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## **Scoot Over: How Electric Scooters Violate the ADA and What Cities Can Do to Maintain Title II Compliance**

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# SCOOT OVER: HOW ELECTRIC SCOOTERS VIOLATE THE ADA AND WHAT CITIES CAN DO TO MAINTAIN TITLE II COMPLIANCE

*Jo Ann Mazoch\**

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## I. INTRODUCTION

IN a viral Facebook post with over three thousand shares, Emily Shryock can be seen posing in her wheelchair beside a group of electric scooters on a city sidewalk.<sup>1</sup> Emily explained the photos in the post with a caption saying, “[O]n my way to work this morning the sidewalks were blocked by Bird scooters in not one, but three!, places.”<sup>2</sup> One of the photos was further captioned, “Three Bird scooters blocking the sidewalk. While the able-bodied folks walking by had the option to go around them I didn’t have that choice.”<sup>3</sup> Emily concluded the post with, “Folks need to realize not everyone has the privilege of being able to walk around these obstacles to continue on their way to work, school or play!”<sup>4</sup>

Imagine traveling down a public sidewalk and finding the path completely blocked. Whose responsibility is it to remove the blockage? The owner of the item blocking the path? The person who left the item in the path? Or is it the owner of the path itself? Emily’s Facebook post gives a firsthand perspective on this exact situation, a situation that many disabled Americans are facing in major cities throughout the country.

While electric scooters are not a new concept, recent start-ups have enhanced the old scooter model through the addition of mobile apps. Electric scooters can now be found on nearby street corners through GPS tracking by using a smartphone. Since their introduction in 2017,<sup>5</sup> these new and improved electric scooters have quickly littered city sidewalks. The scooters have been advertised as a substitute to driving and a solution to the “last mile” travel problem. While providing an alternative, cheap, and fun way to travel through a city, the dockless design of the scooters has allowed them to be left in a wide array of locations, such as across narrow sidewalks or parked on curb ramps. Unfortunately, the appeal of multiple, easily accessible scooters created hazards and made sidewalks inaccessible to those with mobility issues.

With cities facing an invasion of electric scooters, the question becomes—Who is responsible for keeping sidewalks accessible and scooter free? In response to the onslaught of scooters, lawsuits have arisen between cities, citizens, and scooter manufactures in an attempt to determine the responsible party. This paper suggests solutions for cities on how to ensure that their sidewalks remain compliant under Title II of the Americans with Disabilities Act (ADA). Part II of this article will briefly summarize Title II of the Americans with Disabilities Act and § 504 of

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1. Emily Shryock, FACEBOOK (Aug. 20, 2018), <https://www.facebook.com/emily.shryock1/posts/10160726990990174> [<https://perma.cc/RK2M-78BC>].

2. *Id.*

3. *Id.*

4. *Id.*

5. Megan Rose Dickey, *The Electric Scooter Wars of 2018*, TECH CRUNCH, <https://techcrunch.com/2018/12/23/the-electric-scooter-wars-of-2018/> [<https://perma.cc/PK6E-WCFZ>] (last visited July 6, 2019).

the Rehabilitation Act. Part III will provide an in-depth analysis of how Title II of the ADA applies to local entity-owned sidewalks and the private right of action that arises if a sidewalk is rendered inaccessible. Part IV will introduce the problems that electric scooters create for cities, while Part V will highlight the ways in which the electric scooters violate the ADA. Finally, Part VI will introduce solutions that will allow cities to use scooters while still complying with the ADA and keeping sidewalks accessible for disabled citizens.

## II. BRIEF INTRODUCTION TO THE AMERICANS WITH DISABILITIES ACT

Discrimination against the disabled has been described as “most often the product, not of invidious animus, but rather of thoughtlessness and indifference-of benign neglect.”<sup>6</sup> When the ADA was signed, President George Bush stated, “With today’s signing of the landmark Americans with Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence, and freedom.”<sup>7</sup> He further proclaimed that “[t]his historic act is the world’s first comprehensive declaration of equality for people with disabilities.”<sup>8</sup>

However, in the years since the ADA was implemented, complete equality has yet to be found. As President Barack Obama stated, “The ADA . . . made our government more responsive to Americans with disabilities. But we’ve still got more to do to live up to our responsibilities.”<sup>9</sup> One of the ways the government must live up to its responsibilities under the ADA is by keeping sidewalks accessible to those that fall under the Act’s protection.

### A. TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Title II of the ADA prohibits discrimination against disabled individuals by public entities.<sup>10</sup> Under Title II, “[N]o qualified individual with a disability<sup>11</sup> shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of

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6. *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

7. President George H.W. Bush, Remarks on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1067, 1068 (July 26, 1990).

8. *Id.*

9. President Barack Obama, Remarks on the 25th Anniversary of the Americans with Disabilities Act, 2015 DAILY COMP. PRES. DOC. 2 (July 20, 2015).

10. *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131-12161 (2012).

11. The ADA defines an individual with a disability as someone who has “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” *Id.* § 12102(1). Additionally, a physical impairment is defined as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine.” 29 C.F.R. § 1630.2(h)(1) (2018).

a public entity, or be subjected to discrimination by any such entity.”<sup>12</sup> Under the Act, “public entity” is defined as “any state or local government; any department, agency, special purpose district, or other instrumentality of a State or States or local government.”<sup>13</sup> And a “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>14</sup>

Under Title II, the duty of a public entity not to discriminate is extended not just to direct discrimination but also to discrimination “through contractual, licensing, or other arrangements, on the basis of disability.”<sup>15</sup> This means that if a local entity allows a private third-party company to provide services, the entity must ensure that the private company complies with the public entity’s duties under Title II.<sup>16</sup>

#### B. SECTION 504 OF THE REHABILITATION ACT

Similar to Title II, § 504 of the Rehabilitation Act states that any individual with a disability shall not, solely by reason of the 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.”<sup>17</sup> The Rehabilitation Act further defines “program or activity” as all the operations of state and local governments that receive federal funding.<sup>18</sup>

#### C. APPLICATION OF TITLE II AND § 504

These two acts are distinguishable, as Title II’s broad language applies to all public entities, whereas § 504 only prohibits discrimination in entities receiving federal funding.<sup>19</sup> Generally, however, the ADA and the Rehabilitation Act are interpreted *in pari materia*,<sup>20</sup> and “most United States Circuit Courts of Appeal . . . have acknowledged[ ] the ADA and the Rehab[ilitation] Act are materially indistinguishable except that the

12. 42 U.S.C. § 12132 (2012).

13. *Id.* § 12131(1)(A)–(B).

14. *Id.* § 12131(2).

15. 28 C.F.R. § 35.130(b)(1) (2018).

16. *See James v. Peter Pan Transit Mgmt., Inc.*, No. 5:97-CV-747-BO-1, 1999 U.S. Dist. LEXIS 2565, at \*25 (E.D.N.C. Jan. 20, 1999) (holding that a city was not relieved of its Title II obligations merely because the noncompliant bus was operated by an independent contractor).

17. Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2012).

18. *See id.* § 794(b).

19. *See id.*

20. *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc); *see also Wachovia Bank, Nat’l Ass’n v. Schmidt*, 546 U.S. 303, 315–16 (2006) (demonstrating that under the *in pari materia* canon, statutes addressing the same subject matter should generally be read “as if they were one law”).

Rehab[ilitation] Act requires evidence of receipt of federal funding.”<sup>21</sup> Further, “Congress has instructed courts that nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under title V [(i.e., § 504)] of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title.”<sup>22</sup> Together, these two acts prohibit public entities from discriminating against qualified individuals.

Following the enactment of the ADA, the Attorney General provided regulations to supplement the statute.<sup>23</sup> The regulations offer guidelines for compliance with the ADA. One of the requirements of the regulations is that “[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>24</sup> Further, these accommodations “must be sufficient to provide a disabled person ‘meaningful access to the benefit’ or service offered by [the city].”<sup>25</sup>

Additionally, Title II’s implementing sections, § 35.150 and § 35.151, show that the reasonable modification requirements can be satisfied in a number of different ways.<sup>26</sup> Under § 35.151, facilities built or altered after 1992 must be built with specific architectural accessibility standards.<sup>27</sup> Further, under the same section, alterations made to ensure that a facility is in compliance with the ADA that

affects or could affect the usability of or access to an area of a facility that contains a primary function shall be made so as to ensure that, to the maximum extent feasible, the path[s] of travel to the altered area . . . are readily accessible to and usable by individuals with disabilities . . . .<sup>28</sup>

However, under § 35.150, which applies to older facilities, a public entity can comply with the ADA by including relocating services to alternative, accessible sites, and assigning aides to assist persons with disabilities to access the services.<sup>29</sup>

However, Congress has made clear that a public entity is not required to undertake a modification that would impose an undue financial or administrative burden, threaten historic preservation, or effect a fundamen-

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21. *Mich. Paralyzed Veterans of Am., Inc. v. Mich. Dep’t of Transp.*, No. 15-cv-13046, 2017 U.S. Dist. LEXIS 183280, at \*11–12 (E.D. Mich. Nov. 6, 2017).

22. *Id.* at \*12.

23. 42 U.S.C. § 12134 (2012).

24. 28 C.F.R. § 35.130(b)(7)(i) (2018).

25. *Van Velzor v. City of Burleson*, 43 F. Supp. 3d 746, 752 (N.D. Tex. 2014) (quoting *Alexander v. Choate*, 469 U.S. 287, 301 (1985)).

26. *Tennessee v. Lane*, 541 U.S. 509, 532 (2004).

27. *See* 28 C.F.R. § 35.151.

28. *Id.* § 35.151(b)(4).

29. *See id.* § 35.150.

tal alteration in the nature of the service.<sup>30</sup> Because individuals with disabilities should have access to services and facilities, if the “action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.”<sup>31</sup> Further, “a public entity is not only prohibited from affording to persons with disabilities services that are ‘not equal to that afforded others,’ . . . but also cannot prevent a qualified individual with a disability from enjoying ‘any aid, benefit, or service,’ regardless of whether other individuals are granted access.”<sup>32</sup>

Additionally, the Supreme Court has recognized that both the ADA and the Rehabilitation Act are enforceable through private causes of action.<sup>33</sup> To prevail under a Title II private right of action, generally a plaintiff must show that

(1) he is a “qualified individual with a disability”; (2) he was either excluded from participation in or denied the benefits of a public entity’s services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.<sup>34</sup>

By allowing citizens who fall under the ADA’s protection a private right of action against public entities that discriminate, courts then had to determine how far to extend Title II’s “services, programs, or activities” language and what public entities had to do to remain in compliance.

### III. COURTS HAVE HELD THAT SIDEWALKS ARE INCLUDED UNDER TITLE II’S SERVICES, PROGRAMS, OR ACTIVITIES

The Supreme Court has stated that “[t]o effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life . . . .”<sup>35</sup> However, the broad language of the ADA has led to questions about the extent of this “sweeping purpose.” This analysis will focus on court decisions that determine that Title II’s services, programs, or activities language extends to sidewalks.

While often taken for granted, the importance of accessible sidewalks cannot be overstated. Sidewalks have been described as “critical path-

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30. *See id.* In the instance where a public entity believes that the proposed action would “fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with § 35.150(a) of this part would result in such alteration or burdens.” *Id.* § 35.150(a)(3).

31. *Id.*

32. *Henrietta D. v. Bloomberg*, 331 F.3d 261, 274 (2d Cir. 2003) (citations omitted).

33. *Barnes v. Gorman*, 536 U.S. 181, 184–85 (2002).

34. *Weinreich v. L.A. Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997); *see also Melton v. Dall. Area Rapid Transit*, 391 F.3d 669, 671 (5th Cir. 2004).

35. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001).

ways for navigating the many places within a community . . . Sidewalks facilitate travel and enhance sustainability by reducing dependence on motor vehicles to travel within and among neighborhoods. Sidewalks also enhance public safety by providing pedestrians with a walking space outside of the roadway.”<sup>36</sup> The importance of accessibility is especially true when it comes to sidewalks used by disabled individuals.

While sidewalks are never directly addressed by the ADA, Title II of the Act does state, “[N]o 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.”<sup>37</sup> Courts have broadly interpreted the phrase “service, program, or activity.” The Sixth Circuit found that “‘services, programs, or activities’ encompasses virtually everything that a public entity does.”<sup>38</sup> Further, the Second Circuit determined that “the language of Title II’s anti-discrimination provision does not limit the ADA’s coverage to conduct that occurs in the ‘programs, services, or activities’” but instead “is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.”<sup>39</sup> This broad interpretation has prevailed when courts have been faced with the issue of whether services, programs, or activities includes local sidewalks.

#### A. *BARDEN V. CITY OF SACRAMENTO*

The Ninth Circuit broadly applied services, programs, or activities to public sidewalks in *Barden v. City of Sacramento*.<sup>40</sup> In a class action suit against the city, a group of individuals with mobility and vision disabilities alleged that the city violated the ADA and the Rehabilitation Act when it failed to install curb ramps in newly constructed or altered sidewalks, and when it failed to maintain existing sidewalks to ensure accessibility by persons with disabilities.<sup>41</sup> The lower court ruled that the sidewalks were not subject to the program access requirements of either the ADA or the Rehabilitation Act because they are not a service, program, or activity of the city, therefore, the plaintiffs were denied a cause of action against the city.<sup>42</sup>

On appeal, the court disagreed and supported the decision to apply Title II to city sidewalks, by relying on the Rehabilitation Act. The Rehabilitation Act defines program or activity as “‘all of the operations of’ a qualifying local government,”<sup>43</sup> and the legislative history of the ADA

36. Robin Paul Malloy et al., *Land Use Law and Sidewalk Requirements Under the Americans with Disabilities Act*, 51 REAL PROP., TR. & EST. L.J. 403, 405 (2017).

37. 42 U.S.C. § 12132 (2012) (emphasis added).

38. *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998).

39. *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997); see also *Kiman v. N.H. Dep’t of Corr.*, 451 F.3d 274, 287 (1st Cir. 2006); *Yeskey v. Pa. Dep’t of Corr.*, 118 F.3d 168, 172 (3d Cir. 1997).

40. See *Barden v. City of Sacramento*, 292 F.3d 1073, 1076–77 (9th Cir. 2002).

41. *Id.* at 1075.

42. See *id.*

43. *Id.* at 1077 (quoting Rehabilitation Act of 1973, 29 U.S.C. § 794(b)(1)(A) (2012)).



“provid[es] that Title II . . . ‘simply extends the anti-discrimination prohibition embodied in section 504 [of the Rehabilitation Act] to all actions of state and local governments.’”<sup>44</sup> Further, the Ninth Circuit reasoned that the ADA had to 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.’”<sup>45</sup> The court then determined that when deciding whether each function of a city can be characterized as a service, program, or activity, the inquiry should not be “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.’”<sup>46</sup> In this case, the Ninth Circuit found that maintaining public sidewalks is a normal function of a city and, therefore, maintaining sidewalk accessibility falls under the city’s Title II obligations.<sup>47</sup>

The court then looked to 28 C.F.R. § 35.150, which, while not addressing sidewalks, does require installation of curb ramps in all pedestrian walkways.<sup>48</sup> Under this analysis, the Ninth Circuit reasoned that there is 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 sidewalks between the curb ramps were inaccessible.”<sup>49</sup> The court therefore concluded that Title II applied to the maintenance of public sidewalks, which is a normal function of a municipal entity.<sup>50</sup>

#### B. *FRAME v. CITY OF ARLINGTON*

Additionally, in *Frame v. City of Arlington*, the Fifth Circuit held that Title II of the ADA and § 504 of the Rehabilitation Act “unambiguously extend to newly built and altered public sidewalks.”<sup>51</sup> In this case, the plaintiffs depended on motorized wheelchairs to move throughout the city and alleged that inaccessible sidewalks made it “dangerous, difficult, or impossible” for them to travel to various public and private establishments within the city.<sup>52</sup> The court highlighted the importance of a city building and altering sidewalks to meet a demand for the safe movement of people because cities “have the duty to keep their communities’ streets open and available for movement of people and property, the primary purpose to which the streets are dedicated.”<sup>53</sup>

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44. *Id.* (alteration in original) (quoting H.R. REP. NO. 101-485(II), at 84 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 367).

45. *Id.* (quoting *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1172 (9th Cir. 2002)).

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

47. *Id.*

48. *Id.* at 1077.

49. *Id.*

50. *Id.*

51. *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc).

52. *Id.* at 221.

53. *Id.* at 226 n.40 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939)).

Further, the Fifth Circuit determined that because sidewalks are “services” of a public entity under any reasonable understanding of that term, “when a city decides to build or alter a sidewalk and makes that sidewalk inaccessible to individuals with disabilities . . . the city unnecessarily denies disabled individuals the benefits of its services in violation of Title II.”<sup>54</sup> Therefore, the city must take reasonable measures to ensure that the sidewalks are readily accessible to individuals with disabilities.<sup>55</sup>

Moreover, the Fifth Circuit made clear that while the plaintiffs did have a private right of action against the city, the claim occurred not when the defendant built the sidewalk, but when the plaintiff became disabled and then encountered the harm of being unable to use the sidewalk.<sup>56</sup> This means that to show standing, plaintiffs do not need to actually use the noncompliant sidewalk, therefore avoiding the risk of using a noncompliant sidewalk, but instead must show that the noncompliant sidewalk actually affects their activities in some concrete way.<sup>57</sup> In this case, the plaintiffs had standing because they were able to demonstrate that their inability to use the sidewalk resulted in them being forced to take “longer and more dangerous routes.”<sup>58</sup>

### C. AFTER *BARDEN* AND *FRAME*

The above rulings are important for local entities as they give standing to disabled individuals who face inaccessible sidewalks.<sup>59</sup> While there has been some debate about whether states are immune from money damages under Title II,<sup>60</sup> under the ADA, municipal and local governments can still be sued by individuals with disabilities.

However, a common criticism of cases that interpret the ADA broadly is that these decisions place a large financial burden on the state and local governments that must fund the efforts to maintain ADA compliance.<sup>61</sup> For example, after a lawsuit was filed against the city of Los Angeles by a

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54. *Id.* at 226.

55. *Id.* at 227–29.

56. *Id.* at 238.

57. *Id.* at 236.

58. *Id.*

59. *See, e.g., id.* at 223.

60. *See* *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir. 2001) (holding that the state defendant was entitled to sovereign immunity and therefore the state is immune to suit by private individuals under Title II); *see also* *Thompson v. Colorado*, 278 F.3d 1020, 1022 (10th Cir. 2001). *But see* *Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir. 2002) (holding that Title II is an exercise of Congressional power and therefore is not barred by the Eleventh Amendment).

61. Diane K. Lutt, Comment, *Right the First Time: A Critique of the Fifth Circuit’s Refusal to Classify Sidewalks as a “Service, Program, or Activity” Under Title II of the Americans with Disabilities Act* [*Frame v. City of Arlington*, 616 F.3d 476 (5th Cir. 2010)], 50 WASHBURN L.J. 773, 792 (2011) (citing Edwin P. Voss, Jr., *How Title II of the Americans with Disabilities Act May Be Defended by State and Local Governments*, 38 URB. LAW. 627, 628 (2006) (“Disability advocates find federal court a convenient forum to force governmental entities to enter into consent decrees promising to spend millions in taxpayer dollars to create new facilities or to undertake major construction projects to address newly asserted accessibility claims that have not been previously raised.”)).

group of disabled citizens, the city agreed to pledge more than \$1.3 billion over thirty years “to fix its massive backlog of broken sidewalks and make other improvements to help those with disabilities navigate the city . . . .”<sup>62</sup>

Nevertheless, courts have gone on to demonstrate the importance and reason behind concluding that sidewalks fall within the scope of Title II:

Any sensible reading of ADA Title II compels the conclusion that maintaining public pedestrian thoroughfares for citizens to get around a city—and access the many public services and businesses located within—is the archetypal example of the most fundamental of public services. Inaccessible sidewalks are, in fact, the single most readily conceivable example of a basic obstacle to accessibility that comes to mind when considering the purpose that animates the ADA, which is to eliminate obstacles to the full enjoyment of public life by disabled citizens. . . . It is simply common sense: If disabled pedestrians cannot access the sidewalks, then they can hardly access anything else that a city has to offer.<sup>63</sup>

Additionally, part of a city’s duty to ensure reasonable measures that the sidewalks are readily accessible to individuals with disabilities is the maintenance and upkeep of sidewalks. Under the ADA, a public entity is required to “maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities by the Act . . . .”<sup>64</sup> This means that “municipalities are responsible for general upkeep of sidewalks to ensure they remain open and usable to persons with disabilities,”<sup>65</sup> and this upkeep “includes, but is not limited to, snow and debris removal, as well as maintenance of an accessible path throughout works zones, and corrections of any other disruptions.”<sup>66</sup>

Courts have added another requirement by holding that a city is required to keep disabled access routes free of obstruction, even obstructions created by third parties.<sup>67</sup> In *Cohen v. City of Culver City*, an issue arose when the city itself was in compliance with the ADA but private vendors were allowed to prevent disabled access to the existing sidewalks during a street fair.<sup>68</sup>

The court began by analogizing the city’s conduct to that of altering its sidewalks for reasons *unrelated* to ADA compliance—as covered by 28 C.F.R. § 35.151.<sup>69</sup> Section 35.151 allows for temporary blockages related to sidewalk alterations, so long as they are made to bring a facility into

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62. Emily Alpert Reyes, *L.A. Agrees to Spend \$1.3 Billion to Fix Sidewalks in ADA Case*, L.A. TIMES (Apr. 1, 2015), <https://www.latimes.com/local/lanow/la-me-ln-lawsuit-broken-sidewalks-20150331-story.html> [<https://perma.cc/KSC4-FTHA>].

63. *Mote v. City of Chelsea*, 252 F. Supp. 3d 642, 654 (E.D. Mich. 2017).

64. 28 C.F.R. § 35.133(a) (2018).

65. Malloy, *supra* note 36, at 414 (citing 28 C.F.R. § 35.133).

66. *Id.*

67. *Cohen v. City of Culver City*, 754 F.3d 690, 699 (9th Cir. 2014).

68. *See id.* at 698.

69. *See id.* at 699.

compliance with the ADA, if they are made in a way that ensures—to the maximum extent feasible—that the facility will become accessible to disabled persons.<sup>70</sup> Culver City was not given that protection, however, because the “[c]ity chose to alter the existing arrangement of the public sidewalk by allowing private vendors to set up displays . . .” and the “vendors’ presence was entirely unrelated to the goal of making the City’s programs or services accessible to disabled persons.”<sup>71</sup> Therefore the city could not escape liability by arguing that a marginally longer alternative route was available under the § 35.150 standard,<sup>72</sup> which allows for a public entity to comply with the ADA by including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities to access the services.<sup>73</sup>

Further, the court went on to say that “[o]bstructed sidewalks exclude disabled persons from ordinary communal life and force them to risk serious injury to undertake daily activities,” and that obstructed sidewalks are “precisely the sort of ‘subtle’ discrimination stemming from ‘thoughtlessness and indifference’ that the ADA aims to abolish.”<sup>74</sup> This case, along with *Barden* and *Frame*, demonstrates the importance of maintaining sidewalk accessibility and the responsibilities that cities have to their disabled citizens.

#### IV. ELECTRIC SCOOTERS AND THE PROBLEMS THEY CREATE FOR CITIES

Electric scooters began entering cities in mid-2017.<sup>75</sup> Since their introduction, the scooters have caused a number of problems, both logistical and legal, for the cities in which they operate. This section will give an overview of what an electric scooter is and how it works, and then demonstrate the impact that the scooters have had on cities.

##### A. A BRIEF ELECTRIC SCOOTER OVERVIEW

While many rideshare scooter companies exist<sup>76</sup> and more are being added every day,<sup>77</sup> this analysis will focus on Bird, because it is one of the

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70. See 28 C.F.R. § 35.151.

71. *Cohen*, 754 F.3d at 699.

72. See *id.*

73. See 28 C.F.R. § 35.150.

74. *Cohen*, 754 F.3d at 700 (quoting *Chapman v. Pier 1 Imps., Inc.*, 631 F.3d 939, 944–45 (9th Cir. 2011)).

75. See Andrew J. Hawkins, *The Electric Scooter Craze Is Officially One Year Old—What’s Next?*, VERGE (Sept. 20, 2018), <https://www.theverge.com/2018/9/20/17878676/electric-scooter-bird-lime-uber-lyft> [<https://perma.cc/K5UY-RW7W>].

76. See BIRD, <https://www.bird.co/> [Permalink unavailable] (last visited July 6, 2019); Lime-S, LIME, <https://www.li.me/electric-scooter> [<https://perma.cc/N83E-A64H>] (last visited July 6, 2019); SPIN, <https://www.spin.app/> [<https://perma.cc/K54D-NC7U>] (last visited July 6, 2019).

77. Aparna Narayanan, *Auto Giants Rev up Electric Scooter Stampede but Sidewalk Rage Intensifies*, INVESTOR’S BUS. DAILY (Nov. 7, 2018), <https://www.investors.com/news/electric-scooter-companies-electric-bike-companies/> [<https://perma.cc/D56C-DA7A>].

first companies of its kind<sup>78</sup> and it is located in numerous cities.<sup>79</sup> Bird first launched in September 2017 in Santa Monica<sup>80</sup> and has since expanded to over one hundred cities.<sup>81</sup>

Using a scooter is seen by riders as cheap, easy, and convenient.<sup>82</sup> Bird's website lists simple steps for using their electric scooters.<sup>83</sup> The rider begins by using a smartphone to find and unlock the scooter.<sup>84</sup> The rider is charged a base fee for using the scooter and an additional fee per minute the scooter is used.<sup>85</sup> The scooter can then be left wherever the rider finished the ride.

The company considers itself a “last mile electric scooter rental service,” meaning its goal is to help commuters make it through a portion of their commute more efficiently, such as by offering a quick ride from the rider's location to a bus stop.<sup>86</sup> The “last mile” is a term used to mean “the last leg of people's travels within a city—be it after they park their car, come off a bus or metro or simply do a quick trip to the corner shop, a cafe for coffee etc.”<sup>87</sup> Last mile travel creates a problem when public transportation does not take riders right where they need to go, parking is not available, owning a car is not reasonable, or walking is not the best or most convenient way to navigate a city.<sup>88</sup> When announcing plans to bring Bird scooters to more cities, the company's founder and chief executive, Travis VanderZanden, proudly stated, “Today, 40 percent of car trips are less than two miles long. Our goal is to replace as many of those trips as possible so we can get cars off the road and curb traffic and greenhouse gas emissions.”<sup>89</sup> While the mission of the scooter companies is admirable, the launch of scooters in cities has been anything but.

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78. See Dickey, *supra* note 5.

79. See *id.*

80. See Hawkins, *supra* note 75.

81. *Cities*, BIRD, <https://www.bird.co/cities/> [Permalink unavailable] (last visited July 6, 2019) [hereinafter *Cities*, BIRD].

82. Umair Irfan, *Electric Scooters' Sudden Invasion of American Cities, Explained*, VOX (Sept. 7, 2018), <https://www.vox.com/2018/8/27/17676670/electric-scooter-rental-bird-lime-skip-spin-cities> [https://perma.cc/C2P6-RA24].

83. *How It Works*, BIRD, <https://www.bird.co/how/> [Permalink unavailable] (last visited July 6, 2019).

84. See *id.*

85. See Melia Robinson, *A Startup in the West Coast Scooter Sharing Craze Is Already Worth \$1 Billion—Here's What It's Like to Ride a Bird Scooter*, BUS. INSIDER (May 30, 2018), <https://www.businessinsider.com/bird-electric-scooter-review-2018-4> [https://perma.cc/MVN3-8QF4].

86. See *to Live and Scoot in L.A.*, BLOOMBERG BUSINESSWEEK (Sept. 18, 2018), <https://www.bloomberg.com/news/features/2018-09-18/bird-scooters-spread-across-los-angeles-one-year-after-launch> [https://perma.cc/NC4S-HVFN].

87. The Stigo Blog, *The Last Mile—The Term, the Problem and the Odd Solutions*, MEDIUM (Oct. 4, 2017), <https://medium.com/the-stigo-blog/the-last-mile-the-term-the-problem-and-the-odd-solutions-28b6969d5af8> [https://perma.cc/5GTV-5T7X].

88. See *id.*

89. Luz Lazo, *First the Dockless Bikes, Now Scooters*, WASH. POST (Mar. 13, 2018), [https://www.washingtonpost.com/news/dr-gridlock/wp/2018/03/13/first-the-dockless-bikes-now-you-can-hop-on-a-scooter-at-a-sidewalk-near-you/?utm\\_term=.30118ecf4734](https://www.washingtonpost.com/news/dr-gridlock/wp/2018/03/13/first-the-dockless-bikes-now-you-can-hop-on-a-scooter-at-a-sidewalk-near-you/?utm_term=.30118ecf4734) [https://perma.cc/8XH6-7GNM].

## B. THE VOLATILE RELATIONSHIP BETWEEN CITIES AND SCOOTERS

Unfortunately for the start-ups, electric scooters are entering cities that are unwelcoming toward services that impact transportation, since the implementation of rideshare services such as Uber and Lyft were launched without regulation.<sup>90</sup> Cities are again having to “reel in a new wave of transportation startups that simply showed up and started operating without permission.”<sup>91</sup>

In addition to entering hostile territory, electric scooter companies have created their own unique problems for cities. Some cities claim that Bird launched its scooters in their cities without giving any notice or warning to city officials.<sup>92</sup> Further, Bird scooters have been accused of injuring citizens<sup>93</sup> and trespassing on private businesses.<sup>94</sup> Even though the scooters have been in use since mid-2017, the first Centers for Disease Control study to assess the health risks of dockless scooters was only announced in early December 2018.<sup>95</sup> Hatred for the scooters has led citizens to take matters into their own hands, which has resulted in scooters being set on fire or thrown in oceans and local lakes, leading to additional work for city maintenance workers.<sup>96</sup> While these instances show the annoyances created by the scooters for the cities, the largest problem the scooters create is inaccessible sidewalks.

## V. SCOOTERS AND THE ADA: HOW BLOCKED SIDEWALKS LEAVE A CITY VULNERABLE

As demonstrated above, the invasion of scooters into unsuspecting cities has created countless problems. However, one of the most critical issues cities face with the influx of the motorized scooters is that it interferes with a city’s duty to keep sidewalks accessible. One San Francisco citizen summed up the sudden flood of scooters by explaining, “A

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90. Regina Clewlow, *In the Scooter Wars, It Turns Out Cities Get to Decide Who Rules the Streets*, FORBES (Aug. 31, 2018), <https://www.forbes.com/sites/reginaclewlow/2018/08/31/in-the-scooter-wars-it-turns-out-that-cities-get-to-decide-who-rules-the-streets/#55877be43f9d> [https://perma.cc/2X5F-U44C].

91. See Johana Bhuiyan, *Scooter Companies Tried to Barge into San Francisco and Got Kicked Out. Now They’re Making Big Promises to Get Legal*, VOX (June 26, 2018), <https://www.recode.net/2018/6/26/17490378/scooter-sharing-companies-san-francisco-legal-permits> [https://perma.cc/63QG-B8G7].

92. *City of Milwaukee v. Bird Rides Inc.*, No. 18-CV-1066-JPS, 2018 U.S. Dist. LEXIS 187996, at \*1 (E.D. Wis. Nov. 2, 2018).

93. See Alissa Walker, *Bird, Lime Named in Class-Action Lawsuit*, CURBED (Oct. 22, 2018), <https://www.curbed.com/2018/10/22/18009492/bird-lime-scooter-lawsuit-los-angeles> [https://perma.cc/2V2A-LDD8].

94. See Alison Griswold, *Electric Scooter Company Bird Is Being Sued for Trespass*, QUARTS (Dec. 4, 2018), <https://qz.com/1484162/electric-scooter-company-bird-is-being-sued-for-trespass/> [https://perma.cc/K2V8-2GKL].

95. Dan Solomon, *The CDC’s First Study of Dockless Electric Scooters Will Happen in Austin*, TEX. MONTHLY (Dec. 7, 2018), <https://www.texasmonthly.com/article/cdc-study-electric-scooters-austin/> [https://perma.cc/Q9YC-RL2L].

96. See Don Sweeney, *Electric Scooters Are Taking over U.S. Cities. Fires, Poop and Bans Are Not Stopping Them*, SACRAMENTO BEE (Aug. 13, 2018), <https://www.sacbee.com/news/nation-world/national/article216596135.html> [Permalink unavailable].

few weeks ago, I had not noticed any electric scooters in SF. Now you can't exit a building without tripping over one."<sup>97</sup> While the scooters might block everyone's access to sidewalks, this creates an especially dangerous situation for those with disabilities because they are now faced with a challenging or even impossible task of trying to find a safe way around the scooters.<sup>98</sup> The scooters are small enough to be hard to reach, but large enough to create a barrier that is cumbersome and difficult to move. While able-bodied citizens can step over or easily move a misplaced scooter, not every disabled citizen has this option.

#### A. VIOLATIONS OF THE ADA COULD LEAD TO CLASS ACTION SUITS AGAINST CITIES

Disabled citizens might take this problem to the judicial system. Because of this, cities and electric scooter operators may soon be facing an influx of litigation from class action suits. To have standing in a case against a city, a disabled citizen would have to show that

(1) he is a "qualified individual with a disability"; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of his disability.<sup>99</sup>

While no rulings have been made, in October 2018, Mia Labowitz, a paraplegic, filed a class action lawsuit against Bird and Lime (Electric Scooter Defendants), and Santa Monica, Los Angeles, and Beverly Hills (the City Defendants) under Title II and § 504.<sup>100</sup> In the complaint, Labowitz alleges that the

Electric Scooter Defendants' obvious and deliberate exploitation of the rights of disabled persons, together with the City Defendants' deliberate indifference and failure to adopt, implement or enforce ordinances or other requirements necessary to ensure that the Pedestrian Rights of Way are kept free of the Electric Scooter obstructions have resulted in discrimination against persons with disabilities in the form of denial of access to the Pedestrian Rights of Way.<sup>101</sup>

Further the complaint states that the "lack of restrictions regarding the operator, creates hazardous conditions which causes [the Plaintiff], and likely others in the [ADA protected class] difficulty, humiliation and frustration"<sup>102</sup> and that the scooters "deter the Plaintiffs from using the Pedestrian Rights of Way."<sup>103</sup> While the outcome of this case has yet to be

97. Robinson, *supra* note 85.

98. See Shryock, *supra* note 1.

99. See Weinreich v. L.A. Cty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997); see also Melton v. Dall. Area Rapid Transit, 391 F.3d 669, 671 (5th Cir. 2004).

100. See Complaint at 1–14, Labowitz v. Bird Rides, Inc., No. 2:18-cv-09329 (C.D. Cal. Oct. 31, 2018).

101. *Id.* at 35.

102. *Id.* at 24.

103. *Id.* at 25.

decided, it demonstrates the potential legal ramifications that a city may face if it continues to allow electric scooter companies to have free reign over its sidewalks.

#### B. WHAT SCOOTER COMPANIES ARE DOING IN ATTEMPT TO COMPLY WITH THE ADA

While Bird's mission to "reduce traffic congestions and carbon emissions by providing people with a safe, affordable, and environmentally friendly alternative to cars"<sup>104</sup> is commendable, the company has done little to successfully solve the issue of parked scooters blocking the public right of way. Bird, recognizing that the scooters do create a problem, has made some attempt to decrease scooters blocking the sidewalks. The company's website asks that the rider not block public pathways when parking the scooter and further suggests that the scooters be parked by bike racks whenever possible.<sup>105</sup> Additionally, the company offers "Community Mode" through their mobile app that allows for anyone with access to the app to report bad parking.<sup>106</sup>

Bird has even asked other scooter and bike sharing companies to sign a "Save Our Sidewalks" pledge.<sup>107</sup> The purpose of the pledge is to "prevent American cities from suffering the same fate of many Chinese cities where out-of-control vehicle deployment has led to piles of abandoned and broken bicycles over-running sidewalks and polluting public areas."<sup>108</sup> The pledge states, "Although we are competitors, we all share a passion for the transformation that we are all working to bring about. But as an industry of innovators, we need to lead not just on technology, but on social responsibility."<sup>109</sup> To achieve this goal, the pledge calls for daily pickup to prevent cluttering of sidewalks; responsible growth, so that there is not an increase of vehicles unless each vehicle is being used at least three times per day; and revenue sharing in which the company offers to give one dollar per vehicle per day to city governments, so that the money can be used to build more bike lanes, promote safe riding, and maintain shared infrastructure.<sup>110</sup>

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104. *Cities*, BIRD, *supra* note 81.

105. *See id.*

106. *Id.*

107. *See Bird Challenges Competitors to Sign S.O.S (Save Our Sidewalks) Pledge - Includes Dollar-A-Day Per Vehicle Payment to Cities*, PR NEWSWIRE (May 27, 2018), <https://www.prnewswire.com/news-releases/bird-challenges-competitors-to-sign-sos-save-our-side-walks-pledge—includes-dollar-a-day-per-vehicle-payment-to-cities-300620643.html> [<https://perma.cc/C2HN-B784>].

108. *Id.*

109. *Id.*

110. *See id.* In response to the pledge, Spin, a competitor of Bird stated, "Our competitors' recent overtures, including a recent 'Save our Sidewalks' campaign, come off as insincere given recent criminal complaints and settlements. . . . Unlike the other operators, we reached out to the appropriate stakeholders before operating in San Francisco." Euwyn Poon, *Spin's Response to Recent "Pledges" and Our Approach to Working with Cities*, SPIN BLOG (Mar. 29, 2018), <https://blog.spin.pm/spins-response-to-recent-pledges-and-our-approach-to-working-with-cities-b2308b9e693d> [<https://perma.cc/9W4N-9XTQ>].



Other measures taken by scooter and bike share companies include asking users to take a photo verifying proper docking before being allowed to check in the scooter after riding, asking scooter chargers<sup>111</sup> to move scooters that are not parked correctly, and using GPS to impose fines on improperly parked bikes while rewarding proper parkers with free rides.<sup>112</sup> However, the rider ultimately has the freedom to leave the scooter wherever they find convenient, even if that means in the middle of the sidewalk. Further, the company's parking recommendations, even if heeded, do not account for the scooters being moved or knocked over onto the sidewalk by a non-rider.

The scooter companies should be commended on their attempt to regulate the parking of its scooters, but these guidelines are hard to enforce and easily ignored by riders. For example, one rider wrote about her first electric scooter ride and touted that “[t]he experience was delightfully transgressive—no reservations, no red tape, nobody telling me where I could leave the thing once I was done.”<sup>113</sup> Cities have expressed frustrations with scooter users not following these unenforced rules, saying that “Bird users are supposed to use streets and bike lanes, similar to cyclists, and not sidewalks. They’re directed to park their Birds like bikes ‘and not block sidewalks, doorways or ramps,’ but the city says these instructions are being ignored.”<sup>114</sup>

### C. WHAT CITIES ARE DOING IN AN ATTEMPT TO COMPLY WITH THE ADA

Despite Bird's fruitless attempts at keeping its scooters from blocking sidewalks, it is clear from the ADA and the interpreting case law that local governments are responsible for making sure that the accessibility of the sidewalk is maintained. While inaccessible sidewalks are ultimately caused by private scooter vendors and those riding the scooters, the ADA has made clear that a city cannot escape liability just because a private contractor is the cause of the noncompliance.<sup>115</sup> It is undeniably the city's

111. Scooter chargers find scooters within the community, take the scooters home to charge, and then place the scooters back on sidewalks once charged. *See Chargers*, BIRD, <https://chargers.bird.co/join> [Permalink unavailable] (last visited July 6, 2019).

112. Derin Kiykioglu & Jeffrey D. Skinner, *Riding Ahead of the Electric Scooter Curve*, SCHIFF HARDIN: PROD. LIAB. & MASS TORTS BLOG (Nov. 27, 2018), <https://www.productliabilityandmasstorts.com/2018/11/riding-ahead-of-the-electric-scooter-curve/> [https://perma.cc/6QZX-YU6S].

113. Robin Abcarian, *The Bird Electric Scooter Conundrum: So Fun, So Exhilarating, So Dangerous*, L.A. TIMES (Feb. 6, 2018), <https://www.latimes.com/local/abcarian/la-me-abcarian-bird-scooters-20180206-story.html> [https://perma.cc/5V7C-MBX8].

114. Joey Garrison, *Bird Agrees to Suspend Operations in Nashville, Wait for Scooter Regulations*, TENNESSEAN (June 7, 2018), <https://www.tennessean.com/story/news/2018/06/07/bird-scooters-impounded-nashville-thursday/681281002/> [https://perma.cc/7GUM-ACJU].

115. *See* 28 C.F.R. § 35.130(b)(1) (2018) (stating that the duty of a public entity to not discriminate is further extended to discrimination “through contractual, licensing, or other arrangements”); *see also* *Cohen v. City of Culver City*, 754 F.3d 690, 699 (9th Cir. 2014); *James v. Peter Pan Transit Mgmt., Inc.*, No. 5:97-CV-747-BO-1, 1999 U.S. Dist. LEXIS 2565, at \*25 (E.D.N.C. Jan. 20, 1999).

job to make sure that electric scooters remain out of the pedestrian right of way. However, while cities are concerned about the obstructions the scooters create,<sup>116</sup> it is not entirely clear how the cities should go about keeping the paths clear.

The problem of electric scooter parking has created many conflicts between cities and electric scooter companies. Some critics have gone as far as to dub the situation “Scootergeddon, Scooterpocalypse, and Scooter Wars.”<sup>117</sup> Cities have taken to banning, reducing, and impounding the scooters.<sup>118</sup> Some of these measures demonstrate annoyance for how scooter companies have operated in the past. For example, only two scooters companies in San Francisco are permitted to operate, in large part because the other companies—who are now not allowed to operate there—initially launched in the city before the permitting process was in place.<sup>119</sup> Critics of this approach worry that banning the scooters may be detrimental to lower income individuals, as they cite studies that show that lack of accessible transportation is a major hurdle to anyone trying to escape poverty.<sup>120</sup> Even further, bans and fleet caps are seen by some as counterintuitive to city environmental and sustainability programs.<sup>121</sup>

However, the biggest problem prompted by these bans is that they have invited lawsuits.<sup>122</sup> Additionally, due to the multitude of impounded scooters, instructions for how to convert impounded scooters into personal scooters that do not require payment have appeared online.<sup>123</sup> This could result in lost profits for scooter companies and potentially even more legal issues.<sup>124</sup>

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116. See Abcarian, *supra* note 113.

117. Maggie Tillman, *E-Scooter Invasion: Everything You Need to Know About the Electric Scooters from Bird, Lime and Spin*, POCKET-LINT (June 8, 2018), <https://www.pocket-lint.com/apps/news/144782-e-scooter-invasion-everything-you-need-to-know-about-electric-scooters-from-bird-lime-and-spin> [<https://perma.cc/4STD-734A>].

118. See, e.g., Megan Rose Dickey, *Lime, Bird and Spin Have to Temporarily Remove Scooters from SF*, TECH CRUNCH, <https://techcrunch.com/2018/05/24/bird-lime-spin-electric-scooters-san-francisco/> [<https://perma.cc/WCN5-AV7H>] (last visited July 6, 2019); Joey Garrison, *Nashville to Bird: Remove All Scooters from City Rights-of-Way by End of Wednesday or Face Impounding*, TENNESSEAN (June 6, 2018), <https://www.tennessean.com/story/news/2018/06/06/nashville-bird-remove-all-scooters-city-rights-way-end-wednesday-face-impounding/679141002/> [<https://perma.cc/BAF8-J8JK>]; Edvard Pettersson, *Bird Sues Beverly Hills Over Ban on Electric Scooters, Impounds*, BLOOMBERG (Nov. 2, 2018), <https://www.bloomberg.com/news/articles/2018-11-02/bird-sues-beverly-hills-over-ban-on-electric-scooters-impounds> [Permalink unavailable].

119. Clewlow, *supra* note 90.

120. Max Ufberg, *Could Banning Bird Scooters Leave Behind a City’s Most Economically Vulnerable Citizens?*, PAC. STANDARD (Dec. 7, 2018), <https://psmag.com/economics/cities-are-flipping-low-income-residents-the-bird> [<https://perma.cc/EV5F-5DQN>].

121. Luz Lazo, *Bird’s Plea to Mayor Bowser: Allow More Scooters and Don’t Make Us Slow Down*, WASH. POST (Nov. 14, 2018), [https://www.washingtonpost.com/transportation/2018/11/14/birds-plea-mayor-bowser-allow-more-scooters-dont-make-us-slow-down/?noredirect=on&utm\\_term=.b24deba3a7c3](https://www.washingtonpost.com/transportation/2018/11/14/birds-plea-mayor-bowser-allow-more-scooters-dont-make-us-slow-down/?noredirect=on&utm_term=.b24deba3a7c3) [<https://perma.cc/9T9F-B83G>].

122. Pettersson, *supra* note 118.

123. Cory Doctorow, *\$30 Plug-and-Play Kit Converts a Bird Scooter into a “Personal Scooter”*, BOING BOING (Dec. 8, 2018), <https://boingboing.net/2018/12/08/flipping-a-bird.html> [<https://perma.cc/9ZX5-N5JP>].

124. Kit Walsh, *Bird Rides Inc. Demands Takedown of News Report on Lawful Re-Use of Scooters*, ELECTRONIC FRONTIER FOUND. (Jan. 11, 2019), <https://www.eff.org/deeplinks/>

Some cities have even gone as far as deciding that the solution to the blocked sidewalk problem is banning scooters altogether. This has occurred in smaller municipal areas surrounding large cities. While the large cities may have signed up to take on the scooters, the scooters' mobility and range<sup>125</sup> means that some small municipalities neighboring these cities are forced to deal with the scooters that come within their city limits. Highland Park, Texas, a municipality that shares a border with Dallas, decided to ban the scooters and impound and fine the vendor or its customers that leave or use the scooters within the city limits.<sup>126</sup> The ban is in part due to objection to a "business model that relies on using public property as a staging area without permission and reimbursement."<sup>127</sup> However, Bird proclaims that "[c]ities are our #1 customer."<sup>128</sup> It is doubtful that Bird sees messy lawsuits or completely losing a city's business as the best solution to this ongoing problem.

One way Bird has attempted to get around the scooter bans is to directly deliver the scooters to a user's doorstep.<sup>129</sup> The company's Bird Delivery service drops off scooters in the morning and gives the customer complete control of the scooter until the end of the day, when the scooter is then picked up.<sup>130</sup> Local governments have still expressed concern about incorrect uses and safety issues;<sup>131</sup> however, this would allow for the single daily customer to be held accountable for any incorrect parking that blocks sidewalks. Since banning the scooters has led to its own host of problems, cities must find a way to allow the scooters in their cities while also keeping their sidewalks accessible.

## VI. THE SOLUTION TO ACHIEVING COMPLIANCE WITH THE ADA

A large part of the bans on scooters in cities is due to cities figuring out the best way to regulate where the scooters are parked to remain in compliance with the ADA.<sup>132</sup> This is in response to pedestrians, both abled and disabled, asking cities to better regulate where scooters can be

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2019/01/bird-sends-nastygram-reporter-describing-lawful-re-use-impounded-scooters [https://perma.cc/5YYR-J6YN].

125. On a single charge, Bird scooters can travel about fifteen miles and Lime scooters can travel about twenty miles. See Ethan May, *Here's Everything You Need to Know About Bird and Lime Electric Scooters*, INDIANAPOLIS STAR (Sept. 12, 2018), <https://www.indystar.com/story/news/2018/06/21/bird-electric-scooters-rental-costs-hours-charging-locations/720893002/> [https://perma.cc/KT8D-L5U9].

126. William Taylor, *HP Bans Electric Scooters*, PARK CITIES PEOPLE (Sept. 22, 2018), <https://www.parkcitiespeople.com/2018/09/22/hp-bans-electric-scooters/> [https://perma.cc/KL3P-TQSM].

127. *Id.*

128. *Cities*, BIRD, *supra* note 81.

129. Matt McFarland, *Scooter Companies May Have Found a Loophole in Cities' Limitations*, CNN BUS. (Oct. 15, 2018), <https://www.cnn.com/2018/10/12/tech/scooter-rentals/index.html> [https://perma.cc/EAG8-BUQ3].

130. *Id.*

131. *Id.*

132. See Chris Woodyard, *What to Do About Scooters? Officials Work on Solutions as Problems Go On*, USA TODAY (Nov. 18, 2018), <https://www.usatoday.com/story/news/na>

parked<sup>133</sup> and due to the liability cities may face for allowing sidewalks to become inaccessible in violation of Title II of the ADA.

#### A. CITIES MUST IMPLEMENT SCOOTER REGULATION

Like in *Cohen*, by allowing scooters on their sidewalks, cities are “choos[ing] to alter the existing arrangement of the public sidewalk by allowing private vendors” to operate.<sup>134</sup> The sidewalks are being altered for reasons unrelated to ADA compliance under § 35.151—which permits alterations to existing facilities.<sup>135</sup> That provision, however, does not protect cities with the aforementioned scooter alterations.

The only way for cities to allow the continued use of electric scooters is to make sure that the scooters are regulated in a way that keeps scooter parking within ADA compliance. The National Association of City Transportation Officials has released a report that urges cities to first adopt several provisions before allowing scooters into their cities.<sup>136</sup> The provisions include: only allowing the companies to operate in the public right-of-way with legal permission; reserving the right to limit the number of companies operating and the amount of scooters available; reserving the right to revoke permits; reserving the right to establish operating zones; limiting the duration of permits; charging fees to reflect the cost of regulations; and requiring the companies to hold insurance and indemnify the city.<sup>137</sup>

#### B. RIDER ACCOUNTABILITY—HOW TO ENSURE THAT PARKING REGULATIONS ARE MAINTAINED

Once the scooters are regulated, the question then becomes—What happens if a rider does not park in the designated location? The way electric scooter companies currently operate, a large financial strain would be placed on a city to comply with the ADA by trying to ensure that there are no scooters blocking the pedestrian right of way. The city would have to be in communication with all the electric scooter operators to obtain data regarding noncompliant scooter locations and would then have to deploy workers to move scooters blocking sidewalks into a compliant parking location. However, while the problem cannot be ignored, the ADA directly addressed this issue by stating that a public entity is not required “to take any action that it can demonstrate would result in . . .

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tion/2018/11/18/electric-scooters-driving-city-leaders-pedestrians-mad/2030745002/ [https://perma.cc/Q2Q8-SWYK].

133. *Id.*

134. *Cohen v. City of Culver City*, 754 F.3d 690, 699 (9th Cir. 2014).

135. *See* 28 C.F.R. § 35.151(b) (2018).

136. *See generally* NACTO Policy 2018: *Guidelines for the Regulation and Management of Shared Active Transportation*, NAT'L ASS'N CITY TRANSP. OFFICIALS (July 2018), <https://nacto.org/wp-content/uploads/2018/07/NACTO-Shared-Active-Transportation-Guidelines.pdf> [https://perma.cc/DU63-J3N3].

137. *Id.* at 7.

undue financial and administrative burdens.”<sup>138</sup>

One solution has suggested that scooters blocking the pedestrian right of way be treated the same as vehicles illegally parked in handicap spaces: the rider who left the scooter parked in a noncompliant way could be substantially fined by the city.<sup>139</sup> The city could collect information about the scooter’s last rider from the electric scooter company using the data the company is already collecting through the rider’s app.<sup>140</sup>

However, what this solution does not consider is the mobile nature of the scooters. Unlike an illegally parked car, any scooter can be pushed, carried, or accidentally knocked over after the last rider has long since ended the ride. Scooter chargers have demonstrated this mobility issue by describing various locations in which they have found scooters such as “under trash cans, down the side of a canyon, hidden in bushes, or tossed sideways on the side of the street.”<sup>141</sup> By penalizing the last rider to use the scooter, a city would run the risk of fining riders who properly complied with parking ordinances without knowing if a later, third-party interference resulted in the scooter being parked in a noncompliant way.

Logically, solutions have usually included a penalty imposed on scooter companies that do not adhere to the new ordinances or rules. In Austin, an electric scooter company was charged with a 20% fleet reduction for failure to comply with the city’s Dockless Ordinance.<sup>142</sup> However, some proposals have gone so far as to suggest criminal sanctions for companies if they violate the proposed city regulations.<sup>143</sup>

Ironically, in trying to get around scooter bans and limitations,<sup>144</sup> Bird inadvertently created one solution to hold riders accountable for leaving scooters where they block sidewalks. By dropping off scooters at the rider’s door and letting the rider have sole possession of it for the day, Bird would have exact data on the rider who left the scooter in the pedestrian right of way. Additionally, the user is much less likely to abandon the scooter on the sidewalk since the rider is responsible for returning the scooter at the end of the day. However, this solution is unlikely to be one that scooter companies would want to widely implement due to the added

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138. 28 C.F.R. 35.150(a)(3).

139. William Kosinski, *Dockless Electric Scooters Pose a Great Risk to Disabled Individuals*, DAILY TEXAN (Apr. 23, 2018), <http://www.dailytexanonline.com/2018/04/23/dockless-electric-scooters-pose-a-great-risk-to-disabled-individuals> [<https://perma.cc/34FZ-FLF8>].

140. *Id.*

141. Taylor Lorenz, *Electric Scooter Charger Culture is Out of Control*, ATLANTIC (May 20, 2018), <https://www.theatlantic.com/technology/archive/2018/05/charging-electric-scooters-is-a-cutthroat-business/560747/> [<https://perma.cc/MJ32-YJMF>].

142. *Dockless Mobility Program Update*, AUSTIN TRANSP. DEP’T: MOBILITY COMM. COUNCIL (Dec. 6, 2018), <http://www.austintexas.gov/edims/document.cfm?id=311739> [<https://perma.cc/D7J7-WXZX>].

143. Ian Duncan, *Baltimore Officials to Amend Proposal that Called for 30 Days in Jail for Riding Electric Scooters Too Fast*, BALT. SUN (Jan. 28, 2019), <https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-scooter-law-proposal-20190128-story.html> [<https://perma.cc/R8FE-MFJX>].

144. McFarland, *supra* note 129.

cost of employing workers to drop off and pick up scooters at each rider's house each morning.

Likely, and unfortunately, the best solution is for electric scooter companies to change their business plans altogether. While Bird, along with other electric scooter companies, prides itself on its dockless product, for these companies to continue, this feature may have to become a thing of the past. Under current operation standards, the dockless model allows for riders to leave scooters wherever the rider sees fit without a way to hold riders accountable. As the case law demonstrates,<sup>145</sup> it is a city's duty to keep sidewalks accessible to disabled citizens. Under this dockless model, where scooters are constantly changing location and being left haphazardly wherever the rider pleases, cities would have to work around the clock to keep up with the constant blockages created by incorrectly parked scooters. This greatly exceeds the requirements bestowed upon cities by the ADA, due to the specific clarification that cities are not required to adopt a solution that results in an undue burden.<sup>146</sup>

Further, on Bird's website, the company shows that ten electric scooters can fit into one standard parking space.<sup>147</sup> The company itself says that it "reimagines these spaces as multi-purpose parklets where dockless bikes and scooters can easily park."<sup>148</sup> One solution may be that the scooter companies purchase or rent parking spaces from public entities and private business, and then convert the space into a parking station for scooters. Instead of locating the nearest scooter on a sidewalk, the rider would instead go to the nearest parking station to obtain a scooter. Once completing the trip, the rider could then return the scooter to another parking station.

This solution has been adopted on an experimental basis in Santa Monica.<sup>149</sup> The city hopes to work with scooter companies to add these parking spaces to their apps by adding incentives to use the spaces.<sup>150</sup> Additionally, a study of these redesigned spaces used in New York revealed that more people were able to use these spaces than when the spaces were used for cars.<sup>151</sup> The data showed that within a single hour, about two hundred people arrived and left a bike station, while eleven people arrived and left from three parking spaces located next to the station.<sup>152</sup>

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145. See *Cohen v. City of Culver City*, 754 F.3d 690, 699 (9th Cir. 2014); *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011) (en banc); *Barden v. City of Sacramento*, 292 F.3d 1073, 1076-77 (9th Cir. 2002).

146. See 28 C.F.R. § 35.150(a)(3) (2018).

147. See *Impact*, BIRD, <https://www.bird.co/impact/> [Permalink unavailable] (last visited July 6, 2019).

148. *Id.*

149. Madeleine Pauker, *City Establishes Street Parking for Scooters*, SANTA MONICA DAILY PRESS (Nov. 6, 2018), <https://www.smdp.com/city-establishes-street-parking-for-scooters/170545> [<https://perma.cc/Z4YY-QC7P>].

150. *Id.*

151. *Id.*

152. *Id.*

However, a solution like this does create a slight inconvenience for the rider because a parking station will likely not be as near as a randomly parked scooter. It could also limit a scooter's ability to reduce the last mile travel problem. However, scooter companies could easily obtain multiple parking spaces for these parking stations in areas in which they know that there is high scooter usage. Additionally, with so many scooters, and sometimes even bike sharing companies, located within a city, companies could share the burden and cost of creating the parking stations.

Most importantly, this solution creates a system of accountability that cities can easily regulate. The locations of the parking stations can be made known to the cities, so if a rider does not leave the scooter in the designated location after riding it, the city can fine the rider based on location data from the scooter companies. Additionally, this removes the issue created by the scooter's mobility because, if the scooter is not left at a parking station or is subsequently removed from the parking station and left blocking a sidewalk, location data can be used to determine if the last rider did, in fact, bring the scooter back to a designated parking station in compliance with the new parking requirements. This system would be simpler for a city to control since scooter riders will be regulated by where they can park, as opposed to being told where they cannot park. The ability of a city to easily regulate the scooters is the best answer to keeping sidewalks ADA compliant.

While scooter operators may be reluctant to adopt such a business model, it is a city's duty to demand that the venders operate in a way that is compliant with the ADA. Compliance may remove some of the convenience found in free-for-all scooter use, but without the ability to regulate scooters, cities will be faced with banning scooters altogether.

## VII. CONCLUSION

Electric scooters provide a convenient and easy way to navigate a city. However, the scooters create a host of problems that cities must navigate, including violations of Title II of the ADA. This article urges cities to adopt scooter parking regulations that do not create a large burden on cities while still being enforceable. Title II of the ADA requires that public entities not exclude individuals with disabilities from the benefits of services, programs, or activities provided by the public entity. Courts have historically interpreted this language broadly. This has been demonstrated in case law that has held that these services, programs, or activities extend to sidewalks provided by cities. Therefore, any alteration or maintenance to the sidewalks must also meet the standards provided for in the ADA. In addition, the sidewalks cannot become inaccessible, even if the inaccessibility is not caused by the city, but instead by a third party.

While the introduction of electric scooters in cities has helped increase the mobility of many Americans, a small, yet protected, class of citizens has had its mobility reduced and sometimes even eliminated. By allowing

electric scooters to operate on their sidewalks, cities are allowing third-party contractors to create inaccessible and non-ADA compliant sidewalks. Cities will not be able to stand by while disabled citizens are denied access to services, programs, or activities. It is critical then that cities adopt and implement policies that prevent electric scooters from being parked in violation of the ADA. To do this, cities must regulate where and how electric scooters can be parked. However, just regulating where scooters can be parked will not result in a successful change unless cities demand that scooter vendors adopt an operation that gives the city the ability to hold riders accountable for noncompliant parking.

Electric scooters are seen as the transportation of the future. Cities should not stand in the way of advances in transportation. However, cities must also maintain Title II compliance. To do both, cities and scooter operators must work together to create a system that ensures that scooter riders are not given increased mobility at the expense of disabled citizens. Overall, “[i]t is important to remember that these policies aren’t being adopted simply for the sake of regulation, but to ensure that the future of transportation continues to evolve in a way that is safe, equitable, and efficient.”<sup>153</sup>

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153. Clewlow, *supra* note 90.



