No. 11-746

In The Supreme Court of the United States

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

RICHARD FRAME, et al.,

Respondents.

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

BRIEF OF THE CITY OF HUNTSVILLE, ALABAMA AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Do a city's sidewalks, curb ramps, and parking lots – and, by logical extension, other forms of physical infrastructure owned by municipal or state governments – qualify as a "service," "program," or "activity" of a public entity within the meaning of Section 202 of the ADA or Section 504 of the Rehabilitation Act?

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INTEREST OF THE *AMICI CURIAE*

Amici curiae – the City of Huntsville, Alabama and the International Municipal Lawyers Association ("IMLA") – respectfully submit the following brief in support of the petition for *certiorari* filed by the City of Arlington, Texas.[1] The City of Huntsville is home to more than 180,000 people and is a major center of research, development, and engineering for space exploration and military innovation. Huntsville is involved in Americans with Disabilities Act ("ADA") litigation that focuses in large part on the accessibility of its sidewalks. IMLA is a non-profit, professional organization of over 2,000 local government entities, as represented by their chief legal officers, state municipal leagues, and attorneys. IMLA's mission is to advance the responsible development of municipal law through education and advocacy.

Huntsville and IMLA have taken an interest in this litigation because of the serious practical and constitutional issues raised by the potential application of the ADA to sidewalks that are unconnected to any municipal "program," "service," or "activity." Accordingly, *amici* write to urge this Court to grant

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[1] The parties received ten days notice of this brief and timely consented to its filing.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

the City of Arlington's petition for *certiorari*, at least with regard to Question 1 thereof.

SUMMARY OF ARGUMENT

In enacting Title II of the ADA, Congress specifically directed that local governments make the "programs," "services" and "activities" they offer accessible to those with disabilities. 42 U.S.C. §12132. Congress made no mention of "facilities" or other infrastructural elements. Nevertheless, the respondents in this case seek to cut Title II loose from its textual moorings, forcing cities to completely revamp all elements of their *facilities* and *physical infrastructure*, even where the facilities and infrastructural features are not associated with (or integral to accessing) any "program," "service," or "activity" to which Title II of the ADA applies. The Fifth Circuit panel initially rejected this construction on rehearing, holding that Title II's application to infrastructural elements is limited to those elements serving as "gateways" to actual "programs, services, or activities." *Frame v. City of Arlington*, 616 F.3d 476, 488 (5th Cir. 2010). However, on *en banc* rehearing, an 8-7 majority of the Court concluded that stand-alone sidewalks may be deemed to constitute "services" within the meaning of Title II of the ADA. *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (*en banc*).

This illogical interpretation not only conflicts with Department of Justice regulations,[2] but it casts a long and dark shadow of constitutional doubt over Title II of the ADA. The ADA was enacted by Congress pursuant to its power to enforce the Fourteenth Amendment and its power to regulate commerce between the states. The enforcement power, however, does not permit attempts to expand the Fourteenth Amendment beyond its ordinary constraints; thus, when dealing with non-suspect classes such as disabled persons, Congress cannot proscribe rational governmental actions, even if those actions result in differential treatment. Furthermore, this Court has explained that the Commerce Clause does not permit Congress to regulate non-economic intrastate activities, and lower courts across the country have held that Congress cannot compel participation in economic activity.

Accordingly, because cities have ample justification for using limited taxpayer funds for more pressing concerns than repairing cracks in ordinary sidewalks, and because the *failure* or *refusal* to remedy sidewalk accessibility issues cannot be construed to constitute "economic activity," Congress may not mandate retrofitting of sidewalks unconnected to any program, service, or activity. A construction of Title II

[2] *See* 28 C.F.R. §35.104 (defining "walkways" as "facilities" and not as "programs, services, or activities").

that suggests otherwise raises *significant* constitutional questions.

ARGUMENT

A. The Canon of Constitutional Doubt Strongly Supports an Interpretation of the Term "Programs, Services, or Activities" That Precludes Application of Title II of the ADA to City Sidewalks

The original Fifth Circuit panel concluded, on rehearing, that the City of Arlington's sidewalks were not themselves freestanding "programs, services, or activities" within the meaning of the anti-discrimination provision of the ADA, 42 U.S.C. §12132, but were instead "infrastructure, which may provide access to, but are not themselves, 'services, programs, or activities.'" *Frame v. City of Arlington*, 616 F.3d 476 (5th Cir. 2010). The panel noted that many of the sidewalks at issue in this case are not even alleged to provide access to actual "services, programs, or activities." *Id*. at 482. The briefs submitted by the City of Arlington demonstrate clearly that the panel's decision in this regard was correct. *Amici* write separately to illustrate the significant constitutional questions that would arise in the event this court were to stray from the panel's reasoning and find that sidewalks somehow constitute "programs, services, or activities" under Title II.

Congress enacted the ADA pursuant to the enforcement power conferred upon it by section 5 of the Fourteenth Amendment, and also pursuant to the Commerce Clause of Article I, section 8 of the Constitution. 42 U.S.C. §12101(b)(4). As explained below, section 5 does not permit Congress to assert jurisdiction over ordinary sidewalks and curb ramps which do not actually exist to protect any citizen's fundamental rights. Moreover, Congress could not, consistent with relevant Commerce Clause jurisprudence, permissibly force local governments to engage in economic activity by spending millions of dollars in taxpayer money to retrofit sidewalks and install curb ramps, since sidewalks themselves do not constitute "economic activity." Yet, a strained construction of the term "programs, services, or activities" that encompasses sidewalks would do exactly these things, thereby calling into doubt the constitutional validity of this construction of the ADA.

This Court has long held that under the canon of constitutional avoidance, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999) (quotations omitted); *see also Rust v. Sullivan*, 500 U.S. 173, 190 (1991) ("[T]he elementary rule is that every reasonable construction

must be resorted to, in order to save a statute from unconstitutionality.").

This avoidance canon "rests upon our respect for Congress, which we assume legislates in the light of constitutional limitations." *Harris v. United States*, 536 U.S. 545, 556 (2002) (quotations omitted); *see also Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (describing the avoidance canon as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it.") (citations omitted). As shown below, to allow the Fifth Circuit's unlimited construction of the term "programs, services or activities" to stand would be to assume that Congress has legislated without due regard for the constitutional limitations placed upon its powers.

B. An Application of Title II of the ADA to Sidewalks that Do Not Directly Enable the Exercise of Any Fundamental Rights Would Exceed Congress' Power to Enforce the Fourteenth Amendment

Congress declared that its intent in enacting the ADA was "to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. §12101(b)(4). To that end, Congress declared

that it was invoking "the power to enforce the fourteenth amendment." *Id.* Section 5 of the Fourteenth Amendment empowers Congress to enact "appropriate legislation" to "enforce" that Amendment's Equal Protection and Due Process Clauses. U.S. Const. amend. XIV, §5; *see also City of Boerne v. Flores*, 521 U.S. 507, 517-18 (1997).[3]

A law is thus "appropriate" under section 5 only if the statute "may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is 'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). In other words, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Flores*, 521 U.S. at 520; *see also Hale v. King*, 624 F.3d 178, 181 (5th Cir. 2010). This "congruence and proportionality" is required because:

> Congress' power under §5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to

[3] Critically "[w]hether the ADA was passed pursuant to a provision of the Constitution that grants Congress the power to abrogate the states' immunity from suit is *a different question* from whether the substantive provisions of the ADA are a valid exercise of Congress's power to enforce the Fourteenth Amendment." *Nelson v. Miller*, 170 F.3d 641, 648 (6th Cir. 1999) (emphasis supplied).

> enforce,' not the power to determine what constitutes a constitutional violation.

Flores, 521 U.S. at 519 (some quotations omitted). Therefore, in order to establish that Title II is a valid exercise of congressional authority, removal of the barriers at issue in this case must vindicate constitutional rights actually conferred by the Fourteenth Amendment. *Id*. at 519-20.

The "congruence and proportionality" test is applied in three steps. The first step requires identification of the injury to be prevented, a task which itself necessarily requires examination of the scope of the right that Congress sought to protect. *See Flores*, 521 U.S. at 520. The third step calls for a determination of whether the measure adopted by Congress "constitutes appropriate remedial legislation [that vindicates existing constitutional rights], or instead [impermissibly] effects a substantive redefinition of the Fourteenth Amendment right at issue." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). Application of steps one and three of the *Flores* inquiry illustrates definitively that the authorization of a Title II cause of action under the allegations in this case would exceed the limited authority granted Congress by section 5, even assuming the second step is met.[4]

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[4] The second step of the *Flores* inquiry asks "whether there was a history of unconstitutional discrimination." *Ass'n for Disabled Americans, Inc. v. Florida Intern'l Univ.*, 405 F.3d 957

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1. The Fourteenth Amendment Does Not Impose an Obligation on Cities to Retrofit Sidewalks Since There is a Rational Basis for Giving Priority to Other Concerns

As stated above, Congress declared that its purpose in enacting the ADA was "to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. §12101(b)(4). However laudable this goal may have been, there can be no doubt that Congress' objective led it to legislate in an area that occupies the outer limits of the Fourteenth Amendment's field of operation. The Fourteenth Amendment provides only *very* limited protections for persons with disabilities. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 735 (2003) (holding that "discrimination on the basis of [disability] is not judged under a heightened review standard"); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446 (1985).

Indeed, this Court has held that the Fourteenth Amendment places no restrictions on government's ability to treat disabled individuals differently from

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(11th Cir. 2005). Because it is not necessary to make a contrary assumption in order to demonstrate the unconstitutionality of a Title II cause of action in the circumstances of this case, *amici* skip the historical component. *See Jamison v. Delaware*, 340 F.Supp.2d 514, 518 (D. Del. 2004) ("Even if Congress had identified a pattern of discrimination . . . , the ADA is not congruent and proportional to the targeted violation.").

other persons so long as "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Likewise, the Fourteenth Amendment does not require "special accommodations for the disabled, so long as [the government's] actions toward such individuals are rational." *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 367 (2001).

The rational basis standard of review is "the least demanding scrutiny required by the courts." *Lavia v. Pennsylvania Dep't of Corrections*, 224 F.3d 190, 199 (3d Cir. 2000); *accord Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 470 (2008) (Scalia, J., dissenting) ("'rational basis' is the least demanding of our tests"). Governmental actions evaluated under this standard are deemed constitutional if they are supported by "any reasonably conceivable state of facts." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). The standard recognizes that governments "'must be allowed leeway to approach a perceived problem incrementally,' even if [a given] incremental approach is significantly over-inclusive or under-inclusive." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (quoting *Beach Communications*, 508 U.S. at 316).

Under rational basis review, a governmental entity's failure to take affirmative steps to accommodate disabled individuals will be upheld "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of

legitimate purposes that the Court can only conclude that the [government's] actions were irrational." *Jamison v. Delaware*, 340 F.Supp.2d 514, 517 (D. Del. 2004). Such a conclusion is foreclosed when it comes to the failure to devote money to barrier removal, because this Court has recognized that "financial considerations almost always furnish a rational basis for a State to decline to make those alterations." *Tennessee v. Lane*, 541 U.S. 509, 547 (2004) (Rehnquist, C.J., dissenting); *see also Garrett*, 531 U.S. at 372 (explaining that it would be constitutional under rational basis review for an employer to "conserve scarce financial resources" that would otherwise need to be devoted to retrofitting facilities by passing over disabled employees in favor of candidates capable of using existing facilities).

In summary, "[t]hough the ADA seeks to enforce the Fourteenth Amendment's Equal Protection provisions as they relate to disabilities, courts have found that [i]n comparing the protections guaranteed to the disabled under the ADA . . . with those limited protections guaranteed under the rational basis standard of the Fourteenth Amendment, it is clear that the former imposes far greater obligations and responsibilities on the States [and local governments] than does the latter." *Majewski v. Luzerne County*, 2009 WL 1683274, at * 6 (M.D. Penn. June 15, 2009) (quotations omitted); *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 489 (4th Cir. 2005) ("Undoubtedly, Title II imposes a greater burden on the States [and local governments] than

does the Fourteenth Amendment.").[5] As shown below, this disproportionality renders the application of Title II unconstitutional under these circumstances.

2. Title II is Not Narrowly Tailored to Proscribe Conduct That Transgresses the Fourteenth Amendment

"[R]egardless of the extent of its findings, Congress, under section 5, only has the power to prohibit that which the Fourteenth Amendment prohibits." *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1008 (8th Cir. 1999). Consistent with that observation, the final step of the *Flores* inquiry asks whether Title II of the ADA is an appropriately-circumscribed remedial measure.

"To survive scrutiny, Title II must be tailored to remedy or prevent the 'identified conduct transgressing the Fourteenth Amendment's substantive provisions.'" *Zied-Campbell v. Richman*, 2007 WL 1031399, at * 9 (M.D. Penn. Mar. 30, 2007) (quoting *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627, 639 (1999)). A number of considerations factor into this calculus. This Court has noted that "[t]he appropriateness of

[5] Although this Court has held that Title II "also seeks to enforce a variety of other basic constitutional guarantees [*i.e.*, trial by jury, access to criminal proceedings, etc.], infringements of which are subject to more searching judicial review," *Lane*, 541 U.S. at 522-23, there are no allegations here of actual deprivation of fundamental constitutional rights.

remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); *see also id.* at 534 (noting that congruence and proportionality concerns are at their apex where a federal law requires governments to devote "substantial costs" to remedy a marginal constitutional transgression).

The only particular constitutional "right" ostensibly justifying a Title II cause of action in this case is the right to be free from completely irrational discrimination on the basis of disability in the context of access to public sidewalks – sidewalks that are largely unconnected to any facilities where citizens exercise some fundamental right such as voting or redressing grievances through judicial services. Moreover, there are no allegations of actual denial of any fundamental right. This Court's decision in *Tennessee v. Lane*, 541 U.S. 509, 522 (2004) is the seminal authority on this issue. The plaintiffs in *Lane* asserted that they were *literally* denied access to a state courthouse and thereby actually deprived of their fundamental right to participate in the judicial process because of the severely inaccessible nature of the facilities. *Id*. at 513-14.

Tennessee argued in *Lane* that "the fact that Title II applies not only to public education and voting-booth access but also to seating at state-owned hockey rinks indicates that Title II is not appropriately tailored to serve its objectives." *Id*. at 530. This

Court responded that it would be inappropriate to "consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id*. Accordingly, this Court concluded that "*[w]hatever might be said about Title II's other applications,* the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under §5 to enforce *the constitutional right of access to the courts.*" *Id*. at 530-31 (emphasis supplied). Honing in on this distinct constitutional guarantee, this Court held that *on the facts presented*, Title II functioned in a narrowly-tailored way to ensure that disabled citizens were not subjected to unconstitutional denial of the right of access to the courts. *Id*. at 531 ("Because we find that Title II unquestionably is valid §5 legislation *as it applies to the class of cases implicating the accessibility of judicial services,* we need go no further.") (emphasis supplied). Importantly, however, this Court expressly reserved judgment on the much more questionable applications of Title II – *i.e.*, the same applications that are at issue in this case, which involves sidewalks that have no connection to any critical governmental service.

Notably, four justices in *Lane* wrote separately to specifically condemn these questionable applications

of Title II. Chief Justice Rehnquist wrote that Title II's provisions:

> affect *transportation,* health, education, and recreation programs, among many others, all of which are accorded only rational-basis scrutiny under the Equal Protection Clause. A requirement of accommodation for the disabled at a state-owned amusement park or sports stadium, for example, bears *no permissible prophylactic relationship to enabling disabled persons to exercise their fundamental constitutional rights.*

Id. at 550 (Rehnquist, C.J., dissenting) (emphasis supplied). Justice Scalia wrote separately as well, noting again that whatever may be said of courthouses, "[r]equiring access for disabled persons to *all public buildings* cannot remotely be considered a means of 'enforcing' the Fourteenth Amendment." *Id*. at 565 (Scalia, J., dissenting) (emphasis supplied).

In the next major Title II case, *United States v. Georgia*, 546 U.S. 151 (2006), this Court held that the constitutional validity of any Title II cause of action would be assumed only where the allegations of a complaint describe "conduct that *actually* violates the Fourteenth Amendment." *Id.* at 159. For all other circumstances – *i.e.,* in cases where, *as here*, the claimed misconduct allegedly "violated Title II but did not violate the Fourteenth Amendment" – lower courts must consider the validity of the Title II cause of action on an individualized basis, through

application of the congruence and proportionality test. *Id.* at 159.

Both before and after *Georgia*, many lower courts have done precisely that. Some courts have held that Title II provides a valid cause of action "as applied to access to public education." *Ass'n for Disabled Americans, Inc. v. Florida Intern'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005); *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 488 (4th Cir. 2005) (upholding "the remedial measures of Title II *only* as they apply to the class of cases implicating the right to be free from irrational discrimination in public higher education") (emphasis in original); *but see*, *e.g.*, *Press v. State Univ. of New York at Stony Brook*, 388 F.Supp.2d 127, 135 (E.D.N.Y. 2005) ("[T]his Court is unwilling to expand the scope of Title II . . . with respect to a non-fundamental right such as access to post-secondary education that is subject only to rational review.") (citation omitted).

On the other hand, a growing number of courts (and commentators[6]) have applied the congruence and

[6] Note, *Critical Point in the Disabilities Movement: How Will Tennessee v. Lane Affect Claims Brought Under Title II of the Americans with Disabilities Act*, 80 ST. JOHN'S L. REV. 693, 717 (2006) ("Given the Supreme Court's analysis in both *Garrett* and *Lane*, it appears that if the Court were to decide whether Title II was an appropriate response to discrimination in the realm of state services and programs, other than instances invoking the violation of a fundamental right or an 'actual' constitutional violation, it would find Title II to be disproportionate to

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proportionality test to invalidate Title II causes of action outside the limited contexts of public education and access to the courts. *See*, *e.g.*, *Hale v. King*, 624 F.3d 178, 185, *withdrawn on reh'g*, 642 F.3d 492 (5th Cir. 2011) (holding that a Title II cause of action was invalid to the extent it might purport to authorize a state prison inmate to bring suit for denial of access to prison programs that could entitle him to "good time" credits because no fundamental rights were involved and noting that "title II limits state [and local] activity *far more* than does rational-basis review") (emphasis supplied). Although *Hale* has been withdrawn,[7] in cases where a rational basis or other minimalist standard of review applies under the constitution itself, other courts have aligned themselves with the analysis employed by the Fifth Circuit in *Hale*.[8] The Eighth Circuit, for instance, has held that:

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the harms it sought to prevent."); Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of Garrett: An 'As Applied' Saving Construction for the ADA's Title II*, 39 WAKE FOREST L. REV. 133, 173 (2004) ("A case involving access to a hockey rink would likely come out very differently than a case involving denial of a more fundamental right, like access to voting booths or a courthouse.").

[7] The withdrawal of the opinion in *Hale* is not significant. The Court on rehearing simply did not reach the congruence and proportionality inquiry. *Hale v. King*, 642 F.3d 492, 503 (5th Cir. 2011).

[8] The Eleventh Circuit reached a virtually identical conclusion in *Miller v. King*, 384 F.3d 1248, 1275 (11th Cir. 2004), holding that "the ADA affects far more state-prison conduct and

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> Title II does *far more* than enforce the rational relationship standard recognized by the Supreme Court in *Cleburne*. Under Title II, a state's program, service, or activity, even if rationally related to a legitimate state interest and valid under *Cleburne*, would be struck down unless it provided "reasonable modifications." *See* 42 U.S.C. §12131(2). Only if a state can demonstrate that modifications would "fundamentally alter" the nature of the service, program, or activity, could a court uphold the state's policy.
>
> . . . .
>
> Nor does enforcement of Title II against the states [and local governments] comport with the rationale behind the Supreme Court's decision to adopt the rational basis test in *Cleburne*. The *Cleburne* Court emphasized that a rational basis standard of review would best allow governmental bodies the flexibility and freedom to shape remedial efforts toward the disabled. Title II's provisions detract from this notion, by preventing states from making decisions tailored to meet specific local needs and instead imposing upon

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far more prison services, programs, and activities than the Eighth Amendment," which otherwise requires only that states refrain from subjecting inmates to cruel and unusual punishment." Although *Miller* was subsequently vacated, the vacatur was accomplished for the limited purpose of allowing the *pro se* plaintiff a chance to clarify whether any of his Title II claims were intended to allege conduct that actually violated the Eighth Amendment. 449 F.3d 1149, 1151 (11th Cir. 2006).

> them the amorphous requirement of providing reasonable modifications in every program, service, and activity they provide.

Alsbrook v. City of Maumelle, 184 F.3d 999, 1009 (8th Cir. 1999) (*en banc*) (citations omitted); *see also Chase v. Baskerville*, 508 F.Supp.2d 492, 501 (E.D. Va. 2007) ("Title II's goal of accessibility and accommodation is generally not congruent with the rights it implicates, and . . . Title II's indiscriminate demand for accommodation and accessibility on pain of money damages is wildly disproportionate to enforcing any constitutional rights."), *aff'd*, 305 Fed. Appx. 135 (4th Cir. 2008).

The application of these principles to the allegations of this case is straightforward. The complaint below did not allege any conduct whatsoever by the City of Arlington that amounted to a violation of fundamental constitutional rights. Instead, almost all of the allegations focused on problems encountered while attempting to use sidewalks to visit family members, to enter parks, and to conduct other personal activities. If Arlington's failure to remedy these allegedly unfavorable conditions is in any manner discriminatory, that failure nevertheless can be supported with countless rational explanations – not the least of which is the disproportionate amount of money such repairs cost in comparison to the minimal benefits garnered. In the final analysis, the Fourteenth Amendment permits cities to choose to remedy these imperfections on an incremental basis. Title II

cannot constitutionally be interpreted to require so much more.[9]

C. An Application of Title II of the ADA to Sidewalks Would Constitute an Invalid Exercise of Congress' Power Under the Commerce Clause

Even though Title II of the ADA cannot be enforced in this case under the auspices of section 5 of the Fourteenth Amendment, "Title II of the ADA still [potentially] applies to the States [and local governments] as an [ostensible] exercise of Congress's power under the Commerce Clause." *Randolph v. Rodgers*, 253 F.3d 342, 348 n.12 (8th Cir. 2001). "Of course, to say that the ADA is an exercise of Commerce Clause power does not mean that it is necessarily a constitutional exercise of that power." *United States v. Mississippi Dep't of Public Safety*, 321 F.3d 495, 500 (5th Cir. 2003).

It is a bedrock principle of our federalism that "[t]he Constitution creates a Federal Government of

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[9] *See*, *e.g.*, *Chase*, 508 F.Supp.2d at 503-04 ("'[W]hereas it would be entirely rational (and therefore constitutional) for [the] State[s] to conserve scarce financial resources by' selecting for participation in various prison programs and activities those inmates 'who are able to use existing facilities,' Title II largely prohibits such constitutional conduct. . . . In short, Title II imposes an affirmative accommodation obligation . . . that far exceeds what the Equal Protection Clause requires.") (quoting *Garrett*, 531 U.S. at 372), *aff'd*, 305 Fed. Appx. 135 (4th Cir. 2008).

enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995). One of those enumerated powers granted to Congress is the authority "[t]o regulate commerce . . . among the several States." U.S. Const. art. I, §8, cl. 3. In *United Stateas v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000), this Court "identified three broad categories of activity that Congress may regulate under its commerce power." *Lopez*, 514 U.S. at 558. "First, Congress may regulate the use of the channels of interstate commerce." *Id*. "Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id*. "Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *Id.* at 558-59. The Court also noted, however, that "cases have upheld Commerce Clause regulation of intrastate activity only where the activity is economic in nature." *Morrison*, 529 U.S. at 613.

Non-commercial, intrastate sidewalks which are accessible free of charge meet *none* of these tests. Wheelchair ramps and pedestrian sidewalks in suburban neighborhoods are hardly "interstate transportation routes through which persons and goods move." *United States v. Ballinger*, 395 F.3d 1218, 1225 (11th Cir. 2005) (*en banc*). Similarly, sidewalks themselves – which are not commodities – are a far cry from "instrumentalities of interstate commerce, or

persons or things in interstate commerce." *Lopez*, 514 U.S. at 558; *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1250 (11th Cir. 2008) (noting that "channels and instrumentalities of commerce refer only to the ingredients of interstate commerce itself."). The *only* ostensible basis for assertion of regulatory powers over intrastate sidewalks would be an aggregation argument: *i.e.*, the idea that the net effect of unabated disability discrimination would be a substantial impact on the nation's economy.

Crucially, this is the *very same argument* rejected by this Court when it overturned the Violence Against Women Act ("VAWA") in *United States v. Morrison*, 529 U.S. 598 (2000). The VAWA, much like the ADA, attempted to create a federal remedy for victims of discrimination: specifically, violence motivated by gender. *Morrison*, 529 U.S. at 605. Unlike with the ADA, Congress justified its invocation of the Commerce Clause to enact the law through extensive legislative findings.[10] "Congress found that gender-motivated violence affects interstate commerce 'by

[10] The ADA contains no findings concerning the impact of disability discrimination on interstate commerce. *See Lopez*, 514 U.S. at 563. Moreover, unlike Titles I and III of the ADA, 42 U.S.C. §§12111(5)(A), (7), Title II lacks any jurisdictional element ensuring that the statute reaches only those activities that substantially affect interstate commerce. *Klinger v. Department of Revenue*, 366 F.3d 614 (8th Cir. 2004) (noting that "[t]he absence of such a jurisdictional element [may] indicate that a statute is overinclusive, unconstitutionally sweeping within its ambit activities that have no explicit connection with or effect on interstate commerce.").

deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products.'" *Id.* at 615 (quoting H.R. Conf. Rep. No. 103-711, at 385).

Hence, the argument in favor of the law in *Morrison* was that it constituted "a regulation of activity that substantially affects interstate commerce." *Morrison*, 529 U.S. at 609. This Court was skeptical of this line of reasoning, noting that its "cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Id.* at 613; *see also id.* at 611 n.4 (reiterating that "in every case where we have sustained federal regulation under the aggregation principle . . . , the regulated activity was of an apparent commercial character"). This Court concluded that discrete acts of discrimination toward women are not *themselves* "in any sense of the phrase, economic activity." *Id*. at 613. Furthermore, this Court held that Congress's extensive findings regarding the overall impact of gender discrimination on the national economy could not be considered since the acts of discrimination themselves were not economic in nature; otherwise, "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Id.* at 615.

The same reasoning holds true with respect to the application of the ADA to "discriminatory" sidewalks. Like the VAWA, the ADA was intended to remedy discrimination against a subset of the population. In enacting the ADA, however, Congress not only provided civil remedies to victims of discrimination, but in effect mandated expenditures by state and local governments to avoid discrimination. And, according to the interpretation of "programs, services or activities" advocated by the Fifth Circuit, Title II purportedly directs local governments to spend money to modify sidewalks to create smooth, unobstructed pathways with gentle sloped ramps at all intersections.

Whatever may be said about the advisability of such accommodations, one thing is clear: the "discrimination" that allegedly results from the *failure to modify sidewalks* cannot in any way be construed to be, "in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 613. If anything, the City's alleged failure to devote millions of dollars of taxpayer money to correcting these alleged accessibility issues can best be construed as *refusal to engage in economic activity.* Courts have recognized that, "[i]t would be a radical departure from existing case law to hold that Congress can regulate inactivity under the Commerce Clause." *Florida v. United States Dep't of Health & Human Services*, 2011 WL 285683, at * 21-22 (N.D. Fla. Jan. 31, 2011) ("In every Supreme Court case decided thus far, Congress was not seeking to regulate under its commerce power something

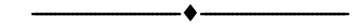
that could even arguably be said to be 'passive inactivity.'") (footnote omitted), *aff'd in pertinent part*, 648 F.3d 1235, 1292-93 (11th Cir. Aug. 12, 2011) ("Although any decision not to purchase a good or service entails commercial consequences, this does not warrant the facile conclusion that Congress may therefore regulate these decisions pursuant to the Commerce Clause."); *Virginia v. Sebelius*, 728 F.Supp.2d 768, 782 (E.D. Va. 2010) ("Neither the Supreme Court nor any federal circuit court of appeals has extended Commerce Clause powers to compel an individual [or entity] to involuntarily enter the stream of commerce by purchasing a commodity in the private market."), *vacated on standing grounds*, 656 F.3d 253 (4th Cir. 2011).

The requirement that the activity being regulated *itself* be economic – and the additional requirement that the activity actually *be* activity, as opposed to inactivity – serves as an important bulwark against congressional takeover of local governance. As this Court held in *Lopez*, were it otherwise:

> Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the[se] theories . . . , it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign.

514 U.S. at 564.

For this reason, "if we are to maintain the Constitution's enumeration of power," *Morrison*, 529 U.S. at 615, the focus must remain not on the potential consequences that could transpire in the absence of regulation, but on the activity being regulated: it is that *activity* that must be economic in nature. *Lopez,* 514 U.S. at 560 ("Where *economic activity* substantially affects interstate commerce, legislation regulating *that activity* will be sustained.") (emphasis supplied). Because the "discrimination" alleged to exist when a local government *fails* to patch a crack in a sidewalk or create a wheelchair ramp is not itself "economic activity," the effects of the failure to engage in such activity cannot be "aggregated" at all. *Morrison*, 529 U.S. at 613; *see also Sebelius*, 728 F.Supp.2d at 782 n.7 ("The collective effect of an aggregate of such inactivity still falls short of the constitutional mark."). Consequently, the Commerce Clause simply cannot be used to regulate sidewalks, and the Fifth Circuit's construction of Title II raises *significant* constitutional questions.



CONCLUSION

For the foregoing reasons, *amici* urge this Court to grant the petition for *certiorari*, and hold that city sidewalks are not a freestanding "program, service, or activity" under Title II of the ADA.

Respectfully submitted,

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