No. 08-10630

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RICHARD FRAME, *et al*.,

Plaintiffs-Appellants

v.

CITY OF ARLINGTON,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS' PETITION FOR REHEARING EN BANC

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INTEREST OF THE UNITED STATES

This appeal focuses on the scope of the protection provided by Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12132. The Attorney General has authority to bring civil actions to enforce Title II. See 42 U.S.C. 12133. In addition, the ADA directs the Attorney General to promulgate regulations to implement Title II based on regulations previously developed under Section 504 of the Rehabilitation Act. 42 U.S.C. 12134. Accordingly, the United States has a strong interest in ensuring that the statute and accompanying regulations are properly interpreted. The United States previously addressed the issue presented in this case in *Barden* v. *City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003), which upheld the Department of Justice's interpretation of the statute and accompanying regulations.[1]

STATEMENT OF THE ISSUE

Whether a public entity's provision and maintenance of sidewalks, curbs, or parking lots qualify as "services, programs, or activities" under Title II of the ADA, 42 U.S.C. 12132.

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[1] The United States filed an *amicus curiae* brief with the Ninth Circuit in *Barden*. At the invitation of the Supreme Court, the United States also filed a brief at the certiorari stage.

STATEMENT OF THE CASE

The facts and procedural history are set forth in this Court's August 23, 2010, opinion and in the petition for rehearing en banc filed on September 7, 2010. In the interest of brevity, the United States does not repeat them here.

INTRODUCTION

A city's provision and maintenance of sidewalks, curbs, and parking lots clearly constitute a "service[], program[], or activit[y]," 42 U.S.C. 12132, under Title II of the ADA. The panel majority's conclusion to the contrary directly conflicts with the Ninth Circuit's ruling in *Barden* v. *City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003). It also is inconsistent with the holdings of other circuits that Title II applies to virtually anything a state or local government does. See *Johnson* v. *City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); *Yeskey* v. *Pennsylvania Dep't of Corr.*, 118 F.3d 168, 170-171 (3d 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); see also Aug. 23 Op. 22 n.4 (Prado, J., concurring in part and dissenting in part) (citing cases). In addition, it is inconsistent with relevant regulations and legislative history. This Court should grant rehearing en banc.

ARGUMENT

A PUBLIC ENTITY'S PROVISION AND MAINTENANCE OF SIDEWALKS, CURBS, AND PARKING LOTS QUALIFY AS "SERVICES, PROGRAMS, OR ACTIVITIES" UNDER TITLE II OF THE ADA

A. The Provision And Maintenance Of Sidewalks, Curbs, And Parking Lots Qualify As "Services, Programs, Or Activities" Under Title II Of The ADA

1. The Statutory Text Is Clear

Both Title II of the ADA and Section 504 of the Rehabilitation Act prohibit covered public entities from denying individuals with disabilities "the benefits of " any "program" or "activity" or, in the case of Title II, any "service[]" of a covered entity on the basis of disability. 29 U.S.C. 794(a); 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 specifically provides that "the term 'program or activity' means *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. And, 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 [such an 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. 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 not only to stay clear of road traffic, but to access shops and businesses, means of public transportation, places of employment, and government offices and facilities. And for "time out of mind," sidewalks have been used 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, the statute covers the sidewalks, curbs, and parking lots 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."). Because this is clear from the statutory text, resort to examination of regulations and legislative history is unnecessary. In any event, this interpretation is consistent with the regulations issued under Title II and its legislative history.

2. The Relevant Regulations And Legislative History Support This Interpretation

a. Regulations

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. Applying the 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. And 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(e),[2] and require public entities with responsibility over existing sidewalks to develop a transition plan for installing curb ramps by a certain date, 28 C.F.R. 35.150(d)(2).

As the Department of Justice has stated, the curb ramp requirements in the Title II regulations were premised on the view that "maintenance of pedestrian walkways by public entities is a covered program." 60 Fed. Reg. 58,462 (1995) (notice of proposed rulemaking). That position, embodied in the Department of Justice's regulations implementing Title II, is entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

b. Legislative History

The Congress that enacted the ADA intended Title II to include public walkways. The House Report accompanying the Act explained that under Title II, "local and state governments are required to provide curb cuts on public streets" because the "employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded

[2] Effective March 15, 2011, Section 35.151(e) will be redesignated as Section 35.151(i). See 75 Fed. Reg. 56,164, 56,217 (Sept. 15, 2010).

the opportunity to travel on *and between* the streets." H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 84 (1990) (emphasis added). Similarly, information submitted to Congress established that one of the greatest barriers that individuals with disabilities faced in participating in the economic life of communities was the inability to use transportation systems, including sidewalks, to reach places of employment and commerce.[3]

Moreover, in subsequent legislation, Congress has explicitly recognized that "public sidewalks" are covered by Title II. Section 1108 of the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (23 U.S.C. 133(b)(3)), which was passed in 1998, authorizes the use of federal funds set aside for transportation improvements undertaken by the States for "the modification of public sidewalks to comply with the Americans with Disabilities Act of 1990."

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[3] See, *e.g.*, *Americans with Disabilities Act of 1989: Hearings on H.R. 2273, Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 248 (1989) (survey identified "availability of curb cuts" as a "major problem[]" for individuals with disabilities); *ibid.* ("[d]isabled citizens are forced to stay home or use the street, because curb cuts and sidewalks are absent or inadequate"). Similarly, Appendix C to Justice Breyer's dissenting opinion in *Board of Trustees* v. *Garrett*, 531 U.S. 356, 391-424 (2001), contains numerous examples of asserted discrimination by state and local governments concerning the condition of public sidewalks and, most notably, a lack of curb ramps, which were presented to an ADA task force.

B. The Panel Majority's Ruling Is Incorrect

In its original opinion, the panel concluded that it need not decide, as the Ninth Circuit did in *Barden*, "that Title II's 'services, programs, or activities' includes 'anything that a public entity does.'" *Frame* v. *City of Arlington*, 575 F.3d 432, 436 (5th Cir. 2009), withdrawn and superseded on reh'g, 2010 WL 3292980 (5th Cir. Aug. 23, 2010). Rather, it concluded that "[i]t is enough for present purposes that we agree that 'services, programs, or activities' is at least broad enough to include curbs, sidewalks, and parking lots.'" *Ibid.* The panel went on to note that:

> [w]hen * * * a public entity provides a sidewalk, or its accompanying curbs, or public parking lots, it provides "a facility supplying some public demand." Because providing curbs, sidewalks, and parking lots is a service within the ordinary, "everyday meaning" of that word, we hold that those facilities also constitute a "service" within the meaning of Title II.

Id. at 437. It also noted that "[t]his understanding is consistent with the legislative history of the ADA, which indicates that Congress envisioned that the ADA would require that local and state governments maintain disability-accessible sidewalks." *Ibid.* (citation omitted). The United States respectfully submits that this conclusion was correct, and that the panel's treatment of this issue in its subsequent August 23, 2010, opinion is incorrect.

1. The Panel Majority's Conclusion That The Statute Is Ambiguous

In departing from its initial analysis of this issue, the panel majority's August 23 opinion concluded that the statutory language is ambiguous. Aug. 23 Op. 13. This conclusion is based in part on the statutory definition of "qualified individual with a disability," which is as follows:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. 12131(2). Specifically, the panel majority concluded that this definition "suggests a distinction between certain physical infrastructure on the one hand and services, programs, and activities on the other." Aug. 23 Op. 12-13. Because "'services' might be broadly understood to include at least some infrastructures, including sidewalks," the panel majority reasoned, the question "whether sidewalks, curbs, and parking lots are properly considered infrastructure or services is unclear." *Id.* at 13. That is, "the statutory language does not rule out the possibility that, for example, some structures used for transportation might be considered to constitute a service." *Ibid.* Accordingly, the panel majority could not "conclude that the statutory language *unambiguously* excludes cities' and

states' physical infrastructure as distinct from the panoply of less tangible benefits cities and states offer to their residents, even though it is often through and by these infrastructures that the services are delivered." *Ibid.*

The United States respectfully disagrees with the conclusion that the statute is ambiguous.[4] The statute's coverage is set forth in Section 12132, which states that it covers services, programs, and activities. As explained above, that language is not ambiguous, but instead clearly encompasses all of the operations of a state or local government. Section 12131, which merely defines who is protected by Title II, cannot obfuscate or detract from the meaning of Section 12132, which broadly describes the government activities Title II regulates.

The panel majority's reasoning is difficult to square with the ruling in *Yeskey*. There, the Court unanimously held that Section 12132 plainly covered state prisons. See 524 U.S. at 210 (rejecting the argument that the statutory provision is ambiguous and holding that "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')").

[4] To the extent an ambiguity exists, the Department of Justice's regulations implementing Title II are entitled to substantial deference. See *Chevron*, 467 U.S. at 844.

To be sure, the focus of the issue in *Yeskey* was the plaintiff's eligibility for a specific program; it did not directly address the accessibility of the prison facility itself. Yet there is little reason to question that, under *Yeskey*, claims relating to a prison facility also would be covered. See *Pierce* v. *County of Orange*, 526 F.3d 1190, 1214 (9th Cir.), cert. denied, 129 S. Ct. 597 (2008). And a prison, like a sidewalk, is a facility. Thus, defining something as a facility does not remove it from the statutory definition of services, programs or activities.

As Judge Prado explained in his partial dissent, "[a] statute is not ambiguous simply because it offers expansive coverage." Aug. 23 Op. 23 (Prado, J., concurring in part and dissenting in part); cf. *Yeskey*, 524 U.S. at 212 ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (citation and internal quotation marks omitted); *Diamond* v. *Chakrabarty*, 447 U.S. 303, 315 (1980) (holding, in the context of a patent law, that "[b]road general language is not necessarily ambiguous when congressional objectives require broad terms").

2. The Panel Majority's Analysis Of The Relevant Regulations

Because it concluded that the statutory language was ambiguous, the panel majority turned to the supporting regulations. See Aug. 23 Op. 13. It explained that facilities, including sidewalks, are addressed in the general provision regarding program accessibility, 28 C.F.R. 35.149, and further elaborated upon in subsequent

provisions, 28 C.F.R. 35.150-35.151. See Aug. 23 Op. 13-14. It concluded, based on its examination of these provisions, that "sidewalks, curbs, and parking lots are not 'services, programs, or activities.'" *Id.* at 14.

This conclusion is erroneous because the regulations clearly indicate that facilities are a subset of services, programs, or activities. The two are not, as the panel majority contends, mutually-exclusive categories.

The regulations simply explain how the Act 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, such as those alleged to have been constructed or altered in this case. 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 where they provide access to facilities covered by the Act, which presumably would be covered under the panel majority's approach. But it also contemplates that they will be installed in other areas as well, which presumably would *not* be covered under the panel majority's ruling. 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.[5]

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

[5] The Ninth Circuit concluded that "[t]he regulation is ambiguous because, while it does not specifically address the accessibility of sidewalks, it does address curb ramps." *Barden*, 292 F.3d at 1077. It concluded, however, that "[t]he curb ramps * * * could not be covered unless the sidewalks themselves are covered." *Ibid.* The Court held that "DOJ's interpretation of its own regulation, that sidewalks are encompassed by the regulation, is not plainly erroneous or inconsistent with the regulation," and the court "therefore defer[red] to the interpretation of the DOJ under [*Auer* v. *Robbins*, 519 U.S. 452 (1997)]." *Ibid.*

constructed or altered streets, roads, and highways," 28 C.F.R. 35.151(e)(1), or the "[n]ewly constructed or altered street level pedestrian walkways," 28 C.F.R. 35.151(e)(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(e) 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 Judge Prado notes, the distinction drawn by the panel majority is unworkable in practice. See Aug. 23 Op. 28 (Prado, J., concurring in part and dissenting in part). It leads 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. See *id.* at 29-30; 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.") (citation and 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 (citation and internal quotation marks omitted). Such an inquiry is more

consistent with the text of the statute. Indeed, it is difficult to square the broad statutory terms used by Congress in Title II with the limited, haphazard patchwork of covered sidewalks that would result from the panel majority's approach. Cf. *id.* at 1077 ("[T]he ADA must be construed broadly in order to effectively implement the ADA's fundamental purpose of provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.") (citation and internal quotation marks omitted).

CONCLUSION

This Court should grant the petition for rehearing en banc and hold that a public entity's provision and maintenance of sidewalks, curbs, and parking lots qualify as "services, programs, or activities" under Title II of the ADA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS' PETITION FOR REHEARING EN BANC with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system.

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CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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Date: September 24, 2010