UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD FRAME, WENDELL DECKER, SCOTT UPDIKE, J.N., a minor, by his next friend and mother, GABRIELA CASTRO, MARK HAMMAN and JOEY SALAS,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 4-05CV-470-Y
THE CITY OF ARLINGTON, a Municipal Corporation,	§	
Defendants.	§	

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANT'S
THIRD RENEWED MOTION TO DISMISS

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PLAINTIFFS' BRIEF RESPONSE TO DEFENDANT'S THIRD RENEWED MOTION TO DISMISS

Plaintiffs, Richard Frame ("Frame"), Wendell Decker ("Decker"), Scott Updike ("Updike"), J.N., a minor, by his next friend and mother, Gabriela Castro, Mark Hamman ("Hamman"), and Joey Salas ("Salas") (collectively, the "Plaintiffs"), hereby respond to Defendant, City of Arlington, Texas' ("Arlington" or the "City"), Third Renewed Rule 12(b)(6) Motion to Dismiss.

I. BACKGROUND

Once again in its third renewed motion to dismiss, Arlington dismissively says that Plaintiffs are making picayune complaints about "individual technical violations" of the ADA and Rehabilitation Acts (the "Acts")[1] and/or sweeping demands that the City tear itself apart and build a brand new infrastructure according to a hyper-extreme interpretation of the Acts. Arlington's intentionally distorted characterization of Plaintiffs' position allows it to set up and attack a Straw Man, *i.e.*, the City ignores Plaintiffs' actual position, and substitutes a distorted and exaggerated version of Plaintiffs' position, which is easier for the City to attack. On the few occasions Arlington does address Plaintiffs' actual position, it misapprehends or misapplies the law. Accordingly, the third renewed motion to dismiss should be denied.

A. FACTUAL BACKGROUND.

Plaintiffs are wheelchair-bound residents of Arlington. Fourth Am. Compl. ¶¶ 18 – 23. They want to access and use the City's services, programs and activities. For instance, Plaintiffs want (and – for medical and basic services – *need*) to be able to get around Arlington's business and downtown districts and areas where they reside, so

[1] Arlington accepts federal financial assistance, subjecting it to § 504 of the Rehabilitation Act. Fourth Am. Compl. ¶ 60.

they can access, among other places, City Hall, U.S. Post Offices, Municipal and Sub Courthouses, voting locations, professional offices, medical facilities, pharmacies, supermarkets, sports stadiums, schools, colleges, parks and restaurants. *Id.* ¶¶ 27, 28-29, 30, 32 – 33, 37, 41, 44, 49-52. But they cannot, because Arlington's system of streets, sidewalks and intersections in these crucial areas – including, but not limited to, Abram Street, Border Street, Bowen Road, Cooper Street, Division Street, South Street, Mesquite Street, Matlock Road, Randol Mill Road, Copeland Road, and Mayfield – lack curb ramps or lack accessible curb ramps and contain sidewalks that drop or rise sharply, stop abruptly, or are impassable because of major obstructions embedded in them. *Id.* ¶¶ 27-30, 33, 35, 38-42, 48-50, 51-56. Far from being minor inconveniences, these conditions routinely put Plaintiffs in harm's way, by forcing them into the street or making it impossible for them to get to where they need to go. *Id.* ¶¶ 26, 31, 41-42, 51.

All of these conditions violate the Acts, and demonstrate that Arlington, despite having had over 10 years to do so, has utterly failed to achieve program accessibility as required by the ADA. *Id.* ¶ 62. Notably, most or all of these violations exist on streets and sidewalks altered since the January 26, 1995 deadline for Arlington to make itself "readily accessible" to the disabled. *Id.* ¶¶ 13, 34, 36-37, 43, 45-47, 50, 53-56. In addition, there is evidence that Arlington has failed to implement a systematic program for providing curb ramps in many sidewalks/curbs predating the ADA. Moreover, Plaintiffs have traveled on – or attempted to travel on – all the streets and sidewalks mentioned herein during the two year period prior to the filing of the complaint, and they intend to continue traveling – or attempting to travel – on these streets and sidewalks in the future. *Id.* ¶¶ 24, 27, 29-30, 32-33, 38, 40-42, 44, 49-52.

B. LEGAL BACKGROUND

Title II of the ADA obligates State and local governments to make their programs and services accessible to disabled persons. 42 U.S.C. § 12132. Streets, sidewalks and curb ramps are among the "programs and services" that must be made accessible under Title II. *City of Sacramento v. Barden*, 292 F.3d 1073, 1076 (9th Cir.), *cert denied*, 539 U.S. 958 (2002) (maintaining public sidewalks is a normal function of a city and … maintaining their accessibility for individuals with disabilities therefore falls within the scope of Title II of the ADA); *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000) (Congress emphasized that ADA protections "would be meaningless if people who used wheelchairs were not afforded the opportunity to travel on and between the streets"); *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1337 (S.D. Cal. 1997) ("Streets are considered existing facilities under the regulations and, as such, curb ramps at existing sidewalks are subject to the general requirements for program accessibility").

If necessary to achieve program accessibility, municipalities were required to make structural changes by January 26, 1995. Not every facility, or every portion of every facility, must be made accessible, but the entire program or service must be accessible. *See* Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, 28 C.F.R. Pt. 35, App. A, at 492 (explaining program access requirement); 28 C.F.R. 35.150. Municipalities are not required to take actions that fundamentally alter the nature of a service, program or activity, or that would impose an undue burden. But the onus is on the city to demonstrate that there are alternatives to structural change or to prove its entitlement to available exceptions. *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 142–43 (2d Cir. 1995) (determination

of undue burden is a fact-specific inquiry the burden of which is on the defendant). While the issue is overall program accessibility, each individual barrier found is a "building block" for finding that the city, viewed in its entirety, is not readily accessible. *Pascuiti v. New York Yankees*, 87 F. Supp. 2d 221, 224 (S.D.N.Y. 1999).

All new facilities – again, including new sidewalks, streets, rights-of-way and so forth – "shall be designed and constructed to be readily accessible to and usable by" disabled persons. 28 C.F.R. § 35.151(a). When a facility is altered (which includes instances where a city alters or resurfaces a street, sidewalk and/or road), it must be made "readily accessible" to the maximum extent feasible. 28 C.F.R. § 35.151(b). Finally, the relevant regulations compel programmatic installation of curb ramps in sidewalks pre dating Title II of the ADA in accordance with a transition plan. 28 C.F.R. § 35.150(d)(1). A schedule for providing curb ramps on walkways controlled by the public entity must give priority to walkways servicing entities covered by the ADA, including state and local government offices and facilities, transportation, places of public accommodation (described in sect. I. A., *supra*), and employers, followed by walkways servicing other areas. 28 C.F.R. § 35.150(d)(2).

II. ARGUMENT

A. THE LEGAL STANDARD ON A MOTION TO DISMISS

In evaluating a motion to dismiss, the Court considers only the complaint, assumes that all well-pleaded facts in it are true, and resolves any ambiguity in the plaintiff's favor. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1994). A motion to dismiss should only be granted where it appears – beyond doubt – that the plaintiff cannot assert any fact that would entitle the party to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Accordingly, motions to dismiss are viewed with disfavor and should

rarely be granted. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

A pleading shall contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Courts do not apply a heightened pleading standard to a complaint alleging a civil rights violation against a municipality. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). "[F]actual details and evidentiary issues [are left to be] developed during discovery." *Capitol Records, Inc. v. Wings Digital Corp.*, 218 F. Supp. 2d 280, 284 (E.D.N.Y. 2002). For this reason, the "Court construes plaintiff's pleading liberally, and lack of detail does not constitute a sufficient ground to dismiss a complaint under Rule 12(b)(6)." *Tex. Commercial Energy v. TXU Energy, Inc.*, 2004 WL 1777597, at *5 (S.D. Tex. Jun. 24, 2004), *aff'd*, 413 F.3d 503. "Dismissal for failure to state a claim is highly disfavored and is not granted routinely because of the liberal "notice pleading" requirements of the Federal Rules." *Gulf Underwriters Ins. Co. v. Great W. Cas. Co.*, 2005 WL 946834, at *7 (W.D. Tex. Mar. 2, 2005). The City's motion should be denied.

B. THE CITY'S STATUTE OF LIMITATIONS ARGUMENT MISAPPREHENDS THE LAW, AND IN ANY EVENT, THERE ARE NO GROUNDS TO DISMISS THE COMPLAINT BASED ON THE STATUTE OF LIMITATIONS.

Arlington argues that Plaintiffs must bring (and have not brought) an action for ADA violations no later than two (2) years after a given street, sidewalk or facility is altered or built, and that any claims for discrimination arising out of events that occurred more than two (2) years preceding the date of Plaintiffs' filing their complaint are barred by the statute of limitations. Both positions are fundamentally wrong.

1. The Statute of Limitations Does Not Apply to Plaintiffs' Claim.

The statute of limitations does not apply to claims seeking purely equitable relief. *Holmberg v. Armbrecht*, 327 U.S. 396 (1946). Declaratory and injunctive relief is equitable, and is not governed by a statute of limitations. *Id.*; *Drew v. Dep't of Corr.*, 297 F.3d 1278 (11th Cir. 2002); *Union Carbide Corp. v. State Bd. of Tax Comm'rs*, 992 F.2d 119 (7th Cir. 1993). Plaintiffs herein seek solely equitable relief (*e.g.*, injunctive and declaratory relief); thus, the statute of limitations does not apply. *Ford v. New Britain Trans. Co.*, 2004 WL 3078827 (D. Conn. Dec. 21, 2004) (Title II claim, filed 13 years after incident giving rise to the action, was not untimely, as statutes of limitations do not apply to claims seeking solely equitable relief).

2. The Continuing Violations Doctrine Militates Against Dismissal.

It is true that, where statutes of limitations apply and where plaintiffs are, at the time, in a position to evaluate the accessibility of public rights-of-way, the limitations period for a Title II accessibility action accrues when a ramp or alteration is "completely constructed and in plain view." *Deck v. City of Toledo*, 56 F. Supp. 2d 886, 893 (N.D Ohio 1999).[2] "However, doctrines such as the continuing violation theory exist to usurp the statute of limitations period and address situations where wrongful conduct is ongoing." *Id.* at 892. "[W]here there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period." *Haithcock v. Frank*, 958 F.2d 671, 677–78 (6th Cir. 1982). In the context of a Title II claim, a continuing violation exists where plaintiffs show that (a) defendant's wrongful conduct continued after the initial event that began the pattern, (b) the injury to plaintiffs continued after the event and (c) the injury to

[2] *Deck* is the type of Title II accessibility case where a state statute of limitations applies, because the *Deck* plaintiffs sought money damages. *Deck v. City of Toledo*, 76 F. Supp. 2d 816, 817 (N.D Ohio 1999).

plaintiffs must have been avoidable if the defendant had at any time ceased their wrongful conduct. *Deck*, 56 F. Supp. 2d at 893.

Here, Plaintiffs allege that (a) Arlington began violating Title II when it failed to make itself readily accessible after the deadline for it to do so under the ADA, and continued to violate it by thereafter building non-compliant facilities (or failing to make facilities compliant when altering them), (b) plaintiffs' injuries continued to accrue as the City repeatedly violated Title II, and (c) additional injury to plaintiffs could have been avoided if the City complied with the ADA by making itself readily accessible and by ensuring that new construction was ADA compliant.[3] This makes out a claim for continuing violations under Title II. *Deck*, 56 F. Supp. 2d at 894. *See Schonfeld*, 978 F. Supp. at 1333 (complaint that alleges municipal inaccessibility and includes at least one violation inside the limitations period sets forth a continuing violations claim under Title II of the ADA); *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480–81 (9th Cir. 1989) (maintaining a discriminatory system both before and during the limitations period is a continuing violation). For this reason, the motion to dismiss should be denied.

The cases upon which Arlington relies to suggest that Plaintiffs in a Title II accessibility action must prove an "organized scheme" of discrimination in order to present a claim under the continuing violations doctrine – *Huckabay v. Moore*, 142 F.3d 233 (5th Cir. 1998), *AMTRAK v. Morgan*, 536 U.S. 101 (2002), and *Henrickson v. Potter*, 327 F.3d 444 (5th Cir. 2003) – make no such point. All three cases involve alleged *employment discrimination* (often racial or gender discrimination), where the bar is set higher to make out a continuing violation claim, as incidents of employment

[3] As was the case in the City of Toledo, "curb ramps are constructed on a continual basis" in Arlington, and accordingly, "Plaintiffs are not attempting to rectify 'passive inaction' of a 'continuing ill effect' and thus a continuing violation exists." *Deck*, 56 F. Supp. 2d at 894.

discrimination are more apparent but less continuing in nature (such incidents should, therefore, be easier to identify but less likely to have long-lasting effects, which justifies setting the bar higher before permitting a plaintiff to go forward on a continuing violations theory):

> Clearly, there is a distinction between a situation involving a gender or racial based "pattern" of discriminatory conduct where wrongful intent is apparent and numerous separate curb cut installations, each of which are at different sites with different characteristics, completed by different contractors and which are likely the result of the City's lack of oversight rather than discriminatory intent.

Deck, 56 F. Supp. 2d at 984. Indeed, the entire notion of "wrongful intent," a notion that explains why plaintiffs alleging intentional employment discrimination are required to establish an "organized scheme" of discrimination in order to assert a continuing violation, is fundamentally inapplicable to a Title II accessibility claim:

> It is not necessary to show that the City specifically intended to discriminate against disabled individuals; the ADA imposes a duty upon the City to comply with its provisions and accommodate persons with disabilities. . . . An affirmative act of intentional discrimination, although generally integral to a claim of race or gender discrimination, is not necessary under the ADA. The City of Toledo has breached its duty under the statute; the City's benign neglect in the oversight of curb ramp construction creates an adverse impact on disabled individuals who live or frequently travel within Toledo. Therefore, if the City was engaged in a discriminatory practice by failing to oversee the contractors, even if they did not affirmatively intend to discriminate, and at least one of the ramps was installed within the statutory two year period (which is undisputed), the statute of limitations will not bar the claims because the City's actions constitutes a continuing violation.

Deck, 56 F. Supp. 2d at 984.[4] Moreover, equitable remedies (which are all Plaintiffs request herein) are available regardless of intent. *Ferguson v. City of Phoenix*, 157

[4] *Accord Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 504 n.14 (E.D. Va. 2002) (noting that "unlike 'patterns' of racial or gender discrimination requiring wrongful intent, the construction of a FHA

F.3d 668, 674–75 (9th Cir. 1998). The phantom "organized scheme" requirement is the only argument Arlington makes against the application of the continuing violations theory, and the argument is wholly inapplicable.

3. The Statute of Limitations Argument is Inapplicable At This Juncture.

Additionally, the statute of limitations can only form the basis for dismissal when all the facts necessary to support it appear on the face of the complaint. *See* Fed. R. Civ. P. 8(c); Fed. R. Civ. P. 12(b)(6); *Moore v. Baylor Health Care Sys.*, 2004 WL 884436 at *1 (N.D. Tex. Apr. 23, 2004); *Kaiser Aluminum* at 1050. "However, where the alleged failure to comply with the statute of limitations does not appear on the face of the complaint, a motion for summary judgment is the proper procedure." *Moore* at *6. Contrary to Arlington's assertions, Plaintiffs allege that they encountered ADA violations within the two years prior to filing the complaint. (Fourth Am. Compl. ¶¶ 24, 27, 29-30, 32-33, 38, 40-42, 44, 49-52). The statute of limitations is an issue for summary judgment or trial, if at all, but it is not a basis upon which to dismiss the claim pursuant to Fed. R. Civ. P. 12.B.

4. Arlington's Hodgepodge of Pleading Issues Do Not Support Dismissal.

Finally, Arlington raises a series of pleading issues that it mislabels as arguments in support of its statute of limitations position. First, it says that Plaintiffs have failed to sufficiently allege facts that would support a tolling allegation. But the recent complaint recites many examples where Plaintiffs encountered barriers and ADA violations at

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non-compliant building may result from neglect or oversight," and "the effects of gender and racial discriminatory acts are not usually continuing in nature, unlike the continuing effects of the construction of a FHA non-compliant building"); *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F. Supp. 2d 1134, 1136 (N.D. Cal. 1998) (Title II of the ADA "guards against both intentional discrimination and simple exclusion from services resulting not from intentional discriminatory acts, but rather from inaction, thoughtlessness, or equal treatment when particular accommodations are necessary").

sidewalks, curb ramps and other facilities within two (2) years of filing their complaint, and longer. Fourth Am. Compl. ¶¶ 24, 27, 29-30, 32-33, 38, 40-42, 44, 49-52. Arlington cites *Jones v. ALCOA, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003), which involves another employment discrimination (racial) case where the incidents of discrimination would be easier to recognize, and the plaintiffs in *Jones* never alleged specific awareness of discrimination which resulted in their § 1981 claims being barred by the statute of limitations. Here, Plaintiffs have clearly alleged facts that would support a tolling allegation. Moreover, if the statute of limitations applies, then these events, which took place within the limitations period, entitle Plaintiffs to bring all of their claims under the continuing violations theory. *See* Sect. II. B. 1-2, *supra*.

Second, Arlington claims that because Plaintiffs have specifically alleged 3, 5, 10, or 12 year timelines with respect to construction and/or alteration of City streets and sidewalks, that Plaintiffs have failed to allege harm or discrimination within the two (2) year statute of limitations. Arlington seems to be confusing and/or merging the dates of construction with the dates Plaintiffs sustained an injury, and it also relies on an incorrect interpretation of the law. *See* Sect. II. B. 1-2, *supra*. As more fully articulated in other parts of this brief (sect. I. B. and sect. II. D. 2.), Title II of the ADA imposes different obligations on public entities for construction and alterations that occur before and after the January 26, 1992 effective date. The dates or timelines that were alleged in Plaintiffs Fourth Amended Complaint were for the specific purpose of identifying those areas where Arlington has a heightened obligation under 28 C.F.R. § 35.151, and to identify other areas where Arlington is governed by 28 C.F.R. § 35.150. Those dates and timelines are irrelevant to and completely separate from the dates of Plaintiffs' injuries that are clearly and separately articulated in the most recent complaint. Fourth

Am. Compl. ¶¶ 24, 27, 29-30, 32-33, 38, 40-42, 44, 49-52. Contrary to Arlington's assertions, there is nothing vague regarding Plaintiffs' allegations, and Plaintiffs made a good faith effort regarding the timelines, which involved an objective analysis from Plaintiffs' experts.[5]

The Fourth Amended Complaint recites many examples of existing sidewalks, curb ramps and other facilities that Arlington has failed to make accessible, (*see*, *e.g.*, Fourth Am. Compl. ¶¶ 27, 28-30, 33, 35, 38-40, 48-51, 53-56), each of which is a building block for finding that the City, when viewed in its entirety, is not readily accessible. *Pascuiti*, 87 F. Supp. 2d at 224. Moreover, the vast majority of noncompliant streets, roads, sidewalks and rights-of-way identified in the complaint have been resurfaced or altered after January 26, 1992, which imposes on Arlington a higher standard to make all such facilities "readily accessible" to the maximum extent feasible. Fourth Am. Compl. ¶¶ 13, 34, 36-37, 43, 45-47, 50, 53-56. With respect to topography, the violations identified in the complaint were measured based on ADAAG guidelines, *e.g.*, 28 C.F.R. § 35.151(c), but any issue on this point should be reserved for discovery and trial. Moreover, Arlington's arguments are attempts to force Plaintiffs to plead with far more specificity than is required by the federal rules. *See* Sect. II. A., *supra*.

C. PLAINTIFFS HAVE LEGAL STANDING TO BRING ALL OF THEIR CLAIMS.

Arlington argues Plaintiffs lack standing because they purportedly fail to allege

[5] The allegations about timelines are based on Plaintiffs' expert's evaluation from extensive photographic evidence gathered on the areas alleged to be non-compliant. Plaintiffs' expert's determination about timelines of alteration and/or construction is based on the following factors many of which are present in Plaintiffs' photographic evidence: Materials used and their typical life cycle, evident "newer" layers of material over older surfaces which are often indicated by darker color (asphalt), condition of adjacent surfaces, sharp edges resulting from formwork (on curbs) or saw cuts on pavement for resurfacing, overlay of one material over the adjacent surface (i.e. asphalt over concrete gutter), among others.

(a) a sufficiently specific personal injury-in-fact, (b) any basis for a real controversy as to possible future injuries Plaintiffs will suffer if the City remains inaccessible, (c) "specific acts of intentional discrimination," (d) that the City receives "federal financial assistance for any particular program by which they are directly benefited," and which, if any, program, service or activity provided by the City has been denied to them, (e) any basis for a private cause of action to enforce the ADA's self-evaluation and transition plan requirements (the City says there is no such legal claim). (Def.'s Mem. Supp. Mot. Dismiss at 8 – 13). All of these arguments miss the mark.

1. Plaintiffs Satisfy The Legal Requirements For Standing.

Notwithstanding Arlington's bare assertion, Plaintiffs unmistakably allege that they have personally suffered the type of injury in fact that entitles them to seek retrospective and prospective relief. Plaintiffs have standing when they are personally prevented from patronizing a public accommodation due to a defendant's existing and future failure to achieve programmatic accessibility and to make its new and altered construction ADA compliant. *Disabled Am. for Equal Access, Inc. v. Ferries del Caribe, Inc.,* 405 F.3d 60 (1st Cir. 2005); *Pickern v. Quality Foods, Inc.,* 293 F.3d 1133 (9th Cir. 2002); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "Past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury," *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004), which bears on whether Plaintiffs will likely be injured in the future, justifying prospective relief.

Also, Plaintiffs unmistakably allege that they are denied meaningful access to essential services throughout Arlington because of the City's rights-of-way system, which is inaccessible when viewed in its entirety and which features inaccessible barriers at new, altered, and existing streets. These barriers continuously subject

Plaintiffs to danger, as they are often forced into busy streets to travel. This is far more than Plaintiffs merely experiencing "difficulty" and "problems" maneuvering around Arlington.

Next, Arlington repeats the bogus claim that Plaintiffs must show intentional discrimination on the City's part. As more fully discussed above, in the context of seeking equitable relief to correct inaccessibility under Title II, "[i]t is not necessary to show that the City specifically intended to discriminate against disabled individuals." *Deck*, 56 F. Supp. 2d at 984; *see* Sect. II, *supra*. The only time intentional discrimination must be shown is when plaintiffs seek money damages. *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001) (plaintiff needs to show intentional discrimination only when he or she seeks to recover money damages).[6] Here, Plaintiffs seek equitable relief *only*; there is no requirement to show the City intentionally discriminated against them.

2. Plaintiffs Have Standing To Assert Rehabilitation Act Claim.

Arlington argues that, in order to state a Rehabilitation Act claim, Plaintiffs must allege that the City receives federal financial assistance to a program that directly benefits Plaintiffs and that the Plaintiffs cannot participate in or enjoy the benefits of these programs because of the program's inaccessible nature. The cases Arlington cites in support of this argument, however – *Lightbourn v. County of El Paso, Texas*, 118 F.3d 421 (5th Cir. 1997) and, in a later section, *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981) – confront these issues at trial, not on a motion to dismiss. Moreover,

[6] The only case Arlington cites to support its argument -- *Carter v. Orleans Parish Pub. Sch.*, 725 F.2d 261 (5th Cir. 1984) – only offers more support for Plaintiffs' position. In *Carter*, the Fifth Circuit held that plaintiff's "claim for *damages* must also fail," because a recent Supreme Court case "reversed an award of *damages* to a private plaintiff who had failed to prove intentional discrimination." *Carter*, 725 F.2d at 264 (emphasis added). As Arlington is well-aware, Plaintiffs herein seek *only* equitable relief, *Carter* does not apply and Plaintiffs are not required to show that the City intentionally discriminated against them.

Plaintiffs *do* allege that the City receives federal financial assistance in connection with its sidewalk, curb ramp, street, intersection, handicap accessible parking space and paratransit programs, and that Plaintiffs have been denied the benefits of these programs because they are inaccessible. Fourth Am. Compl. ¶¶ 60, 62, 75-76. These allegations satisfy the federal rules' notice pleading requirements. *See* Sect. II. A., *supra*.

3. Plaintiffs Have Standing To Enforce Self-Evaluation and Transition Plan Requirements Because Arlington's Failure To Adopt and Implement a Self-Evaluation and Transition Plan Is The Reason Why It Fails To Comply with the ADA.

Arlington argues that Plaintiffs lack standing to enforce the self-evaluation and transition plan requirements set forth in the regulations accompanying Title II of the ADA, because no private cause of action exists to enforce these requirements. In one sense, the City is right: a separate, independent cause of action of this sort (for failure to conduct a self-evaluation and prepare and implement a transition plan) does not exist, and Plaintiffs do not assert one. However, Arlington's failure to comply with the ADA's self-evaluation and transition plan requirements is relevant to the extent it bears a causal connection to Plaintiffs' claims of discrimination. *See Ross v. Gatlinburg*, 327 F. Supp. 2d 834, 841 (E.D. Tenn 2003); *Deck*, 76 F. Supp. 2d at 823; *Matthews v. Jefferson*, 29 F. Supp. 2d 525, 339-40 (W.D. Ark. 1998); *Concerned Parents to Save Dreher Park Ctr. v. City of West Palm Beach*, 884 F. Supp. 487, 490 (S.D. Fla. 1994). "The failure to explicitly articulate the curb ramp requirement outside the context of a transition plan does not abrogate the Department of Justice's clear intention to require curb ramps or other sloped areas where pedestrian walks cross, giving priority to walkways serving entities covered by the Act." *New Jersey Protection and Advocacy, Inc. v. Township of Riverside*, 2006 WL 2226332 at *3 (D.N.J. 2006). Thus, Plaintiffs

can point to Arlington's failure to adopt and implement a self-evaluation and transition plan as the reason why the City fails to comply with the ADA.

D. PLAINTIFFS HAVE CLEARLY ESTABLISHED DISCRIMINATION

1. Plaintiffs Have Alleged Facts to Show Alterations that Trigger Violations of the ADA and Rehabilitation Act.

Arlington, without support, claims Plaintiffs must make highly particularized allegations about when alterations and/or new construction occurred, and carefully "describe the scope of the particular alteration," in order to state a claim that the City is required to install curb ramps at specific locations. Arlington goes so far as to suggest – again without support – that Plaintiffs must address in their complaint whether the depth of the resurfacing overlay on a given street sufficiently impacts its usability. (Def.'s Mem. Supp. Motion Dismiss at 15). There are no such pleading requirements. As noted, federal courts do not apply a heightened pleading standard to complaints alleging a civil rights violation against a municipality; instead, the usual pleading requirement of Federal Rules of Civil Procedure 8(a) applies. *Leatherman,* 507 U.S. at 163. Under Rule 8, Plaintiffs only need to give notice of their claim, leaving "factual details and evidentiary issues to be developed during discovery." *Capital Records,* 218 F. Supp. 2d at 284. Plaintiffs easily meet that low threshold herein.

Plaintiffs allege that many, if not all, of the streets at issue, including relevant portions of Abram, Border, Bowen, South, Randol Mill, and Mesquite, were substantially resurfaced, reconstructed, repaved, and otherwise altered by or on behalf of the City either within the last two years or after January 26, 1992. Fourth Am. Compl. ¶¶ 13, 34, 36-37, 43, 45-47, 50, 53-56. Even to the untrained eye, it is very apparent that fresh resurfacing has occurred on these streets. And, while it is unnecessary to make this allegation in the complaint, it is worth noting that many photographs taken by Plaintiffs

indicate that the resurfacing at issue herein is at least 1.5 inches in depth and involves the length and width of at least a city block, thereby affecting the usability of the street and triggering the duty to install curb ramps at these locations even under the City's interpretation of the law.

Finally, Plaintiffs allege that the City's rights-of-way program is, viewed in its entirety, inaccessible, and further allege, on information and belief, that the City has routinely failed to install curb ramps when resurfacing or altering city streets, roads, and sidewalks or constructed such curb ramps properly. Fourth Am. Compl. ¶ 58. Allegations based on information and belief are sufficient to satisfy federal notice pleading requirements. *Steinbrecher v. Oswego Police Officer Dickey,* 138 F. Supp. 2d 1103, 1109-10 (N.D.Ill. 2001). Facts that show additional alterations are an issue that Plaintiffs' should be allowed to further develop through discovery. Therefore, the motion to dismiss should be denied.

2. Sidewalks are a Service, Program, or Activity and Must Be Accessible as a Whole.

Arlington claims that (a) sidewalks are not a "program, activity or service" under the ADA and (b) Plaintiffs improperly seek to impose a "continuous obligation" on it to maintain all public rights-of-way at some ideal accessibility standard, "whether located on City property or not, in perpetuity," and force it to "install sidewalks that meet some [ideal] accessibility standard at all streets and roadways under its control and responsibility." (Def.'s Mem. Supp. Mot. Dismiss at 17). Arlington's first argument is unsupportable. Its second argument is a pure red herring.

Sidewalks are a "program, activity or service" under the ADA. Arlington furiously attempts to distinguish, a Ninth Circuit case which held that "anything a public entity does" and any "normal function of government," including maintaining public sidewalks,

is covered by Title II. *City of Sacramento v. Barden*, 292 F.3d 1073 (9th Cir.), *cert denied*, 539 U.S. 958 (2002).[7] But the Court's reasoning in *Barden* is supported both by agencies charged with creating regulations and guidelines under Title II and by the legislative history of the ADA itself. U.S. Architectural and Transportation Barriers Compliance Bd., *Accessible Rights-of-Way: A Design Guide* (Nov. 1999) (public rights-of-way constitute a program offered by a government to its citizens); *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000) ("Congress emphasized in enacting the ADA that the employment, transportation, and public accommodations sections of the ADA would be meaningless if people who used wheelchairs were not afforded the opportunity to travel on and between the streets").

The legislative history of Title II supports a finding that sidewalks are a service program, or activity. During congressional hearings, testimony established that one of the greatest barriers disabled persons faced while trying to participate in economic life was the inability to use sidewalks to reach places of employment and commerce. *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) (disabled citizens are forced to stay home or use the street because curb cuts and sidewalks are inadequate). Moreover, in subsequent legislation, Congress has explicitly recognized that public sidewalks are covered by Title II. *See* Section 1108 of the Transportation Equity Act for the 21st Century, Pub. L. No.

[7] After the *Barden* Court issued its opinion, the City of Sacramento petitioned the U.S. Supreme Court for a writ of certiorari and before ruling on the writ, the Supreme Court accepted a powerful *amicus* brief (the "Brief") from the Department of Justice ("DOJ") supporting the *Barden* holding. Justice Department Brief of *Amicus Curiae, Barden* (No. 01-15744). In the Brief, the DOJ emphasized among other things that a public entity is required to make its entire system of public sidewalks accessible, not just the sidewalks that provide access to other government services and programs. *Id.* at 12. The DOJ also recognized that when Congress enacted the ADA, it made a determination that societal benefits of promoting community access to the disabled outweigh the societal costs of complying with the ADA. *Id.* (citing to 42 U.S.C. § 12101 (a)(9); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 3, at 49-50 (1990). After the Supreme Court received the Brief, it quickly denied Sacramento's petition.

105-178, 112 Stat. 107 (23 U.S.C. 133(b)(3)) (authorizes the use of federal funds set aside for transportation improvements undertaken by states for the modification of public sidewalks to comply with the ADA). Finally, Title II regulations are premised on the view that public sidewalk systems are a covered service, program, or activity under Title II. *See 60 Fed. Reg.* 58.462, 58463, (1995) (observing that curb ramp requirements for existing sidewalks were premised on the view that "maintenance of pedestrian walkways by public entities is a covered program") (notice of proposed rulemaking). "That position, embodied in the DOJ's regulations implementing Title II, is entitled to substantial deference." *See* Justice Department Brief of *Amicus Curiae, Barden* (No. 01-15744), at 11-12 (citing to *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Without accessible sidewalks between curb ramps, the regulations' requirements for curb ramps in sidewalks would be meaningless. *Barden*, 292 F.3d at 1077.

Arlington cites *New Jersey Protection and Advocacy, Inc. v. Township of Riverside*, 2006 WL 2226332 at *3 (D.N.J. 2006) for the proposition that "sidewalks, curb ramps, and parking spaces are not a program, activity, or service of a public entity within the meaning of § 12132 of the ADA."[8] However, in deciding not to find sidewalks to be programs, services, or activities for ADA implementing regulations, and instead finding them to be "facilities," the *New Jersey Protection and Advocacy* Court seemed to be engaging in the "needless hair splitting arguments" the *Barden* Court sought to avoid. *See Barden*, 292 F.3d at 1076 ("attempting to distinguish which public functions

[8] Arlington also cites *Geiger v. City of Upper Arlington*, 2006 WL 1888877 at *3 (S.D. Ohio 2006) for the same proposition. However, the *Geiger* opinion does not reject this premise. Rather, the *Geiger* opinion states that the *Barden* decision did not require a city to build brand new sidewalks where none exist in order to comply with the ADA. As articulated below, a requirement that Arlington build brand new sidewalks where none exist is not a position that Plaintiffs have taken. Plaintiffs simply demand that Arlington make their existing sidewalks readily accessible and bring them into compliance with the ADA.

are services, programs, or activities, and which are not, would disintegrate into needless hair splitting arguments"). What Arlington fails to mention however, is that the *New Jersey Protection and Advocacy* Court also recognized that relevant ADA regulations "compel installation of curb ramps in **preexisting** sidewalks in most instances, **regardless** of whether the sidewalks constitute a facility, or a program, service or activity." *See New Jersey Protection and Advocacy*, Inc., 2006 WL 2226332 at *3. According to the *New Jersey Protection and Advocacy* Court, 28 C.F.R. § 35.150(d)(2) "implies a more general obligation to install curb ramps in **all** sidewalks, even those predating the ADA, and the emphasis on curb ramps … suggests that the DOJ considered accessible sidewalks necessary to insure equal participation in and enjoyment of a public entities' services, programs, or activities. *Id*. at *4 (finding the curb cut obligation to be mandated by 42 U.S.C. § 12132); *Kinney v. Yerusalim*, 9 F.3d 1067, 1069 (3rd Cir. 1993)(without curb cuts people with ambulatory disabilities simply cannot navigate the city; activities that are commonplace to those who are fully ambulatory become frustrating and dangerous endeavors).

Arlington also mischaracterizes Plaintiffs' argument as noted in FN 8, supra. Plaintiffs are not suggesting, and have never suggested, that the City has an obligation to build new sidewalks where none exist (and certainly Plaintiffs have never suggested the City must install sidewalks on every street and roadway under its control). Rather, Plaintiffs make the unremarkable claim that the City must make its public rights-of-way program "readily accessible" to disabled persons, ensure that new construction is readily accessible, and ensure that altered construction is readily accessible to the maximum extent feasible. Arlington can argue that the exceptions mentioned above relieve it of the obligation to make a given street, sidewalk, curb ramp, or similar facility

ADA compliant, or it can argue that there is a preferable alternative, but – where those exceptions are available -- it is the City's burden to raise and prove those arguments.[9] Tellingly, Arlington has had the opportunity to make itself accessible for years, but has chosen not to do so. The motion to dismiss should be denied, and the City made to comply with the ADA.

3. Arlington's Constitutional Argument is Wrong.

Arlington again argues Plaintiffs are trying to force upon it "very expansive obligations" to make "the entirety of Arlington . . . have wide, level, and unobstructed sidewalks," that meet Plaintiffs' "ideal standards for accessibility," (see Def.'s Mem. Supp. Mot. Dismiss at 22 – 23), and again commits the Straw Man fallacy.

To reiterate, Plaintiffs do not claim Arlington must build entirely new sidewalks and continuously, "in perpetuity," maintain all City sidewalks to some ideal level of accessibility. Rather, Plaintiffs simply request that Arlington make their public rights-of-way readily accessible around areas of public accommodation.[10]

4. Plaintiffs State a Claim Under the ADA and Rehabilitation Act Because the Liability Waiver Denies them Meaningful Access to Arlington's Paratransit Services.

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[9] Arlington has not suggested any effective alternative to providing compliant sidewalks and curb ramps. Any such alternative would be an issue for trial or summary judgment.

[10] Plaintiffs do not read Arlington's argument as suggesting that Title II is inherently unconstitutional. However, in an abundance of caution, it should be noted that Title II's requirement of program accessibility has been determined to be a "congruent and proportional" response to the pervasive discrimination suffered by the disabled, including segregation and unequal treatment found in the administration of public services and programs, which also includes the systematic deprivation of fundamental rights. *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997). Title II requires modifications that are reasonable and that do not fundamentally alter the nature of the public facilities, services, and programs. *Id* at 532. Title II is constitutional, and we do not believe Arlington suggests otherwise.

Moreover, to the extent Arlington relies on *Lane v. Tennessee* and *Reickenbacker v. Foster* to support its argument, this Court should note the inapplicability of *Lane* and its predecessors and progeny because they are based on Eleventh Amendment state immunity principles. Arlington, as a municipality, receives no such protection from the Eleventh Amendment. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) ("The Eleventh Amendment does not extend its immunity to units of local government."); *McCarthy v. Hawkins*, 381 F.3d 407, 421 (5th Cir. 2004) (local entities cannot assert sovereign immunity); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 902 (6th Cir. Ohio 2004) ("[T]he [Eleventh] amendment protects only states and not municipalities").

"The purpose of paratransit service is to provide service to individuals with disabilities comparable to the level of public transportation or fixed route services provided to non-disabled individuals." *See Melton v. Dart,* 391 F.3d 669, 673 (5th Cir. 2004) (citing 42 U.S.C. § 12143(a)). Public entities operating paratransit service are not required to make "reasonable modifications" under the ADA or Rehabilitation Act. *Id.* at 676. Instead, public entities operating a fixed route system must submit an annual plan to the Secretary of Transportation who reviews the plan to insure that public entities are providing comparable services between their paratransit and fixed route services. *Id.* at 675. Once the FTA approves the plan, the plan itself becomes the accommodation and a violation constitutes prohibited discrimination under Title II. *Id*. Arlington's claim that Plaintiffs have not alleged facts to support a claim under the Acts is without merit.

First, Arlington argues that because Plaintiffs have not been denied physical access to the paratransit service or forced to sign a waiver which others are not required to sign, no ADA or Rehabilitation Act discrimination occurred. However, the Supreme Court has held that denial of *meaningful* access is the equivalent to a full denial of access under the Rehabilitation Act. *Alexander v. Choate*, 469 U.S. 287, 301 (1983). Although the Firth Circuit in *Melton* declined to address whether the meaningful access standard should be applied to claims for denial of access to paratransit services under the Acts, other federal circuits have extended the meaningful access standard to ADA claims. *See Chaffin v. Kansas State Fair Board*, 348 F. 3d 850, 857 (10th Cir. 2003); *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 907 (6th Cir. 2004).

The Tenth Circuit in *Chaffin* has clearly rejected Arlington's physical access argument and held that the ADA requires more than "mere physical access." Instead,

"the ADA requires public entities to provide disabled individuals 'meaningful access' to their programs and services." *Chaffin* at 857. Therefore, Plaintiffs mere physical presence on the paratransit service coupled with being subject to the liability waiver as a condition precedent should be construed as a denial to meaningful access of Arlington's paratransit service.

Arlington's other argument, that ADA or Rehabilitation Act claims do not trigger reasonable modifications, misses the mark. Arlington's motion conspicuously fails to mention whether the City's fixed route system requires patrons to sign liability waivers. In addition to applying the meaningful access standard, Plaintiffs could challenge the liability waiver on the basis that Arlington is requiring more from its paratransit disabled patrons than it requires from non disabled patrons on fixed route systems.

Arlington cites *Melton v. Dart* to support its claim. *Melton*, however, expressly left open the possibility of applying the meaningful access standard, and it held that a municipality could be challenged for failing to provide a comparable paratransit service. 391 F.3d 669. Indeed, the Fifth Circuit made clear that its decision did "not relegate disabled individuals to voiceless acceptance of sub par transportation merely because the ADA does not require reasonable modification to its paratransit services." *Id.* at 675. For these reasons, as well, the motion to dismiss should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order denying Arlington's third renewed motion to dismiss, and for any additional relief the Court finds appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2007, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which sends a notice of electronic filing to the following: Edwin P. Voss of Brown & Hofmeister, LLP, Counsel for Defendant, 740 East Campbell Road, Suite 800, Richardson, Texas 75081; and Denise V. Wilkerson, Assistant City Attorney, City of Arlington, P.O. Box 90231, Arlington, Texas 76004-3231.

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