80237
Tel: (303) 691-3737
MKloster@ndm-law.com
Attorneys for Petitioner