No. 02-815

In the Supreme Court of the United States

CITY OF SACRAMENTO AND MIKE KASHIWAGI, DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS OF THE CITY OF SACRAMENTO, IN HIS OFFICIAL CAPACITY,

Petitioners,

v.

JOAN BARDEN, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

TABLE OF AUTHORITIES—Continued

Page(s)

Statute and Regulations:

TABLE OF AUTHORITIES—Continued

REPLY BRIEF FOR PETITIONERS

Until the Department of Justice filed its *amicus* brief in the Ninth Circuit in this case, the Department had repeatedly taken the position that public sidewalks are *not* themselves a "service," "program," or "activity" covered by Title II of the ADA. See Pet. 28-29; see also California Cities Br. 12 n.7. Respondents do not deny this, nor do they make any attempt to justify the Ninth Circuit's decision to accord deference to the Department's more recent, but contradictory, litigating position below. And respondents make no effort to deny our showing (Pet. 27) that the regulation on which the Justice Department relied below does not, in fact, "require[] the provision of curb ramps," as the Ninth Circuit incorrectly believed. Pet. App. 7a.

The surpassing importance of the question presented is underscored by the array of *amici* who have urged this Court to grant review, including the National League of Cities (on behalf of more than 1700 member cities and municipal leagues whose membership totals more than 18,000 cities and towns); the U.S. Conference of Mayors (on behalf of almost 1200 cities); the National Association of Counties (on behalf of more than 2000 county governments); such widely dispersed cities as Birmingham, Boston, Dallas, Denver, Detroit, Little Rock, Nashville, New York, Phoenix, and Pittsburgh; and several other important governments and organizations. The governmental bodies, which have relied for years on the Justice Department's contrary guidance, deserve an answer *from this Court* to the question presented in this case before the massive obligations that will flow from the Ninth Circuit's decision are visited upon them. And they deserve an answer that – unlike the Ninth Circuit's reasoning, which dismissed analysis of statutory text as "needless hair-splitting," Pet. App. 6a – takes account of the text and structure of the statutes, the meaning and structure of the Justice Department's regulations, and the Department's history of contradictory guidance. As we explain below, respondents' various arguments against review are all unavailing.

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH *YESKEY* AND WITH THE RESULTS REACHED BY OTHER COURTS

As we have explained (Pet. 10-18), the decision below is at odds with *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998); adopts an interpretation that would produce different outcomes from the results reached by other circuits in a variety of cases; and is symptomatic of broad confusion in the lower courts. Respondents' efforts at rebuttal are unconvincing.

1. The decision below is inconsistent with *Yeskey*, which turned on a careful analysis of the operative words of Title II of the ADA – "programs," "services," and "activities." See 524 U.S. at 210; Pet. 10-13. "Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II," the Ninth Circuit explained, it would rely on prior decisions holding that the ADA covers "'anything a public entity does.'" Pet. App. 5a.

Respondents say that the panel did not really "disregard[] the language of the statute" because the prior Ninth Circuit decisions on which the panel relied had for their "very foundation" the "text of the statute." Br. in Opp. 18. That is simply not so. The prior Ninth Circuit case that the panel relied on in concluding that the statutes cover "anything a public entity does" is *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (Pregerson, J.), which is equally bereft of any analysis of the operative language of the statute. The court merely adopted wholesale the conclusion of the Third Circuit in *Yeskey* (which this Court affirmed but on a different rationale, see Pet. 12-13).

Next, respondents invoke (at 13-14) the "sweeping purpose" of the ADA – a consideration, however, that this Court pointedly did *not* cite or rely on in *Yeskey*, and that in any event provides no justification for departing from the plain meaning of the language chosen by Congress. (To the extent the Eighth Circuit has – as respondents claim, Br. in Opp. 12 – misinterpreted *Yeskey* to state a "liberal construction" rule, that would

be even more reason why this Court's intervention is needed.) Respondents also attach importance to the Court's refusal, in *Yeskey*, to recognize a categorical exception for all "programs" that are run by state prisons, but that refusal hardly shows that there need be no "program" at all for the ADA to apply.

Finally, respondents suggest that this case is consistent with *Yeskey* because "one uses and benefits from the public sidewalk system, just as one uses and benefits from a library." Br. in Opp. 12. The same, of course, can be said of most of the infrastructure owned by state and municipal governments, yet it cannot possibly be true that all such public infrastructure is a service, program, or activity. See also 28 C.F.R. § 35.150(a)(1) (a public entity is not "[n]ecessarily require[d] * * * to make each of its existing facilities accessible to and usable by individuals with disabilities"). Employment of workers by state and local governments also confers benefits on those employed, but that hardly makes employment a public "service," "program," or "activity" within the meaning of Title II of the ADA. Pet. 16.

2. As we showed in the petition (at 13-18), there is substantial confusion in the lower courts over the scope of "programs," "services," and "activities." The Ninth Circuit's view that Title II applies to "anything a public entity does" so long as it is a "normal function of a government entity" brings within Title II numerous matters – including arrests, employment, and parental rights termination proceedings – that other courts have ruled are *not* programs, services, or activities of a public entity.

Respondents acknowledge (at 10-11) that the circuits "have split" over whether employment is a "program, service, or activity" covered by Title II of the ADA. They also admit that the lower courts "have struggled with the application of the ADA in the context of termination of parental rights proceedings." Br. in Opp. 10. And they agree (*id*. at 9-10) that the circuits are divided over whether arrests qualify as a "program," "service," or "activity." Respondents do not take issue with our showing that under the approach adopted by the Ninth Circuit in this case, arrests, employment, and termination proceedings would

all be covered by Title II and Section 504. In short, respondents make no effort to deny that the decision below conflicts, in result, with the decisions of other circuits and state courts.

Respondents confine their response to a tepid attempt to explain away the relevance of this case law. The cases involving the termination of parental rights, respondents say, "raise unique issues concerning the intended beneficiaries of the public entity's activity – issues that simply do not apply to public sidewalks." Br. in Opp. 10. "There is no question here," respondents add, "that the City's public sidewalks exist to benefit the general public." *Ibid.* There is no basis, however, for respondents' assumption that "programs," "services," or "activities" are limited to things that benefit the public at large as opposed to some group to whom the services are specifically targeted (such as the unemployed, the disabled, or the orphaned).

Equally meritless is respondents' contention that the employment cases are distinguishable because they involve "not whether public employment is covered at all, but which provision of the ADA appropriately governs this area." Br. in Opp. 10-11. "Determining whether Congress intended public employment to be addressed solely by Title I of the ADA," respondents maintain, "involves a focus on *the overall structure of the statute* * * * – [an] issue[] that simply *do[es] not arise* in addressing sidewalks." *Id.* at 11 (emphasis added).

That is mistaken. Structural evidence is as important in this case as in those cases. The fact that Title I of the ADA covers employment by public entities – and does so through provisions that are materially different from those applicable to Title II – strongly suggests that employment is not a "service," "program," or "activity" within the meaning of Title II. See *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1176 (9th Cir. 1999) (describing various differences in the requirements applicable to claims brought under Title I and Title II), cert. denied, 531 U.S. 1189 (2001). Likewise here, any sensible interpretation of "programs," "services," and "activities" must also take into account the longstanding differential treatment of

existing and *new* facilities – a structural component of Title II and the accompanying regulations that the decision below eviscerates. See Pet. 29; Nat'l Ass'n of Counties Br. 2-3, 7-13; Calif. Cities Br. 4-5, 8-9, 13, 16; Nat'l League of Cities Br. 4-5, 12-14. Thus, respondents' efforts to distinguish the conflicting cases fails at every turn.[1]

3. Respondents emphasize (at 1, 8, 11) that the Ninth Circuit is the first appellate court in the Nation to resolve – or evidently even to entertain – the argument that a sidewalk is a public "program," "service," or "activity." Although that is certainly true, District Judge Milton Schwartz – who, alone among the four federal judges who considered this issue in this case, rested his decision on the *actual words* of the statute – came to the conclusion that a sidewalk is *not* a program, service, or activity. See Pet. 6-7; Pet. App. 9a.

More important, the Ninth Circuit's vanguard decision raises an obvious question: Why, if sidewalks or other forms of infrastructure are "programs," "services," or "activities," did it take so long for such a claim to be advanced in the state or federal courts? The Rehabilitation Act, after all, has been on the books for almost thirty years; the ADA, more than a decade. The answer, we submit, is that the argument is contrary to the plain language of those statutes, inconsistent with the traditional differential regulatory treatment of existing and new facilities,

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[1] Respondents claim (at 9) that *Rosen* v. *Montgomery County*, 121 F.3d 154 (4th Cir. 1997), "rested on * * * an implied requirement of voluntariness" which this Court rejected in *Yeskey*. Respondents misread *Rosen*, which turned primarily on the plain language of the ADA and not on any concept of voluntariness contained in the separate definition of the statutory term "qualified individual with a disability." See 121 F.3d at 157 ("calling a drunk driving arrest a 'program or activity' of the County * * * strikes us as a stretch of the statutory language and of the underlying intent"). The prior decision in *Torcasio* v. *Murray*, 57 F.3d 1340 (4th Cir. 1995), cert. denied, 516 U.S. 1071 (1996), did rely on the voluntariness concept, but the *Rosen* panel cited *Torcasio* only in passing as a "cf." citation. 121 F.3d at 157.

and (until this case) contrary to the Justice Department's guidance. No wonder the argument evidently has never been floated before this case. In any event, this Court has never insisted on a square circuit conflict before granting review to decide an issue of national importance. Several cases on this Court's docket this Term did not involve a square circuit conflict.[2]

II. THE ISSUE PRESENTED IS IMPORTANT

Although they admitted below that this case raises an issue of "profound" importance to the public (Resp. C.A. Reply Br. 2), respondents now attempt, in a variety of ways, to downplay the significance of the Ninth Circuit's decision. Respondents, however, got it right the first time – as strongly confirmed by the governmental and organizational *amici* supporting review.

1. Respondents take issue with the question presented as framed in the petition, criticizing it for mentioning "other forms of infrastructure owned by state or municipal governments" (Pet. i) when the only form of public infrastructure involved in the Ninth Circuit's decision was sidewalks. Br. in Opp. 18-19. But, if a sidewalk is a "service, "program," or "activity," then there is *no logical reason* why roads, bridges, buildings, and other types of physical infrastructure owned by States or municipal governments would not also qualify. As the National Association of Counties' *amicus* brief correctly points out (at 15), under the Ninth Circuit's reasoning "*any* municipally-owned item * * * can become a program, service or activity under the ADA" through the simple expedient of "placing the word 'maintaining' in front of" it. See also Pet. 20, 26.

2. Respondents argue that the decision below resolves only the "simple question" whether a local government has "*any* ob-

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[2] See, *e.g.*, *Entergy Louisiana, Inc.* v. *Louisiana Public Serv. Comm'n*, 71 U.S.L.W. 3483 (order granting certiorari, Jan. 17, 2003) (No. 02-299); *Eldred* v. *Ashcroft*, 123 S. Ct. 769 (2003); *Hillside Dairy Inc.* v. *Lyons*, 123 S. Ct. 769 (order granting certiorari, Jan. 10, 2003) (Nos. 01-950 and 01-1018); *City of Cuyahoga Falls* v. *Buckeye Community Hope Found.*, 122 S. Ct. 2618 (order granting certiorari, June 24, 2002) (No. 01-1269).

ligation" under the ADA and Rehabilitation Act "to take reasonable steps" to remove "barriers" that limit the access of people with "mobility and/or vision disabilities" to public sidewalks. Br. in Opp. 1 (emphasis added). Respondents are again mistaken. As we explained in the petition, petitioners have *already agreed* in this litigation to add to the number of existing curb ramps and curb cuts in Sacramento by building approximately 1500 new curb ramps each year. Moreover, petitioners do not dispute that the Justice Department's regulations impose obligations on the City in carrying out its program of constructing *new* sidewalks or in ensuring access to certain buildings where City programs, services, or activities take place. See Pet. 6 & n.3.

Thus, it is wrong to say that what is at stake is whether the City has "any obligation" to take reasonable steps to remove barriers to sidewalk access. What is at stake is whether the ADA requires the City to go beyond the many reasonable steps it has already taken and – unless the City can prove an undue burden defense in court – uproot trees, move benches and utility poles, and rebuild *existing* sidewalks throughout Sacramento.

In an effort to appear more reasonable, respondents at various points suggest that all the City is required to do under the ADA and the Rehabilitation Act is to make its overall "*system* of public sidewalks" reasonably accessible. Br. in Opp. 19 (emphasis added); see also *id*. at 20 (referring to the "issue of * * * program access along the public sidewalk *system*") (emphasis added). But if that were respondents' position, it is not clear why there was anything left to litigate after the City agreed to add 1500 curb ramps each year to the curb ramps and curb cuts already in existence.

3. Any doubt about the importance of the issue presented is eliminated by the three *amicus* briefs filed in this case. As the *amici* point out, the Ninth Circuit's decision threatens to impose an "enormous financial burden" on local governments as well as to raise "significant implementation issues" with respect to ADA compliance – issues that "greatly impact on the budgets of local governments." Nat'l Ass'n of Counties Br. 3; see also

id. at 12 ("extraordinarily costly effect"); Calif. Cities Br. 13-15 (describing "extraordinary magnitude" of cost of compliance); Nat'l League of Cities Br. 14 ("dire fiscal consequences").

The adverse consequences of the Ninth Circuit's decision are not limited to its fiscal effects. As the *amici* have persuasively demonstrated, the decision below undermines local autonomy by impairing the authority of local governments to make decisions about the timing and priority of changes to existing facilities. Nat'l Ass'n of Counties Br. 11-12, 17. The decision below also creates significant uncertainties about how it is to be implemented within the Ninth Circuit. See *id*. at 16-17.

4. The importance of the issue presented is underscored by *Krumel* v. *City of Fremont*, No. 8:01CV259, slip op. (D. Neb. Jan. 29, 2003), a suit brought by an individual town resident who suffered from various disabilities. The plaintiff claimed that the town, by failing to reposition various mailboxes that protruded over onto the town's sidewalks, had interfered with his ability to maintain an exercise program and healthy lifestyle and thus violated the federal disability discrimination laws. Relying largely on the Ninth Circuit's decision and reasoning in this case – including the proposition that "attempting" to analyze the statutory text would be "needless hair-splitting" – the district court denied the town's motion for summary judgment.

This decision is a clear sign of things to come if the decision below is allowed to stand. The City of Fremont must now endure a trial and final judgment before it will have the right to appeal the district court's ruling. That may take years; and there is no guarantee that the town will expend the substantial financial and political resources that would be required to litigate over principle, rather than settle. Cities, counties, and other municipal governments across the country can be expected to be subjected to a flurry of "infrastructure" lawsuits of the kind endorsed by the Ninth Circuit. This Court should act now to avoid the enormous waste of judicial and municipal resources that will otherwise ensue. Further "percolation" is not likely to

assist this Court in deciding this pure question of statutory construction, particularly given the disconcerting tendency of some lower courts (perhaps misreading this Court's decision in *Yeskey*) to abdicate responsibility for analyzing the words and structure of these important federal statutes.

III. THE DECISION BELOW IS WRONG

Respondents have no answer for most of the merits analysis in the petition (at 22-30). They make no effort to address our criticisms of the Ninth Circuit's "normal function" test. Pet. 23 & n.8. Nor do they offer any defense of the Ninth Circuit's failure to take account of the Justice Department's prior, contradictory guidance to public entities over the years. Pet. 28-29. And respondents do not respond to our showing (Pet. 27) that the regulation on which the Department relied below (28 C.F.R. § 35.150(d)(2)) does not, in fact, "require[] the provision of curb ramps," as the Ninth Circuit incorrectly believed. Pet. App. 7a. Instead, the regulation does nothing more than prescribe the content of a "transition plan" for certain types of public entities (those with more than 50 employees) when the public entity elects to "achieve program compliance" through "structural changes" in existing facilities rather than through other permissible methods. 28 C.F.R. § 35.150(b), (d)(2) (Pet. App. 29a-30a); Pet. 26-27; Calif. Cities Br. 8-12.[3]

At the end of they day, respondents' defense of the result below rests on two basic points: (1) the Rehabilitation Act's

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[3] As we have explained (Pet. 3-4), Congress in passing the ADA specifically directed that the Attorney General's implementing regulations relating to "program accessibility, existing facilities" – *i.e.*, what is now 28 C.F.R. § 35.150 – "*shall be consistent* with regulations and analysis as in Part 39 of title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b) (emphasis added) (Pet. App. 25a-26a). The latter Rehabilitation Act regulations, however, do not *even mention* curb cuts, much less mandate them. Compare 28 C.F.R. § 35.150(d) with *id.* § 39.150(d). The government's new-found interpretation of 28 C.F.R. § 35.150(d)(2) as requiring the provision of curb cuts thus appears to be directly contrary to the command of 42 U.S.C. § 12134(b).

definition of "program or activity" includes "all of the *operations* of * * * a department, agency, * * * or other instrumentality of a State or of a local government" (29 U.S.C. § 794(b) (emphasis added)); and (2) the Ninth Circuit is not alone in refusing to analyze the operative language of these statutes and in concluding that the laws cover "anything a public entity *does*." Br. in Opp. 2-3, 6-7, 15-16. We have explained why those arguments are unavailing. Pet. 22-24.

IV. THIS CASE IS AN IDEAL VEHICLE

Respondents suggest (at 9, 20) that this case is a poor vehicle because it involves an interlocutory appeal. But, as it now stands, the case presents a threshold, significant question of law that was exhaustively briefed in, and squarely decided by, the court of appeals, with extensive *amicus* participation (see Pet. App. 2a). The absence of a complicated record makes this case ideal for resolving an issue of statutory interpretation. The question presented will not be illuminated by the parties' efforts to develop a factual record on the City's distinct defense of "undue burden." This Court has not hesitated to review interlocutory decisions of the federal courts of appeals in exactly this posture. See STERN, GRESSMAN, SHAPIRO & GELLER, SUPREME COURT PRACTICE 196 (8th ed. 2002); *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441 (2001); *United Dominion Indus.* v. *United States*, 121 S. Ct. 1934 (2001); *United States* v. *Hatter*, 121 S. Ct. 1782 (2001).

The Ninth Circuit's decision threatens to impose severe burdens on local governments (a point underscored by the *amicus* briefs). Moreover, as we explained in the petition (at 20-22), and as *amici* confirm (Nat'l League of Cities Br. 17 n.6; Nat'l Ass'n of Counties Br. 15-17), the administrative burden exists even if a municipal government ultimately prevails on an undue burden defense. Respondents simply ignore these onerous administrative burdens.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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