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The Americans with Disabilities Act - The Fifth Circuit's Narrow Interpretation of Services Creates a Split and Burdens the Disabled in Frame v. City of Arlington

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THE AMERICANS WITH DISABILITIES ACT—THE FIFTH CIRCUIT'S NARROW INTERPRETATION OF "SERVICES" CREATES A CIRCUIT SPLIT AND BURDENS THE DISABLED IN *FRAME V. CITY OF ARLINGTON*[1]

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IN *Frame v. City of Arlington*, the Fifth Circuit incorrectly held that sidewalks, curbs, and parking lots are not services, programs, or activities under Title II of the Americans with Disabilities Act (ADA).[2] The term "services, programs, or activities" in the ADA must be construed broadly to align with the statute's intention of eliminating discrimination against individuals with disabilities.[3] Rather, the Fifth Circuit held that the statutory language was ambiguous and justified its holding with a regulation that defines roads, walks, passageways, and parking lots as facilities.[4] The majority failed to recognize, however, that the construction of these facilities is the service that a public entity provides, which brings the term within the statute's reach.

The plaintiffs are a group of five individuals who reside in Arlington, Texas (City) and have impairments that require them to use motorized wheelchairs for mobility.[5] They filed a lawsuit in the Northern District of Texas alleging violations of Title II of the ADA and section 504 of the Rehabilitation Act.[6] They specified "more than one hundred curbs and poorly maintained sidewalks in Arlington that they allege make their travel impossible or unsafe" and also evidenced three public facilities that

1. As this Casenote went to press, the Fifth Circuit withdrew its opinion and agreed to rehear the case en banc. Frame v. City of Arlington, 632 F.3d 177, 177 (5th Cir. Jan. 26, 2011).

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2. Frame v. City of Arlington, 616 F.3d 476, 488 (5th Cir. 2010).

3. Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002).

4. *Frame*, 616 F.3d at 487–88.

5. *Id.* at 479–80.

6. *Id.* at 480.

lacked adequate handicap parking.[7] The sole remedy requested was "an injunction requiring the City to bring its curbs, sidewalks, and parking lots into ADA compliance."[8] Monetary damages were not sought.[9]

The City moved to dismiss the complaint for failure to state a claim upon which relief could be granted.[10] The district court granted the motion finding that the two-year statute of limitations barred the claims because the statute began to run on the date the City finished constructing any noncompliant curb, sidewalk, or parking lot.[11] The plaintiffs appealed to the Fifth Circuit and argued that the statute of limitations did not accrue until the noncompliance was encountered, that the statute does not apply to an injunction, that the noncompliant objects were continuing violations, and that it was the City who had the burden to establish the accrual date.[12]

The Fifth Circuit vacated the district court's judgment and remanded the case, holding that the claims accrued when the noncompliant objects were completed, but that the City had the burden to prove the accrual date and the expiration of the limitations period.[13] The City petitioned the Fifth Circuit for rehearing, arguing that the court erred in finding that sidewalks, curbs, and parking lots constituted services within the meaning of the ADA, and the Fifth Circuit granted the petition.[14]

After the rehearing, the Fifth Circuit withdrew its prior opinion and issued a new opinion holding that "sidewalks, curbs, and parking lots are not 'services, programs, or activities'" within the meaning of Title II of the ADA.[15] Thus, the plaintiffs did not have a private cause of action to enforce the regulatory requirements of the ADA unless the noncompliant sidewalks, curbs, and parking lots denied them access to *actual* services, programs, or activities.[16] The majority reasoned that the ADA's definition of a "qualified individual with a disability"[17] contemplated that certain physical infrastructures would fall outside of the services to which they provide access because the definition references the removal of

7. *Id.* The plaintiffs claim violations of an ADA provision that states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2006).

8. *Frame*, 616 F.3d at 481.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 479 n.1.

14. *Id.*

15. *Id.* at 488.

16. *Id.* The court further held that the plaintiffs had a private cause of action where they claimed that the noncompliant objects denied them access to actual services, programs, or activities and upheld its prior holdings that these claims accrued when the noncompliant objects were completed, but the court held that the City had the burden to prove the accrual date. *Id.* at 490.

17. 42 U.S.C. § 12131(2) (2006) (defining a "qualified individual with a disability" as someone who meets the eligibility requirements for the receipt of services provided by a public entity).

transportation barriers prior to referring to services provided.[18] Thus, the majority concluded that the statute was ambiguous as to whether services included sidewalks, curbs, and parking lots because, as the majority noted, other circuits have interpreted services broadly to include at least some infrastructures, such as sidewalks.[19]

The majority turned to agency interpretation to resolve the ambiguity and noted that a regulation promulgated by the Department of Justice defines sidewalks, curbs, and parking lots as facilities.[20] A separate section of the regulation states that "no qualified individual with a disability shall, because a public entity's facilities are inaccessible . . . be denied the benefits of the services, programs, or activities of a public entity."[21] Thus, the majority concluded that the term "facilities," which includes sidewalks, curbs, and parking lots, is mutually exclusive of "services, programs, or activities," and that the regulatory requirements for facilities in §§ 35.150–35.151 would be superfluous if facilities were a subset of services, programs, or activities.[22]

This holding created a circuit split with the Ninth Circuit,[23] is counter to the conclusion reached by district courts in the Sixth, Seventh, and Tenth Circuits,[24] and is inconsistent with holdings from the Second, Third, and Sixth Circuits.[25] In *Barden v. City of Sacramento*, the Ninth Circuit interpreted the same statute and held that sidewalks were a service, program, or activity within the meaning of the ADA, thus extending Title II's reach to the maintenance of public sidewalks.[26] In the *Frame* dissent, Judge Prado argued that the majority reached the wrong conclusion because it did not recognize that a city provides an essential service through its construction and maintenance of sidewalks, curbs, and parking lots.[27] The dissent argued that the statute is unambiguous and that the plain meaning of the word "service" demands a broad reading that encompasses all normal functions of a local government.[28] It observed that the administrative regulations and congressional history clearly demonstrate an intention to construe services broadly to include anything a public entity does, and it criticized the majority's holding for ignoring precedent

18. *Frame*, 616 F.3d at 485–86.

19. *Id.* at 486.

20. *Id.* (discussing 28 C.F.R. § 35.104 (2010) ("Facility means . . . roads, walks, passageways, [and] parking lots . . . .")).

21. 28 C.F.R. § 35.149.

22. *Frame*, 616 F.3d at 487–88.

23. Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002).

24. Culvahouse v. City of Laporte, 679 F. Supp. 2d 931, 939 (N.D. Ind. 2009); Reichenbach v. City of Columbus, No. 2:03-CV-1132, 2006 WL 2381565, at *3 n.2 (S.D. Ohio Aug. 16, 2006); Young v. City of Claremore, 411 F. Supp. 2d 1295, 1304 (N.D. Okla. 2005).

25. Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998); Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997), *superseded on other grounds by* Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001); Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997).

26. *Barden*, 292 F.3d at 1077.

27. *Frame*, 616 F.3d at 490 (Prado, J., dissenting) (citing *Barden*, 292 F.3d at 1076).

28. *Id.* at 491–92.

and for creating an unworkable standard.[29]

The flaw in the majority's analysis is its failure to recognize that the construction itself of sidewalks, curbs, and parking lots is the service that is provided.[30] Services, programs, or activities is not defined in the ADA, but the Rehabilitation Act defines program or activity as "all of the operations . . . of a State or local government."[31] Congress directed that the ADA be interpreted consistently with the Rehabilitation Act,[32] meaning that services, programs, or activities should be interpreted broadly to include "anything a public entity does."[33] Moreover, there is little doubt that the plain meaning of service in the statute includes sidewalks, curbs, and parking lots. The majority defines service as "[t]he duties, work, or business performed or discharged by a public official,"[34] however, it fails to acknowledge that the construction or maintenance of a sidewalk, curb, or parking lot is "work" performed by a public official.[35] Thus, under the plain meaning of service, the statute unambiguously includes a sidewalk, curb, or parking lot within its meaning.[36] In *Innovative Health Systems, Inc. v. City of White Plains*, the Second Circuit observed that the crucial inquiry is not whether a public function is strictly a service, but whether it is a "natural or normal function or operation" of the governmental entity,[37] and the construction of public sidewalks is clearly a normal function of a city.[38] Furthermore, in a different context, the Supreme Court noted that "general government services" include sidewalks.[39] The *Frame* majority tries to distinguish between a city offering intangible services and providing tangible goods;[40] however, services, programs, or activities is a catch-all phrase, and an attempt to distinguish those services included in the statute and those that are not results in needless hairsplitting.[41]

The majority's reliance on the Department of Justice's regulations is unnecessary because the plain meaning of the statute unambiguously seeks to afford expansive coverage.[42] If the regulations are used to interpret the statute, an administrative agency's interpretation of its regulation

29. *Id.* at 492–94.
30. *Id.* 490.
31. 29 U.S.C. § 794(b) (2006).
32. Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997) (citing 42 U.S.C. § 1234(b) (2006)).
33. Yeskey v. Pa. Dep't of Corr., 118 F.3d 168, 171 (3d Cir. 1997).
34. *Frame*, 616 F.3d at 486 (majority opinion) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993)).
35. *Id.* at 492 (Prado, J., dissenting).
36. *Id.*
37. Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997), *superseded on other grounds by* Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001) (quoting Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222, 232 (S.D.N.Y. 1996)).
38. Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002).
39. Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 17–18 (1947).
40. *Frame*, 616 F.3d at 486 (majority opinion).
41. *Innovative Health Sys., Inc.*, 117 F.3d at 45.
42. *Frame*, 616 F.3d at 492 (Prodo, J., dissenting).

is given deference unless it is plainly erroneous or inconsistent with the regulation.[43] The regulation's preamble clearly states that "[t]he scope of title II's coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment . . . in that title II applies to *anything a public entity does*."[44] Further, defining sidewalks, curbs, and parking lots as a service is consistent with a regulation that requires newly built or altered pedestrian walkways to contain curb ramps at intersections.[45] Moreover, requiring a city to maintain compliant sidewalks, curbs, and parking lots is compatible with a separate regulation requiring a city to provide curb ramps in pedestrian walkways to bring its streets, roads, and walkways into ADA compliance.[46] The majority noted that the regulations define walkways and parking lots as facilities, but the regulations do not foreclose an interpretation that when a city provides those facilities,[47] it is providing a service or that some facilities can also be services, programs, or activities.[48]

The legislative history bolsters this conclusion. In enacting the statute, Congress selected the House bill's general prohibition against discrimination over the Senate's specific prohibitions method,[49] thus explicitly rejecting an approach that would have allowed possible exceptions.[50] The purpose of the ADA was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[51] and this sweeping language suggests that § 12132 be construed broadly to allow for the elimination of public entities' discrimination.[52] Title II was meant to be an extension of "the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act of 1973] to *all actions of state and local governments*,"[53] and one of the central goals of the Act was to eliminate architectural barriers that discriminated against the handicapped.[54] Thus, the ADA must be construed broadly if it is to implement its basic purpose of eliminating discrimination against those with disabilities.[55]

The majority's holding denies a plaintiff a private cause of action to enforce requirements relating to noncompliant sidewalks, curbs, and

43. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945).
44. 28 C.F.R. pt. 35, app. A at 559 (2010) (emphasis added).
45. 28 C.F.R. § 35.151(e) (2010). The Sixth Circuit has held that plaintiffs have a private cause of action against a city that fails to comply with this regulation. Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 913 (6th Cir. 2004).
46. Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002) (interpreting 28 C.F.R. § 35.150(d)(2) (2010)).
47. *Frame*, 616 F.3d at 487 (majority opinion).
48. *Id.* at 493 (Prado, J., dissenting).
49. H.R. REP. No. 101-596, at 67 (1990) (Conf. Rep.).
50. Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 732 (9th Cir. 1999).
51. 42 U.S.C. § 12101(b)(1) (2006).
52. *Bay Area Addiction Research & Treatment, Inc.*, 179 F.3d at 731.
53. H.R. REP. No. 101-485(II), at 357 (1990) (emphasis added).
54. Alexander v. Choate, 469 U.S. 287, 297 (1985).
55. Barden v. City of Sacramento, 292 F.3d 1073, 1077 (9th Cir. 2002) (quoting Hason v. Med. Bd. of Cal., 279 F.3d 1167, 1172 (9th Cir. 2002) (internal quotations omitted)).

parking lots.[56] This decision is wholly inconsistent with the public policy and purpose of the ADA and will make it more difficult for individuals with disabilities to bring a lawsuit under § 12132. When signing the legislation, President George H. W. Bush noted that the ADA was meant to be "comprehensive because the barriers faced by individuals with disabilities are wide-ranging" and that the ADA assured the opening of "all aspects of American life to individuals with disabilities—employment opportunities, *government services, public accommodations, transportation*, and telecommunications."[57] A broad reading that allows a private cause of action is consistent with the accepted interpretation that a plaintiff need not show that it is entirely impossible to access the service, program, or activity, but only that they have been denied "meaningful access."[58] In other words, for public policy reasons, the ADA's preferred interpretation is a reading that makes it easier for a plaintiff to bring suit under the ADA rather than more difficult, as is the effect of the majority's holding.[59]

Moreover, the majority's new framework is unworkable. The majority conceded that a plaintiff still has a private cause of action when the noncompliant sidewalk, curb, or parking lot denies them meaningful access to a service, program, or activity.[60] The dissent, however, pointed out that under this framework a sidewalk is outside of this standard only if it is a sidewalk that leads to nowhere.[61] This framework lacks any limitation or any indication of the impact arising in the relationship between the noncompliant object and the meaningful access to the service, program, or activity. It is unclear if disabled individuals must take the most direct route to the service, whether they will be required to take a detour around the noncompliant object if available, or what the implications will be if the noncompliant object is right outside their home.[62] On remand, the district court is left with the impossible task of applying this new and impractical standard to decipher which of the noncompliant sidewalks, curbs, and parking lots deny the plaintiffs meaningful access to other services, programs, or activities and those that do not.

In conclusion, the Fifth Circuit improperly found that sidewalks, curbs, and parking lots are not services, programs, or activities under the ADA and forbade plaintiffs a private cause of action under the statute unless they can prove that the noncompliant object denies them actual access to services, programs, or activities.[63] The majority erred in failing to acknowledge that the plain meaning of services under the ADA is to be interpreted broadly, and thus failed to determine that the construction

56. Frame v. City of Arlington, 616 F.3d 476, 488 (5th Cir. 2010).
57. Presidential Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070 (July 26, 1990) (emphasis added).
58. *Frame*, 616 F.3d at 484 (citing *Alexander*, 469 U.S. 287, 301 (1985)).
59. *Id.* at 490 (Prado, J., dissenting).
60. *Id.*
61. *Id.* at 495.
62. *Id.*
63. *Id.* at 488 (majority opinion).

and maintenance of sidewalks, curbs, and parking lots is clearly a service that a city provides.[64] Moreover, the corresponding and legislative history regulations indicate a clear intention of Congress and the Department of Justice to interpret services broadly to encompass sidewalks, curbs, and parking lots.[65] Finally, the majority's holding not only places an added burden on those individuals with disabilities who bring an ADA lawsuit, but it attempts to make a distinction that is wholly unworkable.[66] The real losers of this decision include not only the plaintiffs in this case, who are likely to have several of their allegations struck on remand,[67] but also the district courts, which will be charged with applying an unfeasible standard that attempts to make a subtle yet unattainable distinction in the term services,[68] and the millions of disabled Americans who will face a new and completely unnecessary barrier in their attempt to eliminate the discrimination they are burdened by.[69]

64. *Id.* at 492 (Prado, J., dissenting).
65. *Id.* at 493.
66. *Id.* at 494.
67. *Id.* at 484 (majority opinion).
68. *Id.* at 496 (Prado, J., dissenting).
69. *Id.* at 490.