No. 01-15744

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAN BARDEN, *et al.*,

Plaintiffs-Appellants

v.

CITY OF SACRAMENTO, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF THE UNITED STATES

This case involves the interpretation and application of Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. 12131 *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794 *et seq.*, to a city's program of providing, constructing, and maintaining public sidewalks. The Department of Justice enforces Title II and coordinates federal enforcement of the access requirements of Section 504. See 42 U.S.C. 12132 (Title II); 28 C.F.R. Part 41 (Section 504). The Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for promulgating accessibility guidelines for facilities subject to the ADA, which then become the basis of implementation

regulations issued by the Department of Justice. 42 U.S.C. 12134, 12204. These regulations cover, among other things, accessibility of sidewalks and streets. See, *e.g.*, 28 C.F.R. 35.150(d)(2), 35.151(a), (e).

ISSUE PRESENTED

Whether the provision, construction, and maintenance of a system of public sidewalks is a "program or activity" subject to the accessibility requirements of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, or one of a city's "services, programs, or activities" under Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. 12132.

STATEMENT

A. *Statutory And Regulatory Background*

Section 504 provides that:

> No otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

29 U.S.C. 794(a). Title II similarly provides that:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. 12132.

Section 504 requires each agency that provides federal financial assistance to develop implementing regulations. 29 U.S.C. 794(a). The Department of Justice coordinates this effort and has issued "coordination regulations" with which all agency regulations must be consistent. See 28 C.F.R. Pt. 41; Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980).[1]

The Department of Justice also issues regulations to implement Title II, pursuant to 42 U.S.C. 12134. Those regulations must be consistent with the regulations issued to enforce Section 504. 42 U.S.C. 12134.[2] The regulations also must be consistent with architectural "minimum guidelines and requirements" to be developed by the Architectural and Transportation Barriers Board (Access Board). See 42 U.S.C. 12204, 12134(b).

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[1] There is no dispute that the City of Sacramento receives federal financial assistance subject to Section 504. See E.R. 105. However, the record is not clear on the source of the City's federal financial assistance. See *ibid.* We are, therefore, unable to determine which specific funding agency's Section 504 regulations would apply. However, because each agency's regulations must be consistent with the Department of Justice "coordination regulations," see 28 C.F.R. 41.4(a), and because it appears not to make a difference in this case, this brief refers to the Section 504 coordination regulations rather than to any specific agency regulations.

[2] In particular, Section 12134(b), requires that, on most issues, the Title II regulations must be consistent with the Section 504 regulations issued by the Department of Health, Education and Welfare (HEW), which was originally given the task of coordinating the Section 504 regulations. This responsibility was ultimately transferred to the Department of Justice and the coordination regulations promulgated by HEW were then "deemed to have been issued by the Attorney General." See Exec. Order No. 12,250, § 1-502. The Title II regulations regarding the accessibility of "existing facilities" and "communications" must be consistent with the regulations issued to enforce Section 504's application to the federal government itself. See 42 U.S.C. 12134(b). Those regulations are found at 28 C.F.R. 39.150, 39.160.

The implementing regulations for both Section 504 and Title II govern the accessibility of covered facilities. The Title II regulations provide that:

> 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, or be subjected to discrimination by any public entity.

See 28 C.F.R. 35.149. The Section 504 regulations contain an essentially identical provision. See 28 C.F.R. 41.56. The regulations under both statutes define "facility" to include "roads" and "walks." See 28 C.F.R. 35.104 (Title II); 28 C.F.R. 41.3(f) (Section 504). The Title II regulations specifically address one aspect of the accessibility of sidewalks, requiring, among other things, that public entities install curb ramps in newly constructed or altered sidewalks. See 28 C.F.R. 35.151(e)(2).

B. *Facts Of This Case*

Plaintiffs, individuals who are blind or use wheelchairs, sued the City of Sacramento, alleging that the City violated Section 504 and Title II by failing to make its sidewalks accessible. E.R. 3-4, 12-15. In particular, Plaintiffs alleged that the City failed to install curb ramps at intersections in newly constructed or altered streets and failed to remove other obstructions that made some existing sidewalks unusable by wheelchairs or dangerous for the blind (*e.g.*, benches, sign posts and guy wires protruding into the walkway). E.R. 12-15.

The parties entered a partial settlement regarding curb ramps, but left for litigation the scope of the City's obligation to make accessible the stretches of sidewalks between intersections. E.R. 260-301. The district court granted the City's motion for partial summary judgment on this issue, stating that "this Court finds, for reasons stated in open court, that such sidewalks are not a program, service or activity of the City of Sacramento, and thus are not subject to the program access requirements of the ADA or Section 504 of the Rehabilitation Act." E.R. 301. See also E.R. 368-378. The court then certified the order for interlocutory appeal under 28 U.S.C. 1292(b), which this Court accepted. E.R. 302

SUMMARY OF ARGUMENT

Providing, constructing, and maintaining a system of public sidewalks is a service the City of Sacramento provides to its residents, a program administered by its Public Works Department, and an important government activity. When a person with a disability is denied the use of a public sidewalk because it is inaccessible, he or she is excluded from a government service and denied the benefits of a city service, program, or activity.

The regulations promulgated to enforce Title II and Section 504 specifically address steps public entities must take to ensure that their facilities are accessible to individuals with disabilities. Those regulations treat public sidewalks as a facility subject to these requirements. Defendants' argument to the contrary conflicts with agency interpretations of these provisions and is contradicted by the plain language,

context and structure of the regulations. For example, the Title II regulations regarding facility accessibility specifically address one key aspect of sidewalk accessibility, requiring installation of curb ramps at intersections in certain circumstances. The reason sidewalks are subject to curb ramp regulations is because the provision, construction, and maintenance of sidewalks is a government service, program, or activity. Defendants accepted the validity of the curb ramp regulation in the lower court, but offered no explanation of how Title II could apply only to the portion of a sidewalk near an intersection.

That the regulations do not address other aspects of sidewalk accessibility with specificity simply reflects that the Government has not yet completed accessibility guidelines for public facilities generally, or sidewalks in particular. Until that process is complete, public entities have a degree of flexibility in making their sidewalks accessible, but are still bound by the general accessibility regulations for facilities and by the nondiscrimination requirements of Title II itself. The existence of an on-going process to develop additional guidelines specific to sidewalks is further evidence of the agencies' view that public rights of way are subject to accessibility requirements, rather than any indication that sidewalks are not covered by Title II or Section 504.

Finally, Defendants' fear that subjecting sidewalks to accessibility requirements would impose unreasonable financial obligations on public entities is not a reason to disregard the plain language of the statutes and regulations. The

regulations provide ample protection against the prospect of undue financial burdens, requiring modification of existing sidewalks in only certain limited circumstances and only when doing so would not impose an undue financial burden.

ARGUMENT

THE PROVISION, CONSTRUCTION, AND MAINTENANCE OF A SYSTEM OF PUBLIC SIDEWALKS IS A "PROGRAM OR ACTIVITY" WITHIN THE MEANING OF SECTION 504 AND TITLE II

Defendants successfully argued below that sidewalks generally are not subject to the accessibility requirements of Section 504 and Title II because sidewalks are not a "service, program or activity" of a public entity within the meaning of the statutes. Defendants further argued that the Title II regulations that apply to public "facilities" do not apply to public sidewalks. Instead, Defendants contended, sidewalks are covered by the Acts only to the extent that the sidewalks provide direct access to a building in which some other government service is provided. Thus, Defendants apparently believe that they may be required to make a sidewalk accessible if it leads to a public library, but not it if is simply part of the larger system of sidewalks running through the City.

This position directly contradicts the plain meaning of the statutory language and the implementing regulations. As the Access Board has recently explained:

> Title II requires non-discrimination in all programs, services, and activities of public entities. The construction, alteration, or maintenance of the public rights-of-way is an activity of a public entity and is therefore subject to the non-discrimination requirements.

* * *

> A public pedestrian circulation network is both a 'program', *i.e.*, a service delivered by a government to its citizens, and a set of 'facilities,' *e.g.*, the sidewalks, curb ramps, street crossings, and related pedestrian elements that are instrumental in providing the service.

E.R. 180 (Access Board, *Accessible Public Rights of Way Design Guide* 15, 18 (2000) (Access Board Design Guide)).

The Department of Justice has similarly stated that "maintenance of pedestrian walkways by public entities is a covered program" and that sidewalks may need to be altered "in order to provide access to the 'program' of using public streets and walkways." 60 Fed. Reg. 58,462, 58,462, 58,463 (Nov. 27, 1995) (notice of proposed rulemaking).[3] As agencies charged by Congress with implementing Title II, the interpretations of the Department of Justice and the Access Board, even when offered in the form of opinion letters and comments on proposed regulations, "are entitled to respect." *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) (citation and quotation marks omitted).

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[3] The Department has also expressed this view in advisory letters issued under the technical assistance program created by 42 U.S.C. 12206. See, *e.g.*, Technical Assistance Letter to Paul J. Kelley (Feb. 17, 1994) (see Addendum 1) ("[I]f a public entity has responsibility for, or authority over, sidewalks or other public walkways, it must ensure that such sidewalks and walkways meet the program access requirement and, when viewed in their entirety, are readily accessible to and usable by individuals with disabilities."); Technical Assistance Letter to Rhonda L. Daniels (Apr. 8, 1996) (see Addendum 2) ("[B]ecause sidewalks in residential areas are 'facilities' within the meaning of the ADA, residential sidewalks that are constructed with the expectation that they will be turned over to the local government are required to be accessible to people with disabilities.").

Moreover, as discussed below, this interpretation is implemented by regulations that define public sidewalks as a covered "facility" and subject them to the same general accessibility requirements applied to other types of public facilities and to particular requirements specific to public sidewalks. The regulations' imposition of accessibility requirements on public sidewalks is entitled to "controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). See also *Zimmerman* v. *Oregon Dep't of Justice*, 170 F.3d 1169, 1173 (9th Cir. 1999), cert. denied, 121 S. Ct. 1186 (2000) (Title II regulations entitled to *Chevron* deference).

A. *Providing, Constructing, And Maintaining Public Sidewalks Is A "Service," "Program," Or "Activity" Within The Meaning Of Section 504 And Title II*

The statutory phrases "program or activity" and "service, program or activity" are intentionally expansive. Section 504 provides that "the term 'program or activity' means *all of the operations of* * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government * * * any part of which is extended Federal financial assistance." 29 U.S.C. 794(b)(1)(A) (emphasis added). The same phrase in the ADA, expanded to include "services" as well, is at least as broad. See 42 U.S.C. 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [Section 504] or the regulations issued by Federal agencies pursuant to such title.").

Thus, as this Court recently stated, "the ADA's broad language brings within its scope *anything a public entity does.*" *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (citation and internal punctuation omitted) (emphasis added). See also 28 C.F.R. Pt. 35, App. A, p. 476 (analysis of Title II regulations) (same). The range of things "a public entity does," is obviously very broad. Below, Defendants concentrated on one sort of activity – providing services directly to constituents from within a building such as a library, social service office, or school. But public entities also provide a service to the community by building public facilities such as sidewalks, soccer fields, hiking trails, amphitheaters, parking lots, nature paths, boat slips, public beaches, etc. Building a soccer field or a parking lot is clearly a government "activity." Maintaining a nature path or a public beach is also a government "service" or "program." And being able to use the park, trail, beach, or parking lot is one of the "benefits of [these] services, programs, or activities." 42 U.S.C. 12132. See, *e.g.*, *Parker* v. *Universidad De Puerto Rico*, 225 F.3d 1, 6-7 (1st Cir. 2000) (public entity must make park accessible under Title II); *Tyler* v. *City of Manhattan*, 857 F. Supp. 800, 818 (D. Kan. 1994) (recreational facilities). Cf. *Crowder* v. *Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (giving parks as example of a "public service" covered by Title II).[4]

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[4] Defendants conceded below that parks and other similar facilities are covered by Section 504 and Title II, but insisted that this was because other government programs are offered in such facilities. This argument is wrong as a matter of fact and law. Public entities frequently provide the public access to facilities at which no other government service is offered. Cities construct parks that consist of

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Thus, in *Zimmerman*, this Court considered the scope of Title II by asking, "how a Parks Department would answer the question, 'What are the services, programs, and activities of the Parks Department?'" *Id*. at 1174. One answer the Court gave was "we maintain playgrounds." *Ibid*. Similarly, if one were to ask, "What are the services, programs and activities of a city public works department," one answer would be "we provide the citizens with sidewalks and streets; we build sidewalks; we maintain walkways."

To the extent Defendants are asserting that sidewalks themselves are not literally "services, programs, or activities," they misconstrue the scope of the statutes. Even if sidewalks, nature trails, parking lots, or beaches were not properly considered "services, programs, or activities" themselves, they are clearly the product of government services, programs, or activities (*i.e.*, providing, constructing and maintaining sidewalks, trails, parking lots and beaches).[5] These "activities"

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nothing but green space and benches. The only service many municipal parking lots provide is a flat piece of asphalt and some painted lines. In any case, whether the public entity provides additional services at the facility is simply irrelevant under the statutory definitions. Even if the city provides no other services from its facilities – no city-paid soccer referees, no nature guides, no lifeguards, etc. – the city has still engaged in the"activity" of creating the facilities, has implemented a maintenance "program" for the facilities, and provides a "service" to the public by holding the facilities out for the use of its citizens. (continued ...)

[5] This Court has said that Title II does not cover "inputs" to government activities, such as employment. See *Zimmerman*, 170 F.3d at 1174-1175. Defendants argued below that sidewalks are "inputs" because they facilitate access to other government programs (like libraries) and, therefore, are not covered by Title II. However, as discussed above, sidewalks are clearly an "output" of the
(continued ...)

produce "benefits" – sidewalks, trails, parking lots and beaches, and access to them. And both Section 504 and Title II not only prohibit denying individuals with disabilities a chance to "participate in" government programs, they also specifically prohibit denying individuals with disabilities the "benefit of the services, programs and activity of a public entity." 42 U.S.C. 12132 (Title II). See also 29 U.S.C. 794(a) (Section 504); *Zimmerman*, 170 F.3d at 1174. Thus, whether a sidewalk is considered a "service" or "program" directly, or simply a "benefit of" the service, program or activity of providing, constructing and maintaining sidewalks, the result is the same.

For this reason, the implementing regulations under Title II specifically impose accessibility requirements on public sidewalks, including a requirement for adding curb ramps at intersections of newly constructed or altered streets. 28 C.F.R. 35.151(e). In the lower court, Defendants did not dispute the validity of these requirements, even though the regulations apply to sidewalks that, in Defendants' view, are not a "service, program or activity" under Title II. Defendants did not offer any explanation of how constructing a new sidewalk, or altering an existing sidewalk at an intersection, could be a "service, program or activity" but providing, constructing or maintaining sidewalks generally is not. Nor did they offer any

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government program of producing and maintaining sidewalks, not simply an "input" or means of providing other services. In any case, even if public sidewalks were, somehow, only an "input," *Zimmerman* made clear that Section 504 is broad enough to cover both "inputs" and "outputs" even if Title II is not. 170 F.3d at 1181.

explanation of how the portion of a sidewalk abutting an intersection could fall within the statutory language, but the portions a few feet farther down the walk do not.

B. *The Section 504 And Title II Regulations Subject Public Sidewalks To Accessibility Requirements*

Even if Defendants could create an interpretation that would reconcile these positions, it would not be the interpretation adopted by the agencies Congress charged with the responsibility for enforcing and implementing these statutes. Instead, the agency regulations treat sidewalks like other public facilities, requiring public entities to provide individuals with disabilities access to the benefits provided by the city's program of providing, constructing, and maintaining public sidewalks.

1. *The Regulatory Definition Of "Facility" Includes Public Sidewalks*

The Title II "program accessibility" regulations state:

> [e]xcept 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, or be subjected to discrimination by any public entity.

28 C.F.R. 35.149 (emphasis added). The Section 504 regulations contain a nearly identical provision. See 28 C.F.R. 41.56. Both sets of regulations define "facility" to include "roads" and "walks." See 28 C.F.R. 35.105 (Title II); 28 C.F.R. 41.3(f)

(Section 504).[6] The Title II regulations then provide a series of accessibility requirements for covered facilities that elaborate the general requirement of 28 C.F.R. 35.149. See, *e.g.*, 28 C.F.R. 35.150-151.

Thus, the regulations treat sidewalks as facilities subject to regulation under Title II, an interpretation that it entitled to *Chevron* deference. See *Zimmerman*, 170 F.3d at 1173. Defendants argue, however, that the Department regulations do not actually treat a public sidewalk as a "facility" subject to the accessibility regulations. Instead, Defendants assert that the definition of "facility" includes only those sidewalks that are an integral part of some other building complex, and excludes ordinary sidewalks used as a public right of way.

As an initial matter, this argument is ultimately irrelevant to the question of Title II coverage. Even if sidewalks were not "facilities" under the regulation (and therefore not subject to the general accessibility requirements for facilities), they still are clearly subject to the curb ramp requirements of 28 C.F.R. 35.150(d)(2) and 28 C.F.R. 35.151(e). The fact that sidewalks are subject to any Title II regulation at all demonstrates the Department's view that Title II covers a city's program of providing, constructing, and maintaining public sidewalks.[7]

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[6] This definition of "facility" was approved by Congress when it required the Attorney General to adopt Title II regulations for "existing facilities" consistent with those promulgated under Section 504 for federally conducted programs. See 42 U.S.C. 12134(b). Those regulations also define "facility" to include "roads" and "walks." See 28 C.F.R. 39.103.

[7] And, as discussed below, sidewalks would be subject to Title II even if they

(continued ...)

In any case, the "facility" regulations do apply to public sidewalks. Although Defendants are right that sidewalks within a building complex are part of that "facility" (*i.e.*, part of the complex), a public sidewalk existing independent of any other government building is also a "facility" under the plain meaning of the regulation and the Department's long-standing interpretations of its own regulations. There is nothing in the regulatory definition that provides the limitation Defendants attempt to impose. The term "facility" "means *all* * * * roads, walks [and] passageways," 28 C.F.R. 35.104 (emphasis added), a definition that is clearly intended to be expansive. Moreover, the curb ramp regulations that clearly address public sidewalks are set forth as an application of the general facility accessibility rule. As the Department specifically explained in its commentary to the regulations, the curb ramp subsection was "added to the final rule to clarify *the application of the general requirement for program accessibility to the provision of curb cuts* at existing crosswalks." See 28 C.F.R. Pt. 35, App. A, p. 495 (emphasis added).[8] Thus, 28 C.F.R. 35.151 sets standards for new construction and alteration of all "facilities." It begins with a general standard for

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were not given specific treatment by the regulations. See pp. 16-21, *infra*.

[8] See also *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725, 732 n.11 (9th Cir. 1999) ("The Justice Department's interpretation of its own regulations * * * must also be given substantial deference and will be disregarded only if plainly erroneous or inconsistent with the regulation.") (citation and quotation marks omitted).

all newly constructed facilities in subsection (a), and creates a similar general standard for all newly altered facilities in subsection (b). The provision then applies these general facility standards to two special cases: historic properties (subsection (d)) and curb ramps (subsection (e)).[9] Thus, the curb ramp regulation is simply an application of the general accessibility requirement for "facilities" and sidewalks are simply one of many different kinds of facilities covered by the regulations.[10]

2. *The Lack Of Accessibility Guidelines Specific To Public Sidewalks Does Not Mean That Sidewalks Are Not Covered By The Regulations Or Statutes*

Defendants argue, however, that the public sidewalks could not possibly be considered "facilities" under the regulation because the regulations do not provide specific requirements for sidewalks between intersections and because there are no binding accessibility guidelines specific to public sidewalks. This argument

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[9] The curb ramp provision states: "(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway; (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways." 28 C.F.R. 35.151(e).

[10] Once it is understood that the regulations treat sidewalks as "facilities," it is also clear that the regulations impose accessibility requirements on *all* public sidewalks, not just those near some other government program or facility. For example, the "existing facilities" regulations require public entities to develop a transition plan for installing curb ramps in existing sidewalks and to prioritize installation of curb ramps not only in "walkways serving * * * State and local government offices and facilities" but also sidewalks serving "places of public accommodation and employers." 28 C.F.R. 35.150(d)(2).

misunderstands the relationship between the statute, the Department of Justice regulations, and the accessibility guidelines developed by the Access Board.

Defendants are correct that the Title II regulations single out one specific aspect of sidewalk accessibility, namely curb ramps. But rather than demonstrating that sidewalks are not covered, this demonstrates the extraordinary importance the Department placed on taking this first important step toward making sidewalks accessible to individuals with disabilities. See 28 C.F.R. Part 35, App. A, p. 496. The reason the regulations do not provide additional requirements specific to sidewalks is because such guidance is developed through a process that, in the case of public rights of way, is not yet completed.

As discussed above, the ADA requires the Access Board to "issue minimum guidelines * * * for the purposes of subchapters II and III of this chapter." 42 U.S.C. 12204. The Department of Justice implementing regulations "shall be consistent with the[se] minimum guidelines and requirements." 42 U.S.C. 12134(c). Pursuant to these statutory obligations, the Access Board has been developing guidelines which the Department has then considered as a basis for binding regulations.

Defendants are right that this process has not resulted in any guidelines specific to public sidewalks. But this is because the process is not yet complete, not because the Department views sidewalks as outside the scope of Title II. The Access Board began by developing guidelines for public accommodations under Title III. Those standards, the ADA Accessibility Guidelines (ADAAG), were

promulgated by the Access Board and adopted by the Department of Justice for Title III in 1991. See 56 Fed. Reg. 35,592 (July 26, 1991). The Title III guidelines address features of sidewalk accessibility in the context of walkways within the compound of a public accommodation (*e.g.*, the sidewalks between buildings in a hospital complex). See 28 C.F.R. Pt. 35, App. B, pp. 542-551, 553-557 (ADAAG §§4.3-4.5, 4.7-4.8). The reason these guidelines do not also address public sidewalks is simply because public sidewalks (being the responsibility of public entities) are subject to Title II, not to the public accommodations provision that was the subject of the initial version of the ADAAG.

The process to develop accessibility guidelines for Title II is ongoing.[11] Thus, for example, the guidelines specific to correctional facilities have been issued as a final rule by the Access Board but have not been adopted yet by the Department of Justice. See 63 Fed. Reg. 2,000 (Jan. 13, 1998). But this does not mean that prisons are not subject to Title II. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206 (1998).

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[11] The Access Board published draft accessibility guidelines specific to public entities in 1992 and issued an interim final rule in 1994. See 57 Fed. Reg. 60,612 (Dec. 21, 1992); 59 Fed. Reg. 31,676, 32,751 (June 20, 1994). In 1994, the Department of Justice issued a notice of proposed rulemaking, announcing its plan to adopt these Title II guidelines when they became final. See 59 Fed. Reg. 31,808 (June 20, 1994). The Board issued a final Title II rule in 1998, but the Department has not acted to adopt those guidelines because the entire set of accessibility guidelines is currently undergoing a substantial revision by the Access Board. See 64 Fed. Reg. 62,248 (Nov. 16, 1999).

Instead, the Department regulations currently provide that public entities may comply with either the ADAAG for Title III or the Uniform Federal Accessibility Standards (UFAS).[12] See 28 C.F.R. 35.151(c); 28 C.F.R. Pt. 35, App. A, p. 496. The Department recognized that this interim measure would not always address every type of public facility, or every feature of such facilities. The Government, therefore, has repeatedly advised public entities that when they operate facilities that are not specifically addressed by the current guidelines, they are still obliged to comply with the general accessibility requirements of the regulations and the nondiscrimination provisions of the statute itself. For example, the Department's Title II Technical Assistance Manual states that "[i]f no standard exists for particular features, those features need not comply with a particular design standard. However, the facility still must be designed and operated to meet other title II requirements, including program accessibility." See § II-6.2100 (1994 Supp.).[13] The Access Board has provided similar advice.[14]

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[12] The UFAS were developed for purposes of the Architectural Barriers Act, which requires among other things that federally-funded construction projects meet accessibility standards. See 42 U.S.C. 4156.

[13] This Court has held that the Department's views, as expressed in "the Technical Assistance Manual, must also be given substantial deference and will be disregarded only if plainly erroneous or inconsistent with the regulation." *Bay Area Addiction Research & Treatment, Inc.*, 179 F.3d at 732 n.11 (citation and quotation marks omitted).

[14] See Access Board, *Bulletin #5: Using ADAAG* 7 (Sep. 2000) (see Addendum 3) ("[f]acilities for which there are no specific ADAAG criteria are nevertheless subject to other ADA requirements, including the duty to provide equal opportunity. In many cases it will be feasible to provide access by

(continued...)

And both the Access Board and the Department have informed public entities that this position applies to public sidewalks. The Department has provided technical assistance stating that

> [u]ntil this Department publishes a final regulation that establishes specific requirements for accessible public sidewalks, public entities may elect to meet their obligation to provide accessible sidewalks by using the technical provisions applicable to accessible exterior routes under the [ADAAG] or UFAS, or they may follow any other accessibility standard in effect in their jurisdiction.

Technical Assistance Letter to Rhonda L. Daniels (Apr. 8, 1996) (see Addendum 2). The Access Board similarly has advised that:

> [a]lthough no Federal scoping or technical requirements have been established that apply specifically to public rights-of-way, both ADAAG and UFAS contain technical requirements for the construction of accessible exterior pedestrian routes that may be applied to the construction of public rights-of-way. In the absence of a specific Federal standard, public entities may also satisfy their obligation by complying with any applicable State or local law that establishes accessibility requirements for public rights-of-way that are equivalent to the level of access that would be achieved by complying with ADAAG or UFAS.

E.R. 180 (Access Board Design Guide).

As these statements reflect, there has been an on-going process to develop accessibility guidelines specific to sidewalks and other public rights-of-way, a process that provides further evidence of the Government's long-standing position that sidewalks are subject to Title II. The Access Board's draft and interim final rule for its Title II guidelines devoted an entire section to public rights of way,

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[14](...continued)
incorporating basic elements specified in ADAAG * * * . Where appropriate standards exist, they should be applied.").

including sidewalks. See 57 Fed. Reg. 60,612, 60,640-60,650 (Dec. 21, 1992); 59 Fed. Reg. 31,676, 31,722-31,742 (June 20, 1994). Although the Board reserved the public rights of way section when it issued its final Title II guidelines, it did not do so because of any doubts about the scope of Title II's coverage. Instead, the Board made clear that the particular technical specifications proposed in the guidelines had generated substantial public confusion and dispute that needed to be addressed. See 63 Fed. Reg. 2,000, 2,013 (Jan. 13, 1998). The Board did not, however, abandon the process of developing reasonable guidelines for sidewalk accessibility[15] or its position that sidewalks are covered by Title II.[16]

C. *Section 504 And Title II Do Not Require Defendants To Replace Their System Of Existing Sidewalks*

Finally, Defendants argued below that Congress could not have intended to subject public sidewalks to Title II or Section 504, and the Department could not have intended its regulations to apply to sidewalks, because this would have obligated cities to retrofit their entire systems of existing sidewalks at enormous cost. But the regulations provide ample protection from unreasonable costs in making sidewalks accessible, in the same way they protect public entities from excessive expense in making their buildings and other public facilities accessible.

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[15] The Board subsequently created an advisory committee to conduct further studies and to propose revised technical guidelines. See 64 Fed. Reg. 56,482 (Oct. 20, 1999)

[16] See E.R. 180, 183 (Access Board Design Guide).

While public entities do have an obligation to ensure that all *newly constructed* sidewalks are accessible, see 28 C.F.R. 35.151(e), the obligation with respect to existing walks is more limited. Acknowledging the relative difficulty and expense of retrofitting facilities, the "existing facilities" regulation provides that:

> [a] public entity shall operate each service, program, or activity so that * * * when viewed in its entirety, [it] is readily accessible to and usable by individuals with disabilities. This paragraph does not * * * [n]ecessarily require a public entity to make each of its existing facilities accessible * * * [or] [r]equire a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.

28 C.F.R. 35.150(a).

Of course, even if a city does not have to replace its system of sidewalks, making public sidewalks subject to Title II does entail a financial cost. But it is a cost Congress concluded was worth the benefit of providing citizens with disabilities the access to businesses, employment opportunities, and civic life that most people take for granted. As the House Report for the ADA explains, "[t]he employment, transportation, and public accommodation sections * * * would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets." H.R. 485, 101st Cong., 2d Sess. 84 (1990). Similarly, the requirement to provide curb ramps at intersections (which Defendants do not challenge) would be meaningless if all the regulations accomplished was providing individuals in wheelchairs a view from the top of the ramp. The curb

ramp regulation is simply one part of the regulatory scheme to provide individuals with disabilities access to sidewalks they can actually use to reach public accommodations, places of employment and other government services.

CONCLUSION

How the accessibility regulations under Section 504 and Title II apply to the particular sidewalks in this case was not addressed by the district court and is not at issue in this interlocutory appeal. The district court erred in holding that this inquiry was unnecessary because neither Section 504 nor Title II applied to public sidewalks. This Court should reverse that judgment and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points, and contains 5,856 words.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing Brief for the United States as Amicus Curiae in Support of Appellants were sent by overnight mail this 6th day of August, 2001, to the following counsel of record:

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