No.

In the Supreme Court of the United States

CITY OF ARLINGTON, TEXAS,

Petitioner,

v.

RICHARD FRAME, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

JAY DOEGEY
City Attorney
DENISE V. WILKERSON
Assistant City Attorney
P.O. Box 90231
Arlington, Texas 76004
(817) 459-6878

EDWIN P. VOSS, JR.
Brown & Hofmeister, L.L.P.
740 E. Campbell Road
Suite 800
Richardson, Texas 75081
(214) 747-6100

ALAN E. UNTEREINER
Counsel of Record
ROY T. ENGLERT, JR.
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

Counsel for Petitioners

QUESTIONS PRESENTED

Section 202 of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132, provides, among other things, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in" or "denied the benefits of" the "services, programs, or activities" of state and local governments and other public entities. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), in virtually identical terms, prohibits disability-based discrimination in any "program or activity" that receives Federal financial assistance (including such programs or activities of state and local governments). The questions presented, which sharply divided the 16 federal judges involved in this case (including, in the decision below, an 8-7 decision of the Fifth Circuit sitting en banc), are as follows:

1. 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?

2. When does a cause of action under those provisions of the ADA and Rehabilitation Act accrue, where the plaintiff's claims are based on a municipality's failure to originally build or alter sidewalks or curb ramps so as to provide persons with disabilities with adequate access to a governmental "service," "program," or "activity"?

RULE 14.1(b) STATEMENT

Other than those named in the caption, the parties in the court of appeals were the following plaintiffs-appellants (all respondents here): Wendell Decker; Scott Updike; JN, a minor, by his next friend and mother, Gabriela Castro; Mark Hamman; and Joey Salas. Like respondent Richard Frame, each of these respondents is a person with mobility disabilities as defined in Section 202 of the ADA or Section 504 of the Rehabilitation Act.

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OPINIONS BELOW

The divided en banc opinion of the court of appeals (App., *infra*, 1a-70a) is reported at 657 F.3d 215. The 3-judge panel's amended opinion on rehearing and its original opinion (App., *infra*, 73a-111a, 112a-150a) are reported at 616 F.3d 476 and 575 F.3d 432, respectively. The district court's order granting the motion to dismiss (App., *infra*, 151a-161a) is unreported.

JURISDICTION

The court of appeals' judgment was entered on September 15, 2011. App., *infra*, 1a, 71a-72a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of the Americans with Disabilities Act and the Rehabilitation Act, as amended, and of the regulations of the Department of Justice, are set forth at App., *infra*, 163a-183a.

STATEMENT

This case involves two profoundly significant questions concerning the obligations and potential liability of state and municipal governments under two important federal anti-discrimination statutes, the Americans with Disabilities Act and the Rehabilitation Act. The questions concern the scope of the duties imposed by those statutes on public entities to rebuild or alter their sidewalks, curb

ramps, parking lots, and by logical extension other infrastructure and facilities, to ensure accessibility to persons with disabilities who depend on motorized wheelchairs for mobility. More specifically, the case raises the question whether sidewalks, curbs, and parking lots constitute "services," "programs," or "activities," as opposed to infrastructure or facilities. It also presents the important and recurring question of when such a claim accrues under federal law. These related questions, which yielded two 2-1 panel decisions and an 8-7 en banc decision of the Fifth Circuit below, have generated widespread confusion and warrant this Court's review.

A. The Statutory and Regulatory Framework

1. The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, authorizes funding of certain services for the disabled and imposes 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, to public services; and Title III, to public accommodations. 42 U.S.C. §§ 12111-12189; see *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001). Title II became effective on January 26, 1992. Pub. L. No. 101-336, § 205(a), 104 Stat. 327, 338 (1990).

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).

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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).

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 "facilities," 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 be denied the benefits of or participation in any service, program, or activity "because a public entity's facilities are inaccessible to or unusable by individuals 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 service, program, or activity is offered. See App., *infra*, 174a.

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 regulatory requirements imposed on *new* construction and alterations of facilities are more far-reaching, requiring all "[n]ewly constructed or altered" streets, roads, highways, and "street level pedestrian walkway[s]" to "contain curb ramps or other sloped areas" at all intersections. 28 C.F.R. § 35.151(e)(1).

B. The Proceedings Below

1. *The Initiation of This Litigation.* Plaintiffs (respondents here) are individuals who reside in the City of Arlington, Texas, and depend on motorized wheelchairs for mobility. In 2005, they initiated this action against petitioner, the City of Arlington ("the City"). Plaintiffs alleged that more than one hundred poorly maintained curb ramps and sidewalks located throughout the City make their travel to public and private locations difficult. Plaintiffs also pointed to three public facilities they claimed had an insufficient number of handicap parking spaces. Plaintiffs did not allege denial of access to any particular City service, program or activity. They sought injunctive relief requiring the City to bring all its curbs, sidewalks, and parking lots into compliance with the Justice Department's ADA regulations.

The City moved to dismiss the complaint, seeking a determination whether the sidewalks and other facilities themselves were "services" or "programs" or "activities" covered by the ADA and the Rehabilitation Act and, if not, then whether plaintiffs had standing (or a private right of action) to enforce

the regulations that went beyond the statute. The City also requested dismissal on the ground that plaintiffs' claims were filed long after the challenged sidewalks were constructed or altered and thus were time-barred.

2. *The District Court's Ruling*. The court dismissed the complaint. App., *infra*, 151a-162a. It held that plaintiffs' discrimination claims accrued, and the applicable two-year statute of limitations began to run, when the City completed the construction or alteration of any noncompliant curb, sidewalk, or parking lot. *Id.* at 158a-160a. Because the complaint did not identify any dates of noncompliant construction or alteration within the two years preceding its filing date, the court dismissed plaintiffs' claims as time-barred. *Id.* at 158a, 160a.

3. *The Original 2-1 Panel Opinion*. a. A divided panel of the Fifth Circuit vacated and remanded. App., *infra,* 112a-150a (per Jolly, J.). The majority first ruled that sidewalks are "services, programs, or activities" of a public entity under the ADA. *Id.* at 118a-121a. The majority relied on, among other things, a dictionary definition for "service" that included "a facility supplying some public demand" as well as on the decisions of several other circuits that had read "services, programs, or activities" in sweeping fashion to mean "'anything a public entity does'" and any "'normal function of a government entity." *Id.* at 118a-120a (quoting *Barden* v. *City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002)).

Next, the majority agreed with the district court that the plaintiffs' claims "accrued on the date the City completed the construction or alteration of any

noncompliant curb, sidewalk, or parking lot." App., *infra,* 129a, 131a. Based on an extended analysis, the majority rejected plaintiffs' argument for the "discovery rule," under which their claims would accrue "on the date individual plaintiffs encountered a noncompliant curb, sidewalk, or parking lot." *Id*. at 126a; see also *id.* at 128a-129a (noting that a discovery rule would open up public entities to "unlimited exposure to liability"). The panel nonetheless vacated and remanded the case on the ground that the statute of limitations was an affirmative defense and the burden was therefore on the City, not the plaintiffs, to establish the facts necessary to establish that defense. App., *infra,* 130a-131a.

b. Judge Prado dissented in part. App., *infra,* 132a-150a. He found the majority's accrual rule inconsistent with "the ADA's broad remedial purpose." *Id*. at 132a. Judge Prado would have held that accrual occurs "when a plaintiff suffers an injury under the Act based on that plaintiff's actual (as opposed to conjectural) inability to traverse the noncompliant sidewalk or other facility." *Ibid*.

4. *The Amended 2-1 Panel Opinion*. a. On rehearing, the panel withdrew its original opinion and issued a revised opinion. App., *infra,* 73a-111a. Reversing itself, the majority first held that sidewalks themselves are *not* "services, programs, or activities of a public entity" under the ADA. *Id.* at 88a-93a. Title II of the ADA, the majority explained, "mandates the modification of physical infrastructures that 'effectively deny' access to a public entity's services, programs, or activities. Within this framework, sidewalks, curbs, and

parking lots are 'facilities,' not 'services, programs, or activities.'" *Id.* at 75a.

The majority acknowledged that several circuits had interpreted the phrase "services, programs, or activities" far more broadly to encompass "everything that a public entity does," but emphatically rejected that reading as inconsistent with the ADA's definition of a "qualified individual with a disability" (42 U.S.C. § 12131(2)), the ordinary meaning of "services, programs, or activities," and the structure and language of the Justice Department's own regulations. App., *infra,* 87a-93a & n.10. Thus, Section 12131(2) defines "[a] 'qualified individual with a disability' as one who 'with or without . . . the removal of . . . *transportation barriers* . . . meets the essential eligibility requirements for the receipt of *services* or the participation in *programs* or *activities* provided by a public entity.'" *Id.* at 88a (quoting 42 U.S.C. § 12131(2)). That language makes "clear that Congress contemplated that some physical infrastructures constitute a different category from the 'services' to which they provide access." *Ibid.*

Moreover, the majority explained, dictionary definitions point in the same direction because "infrastructure is usually inanimate; this suggests that while infrastructure may aid in the provision of other services, it is not considered a service itself." App., *infra*, 88a-89a. Finally, the court explained that in multiple ways the Justice Department's own regulations confirm this reading. The court pointed to the regulations' "explicit identification of sidewalks, curbs, and parking lots as facilities; the relationship between facilities and services, programs, and activities in § 35.149; and the creation

of regulations unique to facilities in §§ 35.150-151." App., *infra,* 93a. Taken together, these features of the regulations "clearly indicate to us that sidewalks, curbs, and parking lots are covered by the statute, not as 'services,' but in their capacity as gateways to 'services, programs, or activities,' *i.e.,* as facilities." *Id.* at 93a.

Turning to the accrual issue, and applying this revised understanding of "services, programs, or activities," the majority held that a plaintiff "has two years, from the time she knew or should have known that she was denied access to a service, program, or activity, to challenge the architectural barriers causing the exclusion." App., *infra,* 96a.

b. Judge Prado again dissented in part. App., *infra*, 98a-111a. This time, he agreed with the majority's accrual rule but took issue with its holding "that sidewalks, curbs, and parking lots are not services under the ADA." *Id.* at 98a (footnote omitted). In Judge Prado's view, the "correct inquiry" was not whether sidewalks are themselves services but rather whether "a city provides a service through the construction, maintenance, or alteration of those sidewalks." *Id*. at 99a. Judge Prado was of the view that the answer is "yes" and that any distinction between "tangible facilities" and "intangible services" was unworkable. *Id*. at 109a-111a.

5. *The 8-7 En Banc* Decision. a. On further rehearing, the en banc Fifth Circuit reversed course again on the issue of whether sidewalks are a "service," "program," or "activity" under the ADA and the Rehabilitation Act. App., *infra,* 1a-111a. The majority first observed that there were "two different

ways of framing" the issue of the ADA's scope – (a) "whether *building* and *altering* sidewalks are services, programs, or activities," the "benefits" of which are "the resulting sidewalks"; or (b) whether "a city sidewalk *itself* is a service, program, or activity." *Id.* at 13a. The case, however, did "not turn on how we frame the issue" because "[e]ither way, when a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, the city . . . denies disabled individuals the benefits of its services in violation of Title II." *Id.* at 13a-14a (footnote omitted).

Next, the majority held that sidewalks are "unambiguously" a "service, program, or activity of a public entity" under the ADA and Rehabilitation Act. App., *infra,* 14a. The majority relied on the text of the Rehabilitation Act, which "defines a 'program or activity' as 'all of the operations of . . . a local government'"; on *Pennsylvania Dep't of Corrections* v. *Yeskey,* 524 U.S. 206 (1998), which held that prison programs were not excluded from the ADA; and on "common understandings" purportedly reflected in various dictionary definitions. See also App., *infra,* 15a-18a (reasoning that a sidewalk is a service because it "afford[s] a means of safe transportation," "protect[s] pedestrians" from traffic hazards, and supplies a venue for "public assembly and discourse"). The majority also purported to find support for its holding in the Justice Department's regulations, in the ADA's legislative history, and in an *amicus* brief filed by the Department of Justice. *Id.* at 18a-19a, 23a-25a, 34a.

Finally, the majority addressed the accrual issue. App., *infra,* 38a-45a. Based largely on the reasoning that had been set out in Judge Prado's dissent to the amended panel opinion, the majority ruled that "the plaintiffs' cause of action accrued when they knew or should have known they were being denied the benefits of the City's newly built or altered sidewalks." *Id.* at 42a. The majority rejected the City's argument that claims accrued "at the time the City built or altered the inaccessible sidewalks." *Id.* at 42a-45a.[2]

b. Judge Jolly, joined by six judges, dissented in part. App., *infra,* 46a-70a. Based on a detailed analysis similar to that included in the panel's amended majority opinion, the dissenters rejected the majority's conclusion that "sidewalks" qualify as a "service," "program," or "activity" under the ADA or the Rehabilitation Act. The dissenters emphasized that "[t]he statute implicitly classifies a noncompliant sidewalk – not as a service – but as a transportation barrier and a facility, and the regulations specifically define a sidewalk as a facility." *Id.* at 48a. The dissenters would have followed the lead of several decisions of the First Circuit, which held that "facilities are relevant in the ADA context only in their capacity as a gateway to service," *id.* at 65a-66a (citing *Iverson* v. *City of Boston,* 452 F.3d 94, 99-100 (1st Cir. 2006), and *Parker* v. *Universidad de Puerto*

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[2] The majority declined to reach the City's argument that, as construed by the majority, Title II of the ADA exceeded Congress's authority under Section 5 of the Fourteenth Amendment (or that the majority should avoid that constitutional issue by reading the statute narrowly). App., *infra*, 37a-38a.

Rico, 225 F.3d 1, 6-7 (1st Cir. 2000)), as well as decisions of the Eighth and Eleventh Circuits recognizing the key "distinction between facilities and services in the context of courthouse access for disabled persons," *id.* at 66a (citing *Shotz* v. *Cates,* 256 F.3d 1077, 1080 (11th Cir. 2001), and *Layton* v. *Elder,* 143 F.3d 469, 473 (8th Cir. 1998)).[3]

REASONS FOR GRANTING THE PETITION

Has every city in America been under an obligation for almost two decades to make every sidewalk accessible, subject only to a case-by-case defense of "undue burden"? After almost two decades, that question is so unsettled that it divided the court below 8-7. The breathtakingly broad "yes" answer requires torturing the statutory language to transform all municipal infrastructure into a "service," "program" or "activity." To the extent the en banc majority relied on the Justice Department's effort to interpret the statutory language by promulgating an ambiguous regulation, and interpreting its regulation in an *amicus* brief, it defies the principle that "we must be guided to a

[3] The seven dissenting judges also criticized the majority for seeking improperly to "reframe" the issue as involving whether the "building" or "altering" of sidewalks (rather than the sidewalk itself) qualifies as a "service," "program," or "activity." App., *infra,* 49a, 66a-67a. Apart from changing the question presented by the litigants, that approach "falsely assumes that the public generally is provided access to commandeer" the "services of public construction workers" in building and altering sidewalks, and it ignores the requirement under the ADA and Rehabilitation Act that the denial of a public service be "by 'reason of disability.'"

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 Fifth Circuit's decision, public entities in Louisiana, Mississippi and Texas 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" regardless of whether the sidewalk provides access to any municipal programs. 28 C.F.R. § 35.150. There can be no serious dispute, moreover, that the question presented is one of profound importance. And, if sidewalks qualify as a public service, program or activity, it is difficult to see why the same would not be true of roads, bridges, buildings and other types of physical facilities or infrastructure owned (and therefore from time to time "operated" or "maintained") by public entities. As the seven-judge minority correctly noted, "If one concludes, as the majority does, that somehow a sidewalk is a 'service,' then one concludes that the subject matter of a private cause of action against a public entity under Title II is unlimited . . . ." App., *infra*, 48a-49a. The fiscal ramifications of the Fifth Circuit's ruling are staggering.

Those practical ramifications are magnified, moreover, by the en banc court's flawed resolution of the issue of when the plaintiffs' construction-related claims accrued. Under the decision below, state and local governments will be saddled with open-ended, perpetual liability with respect to sidewalks and

other facilities that are constructed in a way that does not permit full access to persons with disabilities. Even decades after the construction or alteration is completed, state and municipal governments will remain open to litigation and liability. To address both of the significant issues presented, further review is warranted.

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE MEANING OF GOVERNMENTAL "SERVICES, PROGRAMS, OR ACTIVITIES" COVERED BY THE ADA AND THE REHABILITATION ACT

Over a strong dissent, the Fifth Circuit sitting en banc held that a City's sidewalks, curb ramps, and parking lots qualify as a "service," "program," or "activity." The 8-7 en banc decision, standing alone, provides a powerful argument that this issue is exceptionally important and difficult and deserving of this Court's attention. But there is more.

As we explain below, the Fifth Circuit's decision exacerbates conflicts and confusion in the lower courts over the reach of Title II of the ADA and the Rehabilitation Act. To be sure, no other federal court of appeals has squarely ruled that sidewalks are *not* a "service, program, or activity" (now that the three-judge panel's amended opinion below has been vacated and superseded).[4] And the Ninth Circuit, in

[4] Several district courts have held that sidewalks are not "services, programs, or activities." See, *e.g.*, *New Jersey Protection & Advocacy, Inc.* v. *Township of Riverside,* No. 04-5914, 2006 WL 2226332, at *3 (D.N.J. Aug. 2, 2006); *Greer* v. *Richardson Indep. School District*, 752 F. Supp. 2d 759, 762-63 (N.D. Tex. 2010) (relying on amended panel decision in this case).

Barden v. *City of Sacramento,* 292 F.3d 1073, 1074, 1076 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003) (No. 02-815), has taken the same position as the Fifth Circuit on the meaning of "services, programs, or activities."[5] Nevertheless, the en banc majority's decision is inconsistent with a number of circuit decisions and symptomatic of a much broader confusion concerning the meaning of the crucial phrase, "services, programs, or activities" that define the reach of these important federal disability-discrimination laws.

A. The en banc majority held that "building" and "altering" sidewalks – as well as the sidewalks themselves – "unambiguously" were "services, programs, or activities of a public entity" under the ADA

[5] Even though *Barden* was the first appellate decision on the sidewalks issue, this Court invited the Solicitor General to file a brief expressing the views of the United States. See 537 U.S. 1231 (2003) (order). Sacramento's certiorari petition (which raised only the sidewalks issue) drew strong support from *amicus* briefs filed or joined by the National League of Cities, the U.S. Conference of Mayors, the National Association of Counties, and numerous major American cities (including Boston, Dallas, Denver, Nashville, and New York). The Solicitor General's brief urged this Court to deny review, arguing that the three-judge panel's decision in *Barden* was interlocutory and might be mitigated or altered (by future remand proceedings and appeals) and there was no circuit conflict on the sidewalks issue. See No. 02-815 U.S. Br. 13-18 (May 27, 2003); see also No. 02-815 Pet. Supp. Br. (June 5, 2003). After review was denied, Sacramento chose to settle rather than face potentially ruinous liability. See Order re Settlement and Disposition, *Barden* v. *City of Sacramento*, No. CIV-S-99-0497 (E.D. Cal. filed July 17, 2003). Now, more than eight years later, the sharply divided en banc decision below demonstrates that this issue is not going away.

and the Rehabilitation Act. App., *infra,* 13a-14a. Given the failure of the ADA to define "services, programs, or activities," the majority first looked to the Rehabilitation Act's definition of "program or activity" as "all of the operations of . . . a local government." *Id.* at 13a (citing 29 U.S.C. § 794(b)(1)(A)). Borrowing that definition, it reformulated the question as being "whether newly built and altered city sidewalks are benefits of 'all of the operations' and 'services' of a public entity within the ordinary meaning of those terms." *Ibid.* The en banc majority answered that question affirmatively. The majority thus held that the ADA and the Rehabilitation Act cover "all of the operations" of a public entity and any "dut[y], work, or business performed or discharged by a public official." *Id.* at 15a-16a (internal quotation marks omitted).

Although the Fifth Circuit reasoned that this answer found support in *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), and *Tennessee* v. *Lane,* 541 U.S. 509 (2004), see App. 12a-13a, 28a, in fact those decisions either lend no support or point in the opposite direction. In *Lane*, this Court analyzed the ADA's requirement to make services accessible, and held that local governments must "remove architectural and other barriers to [the] accessibility" of "judicial services." 541 U.S. at 531-32. This Court emphasized the flexibility granted to local governments under the ADA and its regulations, stating that "a public entity may comply with Title II by adopting a variety of less costly measures, including relocating *services* to alternative, accessible *sites* and assigning aides to assist persons with disabilities in accessing services." *Id.* at 532 (emphasis added); see

also *ibid.* (discussing permissibility of dealing with inaccessibility of certain "facilities" by relocating "services" to other facilities). The Court's opinion thus reflects a recognition that "facilities" (or physical "infrastructure") are not the same thing as "services."[6]

B. The en banc Fifth Circuit's broad view equating "facilities" with "services" under the ADA and Rehabilitation Act conflicts with decisions of the First, Eighth, and Eleventh Circuits. In *Parker* v. *Universidad de Puerto Rico*, 225 F.3d 1, 6-7 (1st Cir. 2000), the First Circuit examined the accessibility requirements applicable to a site located within the Botanical Gardens of the University of Puerto Rico, where the University provided the service of hosting group events. The court noted the regulatory distinction between facilities and services, and held that Title II focuses on "'program accessibility' rather than 'facilities accessibility' . . . to ensure broad access to public services, while at the same time,

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[6] See also 541 US. at 527 (referring to report showing that "some 76% of public *services* and *programs* housed in state-owned *buildings* were inaccessible" to persons with disabilities) (emphasis added). *Yeskey* likewise provides no support for the en banc majority's holding. In that case, this Court merely held that a motivational boot camp in Pennsylvania's prison system qualified as a "service[], program[], or activit[y]." The Court reasoned that "[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 these programs, services, and activities from those provided by public entities that are not prisons." 524 U.S. at 210.

providing public entities with the flexibility to choose how best to make access [to services] available." *Ibid*. Although the government was required to "provide at least one route that a person in a wheelchair can use to" access the various ceremonies hosted at the site in question, the First Circuit explained, the government was not required to reconstruct "every passageway." *Id*. at 7. Accord *Iverson* v. *City of Boston,* 452 F.3d 94, 102-03 (1st Cir. 2006) ("The plaintiffs' complaint offered no meaningful explanation as to how – if at all – the conditions of municipal streets and sidewalks deprived Iverson (or anyone else) of access to *any* public service, program, or activity. For that reason alone, the plaintiffs' barrier-removal claim fails as a matter of pleading.").

Unlike the Fifth Circuit, the Eighth and Eleventh Circuits have also drawn a clear distinction between facilities and services in the context of access for disabled persons to judicial services offered in a courthouse. See *Shotz* v. *Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) ("[Plaintiffs] allege that the wheelchair ramps and bathrooms at the courthouse impede their ability to attend trials. . . . A trial undoubtedly is a service . . . within the meaning of § 12132."); *Layton* v. *Elder*, 143 F.3d 469, 473 (8th Cir. 1998) ("[I]f the county intends to continue using the county *courthouse* to provide *services* . . . it must make . . . the building accessible to individuals with disabilities . . . .") (emphasis added).[7] The Fifth Circuit's decision is inconsistent with these decisions.

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[7] Other courts have also distinguished clearly between "facilities" and "services." See, *e.g., Aswegan* v. *Bruhl,* 113 F.3d 109, 110 (8th Cir. 1997) ("[T]he cable television sought by

C. The Fifth Circuit's expansion of the definition of "services, programs, or activities" 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 Circuit has refused to treat police officers' conduct in arresting a suspect as a service, program, 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 an 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"). Accord *Hainze* v. *Richards*, 207 F.3d 795, 800-01 (5th Cir. 2000) ("Title

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Aswegan is not a public service, program, or activity within the contemplation of the ADA."); *Bryant* v. *Madigan,* 84 F.3d 246 (7th Cir.) (incarceration and provision of place to sleep to incarcerated person is not a service, program, or activity under the ADA), reh'g denied, 91 F.3d 994 (7th Cir. 1996); *Filush* v. *Town of Weston,* 266 F. Supp. 2d 322, 328-29 (D. Conn. 2003) (personnel and equipment used by municipality to provide public education or transportation or law enforcement services are not themselves services or programs, but rather are conduits for providing services).

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 with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life.").

Under the en banc Fifth Circuit's new standard, these decisions would now come out the other way. Certainly, an arrest by a law enforcement officer is an "operation" of a public entity. Nor can there be any serious question that law enforcement is "a dut[y], work, or business performed or discharged by a public official." App., *infra,* 15a-16a (internal quotations omitted).

2. *Employment*. Consistent with the broad standard set out by the Fifth 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. 1998). In contrast, the Ninth Circuit has held that employment by a public entity is *not* a service, program, or activity. *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1174 (9th Cir. 1999). Relying on the distinction between a public entity's "inputs" and "outputs," the Ninth Circuit explained:

> 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).

Under the Fifth 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 a "duty, work or business performed or discharged by a public official." It is also readily characterized as an "operation" of government.

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 rejected that 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 (1999) (internal quotations omitted); see also, *e.g.*, *In re B.S.*, 693 A.2d 716, 720 (Vt. 1997) (same). Again, these decisions would have come out differently under the test now to be used by the Fifth Circuit. A termination-of-parental-rights proceeding is an "operation" of government; it also clearly

involves "work" or a "duty" performed by a public official.

D. The issue of whether a municipal government's sidewalks are "services, programs, or activities" under Title II is of paramount importance. If permitted to stand, the Fifth Circuit's decision will impose on the City of Arlington a duty to make all sidewalks, curbs, and parking lots (not to mention other forms of infrastructure) "accessible" to persons with disabilities. According to respondents, the ADA and the Rehabilitation Act require the City to alter, reconfigure, or even rebuild its existing sidewalks to widen surfaces and correct excessive slopes and cross-slopes; move utility poles, telephone poles, trees and guide wires; eliminate objects that might present an impediment or obstacle to individuals in wheelchairs; and eliminate all abrupt changes in level, including flares and cross slopes where private residential driveways cross neighborhood sidewalks. Moreover, many of respondents' allegations concern non-contiguous or missing sidewalks. Under the decision below, the City would be required to build sidewalks to make a continuous accessible route throughout the City. Arlington has thousands of miles of sidewalks.

The impact and cost of complying throughout the Fifth Circuit would be very substantial indeed. It is difficult to imagine that any municipality exists without some broken sidewalks or obstacles to travel such as utility poles, signs, and guide wires. Earthquakes, drought, and hurricanes take their toll on new construction, requiring constant maintenance. And most municipalities (especially those with historic areas) have sidewalks that do not meet the ADA's width requirements, and that have steep cross

or running slopes. 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 Fifth Circuit's ruling. Under the en banc court's expansive 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 "service, program, or activity," and must be made accessible under the ADA. There are approximately 447,170 miles of roads in the Fifth Circuit alone, and more than 3,981,670 miles of roads nationwide. See Public Road and Street Mileage – 2004, http://www.fhwa.dot.gov/ policy/ 2004cpr/chap16a.htm, p. 2.

E. Finally, review is warranted because the Fifth Circuit's sweeping interpretation of two important federal anti-discrimination statutes is manifestly incorrect, as the en banc dissent persuasively demonstrates (for many reasons that will not be restated here). See App., *infra*, 46a-70a. The en banc majority got it wrong when it determined that the ADA covers every conceivable "operation" of government. That gloss is over-inclusive. As we explained above, it is certainly an "operation" 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."

Contrary to the en banc majority's suggestion, sidewalks do *not* fall within the plain meaning of the words "program," "service," or "activity." A program 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 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. 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 and useful component of a city's infrastructure.

Other evidence in the statutory text confirms that sidewalks are not themselves a service, program, or activity. For example, the ADA defines a "qualified individual 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.

Nor can the plain language of the ADA be expanded by specific reference to the Rehabilitation

Act (see App., *infra*, 13a). The Fifth Circuit majority relied on the Rehabilitation Act's definition of "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). 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 *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. 465 U.S. at 566. 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 receives financial support from the federal government. 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 4 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3, 6.

Finally, the Fifth Circuit was also wrong to rely on the Justice Department's litigating position that existing sidewalks are a program covered by Title II. App., *infra*, 34a. 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); *Sutton* v. *United*

Air Lines, Inc., 527 U.S. 471, 482 (1999). In any event, the Justice Department's position deserves no deference. 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).[8]

Far from being "consistent" with its "earlier pronouncements," the Justice Department's litigating position on the "sidewalks" issue contradicts its prior statements. Since the enactment of the ADA, the Department has regularly provided advice regarding public entities' duties under the statute. In previous guidance, the Department has not stated that a sidewalk itself must be accessible. Instead, it has taken the position that a sidewalk is covered only insofar as it is used to access a specific program,

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[8] This Court recently granted certiorari to consider the degree (if any) of deference to an agency's interpretation of its own regulations – ordinarily, under *Auer* v. *Robbins*, 519 U.S. 452 (1997), given even greater deference than the *Chevron* deference given to certain agency interpretations of statutes – when the agency has taken inconsistent positions in the past and has attempted to announce its new position though an *amicus* brief. *Christopher* v. *SmithKline Beecham Corp.*, No. 11-204 (cert. granted Nov. 28, 2011).

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 access 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*, 187a-188a (emphasis added). See also *id.* at 188a (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*, 185a-186a. 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 http://www.justice.gov/crt/foia/readingroom/frequent_requests/cltr191.txt. "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 clear that the Department has not consistently taken the position in the past that sidewalks are covered by Title II.

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." 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, 212-13 (1988)). The interpretation advanced by the Justice Department in the Fifth Circuit, and accepted by that court, is therefore entitled to no deference.

II. THE ACCRUAL ISSUE INDEPENDENTLY WARRANTS REVIEW

The court below decided a second important issue of federal anti-discrimination law: When exactly does a cause of action accrue under Section 202 of the ADA and Section 504 of the Rehabilitation Act, where the claim targets a state or municipal government's failure to originally build or alter sidewalks, curb ramps, or parking lots – or by logical extension, other types of facilities – so as to provide persons with disabilities with adequate access to a governmental "service," "program," or "activity"? The judges in this case gave multiple, inconsistent answers with far-reaching consequences for the liability exposure and budgets of the City of Arlington and state and local governments across the country.

A. No fewer than *four* different answers were provided below. They identified four different times at which a plaintiff's claim accrues and the statute of limitations begins to run:

> (1) when a plaintiff first knew or should have known that he was being denied the benefits of the City's newly built and altered sidewalks (the rule adopted by the en banc majority, App., *infra*, 41a);
>
> (2) "on the date the City completed the construction or alteration of any noncompliant curb, sidewalk, or parking lot" (the rule adopted by the district court and the original panel majority, App., *infra*, 129a, see also *id.* at 158a-160a);
>
> (3) "when a plaintiff suffers an injury under the Act based on that plaintiff's actual (as opposed to conjectural) inability to traverse the noncompliant sidewalk or other facility" (the rule adopted by Judge Prado in dissenting from the original panel opinion, App., *infra*, 132a); and
>
> (4) when a plaintiff first "knew or should have known that she was denied access to a service, program, or activity" (*not* the sidewalk itself), "on account of [a] noncompliant facility" (the rule adopted by the panel majority in its amended opinion, App., *infra*, 96a, 98a).

The first three approaches assume that a sidewalk is itself a "service," "program," or "activity" under Title II and the Rehabilitation Act; the last assumes the opposite and looks to whether the government's

services, programs or activities are rendered inaccessible because of architectural barriers or other features of facilities or infrastructure.

Two of these four accrual rules (including the en banc majority's approach) incorporate the "discovery rule," under which a plaintiff's actual or imputed knowledge is important, whereas two do not. Indeed, the original panel majority emphatically *rejected* any use of the discovery rule in this setting, noting that this Court had pointedly declined to adopt a "default federal discovery rule," and had limited its use to "cases alleging fraud or medical practice" – both of which, unlike this case, involve "latent injuries." App., *infra,* 127a (citing *TRW Inc.* v. *Andrews,* 534 U.S. 19, 27 (2001)). A discovery rule as applied here was also inappropriate, the original panel majority explained, because it "would forever deny the City a definite limitations period," since "every future plaintiff's discovery of a noncompliant sidewalk would reset the limitations clock." *Id*. at 128a. That result, in turn, would contravene "the policies underlying the statute[] of limitations" including "protect[ion of] defendants against stale claims"; would "eviscerat[e]" the limitations defense in similar ADA cases; and would open up public entities to "unlimited exposure to liability." *Id*. at 128a-129a. In nevertheless adopting a "discovery rule" component, the en banc majority offered no persuasive answer to these objections. *Id*. at 41a, 44a.[9]

[9] Both the district court and the original panel majority went out of their way to reject plaintiffs' argument that their discrimination claims were not time-barred because the City was engaged in a "continuing violation." App., *infra,* 159a. The

B. Unfortunately, the pervasive confusion below on the accrual issue is not unique to this case. Cases in the lower federal courts are sharply divided over the proper accrual rule in this setting. See *Moseke* v. *Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 510 (E.D. Va. 2002); *Speciner* v. *NationsBank, N.A.*, 215 F. Supp. 2d 622, 634-35 (D. Md. 2002); *Deck* v. *City of Toledo*, 56 F. Supp. 2d 886, 892 (N.D. Ohio 1999); *Disabled in Action* v. *Southeastern Pennsylvania Transportation Authority*, 2006 WL 3392733, at *11 (E.D. Pa. Nov. 17, 2006); Eve Hill & Peter Blanck, *Future of Disability Rights: Part Three, Statutes of Limitations in Americans With Disabilities Act "Design and Construction Cases,"* 60 SYRACUSE L. REV. 125, 137-154 (2009) (reviewing extensive case law).[10]

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district court explained that, "even under this theory, at least one of the discriminatory acts must have occurred within the limitations period," yet "[b]y plaintiffs' own account, the most recent alteration . . . was three years before the complaint was filed." *Ibid.* The original panel majority reasoned that it was hesitant to extend the "continuing violation" theory beyond the employment discrimination context, especially where, as here, the alleged violations were *not* related. *Id.* at 124a. Despite these criticisms of using a "continuing violation" concept in this setting, the en banc majority adopted the same result under a different label.

[10] The original panel majority also relied for its "construction completion" accrual rule on *Disabled in Action* v. *Southeastern Penn. Transp. Auth.,* 539 F.3d 199, 209 (3d Cir. 2008), which held that claims brought under 42 U.S.C. § 12147(a) to compel ADA compliance at public transportation facilities accrue upon the completion of alterations to those facilities. App., *infra*, 125a-128a; but see *id.* at 136a-137a (dissenting opinion).

For example, in cases involving design-and-construction claims under both Title II of the ADA and the Fair Housing Act ("FHA"), some courts have endorsed the approach taken by both the district court and the original panel majority in this case: a claim accrues on the date that the public entity completes the construction or alteration of the noncompliant sidewalk, curb, or parking lot. See, *e.g.*, *Garcia* v. *Brockway*, 526 F.3d 456, 461 (9th Cir. 2008) (per Kozinski, J.) (en banc) (in case involving design-and-construction claim under the FHA, holding that the claim accrues "at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued"). The Ninth Circuit's decision in *Garcia* is particularly instructive. There, the en banc majority not only adopted the "date of construction" rule of accrual, but also emphatically rejected competing rules based on a "continuing violation" theory, a "discovery" theory, and a theory that focuses on when the plaintiff "encounters" and is injured by the design-and-construction defect. See *id.* at 461-65.

In contrast, other courts, like the en banc Fifth Circuit majority, have rejected the "date of construction or alteration" approach in favor of a variant of the "discovery rule" under which accrual occurs when the "plaintiff knows or should know of the injury which forms the basis for his Title II claim." *Voices for Independence* v. *Pennsylvania Dept. of Transportation*, 2007 WL 2905887, at *15 (W.D. Pa. Sept. 28, 2007); see also, *e.g.*, *HIP, Inc.* v. *Port Auth. N.Y. & N.J.*, 2008 WL 852445, at *4 (D.N.J. March 28, 2008) (reopening of newly constructed station "alone, did not injure" wheelchair-

bound individuals; only after they attempted to use station, and "and realized that it was not accessible . . . was an injury sustained").[11]

B. The accrual issue is doctrinally important and recurring. As the authorities cited above make clear, it arises regularly not only under the ADA and Rehabilitation Act but also under other federal anti-discrimination statutes such as the FHA. Given the disarray in the reported decisions, commentators have aptly described accrual as "a central and unsettled issue in ADA rights enforcement." Hill & Blanck, *supra*, 60 SYRACUSE L. REV. at 126; see also App., *infra*, 124a-125a (original panel majority describing accrual as "the crucial issue in this appeal"). The choice between accrual rules also has enormous financial consequences for states and local governments (and other types of entities under the FHA). And the mere existence of legal uncertainty in this area has negative collateral effects. See Hill & Blanck, *supra*, 60 SYRACUSE L. REV. at 132 ("In construction-related cases, statutes of limitations allow building owners to plan effectively, determine appropriate insurance needs and expenditures, and confidently appraise, purchase and sell buildings. These interests are served by applying statutes of

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[11] Examples of approach No. 3 include *Pickern* v. *Holiday Quality Foods Inc.*, 293 F.3d 1133, 1136-37 (9th Cir. 2002), and *Access 4 All, Inc.* v. *Trump Int'l Hotel & Tower Condominium*, 458 F. Supp. 2d 160, 167 (S.D.N.Y. 2006). Examples of approach No. 4 include *Mosier* v. *Kentucky*, 675 F. Supp. 2d 693, 698 (E.D. Ky. 2009), and *Toney* v. *U.S. Healthcare, Inc.*, 840 F. Supp. 357, 360 (E.D. Pa. 1993).

limitations in disability construction cases consistently . . . ."). Review is warranted to remove this uncertainty.

C. Finally, review of the accrual issue is needed because the Fifth Circuit decided it incorrectly. To the extent the en banc majority incorporated a discovery rule (by specifying that accrual occurred when a plaintiff "knew or should have known" she was being denied the benefits of the City's newly built and altered sidewalks), it ignored this Court's refusal to adopt a "default federal discovery rule" and practice of limiting use of such a rule to "cases alleging fraud or medical practice" – both of which, unlike this case, involve "latent injuries." App., *infra,* 127a (citing *TRW Inc.* v. *Andrews,* 534 U.S. 19, 27 (2001)); see also *Andrews,* 534 U.S. at 37 (Scalia, J., concurring) (criticizing "injury-discovery rule" as "bad wine of recent vintage").

Moreover, the en banc majority's rule ensures that there is *no end point* to a municipal government's liability on a construction or alteration claim, unless and until the challenged sidewalk or parking lot is rebuilt or otherwise corrected. As Judge Kozinski explained for the en banc Ninth Circuit in *Garcia*, however, "[a]lthough the ill effects of a failure to properly design and construct may continue to be felt decades after construction is complete, failing to design and construct is a single instance of unlawful conduct." 526 F.2d at 463. Without disputing that its approach creates "'unlimited potential municipal liability'" with respect to injunctive relief concerning newly built and altered sidewalks, the en banc Fifth Circuit majority provided these words of reassurance: "The City may

avoid liability whenever it chooses simply by building sidewalks right the first time, or by fixing its original unlawful construction. In other words, the City is not liable forever; it is responsible only for correcting its own mistakes." App., *infra*, 44a. That is cold comfort indeed when defining sidewalks as programs subjects them to program accessibility requirements. Thus, each new sidewalk crack caused by shifting soil or tree roots creates a new federal cause of action under the Fifth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAY DOEGEY
City Attorney
DENISE V. WILKERSON
Assistant City Attorney
P.O. Box 90231
Arlington, Texas 76004
(817) 459-6878

EDWIN P. VOSS, JR.
Brown & Hofmeister, L.L.P.
740 E. Campbell Road
Suite 800
Richardson, Texas 75081
(214) 747-6100

ALAN E. UNTEREINER
Counsel of Record
ROY T. ENGLERT, JR
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500
auntereiner@robbinsrussell.com

DECEMBER 2011

APPENDIX

APPENDIX A

United States Court of Appeals,
Fifth Circuit.

RICHARD FRAME; WENDELL DECKER; SCOTT UPDIKE; J N, a minor, by his next friend and mother GABRIELA CASTRO; MARK HAMMAN; JOEY SALAS,
Plaintiffs-Appellants,

v.

CITY OF ARLINGTON, A Municipal Corporation,
Defendant-Appellee.

No. 08-10630.

Sept. 15, 2011.

Appeal from the United States District Court for the Northern District of Texas

Before JONES, Chief Judge, and KING, JOLLY, DAVIS, SMITH, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD,

SOUTHWICK and HAYNES, Circuit Judges.*

BENAVIDES and PRADO, Circuit Judges:

Title II of the Americans with Disabilities Act (ADA),[1] like § 504 of the Rehabilitation Act,[2] provides that individuals with disabilities shall not "be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." For nearly two decades, Title II's implementing regulations have required cities to make newly built and altered sidewalks readily accessible to individuals with disabilities. The plaintiffs-appellants in this case, five individuals with disabilities, allege that defendant-appellee the City of Arlington (the City) has recently built and altered sidewalks that are not readily accessible to them. The plaintiffs brought this action for injunctive relief under Title II and § 504.

We must resolve two issues. First, we must determine whether Title II and § 504 (and their implied private right of action) extend to newly built and altered public sidewalks.[3] Second, we must determine whether that private right of action accrued at the time the City built or altered its

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* Judge Graves did not participate in this decision.

[1] 42 U.S.C. § 12132.

[2] 29 U.S.C. § 794(a).

[3] Unless otherwise indicated, references to "sidewalks" refer to public sidewalks and parking lots.

inaccessible sidewalks, or alternatively at the time the plaintiffs first knew or should have known they were being denied the benefits of those sidewalks. We hold that the plaintiffs have a private right of action to enforce Title II and § 504 with respect to newly built and altered public sidewalks, and that the right accrued at the time the plaintiffs first knew or should have known they were being denied the benefits of those sidewalks.

I

The plaintiffs in this case depend on motorized wheelchairs for mobility. They allege that certain inaccessible sidewalks make it dangerous, difficult, or impossible for them to travel to a variety of public and private establishments throughout the City. Most of these sidewalks allegedly were built or altered by the City after Title II became effective on January 26, 1992.[4] The plaintiffs sued the City on July 22, 2005, claiming that the inaccessible sidewalks violate Title II of the ADA and § 504 of the Rehabilitation Act. The complaint was most recently amended on August 9, 2007. The plaintiffs seek injunctive relief but not damages.

The district court dismissed the plaintiffs' complaint on statute-of-limitations grounds. The district court determined that the plaintiffs' claims accrued, and the relevant two-year limitations period

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[4] Title II was enacted on July 26, 1990 and became effective eighteen months later on January 26, 1992. Pub. L. No. 101-336 § 205(a), 104 Stat. 327, 338 (1990), (codified as amended at 42 U.S.C. §§ 12131-12165).

began to run, on the date the City finished building or altering any inaccessible sidewalk. After requiring the plaintiffs to "replead their case and allege specific dates of the City's alteration or construction efforts," the district court dismissed the complaint because it did not allege dates of construction or alteration within two years of July 22, 2005.

On appeal, a panel of this Court began by considering whether the plaintiffs had a private right of action to enforce Title II with respect to inaccessible sidewalks. The panel unanimously held that the plaintiffs had such a right because public sidewalks are "services, programs, or activities" of a public entity within the plain meaning of Title II.[5] The panel next considered whether the plaintiffs' claims were barred by Texas's two-year personal-injury statute of limitations. The panel determined that the statute of limitations is an affirmative defense on which the defendant has the burden of proof, and that the district court erred in requiring the plaintiffs to plead dates of construction in their complaint. The panel would have remanded for further proceedings. One member of the panel dissented, however, with respect to the panel majority's finding that the plaintiffs' claims "accrued on the date the City completed the construction or alteration of any noncompliant" sidewalk.[6]

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[5] *See Frame v. City of Arlington*, 575 F.3d 432, 435-37 (5th Cir. 2009) ("*Frame I*"), *withdrawn*, 616 F.3d 476 (5th Cir. 2010) ("*Frame II*"), *vacated and reh'g en banc granted*, 632 F.3d 177 (5th Cir. 2011).

[6] *Frame I*, 575 F.3d at 441.

According to the dissenting judge, the plaintiffs' claims did not accrue until the plaintiffs "physically encounter[ed], or actually learn[ed] of and [were] deterred from attempting to access, a noncompliant sidewalk."[7]

Both parties petitioned for rehearing en banc. The panel majority withdrew its initial opinion and issued a revised opinion.[8] In the revised opinion, the panel majority determined that sidewalks were not "services, programs, or activities of a public entity" within the meaning of Title II. The panel majority thus held that the plaintiffs did not have a private right of action to enforce Title II with respect to sidewalks "in instances where these facilities do not prevent access to some [other] service, program, or activity."[9] The panel majority would have remanded the case "only to the extent [the plaintiffs] have alleged a noncompliant sidewalk, curb, or parking lot denies them access to a program, service, or activity that does fall within the meaning of Title II."[10] With respect to the statute of limitations, however, the panel unanimously found that the plaintiffs' claims did not accrue until the plaintiffs "knew or should have known" they were denied the benefits of the City's services, programs, or activities.[11] A member

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[7] *Id.* at 445.

[8] *Frame II*, 616 F.3d at 486.

[9] *Id.* at 488.

[10] *Id.* at 490.

[11] *Id.*

of the panel again dissented, asserting that the construction, alteration, and maintenance of public sidewalks unambiguously are services, programs, or activities of a public entity within the plain meaning of Title II.[12]

We granted the plaintiffs' second petition for rehearing en banc. At oral argument, the plaintiffs unequivocally abandoned any claims with respect to sidewalks built on or before (and not altered after) January 26, 1992. Accordingly, we deem the plaintiffs' claims with respect to such sidewalks waived and abandoned.[13] All that remain to be considered are the plaintiffs' claims with respect to sidewalks built or altered after January 26, 1992. We refer to such sidewalks as newly built or altered sidewalks.

II

We review de novo a district court's dismissal of a complaint under Rule 12(b)(6).[14] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[15] A claim for relief is plausible on its face "when the plaintiff

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[12] *Id.*

[13] *See Jackson v. Watkins*, 619 F.3d 463, 466 n.1 (5th Cir. 2010).

[14] *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795-96 (5th Cir. 2011).

[15] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[16]

III

It is established that Title II of the ADA and § 504 of the Rehabilitation Act are enforceable through an implied private right of action. The issue is whether these statutes (and their established private right of action) extend to newly built and altered public sidewalks.[17] Based on statutory text and structure, we hold that Title II and § 504 unambiguously extend to newly built and altered public sidewalks. We further hold that the plaintiffs have a private right of action to enforce Title II and § 504 to the extent they would require the City to make reasonable modifications to such sidewalks.

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[16] *Id.*

[17] We note that the City and its amici have repeatedly conceded (in their appellate briefing and at oral argument) that the plaintiffs *have* a private right of action to enforce Title II with respect to newly built and altered sidewalks. The City argues that it has limited obligations with respect to sidewalks built on or before (and not altered after) January 26, 1992, but, as noted above, the plaintiffs have abandoned their claims with respect to such sidewalks. Although our de novo review is not controlled by the City's interpretation of Title II, *see*, *e.g.*, *Sanford's Estate v. Comm'r of Internal Revenue*, 308 U.S. 39, 51 (1939); *Equitable Life Assurance Soc'y of U.S. v. MacGill*, 551 F.2d 978, 983 (5th Cir. 1977), the City's concession supports our decision.

A

1

The ADA is a "broad mandate" of "comprehensive character" and "sweeping purpose" intended "to eliminate discrimination against disabled individuals, and to integrate them into the economic and social mainstream of American life."[18] Title II of the ADA focuses on disability discrimination in the provision of public services. Specifically, Title II, 42 U.S.C. § 12132, 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."

Section 504 of the Rehabilitation Act prohibits disability discrimination by recipients of federal funding. Like Title II, § 504 provides that no qualified individual with a disability "shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or

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[18] *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (citation and quotation marks omitted); *see also* 42 U.S.C. § 12101(b)(1), (2) (stating that the ADA is intended to provide a "clear and comprehensive national mandate" for eliminating disability discrimination as well as "clear, strong, consistent, enforceable standards" addressing such discrimination); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 599 (1999) ("The ADA stepped up earlier measures to secure opportunities for people with developmental disabilities to enjoy the benefits of community living.").

activity receiving Federal financial assistance."[19] The ADA and the Rehabilitation Act generally are interpreted *in pari materia.*[20] Indeed, Congress has instructed courts that "nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V [i.e., § 504] of the Rehabilitation Act ... or the regulations issued by Federal agencies pursuant to such title."[21] The parties have not pointed to any reason why Title II and § 504 should be interpreted differently in this case. Although we focus primarily on Title II, our analysis is informed by the Rehabilitation Act, and our holding applies to both statutes.

As mentioned, there is no question that Title II and § 504 are enforceable through an implied private right of action.[22] Moreover, to the extent Title II's

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[19] 29 U.S.C. § 794(a).

[20] *See, e.g.*, *Kemp v. Holder*, 610 F.3d 231, 234-35 (5th Cir. 2010); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 287-88, 289 n.76 (5th Cir. 2005) (en banc).

[21] 42 U.S.C. § 12201(a); *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) ("The directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."); *cf.* 42 U.S.C. § 12133 (providing that "[t]he remedies, procedures, and rights" available under the Rehabilitation Act "shall be the remedies procedures, and rights" available under Title II of the ADA).

[22] *See United States v. Georgia,* 546 U.S. 151, 154 (2006) ("Title II authorizes suits by private citizens for money damages against public entities that violate [Title II]."); *Tennessee v. Lane,* 541 U.S. 509, 532 (2004) (holding that private plaintiffs could enforce Title II with respect to inaccessible courthouses); *Barnes v. Gorman,* 536 U.S. 181, 185 (2002) (stating that Title II and § 504 of the Rehabilitation Act "are enforceable through

implementing regulations "simply apply" Title II's substantive ban on disability discrimination and do not prohibit conduct that Title II permits, they too are enforceable through Title II's private right of action.[23] This is because when Congress intends a statute to be enforced through a private right of action, it also "intends the authoritative interpretation of the statute to be so enforced as well."[24]

In interpreting the scope of Title II (and its implied private right of action), our starting point is the statute's plain meaning.[25] In ascertaining the

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private causes of action"); *Olmstead,* 527 U.S. at 597 (holding that mentally disabled plaintiffs could sue state health officials under Title II to receive community-based treatment); *Penn. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 210 (1998) (holding that prisoner could sue state prison under Title II to gain admission to motivational boot camp); *McCarthy ex rel. Travis v. Hawkins,* 381 F.3d 407, 415 n. 9 (5th Cir.2004) (noting that "both Title II and § 504 are enforceable directly through private causes of action").

[23] *See Alexander v. Sandoval,* 532 U.S. 275, 285 (2001).

[24] *Id.* at 284-85 (citing Rehabilitation Act regulations).

[25] *See Yeskey,* 524 U.S. at 210 (analyzing the plain meaning of "benefits of the services, programs, or activities of a public entity" in determining the plaintiff's right to sue under Title II); *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 178 (2005) (holding that the implied private right of action to enforce Title IX of the Education Amendments of 1972 encompasses suits for retaliation "based on the statute's text"); *cf. Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 173 (1994) ("[O]ur cases considering the scope of conduct prohibited by § 10(b) [of the Securities Exchange Act of 1934] in private suits have emphasized adherence to the statutory language, the starting point in every case involving

plain meaning of Title II, we "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."[26]

If we determine that the plain meaning of Title II is ambiguous, we do not simply impose our own construction on the statute. When confronted with a statutory ambiguity, we refer to the responsible agency's reasonable interpretation of that statute. Here, because Congress directed the Department of Justice (DOJ) to elucidate Title II with implementing regulations,[27] DOJ's views at least would "warrant respect"[28] and might be entitled to even more deference.[29]

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construction of a statute." (citation, quotation marks, and brackets omitted)).

[26] *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291 (1988).

[27] *See* 42 U.S.C. § 12134(a).

[28] *Olmstead,* 527 U.S. at 598-99.

[29] *See Alexander v. Choate,* 469 U.S. 287, 305 n.24 (1985) (recognizing that "those charged with administering [the Rehabilitation Act] ha[ve] substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination"); *see also Chevron, U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.,* 467 U.S. 837, 843-44 (1984) (holding that when "Congress has explicitly left a gap for the agency to fill ... [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute").

2

We begin by determining whether the plain meaning of Title II extends to newly built and altered sidewalks. As noted, Title II provides that disabled individuals shall not be denied the "benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[30] The Supreme Court addressed this same statutory provision in *Pennsylvania Department of Corrections v. Yeskey,* and held that it "unambiguously" permitted a prisoner to sue a state prison.[31] The Supreme Court considered the text of Title II as it is "ordinarily understood," and reasoned that "prisons provide inmates with recreational 'activities,' medical 'services,' and educational and vocations 'programs,' all of which at least theoretically 'benefit' the prisoners."[32] The Supreme Court noted that "in the context of an unambiguous

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[30] 42 U.S.C. § 12132. There is no dispute that the plaintiffs are qualified individuals with disabilities, nor that the City is a "public entity" within the meaning of Title II. For reference, a "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications to 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). A "public entity" means, inter alia, any local government, or any department, agency, or instrumentality of a local government. *Id.* § 12131(1)(A), (B).

[31] 524 U.S. at 213.

[32] *Id.* at 210.

statutory text," it is "irrelevant" whether Congress specifically envisioned that the ADA would benefit state prisoners.[33] That a statute may be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."[34]

The ADA does not define the "services, programs, or activities of a public entity." The Rehabilitation Act, however, defines a "program or activity" as "all of the operations of ... a local government."[35] As already stated, we interpret Title II and the Rehabilitation Act *in pari materia.* Accordingly, like the Supreme Court in *Yeskey,* we must determine whether newly built and altered city sidewalks are benefits of "all of the operations" and "services" of a public entity within the ordinary meaning of those terms.

Before resolving this issue, however, we briefly acknowledge two different ways of framing it. Some parties urge us to consider whether *building* and *altering* sidewalks are services, programs, or activities of a public entity, and thus whether the resulting sidewalks are "benefits" of those services, programs, or activities. Other parties urge us to consider whether a city sidewalk *itself* is a service, program, or activity of a public entity. As discussed below, we believe this case does not turn on how we

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[33] *Id.* at 212.

[34] *Id.*

[35] 29 U.S.C. § 794(b)(1)(A).

frame the issue.[36] Either way, when a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, the city unnecessarily denies disabled individuals the benefits of its services in violation of Title II.

a

Building and altering city sidewalks unambiguously are "services" of a public entity under any reasonable understanding of that term. The Supreme Court has broadly understood a "service" to mean "the performance of work commanded or paid for by another," or "an act done for the benefit or at the command of another."[37] Webster's Dictionary additionally defines a "service" as "the provision, organization, or apparatus for ... meeting a general demand."[38] For its part, Black's Law Dictionary defines a "public service" as work "provided or facilitated by the government for the general public's convenience and benefit."[39]

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[36] *See Choate,* 469 U.S. at 301 ("The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled ....").

[37] *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2721-22 (2010) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993)).

[38] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993).

[39] BLACK'S LAW DICTIONARY 1352 (9th ed. 2009).

Under each of these common understandings, building and altering public sidewalks unambiguously are services of a public entity. The construction or alteration of a city sidewalk is work commanded by another (i.e., voters and public officials), paid for by another (i.e., taxpayers), and done for the benefit of another (e.g., pedestrians and drivers). When a city builds or alters a sidewalk, it promotes the general public's convenience by overcoming a collective action problem and allowing citizens to focus on other ventures. Moreover, when a city builds or alters a sidewalk, it helps meet a general demand for the safe movement of people and goods.[40] In short, in common understanding, a city provides a service to its citizens when it builds or alters a public sidewalk.

A "service" also might be defined as "[t]he duties, work, or business performed or discharged by a public official."[41] Under this definition too, newly built and altered public sidewalks are services of a public entity. Cities, through their officials, study, debate, plan, and ultimately authorize sidewalk

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[40] *See, e.g., Madsen v. Women's Health Ctr., Inc.,* 512 U.S. 753, 768 (1994) ("The state also has a strong interest ... in promoting the free flow of traffic on public streets and sidewalks ...."); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 696-97 (1992) (Kennedy, J., concurring) (observing that "the principal purpose of streets and sidewalks ... is to facilitate transportation"); *Schneider v. State of N.J., Town of Irvington,* 308 U.S. 147, 160 (1939) ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated.").

[41] *See supra*, n.38.

construction.[42] If a city official authorizes a public sidewalk to be built in a way that is not readily accessible to disabled individuals without adequate justification, the official denies disabled individuals the benefits of that sidewalk no less than if the official poured the concrete himself.

Furthermore, building and altering public sidewalks easily are among "all of the operations" (and thus also the "programs or activities") of a public entity. Webster's Dictionary broadly defines "operations" as "the whole process of planning for and operating a business or other organized unit," and defines "operation" as "a doing or performing esp[ecially] of action."[43] In common understanding, the operations of a public entity would include the "whole process" of "planning" and "doing" that goes into building and altering public sidewalks.[44]

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[42] *Cf. Delano-Pyle v. Victoria Cnty., Tex.,* 302 F.3d 567, 574-75 (5th Cir. 2002) (holding that "when a plaintiff asserts a cause of action against an employer-municipality, under either the ADA or the RA, the public entity is liable for the vicarious acts of any of its employees"); *Duvall v. Cnty. of Kitsap,* 260 F.3d 1124, 1141 (9th Cir. 2001) (similar); *McCarthy,* 381 F.3d at 413-14 (holding that a state official may be sued in his official capacity for prospective relief under Title II); *Henrietta D. v. Bloomberg,* 331 F.3d 261, 289 (2d Cir. 2003) (same).

[43] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1581 (1993).

[44] For its part, Arlington publicizes that it "rebuild[s] sidewalks" through a "program" administered by the Arlington "Department of Public Works Services." City of Arlington, *Questions and Answers—Traffic, Streets & Transportation,* http://www.arlingtontx.gov/cityhall/qna_traffic.html (last visited July 25, 2011). Although perhaps not dispositive, the

In sum, in common understanding, building and altering public sidewalks are services, programs, or activities of a public entity. When a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, disabled individuals are denied the benefits of that city's services, programs, or activities. Newly built and altered sidewalks thus fit squarely within the plain, unambiguous text of Title II.

b

Even if we focus on a public sidewalk *itself,* we still find that a sidewalk unambiguously is a service, program, or activity of a public entity. A city sidewalk itself facilitates the public's "convenience and benefit" by affording a means of safe transportation.[45] A city sidewalk itself is the "apparatus" that meets the public's general demand for safe transportation.[46] As the Supreme Court has observed, sidewalks are "general government services"[47] "provided in common to all citizens"[48] to

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City's characterization of its own programs and services is at least relevant to this case. *Cf. Yeskey,* 524 U.S. at 210 (noting that "the statute establishing the Motivational Boot Camp at issue in this very case refers to it as a 'program'").

[45] *See supra*, n.39.

[46] *See supra*, n.38.

[47] *Everson v. Bd. of Educ. of Ewing,* 330 U.S. 1, 17-18 (1947).

[48] *Comm. for Pub. Educ. & Religious Liberty v. Nyquist,* 413 U.S. 756, 781-82 (1973).

protect pedestrians from the "very real hazards of traffic."[49] The Supreme Court also has recognized that public sidewalks are "traditional public fora" that "time out of mind" have facilitated the general demand for public assembly and discourse.[50] When a newly built or altered city sidewalk is unnecessarily made inaccessible to individuals with disabilities, those individuals are denied the benefits of safe transportation and a venerable public forum.

3

Were there any doubt that the plain meaning of § 12132 extends to newly built and altered sidewalks, other provisions in Title II confirm that it does. Congress directed DOJ to "promulgate regulations" that "implement" § 12132.[51] Congress also required those implementing regulations to be consistent with Rehabilitation Act coordination

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[49] *Everson,* 330 U.S. at 17-18.

[50] *Boos v. Barry,* 485 U.S. 312, 318 (1988) (observing that "sidewalks" are "traditional public fora that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions' "); *Fairchild v. Liberty Indep. Sch. Dist.,* 597 F.3d 747, 757-58 (5th Cir. 2010) (recognizing same).

[51] 42 U.S.C. § 12134(a); *see also* 28 C.F.R. § 35.101 (2010) ("The purpose of this part is to effectuate subtitle A of title II of the [ADA], which prohibits discrimination on the basis of disability by public entities."). DOJ's regulations were amended effective March 11, 2011. The parties do not assert that the amended regulations apply to this case, and we assume that the earlier regulations continue to apply.

regulations codified at 28 C.F.R. pt. 41.[52] Notably, the Rehabilitation Act regulations that Congress sought to replicate under Title II require new and altered facilities, including sidewalks, to be accessible in most circumstances.[53] That Congress directed DOJ to "implement" § 12132 by promulgating regulations governing newly built and altered sidewalks strongly suggests that Congress thought § 12132 would extend to such sidewalks.

In fact, the ADA actually prohibits courts from construing Title II to apply a lesser standard than the Rehabilitation Act *and its implementing regulations*.[54] As the Supreme Court has recognized, Congress's "directive requires us to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act."[55] Because the Rehabilitation Act regulations require new and altered facilities, including sidewalks, to be accessible in most circumstances,

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[52] 42 U.S.C. § 12134(b). The coordination regulations "implement Executive Order 12250, which requires the [DOJ] to coordinate the implementation of section 504 of the Rehabilitation Act" among federal agencies. 28 C.F.R. § 41.1.

[53] 28 C.F.R. § 41.58(a) (requiring new facilities to be accessible, and altered facilities to be accessible "to the maximum extent feasible"); *id.* § 41.3(f) (defining "facility" to include "roads, walks, [and] parking lots").

[54] 42 U.S.C. § 12201(a) (requiring that "nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 ... or the regulations issued by Federal agencies pursuant to such title").

[55] *Bragdon,* 524 U.S. at 632.

our construction of § 12132 requires no less.

Additionally, in clarifying the requirements of Title II in the unique context of "designated public transportation services" (e.g., regular rail and bus services), Congress expressly provided that § 12132 requires new and altered "facilities" to be accessible.[56] Although Congress did not define "facilities," the relevant Department of Transportation (DOT) regulations define the term to include, inter alia, "roads, walks, passageways, [and] parking lots."[57] Congress's express statement that § 12132 extends to newly built and altered facilities is a good indication that Congress thought § 12132 would extend to newly built and altered sidewalks.

The City draws our attention to a purported distinction between "transportation barriers" and "services" in Title II's definition of a "qualified individual with a disability." A qualified individual with a disability is defined as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation

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[56] 42 U.S.C. §§ 12146-47; *see also* H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 366 (noting that the purpose of Part B of Title II "is to clarify the requirements of section 504 [of the Rehabilitation Act] ... and to extend coverage to all public entities that provide public transportation, whether or not such entities receive Federal aid").

[57] 49 C.F.R. § 37.3.

> 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.[58]

According to the City, because Congress included transportation barriers and services in the same sentence, Congress must have contemplated that newly built and altered sidewalks (and other facilities) are not services, programs, or activities within the meaning of § 12132.

As an initial matter, if our focus is on building and altering sidewalks, as opposed to sidewalks themselves, the City's distinction breaks down immediately. Even if the definition of a qualified individual with a disability suggests that sidewalks and services are mutually exclusive, the definition certainly does not suggest (contrary to any ordinary understanding) that building and altering sidewalks are not services.

In any event, Title II's definition of a qualified individual with a disability does not suggest that sidewalks and services are mutually exclusive. The phrase "with or without ... the removal of architectural, communication, or transportation barriers" simply clarifies that the necessity of a reasonable accommodation does not disqualify a disabled individual from invoking Title II in the first

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[58] 42 U.S.C. § 12131(2).

place.[59] Drawing from the complaint in this case, a transportation barrier might be a ditch. The definition thus tells us that a newly built or altered sidewalk implicates Title II even if making that sidewalk readily accessible would require reasonably removing the ditch. In other words, a disabled individual's right not to be denied access to a newly built or altered sidewalk does not turn on his ability to access that sidewalk in the first place. This in no way suggests that newly built and altered sidewalks are exempt from § 12132's plain, unambiguous meaning.

Taking a step back, the phrase "with or without ... the removal of architectural, communication, or transportation barriers" in the definition of a qualified individual with a disability is used to expand Title II's nondiscrimination mandate, not narrow it. The definition ensures that existing barriers are not used to justify future discrimination. But recognizing that existing transportation barriers sometimes impede access to public services does not suggest that Congress thought cities could go on building new, inaccessible sidewalks. We do not think Congress intended to limit the plain meaning of § 12132 by referring to a recognized form of disability discrimination[60] in an effort to expand § 12132's coverage.

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[59] *See Choate,* 469 U.S. at 301 (finding that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers").

[60] *See* 42 U.S.C. § 12101(a)(5) (finding that disabled individuals suffer from various forms of discrimination, including the discriminatory effects of transportation barriers).

Though unnecessary to resolve this case, legislative purpose and history confirm that Congress intended Title II to extend to newly built and altered sidewalks. Congress anticipated that Title II would require local governments "to provide curb cuts on public streets" because the "employment, transportation, and public accommodation sections of [the ADA] would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between streets."[61] Implicit in this declaration is a premise that sidewalks are subject to Title II in the first place. Congress's specific application of Title II is consistent with its statutory findings. In enacting Title II, Congress found that individuals with disabilities suffer from "various forms of discrimination," including "isolat[ion] and segregat[ion],"[62] and that inaccessible transportation

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[61] H.R. REP. NO. 101-485(II), at 84.

[62] 42 U.S.C. § 12101(a)(2), (5); *see also Olmstead,* 527 U.S. at 600 ("Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'for[m] of discrimination.'"); *id.* at 613-14 (Kennedy, J., concurring in part and concurring in the judgment) ("I deem it relevant and instructive that Congress in express terms identified the 'isolat[ion] and segregat[ion]' of disabled persons by society as a 'for[m] of discrimination' ...."); *cf. Choate,* 469 U.S. at 295 (recognizing that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect"); *id.* at 296 (recognizing that "discrimination against the handicapped is primarily the result of apathetic attitudes rather than affirmative animus").

is a "critical area[]" of discrimination.[63] Moreover, Congress understood that accessible transportation is the "linchpin" that "promotes the self-reliance and self-sufficiency of people with disabilities."[64] Continuing to build inaccessible sidewalks without adequate justification would unnecessarily entrench the types of discrimination Title II was designed to prohibit.

Title II does not only benefit individuals with disabilities. Congress recognized that isolating disabled individuals from the social and economic mainstream imposes tremendous costs on society. Congress specifically found that disability discrimination "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[65] Congress also anticipated that "the mainstreaming of persons with disabilities will result in more persons with disabilities working, in increasing earnings, in less dependence on the Social Security system for

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[63] 42 U.S.C. § 12101(a)(3); *see also* H.R. REP. NO. 101-485(II), at 37 (recognizing that inaccessible transportation is "the major barrier" to work for disabled individuals, and "[p]eople who cannot get to work ... cannot exercise their rights and obligations as citizens").

[64] H.R. REP. NO. 101-485(II), at 37.

[65] 42 U.S.C. § 12101(a)(8); *see also* H.R. REP. NO. 101-485(II), at 43 (recognizing that dependency "is a major and totally unnecessary contributor to public deficits and private expenditures" and costs society "literally billions of dollars annually in support payments and lost income tax revenues"); *id.* at 44 (recognizing that disability discrimination "deprives our nation of a critically needed source of labor").

financial support, in increased spending on consumer goods, and increased tax revenues."[66] The Rehabilitation Act was passed with similar findings and purpose.[67] Continuing to build inaccessible sidewalks without adequate justification would unnecessarily aggravate the social costs Congress sought to abate.

To conclude, it would have come as no surprise to the Congress that enacted the ADA that Title II and its implementing regulations were being used to regulate newly built and altered city sidewalks. Indeed, Title II unambiguously requires this result. Having considered both the statutory language of § 12132 as well as the language and design of Title II as a whole, we hold that Title II unambiguously extends to newly built and altered sidewalks. Because we interpret Title II and § 504 of the Rehabilitation Act *in pari materia,* we hold that § 504 extends to such sidewalks as well.

B

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As discussed above, when a city decides to build or alter a sidewalk but makes that sidewalk inaccessible to individuals with disabilities without

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[66] *Id.* at 43-44.

[67] *See, e.g.,* 29 U.S.C. § 701(b)(1) (stating that the "purposes of this chapter ... are ... to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through ... the guarantee of equal opportunity").

adequate justification, the city discriminates within the meaning of Title II. Such a sidewalk benefits persons without physical disabilities, yet that benefit is unnecessarily denied to similarly situated persons with physical disabilities. Continuing to build inaccessible sidewalks without adequate justification needlessly perpetuates the "isolation and segregation" of disabled individuals, and is the type of discrimination the ADA prohibits.[68]

That Title II extends to newly built and altered sidewalks does not mean that it, or its private right of action, requires cities to employ "any and all means" to make such sidewalks accessible.[69] A city's obligation to make newly built and altered sidewalks readily accessible is not "boundless."[70] As the Supreme Court stated in *Tennessee v. Lane,* Title II imposes an "obligation to accommodate," or a "reasonable modification requirement."[71]

On their face, DOJ's regulations governing new

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[68] *Olmstead,* 527 U.S. at 613 (Kennedy, J., concurring in part and concurring in the judgment) (brackets omitted).

[69] *Lane,* 541 U.S. at 531.

[70] *Olmstead,* 527 U.S. at 603 (plurality).

[71] 541 U.S. at 532-33; *see also Choate,* 469 U.S. at 301 (suggesting Rehabilitation Act requires "meaningful access" and "reasonable accommodations"); *Brennan v. Stewart,* 834 F.2d 1248, 1261 (5th Cir. 1988) (recognizing same). We express no opinion as to whether (or when) a failure to make reasonable accommodations should be considered a form of intentional discrimination, a form of disparate impact discrimination, or something else entirely.

and altered facilities are congruous with Title II's reasonable modification requirement. Under DOJ's regulations, each new sidewalk must be made "readily accessible" to individuals with disabilities.[72] This is because, as Congress recognized, the marginal costs of making a new sidewalk readily accessible "are often nonexistent or negligible."[73] With respect to altered sidewalks, the "altered portion" must be made "readily accessible" "to the maximum extent feasible" if it "could affect the usability of the facility."[74] Again, this is because once a public entity decides to alter a sidewalk, it generally is not a significant burden to make the altered portion of that sidewalk accessible.[75] In any event, a public entity is not "required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service."[76] Thus,

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[72] 28 C.F.R. § 35.151(a); *id.* § 35.104 (defining a "facility" to include, inter alia, "roads, walks, passageways, [and] parking lots").

[73] *See* H.R. REP. NO. 101-485(II), at 36 (recognizing that "newly constructed build-ups should be fully accessible because the additional costs for making new facilities accessible are often nonexistent or negligible").

[74] 28 C.F.R. § 35.151(b).

[75] *See* H.R. REP. NO. 101-485(II), at 36 (recognizing that "[i]f accessibility is part of the planning from the onset of a project, then that access costs no more or at the most marginally more than a project with no access").

[76] *Lane,* 541 U.S. at 532; *see also* 28 C.F.R. §§ 35.130(b)(7), 35.150(a)(2)-(3), (b)(1), 35.151(b), (d).

DOJ's regulations do not require cities to achieve accessibility at any cost. Instead, the regulations require only that when a city chooses to construct a new sidewalk or alter an existing one, the city must take reasonable measures to ensure that those sidewalks are readily accessible to individuals with disabilities. This is the same thing Title II requires.

Our conclusion is strongly suggested by the Supreme Court's decision in *Lane*. In *Lane,* the Supreme Court found that Title II requires public entities "to take reasonable measures to remove architectural and other barriers to accessibility."[77] In elucidating the scope of this "reasonable modification requirement," *Lane* reviewed DOJ's regulations with approval:

> As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. 28 C.F.R. § 35.151 (2003). But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures ....[78]

The Supreme Court's use of DOJ's regulations to illustrate the scope of Title II's reasonable

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[77] 541 U.S. at 531.

[78] *Id.* at 532.

modification requirement is a good indication that those regulations simply apply Title II's nondiscrimination mandate.

Similarly, in *Alexander v. Choate*, the Supreme Court recognized that "[t]he regulations implementing § 504 [of the Rehabilitation Act] are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access."[79] As an example, the Supreme Court cited a Department of Health and Human Services regulation "requiring that new buildings be readily accessible" and "building alterations be accessible 'to the maximum extent feasible.'"[80] Again, the Supreme Court's reliance on these regulations to illustrate the scope of § 504's reasonable adjustment requirement strongly suggests that those regulations (and the regulations at issue in this case) simply apply § 504's nondiscrimination mandate.

Consistent with the Supreme Court's discussion in *Lane* and *Choate* (and our own analysis), at least three other circuits have upheld a private right of action to enforce DOJ's regulations governing newly built and altered sidewalks. In *Ability Center of Greater Toledo v. City of Sandusky,* the Sixth Circuit upheld a private right of action to enforce DOJ's regulations with respect to newly built and altered sidewalks.[81] Similarly, in *Barden v. City of*

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[79] 469 U.S. at 302 n.21.

[80] *Id.* (citing 45 C.F.R. § 84.23 (1984)).

[81] 385 F.3d 901, 906-07 (6th Cir. 2004).

Sacramento, the Ninth Circuit permitted a private plaintiff to enforce DOJ's regulations with respect to newly built and altered (and existing) sidewalks.[82] And in *Kinney v. Yerusalim,* the Third Circuit permitted a private plaintiff to enforce DOJ's regulations with respect to altered sidewalks.[83] Although the Tenth Circuit's decision in *Chaffin v. Kansas State Fair Board* did not concern sidewalks, it too upheld a private right of action to enforce DOJ's regulations with respect to other facilities.[84]

On occasion, a plaintiff may attempt to enforce DOJ's regulations beyond what those regulations and even Title II require. In such cases, DOJ's regulations would not "simply apply" Title II's mandate, and thus would not be privately enforceable.[85] Such cases generally should be dealt with at summary judgment or trial. If the City can show that making its newly built and altered sidewalks accessible would have been unreasonable when those sidewalks were built or altered, the City would be entitled to an affirmative defense.[86] Of

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[82] 292 F.3d 1073, 1076 (9th Cir. 2002).

[83] 9 F.3d at 1069.

[84] 348 F.3d 850, 861 (10th Cir. 2003).

[85] *Sandoval,* 532 U.S. at 285.

[86] *Cf. Olmstead,* 527 U.S. at 604 (plurality) (finding that a state may "show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable," "taking into account the resources available to the State and the needs of others with mental disabilities"); *id.* at 607 (Stevens, J., concurring in part and concurring in the judgment) ("If a plaintiff requests relief that requires modification of a State's

course, the district court also will have discretion to craft an appropriate injunction based on the particular facts of the case,[87] and thus will be able to ensure that the City's alleged violations are remedied in a reasonable manner. On the face of the plaintiffs' complaint, however, we cannot say that the plaintiffs' remaining claims are unreasonable as a matter of law.

2

So far, we have determined that the plain meaning of Title II extends to newly built and altered sidewalks, and that DOJ's regulations governing such sidewalks will "simply apply" Title II in most cases. Unless there is some other reason to judicially limit Title II's private right of action, that private right of action would seem to authorize the plaintiffs' claims in this case.

The panel majority in *Frame II* would have limited Title II's private right of action to sidewalks that serve as "gateways" to other public services, programs, or activities.[88] As already discussed, we

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services or programs, the State may assert, as an affirmative defense, that the requested modification would cause a fundamental alteration of a State's services and programs.").

[87] *See, e.g., United States v. Criminal Sheriff, Parish of Orleans,* 19 F.3d 238, 239 (5th Cir. 1994); 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY LANE, FEDERAL PRACTICE AND PROCEDURE § 2942 (2d ed.); *cf. Watson v. City of Memphis,* 373 U.S. 526, 529-31 (1963).

[88] 616 F.3d at 488.

find no statutory basis for such a limitation.[89] The panel majority relied primarily on a DOJ regulation, 28 C.F.R. § 35.149, which provides:

> Except as otherwise provided in § 35.150 [governing the accessibility of existing facilities], no qualified individual with a disability shall, because a public entity's facilities are inaccessible ... be denied the benefits of the services, programs, or activities of a public entity ....

According to the panel majority, § 35.149 suggests that sidewalks and services are mutually exclusive, and that sidewalks are subject to Title II only when they impede access to other services. The panel majority reasoned that if DOJ thought sidewalks could be a service, it would have simply regulated them like any other service and not included them in the definition of a facility.[90]

The problem with *Frame II* is that it interprets § 35.149 in isolation and ignores the rest of DOJ's regulations. Section 35.149 is but one part of DOJ's regulatory scheme. Read as a whole, DOJ's regulatory scheme makes clear that sidewalks are defined as facilities not to exclude them from the scope of Title II, but simply to ensure that they are

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[89] *See Yeskey,* 524 U.S. at 210 (noting that "[t]he text of the ADA provides no basis for distinguishing" the programs, services, and activities of a public entity in one context from those provided in other contexts).

[90] *See* 28 C.F.R. § 41.3(f) (defining "facility" to include "road, walks, [and] parking lots").

made accessible in a gradual and prioritized manner.

Had DOJ omitted sidewalks from the definition of a facility, §§ 35.130 and 35.149 would have required all sidewalks to be immediately accessible.[91] By including sidewalks in the definition of a facility, however, DOJ was able to craft a more nuanced approach. As already discussed, § 35.151 provides that each newly built or altered sidewalk must be readily accessible in most cases.[92] But §§ 35.149 and 35.150 qualify that existing sidewalks (i.e., sidewalks built on or before and not altered after January 26, 1992) need not be made accessible in most cases.[93] And to the extent an existing sidewalk impedes access to some other service, program, or activity, a city may adopt a variety of reasonable accommodations other than structural changes.[94] DOJ's regulatory scheme thus treats newly built and altered sidewalks differently from existing sidewalks. This sensible approach does not suggest that DOJ intended to exclude newly built and altered sidewalks from the plain meaning of Title II's nondiscrimination mandate or its private right of action.[95]

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[91] 28 C.F.R. §§ 35.130, 35.150.

[92] *Id.* § 35.151.

[93] *Id.* §§ 35.149, 35.150(a).

[94] *Id.* § 35.150(b)(1).

[95] We observe that DOJ was given authority only to "implement" § 12132. If a "facility" could never be a "service, program, or activity" within the meaning of § 12132, then § 35.151 would go beyond what § 12132 requires in most circumstances. It would be bizarre to conclude that DOJ

Were there any ambiguity in DOJ's regulations (and we believe there is not), DOJ has filed an amicus brief confirming that newly built and altered sidewalks "are a subset of services, programs, or activities," and that such sidewalks need not "serve as a gateway to a service, program, or activity in order to be covered by Title II." According to DOJ, §§ 35.149-51 "simply explain how the Act applies when the service, program, or activity is a facility, or takes place in a facility." We observe that DOJ's position is consistent with its amicus briefs in similar cases.[96] Because DOJ's amicus brief corroborates our own analysis, we need not determine precisely how much deference it deserves.[97]

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interprets § 12132 in a way that calls into question the validity of its own regulations. *See Sandoval,* 532 U.S. at 282 (noting "considerable tension" in agency regulations that go beyond their statutory mandate); *id.* at 286 n.6 (observing "how strange it is to say" that regulations may prohibit conduct that the statute permits).

[96] *See* Br. for United States as Intervenor and Amicus Curiae at 72-78, *Mason v. City of Huntsville, Ala.,* No. 10-S-2794 (N.D. Ala. June 10, 2011); Br. for United States as Amicus Curiae at 9-16, *Barden v. City of Sacramento,* 292 F.3d 1073 (9th Cir. 2002) (No. 01-15744), 2001 WL 34095025 at *9-16; Br. for United States as Amicus Curiae at 14, *Kinney v. Yerusalem,* 9 F.3d 1067 (3d Cir. 1993) (No. 93-1168), 1993 WL 13120087, at *14.

[97] *Compare Olmstead,* 527 U.S. at 597-98 (finding that DOJ's views as to the meaning of Title II at least "warrant respect" when DOJ has "consistently advocated" its position in other briefing), *and Auer v. Robbins,* 519 U.S. 452, 462-63 (1997) (deferring to agency's interpretation of its own regulations as presented in a legal brief), *with Janus Capital Grp., Inc. v. First Derivative Traders,* 131 S. Ct. 2296, 2304 n.8 (2011) (expressing

As a final matter, limiting Title II's private right of action to sidewalks that serve as gateways to other public services, programs, or activities would create an unworkable and arbitrary standard. Even on the panel majority's view in *Frame II,* "there should be no set proximity limitation of the sidewalk to the benefit."[98] But without a proximity limitation, the standard provides no guidance to courts or local governments about when a newly built or altered sidewalk must be accessible. The standard thus would undermine the ADA's purpose of providing "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities,"[99] and we reject it.

C

The City contends that the plaintiffs lack standing with respect to inaccessible sidewalks they have not personally encountered. To be sure, Article III standing requires a plaintiff seeking injunctive relief to allege "actual or imminent" and not merely "conjectural or hypothetical" injury.[100] Mere "some day" intentions to use a particular sidewalk, "without any description of concrete plans," does not

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"skepticism" over the "degree" to which an agency should receive deference regarding the scope of a private right of action).

[98] 616 F.3d at 484 n.9.

[99] 42 U.S.C. § 12101(b)(2).

[100] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) (citation and quotation marks omitted).

support standing.[101] But "imminence" is an "elastic concept" that is broad enough to accommodate challenges to at least some sidewalks that a disabled person has not personally encountered.[102] For example, a plaintiff may seek injunctive relief with respect to a soon-to-be-built sidewalk, as long as the plaintiff shows a sufficiently high degree of likelihood that he will be denied the benefits of that sidewalk once it is built.[103] Similarly, a disabled individual need not engage in futile gestures before seeking an injunction; the individual must show only that an inaccessible sidewalk actually affects his activities in some concrete way.[104] On remand, the

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[101] *Id.* at 564.

[102] *Id.* at 564 n.2.

[103] *See Walker v. City of Mesquite,* 169 F.3d 973, 979 (5th Cir. 1999) (finding homeowners had standing to enjoin new construction of public housing projects near their neighborhoods).

[104] *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 183-84 (2000) (distinguishing *Lujan* and finding standing based on plaintiffs' assertions that they would use river but for the defendant's pollution); *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979) ("[O]ne does not have to await the consummation of threatened injury to obtain preventative relief. If the injury is certainly impending, that is enough."); *Disabled Ams. for Equal Access, Inc. v. Ferries Del Caribe, Inc.,* 405 F.3d 60, 64 (1st Cir. 2005) (finding standing even though disabled plaintiff had not traveled aboard noncompliant ferry); *Pickern v. Holiday Quality Foods Inc.,* 293 F.3d 1133, 1136-37 (9th Cir. 2002) ("Once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury.").

district court will be able to apply established standing doctrine to weed out any hypothetical claims. At this point, however, the plaintiffs have alleged in detail how specific inaccessible sidewalks negatively affect their day-to-day lives by forcing them to take longer and more dangerous routes to their destinations. This is sufficient to support their right to sue.

D

The City has waged a half-hearted attack on Title II's constitutionality. According to the City, "[a]n interpretation that the ADA requires construction, maintenance and retrofilling [*sic*] of all City sidewalks, curb ramps and parking lots is unconstitutional because it would exceed Congress' enforcement power under § 5 of the Fourteenth Amendment to the United States Constitution." The City has supported its constitutional challenge with approximately three pages of briefing.

We decline to address the City's constitutional challenge at this point. As a preliminary matter, we have not held that Title II requires the City to "construct[], maint[ain] and retrofi[t]" all of its existing sidewalks. We have held only that when a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities without adequate justification, the city discriminates in violation of Title II. Because our holding is considerably narrower than the only interpretation the City asserts would be unconstitutional, it would appear that the City has no constitutional objection to our interpretation.

Additionally, DOJ has not yet had an opportunity to exercise its statutory right to intervene and defend the constitutionality of Title II.[105] DOJ's absence, together with the parties' sparse briefing, supports our decision not to address the constitutional arguments in this case. On remand, the City will have an another opportunity to present its constitutional arguments, and DOJ should have an opportunity to intervene.

IV

There remains the issue of whether the plaintiffs' claims are barred by the statute of limitations. Neither Title II nor the Rehabilitation Act provides a limitations period. Furthermore, the default four-year limitations period for federal causes of action does not apply to this case because that period applies only to claims "arising under an Act of Congress enacted after" December 1, 1990.[106] Both Title II and the Rehabilitation Act were "enacted" before December 1990,[107] and the plaintiffs have not shown that their claims were "made possible" by a post-1990 amendment to either statute.[108]

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[105] 28 U.S.C. § 2403(a); *Haas v. Quest Recovery Servs., Inc.,* 549 U.S. 1163, 1163 (2007) (vacating and remanding to court of appeal "to consider the views of the United States" as to whether Title II validly abrogated state sovereign immunity).

[106] 28 U.S.C. § 1658(a).

[107] Pub. L. No. 101-336 § 205(a) (1990).

[108] *Jones v. R.R. Donnelley & Sons Co.,* 541 U.S. 369, 382 (2004).

When Congress does not establish a limitations period for a federal cause of action, the "general rule" is that we borrow the most analogous period from state law.[109] We decline to adopt a state limitations period only when another federal statute "clearly provides a closer analogy," and "when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial law making."[110] Reference to federal law remains a "closely circumscribed" and "narrow" exception.[111]

No party disputes that Texas's two-year personal-injury limitations period applies to this case.[112] We have already held that Texas's personal-injury limitations period applies to Rehabilitation Act claims in another context,[113] and several of our sister circuits have applied similar limitations periods to claims under both Title II and the Rehabilitation

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[109] *N. Star Steel Co. v. Thomas,* 515 U.S. 29, 34 (1995); *Wilson v. Garcia,* 471 U.S. 261, 266-67 (1985); *see also* 28 U.S.C. § 1652.

[110] *N. Star,* 515 U.S. at 35 (quoting *Reed v. United Trans. Union,* 488 U.S. 319, 625 (1989)).

[111] *Id.*

[112] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 ("[A] person must bring suit for ... personal injury ... not later than two years after the day the cause of action accrues.").

[113] *See Hickey v. Irving Indep. Sch. Dist.,* 976 F.2d 980, 983 (5th Cir. 1992); *cf. Holmes v. Tex. A&M Univ.,* 145 F.3d 681, 684 (5th Cir. 1998) (assuming Texas's two-year personal-injury limitations period applied to claims under Title II).

Act.[114] This is because most discrimination claims involve "injury to the individual rights of a person," and thus are analogous to personal-injury tort claims.[115] In light of this authority and the parties' failure to show or even argue that we should apply some other limitations period, we apply Texas's two-year personal-injury limitations period to this case.[116]

Although we borrow a limitations period from state law, the particular accrual date of a federal cause of action is a matter of federal law.[117] Absent

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[114] *See, e.g., Bishop v. Children's Ctr. for Dev. Enrichment,* 618 F.3d 533, 536 (6th Cir. 2010); *Disabled in Action of Penn. v. Se. Penn. Trans. Auth.,* 539 F.3d 199, 208 (3d Cir. 2008); *Gaona v. Town & Country Credit,* 324 F.3d 1050, 1055 (8th Cir. 2003); *Everett v. Cobb Cnty. Sch. District.,* 138 F.3d 1407, 1409 (11th Cir. 1998); *Soignier v. Am. Bd. of Plastic Surgery,* 92 F.3d 547, 551 (7th Cir. 1996); *cf. Wilson,* 471 U.S. at 276 (finding that § 1983 claims are best characterized as personal injury actions for purposes of determining limitations period).

[115] *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 661 (1987); *Wilson,* 471 U.S. at 277 ("Congress unquestionably would have considered the remedies established in the Civil Rights Act to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract.").

[116] In selecting Texas's personal-injury limitations period, we note that Texas has not adopted a general disability-discrimination law modeled on Title II or the Rehabilitation Act. Texas does prohibit disability discrimination in employment and housing, *see* TEX. LAB. CODE ANN. § 21.051; TEX. PROP. CODE ANN. § 301.025, but the former is not analogous to Title II or the Rehabilitation Act as applied to this case, and the latter is, in any event, subject to a two-year limitations period. *See id.* § 301.151(a).

[117] *See Wallace v. Kato,* 549 U.S. 384, 388 (2007); *Walker v.*

unusual circumstances not present in this case,[118] the rule is that accrual occurs when a plaintiff has "a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief."[119] In other words, accrual occurs "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured."[120]

Drawing from the text of § 12132, an injury occurs (and a complete and present cause of action arises) under Title II when a disabled individual has sufficient information to know that he has been denied the benefits of a service, program, or activity of a public entity. As applied to this case, the plaintiffs' cause of action accrued when they knew or

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Epps, 550 F.3d 407, 414 (5th Cir. 2008).

[118] Although it may be "theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit," the Supreme Court has admonished that we should "not infer such an odd result in the absence of any such indication in the statute." *Reiter v. Cooper,* 507 U.S. 258, 267 (1993). In other words, "[u]nless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997). We see no indication in Title II or § 504 of the Rehabilitation Act that Congress intended the plaintiffs' cause of action to accrue before they could file suit.

[119] *Wallace,* 549 U.S. at 388 (citations and quotation marks omitted); *see also Bay Area Laundry,* 522 U.S. at 201.

[120] *Epps,* 550 F.3d at 414.

should have known they were being denied the benefits of the City's newly built or altered sidewalks. This accrual date dovetails with the plaintiffs' standing to sue. As discussed above, a disabled individual has no standing to challenge an inaccessible sidewalk until he can show "actual," "concrete plans" to use that sidewalk.[121] Only then is the individual actually, as opposed to hypothetically, denied the benefits of the sidewalk. But just as a plaintiff may not sue until he is actually deterred from using a newly built or altered sidewalk, so his complete and present cause of action does not accrue until that time.

Although the City recognizes that "vague and conclusory allegations related to disabled persons in general" are insufficient to support standing, the City nonetheless asserts that the plaintiffs' claims accrued as a matter of law at the time the City built or altered its inaccessible sidewalks. The key point the City fails to grasp is that a city's wrongful act and a disabled individual's injury need not coincide. A city acts wrongfully when it builds an inaccessible sidewalk without adequate justification, but a disabled individual is not injured until he is actually deterred from using that sidewalk.

An example will help illustrate the point. Plaintiff Scott Updike did not become disabled until September 8, 2003 (less than two years before his complaint was filed). Updike was not denied access to the City's inaccessible sidewalks until he became disabled. Indeed, under our precedent, Updike could

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[121] *Lujan,* 504 U.S. at 564.

not have sued to enforce Title II until he became disabled.[122] Thus, regardless of when the City built or altered its inaccessible sidewalks, Updike did not have a complete and present cause of action under Title II, and his cause of action did not accrue, until at least September 8, 2003.

Updike's claims highlight a more general problem with the City's theory of accrual. Sidewalks are durable. If a disabled individual born two years and a day after an inaccessible sidewalk is built has no right to sue, new generations will be denied the benefits of that sidewalk simply because the city evaded litigation in the past. On the City's theory, the City could knowingly construct an inaccessible sidewalk yet escape liability as long as no plaintiff sued for two years (and even if no plaintiff had standing to sue during those two years). We do not think Title II contemplates this result. As Congress noted when it enacted Title II: "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[123] The City's theory of accrual would entrench and reward the types of discrimination Title II was intended to eliminate.

The City asserts that if accrual occurs only when

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[122] *See Melton v. Dallas Area Rapid Transit,* 391 F.3d 669, 671-72 (5th Cir. 2004) (stating that plaintiff must demonstrate he is a qualified individual with a disability as part of prima facie case).

[123] *See* 42 U.S.C. § 12132(a)(2).

a plaintiff is actually deterred from using a newly built or altered sidewalk, the City might be liable for "unlimited potential municipal liability." The City exaggerates. Our decision is limited to injunctive relief concerning newly built and altered sidewalks.[124] The City may avoid liability whenever it chooses simply by building sidewalks right the first time, or by fixing its original unlawful construction. In other words, the City is not liable forever; it is responsible only for correcting its own mistakes. This is not too much to ask, even when the City's mistakes have gone unchallenged for two years.

As for the plaintiffs other than Updike, the City will have an opportunity to prove that these plaintiffs knew or should have known they were being denied the benefits of the City's newly built or altered sidewalks more than two years before they filed their claims. This is because the statute of limitations is an affirmative defense that "places the burden of proof on the party pleading it."[125] Under

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[124] This case does not present the issue of money damages, and we do not reach the issue. We have held, however, that money damages are available under Title II and § 504 only for intentional discrimination. *See Delano-Pyle,* 302 F.3d at 575; *cf. Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274, 284 (1998) (finding that courts have "a measure of latitude" to determine "when it is appropriate to award monetary damages" for violations of Title IX of the Education Amendments of 1972). The class of cases in which money damages will be available for inaccessible sidewalks thus would appear to be small.

[125] *F.T.C. v. Nat'l Bus. Consultants, Inc.,* 376 F.3d 317, 320 (5th Cir. 2004); *In re Hinsley,* 201 F.3d 638, 644-45 (5th Cir. 2000); FED. R. CIV. P. 8(c).

federal pleading requirements, which we follow,[126] a plaintiff is not required to allege that his claims were filed within the applicable statute of limitations.[127]

To be sure, a complaint may be subject to dismissal if its allegations affirmatively demonstrate that the plaintiff's claims are barred by the statute of limitations and fail to raise some basis for tolling.[128] A review of the plaintiffs' complaint in this case, however, shows that there are issues of material fact as to when the plaintiffs knew or should have known they were being denied the benefits of the City's newly built or altered sidewalks. The plaintiffs allege that they were denied the benefits of the City's sidewalks "[w]ithin the last two years, if not also longer." Although this allegation leaves open the possibility that some of the plaintiffs' claims may be barred by limitations, it does not plead the plaintiffs out of their case. Construing the complaint in the plaintiffs' favor, as we must on a motion to dismiss, the plaintiffs allege that they encountered the inaccessible sidewalks within two years of their complaint. Because the statute of limitations is an affirmative defense and not a pleading requirement, it is an issue that must be resolved through discovery and summary judgment or trial.

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[126] *See TIG Ins. Co. v. Aon Re, Inc.,* 521 F.3d 351, 357 (5th Cir. 2008) (noting that "federal law governs the pleading requirements of a case in federal court").

[127] *See Simpson v. James,* 903 F.2d 372, 375 (5th Cir. 1990).

[128] *Jones v. Bock,* 549 U.S. 199, 215 (2007).

V

For the reasons stated, we hold that the plaintiffs have a private right of action to enforce Title II of the ADA and § 504 of the Rehabilitation Act with respect to newly built and altered sidewalks. We further hold that the plaintiffs' private right of action accrued at the time the plaintiffs first knew or should have known they were being denied the benefits of the City's newly built and altered sidewalks. Accordingly, we VACATE the district court's judgment and REMAND for further proceedings.

E. GRADY JOLLY, Circuit Judge, joined by JONES, Chief Judge, and SMITH, GARZA, CLEMENT, OWEN and ELROD, Circuit Judges, dissenting in part and concurring in part:[1]

The provision of Title II that provides a private cause of action for its enforcement reads:

> Subject to the provisions of this subchapter, 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. Although the free-wheeling majority opinion seems to bury the narrowness of the

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[1] This dissent challenges only the majority's conclusion that a sidewalk constitutes a service under 42 U.S.C. § 12132.

question presented in this case,[2] the question is finally at its narrowest and most specific:[3] whether Title II of the ADA provides a private cause of action[4]

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[2] For example, the majority asks whether Title II applies to sidewalks. This broad question is not the question before us, and demonstrates the majority's lack of proper focus. Title II does indeed address sidewalks: it refers to them in their capacity as transportation barriers. Again, the appropriate question is whether Section 12132's *reference to services* includes sidewalks.

In a similar vein, the majority contends that the ADA and the Rehabilitation Act are broad statutes aimed at remedying discrimination against disabled individuals. This point does little to aid our analysis concerning private rights of action to enforce the statute.

[3] Although the issue in this case is now narrowly drawn, the conclusion that the majority advocates leads to consequences beyond this case.

[4] A private cause of action, of course, is not the only means of enforcing Title II. Title II and the accompanying regulations make clear that local governments bear responsibility in determining how best to make their services accessible, and that the Attorney General has enforcement powers to ensure that the city's chosen methods result in services being made accessible. 42 U.S.C. § 12134; 28 C.F.R. § 35.101 *et seq.*

Indeed, according to its publications, the Department of Justice enforces the regulatory requirements of Title II in a variety of ways, including through formal and informal settlement agreements, mediation, and litigation. Enforcing the ADA: A Status Report from the Department of Justice, Issue 2, at 2, available at http://www.ada.gov/aprjun10.pdf (last visited May 18, 2011). In one particularly wide-ranging effort—Project Civic Access—DOJ enters into agreements with municipalities, counties, and other like units of local government; through this project, DOJ has investigated accessibility in all fifty states and beyond. Project Civic Access, http://www.ada.gov/civicac.htm (last visited May 18, 2011).

to enjoin the City to modify its newly constructed or reconstructed sidewalks; the resolution of the question depends on whether a sidewalk is defined as a "service."[5]

The vagueness of the statute and the imprecision of the regulations allow a decision in this case to become complex and difficult. The choice presented by the court today, however, is clear: the amorphous definition of service offered by the majority or the textual definition that separates a facility from a service. The statute implicitly classifies a noncompliant sidewalk—not as a service—but as a transportation barrier and a facility, and the regulations specifically define a sidewalk as a facility.

If one concludes, as the majority does, that somehow a sidewalk is a "service," then one concludes that the subject matter of a private cause of action against a public entity under Title II is unlimited; if one concludes that under the ADA a

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Title II incorporates the remedies available under § 505 of the Rehabilitation Act, which incorporates the "remedies, rights, and procedures set forth in Title VI of the Civil Rights Act of 1964 for violations of § 504 of the Rehabilitation Act." *Olmstead v. L.C. ex rel. Zimring,* 527 U.S. 581, 590 n.4 (1999). The available remedies include "termination or denial of federal funds." *Id.*

[5] The Rehabilitation Act applies only to programs and activities, but it defines these terms as "all of the operations ... of a local government." 29 U.S.C. § 794. A sidewalk, which is an inanimate, static piece of concrete, does not constitute an "operation." Thus, we can safely conclude that a sidewalk is neither a program nor an activity.

sidewalk is a public "facility," and that an inanimate and static public facility is distinguishable from a public service, then a private cause of action is thus limited to services and does not extend to facilities.

Finally, and with no apparent discomfort, the majority finds it necessary to recast the issue that Richard Frame has stated for the en banc court. Specifically, Frame states that the sidewalks he seeks to alter constitute a service. The majority says it is not determinative whether a sidewalk is itself a service, because the labor that produced the sidewalk is a service. The majority, however, fails to recognize that the ADA provides a cause of action only if a service is denied "by reason of" disability.

In other words, the majority's alternative argument necessarily assumes that the plaintiffs were denied access to the service of the city's labor force on account of their respective disabilities. This assumption ignores that the city's labor services are not accessible to the general population as a whole; that is to say that no individual—able bodied or disabled—can commandeer the labor force of a city to construct or reconstruct *any* facility, sidewalk or otherwise. In short, neither facts, nor policies, nor law, supports granting the plaintiffs a right of access to the city's labor force.

For these reasons, and for the reasons that follow, I respectfully dissent.

I.

The bottom-line question presented for en banc

consideration is whether private plaintiffs generally have a cause of action to require the city to reconstruct sidewalks built or repaired after January 26, 1992 (the effective date of the ADA). The question is resolved by the following analysis.

First, Title II's anti-discrimination provisions do not specifically provide that a private cause of action may be brought against a municipality to enforce ADA-compliant sidewalk construction or reconstruction. Second, although the regulations that accompany the ADA address sidewalk construction and reconstruction, *see* 28 C.F.R. § 35.149-151,[6] regulations are not privately enforceable unless they effectuate a statutory mandate, because "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval,* 532 U.S. 275, 286 (2001). That is, as applicable in this case, the statute does not guarantee access to facilities, but only to "services, programs, or activities."

Third, the ADA mandates equal access to governmental *services,* and it therefore provides a disabled individual with a private cause of action if he is being effectively denied meaningful access to a service. *See Alexander v. Choate,* 469 U.S. 287, 301 (1985) (stating in the context of the Rehabilitation Act that a benefit cannot be offered in a way that "effectively denies otherwise qualified handicapped individuals the meaningful access to which they are

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[6] We follow the majority's lead and cite to the regulations in place at the time the plaintiffs petitioned for, and were granted, rehearing en banc. *See* Majority Op. at 16 n.51.

entitled"). Fourth, the question of whether the plaintiffs have a private cause of action to enjoin the City to construct or reconstruct a sidewalk is resolved by determining whether a sidewalk constitutes a service. Fifth, the ADA does not define "service" in specific terms.

Sixth, turning to examine the statute and regulations for guidance, we see that the statute suggests that sidewalks constitute either a barrier to transportation, or a facility, or both. *See* 42 U.S.C. §§ 12131(2), 12146-12147. Additionally, the regulations specifically define sidewalks as a "facility." 28 C.F.R. § 35.104 ("Facility *means* all or any portion of ... roads, walks, [and] passageways ...."') (emphasis added). Furthermore, the regulations draw a distinction between services and facilities at the behest of Congress: DOJ is required to model the relevant regulations after the "regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations[,]" *see* 42 U.S.C. § 12134(b), which differentiate "program[s] or activiti[es]" from "facilities." 28 C.F.R. § 39.150.

Seventh, in the light of the statute and regulations, there is no mandate for accessibility to facilities; on the other hand, there is the express mandate of the statute and the regulations to universal accessibility of services, programs, and activities. Stated differently, facilities are specifically excluded from the access demands of the private cause of action provided in Section 12132. Because a sidewalk is a facility—not a service—the sidewalk regulations are privately enforceable only if an inaccessible sidewalk effectively denies a disabled

individual meaningful access to a public service. Although the majority holds that the wheelchair-disabled have no rights of access to a sidewalk constructed or last repaired before 1992, irrespective of whether that sidewalk effectively denies a disabled person access to a city's services, this dissent would hold that if a noncompliant sidewalk effectively denies meaningful access to a service available to the general public, there is a private cause of action.

II.

This dissent now moves to consider these points more fully. We begin by again noting that the ADA 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" public services. 42 U.S.C. § 12132.

A.

Even though the statute does not explicitly define the term "services," the statute makes a few suggestions to aid our interpretation of the term.[7]

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[7] The majority relies primarily on dictionary definitions to support its argument that a sidewalk is a service. It is therefore somewhat peculiar that the majority relies on several definitions that establish that sidewalks are *not* services. For example, the majority notes that a service is "the *performance* of *work* commanded or paid for by another, or an *act* done for the benefit or at the command of another." Majority Op. at 12 (internal citations and quotation marks omitted) (emphasis added). It must be obvious to the majority that a sidewalk neither "performs work" nor "acts;" it is an inanimate object. Similarly, the majority's argument that a sidewalk "is the

First, Title II deals with "transportation barriers," which include unfriendly sidewalks. Specifically, a "qualified individual with a disability" is defined as a disabled individual "who, *with or without* ... the removal of *architectural,* ... or *transportation* barriers ... meets the essential eligibility requirements for the receipt of *services or the participation in programs or activities* ..." 42 U.S.C. § 12131(2) (emphasis added). Thus, we get some indication as to the meaning of services by reference to what services are *not*. Obviously, the noncompliant sidewalks are alleged by the plaintiffs to be barriers to transportation for the wheelchair disabled. Consequently, it is plain that transportation barriers are treated as barriers to accessing a service, and that sidewalks are not classified as a service.

We are not alone in reaching the conclusion that transportation barriers are distinguishable from services: the Supreme Court has held that the necessary implication of Section 12131(2) is that in some circumstances, local governments must "remove architectural and other barriers to [the] accessibility [of judicial services]." *Tennessee v. Lane,* 541 U.S. 509, 531 (2004). Thus, if transportation barriers, i.e., facilities, and services are coextensive as the majority argues, the ADA requires local governments to "remove" services, i.e., transportation barriers, so that disabled individuals will have access to services. This is the nonsensical

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'apparatus' that meets the public's general demand for safe transportation[,]" majority op. at 15, misses the point; there, the service is transportation, not the facility of the sidewalk itself.

reading that follows from the majority's reasoning; we should strive to avoid such absurdity. *See Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.,* 630 F.3d 431, 439 (5th Cir. 2011).

In sum: although Title II of the ADA does not define services in express terms, it tells us that a service is not an inaccessible sidewalk, which is instead treated as a facility that is a *barrier* to access of a public service.

B.

We continue to look to the statute for guidance on what a service is not, but we now turn to Part B of Title II, which deals not with public services generally, but with the specific subset of public *transportation* services. *See generally* 42 U.S.C. §§ 12141-12165. Within this part, Congress required that local governments make accessible their new and altered facilities, but only those that are "to be used in the provision of designated public transportation services ..." 42 U.S.C. § 12146.[8] Thus, as the majority concedes, the ADA explicitly requires facilities to be made accessible in (and only in) "the

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[8] In this context,

> "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

42 U.S.C. § 12141(2).

unique context of 'designated public transportation services' ...." Majority Op. at 17 (emphasis added).

Given that the statute requires that facilities be accessible to disabled individuals only in this limited context, it is plain that, despite the majority's argument to the contrary, facilities are not merely a "subset of services." *See* Majority Op. at 29 ("DOJ has filed an amicus brief confirming that newly built and altered sidewalks 'are a subset of services, programs, or activities,' ... DOJ's amicus brief corroborates our own analysis ...."). I reiterate: under the ADA, disabled individuals shall not "be excluded from participation in or be denied the benefits of" public *services.* 42 U.S.C. § 12132. Thus, all services must be made accessible in all contexts. Again, the primary implication of Sections 12146 and 12147 is that facilities need only be made equally accessible *in the specific and limited context* of "designated public transit services." Thus, because facilities are not subject to the universal equal accessibility requirement, they are not—as the majority argues—enfolded within the term services.

Moreover, relevant precedent teaches that when Congress included the term "facilities" in Sections 12146 and 12147, it indicated that it had purposefully excluded that term from the private cause of action included in Section 12132. *See Russello v. United States,* 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (alteration in

original); *see also Ott v. Johnson,* 192 F.3d 510, 513 (5th Cir. 1999) ("It is a fundamental tenet of statutory construction that Congress intended to exclude language included in one section of a statute, but omitted from another section."). Thus, we should reject the majority's argument that the use of the term facilities in Sections 12146 and 12147 demonstrates that Congress intended to include the term facilities in Section 12132.[9]

To sum up, Section 12132 provides a private cause of action when disabled individuals are denied access to public "services, programs, or activities." *See* 42 U.S.C. § 12132 (Requiring local governments to provide equal access to its "services, programs, or activities ...."). The use of three—and only three—terms indicates the statute was intended to have a structured meaning. Congress could easily have expressed its intent to prohibit local governments from denying disabled individuals equal access to *all* "facilities, services, programs, or activities." It did not. Instead, it required that local governments make their facilities accessible only in the context of transportation services.

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[9] The Rehabilitation Act further confirms that Congress purposely differentiated facilities and services, as that Act provides the same distinction. *See* 29 U.S.C. § 794(c) ("Small providers are not required ... to make significant structural alterations to their existing *facilities* for the purpose of assuring *program* accessibility, if alternative means of providing the *services* are available.") (emphasis added). It is unsurprising that the Rehabilitation Act repeats the differentiation found in the ADA; as the majority points out, the two statutes are interpreted *in pari materia. See Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir. 2000).

Thus, the ADA, without explicitly defining the term services, identifies two things that a service is not: a transportation barrier and a facility. Applying those distinctions here, it seems that under the statute itself, a noncompliant sidewalk is a transportation barrier and that sidewalks in general, are—like other static, inanimate, immobile infrastructure—facilities.

III.

We now turn to the regulations to resolve any remaining doubt that facilities are distinguishable from services.

A.

Although the majority turns to the regulations hoping to smooth off the rough incongruities of its statutory interpretation of "service" as unambiguous, the regulations, for the reasons below, actually—and compellingly—suggest that a sidewalk itself does not constitute a service.

First, the regulations define and designate a sidewalk as a "facility"—not as a "service, program, or activity." 28 C.F.R. § 35.104 ("Facility *means* all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property ....").

Second, the regulations mirror the statute and require that all *services* shall be accessible to the disabled. 28 C.F.R. § 35.130(a) ("No qualified individual with a disability shall, on the basis of

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 public entity.").

Third, the regulations further provide that no disabled individual "shall, *because a public entity's facilities are inaccessible* ... or unusable ... be excluded from participation in, or be denied the benefits of the *services,* programs, or activities ...." 28 C.F.R. § 35.149 (emphasis added). Thus, under the regulations, as under the statute, all services are mandated to be accessible, but facilities, e.g., sidewalks, may remain inaccessible—a crucial distinction that tells us, contrary to the majority's assertion, that facilities and services are two distinctly separate categories under Title II. *See* 42 U.S.C. § 12132 ("[N]o 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 ...."); *see also* 28 C.F.R. § 35.130 ("No qualified individual with a disability shall, on the basis of 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 public entity."). Stated differently, under Section 35.149, a city violates the law by having inaccessible facilities *only if* those facilities deny disabled individuals access to a service.

Fourth, the regulations further provide that a city is not "[n]ecessarily require[d] ... to make each ... existing facilit[y] accessible to and usable by

individuals with disabilities." 28 C.F.R. § 35.150.[10] Indeed, a municipality is granted the discretion to choose how best to make its services accessible; "alteration of existing facilities and construction of new facilities" is merely one potential method. 28 C.F.R. § 35.150(b)(1). Still further, *if* a city elects to provide access to its services by making "structural change[s] to facilities[,]" that city must "develop ... a transition plan setting forth the steps necessary to complete such changes [,]" and the plan must "include a schedule for providing curb ramps ... giving priority to walkways serving entities covered by the Act ...." 28 C.F.R. § 35.150(d)(1)-(2). If sidewalks are—as the majority urges—services, one would abandon good sense to say—as the regulations would then say—that local governments should focus their *reconstruction efforts* on services, services that "*serve* entities covered by the Act" because the

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[10] "A public entity may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, *alteration of existing facilities and construction of new facilities,* use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is *not* required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section." 28 C.F.R. § 35.150(b)(1) (emphasis added). The standard for new or altered facilities is more stringent: each facility that is built after January 26, 1992 must be made "readily accessible," and each facility that is altered after that date must be made accessible "to the maximum extent feasible." 28 C.F.R. § 35.151(a)-(b). *The question before us, of course, is whether these requirements are enforceable through a private cause of action.*

sidewalks would *themselves* be "entities covered by the Act."

Finally, the regulations require only that a city make *newly constructed* or *reconstructed* sidewalks handicapped-accessible. 28 C.F.R. § 35.151. As we have said more than once, all *services* of the city must be made accessible; if the regulations characterized sidewalks a service, no sidewalk would be allowed to be inaccessible. Section 35.151 is not privately enforceable unless it effectuates a *statutory* mandate. Here, the statutory mandate, requiring accessibility for the disabled, specifically omits facilities. "[P]rivate rights of action to enforce federal law must be created by Congress." *Sandoval,* 532 U.S. at 286. This principle means that agencies, as well en banc courts, cannot "conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.* at 291. Because—as discussed at length above—the statute mandates access to services, not facilities, Section 35.151's requirements are not enforceable in a private suit, but instead are left to other enforcement mechanisms as might be employed by the Attorney General.

In short, the *regulations expressly define sidewalks as facilities,* not as services. And, furthermore, by requiring that all services be made accessible, while requiring facilities to be made accessible only in specific and limited circumstances, the regulations are compelling that a facility—such as a sidewalk—is not a service.

B.

Nor is the regulatory distinction between "facilities" and "services" the result of oversight, mistake, or confusion, but derives from congressional mandate. Indeed, Congress directed that the regulations differentiate between facilities and services.

The ADA—statutorily and specifically—requires that the DOJ regulations regarding "'program accessibility, existing facilities,' ... be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b). The regulations at part 39 of title 28 implementing the Rehabilitation Act draw a distinction between facilities on the one hand and programs and activities on the other. *See* 28 C.F.R. §§ 39.149-50.[11] The majority would do well to understand this point: Congress was well aware that the regulations implementing the Rehabilitation Act do not require facilities—unlike programs and activities—to be accessible, and it dictated that the same rule be made applicable to the ADA. *See* 42 U.S.C. § 12134(b).[12]

The statute further requires that the regulations regarding new and altered facilities track the

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[11] Services are not addressed in these regulations because the Rehabilitation Act applies only to programs or activities.

[12] As an aside, it is unsurprising that the Rehabilitation Act does not require facilities to be made accessible; as already noted, the Rehabilitation Act applies to operations, not to inanimate objects. 29 U.S.C. § 794(b).

language from the "coordination regulations under part 41 of title 28, Code of Federal Regulations...." 42 U.S.C. § 12134(b). The majority correctly argues that the "regulations that Congress sought to replicate under Title II require new and altered facilities, including sidewalks, to be accessible in *most* circumstances." Majority Op. at 16 (emphasis added). The majority's wobble, i.e., "most," proves the point. If facilities, i.e., sidewalks, are services, they must be equally accessible in *all* circumstances, not in "most circumstances." 42 U.S.C. § 12132 ("[*N*]*o qualified individual with a disability shall* ... be excluded from participation in or be denied the benefits of the services, programs, or activities, ...") (emphasis added). Thus, the fact that, pursuant to Congress's direct instructions, the regulations require only that *new*—but not all—facilities be accessible in *most*—but not all—circumstances again suggests that "facility" is not a term that replicates the statutory term "service."[13] The clear mandate of

[13] The majority seems to argue that the statute and regulations grant governmental entities discretion such that they need not make some services accessible. This is a misreading of the statute and the regulations as to accessibility of services, programs, and activities. As discussed above, the statute *itself* provides *no* exception to access. Moreover, although the regulations do, as the majority notes, grant a measure of relief to municipalities that are able to demonstrate that providing access in a particular milieu will result in an undue burden, the regulations further provide that the local government must, even after making this showing, "take any other action that would not result in ... such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services ..." 28 C.F.R. § 35.150(a)(3). In other words, the local government must make the service accessible; it may not be required to do so in the way that a private plaintiff deems most appropriate.

the ADA is the unequivocal right of access to services, programs, and activities, and Congress required that the regulations clarify that this private right of action to demand access does not extend to facilities, a term not mentioned in § 12132.

IV.

This dissent associates with impressive company in recognizing that the statute and regulations, when read together, provide flexibility with respect to facility repair, while requiring that *all services* be made accessible: the Supreme Court and a distinguished circuit court of appeals have recognized that the proper focus of the ADA is access to services, not access to facilities, and that local governments are given discretion as how best to make services accessible.

A.

First, the Supreme Court has placed particular emphasis on the flexibility granted to local governments under the regulations, saying that "a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services." *Lane,* 541 U.S. at 532. It is worth reemphasizing the Court's language: *local governments* may decide whether, as a matter of policy, to "relocat[e] *services* to alternative, accessible sites ...." *See id.* (emphasis added). This insight strongly suggests that sidewalks are not services: Must the majority be told that sidewalks are not

likely to be relocated to another site?

Notwithstanding *Lane's* suggestion that sidewalks are not services, the majority insists that *Lane* supports its position that facilities are services, and thus the plaintiffs here have a private cause of action even if sidewalks are considered facilities. Majority Op. at 24 ("The Supreme Court's use of DOJ's regulations to illustrate the scope of Title II's reasonable modification [of facilities] requirement is a good indication that those regulations simply apply Title II's nondiscrimination mandate."). This "good indication" is not at all what *Lane* indicates. The services at issue in *Lane,* as the Court made clear, were "judicial services"; for our purposes, the important point is that the Court never so much as intimated that the facility—that is, the courthouse—was a service at issue. 541 U.S. at 531. The courthouse was merely the means of accessing the services related to legal matters offered by the government.

It is easy enough to apply *Lane's* explication of the regulations to sidewalks. If a service is provided in a particular building, and that building is inaccessible to the wheelchair disabled because of noncompliant sidewalks, the governmental entity has various options. Among these: it might move the service to another facility that is supported by accessible sidewalks, or it might repair the sidewalks around the original building. The point is this: the *local government* is allowed to decide how to address the issue of inaccessibility of a service, so long as it provides *some* appropriate remedy. Thus, the Supreme Court has implicitly recognized that

because it is within the city's discretion of how and when to reconstruct existing facilities and infrastructure, facilities are not services, and the statute therefore excludes this private cause of action.

B.

The First Circuit has also recognized that facilities are relevant in the ADA context only in their capacity as a gateway to a service, and that the focus of the ADA is on access to services, programs, and activities. *See Iverson v. City of Boston,* 452 F.3d 94, 99-100 (1st Cir. 2006); *Parker v. Universidad de Puerto Rico,* 225 F.3d 1, 6-7 (1st Cir. 2000).[14] In *Parker,* the court clarified the accessibility requirements applicable to the Monet Garden, a site located within the Botanical Gardens of the University of Puerto Rico, where the University provided the service of hosting group events. 225 F.3d at 6. The court noted the regulatory distinction between facilities and services, and said that Title II focuses on "'program accessibility' rather than 'facilities accessibility' ... to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how best to make access [to services] available." *Id.* The court then noted that although the government was

[14] It is certainly true, as the majority eagerly points out, that several other circuits have decided that private plaintiffs have a cause of action to enforce the ADA sidewalk regulations, but the majority—given its failure to acknowledge what the First Circuit has said—would apparently suggest that the viewpoint it urges is the only viewpoint among the other circuits.

required to "provide at least one route that a person in a wheelchair can use to" access the various ceremonies hosted at the Monet Garden, the government was *not* required to reconstruct "every passageway [.]" *Id.* at 7.

At least two other circuits have drawn a distinction between facilities and services in the context of courthouse access for disabled persons. *See Shotz v. Cates,* 256 F.3d 1077, 1080 (11th Cir. 2001) ("[Plaintiffs] allege that the wheelchair ramps and bathrooms at the courthouse impede their ability to attend trials .... A trial undoubtably is a service ... within the meaning of § 12132."); *Layton v. Elder,* 143 F.3d 469, 473 (8th Cir. 1998) ("[I]f the county intends to continue using the county courthouse to provide services ... it must make ... the building accessible to individuals with disabilities ....").

Notably, these holdings fit squarely within this dissent's view of the statute and the regulations. To reiterate, we should hold that private plaintiffs have a cause of action when inaccessible sidewalks deny meaningful access to a public service.

V.

Finally, we turn to address the majority's attempt to reframe the issue presented, and to thereby shift our focus from the actual sidewalks that the plaintiffs seek to modify, to the labor services employed to construct those sidewalks. Of course, this effort reflects the majority's recognition that a static, immovable, and inanimate piece of concrete is not a service—not only in terms of normal thinking,

but as established by the statute, the regulations, and the common definitions of the term. This argument has lately been advanced to the front lines of the majority's interpretative theories, notwithstanding that the plaintiffs stated the question in their en banc brief to be:

> Whether the trial court, consistent with Congress' intent, Department of Justice ("DOJ") interpretations, and numerous precedents, correctly ruled that *the sidewalks* of Arlington, Texas are a "service, program, or activity" within the meaning of Title II of the ADA.
>
> (Emphasis added).

Thus, the majority alternatively contends that even if concrete does not constitute a service, "*building* and *altering* sidewalks are services, programs, or activities ...." Majority Op. at 11 (emphasis added).

This alternative argument leaves unaddressed that, under Section 12132 the denial of the construction worker's "service" must be by "reason of disability," that is, the *disability* must preclude access to the service of the labor of public employees. Furthermore, the argument falsely assumes that the public generally is provided access to commandeer the service of governmental employees. Here, for example, the non-disabled citizens have no individual right to direct the services of public construction workers to any construction project, including a sidewalk. An illustration, which is perhaps apt to our understanding, is that although the legal department of a city provides legal services

in the public interest and on public matters, those public services are not available to the public at large and are not denied to the disabled by reason of their disability.

The majority vigorously contends, and we do not disagree, that Congress passed the ADA with the aim of granting disabled citizens the same access to public services that able-bodied citizens enjoy; but the majority does not contend that the ADA provides disabled individuals with *greater* access to public services. Plainly said, no citizen has access to a city's labor force for the construction of a sidewalk. So, surely, any denial of access to the sidewalk construction crew cannot be "by reason of ... disability."[15]

Thus, the majority is demonstrably incorrect when it insists that it does not matter how broadly we analyze the statute. *See* Majority Op. at 12 ("[W]e believe this case does not turn on how we frame the issue.") The proper question is whether a sidewalk is itself a service. The answer is that it is not.

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[15] For the same reasons, we can safely reject the majority's argument that the Rehabilitation Act provides the plaintiffs with a private cause of action to seek access to the services provided by the city's labor force. *See* 29 U.S.C. § 794(a) ("No otherwise qualified individual with a disability ... shall, solely by *reason of her or his disability,* be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity ....") (emphasis added).

VI.

From reading the majority opinion and this dissent, it is evident that the statute has not been drawn with preciseness. Nevertheless, this dissent has demonstrated that the statute itself differentiates services from facilities, and has addressed sidewalks only as transportation barriers and facilities, but never as a service. The regulations that implement the statute, however, define sidewalks as a facility. Like the statute, these regulations never refer to sidewalks as a service.

This dissent has thus shown that the majority errs when it conflates services and facilities. This error is further demonstrated because the statute and the regulations allow facilities to be inaccessible to the disabled in many circumstances but require all services to be made equally accessible. Thus, a proper reading of the statute makes clear that facilities and services are treated with distinct and separate meanings. When the statute and regulations are considered as a whole, it should be clear, except perhaps to the most intractable, that Congress never intended for sidewalks to constitute a service, accompanied by a private cause of action.

Finally, this dissent has shown the non-functionality of the majority's abstract argument that the labor construction services morph into the sidewalk itself.

For the reasons stated above, I respectfully dissent. I would remand to allow the district court to determine whether the plaintiffs can show that

particular sidewalks deny access to services that are not otherwise accessible.

APPENDIX B

United States Court of Appeals,
Fifth Circuit

No. 08-10630

D.C. Docket No. 4:05-CV-470

RICHARD FRAME; WENDELL DECKER; SCOTT UPDIKE; J N, a minor, by his next friend and mother GABRIELA CASTRO; MARK HAMMAN; JOEY SALAS

Plaintiffs-Appellants

v.

CITY OF ARLINGTON, A Municipal Corporation

Defendant-Appellee

Sept. 15, 2011.

Appeals from the United States District Court for the Northern District of Texas, Fort Worth

Before JONES, Chief Judge, and KING, JOLLY,

DAVIS, SMITH, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, and HAYNES, Circuit Judges. [1]

JUDGMENT ON REHEARING EN BANC

This cause was considered on rehearing en banc and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is vacated, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

E. GRADY JOLLY, Circuit Judge, joined by JONES, Chief Judge, and SMITH, GARZA, CLEMENT, OWEN, and ELROD, Circuit judges, dissents in part and concurs in part.

ISSUED AS MANDATE:

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[1] Judge Graves did not participate in this decision.

APPENDIX C

United States Court of Appeals,
Fifth Circuit.

RICHARD FRAME; WENDELL DECKER; SCOTT UPDIKE; J N, a minor, by his next friend and mother GABRIELA CASTRO; MARK HAMMAN; JOEY SALAS,
Plaintiffs-Appellants,

v.

CITY OF ARLINGTON, A Municipal Corporation,
Defendant-Appellee.

No. 08-10630.

Aug. 23, 2010.

Appeal from the United States District Court for the Northern District of Texas

Before JOLLY, PRADO and SOUTHWICK, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The petition for rehearing is GRANTED. We withdraw our prior opinion, *Frame v. City of Arlington,* 575 F.3d 432 (5th Cir. 2009), and substitute the following, which reflects substantial changes from the earlier opinion.[1]

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[1] This footnote gives the reader a glimpse of the differences between this opinion on rehearing and our first opinion. The district court initially dismissed the plaintiffs' complaint on statute of limitations grounds. On appeal, we vacated in part and remanded. We agreed that the plaintiffs' claims accrued upon completion or alteration of the noncompliant sidewalk, curb, or parking lot, but found that the City had the burden to prove expiration of the two-year limitations period. In so deciding, we accepted the plaintiffs' argument that violations of the regulations were actionable because sidewalks, curbs, and parking lots were "services" provided by the City. Judge Prado dissented, arguing that the statute of limitations was triggered by the plaintiffs' encounters with, not the City's completion of, noncompliant sidewalks, curbs, or parking lots. On petition for rehearing, the City argues we erred in concluding that sidewalks, curbs, and parking lots constitute "services" within the meaning of Title II. The plaintiffs argue that we erred in concluding that the statute of limitations is triggered by completion of a noncompliant sidewalk, curb, or parking lot. The plaintiffs contend that the statute of limitations is triggered by a handicapped person's most recent encounter with that sidewalk, curb, or parking lot. On rehearing, we hold that sidewalks, curbs, and parking lots are *not* Title II services, programs, or activities; thus, the plaintiffs lack a private right of action to enforce the regulations unless noncompliance has denied access to a service, program, or activity. Where a cause of action is established, the statute of limitations is triggered when the plaintiff knew or should have known that he or she was excluded from a city service, program, or activity.

OPINION ON REHEARING

The plaintiffs are persons with disabilities who depend on motorized wheelchairs for mobility. They allege that the City of Arlington, by failing to make the City's curbs, sidewalks, and certain parking lots ADA-compliant, has violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The district court dismissed their complaint on the basis that their claims were barred by the applicable two-year statute of limitations. This appeal raises more than one issue of first impression—at least for this court. Initially, we must decide whether Title II of the ADA authorizes the plaintiffs' claims. To the extent we find Title II authorizes the plaintiffs' claims, we must also consider whether those claims are subject to a statute of limitations and, if so, when the claims accrued.

We hold that Title II mandates the modification of physical infrastructures that "effectively deny" access to a public entity's services, programs, or activities. Within this framework, sidewalks, curbs, and parking lots are "facilities," not "services, programs, or activities." Consequently, plaintiffs only have a private right of action to enforce compliance with the implementing regulations to the extent that the failure to make a sidewalk, curb, or parking lot compliant denies plaintiffs access to actual services, programs, or activities. Where the plaintiffs establish a private cause of action, we further hold that the plaintiffs' claims are subject to a two-year statute of limitations, and that the claims accrued when the plaintiffs were excluded from the desired program, service, or activity. We further

conclude, however, that it was the City's burden to prove accrual and expiration of any limitations period. Because the district court erred in requiring the plaintiffs to prove that their claims had not expired, we remand for further proceedings.

I.

This appeal comes to us from the grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). We therefore accept the factual allegations of the plaintiffs' complaint as true. *See, e.g., Lane v. Halliburton,* 529 F.3d 548, 557 (5th Cir. 2008). The plaintiffs filed their complaint in the district court on July 22, 2005, and amended it three times. Accordingly, for facts we refer to the plaintiffs' final amended complaint.

The plaintiffs are individuals who reside in Arlington who have mobility impairments that require that they use motorized wheelchairs. They point to more than one hundred curbs and poorly maintained sidewalks in Arlington that they allege make their travel impossible or unsafe. They also point to at least three public facilities lacking adequate handicap parking. Count 1 of the plaintiffs' complaint alleges violations of Title II of the ADA. *See* Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.* (prohibiting public entities from discriminating on the basis of disability).[2] Count 2 of

[2] Count 1 also alleges that the City has violated 28 C.F.R. § 35.150 by failing to implement a plan to transition its curbs, sidewalks, and parking lots to ADA compliance. 28 C.F.R. § 35.150 is a regulation promulgated by the Attorney General that requires public entities to develop transition plans to

the plaintiffs' complaint alleges violations of Section 504 of the Rehabilitation Act, which prohibits recipients of federal funding from discriminating against persons on the basis of disability. *See* Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The plaintiffs do not seek monetary damages; they only ask for an injunction requiring the City to bring its curbs, sidewalks, and parking lots into ADA compliance.

The City of Arlington moved to dismiss the complaint, and the district court granted the City's motion on the ground that the plaintiffs' claims were barred by the applicable two-year statute of limitations. The district court held that the plaintiffs' claims accrued, and the two-year limitations period began to run, on the date the City completed the construction or alteration of any noncompliant curb, sidewalk, or parking lot. Because the plaintiffs' complaint did not point to dates of noncompliant construction or alteration within the two years preceding its filing date, July 22, 2005, the district court dismissed the plaintiffs' claims.

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achieve compliance with Title II. *See* ADA Accessibility Guidelines, 28 C.F.R. § 35.150(d)(1) (requiring public entities to draft transition plans). Citing *Alexander v. Sandoval,* 532 U.S. 275 (2001), the district court dismissed the plaintiffs' claims under 28 C.F.R. § 35.150 because it concluded the plaintiffs had no private cause of action to enforce that regulation. *See* 532 U.S. at 291 (implementing regulation, on its own, cannot create private right of action); *see also Iverson v. City of Boston,* 452 F.3d 94, 99-100 (1st Cir. 2006) (no private right of action to enforce 28 C.F.R. § 35.150); *Ability Ctr. of Greater Toledo v. City of Sandusky,* 385 F.3d 901, 913-15 (6th Cir. 2004) (same). The plaintiffs do not appeal that ruling.

On appeal, the plaintiffs argue that their claims accrued on the date individual plaintiffs actually encountered a noncompliant barrier—not on the date the City completed a noncompliant construction or alteration. In the alternative, the plaintiffs argue that statutes of limitation do not apply to claims for injunctive relief; that the noncompliant curbs, sidewalks, and parking lots are continuing violations of the ADA that relieve them of the limitations bar; and that dismissal was improper because the City, and not the plaintiffs, had the burden to establish when the plaintiffs' claims accrued and the limitations period expired.

We consider each of the plaintiffs' arguments separately.

II.

We review a Rule 12(b)(6) dismissal *de novo*. *See, e.g., Lindquist v. City of Pasadena, Tex.,* 525 F.3d 383, 386 (5th Cir. 2008). "The complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff." *Woodard v. Andrus,* 419 F.3d 348, 351 (5th Cir. 2005) (citing *Sloan v. Sharp,* 157 F.3d 980, 982 (5th Cir. 1998)). The interpretation of a statute is a question of law we also review *de novo*. *See, e.g., Motient Corp. v. Dondero,* 529 F.3d 532, 535 (5th Cir. 2008).

A.

The immediate question is whether the plaintiffs

have stated a cognizable claim under Title II of the ADA; that is, whether the plaintiffs have a private right of action, in connection with their statutory right of access, to force a city to maintain its curbs, sidewalks, and parking lots in compliance with the implementing regulations. If they have no claim, then we need not reach the statute of limitations issues. For reasons we explain, we decide that, to the extent noncompliant sidewalks, curbs, or parking lots effectively deny plaintiffs access to a city "service, program, or activity," plaintiffs have a private right of action to enforce the regulations; to the extent the noncompliant sidewalks, curbs, or parking lots do not effectively deny plaintiffs access to a "service, program, or activity," plaintiffs do not have a private right of action to enforce the regulations.[3]

The ADA was passed "[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II applies to public entities. It provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[4] We have held that to make a prima facie

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[3] In some cases, whether a burden effectively denies access can be determined by an objective standard; in other cases, it will be a question of mixed law and fact, or even pure fact.

[4] The ADA was modeled after the Rehabilitation Act, which prohibits recipients of federal funding from discriminating

case under Title II a plaintiff must show: (1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability. *Melton v. Dallas Area Rapid Transit,* 391 F.3d 669, 671-72 (5th Cir. 2004). There is no dispute that the City is a public entity, or that the plaintiffs here have qualifying disabilities.[5]

Plaintiffs have assembled a range of arguments as to how Arlington's newly constructed, newly maintained, and pre-ADA[6] sidewalks, curbs, and

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against persons on the basis of their disability. *See* 29 U.S.C. § 794 ("No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."). The ADA expressly provides that the remedies, procedures, and rights available under the Rehabilitation Act also apply to the ADA, and thus jurisprudence interpreting either statute is applicable to both. *Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir.), *cert. denied,* 531 U.S. 959 (2000). Thus, even though the plaintiffs have brought claims under both statutes, for simplicity's sake we refer only to the ADA claim.

[5] A public entity is "any [s]tate or local government" or "any department, agency, special purpose district, or other instrumentality of a [s]tate or [s]tates or local government." 42 U.S.C. § 12131. A "disability" under the ADA is "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1).

[6] For the purpose of clarity, we use the term pre-ADA for sidewalks, curbs, and parking lots that were built prior to the ADA and have not undergone qualifying alterations.

parking lots are in violation of Title II. Some of the violations pointed to by the plaintiffs are alleged to deny access to public services; other violations are not similarly tied to the deprivation of access to public services. In some instances, the alleged violation excludes plaintiffs from public benefits; in other instances, plaintiffs can access the services but only with difficulty.

Given the breadth of the plaintiffs' attack on Arlington's sidewalk, curb, and parking lot system, we must identify with some precision the degree to which they are entitled to force compliance with the implementing regulations. In so doing, we move in three steps. First, we briefly review our jurisprudence concerning private causes of action to enforce implementing regulations. Second, we analyze the statutory text. Third, because we conclude that the statutory text is in part ambiguous, we turn to the implementing regulations for guidance.

1.

"[P]rivate rights of action to enforce federal law" are creatures of congressional intent. *Sandoval,* 532 U.S. at 286. The Supreme Court has recognized that Title II's anti-discrimination provision, 42 U.S.C. § 12132, is enforceable through a private right of action. *Barnes v. Gorman,* 536 U.S. 181, 184-85 (2002). When deciding whether a general private right of action recognized under the statutory language carries over to the specifics of the implementing regulations, we ask whether the regulation "effectuates a mandate" of the statute.

Ability Center of Greater Toledo v. City of Sandusky, 385 F.3d 901, 906-07 (6th Cir. 2004); *see Alexander v. Sandoval,* 532 U.S. 275, 285 (2001) (explaining that only if a regulation "simply appl[ies]" the statutory obligations does a right of action to enforce the statute carry over to implementing regulations). Thus, to the extent that the regulations implement a mandate of Title II, plaintiffs would be able to sue to enforce the regulations.

2.

Before turning to the statute, we briefly explain the manner in which we interpret a statute administered by an executive agency. If, using the traditional tools of statutory construction, we conclude the statute is clear as to the precise question at issue, "we must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). If, however, the statute is ambiguous, we then defer to the agency's interpretation, if it is reasonable. *Id.* Where the agency has promulgated regulations addressing the question, we look first to those regulations. If the regulations are "ambigu[ous] with respect to the specific question considered," *Moore v. Hannon Food Serv.,* 317 F.3d 489, 495 (5th Cir. 2003); *Christensen v. Harris County,* 529 U.S. 576, 588 (2000) (finding *Auer* deference appropriate "only when the language of the regulation is ambiguous"), we defer to the agency's interpretation of its own regulation "unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins,* 519 U.S. 452, 461 (1997); *Belt v. EmCare, Inc.,* 444 F.3d 403 (5th

Cir. 2006). Were we automatically to defer to an agency interpretation of an unambiguous regulation, we would in effect "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen,* 529 U.S. at 588. With this in mind, we are prepared to undertake an analysis of Title II.

i.

Title II provides that no individual with a qualifying disability shall, "by reason of such disability, be excluded from participation in or denied the benefits of" state or city provided "services, programs, or activities." 42 U.S.C. § 12132. In *Tennessee v. Lane*, the Supreme Court recognized that this language prohibits not just the discriminatory provision of benefits,[7] but also the failure to take reasonable measures to make these benefits accessible to persons with disabilities. 541 U.S. 509, 531-32 (2004) (citing 42 U.S.C. § 12131(2) and explaining that because "[a] failure to accommodate ... will often have the same practical effect as outright exclusion, Congress required the States to take reasonable measures to remove architectural and other barriers to accessibility"). Accordingly, we have stated, in the context of access to public education, that Title II of the ADA "mandat[es] physical accessibility and the removal and amelioration of architectural barriers." *Pace v.*

[7] Intentional discrimination in the provision of otherwise accessible services, programs, or activities, though also clearly prohibited by Title II, is not at issue in this case and need not be considered.

Bogalusa City School Bd., 403 F.3d 272, 291 (5th Cir. 2005).

Later cases have made clear that, at least with respect to the Rehabilitation Act, this obligation extends beyond cases of actual exclusion to cases of constructive exclusion—*i.e.,* a plaintiff need not show it is impossible to access the benefits, but only that, considering all of the circumstances, there is an unreasonable level of difficulty in accessing the benefits. *See Alexander v. Choate,* 469 U.S. 287, 301 (1985) (stating in the context of the Rehabilitation Act that a benefit cannot be offered in a way that "effectively denies" otherwise qualified handicapped individuals "meaningful access" to which they are entitled); *see also Brennan v. Stewart,* 834 F.2d 1248, 1261 (5th Cir. 1988). Other circuits have applied this "meaningful access" standard to ADA claims. *See, e.g., Jones v. City of Monroe, Mich.,* 341 F.3d 474, 479-80 (6th Cir. 2003); *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001). We specifically reserved judgment on this issue in *Melton,* 391 F.3d at 672 n.2, but we now conclude that under the ADA, which was intended to be coextensive with the Rehabilitation Act, a plaintiff must show that a benefit is being administered in a way that "effectively denies" individuals with qualifying disabilities "meaningful access" to the benefits for which they are qualified.[8]

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[8] "Effective denial" of a benefit is a less demanding requirement for a plaintiff than "exclusion" from a benefit. "Effective denial," however, still requires courts to consider all circumstances, including the degree of hardship on the plaintiff and the reasonableness of the modification given its cost and the availability of substitute services.

We thus conclude that the statute unambiguously mandates the modification of certain new, altered, and pre-ADA physical infrastructures to the extent they "effectively deny" individuals with disabilities from "meaningful access" to city services, programs, and activities. *Melton,* 391 F.3d at 672 n.2. Thus, to the extent the plaintiffs claim that noncompliance with the regulations either outright excludes them from or effectively denies them meaningful access to a service, program, or activity, they have a private cause of action to enforce compliance with the regulations.

Many of the plaintiffs' allegations meet this standard. The plaintiffs allege that certain of the City's physical infrastructure—sidewalks, curbs, and parking lots—hinder them from accessing the City's services, programs, or activities—for example, parks, public schools, and polling stations. The district court on remand will be able to determine precisely which of the plaintiffs' alleged violations are tied to the denial of a service, program, or activity.[9]

In some instances, however, the plaintiffs seek the correction of a noncompliant sidewalk, curb, or parking lot without correlating the violation with a deprivation of a service, program, or activity. In

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[9] In making this determination, there should be no set proximity limitation of the sidewalk to the benefit; the requested modification need only be reasonable in the light of all the circumstances, including its costs and whether required to ensure the plaintiff meaningful access to a service, program, or activity. Such matters are properly within the sound discretion of the district court.

these cases, the plaintiffs argue that a private right of action nevertheless exists because sidewalks, curbs, and parking lots are *themselves* services, programs, or activities, access to which they are deprived via noncompliant curb cuts or poorly maintained walks. This claim presents an issue of first impression in this circuit and we turn to it now.

ii.

The plaintiffs urge that Congress intended Title II to be broad, and they ask us to recognize sidewalks, curbs, and parking lots, not just in their capacity to give access to other services, programs, or activities, but as services themselves.[10] The plaintiffs

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[10] Other circuits that have considered the issue have, without thorough analysis, interpreted "services, programs, or activities" broadly and have allowed private claims to force cities to update their systems of pedestrian walkways in compliance with Department of Justice regulations. For example, the Ninth Circuit reasoned that "services, programs, or activities" can be construed as "anything a public entity does." *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir. 2002) (internal quotations omitted). Because a sidewalk can be characterized as "a normal function of a government entity," public sidewalks fall within the scope of Title II. *Id.* (quotation marks and citation omitted).

The Sixth Circuit has held that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does." *Johnson v. City of Saline,* 151 F.3d 564, 569 (6th Cir. 1998). On the strength of this interpretation, it has recognized a private right of action to enforce 28 C.F.R. § 35.151, a regulation that establishes accessibility standards for new and altered curbs and sidewalks. *Ability Ctr. of Greater Toledo,* 385 F.3d at 906-07. Under the Supreme Court's holding in *Sandoval,* the Sixth Circuit could only decide in this way by finding that 28 C.F.R. § 35.151 "simply appl[ies]" the

argue that sidewalks and parking lots are simply one of the panoply of services provided by the City to its citizens. Thus, they seem to argue, they have a private cause of action under Title II in any instance, at any place in the City, to require the City to modify noncompliant sidewalks or parking lots that are unusable to individuals with disabilities; that is to say, access to other services, programs, or activities is an irrelevant consideration. The City disagrees, arguing that sidewalks and parking lots constitute infrastructure, which may provide access to, but are not themselves, "services, programs, or activities." We agree with the City, and for the reasons that follow, we conclude that sidewalks, curbs, and parking lots are not "services, programs, or activities" within the meaning of Title II.

Title II provides that no individual with a qualifying disability shall "be denied the benefits of the services, programs, or activities of a public entity...." 42 U.S.C. § 12132. "[S]ervices, programs, or activities" is not defined in the statute. We are

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obligations of Title II, in other words, by finding that new and altered sidewalks and curbs are a "service, program, or activity."

The Second and Third Circuits have also read "services, programs, or activities" broadly. The Second Circuit has called the language "a catch-all phrase that prohibits all discrimination by a public entity, regardless of context," and has counseled against "hair-splitting arguments" over what falls within its reach. *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 45 (2d Cir. 1997). The Third Circuit has similarly held the language "is intended to apply to anything a public entity does." *Yeskey v. Com. of Pa. Dep't of Corrections,* 118 F.3d 168, 171 (3d Cir. 1997) (quotation marks and citation omitted).

certain in our own minds, however, that "services, programs, or activities" is not "anything a public entity does," as the Ninth Circuit has said in *Barden,* 292 F.3d at 1076; the statute's definition for "qualified individual with a disability" indicates as much. A "qualified individual with a disability" is one who "with or without ... the removal of ... *transportation barriers* ... 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). Thus, we think it is clear that Congress contemplated that some physical infrastructures constitute a different category from the "services" to which they provide access.

Absent a statutory definition or definitive statutory clue, a word "must be given its ordinary, 'everyday meaning.'" *See United States v. Hildenbrand,* 527 F.3d 466, 476 (5th Cir. 2008) (quoting *Watson v. United States,* 552 U.S. 74, 79 (2007)). The definitions for "service"[11] include "[t]he duties, work, or business performed or discharged by a public official," and "the provision, organization, or apparatus for ... meeting a general demand." MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993). When, for instance, a public entity provides or maintains a sidewalk, or its accompanying curbs, or public parking lots, it arguably creates an "apparatus for ... meeting a

[11] If sidewalks, curbs, and parking lots fall within the statutory language, we believe it must be as a "service," though the outcome of our analysis would be the same were sidewalks, curbs, and parking lots considered a "program" or "activity."

general demand," but it does not perform "work ... by a public official." Furthermore, the concept of infrastructure is usually inanimate; this suggests that while infrastructure may aid in the provision of other services, it is not considered a service itself.[12]

In short, the statute's "qualified individual with a disability" definition suggests a distinction between certain physical infrastructure on the one hand and services, programs, and activities on the other. However, as other circuits have indicated, "services" might be broadly understood to include at least some infrastructures, including sidewalks. Thus, whether sidewalks, curbs, and parking lots are properly considered infrastructure or services is unclear; the statutory language does not rule out the possibility that, for example, some structures used for transportation might be considered to constitute a service. Thus, we cannot conclude that the statutory language *unambiguously* excludes cities' and states' physical infrastructure as distinct from the panoply of less tangible benefits cities and states offer to their residents, even though it is often through and by these infrastructures that the services are delivered.

Because of this ambiguity, we defer to the agency interpretation if it represents a reasonable interpretation of the statutory meaning. We begin with the regulations and turn to other sources only if the regulations are ambiguous. Here, the regulations promulgated by the Department of Justice, which appear at 28 C.F.R. Part 35, are

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[12] For example, a bus is a "facility" that provides the service of transportation.

organized into a number of parts. Subpart B contains general requirements. Included therein is a regulation setting forth the general prohibition against discrimination; it essentially repeats the language of Title II's anti-discrimination provision in full, with one minor change.[13] 28 C.F.R. § 35.130. Subpart D deals with the modification of "facilities" to achieve the statutory requirement of accessibility to programs, services, and activities. *Id.* at §§ 35.149-159 ("Subpart D. Program Accessibility"). The first provision in Subpart D sets out a general prohibition forbidding the exclusion of individuals with disabilities from "services, programs, or activities" because "a public entity's facilities are inaccessible to or unusable by individuals with disabilities." *Id.* at § 35.149. By definition, facilities are the public entity's infrastructure—"all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, parking lots, or other real or personal property...." *Id.* at § 35.104.

Subsequent provisions of the regulation explain what this requirement of program accessibility means with respect to a public entity's facilities. As to existing facilities, a public entity need not necessarily "make each of its existing facilities accessible." *Id.* at § 35.150. Instead, facilities need to be modified only to the extent that the service, program, or activity at issue is not readily accessible when viewed in its entirety. As to new facilities, or facilities altered in a way that could affect the

[13] The regulation replaces the language "by reason of such disability" with "on the basis of disability."

usability of the facility, the new or altered part must be readily accessible and usable by individuals with disabilities. *Id.* at § 35.151. The regulations go on to mandate the addition of curb ramps at the intersection of newly constructed or altered pedestrian walkways and newly constructed or altered streets, roads, and highways. *Id.* at § 35.151(e).

A few principles can be drawn from the language and regulatory structure which, when considered together, make clear that sidewalks, curbs, and parking lots are not "services, programs, or activities." First, under the regulations, sidewalks, curbs, and parking lots are specifically defined as facilities and are clustered with items that clearly do not qualify as "services, programs, or activities," such as equipment and sites.[14] We can safely assume that this was not a mistake. This alone strongly suggests we read sidewalks, curbs, and parking lots as falling outside the statutory "services, programs, or activities."

Second, unless we consider the regulatory language to be contradictory, facilities cannot merely be a subset of "services, programs, and activities." 28 C.F.R. § 35.149 prohibits "inaccessible and unusable" "facilities" that exclude individuals with disabilities

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[14] In its entirety, the definition reads: "Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."

from "services, programs, or activities." If some facilities were also "services, programs, or activities," then the regulations, in at least some cases, would actually forbid "inaccessible and unusable" "services, programs, or activities" that exclude individuals with disabilities from "services, programs, or activities." We cannot believe that this interpretation is correct. The only sensible reading is that the categories are mutually exclusive and if sidewalks, curbs, and parking lots were intended to be treated as "services, programs, or activities," they would have been left out of the facilities definition altogether.

Third, the implementation of a unique framework of regulatory requirements for facilities, §§ 35.150-151, belies any attempt to equate facilities with "services, programs, or activities." If facilities were themselves "services, programs, or activities," they would be subject to the regulatory language in § 35.149[15] mandating some degree of immediate accessibility. This requirement would render superfluous the facilities regulations in § 35.150-151, which envision a phasing-in of compliant facilities with a focus on achieving general accessibility to other programs, services, or activities, rather than immediate compliance with a focus on making facilities themselves accessible.

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[15] It reads: "[N]o qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity." 28 C.F.R. § 35.149.

Given the explicit identification of sidewalks, curbs, and parking lots as facilities; the relationship between facilities and services, programs, and activities in § 35.149; and the creation of regulations unique to facilities in §§ 35.150-151, the regulations clearly indicate to us that sidewalks, curbs, and parking lots are covered by the statute, not as "services," but in their capacity as gateways to "services, programs, or activities," *i.e.,* as facilities.

Accordingly, we hold that in the light of the implementing regulations, sidewalks, curbs, and parking lots are not "services, programs, or activities." Because the statute mandates modifications only where an individual with a disability cannot access a service, program, or activity, the regulations requiring modifications to sidewalks, curbs, and parking lots in instances where these facilities do not prevent access to some service, program, or activity do not effectuate a statutory mandate. Plaintiffs thus do not have a private cause of action to enforce the regulatory requirements as they relate to these non-access-denying sidewalks, curbs, and parking lots.

III.[16]

Now we are prepared to consider the issue

[16] Because we hold that there is no private cause of action to challenge sidewalks, curbs, and parking lots unless the noncompliance results in a denial of access to a service, program, or activity, we need not address statute of limitations issues with the claims alleging that sidewalks, curbs, and parking lots are themselves services, programs, or activities. Such claims are not cognizable in a private lawsuit.

addressed by the district court—whether the plaintiffs' claims are time-barred. First, we address the plaintiffs' argument that statutes of limitation do not apply to claims seeking only injunctive relief. Second, we identify the proper statute of limitations. Third, we consider when the plaintiffs' claims accrued.

We reject the plaintiffs' assertion that the statute of limitations does not apply to their claims because they seek only injunctive relief. The plaintiffs cite *Voices for Independence v. Pennsylvania Department of Transportation,* 2007 WL 2905887 (W.D. Pa.), a district court opinion that held a statute of limitations did not apply in an ADA case seeking only equitable relief. *Id.* at *16-17. That opinion, in addition to being nonbinding, is also unpersuasive in the light of the fact that courts regularly apply statutes of limitation to claims under Title III of the ADA, for which only injunctive relief is available.[17] *See, e.g., Gaona v. Town & Country Credit,* 324 F.3d 1050, 1054-56 (8th Cir. 2003) (applying Minnesota's six-year statute of limitations to Title III claim for injunctive relief); *Pickern v. Holiday Quality Foods, Inc.,* 293 F.3d 1133, 1136 n.2 (9th Cir. 2002) (holding ongoing violation brought Title III claim for injunctive relief within California's one-year limitations period); *Sexton v. Otis Coll. of Art &*

[17] Remedies available under Title III of the ADA are the same as those under Title II of the Civil Rights Acts of 1964, 42 U.S.C. § 2000, for which there is only injunctive relief. 42 U.S.C. § 12188(a); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) (Title II of the Civil Rights Acts of 1964 provides injunctive relief only).

Design Bd. of Directors, 129 F.3d 127, 127 (9th Cir. 1997) (applying California's one-year statute of limitations to Title III claim for injunctive relief); *Soignier v. Am. Bd. of Plastic Surgery,* 92 F.3d 547 (7th Cir. 1996), *cert. denied,* 519 U.S. 1093 (1997) (applying Illinois's two-year statute of limitations to Title III claim for injunctive relief). This court has recently held that statutes of limitations apply to § 1983 actions that seek only injunctive relief. *See Walker v. Epps,* 550 F.3d 407, 414 (5th Cir. 2008). We decline to treat the plaintiffs' Title II claims differently.

Now, with respect to the application of the correct limitations period, we begin by noting that neither Title II of the ADA nor the Rehabilitation Act provides a limitations period, and the general federal statute of limitations does not apply to either statute.[18] We have previously held, however, that the Texas two-year statute of limitations for personal injury claims applies in Title II cases filed in Texas federal courts. *Holmes v. Texas A&M Univ.,* 145 F.3d 681, 683-84 (5th Cir. 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2007). The

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[18] Title II adopts the remedies, procedures, and rights of the Rehabilitation Act. 42 U.S.C. § 12133. The limitations period in Rehabilitation Act cases is governed by 42 U.S.C. § 1988(a). That statute directs courts to apply federal law if it provides a limitations period or, if it does not, apply common law, as modified by state law, if it is not inconsistent with the Constitution or laws of the United States. *See, e.g., Holmes v. Texas A&M Univ.,* 145 F.3d 681, 683-84 (5th Cir. 1998) (citing *Hickey v. Irving Indep. Sch. Dist.,* 976 F.2d 980, 982 (5th Cir. 1992)). For Title II claims courts borrow the state statute of limitations from the most analogous state law claim.

district court thus applied the correct two-year statute of limitations.

The Supreme Court has been clear that a claim accrues when the plaintiff knew or should have known that the discriminatory act occurred. *See Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) ("the proper focus is on the time of the *discriminatory act,* not the point at which the *consequences* of the act become painful") (citing *Del. St. Coll. v. Ricks,* 449 U.S. 250, 258 (1980)). Here, the discriminatory act is the denial of access to the service, program, or activity. A plaintiff thus has two years, from the time she knew or should have known that she was denied access to a service, program, or activity, to challenge the architectural barriers causing the exclusion. This is a fact question that must be determined by the fact-finder.

Because the plaintiffs failed to plead that their injuries occurred within two years of the filing of their complaint, the district court dismissed their action. However, as always, the defendant has the burden of establishing affirmative defenses, including a statute of limitations, and so it is the City's obligation to demonstrate expiration of the limitations period. FED. R. CIV. P. 8 ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including ... statute of limitations[.]"); *see also In re Hinsley,* 201 F.3d 638, 644-45 (5th Cir. 2000) (Under Texas law, "[a] party asserting limitations must establish the applicability of the limitations statute, but must, as well, prove when the opponent's cause of action accrued[.]") (quoting *Intermedics, Inc. v. Grady,* 683

S.W.2d 842, 845 (Tex. App. 1984, writ refused n.r.e.)). In this respect the district court erred.

In summary: Plaintiffs' claims are subject to a two-year statute of limitations; plaintiffs' claims accrue when they knew or should have known that they are denied access to a service, program, or activity; and the burden is on the defendant to prove its affirmative defense that the statute of limitations has expired.

IV.

We recap the holdings of this opinion: Title II mandates that cities take reasonable steps to modify infrastructure that "effectively denies" individuals with disabilities access to programs, services, and activities. We hold that curbs, sidewalks, and parking lots do not constitute a service, program, or activity within the meaning of Title II of the ADA. Accordingly, plaintiffs have established cognizable claims under Title II only to the extent they have alleged a noncompliant sidewalk, curb, or parking lot denies them access to a program, service, or activity that does fall within the meaning of Title II. As to their claims that meet this standard, the district court correctly held the plaintiffs' claims were subject to a two-year statute of limitations. These claims accrued on the date the plaintiffs knew or should have known they were denied access to a program, service, or activity on account of the noncompliant facility. However, the district court improperly burdened the plaintiffs with proving accrual within the two years preceding the filing of their complaint. We therefore VACATE the district

court's judgment of dismissal and REMAND for such further proceedings not inconsistent with this opinion.

VACATED and REMANDED.

PRADO, Circuit Judge, concurring in part and dissenting in part:

Although my colleagues granted rehearing and now hold that the statute of limitations applicable to the plaintiffs' claims here begins to run when the individual plaintiff was denied a service, program, or activity,[1] the majority has performed an about-face, and now also holds that sidewalks, curbs, and parking lots[2] are not services under the ADA. While I agree that we must remand this case, I cannot agree with the majority's novel approach to coverage under the ADA, and once again I must dissent.[3] I believe that characterizing sidewalks as "facilities," and thereby limiting private causes of action under the ADA, is not supported by the statute, regulations, or caselaw. I fear that the majority departs dramatically from congressional intent and

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[1] For simplicity, I refer to "services, programs, and activities" simply as "services."

[2] Similarly, for simplicity, I refer to "sidewalks, curbs, and parking lots" as "sidewalks."

[3] Because the majority now recognizes that "[a] plaintiff ... has two years, from the time she knew or should have known that she was denied access to a service, program or activity, to challenge the architectural barriers causing the exclusion," I concur in Part III of the majority's opinion. Maj. Op. at 18.

creates a distinction that is unworkable and ultimately meaningless.

I.

The majority asks whether sidewalks "are services themselves." Maj. Op. at 10. This is not the correct inquiry. The question is not whether the physical structures that compose the sidewalks are a service; rather, it is whether a city provides a service through the construction, maintenance, or alteration of those sidewalks. The answer, of course, is yes. *See Barden v. City of Sacramento,* 292 F.3d 1073, 1074, 1076 (9th Cir. 2002) ("We must decide whether public sidewalks ... are a service, program, or activity ... within the meaning of [the ADA]. We hold that they are .... [because] maintaining public sidewalks is a normal function of a city...."). A public entity that constructs a sidewalk performs a public service. Asking whether sidewalks themselves are a service engages in the type of "hair-splitting" cautioned against by our sister circuits. *See Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 44-45 (2d Cir. 1997) (holding that the zoning decisions of a public entity are covered by the ADA "because making such decisions is a normal function of a government entity"). The majority's approach does not comport with the plain, unambiguous text of the ADA; thus we need not look to the regulations or congressional intent. Even if we do, however, the majority's approach is not supported by the promulgated regulations and does not satisfy the intent of Congress.

A.

Title II 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. In our original opinion, we reasoned:

> Among the definitions for "service" is "a facility supplying some public demand." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1137 (11th ed. 2003). When, for instance, a public entity provides a sidewalk, or its accompanying curbs, or public parking lots, it provides "a facility supplying some public demand." Because providing curbs, sidewalks, and parking lots is a service within the ordinary, "everyday meaning" of that word, we hold that those facilities also constitute a "service" within the meaning of Title II.

Frame v. City of Arlington, 575 F.3d 432, 437 (5th Cir. 2009). I continue to agree with this reasoning. The majority's new opinion, however, adopts a new definition to arrive at a very different result:

> The definitions for "service" include "[t]he duties, work, or business performed or discharged by a public official," and "the provision, organization, or apparatus for ... meeting a general demand." MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993). When, for instance, a

> public entity provides or maintains a sidewalk, or its accompanying curbs, or public parking lots, it arguably creates an "apparatus for ... meeting a general demand," but it does not perform "work ... by a public official."

Maj. Op. at 12. I do not think that two definitions from dueling *Merriam-Webster's* dictionaries justify changing our approach to this case. Indeed, *either* definition encompasses a broad reading of services. When a public entity constructs, maintains, or alters a sidewalk, it performs the "work" traditionally undertaken by a municipality, and thereby provides a public service.

In a show of impressive solidarity, our sister circuits have consistently held that coverage under "services, programs, and activities" is unambiguous and should be broadly construed.[4] The majority's

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[4] *Barden,* 292 F.3d at 1076 ("Rather than determining whether each function of a city can be characterized as a service, program, or activity for purposes of Title II, however, we have construed the ADA's broad language [as] bring[ing] within its scope anything a public entity does.") (quotations and citations omitted); *Johnson v. City of Saline,* 151 F.3d 564, 569 (6th Cir. 1998) ("[W]e must acknowledge that our conclusion—that the discrimination forbidden by § 12132 must be with regard to services, programs, or activities—is for the most part a distinction without a difference. This is because we find that the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does."); *Yeskey v. Comm. of Pa. Dep't of Corr.,* 118 F.3d 168, 171 (3d Cir. 1997) ("The statutory definition of '[p]rogram or activity' in Section 504 indicates that the terms were intended to be all-encompassing. They include '*all* of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government ... any part

opinion dismisses the work of our sister circuits in a footnote, disregarding their interpretation of the ADA and asserting that they considered the issue "without thorough analysis." Maj. Op. at 10 n.10. On the contrary, I believe that the Ninth Circuit, in *Barden,* thoroughly considered the text of the statute, regulations, and legislative history of the ADA provisions at issue here.

The Ninth Circuit answered the same question presented in this case,[5] and held that "*maintaining* public sidewalks is a normal function of a city and without a doubt something that the [city] does. Maintaining their accessibility for individuals with disabilities therefore falls within the scope of Title II." *Id.* at 1076 (emphasis added) (citation and internal quotations omitted). Contrary to the approach taken by the majority opinion, the Ninth Circuit focused its inquiry "not ... on 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.* (quoting *Bay Area Addiction Research*

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of which is extended Federal financial assistance.'") (quoting 29 U.S.C. § 794(b)) (emphasis added); *Innovative Health Sys.,* 117 F.3d at 44 ("The ADA does not explicitly define 'services, programs, or activities.' Section 508 of the Rehabilitation Act, however, defines 'program or activity' as 'all of the operations' of specific entities ....'") (quoting 29 U.S.C. § 794(b)(1)(A)), *superseded on other grounds, Zervos v. Verizon N.Y., Inc.,* 252 F.3d 163, 171 n.7 (2d Cir. 2001).

[5] "We must decide whether public sidewalks in the City of Sacramento are a service, program, or activity of the City within the meaning of Title II of the [ADA] or [the Rehabilitation Act]." *Barden,* 292 F.3d at 1074.

& Treatment, Inc. v. City of Antioch, 179 F.3d 725, 731 (9th Cir. 1999)). We relied on *Barden* in the previous opinion, *see Frame,* 575 F.3d at 436-37, and I am convinced that this reliance was well-placed.

The majority states that it "cannot conclude that the statutory language *unambiguously* excludes cities' and states' physical infrastructure as distinct from the panoply of less tangible benefits cities and state offer to their residents." Maj. Op. at 13. However, I interpret the language of the statute as providing broad coverage, encompassing both the intangible services offered by public entities and the act of offering tangible goods. A statute is not ambiguous simply because it offers expansive coverage.

B.

The statute is unambiguous. Thus, we need not turn to the Department of Justice's regulations. Assuming that we should, however, a plain-reading of the regulations demonstrates that providing sidewalks is a public service. In the preamble to its regulations, the Department of Justice explains:

> The scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504's application to all programs and activities "conducted by" Federal Executive agencies, in that title II applies to *anything a public entity does.*

28 C.F.R. pt. 35, app. A at 456 (1996) (emphasis added).

The majority's opinion looks to Subpart D of the regulations to define "facilities." Maj. Op. at 13 (citing 28 C.F.R. § 35.1149-59). The opinion then reasons that because physical structures such as sidewalks are defined as facilities and "clustered with items that clearly do not qualify as 'services, programs, or activities,'" they cannot be considered services. Maj. Op. at 14. The majority concludes that because only the regulations which apply to services are actionable, a private cause of action exists only for the sidewalks which facilitate a service.

Although the regulations may set apart facilities from services, nothing in the regulations suggests that when a public entity *provides* those facilities, it does not provide a service. Indeed, when a municipality constructs a new facility, or alters an existing one, it must comply with the ADA. *See* 28 C.F.R. § 35.151(a) & (b). Curb ramps and sidewalks are specifically mentioned in 28 C.F.R. § 35.151(e)(2), which requires that "[n]ewly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways." When a public entity is charged with providing new or altered facilities in compliance with the ADA, the regulations do not require that those facilities relate to a covered service. Similarly, there is no limitation that a sidewalk must take the traveler to a "service."[6]

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[6] Although it is merely illustrative of the scope of the

Again, I think that the majority opinion's approach asks the wrong question. It is not the sidewalks themselves that we should concern ourselves with; it is the construction, modification, or alteration of sidewalks that is the "service." The failure of the public entity to construct, alter, or maintain sidewalks in compliance with the ADA is actionable within the scope of the regulations.

C.

Although I do not believe it is necessary to look to the legislative history, Congressional adoption materials support a broad reading of the ADA. In the accompanying House Report, Congress stated that Title II "simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to *all actions of state and local governments*." H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367 (emphasis added); *see also id.* at 151, *reprinted in* 1990 U.S.C.C.A.N. 303, 434 ("Title II ... makes *all activities* of State and local governments subject to the types of prohibitions against discrimination ...

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regulations and not of a private right of action, under 28 C.F.R. § 35.150(d)(2), public entities are required to develop a transition plan for ADA compliance, including 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 ... followed by walkways serving other areas." Sidewalks serving public entities are given priority, but the Department of Justice saw fit to include all manner of destinations within the "other areas" catchall. That the regulation has such broad scope seems to run contrary to the majority's requirement that a sidewalk must lead to a "service."

included in section 504 ....") (emphasis added). When a public entity acts, its actions necessarily fall within the coverage of the ADA and section 504 of the Rehabilitation Act.

"[T]he elimination of architectural barriers was one of the central aims of the Rehabilitation Act." *Alexander v. Choate,* 469 U.S. 287, 297 (1985) (citing S. Rep. No. 93-318, p.4 (1973), U.S. Code Cong. & Admin. News 1973, pp. 2076, 2080). And, as this Circuit has elaborated, the purpose of the ADA and section 504 "is the elimination of discrimination against individuals with disabilities ... [by] [m]andating physical accessibility and the removal and amelioration of architectural barriers." *Pace v. Bogalusa City Sch. Bd.,* 403 F.3d 272, 291 (5th Cir. 2005) (en banc). It would be contrary to the purpose of the ADA for a public entity to erect non-compliant sidewalks.

There exists further indication that Congress did not intend for courts to draw the type of distinction offered in the majority's opinion.[7] Congress was

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[7] As explained by one of the ADA's proponents:

> Title II covers the range of services, programs and benefits offered by State and local governments, without a requirement that such programs or activities received Federal financial assistance. Thus, *title II extends to whatever spheres of authority a State or local government is involved in*–including employment, health and service programs, *the streets–which require curb-cuts*–and the facilities owned or operated by such governments.

136 CONG. REC. E1913-01, E1916 (daily ed. May 22, 1990) (statement of Rep. Hoyer) (emphasis added). Nothing in the

particularly clear on the subject of curb cuts—a portion of the plaintiffs' claims here—stating that: "[t]he employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 367. Therefore, "under this title, local and state governments are required to provide curb cuts on public streets." *Id.*

Nowhere in the legislative history do the architects of the ADA suggest that the ADA does not cover a public entity's actions with regard to its sidewalks. If anything, the clear indications that Congress intended the ADA to encourage (and sometimes mandate) the evenhanded offering of public services, should caution against the majority's opinion's distinctions.

II.

In addition to the statutory analysis performed in Part I, I am concerned by the broader implications of the majority's approach; namely, there is no precedent to support the majority's distinction and the new standard is unworkable.

A.

The majority's opinion offers no caselaw to

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above quote indicates that "the streets" should be treated differently than employment or health and service programs.

support its new analysis. Considering the potential implications of the majority's novel approach, and given the clear intent of Congress described above, this dearth of precedent is troubling.[8]

Additionally, I am unable to locate a single circuit court case that could support the majority's opinion even by analogy or extrapolation. *Kinney v. Yerusalim*, from the Third Circuit, provides some analogous support for a distinction between the treatment of existing facilities and new constructions and alterations. *See* 9 F.3d 1067, 1072 (3d Cir. 1993) (finding that street resurfacing is an "alteration" under 28 C.F.R. § 35.151(b), and thereby requiring curb cuts under 28 C.F.R. § 35.151(e)). Although the regulations place different burdens on municipalities with regard to existing facilities and new or altered facilities, *compare* 28 U.S.C. § 35.150(a) & (b), *with id.* § 35.151(b), even *Kinney* supports a broad reading of covered services and cannot be extended to assist the majority's approach.[9]

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[8] My research reveals only a single federal case that supports the majority's new analysis. In *New Jersey Protection and Advocacy, Inc. v. Township of Riverside,* No. 04-5914, 2006 WL 2226332, at *3 (D.N.J. Aug. 2, 2006), a district court held that sidewalks were not "in and of themselves, programs, services, or activities for the purpose of the ADA's implementing regulations." Obviously, an unpublished district court case from another circuit does not control our analysis. Nor does the district court's opinion alter my belief that we should look to the act of providing, maintaining, and altering the sidewalk as the covered service.

[9] *Kinney* considered whether the resurfacing of city streets constituted an "alteration" under the regulations. 9 F.3d at 1069. At no point did the Third Circuit draw a distinction between streets and the service of providing them:

The majority's opinion creates a split with the Ninth Circuit and is unsupported by any of our sister circuits. While the absence of caselaw on point or analogous treatment is not dispositive, the *Barden* opinion and the great weight of caselaw supporting a broad reading of the ADA, *supra* note 4, forces me to doubt the validity of the majority's new analysis.

B.

The majority's opinion draws a distinction between tangible facilities and intangible services. This distinction will not work when applied to the numerous mixed tangible/intangible services rendered by public entities. Take, for example, a public park. The park has intangible aspects: entertainment, respite, and fresh air. But it also has tangible aspects: the pathways, drinking fountains, and green spaces. Can we separate the tangible aspects from the intangible? Or are the tangible aspects of a park so interwoven with the intangible

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> If a street is to be altered to make it more usable for the general public, it must also be made more usable for those with ambulatory disabilities. At the time that the City determines that funds will be expended to alter the street, the City is also required to modify the curbs so that they are no longer a barrier to the usability of the streets by the disabled.

Id. A street is also named as a "facility." *See* 8 C.F.R. § 35.104. And, obviously, a street is merely a physical structure akin to the sidewalks at issue here. Yet nowhere in *Kinney* did the Third Circuit imply that the street must lead an individual to a public service or be used by buses for public transport. It is enough that the public entity has decided to alter the street to bring the alteration within the ambit of ADA compliance.

that any attempt at separation is futile? When applied to this park hypothetical, I think that the merits of our original treatment of the scope of services are readily apparent. When a public entity decides to build a park (or later alter it), it must do so in a way that provides equal opportunities for access to disabled people.

The majority goes to some lengths to claim that "there should be no proximity limitation of the sidewalk to the benefit." Maj. Op. at 10 n.9. The majority's attempt to water-down its own new standard illustrates the difficulty of managing and applying this new standard. In essence, a sidewalk falls outside of the majority's standard only if it is a sidewalk to nowhere. I question, however, whether any sidewalk goes nowhere.

If the noncompliant sidewalk is immediately outside of a disabled person's home, that sidewalk will necessarily deny the individual access to any public services. If a disabled individual wants to take a circuitous path to a library and encounters a noncompliant sidewalk, may that disabled person properly bring a claim? Under the "sidewalks to nowhere" standard, must a disabled person use the most direct path to a public service? If a disabled person may avoid a sidewalk lacking a curb cut by taking an easy detour, must she do so? Each of these questions runs counter to the basic ameliorative and equalizing aspects of the ADA. *See Pace,* 403 F.3d at 291 ("[T]he Congressional objective of both the ADA and § 504 is the elimination of discrimination against individuals with disabilities.... Mandating physical accessibility and the removal and

amelioration of architectural barriers is an important purpose of each statute.").

The district court, on remand, will be placed in the unenviable position of attempting to apply this standard. The district court will be forced to wrestle with a standard lacking any clear limitations or answers to the questions I have posited above. The majority reasons away these fundamental issues with its statement that proximity should not be considered. But if proximity is of no consequence, then what sidewalk could ever fall outside of the reach of the majority's novel standard?

* * *

Arlington built sidewalks. Arlington maintains sidewalks. And, when it deems it appropriate, Arlington alters the sidewalks. Each of these acts is a normal function of government. The acts taken by Arlington with regard to its sidewalks fall within the unambiguous meaning of "services, programs, and activities." I respectfully dissent.

APPENDIX D

United States Court of Appeals,
Fifth Circuit.

RICHARD FRAME; WENDELL DECKER; SCOTT UPDIKE; J N, a minor, by his next friend and mother GABRIELA CASTRO; MARK HAMMAN; JOEY SALAS,
Plaintiffs-Appellants,

v.

CITY OF ARLINGTON, A Municipal Corporation,
Defendant-Appellee.

No. 08-10630.

July 7, 2009.

Appeal from the United States District Court for the Northern District of Texas

Before JOLLY, PRADO and SOUTHWICK, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The plaintiffs are persons with disabilities who depend on motorized wheelchairs for mobility. They allege that the City of Arlington, by failing to make the City's curbs, sidewalks, and certain parking lots ADA-compliant, has violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The district court dismissed their complaint on the basis that their claims were barred by the applicable two-year statute of limitations. This appeal raises more than one issue of first impression–at least for this court. Initially, we must decide whether Title II of the ADA authorizes the plaintiffs' claims; specifically, whether the City's curbs, sidewalks, and parking lots constitute a service, program, or activity within the meaning of Title II. Because we decide Title II authorizes the plaintiffs' claims, we next ask whether those claims are subject to a statute of limitations and, if so, when the claims accrued. We hold that the plaintiffs' claims are subject to a two-year statute of limitations, and that they accrued upon the City's completion of any noncompliant construction or alteration. We further conclude, however, that it was the City's burden to prove accrual and expiration of any limitations period. Because the district court erred in requiring the plaintiffs to prove that their claims had not expired, we must remand for further proceedings.

I.

This appeal comes to us from the grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). We therefore accept the factual allegations of the plaintiffs' complaint as true. *See,*

e.g., Lane v. Halliburton, 529 F.3d 548, 557 (5th Cir. 2008). The plaintiffs filed their complaint in the district court on July 22, 2005, and thereafter amended it three times. Accordingly, for facts we refer to the plaintiffs' final complaint, as amended.

The plaintiffs are individuals who reside in Arlington who have mobility impairments that require that they use motorized wheelchairs. They point to more than one hundred curbs and poorly maintained sidewalks in Arlington that they allege make their travel impossible or unsafe. They also point to at least three public facilities lacking adequate handicap parking. Count 1 of the plaintiffs' complaint alleges violations of Title II of the ADA. *See* Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.* (prohibiting public entities from discriminating on the basis of disability).[1] Count 2 of

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[1] Count 1 also alleges that the City has violated 28 C.F.R. § 35.150 by failing to implement a plan to transition its curbs, sidewalks, and parking lots to ADA compliance. 28 C.F.R. § 35.150 is a regulation promulgated by the Attorney General which requires that public entities develop transition plans to achieve compliance with Title II. *See* ADA Accessibility Guidelines, 28 C.F.R. § 35.150(d)(1) (requiring public entities to draft transition plans). The district court dismissed, citing *Alexander v. Sandoval,* 532 U.S. 275 (2001), the plaintiffs' claims under 28 C.F.R. § 35.150 because it concluded the plaintiffs had no private right of action to enforce that regulation. *See id.* at 291 (implementing regulation, on its own, cannot create private right of action); *see also Iverson v. City of Boston,* 452 F.3d 94, 99-100 (1st Cir. 2006) (no private right of action to enforce 28 C.F.R. § 35.150); *Ability Ctr. of Greater Toledo v. City of Sandusky,* 385 F.3d 901, 913-15 (6th Cir. 2004) (same). The plaintiffs do not appeal that ruling and therefore we do not address it.

the plaintiffs' complaint alleges violations of Section 504 of the Rehabilitation Act, which prohibits recipients of federal funding from discriminating against persons on the basis of disability. *See* Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. The plaintiffs do not seek monetary damages; they only ask for an injunction requiring the City to bring its curbs, sidewalks, and parking lots into ADA compliance.

The City of Arlington moved to dismiss the complaint, asserting three grounds for dismissal: (1) that the claims were barred by the applicable two-year statute of limitations; (2) that the plaintiffs lacked standing to invoke Title II, the ADA Accessibility Guidelines, or Section 504 of the Rehabilitation Act; and (3) that the alleged facts did not state a legal claim of discrimination.

The district court granted the City's motion on the ground that the plaintiffs' claims were barred by the applicable two-year statute of limitations. The district court held that the plaintiffs' claims accrued, and the two-year limitations period began to run, on the date the City completed the construction or alteration of any noncompliant curb, sidewalk, or parking lot. Because the plaintiffs' complaint did not point to dates of noncompliant construction or alteration within the two years preceding its filing date, July 22, 2005, the district court dismissed the plaintiffs' claims.

On appeal, the plaintiffs argue that their claims accrued on the date individual plaintiffs encountered a noncompliant barrier–not on the date the City

completed a noncompliant construction or alteration. In the alternative, the plaintiffs argue that statutes of limitation do not apply to claims for injunctive relief; that the noncompliant curbs, sidewalks, and parking lots are continuing violations of the ADA that relieve them of the limitations bar; and that dismissal was improper because the City, and not the plaintiffs, had the burden to establish when the plaintiffs' claims accrued and the limitations period expired.

We consider each of the plaintiffs' arguments separately. But before we reach the limitations and accrual issues, we resolve whether Title II otherwise authorizes the plaintiffs' claims.

II.

We review a Rule 12(b)(6) dismissal *de novo. See, e.g., Lindquist v. City of Pasadena, Tex.,* 525 F.3d 383, 386 (5th Cir. 2008). "The complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff." *Woodard v. Andrus,* 419 F.3d 348, 351 (5th Cir. 2005) (citing *Sloan v. Sharp,* 157 F.3d 980, 982 (5th Cir. 1998)). The interpretation of a statute is a question of law we also review *de novo. See, e.g., Motient Corp. v. Dondero,* 529 F.3d 532, 535 (5th Cir. 2008).

The immediate question is whether Title II of the ADA authorizes the plaintiffs' claims, that is, whether the City's curbs, sidewalks, and parking lots are a service, program, or activity within the meaning of Title II. For reasons we explain, we

decide that they are.

The ADA was passed "[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1).[2] The focus of the instant appeal is on Title II of the ADA, which prohibits public entities from discriminating against individuals on the basis of disability. Title II 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.

Title II is enforceable through a private cause of action, *see, e.g., Barnes v. Gorman,* 536 U.S. 181, 184-85 (2002), and we have held that to make a prima facie case under Title II a plaintiff must show: (1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or

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[2] The ADA was modeled after the Rehabilitation Act, which prohibits recipients of federal funding from discriminating against persons on the basis of their disability. *See* 29 U.S.C. § 794 ("No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."). The ADA expressly provides that the remedies, procedures, and rights available under the Rehabilitation Act also apply to the ADA, and thus jurisprudence interpreting either statute is applicable to both. *Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir. 2000), *cert. denied,* 531 U.S. 959 (2000). For simplicity's sake, we refer only to the ADA claim.

activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability. *Melton v. Dallas Area Rapid Transit,* 391 F.3d 669, 671-72 (5th Cir. 2004). There is no dispute that the City is a public entity, or that the plaintiffs here have qualifying disabilities.[3] There is, however, a dispute over whether curbs, sidewalks, and parking lots are encompassed within services, programs, or activities for which a public entity has liability under Title II.

Title II does not define "services, programs, or activities." Although we have not decided whether curbs, sidewalks, or parking lots fall within Title II's coverage, other circuits have interpreted "services, programs, or activities" broadly.

For example, the Ninth Circuit has specifically held that public sidewalks are a service, program, or activity within the meaning of Title II, by reasoning that "services, programs, or activities" can be construed as "'anything a public entity does.'" *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir. 2002) (quoting *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001) (quoting *Yeskey v. Pa. Dep't of Corr.,* 118 F.3d 168, 171 (3d Cir. 1997), *aff'd,* 524 U.S. 206 (1998))). The focus of its inquiry,

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[3] A public entity is "any [s]tate or local government" or "any department, agency, special purpose district, or other instrumentality of a [s]tate or [s]tates or local government." 42 U.S.C. § 12131. A "disability" under the ADA is "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1).

the court wrote, was not on whether a sidewalk can be characterized as a service, program, or activity, but on whether it is "'a normal function of a government entity.'" *Id.* (quoting *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch,* 179 F.3d 725, 730 (9th Cir. 1999) (quoting *Innovative Health Sys., Inc. v. City of White Plains,* 117 F.3d 37, 44 (2d Cir. 1997))). The court concluded that maintaining public sidewalks is "without a doubt something that the [City] 'does,'" and public sidewalks, therefore, fall within the scope of Title II. *Id.* (quotation marks and citation omitted).

The Sixth Circuit has also broadly held that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does." *Johnson v. City of Saline,* 151 F.3d 564, 569 (6th Cir. 1998). Although that court has not specifically decided that sidewalks constitute "services, programs, or activities" within the meaning of Title II, it has held that a plaintiff has a private cause of action under Title II to enforce 28 C.F.R. § 35.151, a regulation that establishes accessibility standards for curbs and sidewalks. *Ability Ctr. of Greater Toledo,* 385 F.3d at 906-07. The plaintiffs in that case complained that the City of Sandusky failed to comply with 28 C.F.R. § 35.151's accessibility standards when it replaced public curbs and sidewalks. *Id.* at 903. The court held that the plaintiffs had a private cause of action to enforce 28 C.F.R. § 35.151 because the regulation effectuates a mandate of Title II; Title II, it reasoned, not only prohibits intentional discrimination, but also requires that public entities make certain accommodations in the course of providing public

services including, in that case, the maintenance of public sidewalks. *Id.* at 906-07.

Finally, the Second and Third Circuits have also read "services, programs, or activities" broadly. The Second Circuit has called the language "a catch-all phrase that prohibits all discrimination by a public entity, regardless of context," and has counseled against "hair-splitting arguments" over what falls within its reach. *Innovative Health Sys.,* 117 F.3d at 45. The Third Circuit has similarly held the language "is intended to apply to anything a public entity does." *Yeskey,* 118 F.3d at 171 (quotation marks and citation omitted).

It is not necessary for us to conclude, as the Ninth Circuit did, that Title II's "services, programs, or activities" includes "anything a public entity does." It is enough for present purposes that we agree that "services, programs, or activities" is at least broad enough to include curbs, sidewalks, and parking lots. Streets and sidewalks, as well as public parking areas, are reasonably understood to be services within the meaning of Title II. Absent a statutory definition or definitive statutory clue, a word "must be given its ordinary, 'everyday meaning.'" *See United States v. Hildenbrand,* 527 F.3d 466, 476 (5th Cir. 2008) (quoting *Watson v. United States,* 552 U.S. 74 (2007)). Among the definitions for "service" is "a facility supplying some public demand." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1137 (11th ed. 2003). When, for instance, a public entity provides a sidewalk, or its accompanying curbs, or public parking lots, it provides "a facility supplying some public demand." Because providing curbs, sidewalks,

and parking lots is a service within the ordinary, "everyday meaning" of that word, we hold that those facilities also constitute a "service" within the meaning of Title II.

This understanding is consistent with the legislative history of the ADA, which indicates that Congress envisioned that the ADA would require that local and state governments maintain disability-accessible sidewalks. *See* H.R. Rep. No. 101-485, pt. 2, at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367 ("The employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets."). In the light of that legislative intent, along with other circuits' broad interpretation and our own appreciation of the plain meaning of the word services, we conclude that curbs, sidewalks, and parking lots are "services, programs, or activities" within the meaning of Title II. Accordingly, Title II authorizes the plaintiffs' claims.

III.

Now we are prepared to address whether the plaintiffs' claims are nevertheless time-barred. Neither Title II of the ADA nor the Rehabilitation Act provides a limitations period, and the general federal statute of limitations does not apply to either statute.[4] We have previously held that the Texas

[4] Title II adopts the remedies, procedures, and rights of the Rehabilitation Act. 42 U.S.C. § 12133. The limitations period in Rehabilitation Act cases is governed by 42 U.S.C. § 1988(a).

two-year statute of limitations for personal injury claims applies in Title II cases filed in Texas federal courts. *Holmes v. Texas A&M Univ.,* 145 F.3d 681, 683-84 (5th Cir. 1998); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2007). The district court therefore applied the correct statute of limitations. The plaintiffs argue, however, that the district court erred in ruling their claims accrued, and the statute began to run, on the date the City completed any noncompliant construction or alteration, instead of on the date the plaintiffs encountered a noncompliant barrier. The plaintiffs argue in the alternative that the statute of limitations does not apply to their claims because they seek only injunctive relief, and that noncompliant curbs, sidewalks, and parking lots are continuing violations of the ADA that relieve them of the limitations bar. We will first address the plaintiffs' alternative arguments before we address the issue of accrual. We conclude that neither of the plaintiffs' alternative arguments succeeds here.

A.

First, we reject the plaintiffs' assertion that the statute of limitations does not apply to their claims because they seek only injunctive relief. The

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That statute directs courts to apply federal law if it provides a limitations period or, if it does not, apply common law, as modified by state law, if it is not inconsistent with the Constitution or laws of the United States. *See, e.g., Holmes v. Texas A&M Univ.,* 145 F.3d 681, 683-84 (5th Cir. 1998) (citing *Hickey v. Irving Indep. Sch. Dist.,* 976 F.2d 980, 982 (5th Cir. 1992)). For Title II claims courts borrow the state statute of limitations from the most analogous state law claim.

plaintiffs cite *Voices for Independence v. Pennsylvania Department of Transportation,* 2007 WL 2905887 (W.D. Pa.), a district court opinion that held a statute of limitations did not apply in an ADA case seeking only equitable relief. *Id.* at *16-17. That opinion, in addition to being nonbinding, is also unpersuasive in the light of the fact that courts regularly apply statutes of limitation to claims under Title III of the ADA, for which only injunctive relief is available.[5] *See, e.g., Gaona v. Town & Country Credit,* 324 F.3d 1050, 1054-56 (8th Cir. 2003) (applying Minnesota's six-year statute of limitations to Title III claim for injunctive relief); *Pickern v. Holiday Quality Foods, Inc.,* 293 F.3d 1133, 1136 n.2 (9th Cir. 2002) (holding ongoing violation brought Title III claim for injunctive relief within California's one-year limitations period); *Sexton v. Otis Coll. of Art & Design Bd. of Directors,* 129 F.3d 127, 127 (9th Cir. 1997) (applying California's one-year statute of limitations to Title III claim for injunctive relief); *Soignier v. Am. Bd. of Plastic Surgery,* 92 F.3d 547 (7th Cir. 1996), *cert. denied,* 519 U.S. 1093 (1997) (applying Illinois's two-year statute of limitations to Title III claim for injunctive relief). We ourselves have recently held that statutes of limitations apply to § 1983 actions that seek only injunctive relief. *See Walker v. Epps,* 550 F.3d 407, 414 (5th Cir. 2008). We decline to treat the plaintiffs' Title II claims differently.

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[5] Remedies available under Title III of the ADA are the same as those under Title II of the Civil Rights Acts of 1964, 42 U.S.C. § 2000, for which there is only injunctive relief. 42 U.S.C. § 12188(a); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) (Title II of the Civil Rights Acts of 1964 provides injunctive relief only).

B.

We also reject the plaintiffs' characterization of noncompliant curbs, sidewalks, and parking lots as continuing violations that bring their claims within the limitations period. The continuing violations doctrine, which typically arises in the context of employment discrimination, relieves a plaintiff of a limitations bar if he can show a series of related acts to him, one or more of which falls within the limitations period. *Pegram v. Honeywell, Inc.,* 361 F.3d 272, 279 (5th Cir. 2004). We hesitate to extend that doctrine here, where the alleged violations are not related. A noncompliant curb, for instance, bears no relation to a noncompliant parking lot on the other side of the City. Furthermore, the concept of a continuing violation plainly is inconsistent with our ultimate holding in this case–which is that the noncompliant construction of a sidewalk constitutes the triggering accrual event for statute of limitations purposes.

In sum, the two-year statute of limitations applies to the plaintiffs' Title II claims, and the continuing violations doctrine does not.

IV.

We now turn to the crucial issue in this appeal, which also is one of first impression: whether the plaintiffs' claims accrued on the date the City completed a noncompliant construction or alteration, or on the date the plaintiffs encountered a noncompliant barrier. The district court held that

the plaintiffs' claims accrued, and the two-year limitations period began to run, on the date the City completed the construction or alteration of any noncompliant curb, sidewalk, or parking lot. Because the plaintiffs' complaint did not allege dates of noncompliant construction or alteration within the two years preceding its filing date, July 22, 2005, the district court dismissed the plaintiffs' claims.

For reasons we explain, we agree with the City that the plaintiffs' claims accrued upon the completion of a noncompliant construction or alteration. However, we agree with the plaintiffs that the City had the burden to prove its affirmative defense that the limitations period had expired with respect to each of the plaintiffs' claims.

A.

Although we borrow the statute of limitations for plaintiffs' Title II claims from state law, federal law governs the claims' accruals. *Jensen v. Snellings,* 841 F.2d 600, 606 (5th Cir. 1988). A claim ordinarily accrues when a plaintiff has "'a complete and present cause of action'" or, stated differently, "when 'the plaintiff can file suit and obtain relief.'" *Wallace v. Kato,* 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., Inc.,* 522 U.S. 192, 201 (1997) (citations omitted)); *Walker,* 550 F.3d at 414. A statute may specify an accrual date by "explicit command." *See TRW Inc. v. Andrews,* 534 U.S. 19, 27 (2001). An accrual date may also be implied by "the structure and text of the particular statute." *Id.* at 27; *Disabled in Action of Penn. v. Southeastern*

Penn. Transp., 539 F.3d 199, 209 (3d Cir. 2008) (structure and text of 42 U.S.C. § 12147(a) imply that claims brought under Title II to compel ADA compliance at public transportation facilities accrue upon the completion of alterations to facilities). Title II, however, neither explicitly commands, nor implies, an accrual date for the plaintiffs' claims.

In the absence of either explicit or implicit statutory guidance, the plaintiffs urge us to apply the discovery rule, under which a claim accrues when a plaintiff knows or has reason to know of the injury that is the basis of the action. *See, e.g., Johnson v. United States,* 460 F.3d 616, 621 (5th Cir. 2006). Under the discovery rule, the plaintiffs' claims would have accrued on the date individual plaintiffs encountered a noncompliant curb, sidewalk, or parking lot.

The City urges a rule that instead attaches accrual to the date a noncompliant construction or alteration is complete. That rule focuses on the discriminatory act, instead of discovery of the discriminatory effect. *See Chardon v. Fernandez,* 454 U.S. 6, 8 (1981) ("the proper focus is on the time of the *discriminatory act,* not the point at which the *consequences* of the act become painful" (citing *Del. St. Coll. v. Ricks,* 449 U.S. 250, 258 (1980))). The City argues that attaching accrual to an individual plaintiff's discovery effectively would eliminate the applicability of any statute of limitations in like ADA cases, and would therefore subject municipalities to unlimited and continuing liability.

We think the City's argument is more persuasive.

First, we note that there is no default federal discovery rule, and nothing requires that we apply it in this case. The United States Supreme Court has declined to adopt a general federal discovery rule, *TRW, Inc.,* 534 U.S. at 27 ("[L]ower federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue.' But we have not adopted that position as our own." (quotation marks and citations omitted)); *see also id.* at 37 (Scalia, J., concurring) ("injury-discovery rule" is "bad wine of recent vintage"), and has limited its own use of the discovery rule to cases alleging fraud or medical malpractice. *Id.* (citing *Bailey v. Glover,* 21 Wall. 342, 347-50 (1874) (fraud); *Urie v. Thompson,* 337 U.S. 163, 169-71 (1949) (latent medical injury claims under Federal Employers' Liability Act); *Kubrick,* 444 U.S. at 120 (medical malpractice claims under Federal Tort Claims Act)). Of course, what fraud and medical malpractice share in common is the risk that their injuries cannot be discovered until some time after the injurious act has passed. For such latent injuries "the cry for a discovery rule is loudest." *See, e.g., Rotella v. Wood,* 528 U.S. 549, 555 (2000). Here, however, the alleged ADA violations are not latent. The fact that a sidewalk does not have a curb cut, for instance, is not hidden, and that an individual plaintiff may not encounter the sidewalk within the limitations period does not somehow make the missing curb cut concealed from potential plaintiffs. *See Disabled in Action of Penn.,* 539 F.3d at 217 n.16 (expressing hesitation in applying discovery rule to plaintiffs' Title II claim alleging city's subway station did not include elevators because there was "nothing latent" about "the fact that newly renovated subway stations do

not include elevators"). We therefore think it is inappropriate to apply a discovery rule here.

Second, although it is true that we have applied the discovery rule in ADA cases alleging employment discrimination, *see, e.g., Holmes,* 145 F.3d at 684; *Burfield v. Brown, Moore & Flint,* 51 F.3d 583, 589 (5th Cir. 1995), the discovery date in those cases coincided with the date of the alleged discriminatory act. In *Burfield,* for example, we held that the plaintiff's claim accrued on the date he received official notice of termination from his employer. *Burfield,* 51 F.3d at 589. In *Holmes,* we held that the plaintiff's claim accrued on the date he first received notice of termination, not on the date his employer later reaffirmed termination. *Holmes,* 145 F.3d at 684-85. Because the dates of the plaintiff's discovery and of the alleged discriminatory act (termination) were the same, those cases offer no rationale or guidance in the context of our case. Under the facts of those cases, for instance, both the plaintiff and his defendant-employer are aware that the limitations period will commence to run on a definite and singular date; it makes no difference either to the plaintiff or the defendant whether the discovery rule is applied because the result is the same. The discovery rule applied to the facts of this case, however, would forever deny the City a definite limitations period, because every future plaintiff's discovery of a noncompliant sidewalk would reset the limitations clock.

We come to our final point, and that is consideration of the policies underlying statutes of limitations. Statutes of limitations exist to protect

defendants against stale claims. *See, e.g., Order of R.R. Telegraphers v. Ry. Express Agency,* 321 U.S. 342, 348-49 (1944) ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."). If the discovery rule were applied in this case, hereafter every new potential plaintiff would constantly retrigger the public entity's liability for any noncompliant sidewalk, without regard to the publicly known date of its completion. As the City has pointed out, the effect would be an evisceration of the statute of limitations defense in like ADA cases and unlimited exposure to liability. We think the wiser, more reasonable, and–in the words of *Order of Railroad Telegraphers*–more just approach, is a rule under which a public entity is liable for a noncompliant construction or alteration, but only during a definite and single limitations period.

Accordingly, we hold that the plaintiffs' claims accrued on the date the City completed the construction or alteration of any noncompliant curb, sidewalk, or parking lot. Under this rule, plaintiffs may hold a public entity liable for construction or alterations that do not comply with the ADA, but only within the time period specified by the applicable statute of limitations. This holding, however, is not the end of our analysis.

B.

Finally, we must consider whether outright dismissal of the complaint was improper, which

depends upon who had the burden to establish the expiration of the limitations period. As a practical matter, the City, and not the plaintiffs, is in the best position to prove accrual. The plaintiffs could not point to dates of construction or alteration within the two years preceding the complaint's filing date, July 22, 2005, without having engaged in discovery with the City. Regardless, it is the City's burden to prove accrual. Under Federal Rule of Civil Procedure 8, the party that asserts an affirmative defense, including the expiration of a limitations period, bears the burden of proof. FED. R. CIV. P. 8 ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including ... statute of limitations[.]"); *see also In re Hinsley,* 201 F.3d 638, 644-45 (5th Cir. 2000) (Under Texas law, "[a] party asserting limitations must establish the applicability of the limitations statute, but must, as well, prove when the opponent's cause of action accrued[.]" (quoting *Intermedics, Inc. v. Grady,* 683 S.W.2d 842, 845 (Tex. App. 1984, writ refused n.r.e.))). The district court erred in burdening the plaintiffs with proving dates of construction or alteration. The district court's dismissal on the basis that the plaintiffs had not alleged accrual within the two years preceding July 22, 2005, was therefore improper. We therefore must vacate the judgment of dismissal and remand. The City will be required to establish its affirmative defense that the plaintiffs' claims have expired in a manner consistent with this opinion.

V.

To summarize, we hold that curbs, sidewalks, and

parking lots constitute a service, program, or activity within the meaning of Title II of the ADA, and that the plaintiffs have established claims under Title II. Although the district court correctly held both that the plaintiffs' claims were subject to a two-year statute of limitations, and that they accrued on the date the City completed any noncompliant construction or alteration, it improperly burdened the plaintiffs with proving accrual within the two years preceding the filing of their complaint. We therefore VACATE the district court's judgment of dismissal and REMAND for such further proceedings not inconsistent with this opinion.

VACATED and REMANDED.

PRADO, Circuit Judge, concurring in part and dissenting in part:

In holding that the plaintiffs' cause of action for their Americans with Disabilities Act ("ADA") claim accrues when the City completes the noncompliant construction, today's majority ignores the plain text of the statute, fails to acknowledge the conflict it creates with traditional rules of standing, and creates a rule at odds with the ADA's broad remedial purpose. I recognize the merits of the majority's position and sympathize with the majority's goal of ensuring that the City is not liable for stale claims. Nevertheless, I conclude that the better rule–and the one that best comports with the text and purpose of the ADA–is that a cause of action accrues when a plaintiff suffers an injury under the Act based on that plaintiff's actual (as opposed to conjectural) inability to traverse the noncompliant sidewalk or other facility. Therefore, with great respect for my colleagues, I must dissent.[1]

I.

The main issue in this case is the purely legal question of when a plaintiff's claim for injunctive relief under Title II of the ADA accrues.[2] There are

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[1] I concur in Parts I and II of the court's opinion.

[2] The majority concludes that a statute of limitations applies to a claim for injunctive relief under Title II of the ADA. *But see Voices for Independence v. Pa. Dep't of Transp.,* No. 06-78, 2007 WL 2905887, at *16 (W.D. Pa. Sept. 28, 2007) ("Defendants' statute of limitations defense is somewhat misplaced in light of the fact that Plaintiffs are seeking only equitable relief here.").

two possibilities: the claim accrues either (1) when the City completes the inaccessible construction or alteration or (2) when the plaintiff actually encounters the noncompliant sidewalk or other facility.

In choosing the earlier accrual date, the majority makes a significant legal misstep: it fails to identify precisely when the plaintiffs *in this case* suffered an injury. That, to me, is the crux of the issue. Comporting with our general approach to claim accrual, a plaintiff's claim accrues when the plaintiff suffers an injury. *See Wallace v. Kato,* 549 U.S. 384, 388 (2007); *Walker v. Epps,* 550 F.3d 407, 414 (5th Cir. 2008) (noting that "the limitations period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured'" (quoting *Piotrowski v. City of Houston,* 237 F.3d 567, 576 (5th Cir. 2001))). Under the text of the ADA provision at issue, an injury occurs when the plaintiff actually suffers exclusion from or denial of a service, program, or activity of a public entity because of a disability. *See* 42 U.S.C. § 12132. The majority's discussion of the discovery rule–which can postpone the running of a statute of limitations for a prior injury–is thus misplaced and unnecessary. *See Disabled in Action of Pa. v. Se. Pa. Transp. Auth.,* 539 F.3d 199, 214 (3d Cir. 2008) ("[T]he district court

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Because I believe that even if a statute of limitations applies, it would begin to run only once the plaintiff actually encounters a noncompliant sidewalk or other facility, I merely assume the applicability of a statute of limitations to claims for injunctive relief. I would leave the full analysis of this issue for another day.

erred in applying the discovery rule to establish when [the plaintiffs'] claims accrued before first determining, per the terms of § 12147(a), when [the plaintiffs'] alleged injuries occurred. These inquiries are analytically distinct."). Instead, we should focus on when the plaintiffs in this case actually suffered an injury under the ADA.

As the majority notes, "[a] claim ordinarily accrues when a plaintiff has 'a complete and present cause of action' or, stated differently, when 'the plaintiff can file suit and obtain relief.'" Maj. Op. at 11 (quoting *Wallace,* 549 U.S. at 388). Only congressional guidance can allow us to deviate from this general rule. Indeed, the Supreme Court has admonished that "[w]hile it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute." *Reiter v. Cooper,* 507 U.S. 258, 267 (1993). As the Supreme Court has further explained, "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.,* 522 U.S. 192, 201 (1997).

A plaintiff does not have a complete and present cause of action and cannot file suit and obtain relief until, inter alia, he or she has standing, which in turn requires the plaintiff to suffer an "injury in

fact." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Thus, an essential question (and one I think the majority overlooks) is when these particular plaintiffs suffered an injury in fact.

One need only look to the text of the ADA to answer this question. The provision at issue, 42 U.S.C. § 12132, 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.

The focus of the statute is on an individual with a disability *being excluded from or denied* the benefits of services, programs, or activities. Although the City's wrongful construction is a general discriminatory act against all disabled people, a particular disabled person would not suffer an injury in fact until he or she encounters that discriminatory exclusion or denial. Simply put, there cannot be an injury under the ADA until the plaintiff actually suffers the exclusion or denial that the statute prohibits. Thus, to suffer an injury under Title II of the ADA, the qualified individual must have *actually encountered* the discrimination or *actually be deterred* from visiting the public accommodation because of exclusion from or denial of the benefits of a service, program, or activity. *See Pickern v. Holiday Quality Foods, Inc.,* 293 F.3d 1133, 1136-37 (9th Cir. 2002) ("[O]nce a plaintiff has *actually* become aware of discriminatory conditions existing

at a public accommodation, *and* is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury." (emphasis added)); *Access 4 All, Inc. v. Trump Int'l Hotel & Tower Condo.,* 458 F. Supp. 2d 160, 167 (S.D.N.Y. 2006) ("In the context of the ADA, awareness of discriminatory conditions, *and* the avoidance of a public accommodation because of that awareness, is injury in fact." (emphasis added)). A plaintiff would not have standing to bring suit against the City here unless that plaintiff had actually encountered the noncompliant sidewalk or other facility. Under the general rule for statutes of limitations, then, the claim does not accrue until this point.

Of course, Congress can specify precisely when the claim will accrue. The Third Circuit recently resolved a case involving a different provision of the ADA under such a scenario. *See Disabled in Action,* 539 F.3d 199. In that case, the public entity, the Philadelphia subway system, planned to make alterations to one of its subway stations but was not going to include an elevator. *Id.* at 205. A nonprofit group that seeks to eliminate discrimination against disabled people brought suit more than two years after learning of the subway system's plans but less than two years after the completion of the construction. *Id.* at 206. The parties agreed that the applicable statute of limitations was two years; thus, if the plaintiffs' cause of action accrued when they learned of the public entity's plans, their suit was untimely, but if it accrued at the completion of construction, then their suit fell within the statute of limitations. *Id.* at 208. The Third Circuit accepted the plaintiffs' argument that their claim did not

accrue until the subway system had actually finished the construction without an elevator.[3] *Id.* at 209. The court based its decision on the language of the relevant statute, which provides that a public entity discriminates if it makes alterations to its transportation system that, *upon the completion of such alterations,* are inaccessible. *Id.* at 209-10 (citing 42 U.S.C. § 12147(a)). That is, the court construed the statute's language as stipulating when the injury occurred and therefore the cause of action accrued: "upon the completion of such alterations." *Id.* (citing 42 U.S.C. § 12147(a)).

Here, the plaintiffs assert a violation of a different portion of the ADA, 42 U.S.C. § 12132, which is the general prohibition against discrimination in the services, programs, or activities of a public entity. As the majority correctly explains, this includes the provision of accessible sidewalks. Based on a regulation implementing the ADA's mandates, a public entity must include curb cuts when undertaking new construction or alterations to a sidewalk. *See* 42 U.S.C. § 12134(a); 28 C.F.R. § 35.151(e)(1). Specifically, with respect to construction or alterations commenced after January 26, 1992, "Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level

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[3] The court did not discuss the issue in this case: whether the statute of limitations might accrue at some point *after* the public entity completes the construction. Indeed, the court's ruling allowed the plaintiffs' suit to proceed, so they did not need to seek the same rule that the plaintiffs do here.

pedestrian walkway." 28 C.F.R. § 35.151(e)(1).

Notably, neither 42 U.S.C. § 12132 nor 28 C.F.R. § 35.151(e)(1) includes language suggesting that the injury occurs upon completion of the construction or alteration. Instead, "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." 42 U.S.C. § 12132. One aspect of possible discrimination is a newly-constructed or altered sidewalk that does not include a curb cut. 28 C.F.R. § 35.151(e)(1). Much like the text of the statute informed the Third Circuit's decision in *Disabled in Action,* so too should the text of the ADA's general prohibition against discrimination inform our analysis. We should vary from the typical rule for claims accrual only for a particularly compelling reason, such as if the text or context of the statute at issue so compels. *See Bay Area Laundry,* 522 U.S. at 201. But that is not the case here. Indeed, the policies behind the ADA, as I discuss below, counsel us to adhere to the general rule in this case.

Construing the plaintiff's injury as occurring when that plaintiff actually encounters a noncompliant sidewalk or other facility makes logical and legal sense. A plaintiff who simply *might* suffer an injury in the future based on the public entity's wrongful act does not have standing if the individual has no knowledge that he or she is being denied access because of a lack of a curb cut on a sidewalk. For example, a disabled person who lives on the other side of town from the noncompliant sidewalk,

does not learn of the noncompliant sidewalk, and will never encounter this sidewalk has not suffered an injury in fact under the ADA and would not have standing to file suit. Standing is necessarily founded upon an actual injury, and in the context of 42 U.S.C. § 12132, an injury occurs when the disabled individual actually attempts to use (or is deterred from using) the noncompliant sidewalk. *See HIP (Heightened Independence & Progress), Inc. v. Port Auth. of N.Y. & N.J.,* No. 07-2982, 2008 WL 852445, at *4 (D.N.J. Mar. 28, 2008) ("The re-opening of the Grove Street PATH Station, alone, did not injure Plaintiffs. Only after Plaintiffs' members attempted to use the Grove Street PATH Station, and realized that it was not accessible to disabled persons, was an injury sustained.").

It follows that the actual denial of access constitutes a plaintiff's injury under the ADA; only then can a plaintiff have a "complete and present cause of action" to "file suit and obtain relief." That is, based upon the statutory prohibition in the text of the ADA, the actual–as opposed to conjectural–denial of access triggers the running of the statute of limitations, particularly when the plaintiff is seeking only injunctive relief. *See James v. City of Dallas,* 254 F.3d 551, 563 (5th Cir. 2001) (noting that to have standing to seek injunctive relief, a plaintiff must show that he or she is "likely to suffer *future injury* by the defendant and that the sought-after relief will prevent that future injury" (emphasis added)).

The majority proceeds, however, as if a disabled person suffers an injury–and therefore has a complete and present cause of action–once the City

finishes the construction. According to the majority, the City's wrongful act triggers the statute of limitations. But 42 U.S.C. § 12132 focuses not on the City, but on a qualified individual who is being excluded from or denied the benefits of a service, program, or activity. Indeed, the majority acknowledges that to prove a prima facie case under Title II of the ADA, the plaintiff must show that, inter alia, he or she is "*being denied* the benefits of services, programs, or activities." Maj. Op. at 5 (citing *Melton v. Dallas Area Rapid Transit,* 391 F.3d 669, 671-72 (5th Cir. 2004)) (emphasis added). The use of the gerund "being" signifies that the plaintiff must show that he or she is suffering a *present or future* injury to obtain injunctive relief. If the plaintiff never encounters the noncompliant sidewalk (or is not actually deterred from accessing it), then he or she is not *being* excluded from or denied the benefits of anything. *See HIP (Heightened Independence & Progress), Inc.,* 2008 WL 852445, at *4.

It is not as if the City's construction injured the plaintiff but the plaintiff did not understand the effects of the City's wrongful act or recognize the injury; instead, the plaintiff does not suffer an injury at all until he or she physically encounters, or actually learns of and is deterred from attempting to access, a noncompliant sidewalk. A lack of accessibility in the abstract is not enough for a disabled plaintiff to have standing, as that would be a conjectural harm. *See, e.g., O'Shea v. Littleton,* 414 U.S. 488, 494 (1974); *cf. Pickern,* 293 F.3d at 1136-37. Put differently, a denial of access is not a later consequence of an injury but rather is the injury

itself. The plaintiffs here recognized this when they described the injury in their complaint as the "frequent[ ] deni[al of] the full and equal use and enjoyment of Arlington's pedestrian rights-of-way while conducting daily activities." The complaint also details the specific barriers to access each plaintiff suffers every day and affirms the plaintiffs' desire to travel to various inaccessible destinations in the future.

The majority fails to recognize that the City's wrongful act and the plaintiffs' injury occur at different points in time. Although the majority rejects the Western District of Pennsylvania's analysis in *Voices for Independence* as unpersuasive, that decision correctly separated the wrongful act from the plaintiff's injury. Under the same facts as here, the court stated,

> While we agree with Defendants that it is acts of "new construction" and/or "alterations" which trigger a public entity's *duty* to install the requisite curb cuts and, while we further agree that the failure to install the required curb cuts constitutes *an act of discrimination* under Title II of the ADA, we conclude that Defendants' statute of limitations argument misses the mark. The issue of when a defendant's duty arises (and/or when it is breached by perpetration of a discriminatory act) is distinct from the issue of when a plaintiff's injury arises or when his cause of action begins to accrue.

2007 WL 2905887, at *13. We should not conflate the City's wrongful act with the plaintiffs' injury

stemming from that wrongful act. These are two separate and distinct concepts. Although a wrongful act and an injury often occur at the same time, they are not concurrent here. The City acts unlawfully when it builds a noncompliant sidewalk, but the individual plaintiffs are not injured until they actually suffer the barrier to access. Because there is a private right of action to vindicate one's rights under Title II of the ADA, and because a plaintiff must actually be excluded from or denied the benefits of the sidewalks or other facilities to suffer an injury and therefore have a cause of action under the text of the statute, we must separate the initial wrongful act from the plaintiff's injury.[4] It follows that the date on which the City constructed a sidewalk without a curb cut has no bearing on the accrual of the cause of action. The focus of our analysis should be on when the plaintiffs actually suffered the denial of access that the text of the ADA prohibits.

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[4] Consider, for example, the Alabama Supreme Court's decision in *Ramey v. Guyton,* 394 So. 2d 2 (Ala. 1980). In that case, the defendant, a doctor, prescribed birth control pills to the plaintiff. *Id.* at 3. About a year after the plaintiff's visit to the doctor, she suffered a stroke, which she claimed stemmed from the doctor's alleged negligent act in prescribing the birth control pills. *Id.* The Alabama Supreme Court ruled that the plaintiff's cause of action accrued on the date of her stroke, not on the date the doctor prescribed the birth control pills. *Id.* As the court stated, "the negligent act and the resultant harm did not coincide. Thus, the accrual date of the cause is delayed to the date when the injury occurred." *Id.* at 4. The same principle holds true here: the date of the wrongful act (improper construction) and the date of the plaintiffs' injury (encountering the inaccessibility) are not the same.

In sum, under our general rule for statutes of limitations, a plaintiff's claim does not accrue until he or she has a complete and present cause of action. A plaintiff does not have a complete and present cause of action unless the plaintiff has standing, which in turn requires the plaintiff to suffer an injury in fact. Under Title II of the ADA, a plaintiff does not suffer an injury in fact until he or she suffers actual exclusion from the inaccessible services, programs, or activities. It follows that the statute of limitations did not begin to run in this case until the plaintiffs actually encountered the noncompliant sidewalk or other facility.

II.

There is no compelling reason to deviate from our general rule for claim accrual in this case. In fact, the policy considerations cut in favor of ruling that the plaintiffs' request for injunctive relief to correct the ADA noncompliance accrues when the plaintiffs actually suffer the injury. In weighing the relevant policies in this case, the majority fails to consider the ADA's "broad mandate" and "sweeping purpose" of eradicating discrimination against disabled people in public accommodations. *See, e.g., PGA Tour, Inc. v. Martin,* 532 U.S. 661, 675 (2001); *see also Meyers ex rel. Benzing v. Texas,* 410 F.3d 236, 239 (5th Cir. 2005) (discussing the "ADA's broad prohibitions of discrimination in public services and accommodations").

The majority focuses on the policies underlying statutes of limitations, but it wholly ignores both the policies underlying the ADA and the consequences of

its decision. Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). With respect to curb cuts–which is the focus of the plaintiffs' complaint–Congress noted that "[t]he employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H.R. REP. NO. 101-485, at 84 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 367. By cutting off a plaintiff's ability to sue two years after the City completes the construction or alteration, the majority leaves many disabled people with no ability to vindicate their rights. In essence, the City can avoid all liability and maintain noncompliant sidewalks if it successfully avoids a lawsuit for two years after completing the construction or alteration. The City could then have what amount to "illegal" sidewalks in perpetuity. A newly disabled person, or a disabled person who just moves to the City, would have no recourse but to suffer through the ADA violation. This result runs directly counter to the ADA's sweeping remedial purpose. *See PGA Tour, Inc.,* 532 U.S. at 675.

Ruling that the cause of action accrues upon the completion of the construction places upon disabled people an affirmative duty to go out and find all noncompliant sidewalks just after construction or face having to live with sidewalks without curb cuts possibly forever (or at least until the City makes additional improvements or alterations to those sidewalks). As the court in *Voices for Independence*

noted, "Defendants would have us place an affirmative burden on disabled persons such as the Plaintiffs to navigate and seek out defective curb cuts far and wide in order to file suit within two years of their installation. Such a result strikes this Court as unduly burdensome and contrary to the remedial purposes of the statute." 2007 WL 2905887, at *15. Such a duty simply perpetuates the conditions that Congress condemned nineteen years ago when it enacted the ADA. As Congress noted,

> [H]istorically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.

42 U.S.C. § 12101(a)(2).

There are certainly policy considerations that cut the other way. If the court measures the limitations period from the time that any potential plaintiff encounters the ADA violation (i.e., suffers a denial of access), then the City could be subject to liability many years after constructing the sidewalk. Indeed, there would likely be no shortage of plaintiffs seeking to redress the ADA violation, thereby mitigating the effect of any statute of limitations for all practical purposes.

Two key facts, however, temper this concern. First, the City's wrongful conduct causes legal

injuries to disabled people every day.[5] Of course, the statute of limitations might run as to any particular plaintiff who does not file suit within two years of encountering a noncompliant sidewalk. A statute of limitations should not, however, cut off a plaintiff's ability to redress a new injury to that plaintiff, even if that new injury originated from prior wrongful conduct. That is, as I discuss above, wrongful conduct does not become actionable until a plaintiff suffers an injury based on that conduct. Thus, the City's policy argument is less convincing because it is essentially asserting that if it successfully evades litigation for two years, it is exempt from complying with the ADA altogether, even though disabled people continue to suffer injuries based on the City's wrongful conduct.

Second, the City can avoid all future liability by simply fixing the original unlawful construction. The City is not liable forever; it is responsible only for correcting the deficient construction or alteration.[6]

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[5] The majority's discussion of the plaintiffs' continuing violation argument is circular. The majority rejects the plaintiffs' continuing violation theory largely based on its resolution of the plaintiffs' accrual argument. But in rejecting the accrual argument, the majority necessarily assumes that the plaintiffs are not suffering injuries each time they encounter a prohibited denial of access. The text of the ADA and the standing issues I discuss above support neither contention. Regardless, given the disposition I advocate, the court need not decide whether the continuing violation doctrine applies in this instance.

[6] In balancing the consequences of our decision, I recognize that one implication of my analysis is that under the reasoning of the rule I propose, it is possible that a city might be liable for money damages many years after improperly constructing non-ADA compliant facilities. This case does not present that

Precisely defining when the injury occurs therefore answers, or at least outweighs, the majority's main policy concerns. The broad remedial goal of the ADA–the eradication of public discrimination against disabled people–therefore supports a ruling that a plaintiff suffers an injury when he or she actually encounters a prohibited denial of access to a public

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question, however, as the plaintiffs conceded at oral argument that they are seeking only injunctive relief. The court therefore need not reach that issue.

Regardless, monetary damages under the ADA are likely less common than injunctive relief, as they are available only for intentional discrimination. *Delano-Pyle v. Victoria County,* 302 F.3d 567, 574 (5th Cir. 2002) ("A plaintiff asserting a private cause of action for violations of the ADA or the [Rehabilitation Act] may only recover compensatory damages upon a showing of intentional discrimination."). It would require an extraordinary situation to find that a city intentionally discriminated against disabled people by failing to include curb cuts in the sidewalks. The purposes of monetary damages and injunctive relief in the ADA context are thus different: monetary damages compensate an individual plaintiff for a defendant's prior intentional act of discrimination, whereas injunctive relief vindicates the rights of a disabled person stemming from an ongoing injury. *See Texas v. Lesage,* 528 U.S. 18, 22 (1999) (per curiam) (criticizing this court for failing to distinguish between a retrospective claim for damages and a forward-looking claim for injunctive relief). Additionally, although the Supreme Court recently held that a plaintiff can receive monetary damages under the ADA for conduct that violates the Fourteenth Amendment, it left open whether damages are available for Title II violations that do not violate the Constitution. *See United States v. Georgia,* 546 U.S. 151, 159 (2006). It might be that the imposition of monetary damages requires both intentional conduct and a violation of constitutional rights. Accordingly, the class of cases in which money damages will be available for ADA violations is likely quite small, tempering any concerns I might initially have had about a city's ongoing fiscal liability.

entity's services, programs, or activities.

We must choose between two options, neither of which is ideal. Either we must give stronger credence to the policies behind statutes of limitations, thereby eschewing the broad goals of the ADA, or we must forego the City's desire to strictly cut off its liability to allow disabled people to vindicate their rights. The majority chooses the former; the text of the ADA, the analysis of when a plaintiff actually suffers an injury, and the purposes behind the Act compel me to choose the latter.

III.

This case presents us with a difficult choice. With immense respect for the majority's position, I think that the better, legally correct, and more pragmatic answer is to allow a plaintiff to bring suit for injunctive relief within two years of his or her injury, that is, within two years of when the plaintiff was unable to access or was deterred from attempting to access a noncompliant sidewalk or other facility. The contrary result countenances a public entity's decision to construct or alter a sidewalk without curb cuts, allowing this ADA violation to go uncorrected forever so long as no one brings suit within two years of the construction or alteration.

Implicit in the majority's decision is an assumption that, most of the time, a plaintiff will exist who can file suit within two years of the City's completion of the construction or alteration. Although that may be true in many situations, it is not always the case. This fact undermines the

majority's conclusion, demonstrating the negative consequences stemming from the court's ruling.

Consider the following hypothetical: Suppose that a city is developing an area of town where no one lives. In the initial stages of the development, the city constructs sidewalks but mistakenly fails to include curb cuts. Two years and one month later, the city completes the development and people begin moving in. At that point, a disabled person would suffer an injury based upon his or her inability to access the sidewalks and navigate around the neighborhood. Given that there was no one who could have asserted an ADA claim within two years of the completion of the construction–because a disabled person would not have standing until he or she moves into the development and actually suffers a denial of access–no one would ever be able to sue to seek redress for this clear ADA violation. Such a result does not square with the conception of an "injury" under Title II of the ADA or Congress's goal in enacting this statute. We do not want to foreclose a lawsuit from an individual acting as a "private attorney general" to require the city to *correct* the ADA noncompliance. The city should not be "off the hook" for continued ADA compliance two years after completing the construction merely because there were no possible plaintiffs within that period. Moreover, the city can cut off its liability by simply curing the defect. Thus, carefully defining when the plaintiff suffers an injury for purposes of injunctive relief reconciles the problems inherent in the majority's analysis.

Because the majority's decision is inconsistent

with the general rule of claim accrual, the conception of an injury under the text of the ADA for purposes of standing, and the broad goals of the Act, I respectfully dissent.

APPENDIX E

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORTH WORTH DIVISION

RICHARD FRAME, WENDELL DECKER, SCOTT UPDIKE, JUAN NUNEZ, a minor, by his next friend and mother, GABRIELA CASTRO, MARK HAMMAN, and JOEY SALAS	§	
Plaintiffs,	§	CIVIL
V.	§	ACTION
	§	NO. 4:05
THE CITY OF ARLINGTON, TEXAS,	§	-CV-470-Y
Defendant.	§	

ORDER GRANTING THIRD RENEWED MOTION TO DISMISS

Pending before the Court is defendant The City of Arlington's Third Renewed Motion to Dismiss [doc. #86], filed April 30, 2007. After consideration, the Court GRANTS the motion.

I. BACKGROUND

On July 22, 2005, Plaintiffs, who are all Arlington residents with disabilities, filed suit against Arlington for discrimination under the Americans with Disabilities Act ("the ADA") and the Rehabilitation Act.[1] They also complain of Arlington's failure to implement a transition plan as provided by the regulations governing the ADA. Specifically, Plaintiffs asserted that "Arlington's system of streets, sidewalks and intersections in . . . crucial areas . . . lack curb ramps or lack accessible curb ramps and contain sidewalks that drop or rise sharply, stop abruptly, or are impassable because of major obstructions embedded in them." (Pls.' Resp. at 2.) Arlington moved to dismiss Plaintiffs'

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[1] This is not plaintiff Richard Frame's first time to file suit under the ADA. In the past five years, Frame has filed 14 lawsuits in this Court against several businesses in Tarrant County for "accommodation discrimination" under Title III of the ADA. Twelve of the suits were voluntarily dismissed. *See Frame v. Lowe's Home Ctrs., Inc.*, No. 4:03-CV-315-A; *Frame v. Outback Steakhouse of Fla., Inc.*, No. 4:03-CV-870-A; *Frame v. Columbia Regency Tex. I, L.P.*, No. 4:03-CV-1349-Y; *Frame v. WRI Overton Plaza, L.P.*, No. 4:04-CV-028-A; *Frame v. Fry's Elecs., Inc.*, No. 4:04-CV-414-Y; *Frame v. N. Tex. Dist. Council Assemblies of God*, No. 4:04-CV-563-Y; *Frame v. 9 SC Assocs. Ltd.*, No. 4:04-CV-721-Y; *Frame v. Armin & Anna Mandel Trust*, No. 4:06-CV-230-A; *Frame v. Courtside Plaza Shopping Ctr., L.C.*, No. 4:06-CV-451-Y; *Frame v. Boston Market Corp.*, 4:06-CV-721-Y; *Frame v. Chick-Fil-A, Inc.*, No. 4:07-CV-308-Y; *Frame v. RPI Overland Ltd.*, 4:07-CV-503-A. One case, along with the instant case, remains pending. *Frame v. Cheddar's Casual Café, Inc.*, No. 4:07-CV-744-A. Needless to say, the Court is growing weary of Frame's ADA grievances.

complaint under Rule 12.[2] This Court agreed that Arlington's limitations arguments seemed to be fatal to Plaintiffs' claims. However, this Court declined to dismiss Plaintiffs' complaint and instead ordered Plaintiffs to amend their complaint to "adequately allege construction and/or alteration dates or timelines for the locations alleged to be noncompliant . . . with the ADA and the Rehabilitation Act." (July 31, 2006, Order at 2.) Plaintiffs filed an amended complaint, and Arlington has again moved to dismiss it on the basis of limitations and lack of standing, among other arguments.[3]

II. APPLICABLE LAW

A. RULE 12(B)(6)

Arlington moves to dismiss Plaintiffs' complaint because it fails to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6). Rule 12 must be interpreted in conjunction with Rule 8(a), which sets forth the requirements for pleading a claim for relief in federal court and calls for "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508

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[2] This motion was Arlington's second motion to dismiss. This Court denied as moot Arlington's first motion to dismiss when Plaintiffs amended their complaint after the motion was filed.

[3] After Arlington filed its third motion to dismiss, Plaintiffs filed another amended complaint which only added more plaintiffs. Because no new claims were added, this Court did not moot Arlington's motion to dismiss and is now construing the motion as addressing Plaintiffs' fourth amended complaint.

(2002) (holding Rule 8(a)'s simplified pleading standard applies to most civil actions).

"A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982). The Court must accept as true all well pleaded, nonconclusory allegations in the complaint, and must liberally construe the complaint in favor of the plaintiff. *See id.* The plaintiff, however, must plead specific facts, not mere conclusory allegations, to avoid dismissal. *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). In other words, he must plead "enough facts to state a claim to relief that is plausible on its face" and his "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1974 (2007).

A statute of limitations may support dismissal under Rule 12(b)(6) where the complaint establishes that the action is barred and the pleadings fail to raise a basis to toll the statute. *See Jones v. ALCOA, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003). Likewise, a lack of standing will support a Rule 12 dismissal. *See Hosein v. Gonzalez*, 452 F.3d 401, 403 (5th Cir. 2006) (holding Rule 12(b)(1) dismissal, which is decided under Rule-12(b)(6) standard, appropriate if plaintiff lacks standing because court lacks subject-matter jurisdiction).

B. THE ADA AND THE REHABILITATION ACT

1. The Acts Themselves

Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1) (West 2005). Title II of the ADA prohibits discrimination in the provision of public services: "[N]o 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." *Id.* § 12132 (West 2005). The Rehabilitation Act was enacted "to ensure that handicapped individuals are not denied jobs or other benefits because of prejudiced attitudes or ignorance of others." *Brennan v. Stewart*, 834 F.2d 1248, 1259 (5th Cir. 1988); *see also* 29 U.S.C.A. § 794 (West 1999 & Supp. 2007). Because the ADA expressly provides that rights and remedies available under the Rehabilitation Act are also available under the ADA, the law interpreting either statute is applicable to both. *See* 42 U.S.C.A. § 12133 (West 2005); *Hainze v. Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

The ADA authorizes the Attorney General to promulgate regulations implementing its provisions. *See* 42 U.S.C.A. § 12134(a) (West 2005). One such regulation addresses a public entity's responsibilities regarding "existing facilities," a phrase that includes "all or any portion of [its] buildings, structures, sites, complexes, . . . roads, walks, passageways, [and]

parking lots" that were in existence at the time of the ADA's enactment—July 26, 1990. 28 C.F.R. § 35.104 (2006). With respect to newly constructed or altered streets and sidewalks, the regulations require the installation of curb cuts or comparable means of ingress and egress for disabled persons. *See id.* § 35.151(e) (2006). Consistent with Title II's emphasis on program accessibility, the regulatory scheme generally does not require public entities to retrofit their existing facilities. *See Tennessee v. Lane*, 541 U.S. 509, 532 (2004); *see also* 28 C.F.R. § 35.150(a)(1) (2006).

If structural changes to existing facilities are to be undertaken to accomplish program accessibility, a transition-plan regulation directs a public entity to "develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. § 35.150(d)(1) (2006). Public entities with responsibility over streets, roads, or walkways bear an additional burden: the regulation requires those entities to craft, in their transition plan, "a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, giving priority to walkways serving. . . State and local government offices and facilities, transportation, places of public accommodation, and employers." *Id.* § 35.150(d)(2). Finally, the transition-plan regulation mandates that any structural changes to existing facilities "be made within three years of January 26, 1992, but in any event as expeditiously as possible." *Id.* § 35.150(c).

2. Statutes of Limitation

Because Title II adopts the remedies and rights set forth in the Rehabilitation Act, the same limitations statute would apply to both claims. *See Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1409 (11th Cir. 1998). The determination of a limitations period under the Rehabilitation Act is governed by a three-step inquiry: (1) follow federal law if federal law provides a limitations period; or (2) apply the common law, as modified by Texas law, if no limitations period is provided by federal law; but (3) apply state law only if it is consistent with the Constitution and federal law. *See* 42 U.S.C.A. § 1988(a) (West 2003); *Holmes v. Tex. A&M Univ.*, 145 F.3d 681, 684 (5th Cir. 1998). The ADA, like many federal civil rights statutes, does not contain a specific statute of limitations. *See* 42 U.S.C.A. § 12132; *Holmes*, 145 F.3d at 683. The general federal statute of limitations does not apply to the ADA or the Rehabilitation Act because it only applies to statutes enacted after December 1, 1990, and both the ADA and the Rehabilitation Act were enacted before that date. *See* 28 U.S.C.A. § 1658 (West 2006). Thus, this Court must apply the Texas statute of limitations governing the state cause of action most analogous to Plaintiffs' ADA and Rehabilitation-Act claims. *See Goodman v. Likens Steel Co.*, 482 U.S. 656, 660 (1987); *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980, 982 (5th Cir. 1992). As Arlington asserts, claims that allege discrimination are essentially claims for personal injury, which are subject to a two-year limitations period in Texas. *See* TEX. CIV. PAC. & REM. CODE ANN. § 16.003 (Vernon Supp. 2007); *Hickey*, 976 F2d

at 983; *accord Deck v. City of Toledo*, 56 F. Supp. 2d 886, 890-91 (N.D. Ohio 1999) (holding ADA claims similar to personal-injury or discrimination claim and applying Ohio's two-year limitation period).

While state law determines the applicable limitations period, federal law governs the accrual of a cause of action. *See Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983). A cause of action accrues when "the plaintiff knows or has reason to know of the injury. . . and who has inflicted the injury." *Id.*

III. DISCUSSION

Plaintiffs filed their complaint on July 22, 2005. Thus under the two-year limitation period, any violation of the ADA or the Rehabilitation Act must have occurred after July 21, 2003. Indeed, this Court implicitly recognized the limitations problem in this case by ordering Plaintiffs to replead their case and allege specific dates of the City's alteration or construction efforts. Unfortunately, Plaintiffs' amended complaint does not remedy this problem. Plaintiffs allege that all of the actions taken by Arlington on the complained-of streets and sidewalks occurred anywhere from three to ten years ago. (Pls.' 4th Am. Comp. at ¶¶ 34, 36, 37, 43, 45, 46, 47, 48, 50, 53, 54, 55, 56.) Although Plaintiffs allege that they have attempted to use these roadways and sidewalks during the limitations period, their discrimination cause of action accrued when the improvements took place. *See Deck*, 56 F. Supp. 2d at 892 (holding limitations began to run on ADA claim regarding insufficient curb ramps at the time the

discriminatory act occurred and not in response to the continuing effects of those acts).

Plaintiffs' argument that Arlington is committing a continuing violation of the ADA and the Rehabilitation Act does save them from the effects of limitations. The continuing-violation theory is an exception to a limitations period because such a violation alleviates the staleness concerns that statutes of limitation address. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). But even under this theory, at least one of the discriminatory acts must have occurred within the limitations period. *See id.* By Plaintiffs' own account, the most recent alteration by Arlington was three years before the complaint was filed. Further, Arlington convincingly rebuts Plaintiffs' remaining arguments in opposition to the application of limitations. (Def.'s Br. in Supp. at 4-8; Def.'s Reply at 3-4.)

Plaintiffs' transition-plan claims are also subject to dismissal. Under some circumstances, Title II creates a private right of action against noncompliant public entities. *See* 42 U.S.C. § 12133 (West 2005); *see also Lane*, 541 U.S. at 517. Plaintiffs, however, are raising violations of, and rights to enforce, the transition-plan regulation. An implementing regulation sometimes may be enforced through a private right of action available under the statute it implements. *See Alexander v. Sandoval*, 532 U.S. 275, 284-85 (2001). But a private plaintiff may not, merely by referencing the underlying statute, enforce an implementing regulation that prohibits broader conduct than the underlying

statute itself prohibits. *See generally id.* at 286 (stating power to create private right of action lies exclusively with Congress). Thus, a private right of action may be conceived only by a statute that clearly evinces Congressional intent to bestow such a right. *See id.* at 286-87. In other words, an implementing regulation, on its own, cannot create a private right of action. *See id.* at 291. The transition-plan regulation imposes obligations on public entities different than and beyond those imposed by the ADA itself. As such, the transition-plan regulation is not enforceable through a private right of action under Title II. *See, e.g., Iverson v. City of Boston*, 452 F.3d 94, 99-100 (1st Cir. 2006); *Ability Cir. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 913-15 (6th Cir. 2004); *Cherry v. City College of San Francisco*, No. C04-04981 WHA, 2005 WL 2620560, at *2 (N.D. Cal. 2005). *But see Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 856-60 (10th Cir. 2003) (holding transition-plan regulation enforceable through private suit).

IV. CONCLUSION

Because Plaintiffs' discrimination claim solely focuses on alterations to roadways and sidewalks that occurred at least three years before Plaintiffs filed suit, it is barred by the statute of limitations. Further, Plaintiffs do not have standing to enforce,

through a private right of action, the transition-plan regulation.

SIGNED March 31, 2008.

/s/
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD FRAME, WENDELL DECKER, SCOTT UPDIKE, JUAN NUNEZ, a minor, by his next friend and mother, GABRIELA CASTRO, MARK HAMMAN, and JOEY SALAS	§	
Plaintiffs,	§	CIVIL
V.	§	ACTION
	§	NO. 4:05-
THE CITY OF ARLINGTON, TEXAS,	§	CV-470-
	§	Y
Defendant.	§	

FINAL JUDGMENT

In accordance with the order issued this same day and Federal Rule of Civil Procedure 58, all claims in this cause are hereby DISMISSED with prejudice. All costs under 28 U.S.C. § 1920 are taxed against Plaintiffs.

SIGNED March 31, 2008.

/s/
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX G

The Rehabilitation Act of 1973, as amended, provides in pertinent part:

29 U.S.C. § 794:

Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service. * * *

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency[,] * * * system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph

(1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

* * *

The Americans with Disabilities Act of 1990, as amended, provides in pertinent part:

Subchapter II – Public Services

PART A – PROHIBITION AGAINST DISCRIMINATION AND OTHER GENERALLY APPLICABLE PROVISIONS

42 U.S.C. § 12131:

Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to 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.

42 U.S.C. § 12132:

Discrimination

Subject to the provisions of this subchapter, 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. § 12133:

Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C. § 12134:

Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect

to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

PART B – ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY

* * *

42 U.S.C. § 12146:

New facilities

For purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with

disabilities, including individuals who use wheelchairs.

42 U.S.C. § 12147:

Alterations of existing facilities

(a) General rule

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not

disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations

(1) General rule

For purposes of section 12132 of this title and section 794 of title 29, it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Rapid rail and light rail key stations

(A) Accessibility

Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on July 26, 1990.

(**B) Extension for extraordinarily expensive structural changes**

The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following
July 26, 1990, at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) Plans and milestones

The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection—

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

The Department of Justice's regulations relating to the ADA provide in pertinent part:

28 C.F.R. § 35.104:

Definitions.

For purposes of this part, the term—

* * *

Disability means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.

(1)(i) The phrase *physical or mental impairment* means—

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;

(B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) The phrase *physical or mental impairment* includes, but is not limited to, such contagious and noncontagious diseases and conditions as orthopedic, visual, speech

and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic), tuberculosis, drug addiction, and alcoholism.

(iii) The phrase *physical or mental impairment* does not include homosexuality or bisexuality.

(2) The phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) The phrase *has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) The phrase *is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.

(5) The term *disability* does not include—

(i) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(ii) Compulsive gambling, kleptomania, or pyromania; or

(iii) Psychoactive substance use disorders resulting from current illegal use of drugs.

* * *

Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located.

* * *

Individual with a disability means a person who has a disability. The term individual with a disability does not include an individual who is currently

engaging in the illegal use of drugs, when the public entity acts on the basis of such use.

Public entity means—

(1) Any State or local government;

(2) Any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(3) The National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

Qualified individual with a disability means an individual with a disability who, with or without reasonable modifications to 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.

* * *

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

Subpart D – Program Accessibility

28 C.F.R. § 35.149:

Discrimination prohibited.

Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity.

28 C.F.R. § 35.150:

Existing facilities.

(a) *General*. A public entity shall 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. This paragraph does not—

(1) Necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) Require a public entity to take any action that would threaten or destroy the historic significance of an historic property; or

(3) Require a public entity to take any action that it can demonstrate would result in a

fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

(b) *Methods*—(1) *General*. A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public

entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of § 35.150(a) in historic preservation programs, a public entity shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section, alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* Where structural changes in facilities are undertaken to comply with the obligations established under this section, such

changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible.

(d) *Transition plan.* (1) In the event that structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. A public entity shall provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan shall be made available for public inspection.

(2) If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall 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.

(3) The plan shall, at a minimum—

> (i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;

(ii) Describe in detail the methods that will be used to make the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the official responsible for implementation of the plan.

(4) If a public entity has already complied with the transition plan requirement of a Federal agency regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this paragraph (d) shall apply only to those policies and practices that were not included in the previous transition plan.

28 C.F.R. § 35.151:

New construction and alterations.

(a) *Design and construction*. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) *Alteration*. Each facility or part of a facility altered by, on behalf of, or for the use of a public

entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) *Alterations: Historic properties.* (1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of § 35.150.

(e) *Curb ramps*. (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

28 C.F.R. § 41.3:

Definitions.

As used in this regulation, the term:

* * *

(d) *Recipient* means any State or its political subdivision, any instrumentality of a State or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(e) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(f) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

APPENDIX H

DEC 21 1995

The Honorable Charles H. Taylor
U.S. House of Representatives
231 Cannon Building
Washington, D.C. 20515-3311

Dear Congressman Taylor:

This letter is in response to your inquiry on behalf of your constituent, xx _____, regarding the broken sidewalk at Central Elementary School in Haywood County, North Carolina. xx _____ wishes to know whether the school could be required to repair the sidewalk under the Americans with Disabilities Act of 1990 (ADA).

Title II of the ADA prohibits discrimination against qualified individuals with disabilities on the basis of disability in all programs, activities, and services provided by or on behalf of State and local governments. The Department of Justice's title II regulation prohibits a public entity from denying the benefits of such programs, activities, and services to qualified individuals with disabilities because the entity's facilities are inaccessible to or unusable by individuals with disabilities.

A public entity is required to provide "program access," i.e., the entity is required to operate each service, program, or activity it provides so that, when viewed in its entirety, the service, program, or activity is readily accessible to and usable by individuals with disabilities. Providing program access does not necessarily require a public entity to make each of its facilities fully accessible. For example, program access can be achieved by the relocation of services from inaccessible to accessible buildings or by the assignment of aides to program beneficiaries. In addition, a public entity is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of its services, programs, or activities or in undue financial and administrative burdens.

cc: Records, Chrono, Wodatch, McDowney, Milton, FOIA
n:\udd\milton\congress\sidewalk.tay\sc.young-parran
01-4121

With respect to the situation you describe, title II of the ADA requires public entities to maintain in operable working condition those features of facilities that are required for program access and over which the public entities have control. Therefore, if a public entity has responsibility for, or authority over, sidewalks or other public walkways, and if such sidewalks or walkways are necessary to ensure accessibility to the entity's programs, services, or

activities, then the public entity has an obligation to maintain the sidewalks or walkways in usable working condition.

I hope this information is helpful to you in responding to your constituent.

Sincerely,

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

APPENDIX I

U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20035

Office of the Assistant
Attorney General MAY 14 1998

The Honorable William D. Delahunt
Member, U.S. House of Representatives
15 Cottage Avenue
Quincy, Massachusetts 02169

Dear Congressman Delahunt:

I am responding to your letter on behalf of your constituent, Mr. XXX _____ regarding whether the Americans with Disabilities Act (ADA) requires the removal of snow and maintenance of sidewalks on a city street. Please excuse our delay in responding.

The answer to this question depends on the specific circumstances. The Department of Justice regulation implementing title II of the ADA requires a public entity (such as a city) to ensure that its services, programs, and activities in existing facilities are accessible to people with disabilities. The focus of the requirement is access to services,

programs, and activities, as opposed to access to physical structures. Therefore, there is no general requirement that compels a public entity to ensure that all sidewalks are free of snow.

However, if the sidewalk is part of an accessible route that is required to provide access to a covered program or activity, the public entity that provides the program would be required to ensure the sidewalk remains accessible. However, temporary interruptions in accessibility, such as those caused by snow, generally do not constitute violations of title II unless they persist beyond a reasonable period of time. Further, only those sidewalks that are required by the ADA to be accessible and that are within the control of the city will be required to be maintained by the city.

To the extent that a public entity provides snow removal services, title II requires those services to be provided in a non-discriminatory manner. However, sidewalk snow removal by private property owners is private action not covered by title II absent some substantial involvement by the public entity. The ADA, therefore, does not generally require local governments to pass ordinances compelling property owners to remove snow from sidewalks.

(handwritten) FOIA

2

If sidewalks lead to places of public accommodation (such as stores or restaurants) covered by title III of the ADA, the owners or operators of these public accommodations may have

obligations to maintain them under title III. If a sidewalk is part of a required accessible route and if the public accommodation exercises control over the sidewalk, the public accommodation may be required to keep the sidewalk accessible. As under title II, temporary interruptions to access because of snow are permissible unless they persist beyond a reasonable period of time.

I hope this information is helpful to you in responding to your constituent.

Sincerely,

Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division