WALK THIS WAY: DO PUBLIC SIDEWALKS QUALIFY AS SERVICES, PROGRAMS, OR ACTIVITIES UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT?

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In 2005, 54.4 million people in the United States reported some degree of disability. For many of these people—particularly the 13.5 million Americans who use wheelchairs, canes, crutches, or walkers—the issue of sidewalk accessibility is not merely one of convenience, but of civil rights and public safety. Faced with public sidewalks that are impassable due to disrepair, physical obstacles, or an absence of curb ramps, many individuals with disabilities are forced to choose between remaining housebound or traveling in the streets—posing a danger to both themselves and drivers. However, as disability activists push to resolve these shortcomings with an eye toward enhancing accessibility, cities counter by pointing to the significant expense of upgrading thousands of miles of sidewalk.

How to remedy the deterioration of public sidewalks has become a topic of debate between disability advocates and cities grappling with severe budget constraints. Title II of the Americans with Disabilities Act (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 the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." This Note examines the circuit split among federal courts as to whether public sidewalks are "services, programs, or activities" within the meaning of Title II, thus providing plaintiffs with a private right of action to force cities to ensure that public sidewalks are accessible to the disabled. This Note argues that the statutory text, legislative history, implementing regulations, and agency interpretation of Title II of the ADA supports the conclusion that "services, programs, or activities" includes public sidewalks.

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INTRODUCTION

In November 2004, Elizabeth "Lisi" Bansen died when an SUV hit her as she traveled in her wheelchair from the corner store to her home.[1] Bansen was relegated to the street because the sidewalk was not wheelchair accessible.[2] The sidewalk near Bansen's home was cracked and "choked with weeds," and there was no curb ramp at the intersection where she was killed.[3] In 2007, a jury found the city of St. Louis liable for Bansen's death due to the city's "failure to maintain safe and usable sidewalks."[4] Although the city had already spent $7.5 million to install curb ramps at ninety percent of the city's intersections, some areas of the city had simply "fall[en] through the cracks."[5]

Lisi Bansen's story is not unique. In 2006, Josefina Quinones sued the city of Chula Vista for $10 million after her husband, James A. Quinones, was struck and killed by a car.[6] James, who used an electric wheelchair, was traveling in the street because there was no ramp to get onto the sidewalk.[7] In 1998, Ohio resident Kelly Dillery was charged with child endangerment after a motorist complained about Dillery riding her wheelchair in the street with her four-year-old daughter in her lap.[8] Dillery argued that the sidewalks were inaccessible and eventually sued the city of Sandusky under the Americans with Disabilities Act (ADA).[9]

As these stories indicate, the accessibility of sidewalks and curbs has become an issue of public safety for many.[10] Of the 291.1 million people in the United Sates in 2005, 54.4 million reported some degree of disability.[11]

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1. *See* Jeremy Kohler, *Path of Resistance*, ST. LOUIS POST-DISPATCH, Nov. 11, 2005, at A1; *see also* Elizabeth Pendo, *Taking It to the Streets: A Public Right-of-Way Project for Disability Law*, 54 ST. LOUIS U. L.J. 901, 904–05 (2010) (discussing the Lisi Bansen story).

2. *See* Kohler, *supra* note 1, at A1.

3. *See id.*; *see also* Pendo, *supra* note 1, at 904.

4. Pendo, *supra* note 1, at 904–05.

5. Kohler, *supra* note 1, at A1.

6. *See* Tanya Mannes, *Widow: Lack of Ramps Led to Husband's Death*, SAN DIEGO UNION-TRIB., June 15, 2007, at B1.

7. *See id.*

8. *See Wheelchair Mom Not Guilty of Putting Daughter, 5, at Risk*, PLAIN DEALER (Clev.), Mar. 12, 1999, at 1A; *Disabled Mother Innocent in Ohio*, BOS. GLOBE, Mar. 12, 1999, at A24.

9. *See Mom in Wheelchair Files Suit in Sandusky*, PLAIN DEALER (Clev.), June 12, 1999, at 4B; *see also* RUTH COLKER, THE LAW OF DISABILITY DISCRIMINATION 586 (7th ed. 2009) (noting that Dillery's claims under the Americans with Disabilities Act also included allegations that "police 'stopped, charged and harassed' her because of her disability" and "made no reasonable accommodation for her" (quoting Kelly Dillery's police report)).

10. *See, e.g.*, Donald Shoup, *Putting Cities Back on Their Feet*, 136 J. URB. PLAN. & DEV. 225, 225 (2010) (commenting that broken sidewalks "especially impede people with disabilities"); Chris Joyner, *Sidewalks Become Battlegrounds*, USA TODAY, Oct. 26, 2009, at 3A (discussing the "potentially dangerous practice" of disabled individuals across the country using their wheelchairs to travel in the streets due to sidewalk disrepair).

11. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, CURRENT POP. REP. P70-117, AMERICANS WITH DISABILITIES: 2005, at 4 (2008), *available at*

In addition to the 13.5 million Americans who use wheelchairs, canes, crutches, or walkers, 7.8 million people reported some level of visual impairment, including 1.8 million who are completely blind.[12]

However, as disability rights advocates push for cities to comply with the standards of the ADA,[13] cities note that the classification of sidewalks as "services" has significant fiscal consequences.[14] Under Title II of the ADA, public entities are obligated to bring their "services, programs, and activities" into compliance with ADA regulations regarding accessibility.[15] Cities argue that designating sidewalks as "services" ignores the financial limitations on public entities given the "phenomenal[] expens[e]" of bringing thousands of miles of sidewalk into compliance with the ADA.[16] How to best handle the deterioration of our nation's sidewalks has become a point of contention between disability rights advocates and municipalities facing severe budget constraints.[17]

Title II of the ADA forbids disability discrimination by government entities by providing 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."[18] While the statute defines both "public entity" and "disability," Title II does not explicitly define what constitutes a "service, program, or activity."[19] This Note examines the extent to which plaintiffs have a private right of action under Title II to force a city to maintain public curbs, sidewalks, and parking lots in compliance with the ADA. Specifically, this Note addresses whether public

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http://www.census.gov/prod/2008pubs/p70-117.pdf (based on data collected from a Survey of Income and Program Participation (SIPP) conducted in 2005). The SIPP concerned only the civilian non-institutionalized population of the United States, and consequently did not include the disability statuses of individuals living in institutional group facilities, such as nursing homes. *Id.* at 3–4. Statistician Matthew Brault notes that had institutionalized persons been included in the population universe, "estimates of disability prevalence may have been higher." *Id.* at 3.

12. *See* Pendo, *supra* note 1, at 904 (citing BRAULT, *supra* note 11, at 6).

13. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C.).

14. *See* Stephanie Francis Cahill, *Where the Sidewalk Ends: Court Rules Sidewalks Must Be Accessible Under the ADA*, A.B.A. J. E-REP. (A.B.A., Chicago, Ill.), June 28, 2002, at 9 (discussing the position of the National League of Cities, that "financial straits prohibit" cities from making sidewalks completely accessible, and that the U.S. Court of Appeals for the Ninth Circuit's decision recognizing sidewalks as "services" under Title II "ignores the limitations on public entities" (internal quotations omitted)); *see also* Joyner, *supra* note 10, at 3A (reporting that "cash-strapped cities and disability-rights advocates [are] at odds" over how to deal with the problem of inaccessible sidewalks).

15. 42 U.S.C. §§ 12132, 12134 (2006); *see* 28 C.F.R. § 35.149 (2010 and Mar. 15, 2011 amendments).

16. Cahill, *supra* note 14, at 9.

17. *See id.*; *see also* Joyner, *supra* note 10, at 3A.

18. 42 U.S.C. § 12132.

19. *Id.* § 12131; *see* Frame v. City of Arlington, 616 F.3d 476, 485 (5th Cir. 2010), *reh'g en banc granted*, No. 08-10630, 2011 WL 242385, at *1 (5th Cir. Jan. 26, 2011); Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002).

sidewalks can be considered "services, programs, or activities" within the meaning of Title II of the ADA and section 504 of the Rehabilitation Act.[20]

Part I of this Note explains the civil rights model of disability law, discusses the provisions and court interpretations of section 504 of the Rehabilitation Act and Title II of the ADA, and, finally, addresses the tools of statutory interpretation. Part II details the recent circuit split among the federal courts regarding whether public sidewalks, curbs, and parking lots qualify as "services, programs, or activities" under Title II of the ADA. At stake in this conflict of statutory interpretation is whether an individual may bring a private action against a public entity when public sidewalks do not meet the accessibility requirements of the ADA regulations. Finally, Part III argues that though sidewalks themselves may be "facilities," the provision and maintenance of a public sidewalk system is a government service within the meaning of Title II.

I. DISABILITY AND CIVIL RIGHTS: NONDISCRIMINATION IN PUBLIC SERVICES UNDER SECTION 504 AND TITLE II OF THE ADA

A. The Shift from the Integrationist Model of Disability to the Civil Rights Model

Disability law, and the relationship between disability and the law, has changed as society's understanding of disability has developed over time.[21] In the 1960s, disability rights activist Jacobus tenBroek detailed a shift in the disability law paradigm from "custodialism" to "integrationism."[22] Professor tenBroek maintained that laws relating to the handicapped originally developed on a theory of custodialism—a medically oriented model of disability that emphasized the physical differences of persons with disabilities and the need to cure, or separate and protect, these individuals.[23]

Professor tenBroek contrasted the custodial model with the newer integrative approach, which is based on a civil rights conception of disability.[24] Proponents of the integrative model disregarded isolation and protection, instead focusing on achieving equality, access, and full

20. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701–795n (2006)).

21. *See* MARK C. WEBER, UNDERSTANDING DISABILITY LAW 1 (2007); *see also* H.R. REP. NO. 101-485(III), at 25–27 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 447–49.

22. Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 816 (1966); *see* WEBER, *supra* note 21, at 1.

23. tenBroek & Matson, *supra* note 22, at 815–16; *see* WEBER, *supra* note 21, at 1. Custodialism is a "societal approach[] to disability" that reflects itself in "'policies of segregation and shelter, of special treatment and separate institutions.'" Robert L. Burgdorf, Jr., *Restoring the ADA and Beyond: Disability in the 21st Century*, 13 TEX. J. C.L. & C.R. 241, 247–48 (2008) (quoting tenBroek & Matson, *supra* note 22, at 816).

24. *See* tenBroek & Matson, *supra* note 22, at 816; *see also* Burgdorf, *supra* note 23, at 265 (explaining that the civil rights model of disability "views the limitations that arise from disabilities as largely the result of prejudice and discrimination" rather than simply the "inevitable result" of an individual's physical or mental impairments).

participation in society for individuals with disabilities.[25] Recognizing that the social handicap experienced by disabled persons often outweighs the actual physical restrictions of their impairments,[26] civil rights advocates worked to remove these attitudinal barriers to social equality and economic opportunity.[27]

B. The Disability Rights Movement: "You Gave Us Your Dimes, Now We Want Our Rights"[28]

The shift to a civil rights model of disability ushered in the disability rights movement.[29] Emboldened by the efforts of other minority groups in the 1960s and 1970s to achieve equality, disability activists used tactics such as marches, protests, acts of civil disobedience, and litigation to advocate for change.[30]

In the 1970s and 1980s, Congress passed a number of federal laws prohibiting disability-based discrimination, including the Individuals with Disabilities Education Act (IDEA),[31] the Voting Accessibility for the Elderly and Handicapped Act,[32] the Air Carrier Access Act of 1986,[33] and

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25. *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 426–27 (1991) (explaining that under the civil rights model of disability, disabled persons are considered "equal citizens" who do not need charity, but rather the opportunity to "participate fully in society"); tenBroek & Matson, *supra* note 22, at 816, 840; *see also* Burgdorf, *supra* note 23, at 249. Professor Robert L. Burgdorf characterizes Professor tenBroek's approach as an argument that a national policy of integrationism should control because "people with disabilities have a constitutional and legal right to live in the world, to freedom of movement within that world, and to equal access to places of public accommodation; and that artificial barriers that keep such individuals from moving about throughout society are or should be illegal." Burgdorf, *supra* note 23, at 250 (citing Jacobus tenBroek, *The Right To Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841, 848–52, 910–18 (1966)).

26. *See* tenBroek & Matson, *supra* note 22, at 814–16; *see also* tenBroek, *supra* note 25, at 842 (arguing that the "actual physical limitations resulting from the disability more often than not play little role in determining whether the physically disabled are allowed to move about and be in public places").

27. *See* WEBER, *supra* note 21, at 1.

28. This slogan was used by activists during the disability rights movement. *See* Burgdorf, *supra* note 25, at 426 (citing Terri Schultz, *The Handicapped, a Minority Demanding Its Rights*, N.Y. TIMES, Feb. 13, 1977, at E8).

29. *See* Burgdorf, *supra* note 25, at 426–28; *see also* Burgdorf, *supra* note 23, at 247–48 (noting that tenBroek's theory of an integrationist approach to disability was "the conceptual foundation for the systematic use" of court actions challenging disability discrimination which "ultimately culminat[ed] in what we have come to call a Disability Rights Movement").

30. *See* Burgdorf, *supra* note 25, at 427–28; *see also* Schultz, *supra* note 28, at E8 (reporting that "thousands of the disabled are picketing, filing suits and lobbying for the equal protection promised but never received").

31. Individuals with Disabilities Education Act, Pub. L. No. 91-230, tit. VI, 84 Stat. 175–88 (codified as amended at 20 U.S.C. §§ 1400–1482 (2006)) (providing federal special education funding to states that guarantee children with disabilities a free, appropriate public education).

32. Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified at 42 U.S.C. § 1973ee (2006)) (providing for accessible polling stations and nondiscrimination policies).

the Fair Housing Amendments Act of 1988.[34] However, the broadest and "most important" federal statute was section 504 of the Rehabilitation Act of 1973,[35] which prohibits discrimination based on disability in programs receiving federal financial assistance.[36]

C. The Rehabilitation Act of 1973

The Rehabilitation Act of 1973[37] was one of the first comprehensive federal laws enacted to benefit individuals with disabilities.[38] Sections 501 and 503 focus on employment, and prohibit disability discrimination by federal agencies and federal contractors, respectively.[39] Section 502 establishes the Architectural and Transportation Barriers Compliance Board, charged with enforcing the Architectural Barriers Act of 1968, while section 504 prohibits disability discrimination in any program or activity receiving federal funding.[40]

1. Section 504: Provisions

Section 504 of the Rehabilitation Act provides that "[n]o 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 Federal financial assistance."[41] The phrase "program or activity" is defined

33. Air Carrier Access Act of 1986, Pub. L. No. 99-435, 100 Stat. 1080 (codified at 49 U.S.C. § 41705 (2006)) (forbidding disability discrimination in commercial air transportation and establishing accessibility requirements).

34. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601–3614 (2006)) (prohibiting disability discrimination in housing).

35. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified at 29 U.S.C. §§ 701–795n (2006)).

36. 29 U.S.C. § 794; Burgdorf, *supra* note 25, at 428; *see also* LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW § 1:2, at 5 (4th ed. 2009) (deeming Section 504 of the Rehabilitation Act the "most significant federal protection for individuals with disabilities" prior to the Americans with Disabilities Act).

37. 29 U.S.C. §§ 701–795n.

38. *See id.*; *see also* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:17, at 53.

39. *See* 29 U.S.C. §§ 791, 793; *see also* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:17, at 54. Under sections 501 and 503, federal agencies and contractors are not only prohibited from discriminating on the basis of disability, but are also required to use affirmative action programs to employ qualified individuals with disabilities. *See* COLKER, *supra* note 9, at 32.

40. *See* 29 U.S.C. §§ 792, 794; *see also* COLKER, *supra* note 9, at 32.

41. 29 U.S.C. § 794(a) (prohibiting disability discrimination by the United States Postal Service as well). The nondiscrimination principle embodied by Section 504 was initially proposed as an amendment to Title VI of the Civil Rights Act of 1964. *See* Alexander v. Choate, 469 U.S. 287, 295–96 n.13 (1985); H.R. 14033, 92d Cong., 118 CONG. REC. 9,712 (1972); S. 3044, 92d Cong., 118 CONG. REC. 525–26 (1972);. *See generally* Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (2006) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). After the amendment did not pass, Section 504 was added to the proposed Rehabilitation Act at the end of the legislative session—passing without debate. *See* COLKER, *supra* note 9, at 32.

as "all the operations" of a qualifying state or local government entity,[42] where any part of the entity is receiving federal funding.[43]

Section 504 was originally implemented through regulations promulgated by the Department of Health, Education, and Welfare (HEW).[44] The responsibility for issuing regulations to enforce section 504 was eventually transferred to the Department of Justice (DOJ).[45] Additionally, the head of any federal department or agency that extends federal financial assistance, as well as the United States Postal Service, is required to issue regulations "as may be necessary" to implement the provisions of section 504.[46] These regulations must be consistent with DOJ regulations.[47]

Section 505 of the Rehabilitation Act provides that the remedies of the Civil Rights Act of 1964 are available to persons protected by section 504.[48] The remedies available to plaintiffs in the event of a section 504 violation include: the termination of federal funding, injunctive relief, damages, and attorney's fees.[49]

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42. 29 U.S.C. § 794(b)(1).

43. *Id.* § 794(b); *see also* 1 Americans with Disabilities: Practice and Compliance Manual (West) § 1:88 (Apr. 2010). The Civil Rights Restoration Act of 1987 amended Section 504 to state that where a part of a program or activity receives federal funding, the entire program is subject to the nondiscrimination requirements of Section 504. *See* Civil Rights Restoration Act of 1987, 20 U.S.C. § 1681 (2006); 29 U.S.C. § 794(b)(1)(B) (noting that Section 504 applies to state or local government entities that distribute federal funding "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"); *see also* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:20, at 60.

44. *See* Exec. Order No. 11,914, 41 Fed. Reg. 17,871 (Apr. 28, 1976); *see also* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:2, at 6 (discussing Executive Order 11,914, in which President Gerald Ford mandated that the Department of Health, Education, and Welfare (HEW) promulgate regulations under Section 504 in response to public displeasure over the lack of enforcement). In 1980, HEW became the Department of Health and Human Services (HHS). *Id.* § 1:2, at 7. Executive Order No. 11,914 was later revoked by Executive Order No. 12,250, in which President Jimmy Carter mandated that the Attorney General "coordinate the implementation and enforcement of" the nondiscrimination provisions of Section 504 of the Rehabilitation Act. Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).

45. *See* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:2, at 7.

46. 29 U.S.C. § 794(a); *see also* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:2, at 7 n.29 ("Each federal agency and department granting federal financial assistance is to promulgate its own regulations using the Department of Justice regulations as a guideline.").

47. *See* 1 Americans with Disabilities: Practice and Compliance Manual, *supra* note 43, § 1:3.

48. *See* 29 U.S.C. § 794a(a)(2). Section 505 was added to the Rehabilitation Act by amendment in 1978. *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 120(a), 92 Stat. 2955, 2982; *see also* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:2, at 7. Though Title VI does not explicitly provide a private right of action, the U.S. Supreme Court has found "an *implied* right of action" and concluded that private individuals "'may sue to enforce Title VI,'" and therefore have a private right of action under Section 504 and Title II. Barnes v. Gorman, 536 U.S. 181, 185 (2002) (quoting Alexander v. Sandoval, 532 U.S. 275, 280 (2001)) (holding that plaintiffs may seek compensatory, but not punitive, damages under Section 504 and Title II of the Americans with Disabilities Act (ADA)); *see also infra* notes 111–12.

49. *See* 29 U.S.C. § 794a; 1 Americans with Disabilities: Practice and Compliance Manual, *supra* note 43, §§ 1:250–58; *see also* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:21–22, at 65–67. Termination of federal funds is limited to the specific program or part

2. Regulations Implementing Section 504

Under the DOJ's regulations that implement section 504, entities receiving federal financial assistance must ensure that "no qualified handicapped person is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity . . . because the recipient's facilities are inaccessible to or unusable by handicapped persons."[50] Any federally funded program or activity must, when "viewed in its entirety," be "readily accessible to and usable by" persons with disabilities.[51]

However, while alterations to existing facilities must be accessible "to the maximum extent feasible,"[52] all existing facilities need not be readily accessible to comply with section 504.[53] In choosing compliance methods for existing facilities, entities are required to "give priority to those methods that serve handicapped persons in the most integrated setting appropriate."[54] Additionally, though the statute does not expressly outline an undue burden standard, courts have interpreted section 504 not to require recipients of federal funds to take any action that would constitute an undue burden or fundamentally alter the nature of the program or activity in question.[55]

3. Scope of Section 504

The scope of section 504 is limited in that it only covers entities that receive federal financial assistance.[56] Additionally, the plain language of

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of a program that was found to violate Section 504. *See* ROTHSTEIN & ROTHSTEIN, *supra* note 36, § 1:21, at 65. In an action brought under Section 504, compensatory damages are available only upon a showing of discriminatory intent or deliberate indifference. *See, e.g.*, Ferguson v. City of Phx., 157 F.3d 668, 679 (9th Cir. 1998); Wood v. President & Trs. of Spring Hill Coll., 978 F.2d 1214, 1219 (11th Cir. 1992); *see also* 1 Americans with Disabilities: Practice and Compliance Manual, *supra* note 43, § 1:252.

50. 28 C.F.R. § 42.520 (2010).

51. *Id.* § 42.521(a); *see also* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089, 1099 (1995) (explaining that in recognition of "the cost-effectiveness of accessible design," the regulations subject new facilities to stricter requirements than existing facilities).

52. 28 C.F.R. § 42.522(a).

53. *Id.* § 42.521(a)–(b) (providing that recipients of federal financial assistance are "not required to make structural changes in existing facilities where other methods are effective in achieving compliance"); *see also* Weber, *supra* note 51, at 1099.

54. 28 C.F.R. § 42.521(b); *see also* Weber, *supra* note 51, at 1099.

55. *See* Weber, *supra* note 51, at 1103 (citing Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410, 414 (1979) (holding that the college's "reasonable physical qualifications for admission to a clinical training program" did not violate Section 504, as "fundamental alteration[s] in the nature of a program" are beyond the sort of reasonable modification required by Section 504)).

56. *See* Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2006); Weber, *supra* note 51, at 1110; *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 Section 504 "prohibits discrimination only by recipients of [f]ederal financial assistance"); Burgdorf, *supra* note 25, at 429 (commenting that under Section 504 and other pre-ADA nondiscrimination laws, "almost all activities and programs not funded by the federal government could freely discriminate on the basis of disability").

the statute prohibits only discrimination "solely by reason" of disability, opening the door for narrow judicial interpretation of the statute.[57]

However, in *Alexander v. Choate*[58] the U.S. Supreme Court rejected the argument that "proof of discriminatory animus" is required to establish a cognizable claim under section 504 of the Rehabilitation Act and its implementing regulations.[59] Examining the legislative history of section 504, the Court reasoned that Congress had perceived disability discrimination to most often be the result, not of intentional discrimination, "but rather of thoughtlessness and indifference—of benign neglect," and pointed out that federal agencies have concluded that discrimination against disabled individuals "is primarily the result of apathetic attitudes."[60]

Nevertheless, though the Court "assume[d] without deciding" that some disparate impact claims would be viable under section 504, it rejected the "boundless notion" that any showing of disparate impact would prove a prima facie section 504 claim.[61] Mindful of "the desire to keep § 504 within manageable bounds," the Court upheld a Medicaid plan that limited the annual number of hospitalization days covered by Medicaid, despite the fact that the plan had a greater negative impact on persons with disabilities.[62]

D. The Americans with Disabilities Act of 1990

As the limitations of section 504 and other nondiscrimination statutes became apparent, disability rights activists began a push to amend civil rights statutes.[63] In the mid-1980s, advocates attempted to amend the Civil Rights Act of 1964 to include individuals with disabilities.[64] After those

57. *See* Weber, *supra* note 51, at 1110–11 & n.126 (discussing *Cushing v. Moore*, 783 F. Supp. 727, 734 (N.D.N.Y. 1992), *aff'd in part and remanded in part*, 970 F.2d 1103 (2d Cir. 1992), in which the court, emphasizing the statutory phrase "solely by reason of," found no cause of action to be available to the plaintiff, who alleged he was denied self-medication privileges in a public health program because he was disabled and unemployed).

58. 469 U.S. 287 (1985).

59. *Id.* at 292–99; *see also* COLKER, *supra* note 9, at 555.

60. *Choate*, 469 U.S. at 295–96. The Court further argued that it would "be difficult if not impossible" to effect much of the behavior Congress sought to change if the Rehabilitation Act was read to only prohibit intentional discrimination. *Id.* at 296–97 (noting that the elimination of architectural barriers was a "central aim[] of the [Rehabilitation] Act," yet most were not erected purposely to exclude persons with disabilities (citing S. REP. NO. 93-318, at 4 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2076, 2079)).

61. *Id.* at 298–99; *see also* WEBER, *supra* note 21, at 168 (commenting that the Court thought that requiring recipients of federal funds to assess every proposed action's effect on the disabled would "be unwieldy and contrary to congressional intent").

62. *Choate*, 469 U.S. at 289–99.

63. *See* Burgdorf, *supra* note 25, at 430–31 ("Experience with the application of . . . prior statutes, including section 504 of the Rehabilitation Act of 1973, uncovered or highlighted weaknesses of such laws arising from their statutory language, the limited extent of their coverage, inadequate enforcement mechanisms, and erratic judicial interpretations." (citations omitted)).

64. *See, e.g.*, H.R. 370, 99th Cong., H.R. 370, 99th Cong., 131 CONG. REC. 454 (1985) (statement of Rep. John Joseph Moakley); *see also* Burgdorf, *supra* note 25, at 429.

efforts proved unsuccessful, advocates proposed a comprehensive federal statute prohibiting disability discrimination.[65]

1. General Provisions: Overview, Findings, and Purposes

The ADA was enacted pursuant to Congress's powers under the Commerce Clause and Section 5 of the Fourteenth Amendment.[66] The overarching purpose of the ADA is "[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[67] Additionally, the framers of the ADA sought to establish "clear, strong, consistent, enforceable standards" addressing disability discrimination, and "to ensure that the Federal government plays a central role" in enforcing those standards.[68]

Congress noted that at the time, forty-three million Americans had physical or mental impairments, and that the number would only increase as the population aged.[69] Congress reported that persons with disabilities had been historically isolated by society, and that disability discrimination "continue[d] to be a serious and pervasive social problem."[70] Congress outlined various forms of such discrimination—including "outright intentional exclusion," architectural barriers, and "failure to make modifications to existing . . . practices."[71] Congress went on to note that unlike individuals who have experienced discrimination based on "race, color, sex, national origin, religion, or age," people with disabilities had often been without legal recourse to address discrimination against them.[72] Congress concluded that persons with disabilities constituted a "discrete and insular minority"[73] and outlined the goals of achieving "equality of

65. *See* H.R. 4498, 100th Cong., 134 CONG. REC. 9604-08 (1988) (statement of Rep. Silvo O. Conte); S. 2345, 100th Cong., 134 CONG. REC. 9379-82 (1988); *see also* Burgdorf, *supra* note 25, at 432.

66. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101(b)(4) (2006) (stating that one purpose of the ADA was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities"). *See generally* U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."); U.S. CONST. amend. XIV, § 5 ("The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

67. 42 U.S.C. § 12101(b)(1).

68. *Id.* § 12101(b)(2)–(3).

69. *Id.* § 12101(a)(1); *see also* Pendo, *supra* note 1, at 904 (noting that "the number and percentage of people with . . . disabilities are expected to rise as the population ages" (citing BRAULT, *supra* note 11, at 4 ("As age increases so does the prevalence of disability.")).

70. 42 U.S.C. § 12101(a)(2); *see also* Burgdorf, *supra* note 25, at 435–36.

71. 42 U.S.C. § 12101(a)(5); *see also* Burgdorf, *supra* note 25, at 435.

72. 42 U.S.C. § 12101(a)(4); *see also* Burgdorf, *supra* note 25, at 435.

73. 42 U.S.C. § 12101(a)(7); *see also* Burgdorf, *supra* note 25, at 436 (arguing that this finding serves as "a Congressional endorsement" of the idea that disability is a "suspect" classification subject to "heightened judicial scrutiny under the equal protection clause").

opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities."[74]

2. Judicial Interpretation

The five titles of the ADA prohibit discrimination on the basis of disability in a number of different contexts, including employment, the provision of public services, places of public accommodation, and communication services.[75] Under the ADA, "disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[76] Between 1999 and 2002, the Supreme Court decided a series of cases that narrowly interpreted the definition of disability under the "actually disabled" prong, further limiting the scope of protection provided by the ADA.[77]

In three cases decided on June 22, 1999, the Court ruled that mitigating measures must be taken into account when determining whether a person is disabled under the ADA.[78] In *Sutton v. United Air Lines, Inc.*,[79] the lead case of the so-called "*Sutton* trilogy," the plaintiffs argued that that they had been discriminated against on the basis of their disability because, although their corrected vision met United Airline's 20/100 standard for employment, United rejected them because of their uncorrected vision.[80] The Court held that mitigating measures, such as glasses, "must be taken into account when judging whether [a] person is 'substantially limited' in a major life activity and thus 'disabled' under the Act," and concluded that the plaintiffs were not "actually disabled" because their corrected vision was 20/20.[81] The Court reiterated this holding in the other *Sutton* trilogy

74. 42 U.S.C. § 12101(a)(8); *see also* Burgdorf, *supra* note 25, at 437 (reasoning that Congress's inclusion of this finding establishes these four goals as "guiding stars to illuminate the interpretation of the Act's provisions").

75. *See* 42 U.S.C. §§ 12111–17, 12131–34, 12181–89, 12201–13; 47 U.S.C. § 225; *see also* John C. Coleman, III & Marcel L. Debruge, *A Practitioner's Introduction to ADA Title II*, 45 ALA. L. REV. 55, 56 (1993); WEBER, *supra* note 21, at 5.

76. 42 U.S.C. § 12102(2); *see also* Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 77 ST. JOHN'S L. REV. 225, 230 (2003). This definition provides individuals with three methods of demonstrating they are covered by the ADA. Individuals with a current physical or mental disability fall within the first prong, and are deemed "actually impaired." *See* WEBER, *supra* note 21, at 25.

77. Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 34 (2007) (internal quotation marks omitted).

78. *See* Burgdorf, *supra* note 23, at 258–62.

79. 527 U.S. 471 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553; *see infra* Part I.F.

80. 527 U.S. at 476. The twin sister plaintiffs' vision was 20/20 if they wore eyeglasses or contact lenses. *Id.* at 475. Uncorrected, the plaintiffs' vision was 20/200 in one eye and 20/400 in the other eye. *Id.*

81. *Id.* at 482, 488–89.

cases: *Albertson's, Inc. v. Kirkingburg*[82] and *Murphy v. United Parcel Service, Inc.*[83]

In 2002 the Supreme Court further limited the ADA's scope by narrowly interpreting the meaning of "major life activity."[84] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[85] the Supreme Court held that a "major life activity" is one that involves the ability to perform the fundamental tasks essential to most people's daily lives, not merely a task required by an individual's specific job.[86] The Court reasoned that the terms of the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[87]

E. Title II: Public Services

Title II, the "public services" provision of the ADA, prohibits discrimination by public entities.[88] Title II overlaps substantially with Section 504 of the Rehabilitation Act, but expands Section 504's obligations to cover governmental entities not receiving federal funding.[89]

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82. 527 U.S. 555, 565–66 (1999) (holding that the Ninth Circuit erred by failing to take mitigating measures into account in determining whether plaintiff, who had 20/200 vision in his left eye and monocular vision, was disabled because plaintiff's "brain ha[d] developed subconscious mechanisms for coping with [his] visual impairment," and the Court saw "no principled basis for distinguishing between measures undertaken with artificial aids, like medications and devices, and measures undertaken, whether consciously or not, with the body's own systems" (internal quotation marks omitted)).

83. 527 U.S. 516, 521 (1999) (holding that a mechanic fired because of his high blood pressure did not meet the ADA definition of "disabled" because "when medicated, [his] high blood pressure [did] not substantially limit him in any major life activity"), *superseded by statute*, Pub. L. No. 110–325, 122 Stat. 3553; *see infra* Part I.F.

84. *See* Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 200–01 (2002), *superseded by statute*, Pub. L. No. 110-325, 122 Stat. 3553; *see also* Colker, *supra* note 77, at 61 ("[R]ecent decisions suggest that [the Supreme Court] is further constricting the scope of the ADA . . . most evident in the Court's 2002 decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.").

85. 534 U.S. 184 (2002), *superseded by statute*, Pub. L. No. 110–325, 122 Stat. 3553; *see infra* Part I.F.

86. *Toyota Motor Mfg.*, 534 U.S. at 197–202. The Court reversed the U.S. Court of Appeals for the Sixth Circuit's finding that the plaintiff was disabled because it inappropriately considered the plaintiff's inability to do manual work in her specific occupation, due to carpal tunnel syndrome and tendonitis, as "sufficient proof that she was substantially limited in performing manual tasks" and disregarded the plaintiff's ability to do household tasks such as brushing her teeth and bathing. *Id.* at 201–02.

87. *Id.* at 197.

88. *See* Americans with Disabilities Act of 1990 § 201–04, 42 U.S.C. § 12131–34 (2006); *see also* Coleman & Debruge, *supra* note 75, at 56.

89. *See* Coleman & Debruge, *supra* note 75, at 57; *see also* 42 U.S.C. § 12201(a) ("Except as otherwise provided . . . 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 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title."); Bragdon v. Abbott, 524 U.S. 624, 631–32 (1998) (stating that § 12201(a) "requires [the Court] to construe the ADA to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act"). The legislative history of Title II explains that Congress intended that Title II "simply extend[] the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to all actions of state and

Thus, government entities receiving federal financial assistance, i.e., most branches of state and local government, are governed by both Title II and Section 504.[90]

1. Provisions

The legislative history of Title II provides that Congress enacted Title II with the intent of "break[ing] down barriers to the integrative participation of people with disabilities in all aspects of community life."[91] Title II's general discrimination prohibition 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."[92] The term "public entity" includes any state or local government[93] and their departments, agencies, special purpose districts, or other instrumentalities.[94]

2. Regulations Implementing Title II

The Attorney General is required to promulgate regulations to enforce the provisions of Title II.[95] The regulations give effect to the Title II requirement that, "no qualified individual with a 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."[96]

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local governments." H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

90. *See* WEBER, *supra* note 21, at 163. Additionally, because the ADA was modeled after the Rehabilitation Act, and Title II expressly provides that the remedies available under Section 504 also apply to Title II, courts have held that jurisprudence interpreting either Section 504 or Title II is applicable to both. *See, e.g.*, Hainze v. Richards, 207 F.3d 795, 799 (5th Cir. 2000).

91. H.R. REP. No. 101-485(III), at 49–50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 472–73; *see also* Tennessee v. Lane, 541 U.S. 509, 523–25 (2004) (finding that Title II constituted a valid exercise of Congress's enforcement power because Title II was passed against a backdrop of "pervasive" state discrimination in the allocation of public services against persons with disabilities, as documented in the legislative history of Title II, Supreme Court cases, state laws, and the decisions of other courts).

92. 42 U.S.C. § 12132; *see also* Coleman & Debruge, *supra* note 75, at 57.

93. Title II covers only state and local governments, not the federal government. *See* 42 U.S.C. § 12131(1). Programs conducted by any executive agency or the United States Postal Service fall under the purview of Section 504. *See* 29 U.S.C. § 794(a); *see also* COLKER, *supra* note 9, at 508.

94. 42 U.S.C. § 12131(1); *see also* Coleman & Debruge, *supra* note 75, at 57. A "qualified individual with a disability" is defined as a person 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 § 12131(2); *see also* Coleman & Debruge, *supra* note 75, at 57.

95. 42 U.S.C. § 12134(a).

96. 42 U.S.C. § 12132.

To comply with the ADA, public entities must operate such that each program, service, or activity, "when viewed in its entirety," is accessible to individuals with disabilities.[97] The DOJ regulations explicitly prohibit public entities from excluding the disabled from services because of inaccessible or unusable facilities.[98] A "facility" is defined as "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."[99] New facilities constructed after January 26, 1992 must be "readily accessible to and usable by individuals with disabilities."[100] Any alteration of a facility that "could affect the usability of the facility or part of the facility" must be readily accessible to the "maximum extent feasible."[101]

Existing facilities are subject to a program access standard, meaning that public entities are not "necessarily require[d]" to make every existing facility accessible, as long as the entity's programs, services, or activities are accessible "when viewed in [their] entirety."[102] A public entity does not have to make structural changes to existing facilities if the entity can achieve compliance through other methods.[103] Additionally, public entities are not required to make existing facilities accessible where doing so "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens."[104]

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97. 28 C.F.R. § 35.150(a) (2010 and Mar. 15, 2011 amendments); *see also* Coleman & Debruge, *supra* note 75, at 87 (noting that the Title II regulations "focus first and foremost on *access to the program or service, not access to the facility*").

98. *See* 28 C.F.R. § 35.149 ("Except as otherwise provided . . . 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 . . . ."); *see also* John W. Parry, *State & Local Government Services Under the ADA: Nondiscrimination on the Basis of Disability*, 15 MENTAL & PHYSICAL DISABILITY L. REP. 615, 618 (1991) (noting that "[p]rogram inaccessibility constitutes illegal discrimination").

99. 28 C.F.R. § 35.104.

100. *Id.* § 35.151(a); *see also* Coleman & Debruge, *supra* note 75, at 89.

101. 28 C.F.R. § 35.151(b); *see also* Coleman & Debruge, *supra* note 75, at 89.

102. *See* 28 C.F.R. § 35.150(a); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, THE AMS. WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL, § II-5.1000 (1993). The DOJ's Interpretive Guidance for ADA Title II notes that Title II requires existing facilities to comply with a program access standard "because the cost of retrofitting existing facilities is often prohibitive." 28 C.F.R. pt. 35, app. A, § 35.150.

103. *See* 28 C.F.R. § 35.150(b)(1); *see also* U.S. DEP'T OF JUSTICE, *supra* note 102, § II-5.2000 ("A public entity must make its 'programs' accessible. Physical changes to a building are required only when there is no other feasible way to make the program accessible.").

104. 28 C.F.R. § 35.150(a)(3); *see also id.* pt. 35, app. A, § 35.150 (cautioning that "Congress intended the 'undue burden' standard in Title II to be significantly higher than the 'readily achievable' standard in Title III" and stating that Title II's program access requirement "should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases"). In the House Report on the ADA, Congress acknowledged that the requirement of program access in existing facilities is subject to an undue burden standard. H.R. REP. No. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473. However, Congress also praised the

When a public entity with fifty or more employees decides to structurally modify existing facilities to achieve accessibility, the entity must develop a transition plan "identify[ing] physical obstacles in facilities that limit the accessibility of [government] programs or activities," and outline a process for making those facilities accessible to the disabled.[105] A public entity that has authority over streets, roads, or walkways must include in its transition plan a schedule for providing curb cuts, "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."[106]

Finally, any "[n]ewly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas" at intersections featuring curbs or other such barriers to sidewalk access.[107] Newly constructed or altered sidewalks must feature curb ramps at intersections as well.[108]

3. Enforcement of Title II and Remedies for a Violation Thereof

The requirements of Title II are enforced through the "remedies, procedures, and rights set for forth in Section 794a of title 29 [section 505 of the Rehabilitation Act]."[109] As discussed in Part I.C.1, section 505 incorporates the remedies, procedures, and rights available under Title VI of the Civil Rights Act of 1964.[110]

In *Barnes v. Gorman*,[111] the Supreme Court recognized that individuals have a private cause of action to enforce both Section 504 and Title II.[112] The Court explained that its prior decisions had recognized an "*implied* [private] right of action" to enforce Title VI of the Civil Rights Act of 1964, and that the remedies available for claims under Section 504 and Title II are "coextensive with the remedies . . . brought under Title VI."[113] However,

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"long-range" societal benefits of the integration of people with disabilities despite the "short-term" yet "substantial" financial and administrative burdens. *Id.*

105. 28 C.F.R. § 35.150(d).

106. *Id.* § 35.150(d)(2).

107. *Id.* § 35.151(e)(1) (to be codified at section 35.151(i)(1) after Mar. 15, 2011 amendments to the Title II regulations); *see also* Kinney v. Yerusalim, 9 F.3d 1067, 1075 (3d Cir. 1993) (holding that the "resurfacing of the city streets is an alteration within the meaning of 28 C.F.R. § 35.151(b) which must be accompanied by the installation of curb cuts under 28 C.F.R. § 35.151(e)").

108. 28 C.F.R. § 35.151(e)(2) (to be codified at section 35.151(i)(2) after Mar. 15, 2011 amendments). The legislative history of the ADA reveals that Congress explicitly recognized the importance of mandating curb cuts under Title II, 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." *See* H.R. REP. No. 101-485(II), at 84, *reprinted in* 1990 U.S.C.C.A.N. 303, 367.

109. 42 U.S.C. § 12133 (2006).

110. *See* 29 U.S.C. § 794a (2006); *see also supra* note 48 and accompanying text.

111. 536 U.S. 181 (2002).

112. *See id.* at 184–85.

113. *Id.* at 185; *see* Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001) ("[I]t is clear from our decisions [and] from Congress's amendments of Title VI [that] private individuals

exactly what government conduct gives rise to a private cause of action under Title II has been the subject of debate.[114]

In *Alexander v. Sandoval*[115] the Supreme Court held that individuals do not have a private cause of action to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964.[116] The Court explained that "private rights of action to enforce federal law must be created by Congress," and therefore only regulations that "simply apply" the provisions of a controlling statute can be enforced through a private cause of action.[117] Title VI, by its terms, prohibits only intentional discrimination.[118] As such, the Court held that disparate impact regulations are not encompassed within the private right to enforce Title VI.[119]

In the wake of *Sandoval*, some courts have distinguished between Title VI and Section 504 or Title II, and concluded that disparate impact claims brought under Section 504 or Title II are actionable.[120] Courts distinguishing *Sandoval* note that the *Choate* Court rejected the notion that Section 504 bars only intentional discrimination, and implied that some disparate impact claims would be valid.[121]

Defendants have also argued, in light of *Sandoval*, that plaintiffs only have a private right of action to enforce ADA regulations when the claims are based on intentional discrimination.[122] In *Ability Center of Greater*

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may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages."); Cannon v. Univ. of Chicago, 441 U.S. 677, 703 (1979).

114. It is also worth noting that some states have sought to challenge the constitutionality of Title II under the Eleventh Amendment doctrine of sovereign immunity. *See generally* U.S. CONST. amend. XI; Tennessee v. Lane, 541 U.S. 509 (2004). However, because Eleventh Amendment sovereign immunity protects only states, not counties or municipalities, sovereign immunity has not been an issue in the conflict regarding whether Title II covers public sidewalks, and is therefore beyond the scope of this Note. *See* Lincoln Cnty. v. Luning, 133 U.S. 529, 530 (1890) ("The Eleventh Amendment limits the jurisdiction only as to suits against a State."). For a discussion of how the doctrine of state sovereign immunity impacts Title II actions brought against state entities, see COLKER, *supra* note 9, ch. 6.B.

115. 532 U.S. 275 (2001).

116. *Id.* at 293 ("Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.").

117. *Id.* at 285–86.

118. *Id.* at 280 ("[I]t is . . . beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination.").

119. *Id.* at 293.

120. *See* COLKER, *supra* note 9, at 555.

121. *See, e.g.*, Frederick L. v. Dep't of Pub. Welfare, 157 F. Supp. 2d 509, 538 (E.D. Pa. 2001) ("[W]hile the conduct regulated by section 601 of Title VI is limited to intentional discrimination, the same cannot be said for section 504. With section 504, Congress clearly sought to remedy a problem of a different, and for these purposes broader, nature." (citations omitted)).

122. *See id.* at 538–39 (rejecting the defendants' argument that the "[p]laintiffs' ADA claims must be dismissed in accordance with *Sandoval*"); *see also* Access Living v. Chi. Transit Auth., No. 00-C-0770, 2001 WL 492473, at *6 (N.D. Ill. May 9, 2001) ("Defendant argues that plaintiffs have failed to present a prima facie case of discrimination under the ADA and Rehabilitation Act because they have failed to present evidence of intentional discrimination . . . .").

Toledo v. City of Sandusky,[123] plaintiffs filed a class action claiming that the city: (1) did not comply with 28 C.F.R. § 35.151 when replacing and repairing sidewalks and (2) "failed to adopt a transition plan" in accordance with 28 C.F.R. § 35.150(d).[124] The city argued that under *Sandoval*, individuals do not have a private right of action under Title II to enforce Title II regulations.[125] The U.S. Court of Appeals for the Sixth Circuit, relying on *Choate*, found that Title II does not merely prohibit invidious discrimination, but also requires public entities to make reasonable accommodations, and "contemplates that such accommodations must sometimes come in the form of public entities removing architectural barriers that impede [the] disabled."[126] The court concluded that 28 C.F.R § 35.151 clearly "imposes requirements specifically envisioned" by Title II, and is therefore "enforceable through Title II's private cause of action."[127]

A plaintiff bringing a private cause of action under Title II generally must show that: (1) he is a qualified individual with a disability; (2) he is being excluded from participation in, or being denied the benefits of, a public entity's services, programs, or activities; and (3) he was excluded or denied the benefit solely on the basis of his disability.[128]

The phrase "program, services, or activities" is not defined in Title II nor in the implementing regulations promulgated by the DOJ. However, a number of federal circuit courts have embraced a broad definition of "services, programs, or activities."[129] In *Innovative Health Systems, Inc. v. City of White Plains*,[130] the U.S. Court of Appeals for the Second Circuit found that "[a]ll governmental activities of public entities are covered" under Title II.[131] Similarly, the U.S. Court of Appeals for the Third Circuit has held that Congress intended that the phrase "apply to anything a public entity does," and therefore found that Title II applies to state and local correctional facilities.[132]

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123. 385 F.3d 901 (6th Cir. 2004).

124. *Id.* at 903.

125. *See id.* at 904.

126. *Id.* at 907.

127. *Id.* at 910, 913. However, the court found that the transition plan requirement of 28 C.F.R. § 35.150(d) did "more than simply apply or effectuate [Title II]," and that, therefore, plaintiffs had no private right of action to force the city to adopt a transition plan. *Id.* at 914–15.

128. *See, e.g.*, Melton v. Dall. Area Rapid Transit, 391 F.3d 669, 671–72 (5th Cir. 2004) (citing Lightbourn v. Cnty. of El Paso, 118 F.3d 421, 428 (5th Cir. 1997)); Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002) (citing Weinreich v. L.A. Cnty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997)).

129. *See* Laurence Paradis, *Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services, and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 395–99 (2003). *But see* Frame v. City of Arlington, 616 F.3d 476, 485–86 (5th Cir. 2010), *reh'g en banc granted*, No. 08-10630, 2011 WL 242385, at *1 (5th Cir. Jan. 26, 2011).

130. 117 F.3d 37 (2d Cir. 1997), *superseded on other grounds*, Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001).

131. *Innovative Health Sys., Inc.*, 117 F.3d at 45 (citing 29 U.S.C. § 794(b)(1)(A); 28 C.F.R. pt. 35, app. A at 456 (2010)); *see also* Paradis, *supra* note 129, at 397.

132. Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997) (quoting 28 C.F.R. pt. 35, app. A, at 456), *aff'd*, 524 U.S. 206, 212 (1998) ("[T]he fact that a statute can be

As with Section 504, the remedies available in a private cause of action under Title II include attorney fees, injunctive relief, and compensatory damages.[133] Punitive damages are not available in a private suit under Title II.[134] Courts have generally held that compensatory damages are only available upon a showing of intentional discrimination.[135]

F. The ADA Amendments Act of 2008

The Supreme Court's decisions in the *Sutton* trilogy and *Toyota Motor Manufacturing* were met with criticism from the disability rights community, who argued that the Court's pro-defendant interpretation of the ADA was inconsistent with congressional intent.[136] Advocates pointed out the "Catch-22" created by the Court's approach to mitigating measures, under which a person could be considered "too impaired" to be hired, yet not impaired enough to fall under the protection of the ADA.[137]

On September 25, 2008, President George W. Bush signed the ADA Amendments Act of 2008[138] (ADAAA) into law.[139] In enacting the ADAAA, Congress sought to "restore the intent and protections of the Americans with Disabilities Act of 1990."[140] Congress determined that the Supreme Court, in the *Sutton* trilogy, had "narrowed the broad scope of

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'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985))). Additionally, the U.S. Courts of Appeal for the Sixth and Seventh Circuits have found that Title II applies to "virtually everything that a public entity does." Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998); *see* Oconomowoc Residential Programs, Inc., v. City of Milwaukee, 300 F.3d 775, 782 (7th Cir. 2002) (concluding Title II covers "anything a public entity does" (quoting 28 C.F.R. pt. 35, app. A)).

133. *See supra* notes 49, 109 and accompanying text; *see also* Paradis, *supra* note 129, at 391–95.

134. *See* Barnes v. Gorman, 536 U.S. 181, 189 (2002); *see also supra* note 49 and accompanying text.

135. *See, e.g.*, Ferguson v. City of Phx., 157 F.3d 668, 674–75 (9th Cir. 1998) (holding that plaintiffs must prove intentional discrimination in order to receive compensatory damages under Section 504 or Title II, but declining to decide whether a "discriminatory animus" or "deliberate indifference" standard is proper, as the plaintiff's claims did not pass either test).

136. *See, e.g.*, Colker, *supra* note 77, at 34 (arguing that Congress intended to cover individuals with "both mild and severe disabilities" under the ADA, "[y]et, the Court has interpreted the ADA inconsistently with that intent, resulting in the ADA . . . only covering those too disabled to work").

137. WEBER, *supra* note 21, at 19–20; *see also* Pendo, *supra* note 76, at 261–62 (concluding that in the wake of the *Sutton* trilogy, "employers [were] free to reject fully capable workers with correctable impairments without fear of an ADA claim because those workers [were] not 'disabled' as defined by the Court").

138. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553.

139. 154 CONG. REC. S 9626 (daily ed. Sept. 26, 2008) (statement of Sen. Harry Reid) (noting that the ADAAA passed with "overwhelming, bipartisan support in the Senate and House of Representatives").

140. § 2, 122 Stat. at 3553; *see* 154 CONG. REC. S9626 ("Simply put, the ADA Amendments Act restores the landmark Americans with Disabilities Act to the civil rights law it was meant to be.").

protection intended to be afforded by the ADA"—excluding individuals Congress had meant to cover.[141]

The ADAAA explicitly rejects the *Sutton* trilogy requirement that mitigating measures be taken into account in determining whether a person is "substantially limited" with respect to a major life activity, as well as *Toyota Motor Manufacturing*'s rule that only those activities "of central importance to most people's daily lives" constitute major life activities under the ADA.[142]

G. Rules of Statutory Interpretation

As the *Sutton* trilogy and the ADAAA demonstrate, the breadth of the ADA's scope intended by Congress has not always been clear. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[143] the Supreme Court outlined the two-step process governing judicial interpretation of a statute administered by an executive agency.[144] First, a court must look to the statute and determine if Congress directly addressed the given issue.[145] If, using the "traditional tools of statutory construction," the court concludes that the intent of Congress was unambiguous with respect to the specific issue in question, the court must give effect to that clear intent.[146]

To determine legislative intent, courts first turn to the plain language of the statute.[147] Though a word must be given its ordinary meaning,[148] the words used in a given statute should be considered in context, based upon a reading of the statutory text in its entirety.[149] If possible, a court must construe the statute in a way that gives every word "some operative effect."[150] However, courts may "reject words 'as surplusage'" if

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141. § 2, 122 Stat. at 3553.

142. *Id.* at 3554; *see supra* notes 86–87 and accompanying text. Congress declared that the strict standard for "substantially limits" created by the Supreme Court in *Toyota Motor Manufacturing* "created an inappropriately high level of limitation necessary to obtain coverage under the ADA." § 2, 122 Stat. at 3554.

143. 467 U.S. 837 (1984).

144. *See id.* at 842–43; *see also* Ann Graham, *Searching for* Chevron *in Muddy* Watters*: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 232–33 (2008).

145. *Chevron*, 467 U.S. at 842.

146. *Id.* at 843 n.9.

147. *See* Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished." (citing Demarest v. Manspeaker, 498 U.S. 184, 190 (1991))).

148. *See* Smith v. United States, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." (citing Perrin v. United States, 444 U.S. 37, 42 (1979))).

149. *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006); *see also* Deal v. United States, 508 U.S. 129, 132 (1993) (discussing the "fundamental principle of statutory construction" that a court must determine the meaning of a word, not in isolation, but in light of the context in which the word is used).

150. Reich v. Arcadian Corp., 110 F.3d 1192, 1195–96 (5th Cir. 1997) (quoting United States v. Nordic Vill., Inc., 503 U.S. 30, 36 (1992)).

"repugnant to the rest of the statute."[151] In interpreting a word or phrase, a court should consider the purpose of the statute, and "consult[] any precedents or authorities" that may be relevant to the analysis.[152]

If a court determines that the statute is silent or ambiguous with respect to the question at issue, the court must then turn to the agency's interpretation of the statute.[153] So long as the agency interpretation is "based on a permissible construction of the statute," a court must defer to that interpretation.[154] However, an agency's interpretation only merits deference "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[155]

In discerning the agency's interpretation of a statute, courts first look to any regulations the agency has promulgated that address the question at issue.[156] If an agency regulation is unambiguous, and a reasonable interpretation of the statute, a court must give effect to that regulation.[157] Only when the language of an agency regulation is ambiguous may a court look to the agency's interpretation of its own regulation.[158] An agency's interpretation of its own ambiguous regulation is entitled to deference under *Auer v. Robbins*,[159] unless "plainly erroneous or inconsistent with the regulation."[160]

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151. Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001).

152. *Dolan*, 546 U.S. at 486.

153. *See Chickasaw*, 534 U.S. at 94 (quoting KARL LLEWELLYN, THE COMMON LAW TRADITION 525 (1960)).

154. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Additionally, though courts "must reject administrative constructions which are contrary to clear congressional intent," an agency interpretation does not have to be the only permissible interpretation of the statutory provision, or even the interpretation the court would have reached itself, to be entitled to deference. *Id.* at 843 n.9 (citing Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981)).

155. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001); *see* David Goodman, Recent Case, Gonzales v. Oregon, *126 S. Ct. 904 (2006)*, 74 TENN. L. REV. 437, 446 (2007) (discussing the Court's "force of law" analysis in *United States v. Mead Corp.*); *see also* Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (stating that agency interpretations, such as opinion letters, that "lack the force of law[,] do not warrant *Chevron*-style deference" (citing Reno v. Koray, 515 U.S. 50, 61 (1995))). An agency interpretation that lacks the force of law is "'entitled to respect' only to the extent it has the 'power to persuade.'" Gonzales v. Oregon, 546 U.S. 243, 256 (2006) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see* Graham, *supra* note 144, at 241 (discussing the "very limited" *Skidmore v. Swift & Co.* deference standard).

156. *See* Frame v. City of Arlington, 616 F.3d 476, 483 (5th Cir. 2010), *reh'g en banc granted*, No. 08-10630, 2011 WL 242385, at *1 (5th Cir. Jan. 26, 2011).

157. *See Chevron*, 467 U.S. at 843–44 (noting that where Congress has expressly delegated an agency the authority to "elucidate a specific provision of the statute by regulation," the agency regulation controls unless it is "arbitrary, capricious, or manifestly contrary to the statute"). Even where the legislative delegation was "implicit rather than explicit," the agency construction will be given effect if reasonable. *Id.* at 844.

158. *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

159. *Id.* (deferring to the Department of Labor's amicus brief in interpreting an ambiguous agency regulation promulgated to enforce the Fair Labor Standards Act). In *Gonzales*, the Supreme Court distinguished *Chevron* from *Auer*, explaining that *Chevron*

II. ARE PUBLIC SIDEWALKS CONSIDERED "SERVICES, PROGRAMS, OR ACTIVITIES" WITHIN THE MEANING OF TITLE II?

Courts have disagreed over whether citizens have a private right of action under Title II to compel a city to maintain public curbs, sidewalks, and parking lots in compliance with ADA regulations. Specifically, circuits have split regarding whether public sidewalks are considered "services, programs, or activities" within the meaning of Title II of the ADA and section 504 of the Rehabilitation Act.

Part II examines the split between the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the Fifth Circuit regarding whether public sidewalks qualify as "services, programs, or activities" covered by Title II. Part II.A outlines the Ninth Circuit's conclusion that public sidewalks are considered "services, programs, or activities" within the meaning of Title II, and therefore must comport with the accessibility requirements of the Title II regulations. Part II.B details the Fifth Circuit's contrary determination that public sidewalks are facilities, and therefore not automatically subject to Title II's nondiscrimination provisions.

A. Broad Interpretation: Sidewalks Are "Services, Programs, or Activities" Subject to the Title II Regulations

The Ninth Circuit has endorsed a broad interpretation of "services, programs, or activities," concluding that the ADA's "fundamental purpose" of eliminating disability discrimination is best served by including public sidewalks within the phrase "services, programs, or activities."[161] This section discusses the Ninth Circuit's ruling in *Barden v. City of Sacramento*[162] that public sidewalks are a "service, program, or activity" within the meaning of Title II, and are thus subject to the program accessibility requirements of the Title II regulations. First, this section outlines the court's argument that precedent, the plain language of the Rehabilitation Act, and the legislative history of Title II support a broad interpretation of Title II. Then, it details the court's determination that, though consistent with the conclusion that sidewalks fall within the scope of Title II, the regulations are ultimately ambiguous. Next, it examines the court's decision, in light of the ambiguity of the Title II regulations, to defer to the DOJ's position that public sidewalks are subject to the regulations' accessibility requirements. Finally, this section discusses the Supreme

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deference applies when interpreting an ambiguous statute, whereas *Auer* deference applies when interpreting an ambiguous agency regulation. *Gonzales*, 546 U.S. at 255; *see* Graham, *supra* note 144, at 239–41.

160. *See* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Udall v. Tallman, 380 U.S. 1, 16 (1965)). The Court explained that an agency's interpretation of its own regulations must be afforded "substantial deference" and will be given effect unless an "alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Id.* at 512 (quoting Gardebring v. Jenkins, 485 U.S. 415, 430 (1988)).

161. Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002) (citing Hason v. Med. Bd., 279 F.3d 1167, 1172 (9th Cir. 2002)).

162. 292 F.3d 1073 (9th Cir. 2002).

Court's decision to deny review, and the state of disability rights advocacy in the wake of *Barden*.

In 1999, a group of individuals with mobility and vision impairments brought a class action against the city of Sacramento, alleging that the city had violated Title II and section 504 by failing to maintain existing public sidewalks and to make them accessible to persons with disabilities.[163] The plaintiffs argued that the city's failure to remove obstacles such as benches, sign-posts, and wires violated the program accessibility requirements of Title II's implementing regulations.[164] The District Court for the Eastern District of California partially granted the city's motion for summary judgment, concluding that public sidewalks were not a "service, program, or activity" under Title II.[165] The plaintiffs appealed, and a group of fourteen disability rights organizations filed an amicus brief in support of the plaintiffs,[166] as did the Department of Justice.[167]

On June 12, 2002, the Ninth Circuit reversed the district court, holding that public sidewalks constitute "services" within the meaning of Title II of the ADA and are therefore subject to the accessibility requirements of the ADA regulations.[168] The court determined that a broad reading of the term "services, programs, or activities" was supported by precedent, the plain language of the Rehabilitation Act, the legislative history of Title II, and the DOJ's interpretation of its own regulation.[169]

In its analysis, the Ninth Circuit first pointed to the broad interpretation of the phrase "service, program, or activity" by the U.S. Courts of Appeals for the Second, Third, and Sixth Circuits.[170] Echoing the reasoning of the

163. *See id.* at 1075. The plaintiffs also claimed that the city's failure to install curb cuts in newly constructed or altered sidewalks was a violation of Title II, but that issue was settled before the case reached the Ninth Circuit. *See id.* (reporting that the "parties stipulated to the entry of an injunction regarding the curb ramps"); *see also* Cahill, *supra* note 14, at 9 (reporting that in the settlement the city agreed to install a specific number of curb cuts over a thirty-year period).

164. *Barden*, 292 F.3d at 1075; *see also* 28 C.F.R. §§ 35.149–51 (2010 and Mar. 15, 2011 amendments).

165. *See Barden*, 292 F.3d at 1075.

166. Brief for Amicus Curiae Supporting Plaintiffs-Appellants and Reversal, *Barden*, 292 F.3d 1073 (No. 01-15744), 2001 WL 34095025 (submitted on behalf of the Western Law Center for Disability Rights (WLCDR), the American Association of People with Disabilities (AAPD), the National Association of Protection and Advocacy Systems (NAPAS), the Disability Rights Education and Defense Fund, Inc. (DREDF), the United Cerebral Palsy Association (UCP), Protection and Advocacy, Inc. (PAI), the National Senior Citizens Law Center, ADAPT, the California Council of the Blind (CCB), the American Association of Retired Persons (AARP), the Gray Panthers, the National Multiple Sclerosis Society, Californians for Disability Rights (CDR), and the California Foundation for Independent Living Centers (CFILC)).

167. Brief for the United States as Amicus Curiae Supporting Appellants, *Barden*, 292 F.3d 1073 (No. 01-15744), 2001 WL 354095025.

168. *See Barden*, 292 F.3d at 1074.

169. *See id.* at 1076–78.

170. *See id.* at 1076 (citing Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998); Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997), *aff'd*, 524 U.S. 206 (1998); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997), *superseded on other grounds*, Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001)); *see also supra* notes 130–32 and accompanying text.

Second Circuit in *Innovative Health Systems*, the Ninth Circuit noted the inefficiency of requiring courts to engage in the sort of "hair-splitting" that would be involved in determining which public functions technically qualify as "services, programs, or activities."[171]

Following the precedent set by *Lee v. City of Los Angeles*,[172] in which it embraced the Third Circuit's interpretation of Title II's plain language as "bring[ing] within its scope 'anything a public entity does,'"[173] the court reasoned that the proper question was not whether a public function could technically be considered a service, program, or activity, but rather "whether it is 'a normal function of a governmental entity.'"[174] The Ninth Circuit concluded that maintaining a system of public sidewalks is "without a doubt something that the [City] 'does,'" and therefore falls under the purview of Title II.[175]

The court next turned to the plain language of the statute.[176] The court acknowledged that the phrase "services, programs, or activities" is not defined in the ADA, but noted that the Rehabilitation Act defines "program or activity" as "all the operations" of an eligible state or local government.[177] Furthermore, the Court reasoned, the legislative history of the ADA provides that Title II "'simply extends the anti-discrimination prohibition embodied in § 504 [of the Rehabilitation Act] to *all actions of state and local governments*.'"[178]

The court next examined the language of the program accessibility requirements set forth in Title II's implementing regulations.[179] The court noted that though section 35.150 prioritizes the provision of curb ramps for "walkways serving government offices, 'transportation, places of public accommodation, and employers,'" the regulation mandates that curb cuts be installed in "'walkways serving other areas'" as well.[180] The court explained that section 35.150's requirement that curb cuts be installed in all sidewalks evidenced a "general concern for the accessibility of public sidewalks" and a "recognition" that public sidewalks fall within the scope of the ADA.[181] However, the court concluded that in spite of this, the

171. *Id.* at 1076 (quoting *Innovative Health Sys.*, 117 F.3d at 45).

172. 250 F.3d 668 (9th Cir. 2001).

173. *Id.* at 691 (quoting *Yeskey*, 118 F.3d at 171).

174. *Barden*, 292 F.3d at 1076 (quoting Bay Area Addiction Research & Treatment, Inc., v. City of Antioch, 179 F.3d 725, 731 (9th Cir. 1999)).

175. *Id.* (quoting Hason v. Med. Bd. of Cal., 279 F.3d 1167, 1173 (9th Cir. 2002)).

176. *See id.* at 1076–77.

177. *Id.* at 1077; *see* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794(b)(1)(B) (2006); *supra* note 42 and accompanying text.

178. *Barden*, 292 F.3d at 1077 (quoting H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367); *see also supra* note 90 (stating that because Title II is modeled after section 504, precedent interpreting either is applicable to both).

179. *See Barden*, 292 F.3d at 1075–77 (detailing the provisions of 28 C.F.R. §§ 35.149–151 (2010)); *see also supra* Part I.E.2.

180. *Barden*, 292 F.3d at 1077 (quoting 28 C.F.R § 35.150(d)(2)); *see supra* note 106 and accompanying text.

181. *Barden*, 292 F.3d at 1077 (citing 28 C.F.R § 35.150).

regulation is ambiguous because it provides for curb ramps but does not specifically mention sidewalks.[182]

Deeming the language of section 35.150 ambiguous, the court turned to the interpretation provided by the DOJ, the agency responsible for promulgating the accessibility regulations.[183] The DOJ took the position that sidewalks are subject to the program accessibility requirements of Title II.[184] The DOJ's interpretation is entitled to deference under *Auer*, the court explained, unless "plainly erroneous or inconsistent with the regulation."[185]

The court explained that because, logically, mandating curb ramps would be useless unless the sidewalks between were required to be accessible, the DOJ's stance was not plainly erroneous or inconsistent with the language of section 35.150.[186] Consequently, the court deferred to the DOJ's interpretation of its own regulation.[187] Based on the foregoing analysis, the Ninth Circuit held that sidewalks do constitute a "service, program, or activity . . . within the meaning of Title II," and thus must comply with the program accessibility requirements of the Title II regulations.[188] The court remanded the case to the district court to determine whether bringing the sidewalk system into compliance would impose "undue financial and administrative burdens" on the city of Sacramento.[189]

After the city of Sacramento filed a petition for writ of certiorari with the Supreme Court, the Court invited the Solicitor General to file a brief expressing the opinion of the United States, which the Solicitor General did in May of 2003.[190] In its amicus brief, the Solicitor General opined that the Ninth Circuit was correct in holding that public sidewalks are subject to the accessibility requirements of Title II.[191] On June 27, 2003, the Supreme Court denied review in *Barden*.[192]

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182. *Id.* at 1077.

183. *Id.*; *see also* 42 U.S.C. § 12134(a) (2006); *supra* note 95 and accompanying text.

184. *See* Brief for the United States as Amicus Curiae Supporting Appellants, *supra* note 167, at 5–7; *see also Barden*, 292 F.3d at 1077; Cahill, *supra* note 14, at 9 (reporting that the Ninth Circuit cited an amicus brief submitted by the DOJ, concluding that sidewalks are subject to program accessibility regulations).

185. *Barden*, 292 F.3d at 1077 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997); Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1074 (9th Cir. 2001)).

186. *Id.*; *see supra* notes 97, 102–04 and accompanying text.

187. *Barden*, 292 F.3d at 1077; *see also* 1 Americans with Disabilities: Practice and Compliance Manual, *supra* note 43, § 2:26 (stating that in *Barden*, the Ninth Circuit held that the "Department of Justice's interpretation of its own accessibility regulation under the ADA . . . was entitled to deference . . . where the regulation was ambiguous, since it addressed curb ramps but not sidewalks, and such interpretation was not plainly erroneous or inconsistent with the regulation").

188. *Barden*, 292 F.3d at 1074.

189. *Id.* at 1078 & n.6 (quoting 28 C.F.R. § 35.150(a)(3) (2010)).

190. *See* City of Sacramento v. Barden, 537 U.S. 1231, 1231 (2003) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States."); *see also* Brief for the United States as Amicus Curiae, City of Sacramento v. Barden, 539 U.S. 958 (2003) (No. 02-815), *available at* http://www.justice.gov/osg/briefs/2002/2pet/6invit/2002-0815.pet.ami.inv.pdf.

191. *See* Brief for the United States as Amicus Curiae, *supra* note 190, at 7–8 (reasoning that Sacramento's provision of a public sidewalk system constituted a fundamental service,

Barden was heralded as a major victory for disability rights advocates, and has inspired disability rights advocates to file similar lawsuits in cities across the country.[193] The U.S. District Court for the Northern District of Indiana recently considered whether the "services, programs, or activities" of a city includes public sidewalks in *Culvahouse v. City of Laporte*.[194] The court, in line with *Barden*, found that Title II is "broad enough to include public sidewalks within the scope of a city's services, programs, or activities."[195]

In August of 2006, Californians for Disability Rights (CDR), the California Counsel for the Blind, and California residents Ben Rockwell and Dmitri Belser filed a class action lawsuit against the California Department of Transportation (Caltrans), among other parties, alleging that Caltrans had failed to make existing sidewalks and Park and Ride facilities accessible to individuals with disabilities.[196] On June 2, 2010, the District Court for the Northern District of California approved a settlement agreement in which Caltrans agreed to spend $1.1 billion over the next thirty years to remove barriers and improve sidewalk accessibility in California.[197]

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and that when a resident is denied the use of that sidewalk system because the sidewalks are inaccessible, "he or she is 'excluded from,' and 'denied the benefits of,' the 'services, programs, or activities of a public entity'" (quoting 42 U.S.C. § 12132 (2006))); *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION, ENFORCING THE ADA: A STATUS REPORT FROM THE DEPARTMENT OF JUSTICE 2–3 (2003), *available at* http://www.ada.gov/aprjun03prt.pdf (stating that the DOJ's brief also argued that Sacramento's concern that it would incur "staggering costs" was unfounded in light of "title II's undue financial and administrative burdens defense").

192. *See* City of Sacramento v. Barden, 539 U.S. 958 (2003) (denying certiorari); *see also* U.S. DEP'T OF JUSTICE, *supra* note 191, at 2 (reporting that the Supreme Court declined to review *Barden*).

193. *See* Joyner, *supra* note 10, at 3A (describing Scott Crawford's lawsuit against the city of Jackson, Mississippi, as "aimed at getting the city to comply with ADA standards by making sidewalks, bus stops and other public areas accessible to the disabled"); *see also* Elizabeth Campbell, *Disabled Arlington Man Continues His Quest for Access*, STAR-TELEGRAM, Sept. 11, 2010, http://www.star-telegram.com/2010/09/11/2461097/disabled-arlington-man-continues.html (reporting twenty lawsuits filed by the Texas Civil Rights Project and ADAPT of Texas alleging that Texas cities, counties, and businesses have violated the ADA in a range of ways, including inaccessible sidewalks).

194. 679 F. Supp. 2d 931, 939 (N.D. Ind. 2009).

195. *Id.* at 939 (citing Frame v. City of Arlington, 575 F.3d 432, 437 (5th Cir. 2009) (granting plaintiffs motion for summary judgment on the issue of liability), *withdrawn and superseded on reh'g*, 616 F.3d 476 (5th Cir. 2010)).

196. *See* Californians for Disability Rights, Inc. v. Cal. Dep't of Transp., No. C 06-5125, 2009 WL 2982840, at *1 (N.D. Cal., Sept. 14, 2009); *see also* Joyner, *supra* note 10, at 3A (noting that California faced "potentially billions of dollars in sidewalk-repair costs" should it lose).

197. Californians for Disability Rights, Inc., v. Cal. Dep't of Transp., No. C 06-5125, 2010 U.S. Dist. LEXIS 62837, at *6, 28 (N.D. Cal. June 2, 2010) (approving settlement in which Caltrans agreed to: (1) a commitment to a spend $1.1 billion over the next thirty years to make walkways more accessible; (2) a "monitoring procedure" to oversee compliance during the first seven years and mandatory annual reporting for thirty years; (3) a "grievance procedure" to handle public complaints regarding accessibility; and (4) a payment of attorney's fees not less than $3.75 million but not to exceed $8.75 million for "past work and future compliance services"); *see also* Riya Bhattacharjee, *Caltrans Settles Class Action*

B. Narrow Interpretation: Public Sidewalks Are Facilities, Do Not Qualify as "Services, Programs, or Activities" Under Title II

Not all courts have found the Ninth Circuit's broad interpretation of Title II persuasive. The Northern District of Indiana, though agreeing in *Culvahouse* that sidewalks constitute a "service, program, or activity" of a public entity within the meaning of Title II, chose not to endorse the Ninth Circuit interpretation of "programs, services, or activities" as "anything a public entity does."[198] In addition, the U.S. District Court for the District of New Jersey, in an unpublished opinion, explicitly disagreed with the Ninth Circuit and concluded that sidewalks are "facilities" that do not themselves constitute "programs, services, or activities" under the ADA.[199] The court pointed out that the ADA regulations include sidewalks in the definition of "facilities" and argued that while a public entity must ensure that its services are accessible, the regulations do not require that each existing facility be made readily accessible.[200]

Part II.B details the argument in favor of a narrow interpretation of Title II, under which public sidewalks do not in themselves qualify as "services, programs, or activities." Part II.B.1 examines the concern presented by city advocates that deeming sidewalks "services" under the ADA imposes significant fiscal burdens on cities and municipalities. Part II.B.2 outlines the Fifth Circuit's determination in *Frame v. City of Arlington*[201] that a narrow interpretation of the phrase "services, programs, or activities" is proper given the "clear" congressional intent to distinguish between "physical infrastructures" and the "services to which they provide access."[202]

Disability-Access Lawsuit, BERKELEY DAILY PLANET, Jan. 07, 2010, http://www.berkeleydailyplanet.com/issue/2010-01-07/article/34425 (reporting Caltrans' announcement of the settlement agreement, a "landmark achievement for disability rights advocates"). California Governor Arnold Schwarzenegger lauded the agreement as "a victory for all Californians—taxpayers and the disability community who have a right to equal access to all walkways." *Id.* at 22.

198. *See Culvahouse* 679 F. Supp. 2d at 939 (acknowledging that "the [ADA] may not mandate that the phrase 'services, programs, or activities' encompass, without exception, all things that a public entity does" (citing *Frame*, 575 F.3d at 437)).

199. *See* N.J. Prot. & Advocacy, Inc., v. Twp. of Riverside, No. 04-5914, 2006 WL 2226332, at *3 & n.4 (D.N.J. Aug. 2, 2006) (noting that the Title II regulations "explicitly refer to walks and roadways as 'facilities,' rather than activities, programs, or services"). The U.S. District Court for the District of New Jersey argued that the fact that a city provides the service of maintaining a facility does not make the facility a service, and that such a reading would render 28 C.F.R § 35.104 superfluous. *See id.* at *3 (maintaining that the Ninth Circuit's analysis in Barden "ignores the distinction between a city's responsibility to maintain sidewalks and the enterprises ordinarily deemed programs, services, and activities.").

200. *See id.* at *2.

201. 616 F.3d 476 (5th Cir. 2010), *reh'g en banc granted*, No. 08-10630, 2011 WL 242385 (5th Cir. Jan. 26, 2011).

202. *Id.* at 485–86.

1. Policy Considerations in Favor of a Narrow Interpretation of "Services, Programs, or Activities"

Those opposed to a broad reading of Title II argue that public policy weighs against deeming public sidewalks "services" under the ADA.[203] In *Barden*, over seventy-five California cities joined the National League of Cities' amicus brief in support of the city of Sacramento.[204] When the Ninth Circuit ruled against Sacramento, hundreds of cities offered to support Sacramento's efforts to have the Ninth Circuit's ruling overturned by the Supreme Court, including Phoenix, Denver, and New York City.[205]

City advocates argue that the Ninth Circuit failed to appreciate the financial implications of requiring cities to ensure sidewalks are readily accessible to people with disabilities.[206] Local government representatives frame the issue as a "stand against unfunded federal mandates" and contend that cities simply do not have the resources to bring miles of public sidewalk into immediate compliance with Title II regulations.[207]

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203. *See* Brief of the National League of Cities and 76 Cal. Cities as Amici Curiae in Support of Appellees at 3–6, Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002) (No. 01-15744), 2001 WL 34095218 at *3–6 [hereinafter Brief of the National League of Cities] (arguing that under the "clear language" of the ADA regulations, a public entity is only required to remove the "'physical obstacles in [its] facilities *that limit the accessibility of its programs or activities* to individuals with disabilities'" (quoting 28 C.F.R. § 35.150(d)(3)(i) (2010))). The amici maintained that if a facility could itself constitute a program, every structure and facility would have to be made accessible at "enormous cost, regardless of whether programs were offered at those structures and facilities," overturning "the entire regulatory framework for disabled access." *Id.* at 3.

204. *See id.* at 1–2 (submitted on behalf of the National League of Cities and seventy-six California cities).

205. *See Some Cities Changes [sic] Sides, Withdraw Support for Sacramento Appeal*, RAGGED EDGE ONLINE, Jan. 11, 2003, http://ragged-edge-mag.com/drn/sacramento110102.html [hereinafter *Some Cities Change Sides*] (reporting that "hundreds" of cities "offered to sign onto a friend-of-the-court brief supporting Sacramento"); *see also Cities Join Sacramento to Take Sidewalk Access Fight to Supreme Court*, RAGGED EDGE ONLINE, Nov. 25, 2002, http://ragged-edge-mag.com/drn/sacramento110102.html (reporting that Sacramento claimed to "already ha[ve] the support of 75 cities, including Phoenix, Denver and New York City"). However, several California cities that supported Sacramento at the appellate level, including San Anselmo, San Rafael, Corte Madera, Mill Valley, and San Diego, "change[d] sides" and decided not to support Sacramento in its appeal to the Supreme Court. *See Some Cities Change Sides*, *supra* (reporting the San Rafael city manager's statement that the city withdrew its support for Sacramento upon learning the case "is being seen as a major civil rights struggle"); *see also* Dwight Daniels, *City Reverses Course on Sidewalk Repairs*, SAN DIEGO UNION-TRIB., Dec. 20, 2002, at B2 (discussing San Diego city attorney Casey Gwinn's decision to "reverse course" after meeting with disability advocates, researching the law, and "doing some soul searching").

206. *See* Cahill, *supra* note 14, at 9 (discussing National League of Cities' attorney Greg F. Hurley's statement that the Ninth Circuit's decision "ignores the limitations on public entities" given the "phenomenally expensive task" of bringing thousands of miles of sidewalk into compliance with ADA accessibility regulations); *see also Some Cities Change Sides*, *supra* note 205 (providing Sacramento Public Works Director Mike Kashawagi's comment that "[t]he financial implications for cities, counties, telecommunications and utility companies if [the *Barden*] decision is permitted to stand are enormous").

207. *See* Daniels, *supra* note 205, at 1 (providing California League of Cities spokeswoman Megan Taylor's explanation that the league's support of Sacramento "has

Bringing sidewalks into compliance with ADA accessibility regulations is an expensive task, with the cost easily running into the millions.[208] In 1998, the Los Angeles City Council approved a ballot measure that would allot almost $770 million to repair damaged sidewalks over a twenty year period, $171.8 million of which would be designated for curb cuts and other ADA mandated improvements.[209] Pasadena, California spent $9.7 million over a five year period to fix damaged sidewalks.[210] The city of Little Rock, Arkansas, spent $2600 widening one stretch of sidewalk to allow wheelchair users room to maneuver around a single utility pole.[211] As Lancaster City, Pennsylvania Mayor Rick Gray commented when faced with the $4 million cost of bringing Lancaster's curb ramps into ADA compliance: "Regulations are cheap. Implementation is expensive."[212]

City advocates point out that Congress outlined separate standards for new facilities and existing facilities in recognition of the prohibitive cost of requiring a city to update its entire public infrastructure at one time.[213] They argue that imposing a program-access standard with regard to sidewalks that do not affect access to government programs hinders a public entity's' ability to realize the program accessibility envisioned by the ADA.[214] City advocates reason that it is more cost effective to concentrate

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nothing to do with cities being for or against the issues the disabled community is raising" but is a "question of resources"). Taylor cautioned that California's budget deficit of over $30 billion will further limit resources, and pointed out that cities still have to "make sure bridges don't fall down and children go to school in public buildings where the toilets flush." *Id.*

208. *See, e.g.*, Andy Davis, *LR Adding Wheelchair Curb Ramps Around City*, ARK. DEMOCRAT-GAZETTE, Feb. 2, 2005, at 1B (discussing statement of the assistant director of public works that moving obstacles such as utility poles, traffic signals, and hydrants would "cost tens of thousands of dollars"); *see also* Erin Emery, *Disabled See Barriers in Pueblo*, DENVER POST, Aug. 17, 2003, at 1B (reporting that the city of Pueblo, Colorado has "millions of dollars of work to do" to comply with the ADA, and noting that it will cost "at least $20 million" to fix "curb cuts and ramps on sidewalks" and "problems in buildings"); Anne Belli Gesalman, *Disabilities Act Spurs Changes*, DALL. MORNING NEWS, Oct. 8, 1995, at 37A (commenting that "[i]n addition to the $1 million already spent, the city of Dallas plans to spend at least another $750,000 over the next several years on ADA improvement").

209. Sue McAllister, *A Deeply Rooted Problem*, L.A. TIMES, Aug. 14, 1998, at B2.

210. *Id.*

211. *See* Andy Davis, *Sidewalk Where Pole Posed Issue Is Widened*, ARK. DEMOCRAT-GAZETTE, Mar. 3, 2005, at 1B.

212. Bernard Harris, *How Many Ramps Must Be Redone?*, LANCASTER NEW ERA, Feb. 22, 2007, at A1; *see also* George Merritt, *Still Battling Barriers: Costs, Intricate Rules Make Goal of 1990 Disabilities Law Elusive*, DENVER POST, Feb. 1, 2004, at 1B (providing Pueblo City Manager Lee Evett's comment regarding the $20 million worth of curb modifications needed in Pueblo: "we want to comply, but who can pay for that? . . . The feds don't want to pay for it, the state doesn't want to pay for it, we can't pay for it—even the Justice Department doesn't know what to do").

213. *See* Brief for the National League of Cities, *supra* note 203, at 3.

214. *See id.* (arguing that Congress "sought to balance the societal interest in greater disabled access with the need to ensure the efficient use of limited public resources"); *see also* Brief for Texas Municipal League and International Municipal Lawyers Ass'n as Amici Curiae in Support of the Appellee's Petition for Rehearing En Banc at 4, Frame v. City of Arlington, 575 F.3d 432 (5th. Cir. 2009) (Nos. 08-10630, 08-10631), 2009 WL 6706544 at *4 [hereinafter Brief for Texas Municipal League] (arguing that Congress enacted regulations requiring "immediate access to *programs* but more gradual, incremental

limited funds on facilities where the accessibility of government services, programs, and activities is a problem.[215]

2. *Frame v. City of Arlington*: Title II Coverage of Public Sidewalks Contingent on Whether Noncompliance Hinders Access to "Actual" Services

In August of 2010, the Fifth Circuit adopted a narrow interpretation in *Frame v. City of Arlington* that public sidewalks are not, in themselves "services, programs, or activities," and therefore, plaintiffs have a private cause of action to enforce the Title II regulations only to the extent that noncompliant sidewalks prevent access to "actual" government services, programs, or activities.[216] This section will begin by detailing the court's determination that the statutory text, though ambiguous, supports a narrow construction of Title II. Second, this section discusses the court's conclusion that the language and structure of the Title II regulations unambiguously indicates that sidewalks constitute facilities as distinct from the services to which they provide access.

In 2008, two disabled residents sued the city of Arlington under Title II and section 504, citing over one hundred inaccessible curbs and sidewalks.[217] The plaintiffs requested an injunction requiring the city of Arlington to bring any non-accessible curbs, sidewalks, and parking lots into compliance with ADA regulations.[218]

In its original opinion in *Frame v. City of Arlington*,[219] the Fifth Circuit concluded that sidewalks, curbs, and parking lots are considered "services, programs, or activities" within the meaning of Title II.[220] Both parties disagreed with the court's rulings, and the panel granted a petition for rehearing.[221] After rehearing the case, the Fifth Circuit withdrew its earlier

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implementation of access to *facilities*" in an effort to balance the desire to achieve accessibility with the "tremendous financial costs" on public entities).

215. *See* Brief of the National League of Cities, *supra* note 203, at 16.

216. Frame v. City of Arlington, 616 F.3d 476, 480 (5th Cir. 2010), *reh'g en banc granted*, No. 08-10630, 2011 WL 242385, at *1 (5th Cir. Jan. 26, 2011).

217. *Id.* Both plaintiffs had mobility impairments that necessitated the use of motorized wheelchairs. *Id.* The plaintiffs complained of "missing or badly sloped curb ramps; impassable, noncontinuous or nonexistent sidewalks; and inadequate handicap parking." Op-Ed., *Under ADA, Is a Sidewalk an Essential Service or an Amenity?*, STAR-TELEGRAM, Aug. 24, 2010, http://www.star-telegram.com/2010/08/24/2422898/under-ada-is-a-sidewalk-an-essential.html.

218. *See Frame*, 616 F.3d at 481.

219. 575 F.3d 432 (5th Cir. 2009), *withdrawn and superseded on reh'g by* 616 F.3d 476 (5th Cir. 2010).

220. *Frame*, 575 F.3d at 436–37. The Fifth Circuit also held that plaintiffs' Title II claims accrued on the date the city completed the noncompliant construction or alterations, not when individual plaintiffs actually encountered such noncompliant barriers. *Id.* at 441.

221. *See Frame*, 616 F.3d at 479. Plaintiffs challenged the court's decision on the statute of limitations issue. *See id.* at 479 n.1. The city of Arlington contested the court's conclusion that sidewalks, curbs, and parking lots constitute "services, programs, or activities" within the meaning of Title II, and the Texas Municipal League and the International Lawyers Association filed an amicus brief in support of the City's petition for rehearing. *See* Brief for Texas Municipal League, *supra* note 214.

opinion and held that public sidewalks, curbs, and parking lots cannot, in themselves, be considered "services, programs, or activities" within the meaning of the ADA.[222] The court concluded that sidewalks, curbs, and parking lots are "facilities" and therefore plaintiffs did not have a private cause of action to enforce the Title II regulations unless the noncompliant sidewalks prevent access to an actual service, program, or activity.[223]

The Fifth Circuit acknowledged that other circuits had broadly interpreted the language of Title II to encompass public sidewalks, but maintained that the Second, Third, Sixth, and Ninth Circuits failed to conduct a "thorough analysis" of the issue.[224] The court concluded that it was "certain" that "services, programs, or activities" could not include "anything a public entity does" as the Ninth Circuit had previously held in *Barden*.[225]

Turning first to the statutory text, the Fifth Circuit noted that Title II does not define the phrase "services, programs, or activities," but found the statutory definition of "'qualified individual with a disability'" instructive.[226] Section 12131(2) defines a "'qualified individual with a disability'" as a person 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.'"[227] The court reasoned that this definition indicated Congress's intent to differentiate between physical infrastructures and the "'services' to which they provide access."[228]

The court explained that a narrow reading of the statute was also supported by the "ordinary, 'everyday meaning'" of the term "service."[229] The court cited a dictionary defining a "service" as "'the duties, work, or business performed or discharged by a government official'" and "'the provision, organization, or apparatus for . . . meeting a general demand.'"[230]

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222. *See Frame*, 616 F.3d at 479–80 & n.1; *see also Under ADA, Is a Sidewalk an Essential Service or an Amenity?*, *supra* note 217 (reporting that the Fifth Circuit's decision to "reverse[] itself and on a 2-1 vote offer[] a narrow interpretation of the ADA's requirements").

223. *See Frame*, 616 F.3d at 488; *see also* Greer v. Richardson Indep. Sch. Dist., No. 3:08-CV-160-M, 2010 WL 4607393, at *3 (N.D. Tex. Nov. 12, 2010) (relying on *Frame* in concluding that plaintiff could not prove a claim for injunctive relief under Title II based on noncompliant parking spaces and a noncompliant ramp at a school football stadium because she failed to prove she was denied access to the services at the field).

224. *Frame*, 616 F.3d at 485 n.10.

225. *Id.* at 485. The dissent argued that the majority cited no case law in support of this narrow interpretation. *See id.* at 494 (Prado, J., concurring in part and dissenting in part).

226. *Id.* at 485–86 (majority opinion) (quoting 42 U.S.C. §§ 1231(2), 12312 (2006)).

227. *Id.* (quoting 42 U.S.C. § 12131(2)); *see supra* note 94.

228. *Frame*, 616 F.3d at 486.

229. *Id.* (citing United States v. Hildenbrand, 527 F.3d 466, 476 (5th Cir. 2008)).

230. *Id.* (citing MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993)). In its original opinion the Fifth Circuit consulted a different dictionary, which defined a "service" as "a facility supplying some public demand." *See* Frame v. City of Arlington, 575 F.3d 432, 437 (5th Cir. 2009) (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1137 (11th ed. 2003)), *withdrawn and superseded on reh'g by* 616 F.3d 476 (5th Cir. 2010). Upon rehearing, the dissent argued that sidewalks constitute a public service under either definition because a public entity, in providing and maintaining sidewalks,

The court reasoned that while a public entity arguably provides an "apparatus" by building and maintaining public sidewalks, the infrastructure itself does not constitute a service.[231]

The Fifth Circuit noted that this analysis of the statutory text supports the conclusion that sidewalks constitute infrastructure, as distinct from the services to which they provide access.[232] However, the court acknowledged that the term "services" could be interpreted more broadly, as Second, Third, Sixth, and Ninth Circuit precedent has indicated, and ultimately concluded that the statute was ambiguous.[233]

The Fifth Circuit therefore looked to the regulations promulgated by the DOJ.[234] The court determined that the language and structure of the regulations, taken together, "clearly indicate[d]" that sidewalks, curbs, and parking lots do not constitute "services, programs, or activities" within the meaning of the ADA.[235] The Fifth Circuit claimed that the fact that the section 35.104 definition of "facilities" includes sidewalks, curbs, and parking lots "strongly suggests" they do not qualify as "services, programs, or activities."[236] The court found additional support in section 35.149, which prohibits a public entity from excluding disabled individuals from "services, programs, or activities" because of the inaccessibility of its facilities.[237] The court argued that reading facilities as a subset of services would render section 35.149 redundant, prohibiting inaccessible services that exclude the disabled from "services."[238] Thus, the court reasoned, facilities and services must be considered "mutually exclusive" categories.[239]

Finally, the court took note of the "unique framework of regulatory requirements" established for facilities, which outlines different accessibility requirements for new facilities, as opposed to alterations of existing facilities.[240] The court argued that subjecting facilities to the same regulatory requirements as services would render the facilities regulations "superfluous."[241] The court explained that if facilities were considered services, they would be subject to the "immediate compliance" requirement

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"performs the 'work' traditionally undertaken by a municipality." *Frame*, 616 F.3d at 491 (Prado, J., concurring in part and dissenting in part).

231. *See Frame*, 616 F.3d at 486 (majority opinion).

232. *See id.*

233. *See id.* ("[W]e 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 . . . .").

234. *See id.* at 486–87 (discussing 28 C.F.R. §§ 35.104, 35.130, 35.149–59 (2010)); *see supra* Part I.E.2.

235. *Frame*, 616 F.3d at 488 (citing 28 C.F.R. § 35.149–51).

236. *Id.* at 487 (noting that sidewalks, parking lots, and curbs are "clustered" with items, such as equipment, that "clearly do not qualify as 'services, programs, or activities'"); *see* 28 C.F.R. § 35.104.

237. *See Frame*, 616 F.3d at 487 (quoting 28 C.F.R. § 35.149).

238. *See id.* (citing 28 C.F.R. § 35.149).

239. *See id.*

240. *See id.* (arguing that if facilities qualified as "'services, programs, or activities,' they would be subject to the regulatory language in § 35.149").

241. *Id.* at 487–88 (citing 28 C.F.R. §§ 35.149–51).

of § 35.149, negating the "general accessibility" requirements of the facilities regulations, which provide for a "phasing-in of compliant facilities."[242]

In light of the language and structure of the ADA regulations, the court found that the regulations "clearly indicate[d]" that sidewalks, curbs, and parking lots are "facilities" that do not qualify as "services, programs, or activities" under Title II.[243] Because the court found that the Title II regulations unambiguously indicated Congress's intent to distinguish between "services" and "facilities" and to deem sidewalks facilities, it did not address the DOJ's interpretation of the regulations.[244] The Fifth Circuit held that plaintiffs have no cause of action to "enforce the regulatory requirements" with respect to those facilities unless they prevent access to some actual service, program, or activity.[245]

The Fifth Circuit's holding in *Frame* was not unanimous, and Judge Edward C. Prado wrote a vigorous dissent on the issue of whether sidewalks constitute a "service" within the meaning of Title II.[246] Judge Prado argued that the issue is not whether sidewalks are themselves a service, but whether a city provides a service through the construction, maintenance, or alteration of those sidewalks.[247]

Judge Prado found that the majority's holding was contrary to congressional intent.[248] He contended that the plain language of the statute "unambiguous[ly]" provides that the phrase "services, programs, and activities" should be interpreted broadly, and argued that sidewalks, parking lots, and curbs clearly qualify as a "service" within the ordinary meaning of the word.[249]

Judge Prado noted that even if the statute could be considered ambiguous, the plain language of the relevant regulations "demonstrates that providing sidewalks is a public service," as does the legislative history

242. *Id.* (discussing 28 C.F.R. §§ 35.149–51); *see supra* notes 100–04 and accompanying text.

243. *Id.* at 488.

244. *Id.* at 480, 483 (upon finding the statutory text ambiguous, looking first to the implementing regulation and only deferring to the agency's interpretation of its own regulations if "the regulations are 'ambigu[ous] with respect to the specific question considered'") (quoting Moore v. Hannon Food Serv., 317 F.3d 489, 495 (5th Cir. 2003)).

245. *Id.* at 488, 490. The court provided that district courts should not apply any "set proximity limitation of the sidewalk to the benefit" in determining whether an individual has effectively been denied the benefit of a public service due to the inaccessibility of a sidewalk. *Id.* at 484 & n.9.

246. *See id.* at 490–96 (Prado, J., concurring in part and dissenting in part).

247. *See id.* at 490 ("I fear that the majority departs dramatically from congressional intent and creates a distinction that is unworkable and ultimately meaningless.").

248. *Id.*

249. *Id.* at 491–92 (interpreting the language of Title II as "providing broad coverage" and arguing that "[a] statute is not ambiguous simply because it offers expansive coverage"). Judge Prado commented that other circuits have "consistently held" that the phrase "services, programs, or activities" provides broad coverage under Title II. *Id.* at 491.

of Title II.[250] In Judge Prado's view, though the regulations distinguish between facilities and services, the provision of those facilities still constitutes a service.[251]

Finally, Judge Prado deemed the majority's standard "unworkable," given the difficulty in determining which sidewalks qualify as Title II services and which do not.[252] Judge Prado reasoned that without any proximity limitation, only "sidewalks to nowhere" would not meet the majority's standard, and questioned whether any sidewalk truly "goes nowhere."[253]

III. PUBLIC SIDEWALKS ARE COVERED "SERVICES, PROGRAMS, OR ACTIVITIES" UNDER TITLE II OF THE ADA

Part II of this Note detailed the circuit split regarding the reach of Title II's nondiscrimination mandate, specifically whether the phrase "services, programs, or activities" encompasses public sidewalks.[254] The Ninth Circuit has endorsed a broad reading of Title II and held that public sidewalks are a "service, program, or activity" within the meaning of the statute. The Fifth Circuit has read Title II more narrowly, and held that public sidewalks are facilities that do not qualify as "programs, services, or activities." Title II was passed as part of the ADA, a civil rights statute that represents the culmination of the disability rights movement.[255] Enacted to facilitate the "integrated participation of people with disabilities in all aspects of community life,"[256] Title II provides that public entities shall not exclude disabled persons from, or deny them the benefits of, government "services, programs, or activities."[257] Part III of this Note argues that the

250. *Id.* at 492–94 (pointing out that "[c]urb ramps and sidewalks are specifically mentioned in 28 C.F.R. § 35.151(e)(2)" and arguing that "[i]t would be contrary to the purpose of the ADA for a public entity to erect non-compliant sidewalks").

251. *See id.* at 493 ("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.").

252. *Id.* at 494.

253. *Id.* at 495. Following the Fifth Circuit's August 23, 2010 ruling in *Frame*, the plaintiffs filed a petition for rehearing en banc on September 7, 2010, and the DOJ filed an amicus brief in support of the plaintiffs' position. Brief for the United States as Amicus Curiae Supporting Appellants' Petition for Rehearing En Banc, *Frame*, 616 F.3d 476 (No. 08-10630), 2010 WL 5306469. In its brief, the DOJ argued, in line with *Barden* and the Fifth Circuit's first opinion in *Frame*, that the provision and maintenance of public services constitute "services, programs, or activities" within the meaning of Title II, and agreed with Judge Prado that the Fifth Circuit's distinction between public sidewalks that lead to public functions that are programs, services, or activities, and those that do not is "unworkable in practice." *Id.* at 14–15. The Fifth Circuit granted the petition for rehearing en banc on January 26, 2010. Frame v. City of Arlington, No. 08-10630, 2011 WL 242385, at *1 (5th Cir. Jan. 26, 2011).

254. *See supra* Part II.

255. *See supra* Part I.D.1.

256. H.R. REP. No. 101-485(III), at 49–50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 472–73 (noting that integrated public services are "essential" to achieving the goals of Title II and eliminating the "invisibility of the handicapped"); *see supra* note 91 and accompanying text.

257. *See supra* Part I.E.1.

statutory text, legislative history, implementing regulations, and agency interpretation of those implementing regulations support the Ninth Circuit's conclusion that public sidewalks constitute a "service, program, or activity" of a public entity within the meaning of Title II of the ADA and section 504 of the Rehabilitation Act.

First, this part argues that the plain language of Title II unambiguously indicates that public sidewalks are a covered "service, program, or activity"—a conclusion further supported by the legislative history of Title II. Then, this part posits that even supposing Title II could be considered ambiguous, the plain language of the Title II regulations evidences the DOJ's clear view that public sidewalks are a "service, program, or activity" within the meaning of Title II—an interpretation entitled to substantial deference under *Chevron*.

Next, this part contends that even if the Title II regulations were unclear, the DOJ's position that public sidewalks are subject to the accessibility requirements of the Title II regulations is entitled to deference under *Auer*. Finally, this part reasons that applying the nondiscrimination provision of Title II to sidewalks would not require cities to immediately replace their entire sidewalk system, and that the undue burden provision in the Title II regulations protects cities from excessive expenses associated with bringing sidewalks into compliance with the ADA.

A. The Provision, Construction, and Maintenance of a Public Sidewalk System Is a "Service," Program, or Activity" Within the Meaning of Title II

Title II provides that "no qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity."[258] In interpreting Title II, *Chevron* requires that a court first look to the statutory language and determine whether Congress clearly intended sidewalks to fall within Title II's purview.[259] This section argues that using the "traditional tools of statutory construction," an analysis of Title II makes it clear that the phrase "services, programs, or activities" is broad enough to include the provision and maintenance of a system of public sidewalks.[260]

Though Title II does not define the term "services, programs, or activities," section 504 of the Rehabilitation Act defines the statutory phrase "program or activity" as "all the operations" of a qualifying local government.[261] Because Title II was modeled on section 504, and the ADA explicitly provides that the provisions of the ADA should not be "construed to apply a lesser standard than the standards applied under Title V of the

258. *See supra* note 92 and accompanying text.

259. *See supra* Part I.G.

260. *See supra* note 146 and accompanying text.

261. *See supra* notes 42, 89–90 and accompanying text. Similarly, the legislative history of Title II indicates that Title II was meant to extend the provisions of section 504 to "all actions of state and local governments." *See supra* note 178.

Rehabilitation Act," the statutory text of Title II should be interpreted as broadly as the section 504 definition of "programs or activities."[262]

The Second, Third, Sixth, and Ninth Circuits have concluded that the phrase "services, programs, or activities" is purposefully expansive.[263] The ordinary meaning of the word "service" is necessarily broad, as evidenced by the multiple expansive definitions of the term.[264] When a local government provides a public sidewalk system, it performs the "work" of a public official by providing a "facility supplying [a] public demand" and an "apparatus . . . meeting a general demand."[265] Thus, as the Ninth Circuit concluded in *Barden*, the provision of a public sidewalk system can reasonably be understood to constitute a "service" under Title II.[266]

Importantly, the canons of statutory construction also provide that a word should not be interpreted in isolation, but in light of the structure and purpose of the statute.[267] The structure of Title II supports a broad reading of the term "services." While Congress provided detailed, explicit definitions for some Title II's terms—including "public entity," "qualified individual with a disability," and "facility"—it did not place any such constraints on the reading of the phrase "services, programs, or activities."[268] Furthermore, the term "service" is grouped with the similarly general words "activity" and "program."[269]

A broad reading of Title II is further supported by the ADA's legislative history. Congress's stated purpose in passing the ADA was "[t]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[270] Moreover, Congress enacted the ADAAA with the express purpose of counteracting the Supreme Court's narrow interpretation of certain ADA terms, and reiterating its intent to provide expansive coverage for individuals with disabilities under the ADA.[271]

The Supreme Court has acknowledged that Title II was enacted against a historical background of state discrimination in the provision of public services.[272] The legislative history of the Rehabilitation Act and the ADA

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262. *See supra* note 89; *see also supra* notes 177–78 and accompanying text.

263. *See supra* Part I.E.3; *see also supra* notes 170–75 and accompanying text.

264. *See supra* note 230 and accompanying text. When not expressly defined in the statute, statutory terms are given their "ordinary meaning." *See supra* Part I.G.

265. *See supra* note 230 and accompanying text.

266. *See supra* note 249 and accompanying text.

267. *See supra* Part I.G.

268. *See supra* notes 93–94 and accompanying text.

269. *See* Brief for the United States as Amicus Curiae, *supra* note 190, at 7 n.2 (noting that the dictionary definitions of the terms "program," "activity," and "service" "confirm their breadth"). The dictionary definition of "*activity*" is "a natural or normal function." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 22 (1986). "*Program*" is defined as "a schedule or system under which action may be taken towards a desired goal." *Id.* at 1812.

270. *See supra* note 67 and accompanying text.

271. *See supra* Part I.F.

272. *See supra* note 91 and accompanying text.

reveals that Congress specifically recognized architectural barriers as a pervasive form of discrimination against the handicapped.[273]

Critically, legislative history of the ADA also indicates that Congress specifically recognized the importance of accessible streets and walkways in accomplishing the integrative goals of the ADA. In the House Report accompanying the ADA, Congress expressly stated that public entities must provide curb cuts, and noted that 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 the streets."[274]

The Rehabilitation Act definition of "programs and services" and a plain reading of language of Title II support the conclusion that the statutory phrase "services, programs, and activities" is unambiguously broad.[275] In light of the statutory text and the legislative history of Title II, it is clear that Congress intended to provide for expansive coverage under Title II of the ADA, and that sidewalks fall within the scope of Title II.[276]

B. Public Sidewalks Constitute a Public Service Within the Meaning of the Title II Regulations

As Part III.A argued, the statutory text of Title II is unambiguously broad, and covers all activities of state and local governments, including the provision and maintenance of a public sidewalk system. Because Title II clearly encompasses the provision of public sidewalks, it is unnecessary to consider the DOJ's implementing regulations.[277] As the Supreme Court outlined in *Chevron*, once a court concludes that Congress has directly addressed a specific issue, the court "must give effect to the unambiguously expressed intent of Congress."[278]

Nevertheless, this section argues that even if the text of Title II were considered ambiguous, the DOJ regulations plainly demonstrate that sidewalks qualify as a public service within the meaning of Title II.[279] So long as the DOJ regulations are unambiguous and "based on a permissible construction of the statute," they are entitled to deference under *Chevron*.[280]

The Title II regulations promulgated by the DOJ provide that "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,

273. *See supra* notes 60, 71 and accompanying text.

274. *See supra* note 108.

275. *See* Part II.A; *see also* Brief for the United States as Amicus Curiae Supporting Appellants' Petition for Rehearing En Banc, *supra* note 253, at 3, 5 ("By its plain terms, the statute covers the sidewalks, curbs, and parking lots at issue in this case.").

276. *See supra* note 249 and accompanying text.

277. *See supra* Part I.G; *see also supra* note 146 and accompanying text.

278. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984); *see also* supra Part I.G.

279. *See infra* notes 280–93 and accompanying text.

280. *See supra* notes 153–54 and accompanying text.

programs, or activities of a public entity."[281] While it is true, as the Fifth Circuit recognizes, that the regulations differentiate between "services" and "facilities," it does not follow that the provision of certain facilities cannot constitute a service.[282] Sidewalks, as infrastructure, constitute facilities.[283] The DOJ regulations expressly define "facilities" to include "walks" and "passageways," as the Fifth Circuit noted in *Frame*.[284] However, while the sidewalks themselves may be facilities, the provision and maintenance of a public sidewalk system is a government service.[285]

Additionally, Title II and the DOJ's implementing regulations not only proscribe the exclusion of disabled individuals from government "programs, services, or activities," but also prohibit public entities from denying disabled persons the benefit of those government functions.[286] In supplying a system of sidewalks, a government entity performs a service, the benefit of which is the ability to use city walkways to freely move about a city. If sidewalks are inaccessible to, and unusable by, disabled persons, those individuals are both "exclude[d] from participation in" the city's system of public walkways and "den[ied] the benefit of" a government service.

Furthermore, the Title II regulations specifically contemplate Title II's application to public sidewalks.[287] Though the regulations do not expressly state that sidewalks must be made accessible, section 35.151(e) provides that all newly constructed or altered roads and walkways must contain curb ramps.[288] This requirement, as the Ninth Circuit recognized in *Barden*, "reveals a general concern for the accessibility of public sidewalks."[289] Moreover, because curb ramps "could not be covered [under the ADA] unless the sidewalks themselves are covered," the curb ramp requirement serves as an acknowledgment that public sidewalks are covered under Title II.[290]

Under the Fifth Circuit's reading of the Title II regulations, public entities would only be obligated to modify sidewalks to the extent necessary to provide access to other, "actual," government services, such as schools.[291] This interpretation overlooks the language of section

281. *See supra* note 98 and accompanying text.

282. *See supra* notes 244, 251 and accompanying text.

283. *See supra* note 232 and accompanying text.

284. *See supra* note 236 and accompanying text.

285. *See supra* note 251 and accompanying text; *see also* Brief for the United States as Amicus Curiae, *supra* note 190, at 8 (noting that "in other contexts, [the Supreme] Court itself has recognized the provision of sidewalks as an archetypal 'general government service[]'" (quoting Everson v. Bd. of Educ., 330 U.S. 1, 17–18 (1947) (noting that providing churches access to "such general government services as ordinary police and fire protection, connections for sewage disposal, [and] public highways and sidewalks" does not pose a problem under the Establishment Clause of the First Amendment))).

286. *See supra* Part I.E.1–2.

287. *See supra* Part II.A.

288. *See supra* notes 107–08 and accompanying text.

289. *See* Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002); *see also supra* note 181 and accompanying text.

290. *See Barden*, 292 F.3d at 1077; *see also supra* note 186 and accompanying text.

291. *See supra* Part II.B.2.

35.150(d)(2), which contemplates the accessibility of all public sidewalks, not just those immediately adjacent to other government facilities. Though section 35.150(d)(2), which requires public entities to implement transition plans, prioritizes the installation of curb ramps in "walkways serving entities covered by the Act, including State and local government offices and facilities," the regulation also requires that transition plans schedule curb cuts for walkways serving "transportation, places of public accommodation, and employers" as well as "walkways serving other areas."[292]

The plain language of the DOJ regulations evidences the DOJ's position that public sidewalks are subject to the provisions of Title II. Because the DOJ promulgated the Title II regulations pursuant to authority delegated to it by Congress, the DOJ's interpretation of Title II contained in those regulations is entitled to *Chevron* deference.[293]

C. The Department of Justice Considers Sidewalks Subject to the Accessibility Requirements of the Title II Regulations

Part III.B argues that even if the language of Title II were deemed ambiguous, the conclusion that public sidewalks fall within the scope of Title II is still warranted because the Title II regulations unambiguously reflect the DOJ's position that public sidewalks are covered by Title II—earning deference under *Chevron*. Consequently, it is unnecessary to turn to the DOJ's interpretation of the Title II regulations it promulgates.[294] However, in the event the Title II regulations are considered ambiguous, this Note argues that a broad interpretation of Title II is still proper because the DOJ has taken the stance that public sidewalks are subject to the accessibility requirements of the Title II regulations, and an agency's interpretation of its own ambiguous regulation is afforded deference under *Auer*.

In the amicus brief submitted to the Supreme Court in *Barden*, the Solicitor General outlined the DOJ's position that public sidewalks fall within the scope of Title II and the DOJ regulations. The Solicitor General identified the Title II regulations as being "premised on the view that a public sidewalk system is a covered service, program, or activity under Title II."[295] The DOJ reaffirmed this position in its amicus brief in support of the plaintiff's petition for rehearing en banc in *Frame*.[296] That interpretation cannot be said to be "plainly erroneous or inconsistent with

292. 28 C.F.R. § 35.150(d)(2) (2010 and Mar. 15, 2011 amendments); *Barden*, 292 F.3d at 1077.

293. *See supra* Part I.G; *see also* Brief for the United States as Amicus Curiae Supporting Appellants' Petition for Rehearing En Banc, *supra* note 253, at 6 (arguing that the DOJ's position that "maintenance of pedestrian walkways by public entities is a covered program" under Title II is "entitled to substantial deference").

294. *See supra* Part I.G.

295. *See* Brief for the United States as Amicus Curiae, *supra* note 190, at 6, 10–12.

296. *See* Brief for the United States as Amicus Curiae Supporting Appellants' Petition for Rehearing En Banc, *supra* note 253, at 6.

the regulation[s]" themselves, and therefore, as the Ninth Circuit concluded, the DOJ's interpretation is entitled to substantial deference under *Auer*.[297]

D. Title II and its Implementing Regulations Do Not Require Cities To Make Every Existing Sidewalk Accessible

Finally, it is worth noting the weakness of arguments suggesting that subjecting public sidewalks to the accessibility requirements of Title II would pose excessive financial and administrative burdens on cities. This section asserts that the Title II regulations protect cities from unreasonable costs by providing that public entities are not "necessarily require[d]" to make every existing facility accessible, and are not required to take any steps that would result "in undue financial and administrative burdens."[298]

A public entity does not have to make its entire existing sidewalk system immediately accessible to the disabled to comply with Title II. While the regulations require that all newly constructed or altered sidewalks are readily accessible, existing sidewalks, like other existing facilities, are subject to the more limited program access standard.[299] Under the Title II regulations, a public entity is not obligated to renovate every existing stretch of sidewalk, but is only required to replace existing sidewalks to the extent necessary to ensure that the public sidewalk system, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.[300]

Furthermore, the legislative history of the ADA reveals that Congress acknowledged the potential financial constraints on cities, and the Title II regulations expressly state that a city's obligation to make existing facilities accessible is subject to an undue burden defense.[301] A public entity is not required to renovate its sidewalks if it can show that bringing its public sidewalk system into compliance with Title II's accessibility requirements would result in "undue administrative or financial burdens."[302]

Granted, "undue burden" is a demanding standard, and even minor fixes, such as removing obstacles in sidewalks, will impose some cost on cities.[303] However, as Congress noted in the House Report on the ADA, the long-term societal benefits of the integration of people with disabilities are worth the short-term financial and administrative burdens.[304]

CONCLUSION

The ADA was enacted against a history of state discrimination in the administration of public services. Many viewed the passage of the ADA as a major civil rights victory, and a significant step towards the full

297. *See Barden*, 292 F.3d at 1077; *see also supra* Part II.A.
298. *See supra* notes 102–04 and accompanying text.
299. *See supra* notes 100–02 and accompanying text.
300. *See supra* Part I.E.2.
301. *See supra* note 104 and accompanying text.
302. *See supra* Part I.E.2.
303. *See supra* notes 104, 208–12 and accompanying text.
304. *See supra* note 104.

participation of disabled individuals in society. However, since the ADA's enactment, courts have struggled to discern exactly how far Congress intended the protections of the ADA to reach.

One such source of contention has been the scope of Title II, and what government functions fall within Title II's nondiscrimination mandate. The Ninth Circuit has endorsed a broad interpretation of the statutory text, holding that public sidewalks constitute "programs, services, or activities" within the meaning of Title II. The Fifth Circuit, in contrast, has interpreted the statute more narrowly and determined that public sidewalks are not in themselves "services" within the meaning Title II.

The statutory language, legislative history, implementing regulations, and DOJ interpretation of Title II demonstrate that public sidewalks are in fact subject to the accessibility requirements of Title II. The Fifth Circuit's holding in *Frame* would allow public entities to deny individuals with disabilities access to public sidewalks that do not lead to some other government service. Such a narrow interpretation of Title II contravenes Congress's stated goals of integration and participation. As Jacobus tenBroek recognized at the beginning of the disability rights movement, "[t]he right to live in the world," includes the right to move within it.[305] "Without that right, that policy, that world, it is no living."[306]

305. tenBroek, *supra* note 25, at 918.
306. *Id.*

Notes & Observations