UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE ABILITY CENTER OF GREATER TOLEDO, et al.,	)	
Plaintiffs,	)	No. 3:99CV7555
v.	)	Judge James G. Carr
THE CITY OF SANDUSKY, et al.,	)	UNITED STATES' MEMORANDUM OF LAW AS AMICUS CURIAE
Defendant	)	

UNITED STATES' MEMORANDUM
OF LAW AS AMICUS CURIAE

The United States of America, by its undersigned counsel, submits this Memorandum of Law as amicus curiae.

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INTRODUCTION

On September 8, 1999, the Ability Center of Greater Toledo and individuals with mobility impairments (collectively, "the Plaintiffs") filed the Complaint in this case. The Complaint alleges that the Defendant City of Sandusky ("the City" or "the Defendant") failed to install curb ramps on sidewalks as required by title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131, et seq. (Compl. ¶ 1.) Plaintiffs allege that sidewalks throughout the City are inaccessible or unsafe for people who use wheelchairs because there are no curb cuts and ramps, or because curb cuts and ramps have been improperly installed. Id.

On February 16, 2001, this Court entered an order granting Plaintiff's summary judgment motion in part and denying Plaintiffs' motion in part. This Court ruled that the City's failure to install, or properly install, curb cuts and ramps when resurfacing streets and altering or installing city sidewalks violated the ADA. The Court denied Plaintiffs' claim for compensatory and punitive damages.

On April 25, 2001, the City filed a Motion for Reconsideration based upon the Supreme Court's decision in Alexander v. Sandoval, 531 U.S. 1049, 121 S.Ct. 1511 (2001).[1] In Sandoval,

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[1] The City does not identify a federal rule on which it bases its Motion for Reconsideration. (City's Mot. for Recons.) In general, motions for reconsideration of a judgment are construed as motions to alter or amend a judgment under Fed. R. Civ. P. 59(e). McConocha v. Blue Cross and Blue Shield Mutual of Ohio, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996). Such motions must be filed within ten days after the judgment. Fed. R. Civ. P. 59(e). The City filed its motion for reconsideration almost two months after this Court entered its order. Thus, the City's Rule 59(e) motion is untimely and should be denied. This Court may treat an untimely Rule 59(e) motion as a Rule 60(b) motion. Windsor v. United States Department of Justice, 740 F.2d 6, 7 (6th Cir. 1984) (per curium). Presumably, the City is seeking relief from the order pursuant to Rule 60(b)(6). Such relief is applied only in exceptional circumstances. Cincinnati Insurance Co. v. Byers, 151 F.3d 574, 577 (6th Cir. 1998) (a substantial change in decisional law governing the action constitutes an exceptional circumstance). As we establish infra, the Supreme Court's decision in Sandoval is distinguishable from the instant case and, therefore, does not represent a

the Supreme Court held that, under title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d et seq., there is no implied right of action to enforce implementing regulations that prohibit the use of criteria or methods of administration with respect to a program or activity that have a discriminatory effect. The City does not challenge the validity of the curb cut provision of the title II regulation. Instead, relying on the Supreme Court's decision in Sandoval, it asserts that private plaintiffs have no right of action to enforce this provision of the title II regulations. (City's Mot. for Recons., at 2.) On August 13, 2001, the Court granted the United States leave to participate in this case as an amicus curiae. On September 12, 2001, the City filed its Reply to Plaintiffs' Response, further clarifying its position that, without an explicit congressional grant of such a right, the plaintiffs cannot bring an action to enforce the regulations promulgated pursuant to 42 U.S.C. §12134.

As set forth below, the City's motion for reconsideration should be denied because the Supreme Court's decision in Sandoval does not affect this Court's prior ruling. Unlike the regulations at issue in Sandoval, the curb cut regulation at issue here falls squarely within the scope of the ADA and is merely an interpretation of that statute. Since there is no dispute that there is a private cause of action to enforce title II of the ADA, these interpretative regulations may also be enforced in such an action. Sandoval, 121 S.Ct. at 1518 ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.").

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substantial change in the decisional law affecting this case. Accordingly, the Sandoval decision does not constitute an exceptional circumstance, and the City's Motion for Reconsideration should be denied.

ARGUMENT

I. Overview of Title II of the ADA and the Title II Regulation

The ADA was intended to bring people with disabilities into the mainstream of American society. Title II of the ADA is intended to assure people with disabilities access to the services, programs, and benefits offered by the state and local governments. A critical, but often overlooked, benefit provided by governments is the provision of public streets and sidewalks, so that persons can travel from place to place to take advantage of economic and social opportunities.

Title II of the ADA provides:

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

§ 202 of title II, 42 U.S.C. § 12132. Title II further directs the Department of Justice to promulgate regulations to implement this prohibition against discrimination. 42 U.S.C. § 12134.

Consistent with the statute and congressional intent, the Department of Justice title II regulation requires that newly constructed or altered facilities be accessible, 28 C.F.R. § 35.151, and specifically requires that curb cuts be included in new construction or alteration of streets and pedestrian walkways:

> (1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.
>
> (2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other sloped areas at intersections to streets, roads, or highways.

28 C.F.R. §§ 35.151(e)(1) & (2).[2]

II. The Narrow Holding of the Sandoval Decision Does Not Affect This Court's Prior Ruling

A. The Regulation At Issue In Sandoval Was Outside The Scope of the Authorizing Statute

The City does not challenge the validity of the curb cut provision. (City's Mot. for Recons.) Nor, at this point, does it argue that it has not violated that provision. Id. Instead, relying on the Supreme Court's recent decision in Sandoval, it asserts that private plaintiffs have no right of action to enforce this provision of the title II regulation. Id. at 2. Before we discuss the impact of the Sandoval decision on this case, the limited holding of Sandoval must first be examined.

Sandoval involved a class action claim brought by non-English speaking residents against the State of Alabama, alleging that the state's practice of administering driver's licensing exams only in English had a discriminatory impact on the class in violation of disparate impact regulations promulgated pursuant to § 602 of title VI. Sandoval, 121 S. Ct. at 1515. Section 601 of title VI provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity." 42 U.S.C. § 2000d. Section 602 authorizes federal agencies to "effectuate the provisions of [§ 601] . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 2000d-1. The disparate impact regulations promulgated by federal

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[2] The regulation also contains specific provisions requiring that transition plans for ensuring access to existing facilities include schedules for providing curb cuts at locations that are not otherwise being altered, 28 C.F.R. § 35.150(d)(1). These provisions are not at issue for purposes of the motion for reconsideration.

agencies pursuant to § 602 prohibit recipients of federal funds from "utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." See e.g. 28 C.F.R. § 42.104(b)(2) (DOJ regulations).

Based on case law interpreting title VI, the Court observed that Congress intended to create an implied private cause of action to enforce § 601. Sandoval, 121 S.Ct. at 1515-1516, 1518. The question was whether Congress had also intended the disparate impact regulations to be privately enforced. The Court noted that there were two types of regulations. Regulations that simply "apply," "construe," or "clarify[]" a statute can be privately enforced through the existing cause of action to enforce the statute because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of a statute to be so enforced as well." Id. at 1518. But regulations that go beyond the statute require a separate cause of action. Id. at 1519. In applying this dichotomy, the Court held that title VI only prohibits disparate treatment discrimination. Id. at 1516. Since the title VI regulations expanded the § 601 definition of discrimination to include disparate impact discrimination, they could not be viewed merely as an interpretation or application of § 601. Accordingly, the Court concluded that Congress had to have created (either explicitly or implicitly) a separate private cause of action to enforce such regulations. Id. Assessing the text and structure of the statute, the Court concluded that Congress had intended only agency enforcement of the disparate impact regulations and had not intended to create a private right of action to enforce those regulations that went beyond the statute. Id. at 1522-23.

Relying on Sandoval, the City argues that, since title II of the ADA incorporates the remedies, procedures, and rights set forth in title VI, the private plaintiffs in this case have no

right of action to enforce the title II regulations, including the curb cut provision. (City's Mot. for Recons., at 2; City's Reply Br., at 4, 5-6.) The City further argues that Congress did not grant individuals the express right of action to enforce the title II regulation. (City's Reply Br. at 3.)

The City's simplistic argument ignores the analytical framework set forth by the Supreme Court in Sandoval. The proper inquiry is whether the implementing regulation at issue is an application or interpretation of title II's statutory language or whether it goes beyond the statute. Plaintiffs would only need a cause of action that is distinct from their right to enforce title II if the curb cut regulation falls outside the scope of title II. As discussed below, Congress clearly intended title II to require the removal of architectural barriers and the title II curb cut regulation at issue merely interprets, applies, and clarifies Congress' definition of discrimination, exclusion, and denial of benefits.

B. The Curb Cut Regulation At Issue In This Case Falls Squarely Within the Scope of Title II of the ADA

1. The Statutory Language and Legislative History of the ADA Explicitly State Congress' Intent to Require the Removal of Architectural Barriers

In enacting the ADA, Congress made findings applicable to the entire Act. These findings expressly determined that people with disabilities were subjected to "various forms of discrimination," including the obstacles posed by architectural barriers:

> (5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation and relegation to lesser services, programs, activities, benefits, jobs or other opportunities.

42 U.S.C. §§ 12101(a)(2), (3), (5) (emphasis added). As Congress stated, one of the purposes of the ADA was to "eliminat[e]" this discrimination. 42 U.S.C. § 12101(b)(1).

Congress' intent to address a wide variety of discrimination is codified in the language of § 202, the operative section of title II:

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

42 U.S.C. § 12132. Similarly, Congress' intent to prohibit more than disparate treatment is reflected in title II's definition of "qualified individual with a disability:"

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

42 U.S.C. § 12131(2) (emphasis added). Thus, by definition, discrimination against a "qualified individual with a disability" is assessed in conjunction with, among other things, the "removal of architectural . . . barriers."

The legislative history of the ADA further confirms that the removal of architectural barriers – specifically the installation of curb cuts – was a key objective of the legislation. Congress highlighted the importance of curb cuts in a House report, which provides:

> [U]nder [title II], local and state governments are required to provide curb cuts on public streets. The employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets.

H.Rep. No. 101-485, 2d Sess., pt. 2, at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367. In fact, consistent with every other court to address the issue, the district court in this case has found, citing this legislative history, that ". . . Congress specifically required local and state governments to provide curb cuts on public streets." Ability Center of Greater Toledo v. Sandusky, 133 F.Supp.2d 589, 591 (N.D. Ohio 2001) (citations omitted); accord, Kinney v. Yerusalim, 9 F.3d 1067 (3d Cir. 1993), cert. denied, 511 U.S. 1033 (1994); Deck v. City of Toledo, 56 F.Supp.2d 886 (N.D. Ohio 1999).

The City's argument ignores the fact that, unlike title VI, the ADA prohibits more than just disparate treatment of individuals on the basis of their disabilities. It also requires that certain accommodations be made for them. Simply prohibiting disparate treatment could not redress the problem Congress intended to address: "that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(6). As the Supreme Court explained with reference to title II's predecessor, the Rehabilitation Act of 1973, "much of the conduct that Congress sought to alter . . . would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent. For example, elimination of architectural barriers was one of the central aims of the Act ... yet such barriers were clearly not erected with the aim or intent of excluding the handicapped." Alexander v. Choate, 469 U.S. 287, 297-98 (1985).[3] The legislative history of the ADA underscores Congress' recognition that

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[3] In a parenthetical, the Sandoval opinion characterizes the provisions at issue in Choate as "regulations clarifying what sorts of disparate impacts upon the handicapped were covered by § 504 of the Rehabilitation Act of 1973, which the Court assumed included some such impacts." Id. at 1518-19.

discrimination against the disabled is often the product of indifference rather than animosity. See H.R. Rep. No. 101-485, 2d Sess., pt. 2, at 29 (1990). Congress emphasized that the effect of discrimination against disabled individuals is the same, however, whether the motivation is malicious or benign. See H.R. Rep. No. 100-711, 2d Sess., at 25 (1988) ("[a]cts that have the effect of causing discrimination [against persons with disabilities] can be just as devastating as intentional discrimination").

The case law confirms that Congress addressed more than prohibitions against disparate treatment in title II of the ADA. The Supreme Court recently expressly rejected the argument that title II's prohibition on "discrimination" encompassed only "uneven treatment of similarly situated individuals," explaining that the structure of the statute and administrative interpretations indicated that "Congress had a more comprehensive view of the concept of discrimination." Olmstead v. L.C., 527 U.S. 581, 598 (1999). The Tenth Circuit later reconfirmed this view, while recognizing that "[a] cursory reading of the statutory language can leave the impression that title II simply prohibits intentional exclusion against the disabled." Thompson v. Colorado, 258 F.3d 1241, 1249 (10th Cir. 2001). The court explained that "[a] more thorough review, however, reveals that, rather than preventing public entities from treating the disabled differently than the nondisabled, title II requires that public entities make certain accommodations for the disabled in order to ensure their access to government programs." Id. The court then concluded that "from the language of the statute it is clear title II requires public entities to make accommodations for the disabled. The regulations issued by the Department of Justice implementing title II confirm this reading of the statute." Id. at 1250.

Two cases have considered the validity of a private right of action to enforce title II as interpreted by implementing regulations in light of Sandoval. In Access Living of Metro. Chicago v. Chicago Transit Auth., 2001 WL 492473 (N.D. Ill. 2001), the court held that Sandoval did not abrogate a private plaintiff's right to sue under title II because:

> the regulations implementing Title II of the ADA do not, as the Court found regarding Title VI's regulations in Sandoval, expand the meaning of discrimination. Rather, the regulations [] simply clarify the definition of discrimination (i.e. what [modifications] are reasonable), and therefore are not an invalid basis under which to bring suit under Sandoval.

Id. at *6.

Similarly, in Frederick L. v. Department of Public Welfare, 2001 WL 830480 (E.D. Pa. 2001), the court stated that the Sandoval decision did not preclude plaintiffs' ADA claim. Plaintiffs alleged that the defendants violated provisions of the title II regulation, which prohibit methods of administration having a discriminatory effect, and require administration of programs in the most integrated setting appropriate. Id. at 27. In denying defendants' motion to dismiss plaintiffs' ADA claim, the court held that "[t]he ADA, like section 504 and unlike title VI, prohibits disparate-impact discrimination." Id. The ADA regulation's provisions at issue in Frederick L. were merely rules for implementation of the statutory directives and did not prohibit otherwise permissible conduct. Id. As support for this conclusion, the court noted that Congress enacted the ADA with the goal of ensuring equality of opportunity, full participation, independent living and economic self-sufficiency. Congress intentionally chose not to list every type of action that constitutes discrimination because title II simply extends the anti-discrimination prohibitions embodied in § 504. Id. Analogous to the provisions at issue in

Frederick L., the curb cut provision simply implements the title II statutory directives. The lack of curb cuts is a tremendous obstacle to the smooth integration of those with disabilities into the commerce of daily life. Significantly, the installation of curb cuts ensures that individuals with disabilities have access to programs, services, and facilities, and are able to perform the essential task of crossing the street. Without the ability to travel on and between the streets, the opportunities afforded by the ADA are of little benefit to individuals who use wheelchairs.

Thus, the text and legislative history of title II as well as the relevant case law reflect Congress' intent that title II proscribe more than just disparate treatment discrimination. Unlike the title VI regulations at issue in Sandoval, and contrary to the city's argument that the regulation forbids conduct permitted by the statute (City's Reply Br. at 3.), the curb cut provision does not expand the meaning of discrimination under title II. Therefore, the City's Motion for Reconsideration should be denied.

2. The Title II Curb Cut Provision is Consistent with Section 504 of the Rehabilitation Act, the Section 504 Regulations, and the Access Board Guidelines, All of Which Are Explicitly Referenced in Title II of the ADA

Since title II encompasses the perpetuation of architectural barriers and the failure to make new and altered facilities accessible as forms of discrimination, the question becomes what types of barriers will violate title II's prohibition of "discrimination." As discussed below, Congress pointed to § 504 of the Rehabilitation Act, to § 504's preexisting implementing regulations, and to other titles of the ADA for guidance. Congress also instructed DOJ to issue regulations that reflect the standards contained in regulations implementing § 504, which were to serve as a substantive floor for determining compliance with title II. The title II curb cut

provision is consistent with § 504 and its implementing regulations, and with titles I and III of the ADA.

Sections 501 and 204 of the ADA express Congress' intent that title II be construed consistently with § 504 of the Rehabilitation Act and its implementing regulations. In § 501(a) of the ADA, Congress instructed that:

> (a) ... Except as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C. § 12201(a). This provision requires that the "Act" (including title II) not be construed to apply "a lesser standard" than "regulations" previously issued under 29 U.S.C. § 794. See Abbott v. Bragdon, 524 U.S. 624, 631-32 (1998) (citing to § 501(a) of the ADA in construing the ADA to "grant at least as much protection as the regulations implementing the Rehabilitation Act"). Particularly relevant to the City's motion, the Rehabilitation Act regulations included – in a subpart entitled "Guidelines for Determining Discriminatory Practices" – the requirement that new facilities and alterations to existing facilities shall "be designed and constructed to be readily accessible to and usable by [persons with disabilities]." 28 C.F.R. § 41.58(a).[4] This phrase, a term of art, is understood to incorporate one of the various government standards for accessible design (such as the Minimum Guidelines and Requirements for Accessible Design and the Uniform Federal Accessibility Standards). See H.Rep. No. 101-485, 2d Sess., pt. 2, at 117-118 (1990); S.Rep. No. 101-116, 1st Sess. at 69-70 (1989).

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[4] The purpose of the regulation at 28 C.F.R. Part 41 was to implement Executive Order 12250 (1980), which required DOJ to coordinate the implementation of § 504 by the various federal agencies. 28 C.F.R. § 41.1; see also id. § 41.4(a) (requiring each federal agency to issue

In addition, in § 204(b) of the ADA, Congress directed that regulations implementing title II (except for subtitle B, over which the Secretary of Transportation has authority) shall be consistent with specific § 504 regulations which prohibit more than just disparate treatment:

> (b) Relationship to other Regulations. Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) shall be consistent with ... the coordination regulations under [28 C.F.R. part 41], applicable to recipients of Federal financial assistance under § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794). With respect to 'program accessibility, existing facilities', and 'communications', such regulations shall be consistent with regulations and analysis as in [28 C.F.R. part 39], applicable to federally conducted activities under such § 504.

42 U.S.C. § 12134(b). In discussing § 204(b), Congress stated that it:

> has chosen not to list all the types of actions that are included within the term 'discrimination', as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local government .... In addition, however, section 204 also requires that regulations issued to implement this section be consistent with regulations issued under section 504 .... In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous section 504 regulations.

H.Rep. No. 101-485, 2d Sess., pt. 2, at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367.

The § 504 regulations referenced by Congress, at 28 C.F.R. Parts 39 and 41, uniformly prohibit various actions and inactions in addition to disparate treatment, all described as forms of discrimination. See generally 28 C.F.R. §§ 41.51-41.58. These include the failure to operate programs or activities in existing facilities so that, when viewed in their entirety, they are readily accessible and usable by persons with disabilities (28 C.F.R. § 39.150(a)); the failure to design and construct new facilities or alterations to existing facilities so that they are accessible (28

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regulations to implement 29 U.S.C. § 794 that are "consistent with this part").

C.F.R. § 41.58);[5] the failure to furnish appropriate auxiliary aids where necessary to allow persons with disabilities an equal opportunity to participate (28 C.F.R. § 39.160(a)); and the failure to make reasonable accommodations (28 C.F.R. § 41.53).

Also, § 204(c) requires that the Attorney General's title II regulations include standards applicable to facilities that are consistent with the architectural guidelines issued by the Architectural and Transportation Barriers Compliance Board ("Access Board"). 42 U.S.C. § 12134(c). The Board, in turn, was instructed to issue guidelines that would "supplement the existing Minimum Guidelines and Requirements for Accessible Design" to "ensure that buildings [and] facilities . . . are accessible . . . to individuals with disabilities," 42 U.S.C. § 12204(a), and to "establish additional requirements, consistent with [the ADA], to ensure" accessibility by persons with disabilities, 42 U.S.C. § 12204(b). The preexisting Minimum Guidelines and Requirements for Accessible Design required access to newly constructed and altered buildings and facilities. See 36 C.F.R. §§ 1190.31, 1190.33.[6]

In sum, Sections 501 and 204 of the ADA require that title II be construed and implemented consistent with § 504 of the Rehabilitation Act, certain implementing regulations, and the Access Board's architectural guidelines. By its express references to these regulations and guidelines, Congress intended that discrimination prohibited under title II encompass more

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[5] The requirements concerning existing facilities and new construction or alterations are specific applications of the more general "program accessibility" requirement, i.e., that no person with a disability shall be subjected to discrimination under any program or activity because of inaccessible facilities. See 28 C.F.R. §§ 39.159, 41.56.

[6] These guidelines were issued in 1982 for purposes of the Architectural Barriers Act, 42 U.S.C. §§ 4151 et seq., which generally requires that federal agencies and recipients of certain types of federal funds ensure access to buildings and facilities that they design, construct, or alter.

than disparate treatment, such as failure to build and alter buildings and facilities in an accessible manner and failure to provide access to existing facilities. The curb cut provision contained in the title II regulation is consistent with these other requirements. It does not expand the meaning of discrimination but "essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local government." H.Rep. No. 101-485, 2d Sess., pt. 2, at 84 (1990).[7]

1. Titles I and III of the ADA Identify The Failure to Remove Architectural Barriers As Discrimination Prohibited By The Statute

Similar to its requirement that title II regulations be consistent with certain regulations implementing § 504 of the Rehabilitation Act, § 204(b) also mandates that these title II regulations be consistent with titles I and III of the ADA. 42 U.S.C. § 12134(b) ("regulations [implementing title II] shall be consistent with this Act"). A House Report states that "[t]he Committee intends ... that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III ...." and that the implementing regulations include "any requirements [of the section 504 regulations] such as program access that go beyond titles I and III." H.Rep. No. 101-485, 2d Sess., pt. 2, at 84 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 367. See also H.Rep. No. 101-485, 2d Sess., pt. 3, at 51 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 474. See Kinney v. Yerusalim, 9 F.3d 1067, 1073 n. 6 (3d

[7] The City incorrectly relies on § 1003 of the Rehabilitation Act Amendments of 1986 for the proposition that the Rehabilitation Act of 1973 applies only to suits for a violation of a statute. (City's Reply Br. at 5.) Section 1003 provides that states are not immune from private suit in Federal court under § 504 of the Rehabilitation Act of 1973 and that remedies against the state are available to the same extent as those against any public or private entity other than a State. 42 U.S.C. § 2000d-7. The terms of § 1003 apply only to states, and in any event do not affect clear congressional intent that discrimination prohibited under § 504, and consequently title II, encompasses more than disparate treatment.

Cir. 1993), cert. denied, 511 U.S. 1033 (1994) (in case holding that alterations to streets required installation of curb cuts, court found that titles II and III should be read consistently).

Titles I and III of the ADA proscribe more than simply disparate treatment. For example, title I prohibits covered employers from outright exclusion of people with disabilities, 42 U.S.C. §§ 12112(a) and (b)(4), as well as from discriminating against them by utilizing criteria that have the effect of discrimination on the basis of disability, and not making reasonable accommodation. 42 U.S.C. §§ 12112(b)(3)(A) and (b)(5)(A). Similarly, title III prohibits disparate treatment by places of public accommodation, 42 U.S.C. §§ 12182(a), as well as other forms of discrimination, including failure to make reasonable modifications and failure to remove architectural barriers. 42 U.S.C. §§ 12182(b)(2)(A)(ii) and (iv). It specifically requires that newly constructed or altered facilities be accessible, 42 U.S.C. § 12183.

Congress also specified that the title II and III accessibility guidelines be consistent with the Access Board's guidelines, which, as we noted above, were required to be consistent with and supplement existing guidelines. § 204(c) of the ADA, 42 U.S.C. § 12134(c) (title II); § 306(c) of the ADA, 42 U.S.C. § 12186(c) (title III); § 504(a) of the ADA, 42 U.S.C. § 12204(a) (titles II and III).

Given the detailed instructions by Congress as to which regulations to follow for various provisions (including regulations that specifically involve program accessibility and architectural barriers), it is clear that Congress was aware of the content of these regulations, including that they defined discrimination broadly to include more than just disparate treatment, unlike title VI.

In order to avoid rendering all of the statutory provisions discussed above nullities, title II's prohibition on exclusion, denial, and discrimination must be read to encompass the DOJ curb

cut provision that the City contests in this case. This provision does not expand the definition of discrimination beyond what the statute provides, but instead merely interprets the broad statutory definition of discrimination intended by Congress. After all, consistent with § 504, certain implementing regulations, and the Access Board's guidelines, Congress intended title II to address a broad variety of prohibited conduct. See Sandoval, 121 S.Ct. at 1518 (noting that regulations that "construe" or constitute "the authoritative interpretation of the statute" are "covered by the cause of action to enforce" the statute).

CONCLUSION

In sum, the Supreme Court's decision in Sandoval does not affect this Court's prior decision. The statutory language, the legislative history, and the case law interpreting title II establish that Congress intended discrimination prohibited under title II to encompass more than disparate treatment, such as the failure to engage in barrier removal and the failure to provide program access. As such, the curb cut provision at § 35.151(e) merely interprets title II. The curb cut provision requires the City to make modifications to its newly constructed or altered streets, roads, and highways by installing curb ramps. The purpose of the curb cut provision is to ensure that individuals with disabilities have access to services, programs, and activities. Thus, the curb cut provision does not go beyond the scope of discrimination as set forth in the ADA.

For these reasons, the United States respectfully submits that the Court should deny the City's Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that today I served copies of the foregoing United States' Memorandum of Law as Amicus Curiae upon counsel listed below in the above matter, via first class mail to the following addresses:

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