No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), provides, among other things, that "[n]o otherwise qualified person with a disability * * * shall, solely by reason of her or his disability, be excluded from the participation in," or "denied the benefits of," or "subjected to discrimination under," any "program or activity" that "receiv[es] Federal financial assistance" (including such programs or activities of state or local governments). Section 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, in virtually identical terms prohibits disability-based discrimination in the "services, programs, or activities" of state and local governments and other public entities (and does so without regard to whether the public entity receives any federal funding). The question presented in this case is:

Whether a City's sidewalks – or other forms of physical infrastructure owned by state or municipal governments – constitute an "activity," "program," or "service" of a public entity within the meaning of Section 504 of the Rehabilitation Act or Section 202 of the ADA.

RULE 14.1(b) STATEMENT

Other than those named in the caption, the parties in the court of appeals were respondents Susan Barnhill, Jeffrey Evans, Tony Martinez, Brenda Pickern, Jeff Thom, Suzanne Fitts Valters, and Mitch Watkins, who are named representatives of the plaintiff class certified by the district court of "all persons with mobility and/or vision disabilities who seek full and equal access pertaining to curb cuts and sidewalks in the City of Sacramento's public rights of way."

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 292 F.3d 1073. The district court's order granting petitioners' partial motion for summary judgment and certifying the order for permissive interlocutory appeal under 28 U.S.C. § 1292(b) (App., *infra*, 9a-10a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 2002. App., *infra*, 1a. Rehearing was denied on September 5, 2002. App., *infra*, 19a-20a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, as amended, as well as of the regulations of the Department of Justice, are set forth at App., *infra*, 21a-31a.

STATEMENT

This case is a class action brought by mobility- and vision-impaired residents of the City of Sacramento, California, against the City and its Director of the Department of Public Works (petitioners here). Alleging disability discrimination under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Section 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, the plaintiffs (respondents here) challenged the City's failure to install curb ramps at intersections when resurfacing or altering city streets and sidewalks and when constructing new sidewalks and streets. Significantly for present purposes, respondents also maintained that all of the *existing* sidewalks in Sacramento were public "programs" or "activities" or "services." Thus, they alleged, the City was required, under the

ADA and the Rehabilitation Act, to ensure accessibility of the *existing* sidewalks to persons with disabilities (including the respondent class of wheelchair-bound and vision-impaired citizens). According to respondents, the Acts require the City to alter, reconfigure, or even rebuild its *existing* sidewalks to widen surfaces; move benches, fire hydrants, utility poles, traffic signal poles, telephone poles, trees, newspaper racks, guide wires, mailboxes, and other package service receptacles; eliminate roots and other protruding objects that might present an obstacle to individuals in wheelchairs or with vision impairments; and eliminate all abrupt changes in level of more than ¼ inch (or ½ inch if the change in level is beveled), including flares and cross slopes where private driveways cross sidewalks.

After the City agreed to install curb ramps on newly constructed or altered streets and sidewalks, the district court ruled that the existing public sidewalks do not constitute a "program, service or activity" covered by the ADA and thus granted summary judgment to the City on the remaining federal claims. The Ninth Circuit reversed, holding that the ADA and Rehabilitation Act cover "anything a public entity does" and any "normal function of a governmental entity" – including ownership of public rights-of-way and physical infrastructure such as sidewalks.

A. The Statutory and Regulatory Framework and This Court's Decision in *Yeskey*

1. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of certain services for the disabled and imposes certain conditions on the recipients of federal funds. Among other things, the Act (in Section 504) bars discrimination against persons with disabilities under federal grants and programs. 29 U.S.C. § 794(a). Specifically, Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States * * * 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) (emphasis added). For purposes of this mandate, "program or activity" is defined as including "all of the operations of * * * a department, agency, * * * or other instrumentality of a State or of a local government." *Id.* § 794(b).

In 1990, Congress passed the Americans with Disabilities Act (ADA). The ADA applies even to entities that do not receive federal funding. Each of the ADA's three titles addresses discrimination against the disabled in a different area: Title I relates to employment, Title II relates to public services, and Title III relates to public accommodations. 42 U.S.C. §§ 12111-12189; see *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001).

Title II includes a provision – modeled after Section 504 of the Rehabilitation Act – that 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 a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (emphasis added). The ADA does not define "services, programs, or activities,"[1] but it does define "qualified individual with a disability" as someone with a disability "who, with or without reasonable modifications to the rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." *Id.* § 12131(2).

The ADA directs the Attorney General to issue regulations to implement these provisions of Title II. 42 U.S.C. § 12134(a); see generally 28 C.F.R. Part 35. To the extent that such regulations involve "program accessibility" for "existing facilities,"

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[1] The ADA defines a "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(B). There is no dispute that petitioner City of Sacramento falls within this definition.

they must be consistent with the "regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under" Section 504 of the Rehabilitation Act. 42 U.S.C. § 12134(b).

2. The Justice Department's Title II "program accessibility" regulations require that no person with a disability shall be denied the benefits of or participation in any program, service, or activity "because a public entity's facilities are inaccessible to or unusable by persons with disabilities." 28 C.F.R. § 35.149. "Facility" is a defined term under the regulations (see *id.* § 35.104), encompassing any place where a program, service, or activity is offered. See App., *infra*, 27a-28a.

The program accessibility regulations impose different requirements with respect to "existing facilities" (28 C.F.R. § 35.150) than with regard to "new construction and alterations" of facilities (*id.* § 35.151). As for existing "facilities," public entities are required 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." *Id.* § 35.150(a). That obligation, however, "does not * * * [n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(1). Nor does the obligation "[r]equire a public entity to take any action that it can demonstrate would result" either in "a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.150(a)(3). The requirements imposed on new construction and alterations of facilities are more far-reaching. See *id.* § 35.151; see also App., *infra*, 28a-31a.[2]

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[2] For example, the regulations require all "newly constructed or altered" streets, roads, highways, and "street level pedestrian walkways" to "contain curb ramps or other sloped areas" at all intersections. 28 C.F.R. § 35.151(e)(1); see also *Kinney* v. *Yerusalem*, 9 F.3d 1067 (3d Cir. 1993) (resurfacing of streets constitutes "alteration" triggering the obligation to install curb ramps).

3. In *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), this Court held that a motivational boot camp in Pennsylvania's prison system qualified as a "service[], program[], or activit[y]" covered by the ADA. Rejecting the argument that Title II of the ADA categorically exempts all state correctional facilities, the Court carefully examined the text of the statute and concluded that "[s]tate prisons fall squarely within the statutory definition of 'public entity[].'" *Id*. at 210. Moreover, "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs'" – and there is "no basis" in the ADA's text "for distinguishing those programs, services, and activities from those provided by public entities that are not prisons." *Ibid.* Even "the [Pennsylvania] statute establishing the * * * Boot Camp," the Court noted, "refers to it as a 'program.'" *Ibid*.

B. The Proceedings Below

1. Respondents brought this action in the United States District Court for the Eastern District of California. On behalf of themselves and others similarly situated, respondents alleged in their first amended complaint that the City of Sacramento "discriminate[s] against persons with disabilities" by, among other things, (1) "routinely failing to install proper curb ramps (also known as 'curb cuts') when resurfacing, repairing, and/or altering city streets and/or sidewalks" and by (2) "failing to ensure program access to public rights-of-way." C.A. ER 2.

In a stipulation, the parties agreed, among other things, that the case should be certified as a class action on behalf of "all persons with mobility and/or vision disabilities who seek full and equal access pertaining to curb cuts and sidewalks in the City of Sacramento's public rights of way." C.A. E.R. 33. The district court, acting on the parties' stipulation, certified a class action pursuant to Fed. R. Civ. P. 23(b)(2) with the individual plaintiffs to serve as class representatives. C.A. E.R. 35.

Respondents filed a motion for summary adjudication seeking a determination that the sidewalks themselves are covered

by the program access requirements of the ADA and the Rehabilitation Act. On the same day, petitioners filed a motion for partial summary judgment seeking approval of the City's Transition Plan for Curb Ramps as well as a determination that the sidewalks themselves are not "programs," "services," or "activities." In agreeing to build curb ramps but resisting plaintiffs' efforts to characterize the sidewalks as "programs" that must be made accessible, petitioners acknowledged that the City's program of *constructing* new sidewalks qualifies as a "program" subject to the ADA and the Rehabilitation Act. They also acknowledged that the City's program of *maintaining* its existing sidewalks qualifies as a "program" covered by those laws – so that, for example, the City could not lawfully neglect the upkeep or repair of existing curb ramps while at the same time repairing curbs or other features not used by the disabled. The City also acknowledged that, in certain cases where public services, programs or activities are offered in buildings or other facilities that are inaccessible without modifications to abutting sidewalks, the City might be required by the ADA and the Rehabilitation Act to ensure that the sidewalks allowed full access to such programs. But petitioners disagreed *that the sidewalks themselves* were "programs" or "services" or "activities" covered by these federal antidiscrimination laws.[3]

2. At a hearing on the parties' motions, the district court indicated that it had great difficulty seeing how "sidewalks can be and can fit the definition" of a "service," "program," or "activity" covered by the ADA or the Rehabilitation Act. Tr. 70. At most, the court explained, a sidewalk might qualify as "part of a facility" where public programs or services are offered or activities conducted. *Ibid.* To illustrate, the district court gave the example of a stadium where "football game[s]" or "track

[3] Subsequently, the parties settled the issue of curb ramps and stipulated to the entry of an injunction under which the City agreed to a detailed schedule for installing approximately 1500 curb ramps each year. See App., *infra*, 11a-18a; C.A. ER 262.

meets" are conducted (a stadium that is inaccessible to persons in wheelchairs without "a walkway around the outside"). *Ibid.* The walkway in this example, the district court reasoned, "could well be called part of the *facility* for the service, [but] not a *service*. I don't think the walkway would be a service and I don't think it would be a program. But I think it would be part of a facility to furnish programs." *Ibid.* (emphasis added).

The district court later entered an order formally granting petitioners' motion for partial summary judgment "for [the] reasons stated in open court." App., *infra*, 9a. "[S]idewalks," the court explained, "are not a program, service, or activity of the City of Sacramento, and thus are not subject to the program access requirements of the ADA or Section 504 of the Rehabilitation Act." *Ibid.* The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). App., *infra*, 9a.

3. The Ninth Circuit reversed. App., *infra*, 1a-8a. In holding that "public sidewalks in the City of Sacramento are a service, program, or activity" under Title II of the ADA (and presumably a "program or activity" under Section 504 of the Rehabilitation Act), the court thought it unnecessary actually to "determin[e] whether each function of a city can be characterized as a service, program, or activity." App., *infra*, 5a. Such an inquiry into the meaning of the statute's words, according to the panel, would amount to "needless hair-splitting" because those terms encompass "'"*anything* a public entity *does*."'" *Id.* at 5a-6a (emphasis added). The panel opined that the operative question was "not so much * * * whether a particular public function can *technically* be characterized as a service, program, or activity, but whether it is a '"*normal function of a governmental entity*."'" *Id.* at 6a (emphasis added).

Applying that test, the panel next ruled that "*maintaining* public sidewalks is a normal function of a city and "without a doubt something that the [City] 'does.'" App., *infra*, 6a (emphasis added) (quoting *Hason* v. *Medical Bd. of Cal.*, 279 F.3d 1167, 1173 (9th Cir. 2002), cert. granted, 72 U.S.L.W. 3247

(Nov. 18, 2002) (No. 02-479)). "Maintaining their accessibility for individuals with disabilities," the panel then reasoned, "therefore falls within the scope of Title II." *Ibid.*

The panel also purported to find support for this conclusion in (1) "the plain language of the Rehabilitation Act," which defines "program or activity" as including "all of the operations of" a qualifying local government (29 U.S.C. § 794(b)(1)(A)); (2) snippets drawn from the ADA's "legislative history"; and (3) "the tenor of" a Justice Department regulation, 28 C.F.R. § 35.150, which relates to the content of "transition plans" that public entities must adopt under certain circumstances. App., *infra*, 6a-7a. The panel made no attempt to explain how a sidewalk could constitute an "operation." Nor did the panel explain how scattered references in the legislative history to "actions" or "activities" of local governments supported its holding.

As for the "tenor" of the Justice Department regulations, the panel pointed to 28 C.F.R. § 35.150(d), which requires a public entity with more that 50 employees that chooses to "achieve program accessibility" by making "structural changes to facilities" to develop a "transition plan." *Id.* § 35.150(d)(1). If the public entity has "responsibility or authority over streets, roads, or walkways," then "its transition plan" must "include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas." *Id.* § 35.150(d)(2). In the panel's view, Section 35.150(d)(2) "requires the provision of curb ramps," not only for "priority" walkways serving government offices, transportation, places of public accommodation, and employers, "but also for walkways serving other areas." App., *infra*, 7a (internal quotations omitted). Section 35.150's "requirement of curb ramps in all pedestrian walkways," the panel opined, "reveals a general concern for the accessibility of public sidewalks, as well as a recognition that sidewalks fall within the ADA's coverage,

and would be meaningless if the sidewalks between the curb ramps were inaccessible." *Ibid.* Moreover, the court said, although the Justice Department's regulation was "ambiguous" with respect to whether "sidewalks are subject to the accessibility regulations," the Department in an *amicus* brief submitted to the court had interpreted its regulation as covering sidewalks, and that interpretation was "entitled to deference." *Ibid.*

REASONS FOR GRANTING THE PETITION

Has every city in American been under an obligation for more than a decade – though never until this litigation noticed by the Justice Department or any court – to make every *existing* sidewalk accessible, subject only to a case-by-case defense of "undue burden"? That is the question the Ninth Circuit blithely answered "yes," dismissing analysis of the words of the statute – "program," "service," or "activity" – as mere hair-splitting. That breathtakingly broad holding requires torturing the statutory language to make infrastructure into a "program," "service," or "activity." To the extent it relies on the Justice Department's effort to interpret the language by promulgating an ambiguous regulation, interpreting its regulation in a brief, and demanding deference, it defies the principle that "we must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

As a result of the Ninth Circuit's decision, public entities in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington will be subject to the requirement – under the Justice Department's implementing regulations – to "operate each" existing sidewalk so that, "when viewed in its entirety, it is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150. As respondents acknowledged below, the question whether sidewalks are a "program," "service," or "activity" that must be rendered accessible to individuals with mobility-

based, vision-based, or other types of disabilities is one of "profound" importance. Resp. C.A. Reply Br. 2. And, if sidewalks qualify as a public program, activity, or service, it is difficult to see why the same would not be true of roads, bridges, buildings and other types of physical infrastructure owned (and therefore from time to time "maintained") by public entities. (Indeed, respondents have contended in the court below that all streets in Sacramento are also covered.) The fiscal ramifications of the Ninth Circuit's ruling are staggering.

Beyond erroneously resolving an issue of surpassing importance, the Ninth Circuit's decision warrants review because it offers a valuable opportunity to dispel the widespread confusion in the lower courts over what constitutes a public "program," "activity," or "service" covered by Title II of the ADA and Section 504 of the Rehabilitation Act. In *Pennsylvania Dep't of Corrections* v. *Yeskey*, *supra*, this Court rejected an argument for a categorical exclusion from the ADA for "programs" offered to inmates by state prisons. Although the Court had no occasion in *Yeskey* to delineate the outer boundaries of the terms "programs," "activities," and "services," it did make clear that those boundaries are identified by careful examination of the statutory language. Ignoring that teaching, the Ninth Circuit in this case essentially threw up its hands, characterizing any inquiry into the meaning of the operative words of these statutes as "technical[]" and "needless hair-splitting" and concluding that the ADA and Rehabilitation Act cover "*anything* a public entity does." App., *infra*, 5a-6a (emphasis added). The Ninth Circuit's approach conflicts with the approaches of other circuits and reflects pervasive confusion in the lower courts – before and after *Yeskey* – that warrants this Court's attention.

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

The Ninth Circuit expressly declined to analyze the operative language of the ADA and the Rehabilitation Act. In that

court's view, "[a]ttempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless 'hair-splitting arguments.'" App., *infra*, at 5a-6a (quoting *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37 (2d Cir. 1997), superseded on other grounds, *Zervos* v. *Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001)). "Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II," the panel explained, "we have construed 'the ADA's broad language [as] bring[ing] within its scope *anything* a public entity *does*.'" App., *infra*, 5a (emphasis added) (quoting *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)). "The focus of the inquiry," the court added, "is * * * whether [a particular function] is a '*normal* function of a government entity.'" App., *infra*, 6a (emphasis added) (quoting *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725, 731 (9th Cir. 1999)).

The Ninth Circuit's broad interpretation follows the lead of the Second Circuit. In *Innovative Health Systems*, *supra*, a panel of the Second Circuit held that Title II covers a public entity's zoning decisions.[4] According to the Second Circuit, the ADA (and the Rehabilitation Act) encompass zoning decisions "because making such decisions is a normal function of a governmental entity." 117 F.3d at 44. The Second Circuit further held that "the language of Title II's anti-discrimination provision does *not* limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City. Rather, it

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[4] In so ruling, the Second Circuit departed from the nearly uniform approach taken by the district courts, which had held that zoning decisions are not a program, service, or activity under Title II. See, *e.g.*, *United States v. City of Charlotte*, 904 F. Supp. 482, 484-85 (W.D.N.C. 1995); *Kessler Inst. for Rehab., Inc.* v. *Mayor and Council of Borough of Essex Falls*, 876 F. Supp. 641, 655 (D.N.J. 1995); *Moyer* v. *Lower Oxford Township*, No. Civ. A. 92-3348, 1993 WL 5489, *2 (E.D. Pa. 1993); *Burnham* v. *City of Rohnert Park*, No. C. 92-1439SC, 1992 WL 672965, *5 n.9 (N.D. Cal. 1992).

is a catch-all phrase that prohibits *all* discrimination by a public entity * * *." *Id.* at 44-45 (emphasis added).

A. The Ninth Circuit's approach to determining the scope of Title II of the ADA and Section 504 of the Rehabilitation Act is in considerable tension with *Yeskey*. In that case, the Court held that a motivational boot camp offered in Pennsylvania's prison system qualified as a "service[], program[], or activit[y]" covered by the ADA. In refusing to hold that Title II categorically exempted state prisons, the Court focused on the meaning of "'programs, services, or activities' as those terms are ordinarily understood" (524 U.S. at 210), explaining:

> Modern prisons provide inmates with many recreational "activities," medical "services," and educational and vocational "programs," all of which theoretically "benefit" the prisoners (and any of which prisoners could be "excluded from participation in").

Ibid. The Court noted, moreover, that "the statute establishing the Motivational Boot Camp at issue in this very case refers to it as a 'program.'" *Ibid.* Finally, in rejecting the Commonwealth's contention that prisons are exempt from Title II because prisoners do not seek to participate in them, the Court again examined the statutory text and concluded that "the words do not connote voluntariness." *Id.* at 211. The Court also noted, for example, that "[t]he prison law library" is "a service" that "prisoners are free to take or leave." *Ibid.* Throughout its analysis, the Court focused on the prison operations that naturally fell within the terms "activities," "services," and "programs."

Moreover, in focusing on the plain meaning of the statutory terms, this Court departed from the approach that the Third Circuit (whose ruling the Court affirmed) had taken. The Third Circuit (like the panel opinion below) had held that the term "activity" included any "natural or normal function or operation" of government. See 118 F.3d 168, 170 (3d Cir. 1997) (internal quotations omitted). Similarly, the Third Circuit had held that the ADA's "broad language is intended to appl[y] to

anything a public entity does." *Id*. at 171 (internal quotations omitted). The Ninth Circuit in this case expressly relied on the Third Circuit's opinion in *Yeskey* in articulating its broad approach to ascertaining whether something is covered by Title II. By abdicating its duty to assess whether sidewalks fit within the statutory term "programs, services, and activities" because such an inquiry would "disintegrate in to needless 'hair-splitting arguments'" (App., *infra*, 6a), the Ninth Circuit departed from the approach taken by this Court in *Yeskey*.

B. The Ninth Circuit's view that Title II of the ADA 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 that other federal circuits, and certain state courts, have determined are *not* programs, services, or activities of a public entity. The Court should grant review to clarify, and bring uniformity to, this important area of federal law.

1. *Arrests.* The Fourth and the Fifth Circuits have refused to treat police officers' conduct in arresting a suspect as a program, service, or activity under Title II. In *Rosen* v. *Montgomery County*, 121 F.3d 154 (4th Cir. 1997), a deaf plaintiff argued that a county's failure to provide a interpreter and a TTY telephone during an arrest for drunk driving violated Title II of the ADA. The Fourth Circuit held that an arrest is not a "program or activity." "[C]alling a drunk driving arrest a 'program or activity' of the County, the 'essential eligibility requirements' of which (in this case) are weaving in traffic and being intoxicated, strikes us as a stretch of the statutory language and of the underlying legislative intent." 121 F.3d at 157; see also *id.* at 158 (the plaintiff "was in no way 'denied the benefits of' his arrest").

Similarly, in *Hainze* v. *Richards*, 207 F.3d 795 (5th Cir.), cert. denied, 531 U.S. 959 (2000), the Fifth Circuit held that an officer's use of force during an arrest is not actionable as a program, service, or activity. There, a mentally disabled arrestee argued that he was denied the benefits of the defendant county's mental health training when an officer (supposedly in

contravention of that training) used force to restrain him. *Id.* at 800. The court rejected the plaintiff's claims, holding that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects of mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Id.* at 801.[5]

Under the Ninth (and Second) Circuit's interpretation, these decisions would have come out the other way. Certainly, an arrest by a law enforcement officer is something "a public entity does." Nor can there be any serious question that law enforcement is "a normal function of a government entity."

In reaching the conclusion that Title II does not require police officers to accommodate a disability during an arrest because an arrest is not a "service[], program[], or activit[y]," several courts have carefully distinguished situations in which an officer arrests an individual *because of his or her disability*. These courts have interpreted Section 12132 as containing two independent clauses: one addressing reasonable accommodation (the "programs, services, and activities" clause), and another addressing intentional discrimination (the "subjected to discrimination" clause). See 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, [1] be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or [2] be sub-

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[5] Several district courts have similarly concluded that Title II does not require a public entity to accommodate a suspect's disability during an arrest. See, *e.g.*, *Crocker* v. *Lewiston Police Dep't*, No. 00-13-PC, 2001 WL 114977, *8 (D. Me. 2001); *Patrice* v. *Murphy*, 43 F. Supp. 2d 1156 (W.D. Wash. 1999); *Gorrell* v. *Delaware State Police*, No. Civ. A. 98-649 SLR, 1999 WL 1893142, *3-*4 (D. Del. 1999). But see *Gohier* v. *Enright*, 186 F.3d 1216 (10th Cir. 1999) (holding that there is no rule categorically barring application of Title II to arrests); cf. *Gorman* v. *Bartch*, 152 F.3d 907 (8th Cir. 1998) (transportation of suspect to police station after arrest covered by Title II).

jected to discrimination by any such entity"). Relying on the second clause, these courts have stated that, when the police misperceive the effects of a disability as criminal activity, they have chosen a course of action *because of* the individual's disability in violation of the proscription against intentional discrimination set forth in the second clause. See *Gohier* v. *Enright*, 186 F.3d 1216, 1220 (10th Cir.1999) (surveying cases); *Hainze*, 207 F.3d at 800. According to these courts, such conduct is qualitatively different from instances in which the police merely fail to accommodate a disability during an arrest.

Unlike the Fifth and Tenth Circuits, the Ninth Circuit does not read Section 12132 as containing two completely independent clauses. See *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1175 (9th Cir. 1999) ("The second clause of Section 12132 * * * must relate to a government service, program, or activity * * *."), cert. denied, 531 U.S. 1189 (2001). Because the Ninth Circuit treats the second clause as inextricably linked to the first, it reasoned in this case that the second clause *expanded* on the scope of Title II to cover more functions than just those that can be "characterized" as "programs" or "services" or "activities." App., *infra*, 5a. See also *Innovative Health*, 117 F.3d at 45 ("[T]he language of Title II's anti-discrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City. Rather, it is a catch-all phrase that prohibits discrimination by a public entity, regardless of the context * * *."). At the same time, the Ninth Circuit failed to grasp that the claim in this case was not one of outright intentional discrimination by the City in violation of the second clause but rather of a failure by the City to accommodate the respondents' disability – a claim, in other words, that the respondents had been "excluded from participation in or be[en] denied the benefits of the services, programs, or activities of" the City. 42 U.S.C. § 12132.

Guidance from this Court is needed to clarify the relationship between these two clauses and to bring greater uniformity to the lower courts' conflicting interpretations.

2. *Employment*. Consistent with the broad standard set out by the Ninth Circuit here, the Eleventh Circuit has concluded that employment by a public entity is actionable under Title II of the ADA (even though Title I separately governs employment by most employers). See *Bledsoe* v. *Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816, 820-25 (11th Cir.), cert. denied, 525 U.S. 826 (1998). That court found the language of the ADA unilluminating as to what the terms "program, service, or activity" mean. Nonetheless, it adopted the statement in *Innovative Health Systems* that "Title II's antidiscrimination provision does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' [of a public entity]" (*id*. at 822 (brackets in original)). Relying on this reading of Title II, as well as the legislative history and the Justice Department's ADA regulations (see 28 C.F.R. § 35.140(a)), the Eleventh Circuit held that Title II encompasses employment. Many other district courts have followed suit. See *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130, 135 (D. Mass. 1998); *Ethridge* v. *Alabama*, 847 F. Supp. 903, 906 (M.D. Ala. 1993); *Saylor* v. *Ridge*, 989 F. Supp. 680, 688 (E.D. Pa. 1998); *Magee* v. *Nassau County Medical Center*, 27 F. Supp. 2d 154, 159 (E.D.N.Y. 1998).

Other courts, including (oddly) the Ninth Circuit, have come to the opposite conclusion. Rather than rely on the expansive definition used by the lower court in this case, and by the Eleventh Circuit in *Bledsoe*, these courts have developed a different test for ascertaining whether a government function is a program, service, or activity. According to these courts, "[t]he phrase 'services, programs, or activities' * * * understood as a whole, focuses on a public entity's *outputs* rather than its *inputs*." *Decker* v. *Univ. of Houston*, 970 F. Supp. 575, 578 (S.D. Tex. 1996) (emphasis added), aff'd mem., 159 F.3d 1355 (5th Cir. 1998). See also *Zimmerman*, 170 F.3d at 1174; *Currie* v. *Group Ins. Comm'n*, 147 F. Supp. 2d 30, 34-35 (D. Mass. 2001), stay granted, 290 F.3d 1 (1st Cir. 2002). As the Ninth Circuit has explained the distinction:

> Consider, for example, how a Parks Department would answer the question, "What are the services, programs, and activities of the Parks Department?" It might answer, "We operate a swimming pool; we lead nature walks; we maintain playgrounds." It would not answer, "We buy lawnmowers and hire people to operate them." The latter is a *means* to deliver the services, programs, and activities of the hypothetical Parks Department, but it is *not itself* a service, program, or activity of the Parks Department.

Zimmerman, 170 F.3d at 1174 (emphasis added). Each of the courts that has used this analytical framework has concluded that employment is an "input," not an "output," and therefore is not a service, program, or activity under Title II. See also *Patterson* v. *State Dep't of Corrections*, 35 F.Supp. 2d 1103 (C.D. Ill. 1999) (Title II does not cover employment).

Under the Ninth Circuit's approach adopted in *this* case, however, employment *would* be a covered "service, program or activity." Like making arrests, hiring people to execute the functions of government is plainly something a public entity "does." It is also readily characterized as a "normal function" of government. Yet employment is not a program, service, or activity under the input/output analysis. Review by this Court in this case would clarify the validity of the input/output distinction, which petitioners expressly invoked in the court below.

3. *Proceedings Involving the Termination of Parental Rights.* State family courts conduct proceedings involving the "termination of parental rights" in which a court-appointed lawyer or other interested person petitions the court to terminate a parent's custodial rights. At times, parents have contended that any decision on custodial rights should not discriminate against them based on their disabilities. State courts have uniformly rejected this argument on the ground that "termination proceedings are not 'services, programs, or activities' within the meaning of Title II of the ADA." *In re Anthony B.*, 54 Conn. App. 463, 471-72 (Conn. App. 1999) (internal quotations and

ellipses omitted); see also *In re Terry*, 240 Mich. App. 14, 24 (2000) ("termination proceedings are not 'services, programs, or activities' under the ADA"); *In re BFK*, 704 So. 2d 314, 317 (Ct. App. La. 1998) (same); *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997) (same); *In re Torrance P.*, 522 N.W.2d 243, 245-46 (Ct. App. Wis. 1992) (ADA not a basis to attack court order in termination of parental rights proceeding). On the basis of that reasoning, state courts have concluded that "the ADA neither provides a defense to nor creates special obligations in a termination proceeding." *In re Anthony B.*, 54 Conn. App. at 472.

Again, these decisions would have come out differently under the tests used by the Ninth and Second Circuits. A termination-of-parental-rights proceeding is a "normal function of government." Making a decision as to whether a parent may have custodial, visitation, or other parental rights vis-à-vis a child is something a public entity (*i.e.*, a state court) does. Nonetheless, every state court of which we are aware has held that these proceedings are not covered by the ADA.[6]

This Court should take this opportunity to dispel the substantial confusion in the lower courts.

II. THIS ISSUE IS OF GREAT PUBLIC IMPORTANCE

The decision that a municipal government's sidewalks (or any other piece of a public entity's infrastructure) are "programs, services, or activities" under Title II is of paramount importance, both because of the cost of compliance and because of the potential doctrinal ramifications of the lower court's ruling.

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[6] In contrast to these state court decisions, the Second Circuit has held in *Innovative Health* that another type of state proceeding – zoning decisions – is covered by Title II of the ADA. See pages 11-12, *supra*. The Ninth Circuit has also reached the same conclusion with respect to zoning decisions and other state proceedings. See *Bay Area Addiction Research and Treatment*, 179 F.3d at 731 (zoning); *Thompson* v. *Davis*, 295 F.3d 890 (9th Cir. 2002) (parole proceedings), pet. for cert. filed, __ U.S.L.W. __ (Nov. 4, 2002) (No. 02-724).

Respondents admitted in the Ninth Circuit that this issue was of "profound" importance. Resp. C.A. Reply Br. 2. For that reason as well, further review is urgently needed.

If permitted to stand, the Ninth Circuit's decision will impose on the City of Sacramento a duty to make all of its existing sidewalks "accessible" to persons with disabilities. Sacramento must undertake to make each sidewalk accessible even if the City is not in the process of building, altering, or repairing that infrastructure. Sacramento has thousands of miles of sidewalks; the cost of complying with such a ruling is no doubt very substantial indeed. According to respondents, the ADA and the Rehabilitation Act require the City to alter, reconfigure, or even rebuild its existing sidewalks to widen surfaces; move fire hydrants, benches, utility poles, traffic signal poles, telephone poles, trees, newspaper racks, guide wires, mailboxes, and other package service receptacles; eliminate roots and other protruding objects that might present an impediment or obstacle to individuals in wheelchairs or with vision impairments; and eliminate all abrupt changes in level of more than ¼ inch (or ½ inch if the change in level is beveled), including flares and cross slopes where private driveways cross sidewalks.

Moreover, although this case concerns only the City of Sacramento, the holding of the lower court – that sidewalks are covered by Title II of the ADA and the Justice Department's "program accessibility" regulations, 28 C.F.R. § 35.149 – obviously is binding precedent throughout the entire Ninth Circuit. In other words, every sidewalk on all 450,000 miles of roads in the nine States that comprise the Ninth Circuit arguably must now be made ADA-compliant.[7]

The cost of complying with the Ninth Circuit's ruling will be enormous. It is difficult to imagine that any municipality exists without some broken sidewalks or obstacles to travel such

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[7] See www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf. This figure excludes roads under federal control.

as benches, utility poles, signs, mailboxes, and guide wires. And most municipalities (especially those with historic areas) have sidewalks that do not meet the ADA's width requirements, and that have steep cross slopes. One estimate of the cost of sidewalk construction is $36,000 per mile (see www.commuterservices.com/costs.htm). This expense will cause serious strains on tight municipal budgets and interfere with competing demands on government funds.

Nor are sidewalks the only item of publicly owned or maintained property affected by the Ninth Circuit's ruling. Under the panel's reasoning, any piece of property that is at any time "maintained" by a public entity – even if the public entity is not currently expending funds on that property, and even if that property is not necessary to access a public service – is arguably covered by Title II of the ADA. Thus, *every piece of a municipality's infrastructure* is arguably now a "program, service, or activity," and must be made accessible under the ADA. For example, under the Ninth Circuit's ruling, every *road* is covered by Title II (a point that respondents themselves have urged in the lower courts). If that is so, then no person with a disability can be denied the benefits of roads. The implications are staggering. There are approximately 450,000 miles of roads in the Ninth Circuit alone, and more than 3,730,000 miles of roads nationwide. See www.fhwa.dot.gov/ohim/1994/section5/hm-14.pdf. What measures would have to be taken to ensure that persons with disabilities can enjoy "the benefits" of roads? Will every road have to be passable by foot and by wheelchair for persons who are unable to drive? The potential cost of making all roads ADA compliant is exorbitant.

Contrary to respondents' suggestion below, the cost of complying with the Ninth Circuit's ruling and the ramifications of that ruling are not meaningfully alleviated by the availability of an "undue burden" defense articulated in the DOJ regulations. See 28 C.F.R. § 35.150(a)(3) (stating that the obligation to make public facilities accessible does not "[r]equire a public entity to take any action that it can demonstrate would result "in

undue financial and administrative burdens"). *First*, before a municipality can take advantage of this provision, it must undertake an assessment of the piece of infrastructure at issue, determine whether it complies with the ADA's accessibility requirements, what measures are needed to bring it into compliance, and how much those measures would cost. That alone will entail tremendous administrative burdens and costs.

This administrative burden is exacerbated, in many instances, because the public entities – who are the only parties required to comply with the ADA – may not be the only entities with control over the obstacles to accessibility. Sidewalks are a good example. Transit authorities place bus benches on sidewalks. Electric companies set down guide wires. And broken sidewalks are often caused by roots of trees on private landowners' property. Thus, to determine how it could comply with the ADA's accessibility requirements and what the cost of compliance would be, a public entity would be required to coordinate with a host of other entities.

Second, the regulations place the burden of proof on the public entity to establish the undue-burden defense. See 28 C.F.R. § 35.150(a)(3). As a consequence, public entities will be forced to incur costs associated with defending ADA lawsuits and responding to Justice Department inquiries demanding that sidewalks, roads, buildings, and anything else owned by a municipality be made accessible. All of these costs – whether related to self-assessment of compliance or to litigation and investigations – will be incurred regardless of whether it is ultimately determined that an undue financial or administrative cost is associated with complying with the accessibility requirements.

Third, even if a public entity succeeds in establishing the undue-burden defense, it will still be required under the Justice Department's regulations to "take any other action that would not result in * * * such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services

provided by the public entity." 28 C.F.R. § 35.150(a)(3). The undue-burden defense is therefore cold comfort indeed.

III. THE DECISION BELOW IS WRONG

Finally, review is warranted because the Ninth Circuit's sweeping interpretation of two important federal statutes is manifestly incorrect. The panel below erred by refusing (contrary to this Court's teaching in *Yeskey*) to conduct *any* inquiry into whether the operative language of the statutes – which reach only "programs," "activities," and (in the case of the ADA) "services" – covers existing sidewalks owned by a public entity. Careful analysis of the text of the statute, as well as its structure and purposes, would yield the opposite result.

The Ninth Circuit's analysis began with the misconception that Title II applies to "anything a public entity does" (App., *infra*, 5a), so long as it can be characterized as a "normal function of a governmental entity" (*id.* at 6a). Then, seemingly untroubled by the fact that a sidewalk is neither a "function" nor something a public entity "does," the Ninth Circuit simply added the word "maintaining" (*ibid.*) in front of the word "sidewalk" to reach the conclusion that *sidewalks themselves* are programs, services, and activities under the ADA. Finally, the lower court afforded deference to the Justice Department's litigating position that sidewalks are covered by Title II and the Department's regulations (which the Ninth Circuit admitted were "ambiguous") relating to access to existing public facilities. The Ninth Circuit's analysis was flawed at every turn.

A. The Ninth Circuit erred when it refused to decide "whether a particular public function" – here, a sidewalk – can be "characterized as a service, program, or activity" (App., *infra*, 6a). When the statutory text is unambiguous, as this text is (*Yeskey*, 524 U.S. at 212), a court's only role is to determine whether the facts at issue fit within the statutory framework. In other words, there is no need to add a judicial gloss to a statute when its own terms are clear. Thus, the Ninth Circuit was required to do the one thing it refused even to attempt – decide

whether a sidewalk can properly be described as a "program," "service," or "activity." See page 7, *supra*.

Equally flawed was the Ninth Circuit's suggestion that the ADA covers any "normal function" of government. That gloss is both over- and under-inclusive. It is under-inclusive because it excludes from the ADA's reach innovative government programs, which may not represent a typical or traditional function of government, but that nonetheless provide a benefit to the public. The boot camps in *Yeskey* are one example. For another example, suppose a city decided to provide general investment advice to its residents, but elected not to print the written materials it distributed in braille. Is the dissemination of investment advice a "normal function" of a municipal government? No. But there is no doubt that this would be a public "program" or "service" covered by the ADA. The Ninth Circuit's standard is also over-inclusive. As we explained above, it is certainly a "normal function" of government to employ people, make arrests, and conduct proceedings relating to the termination of parental rights, yet numerous courts have held that those functions are *not* covered by Title II because they are not "programs," "services," or "activities."[8]

Nor can the plain language of the ADA be expanded by reference to the Rehabilitation Act (see App., *infra*, 6a-7a). The Ninth Circuit relied on the Rehabilitation Act's definition of

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[8] Nor is the "normal function" test especially workable. That test is reminiscent of the "traditional function of government" standard used in the state action context. See, *e.g.*, *Edmonson* v. *Leesville Concrete Co., Inc.*, 500 U.S. 614, 624 (1991) (in making state action determination, considering "whether the action in question involves the performance of a traditional function of government"). The state action doctrine has been described as "'a conceptual disaster area'" – a scenario hardly worth emulating. Ronna Greff Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 NOTRE DAME L. REV 1150, 1150 (1985) (quoting Black, *The Supreme Court, 1966 Term – Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)).

"program or activity" as including "*all* of the *operations* of * * * a department, agency, * * * or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 29 U.S.C. § 794(b) (emphasis added). But subsection (b) was added by Congress in 1987 through passage of the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28, for a specific purpose: to overturn this Court's decision in *Grove City College* v. *Bell*, 465 U.S. 555 (1984). In *Grove City*, the Court held that under similar language in Title IX, 20 U.S.C. § 1681(a), only the "program or activity" of a university that was actually receiving federal financial assistance – not the entire university – was subject to Title IX's prohibition against discrimination on the basis of sex. By amending the statute, Congress clarified that "all" programs and activities – *i.e.*, operations – of a grant recipient are covered by the statute if "any" of those programs or activities receive financial support from the federal government. In other words, Congress's reference to "operations" as a shorthand for "program or activity" was hardly intended to expand those terms. See S. Rep. No. 100-64, at 6 (1987).[9]

B. Sidewalks do not fall within the plain meaning of the words "program," "service," and "activity." A program, quite simply, is "a schedule or system under which action may be taken toward a desired goal." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1812 (1986); see also AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1324 (4th ed. 2000) (a "system of services, opportunities, or projects, usually designed to meet a social need"). A service is "[a]n act or variety of work done for

[9] Because the Rehabilitation Act does not expand the meaning of the statutory terms, the snippets of the ADA's legislative history demonstrating Congress's intent to rely on the Rehabilitation Act (App., *infra*, 6a-7a) also do not support the Ninth Circuit's expansive reading of the statute.

others." *Id*. at 1521. And an activity is "a specified pursuit in which a person [or entity] partakes." *Id*. at 18.

Is a sidewalk any of these things? Quite plainly not.[10] A sidewalk is not a "specified pursuit" in which a public entity partakes. Nor is a sidewalk "an act done for others." And a sidewalk is not a "system under which action may be taken toward a desired goal." Instead, sidewalks are simply an important existing piece of a city's infrastructure. The conclusion that sidewalks are not themselves a program, service, or activity is confirmed, moreover, by other evidence in the statutory text. For example, the ADA defines a "qualified person with a disability" who "meets the essential eligibility requirements for the *receipt* of services or *the participation in* programs or activities *provided* by a public entity." 42 U.S.C. § 12131(2) (emphasis added). As that language makes clear, "services" are something that can be "received" by the public, and "programs or activities" are things that citizens "participate" in. No one "receives" or "participates in" a sidewalk.

This is not to say that *constructing*, *altering*, or *maintaining* a sidewalk is not a public program, service, or activity. The construction of a sidewalk *is* "an act done for others." So too is the maintenance of a sidewalk, and the resurfacing of streets (during which curb ramps may be constructed). But the Ninth Circuit did not require plaintiffs to show that the City of Sacramento was engaged in the construction, alteration, or maintenance of sidewalks, or for that matter in any action with regard to its sidewalks – the court purported to apply the "test" of "anything a public entity does," yet did not require the City to *do* anything before its sidewalks would be deemed covered.

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[10] "East side, west side, all around the town. The tots sang 'ring-a-rosie,' 'London Bridge is falling down.' Boys and girls together, me and Mamie O'Rourke/Tripped the light fantastic/On the [programs, services, or activities] of New York." With apologies to James W. Blake and Charles E. Lawlor, *Sidewalks of New York* (1894).

The court of appeals did, however, at one point insert the word "maintaining" in front of the word "sidewalks," and it did characterize the maintenance of sidewalks as a function of government. App., *infra*, 6a. But the Ninth Circuit had no basis for recharacterizing the issue in that way (and this method of analysis could be used to convert any item of physical infrastructure into a covered "program"). The only question before the court of appeals was whether *sidewalks themselves* are a program, service, or activity as those words are used in Title II. Under the plain meaning of the operative words of the statutes, sidewalks are not covered.

C. The Ninth Circuit was also wrong to rely on the Justice Department's litigating position that existing sidewalks are covered by Title II. To begin with, an agency's interpretation is not entitled to deference when the statute is unambiguous. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984); *FDA* v. *Brown & Williamson*, 529 U.S. at 125-26; *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (rejecting construction of ADA advanced by EEOC and Justice Department even on the assumption that full *Chevron* deference was warranted). Thus, in *Yeskey*, although the Department's regulations provided that prisons were covered by the ADA, and although the Third Circuit relied on those regulations (see 118 F.3d at 171-72), *this* Court relied on the statutory language alone. 524 U.S. at 212.

Nonetheless, the Ninth Circuit relied on a Justice Department regulation (28 C.F.R. § 35.150(d)(2)) in concluding that sidewalks are a program, service, or activity under the ADA. Section 35.150(d)(1) requires public entities that elect to "achieve program accessibility" by making "structural changes in [existing] facilities" to develop a "transition plan." If the public entity has "responsibility or authority over streets, roads, or walkways," then "its transition plan" must "include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public

accommodation, and employers, followed by walkways serving other areas." *Id.* § 35.150(d)(2). Section 35.150's "requirement of curb ramps in all pedestrian walkways," the panel asserted, "reveals a general concern for the accessibility of public sidewalks, as well as a recognition that sidewalks fall within the ADA's coverage, and would be meaningless if the sidewalks between the curb ramps were inaccessible." App., *infra*, 7a. The Ninth Circuit recognized that the regulation is "ambiguous" because it does not specifically require the accessibility of sidewalks, speaking instead only to curb cuts. *Id.* at 8a. Nonetheless, citing *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997), the court accorded deference to the Justice Department's position that this regulation and the ADA govern sidewalks.

The Justice Department's position, however, deserves no deference. To begin with, the regulation on its face applies only to public entities that choose to ensure the accessibility of programs offered in "existing facilities" by making "structural changes" to those facilities. 28 C.F.R. § 35.150(d)(1); see also *id.* § 35.150(b)(1) (indicating that one means of complying is the "alteration of existing facilities and construction of new facilities"). Even then, all the regulation requires is the formulation of a "transition plan." In certain circumstances (if the public entity has "responsibility or authority over streets, roads, or walkways"), the regulations also require the transition plan to include "a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs" – and that schedule must "giv[e] priority" to "walkways serving entities covered by the Act, * * * followed by walkways serving other areas." *Id.* § 35.150(d)(2). Thus, the Ninth Circuit was simply wrong to suggest that this regulation "requires the provision of curb ramps." App., *infra*, 6a.

In any event, as this Court explained in *United States* v. *Mead Corp.*, 533 U.S. 218 (2001), not all agency pronouncements are entitled to the same level of deference. Instead, "'[t]he weight [accorded to an administrative] judgment in a particular case will depend upon * * * all those factors

which give it the power to persuade, if lacking the power to control." *Id.* at 228 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). An important factor in determining the appropriate level of deference is the agency's "'consistency with earlier and later pronouncements.'" *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

Far from being "consistent" with its "earlier pronouncements," the Justice Department's litigating position in the lower court contradicts its prior statements. Since the enactment of the ADA, the Department has regularly provided advice regarding public entities' duties under the statute. In every instance of which we are aware in which the Department was asked for guidance on an entity's duties with regard to a sidewalk, the Department has *not* stated that a sidewalk itself must be accessible. Instead, its has taken the position that a sidewalk is covered only insofar as it is used to access a specific program, service, or activity. Thus, in 1998 the Justice Department responded to an inquiry from a Member of Congress regarding whether the ADA requires the removal of snow and maintenance of sidewalks on a city street. According to the response provided by Bill Lann Lee, the Acting Assistant Attorney General for the Civil Rights Division:

> The focus of the [ADA's accessibility] requirement is access to services, programs, and activities, *as opposed to physical structures*. Therefore, there is no general requirement that compels a public entity to ensure that all sidewalks are free of snow.

App., *infra*, 34a (emphasis added). See also *ibid.* (noting that if a sidewalk is part of a "route that is required to provide access" to a program or activity, it would have to be accessible). Similarly, in 1995, the Department advised that a school would be required to repair a sidewalk only "if such sidewalks or walkways are necessary to ensure accessibility to the entity's programs services or activities." App., *infra*, 33a. And in 1996, the Department stated that "sidewalks must be maintained in

operable condition" *if* sidewalks were necessary to ensure that an entity's "programs, services, and activities are accessible." See www.usdoj.gov/crt/foia/cltr191.text. "Notably, *only those sidewalks that are required by the ADA to be accessible* * * * will be required to be maintained by the city." *Ibid.* (emphasis added). Of course, if sidewalks are *themselves* programs, services, or activities, this last statement would be nonsensical; *all* sidewalks would be required to be accessible. It is thus abundantly clear that the Department has consistently taken the position in the past that sidewalks are *not* covered by Title II.

Moreover, the Department's interpretation ignores and is inconsistent with the fundamental distinction – repeatedly expressed in the text of the ADA (*e.g.*, 42 U.S.C. §§ 12134(b), 12146, 12147) as well as in the Department's own regulations (*e.g.*, 28 C.F.R. §§ 35.150, 35.151) – between the obligations of public entities with respect to "existing facilities" and the far more extensive duties relating to the "new construction or alteration" of public facilities. This distinction reflects Congress's recognition that it would be impossible and undesirable to mandate the demolition and rebuilding of the nation's entire public infrastructure in order to achieve universal accessibility to persons with disabilities. Instead, Congress sought to bring about greater accessibility incrementally and in a way that balances the need for greater access with the need to ensure the efficient use of finite public resources. The statute and regulations achieve that balance by requiring public entities to focus on making their *programs*, *services*, and *activities* accessible, while at the same time permitting non-programmatic barriers to be eliminated gradually and naturally through the incorporation of accessible design features when public entities elect to construct or alter their buildings, structures or facilities. The Department's interpretation in this case – that existing sidewalks *are* programs, services or activities – destroys that careful balance in derogation of Congress's clear intent.

Under *Mead*, then, the Justice Department's new "interpretation" of its regulation – which is implausible in its own

right and inconsistent with the structure and purpose underlying the ADA – has little "power to persuade." Indeed, this litigation is the *only* instance of which we are aware in which the Department has taken the position that sidewalks are a program, service, or activity. "An interpretation advanced in a litigation brief," according to this Court, receives deference at the lowest end of the spectrum of judicial responses, "near indifference." *Mead*, 533 U.S. at 228 (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988)). The interpretation advanced by the Justice Department in the Ninth Circuit, and accepted by that court, is therefore entitled to no deference.

* * *

The Ninth Circuit's decision imposes a massive new legal duty on thousands and thousands of state and local governments to make all public sidewalks – not to mention streets and other elements of the public infrastructure – accessible to and usable by persons with disabilities, unless the public entity can prevail in litigation on a defense of "undue burden." That sweeping and fiscally burdensome obligation was never mentioned by Congress in the text of the ADA (and the Ninth Circuit thought it was unnecessary "hair-splitting" to examine the operative statutory text). The new legal duty is instead based on a regulation of the Department of Justice that the Ninth Circuit (charitably) described as "ambiguous." Yet until it filed its brief in this case, the Justice Department had consistently taken the position in answering inquiries about the meaning of the ADA that public sidewalks are *not* themselves a "service," "program," or "activity" covered by Title II. This Court's review is sorely needed to ensure that, if in fact such a broad new obligation is to be imposed on public entities, that obligation is rooted in the text and structure of the ADA and not in statements made in Justice Department regulations that are at best ambiguous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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