IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

FAUSTINO XAVIER BETANCOURT-COLON, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 19-cv-1837 (GAG)
CITY OF SAN JUAN, a public entity also known as the Municipality of San Juan,	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTRODUCTION

Plaintiffs, four individuals with mobility disabilities, allege that the Municipality of San Juan ("Municipality" or "San Juan") violates Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131-12134 ("ADA"), by failing to install and maintain curb ramps necessary to ensure its sidewalks are accessible to individuals with mobility disabilities. Am. Compl. ¶¶ 1-4, 11, ECF No. 11. On September 1, 2020, the Court denied the Municipality's motion to dismiss, finding the plaintiffs had adequately pled their claims under Title II of the ADA by at minimum alleging that the inaccessibility of sidewalks in San Juan affects their ability to access other covered services, programs, or activities. Order 8, ECF No. 17. The Court requested that the parties submit further briefing addressing whether sidewalks themselves are "services" under Title II of the ADA. *Id.* at 9.

The United States respectfully files this Statement of Interest to assert its long-held position, endorsed by multiple circuit courts, that a public entity's provision and maintenance of sidewalks qualifies as a service, program, or activity under Title II of the ADA; and to explain why this position is supported by the statute's plain language and its implementing regulations.

INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest because this litigation implicates the proper interpretation and application of Title II of the ADA.[1] As the federal agency charged with enforcement and implementation of Title II of the ADA, 42 U.S.C. §§ 12133-12134, the Department of Justice has an interest in supporting the proper and uniform application of the

[1] The Attorney General is authorized "to attend to the interests of the United States" in any case pending in federal court. 28 U.S.C. § 517.

ADA, in furthering Congress's intent to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101 (b)(2), and in furthering Congress's intent to reserve a "central role" for the federal Government in enforcing the standards established in the ADA. *Id.* § 12101 (b)(3). The United States has previously addressed the issue presented in this case in *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) and *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002).[2]

STATEMENT OF THE ISSUE

Whether a public entity's provision and maintenance of public sidewalks is a covered service, program, or activity under Title II of the ADA. 42 U.S.C. § 12132.

STATEMENT OF THE CASE

The facts and procedural history are set forth in the Court's September 1, 2020, Order. In the interest of brevity, the United States does not repeat them here.

ARGUMENT

THE PROVISION AND MAINTENANCE OF PUBLIC SIDEWALKS IS A SERVICE, PROGRAM, OR ACTIVITY WITHIN THE MEANING OF TITLE II

A municipality's provision and maintenance of sidewalks constitutes a service, program, or activity under Title II of the ADA. 42 U.S.C. § 12132. San Juan's argument to the contrary, *see* Mot. to Dismiss 13-20, ECF No. 14; Def.'s Mem. in Compliance with Order 2-10, ECF No. 19, runs counter to the plain language of the statute. It directly conflicts with the Fifth Circuit's en banc decision in *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011), and the Ninth Circuit's ruling in *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002). It is

[2] *See* Br. for U.S. as Amicus Curiae in Supp. of Appellants, *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002) (No. 01–15744), 2001 WL 34095025; Br. for U.S. as Amicus Curiae Supp'g Appellants' Pet. for Reh'g En Banc, *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) (No. 08-10630), 2010 WL 5306469.

inconsistent with the holdings of other circuits that Title II applies to virtually anything a state or local government does. *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); *Yeskey v. Pennsylvania Dep't of Corr.*, 118 F.3d 168, 170-71 (3rd Cir. 1997), aff'd, 524 U.S. 206 (1998); *Innovative Health Sys. Inc. v. City of White Plains*, 117 F.3d 37, 44-45 (2d Cir. 1997), superseded on other grounds, *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). And it is inconsistent with Title II's implementing regulations.

A. The Statutory Text Is Clear

Title II of the ADA prohibits public entities from denying individuals with disabilities "the benefits of" any "service," "program" or "activity" on the basis of disability. 42 U.S.C. § 12132. As the Supreme Court has recognized, those statutory terms are unambiguously broad. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). Section 504 of the Rehabilitation Act specifically defines the term "program or activity" as "*all of the operations of*" a covered public entity, 29 U.S.C. § 794(b) (emphasis added), and Congress required Title II to be interpreted at least as broadly as Section 504, *see* 42 U.S.C. § 12201(a).

Generally speaking, provision and maintenance of a system of sidewalks for pedestrians to move about for personal, commercial, or other reasons is a "service" that a city provides to its residents. Indeed, it is one of the most fundamental services provided by any municipality. The provision of that service is dependent on government "activities" ranging from the initial construction of the sidewalks to the maintenance of the sidewalks. In most cases, the provision of that service likely is undertaken as part of a city "program." When an individual with a disability is denied the use of a city sidewalk system because the sidewalks are inaccessible to individuals with disabilities, he or she is "excluded from" and "denied the benefits of" the

"services, programs, or activities of a public entity," and "subjected to discrimination by [that] entity." 42 U.S.C. § 12132.

Providing and maintaining a network of walkways for pedestrians to get around town is a quintessential, not to mention ages old, government service. As the Ninth Circuit held in *Barden*, "maintenance of public sidewalks . . . is a normal function of a municipal entity." 292 F.3d at 1077; *see also Frame* 657 F.3d at 227 ("[A] public sidewalk *itself* . . . unambiguously is a service, program, or activity of a public entity. A city sidewalk facilitates the public's convenience and benefit by affording a means of safe transportation.") (emphasis in original, internal quotation marks omitted). And, as the Supreme Court has recognized in another context, the provision of sidewalks is an archetypal "general government service[]." *Everson v. Board of Educ*, 330 U.S. 1, 17-18 (1947) (noting that there is no Establishment Clause difficulty in giving churches access to "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks"). Sidewalks permit the public to stay clear of road traffic and to access shops and businesses, means of public transportation, places of employment, and government offices and facilities. Sidewalks have also been used since "time out of mind," for the purpose of public association and speech. *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)).

By its plain terms, Title II of the ADA covers the sidewalks and curbs at issue in this case. *See Barden*, 292 F.3d at 1076 ("Maintaining the[] accessibility [of public sidewalks] for individuals with disabilities . . . falls within the scope of Title II."); *see also Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014) ("We construe the language of the ADA broadly to advance its remedial purpose . . . . A city sidewalk is therefore a 'service, program, or activity' of a public entity within the meaning of Title II.") (internal citations omitted); *Frame*, 657 F.3d

at 223 ("Based on statutory text and structure, we hold that Title II and § 504 unambiguously extend to newly built and altered public sidewalks."). While the application of Title II to public sidewalks is clear from the statutory text alone, this interpretation is further affirmed by examination of the statute's implementing regulations.

B. The Title II Regulations Support this Interpretation

Title II regulations promulgated by the Department of Justice state that "[n]o qualified individual with a disability shall, on the basis of disability, . . . be denied the benefits of the services, programs, or activities of a public entity." 28 C.F.R. § 35.130(a). Applying this general prohibition to facilities, the regulations provide that no one with a covered 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." 28 C.F.R. § 35.149. The regulations expressly define "facility" to include "roads" and "walks" controlled by a public entity. 28 C.F.R. § 35.104.

Furthermore, the Title II regulations specifically recognize the ADA's application to public sidewalks. The regulations provide that newly constructed or altered streets and pedestrian walkways "must contain curb ramps." 28 C.F.R. § 35.151(i). They also require public entities with responsibility over existing sidewalks to develop a transition plan for installing curb ramps by a certain date for walkways serving entities covered by the ADA *and* walkways serving "other areas." 28 C.F.R. § 35.150(d)(2). As the Department of Justice explained in the regulatory guidance accompanying the Title II regulations, the curb ramp requirements were premised on the view that "[t]he 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."[3] 28 C.F.R. Part 35, App. B at § 35.150 (quoting H.R. Rep. No. 101-485, pt. 2, at 84 (1990)) (emphasis added). As this regulatory guidance and the regulations themselves make clear, a public entity's provision and maintenance of sidewalks is a covered program, service, or activity under Title II.

C. San Juan's Interpretation of Title II is Incorrect

In its motion to dismiss, San Juan asserted that the only way plaintiffs can prove a violation of Title II of the ADA based on the inaccessibility of the Municipality's sidewalks is by establishing that inaccessible sidewalks denied them access to other public services, programs, or activities. ECF No. 14 at 14; *see also* ECF 19 at 4-5. In support of this argument, San Juan relies primarily on reasoning in a since vacated Fifth Circuit opinion, *Frame v. City of Arlington*, 616 F.3d 476 (5th Cir. 2010), vacated, 657 F.3d 215 (5th Cir. 2011). In that opinion, the panel majority found that the relevant statutory language in Title II was ambiguous, and for that reason turned to the supporting regulations. *Id.* at 482. The panel majority explained that facilities, including sidewalks, are addressed in the general provision regarding program accessibility, 28 C.F.R. § 35.149, and elaborated upon in subsequent provisions, 28 C.F.R. § 35.150-151. *Id.* at 486-87. It then concluded, based on its examination of these provisions, that "sidewalks, curbs, and parking lots" are "facilities," and thus are not "services, programs, or activities." *Id*. at 480, 487-88.

[3] This guidance issued in the course of notice-and-comment rulemaking reflects the "agency's authoritative, expertise-based, fair, [and] considered judgment" about the basis for Title II's curb ramp requirements. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)). Under these circumstances, the United States Supreme Court has held that courts should defer to the Department's interpretation of its own regulation. *See id.*; *see also id.* at 2410, 2413 (using the Department's concurrent regulatory guidance to the ADA as an example of where *Auer* deference applies). "When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean." *Id.* at 2418.

This conclusion and reasoning have since been rejected and vacated by the Fifth Circuit sitting en banc, *see Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011), and justifiably so. The regulations clearly indicate that facilities are a subset of services, programs, or activities. The two are not, as the earlier panel majority contended, mutually exclusive categories.

The regulations simply explain how Title II of the ADA applies when the service, program, or activity is a facility, or takes place in a facility. Section 35.149 of the regulations provides that, generally, facilities must be made accessible so that individuals with disabilities can enjoy a public entity's services, programs, and activities. *See* 28 C.F.R. § 35.149. Section 35.150 provides an exception to the general requirement of immediate accessibility for existing facilities. *See* 28 C.F.R. § 35.150; 28 C.F.R. § 35.149 (indicating that the requirements of Section 35.149 apply "[e]xcept as otherwise provided in [Section] 35.150"). Section 35.151 applies to newly constructed or altered facilities. *See* 28 C.F.R. § 35.151.

Perhaps the clearest indication that all sidewalks are covered comes from Section 35.150(d)(2), which provides as follows:

> If a public entity has responsibility or authority over streets, roads, or walkways, its transition plan shall include a schedule for providing curb ramps or other sloped areas where pedestrian walks cross curbs, *giving priority to walkways serving entities covered by the Act*, including State and local government offices and facilities, transportation, places of public accommodation, and employers, *followed by walkways serving other areas*.

28 C.F.R. § 35.150(d)(2) (emphasis added). The regulation clearly contemplates that curb ramps will be installed for sidewalks providing access to facilities covered by Title II of the ADA, which presumably would be covered even under San Juan's proposed approach. But it also contemplates that they will be installed for sidewalks providing access to "places of public accommodation" (covered under Title III), "employers" (covered under Title I), and "other areas" as well, which according to San Juan, would not be covered. As the Ninth Circuit held in

Barden, "Section 35.150's requirement of curb ramps in all pedestrian walkways reveals a general concern for the accessibility of public sidewalks, as well as a recognition that sidewalks fall within the ADA's coverage, and would be meaningless if the sidewalks between the curb ramps were inaccessible." 292 F.3d at 1077.

This interpretation is further supported by Section 35.151. The provisions in Section 35.151 that address curb ramps contain no requirement that the "[n]ewly constructed or altered streets, roads, and highways," 28 C.F.R. § 35.151(i)(1), or the "[n]ewly constructed or altered street level pedestrian walkways," 28 C.F.R. § 35.151(i)(2), at issue serve as a gateway to a service, program, or activity in order to be covered by Title II. Rather, a straightforward reading of Section 35.151(i) reinforces the conclusion that all such streets, roads, highways, and pedestrian walkways are covered. Making accessible only the walkways that serve as gateways would often be meaningless if those with disabilities could not get to them because their residential walkways are not accessible.

Moreover, as the Fifth Circuit noted in its en banc opinion in *Frame*, "limiting Title II's private right of action to sidewalks that serve as gateways to other public services, programs, or activities would create an unworkable and arbitrary standard." 657 F.3d at 235. It would lead to difficult line-drawing problems with regard to whether a particular sidewalk is sufficiently related to a service, program, or activity to be covered by Title II and thus "would undermine the ADA's purpose of providing 'clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.'" *Id.* (quoting 42 U.S.C. § 12101(b)(2)); *see also Barden*, 292 F.3d at 1076 ("Attempting to distinguish which public functions are services, programs, or activities, and which are not, would disintegrate into needless hair-splitting arguments.") (internal quotation marks omitted).

The inquiry should focus "not so much on whether a particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity." *Barden*, 292 F.3d at 1076 (internal quotation marks omitted); *see also Yeskey*, 524 U.S. at 210-11 (Title II's unambiguous statutory language demonstrates its broad coverage, extending to prisons even if the statute does not mention prisons). Such an inquiry is more consistent with the broad statutory terms used by Congress in Title II, which aim "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2); *see also Barden*, 292 F.3d at 1077. That mandate would not be served by the limited, haphazard patchwork of covered sidewalks that would result from the approach advanced by San Juan.

In addition to attempting to find support for its position in the now vacated panel decision in *Frame,* San Juan also relies on the Sixth Circuit's decision in *Babcock v. Michigan*, 812 F.3d 531 (6th Cir. 2016). This reliance is misplaced.

The court in *Babcock* did not, as San Juan suggests, conclude that sidewalks cannot be a "service" under Title II. The *Babcock* majority explicitly noted it was not tasked, as was the Fifth Circuit in *Frame*, with determining whether sidewalks are services. *Babcock*, 812 F.3d at 538 n.5. Rather, it was asked to decide "whether certain design features in a building—for example handrails at entrances—qualify as a 'service'." *Id.* While the court concluded that the design features at issue were not services[4], it acknowledged that such features "do not satisfy a 'general demand' for 'safe transportation' in the same way that a sidewalk does" nor are they "ordinarily 'provided in common to all citizens.'" *Id.* (quoting *Frame*, 657 F.3d at 226-27). As

[4] The United States does not take a position as to whether this conclusion is correct as this case does not require the Court to address this question.

Judge Rogers noted in his concurrence, the *Babcock* majority's opinion thereby acknowledged that sidewalks may qualify as "services" under Title II and left in place prior Sixth Circuit precedent supporting such a conclusion. *Id.* at 543 (Rogers, J., concurring)[5]; *see also Madej v. Maiden*, 951 F.3d 364, 373 (6th Cir. 2020), cert. denied, 2020 WL 6037415 (U.S. Oct. 13, 2020) ("*Babcock* involved the 'design features in a building' and suggested that those facts might distinguish it from a case that found a transportation facility (a sidewalk) covered.")

Indeed, district courts in the Sixth Circuit have subsequently found that sidewalks are covered by Title II and that their conclusions are consistent with the reasoning in *Babcock*. *See Michigan Paralyzed Veterans of Am., Inc. v. Michigan Dep't of Transportation*, No. 15-13046, 2017 WL 5132912, at *11 (E.D. Mich. Nov. 6, 2017) ("Not only did the Sixth Circuit in *Babcock* leave open the possibility that sidewalks could be considered "services, programs, or activities" under the ADA—it strongly suggested this conclusion, which this Court reaches today."); *Mote v. City of Chelsea*, 284 F. Supp. 3d 863, 883 (E.D. Mich. 2018) ("Even if the sidewalks at issue were not "facilities" subject to the ADA, the program of building and maintaining sidewalks certainly is a "service" provided by the defendant by any coherent interpretation of that term."). District courts in other circuits have also found sidewalks to be a covered service under Title II of the ADA. *See Hamer v. City of Trinidad*, No. 16-02545, 2020 WL 869818, at *6–12 (D. Colo. Feb. 21, 2020) (holding maintenance of public sidewalks is a "service" covered under Title II); *Willits v. City of Los Angeles*, 925 F. Supp. 2d 1089, 1093

[5] The earlier opinion referred to by Judge Rogers is *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004), in which the Sixth Circuit held that 28 C.F.R. § 35.151 is enforceable through a private cause of action, *id.* at 907, and acknowledged that the defendants did "not dispute the district court's finding that they failed to comply with § 35.151" by failing to install accessible sidewalks throughout the city. *Id.* at 904; *see also Babcock* 657 F.3d at 543 (Rogers, J., concurring) ("Nothing in [*Ability Center*] cast doubt on the fact that a city's failure to properly construct sidewalks violates 28 C.F.R. § 35.151 and 42 U.S.C § 12132.").

(C.D. Cal. 2013) (same); *Culvahouse v. City of LaPorte*, 679 F. Supp. 2d 931, 939 (N.D. Ind. 2009) (same).

Finally, San Juan looks to two First Circuit decisions, *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006) and *Parker v. Universidad de Puerto Rico*, 225 F.3d 1 (1st Cir. 2000), for support. As the Municipality acknowledges, however, there are no First Circuit cases directly on point. ECF No. 14 at 14; ECF No. 19 at 5. The question in *Iverson* was whether the Title II regulations requiring entities to conduct a self-evaluation and make a transition plan are enforceable through a private right of action—the court held that they were not. 452 F.3d at 96. In *Parker*, the First Circuit found that the plaintiff had established a prima facie case that he was denied access to the University of Puerto Rico's "services, programs, or activities" when his wheelchair overturned during a visit to the University's Botanical Gardens because of an alleged defect on the path, causing him injury. 225 F.3d at 5, 3. The court held that the University had an obligation to make the Garden accessible, and to provide at least one route to the garden that could be used safely by an individual in a wheelchair. *Id.* at 6-7. In neither *Iverson* nor *Parker* did the First Circuit provide an opinion on whether sidewalks themselves are services under Title II of the ADA.

In sum, San Juan's position is not supported. It runs counter to the plain statutory language of Title II of the ADA, the statute's administrative interpretation, and circuit court precedent, all of which point to the conclusion that the provision and maintenance of sidewalks is among the "services, programs, or activities" that public entities must make accessible under Title II.

CONCLUSION

The United States respectfully requests that the Court consider this Statement of Interest in this litigation.

Date: November 9, 2020

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