Lane did not articulate any specific standards for how services, programs, or activities should be determined on a particular set of facts because it was not germane to the immunity issue.[49]

The Court's most recent Title II case is an odd and incomplete one, and the Justices' intentions are unclear. The case, *City & County of San Francisco v. Sheehan*,[50] involved a mentally ill woman living in a group home who threatened to use a knife to kill her social worker.[51] The social worker supervising the group home called the police for help with "some sort of intervention" to take the woman to a secure facility.[52] When the police arrived and used a key to unlock the door to the room, the woman grabbed a kitchen knife and began approaching the officers, yelling that she didn't need help and would kill them if they did not leave.[53] The officers initially retreated, but worried that the woman would gather more weapons or try to flee out a back window, they decided to reenter the room and attempt to subdue her.[54] As the Court noted, "[i]n making that decision, they did not pause to consider whether Sheehan's disability should be accommodated."[55] During the confrontation that ensued, the woman was shot multiple times but survived.[56]

Sheehan does resolve whether the plaintiff should have been accommodated because the Court dismissed its writ of certiorari on the Title II issue as improvidently granted.[57] Justice Scalia, in his separate opinion concurring with the majority's decision, described

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49. There was another Supreme Court Title II decision issued prior to *Lane*, but it was so clearly about a program of a public entity that the Court did not even mention the issue. *See* Olmstead v. L.C., 527 U.S. 581, 600 (1999) (finding unjust institutionalization of individuals with disabilities to receive mental health care services may violate Title II's integration mandate).

50. City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015).

51. *Id.* at 1769–70.

52. *Id.* at 1770.

53. *Id.*

54. *Id.* at 1770–71.

55. *Id.* at 1771.

56. *Id.* She was tried for "assault with a deadly weapon, assault on a peace officer with a deadly weapon, and making criminal threats." *Id.* She was acquitted for making threats, but the jury was hung on the assault counts, and the prosecutors did not retry her. *Id.*

57. *See id.* at 1774.

the reason as "bait-and-switch tactics" by San Francisco on appeal.[58] The Court granted certiorari to determine whether § 12132 "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."[59] The Court understood this question to "embody" San Francisco's argument below that "Title II *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents . . . prior to . . . securing the scene and ensuring that there is no threat to human life."[60] At oral argument, however, San Francisco conceded the ADA applies to arrests but argued the plaintiff posed a "direct threat" that excused law enforcement from accommodating her.[61] That displeased the Court, which indicated that there was "an important question" whether § 12132 applies to arrests that "would benefit from briefing and an adversary presentation."[62] Beyond that, the Court did not explain any reason why arrests might fall outside the scope of the "activities" of a public entity.[63]

B. "Excluded from Participation in or Denied the Benefit of" the Services, Programs, or Activities, or "Be Subjected to Discrimination"

Sheehan briefly touched on another aspect of Title II's scope. The Court noted that an arrest may be an "'activity' in which the arrestee 'participat[es]' or from which the arrestee may 'benefi[t].'"[64] This reflects that there are actually several ways that discrimination may occur under § 12132.

The first clause of § 12132 identifies two ways a public entity may discriminate. The public entity is prohibited from excluding a "qualified individual with a disability" from "participat[ing]" in the public entity's "services, programs, or activities," or denying the indi-

58. *Id.* at 1779 (Scalia, J., concurring in part and dissenting in part).

59. *Id.* at 1772 (majority opinion) (quoting San Francisco's Petition for Certiorari).

60. *Id.* (quoting San Francisco's Ninth Circuit briefs).

61. *Id.* at 1772–73.

62. *Id.* at 1773.

63. Part VI *infra* discusses the implications of *Sheehan*.

64. *Sheehan*, 135 S. Ct. at 1773.

vidual "the benefits of the services, programs, or activities."[65] The second clause additionally prohibits the public entity from "subject[ing]" the individual "to discrimination."[66] The second clause is generally referred to as the "catch-all" clause.[67] The Department of Justice's ("DOJ") regulations reflect that each of these addresses different types of discrimination.

For example, some types of discrimination involve denials of participation: a public entity may not "[d]eny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards,"[68] or "the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities."[69]

Other types of discrimination involve denials of benefits: a public entity may not "[p]rovide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others."[70] A public entity also may not:

> Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others.[71]

Additional examples, consistent with the "catch-all" clause, expand beyond either outright excluding or denying individuals:

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65. 42 U.S.C. § 12132 (2012).

66. *Id.*

67. *See, e.g.*, Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997) (characterizing the second clause of § 12132 as "a catch-all phrase"), *recognized as superseded on other grounds*, Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001).

68. 28 C.F.R. § 35.130(b)(1)(vi) (2016).

69. *Id.* § 35.130(b)(2).

70. *Id.* § 35.130(b)(1)(iii).

71. *Id.* § 35.130(b)(1)(iv).

> (4) A public entity may not, in determining the site or location of a facility, make selections—
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> . . . .
>
> (ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.
>
> . . . .
>
> (7)(i) 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.[72]

The DOJ's regulations also set out an integration mandate that is not limited to the exclusion or denial of benefits or services: "A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities."[73]

The structure of § 12132 has not been integral to any Supreme Court decisions to date. As noted previously, the Court in *Sheehan* suggested that an arrest could be either something in which the arrestee participates or something from which she benefits.[74] In *Yeskey*, the Court also seemed to recognize the two parts of the first clause but did not expand on them, merely stating the case involved services, programs, and activities "which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded

72. *Id.* § 35.130(b)(4)(ii), (b)(7)(i).

73. *Id.* § 35.130(d).

74. *See* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1773 (2015).

from participation in')."[75] The only other case in which the Court commented on this language offers even less insight.

In *United States v. Georgia*—holding that the State of Georgia was not immune under the Eleventh Amendment from suit for money damages by a paraplegic inmate who had been housed in an inaccessible facility—the Court merely restated the first clause of § 12132 verbatim.[76] The Court concluded it was "quite plausible that the alleged deliberate refusal of prison officials to accommodate [the prisoner's] disability-related needs in such fundamentals as mobility, hygiene, medical care, and virtually all other prison programs constituted 'exclu[sion] from participation in or . . . deni[al of] the benefits of' the prison's 'services, programs, or activities.'"[77]

Sheehan additionally referenced the "catch-all" clause, suggesting it would apply to arrests "if the failure to arrest an individual with a mental disability in a manner that reasonably accommodates that disability constitutes 'discrimination.'"[78] The lower courts have debated whether the "catch-all" functions as a separate basis for Title II liability, regardless of whether the plaintiff has identified a service, program, or activity of the public entity.[79] The Second Circuit concluded that the "catch-all phrase . . . prohibits all discrimination by a public entity, regardless of the context" and rejected the public entity's arguments about whether a zoning regulation was a service, pro-

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75. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998).

76. 546 U.S. 151, 157 (2006) (quoting 42 U.S.C. § 12132) (citations omitted).

77. *Id.* (second and third alterations in original). In its earlier related decision in *Tennessee v. Lane*, the Court focused only on the evidence in the congressional record about the extent to which states and local governments were excluding individuals from participating in their services, programs, and activities. *See* Tennessee v. Lane, 541 U.S. 509, 527 (2004) ("With respect to the particular services at issue in this case, Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities."). The issue in both *Georgia* and *Lane* was Congress's authority to impose money damages on public entities under Title II, so the question of whether a plaintiff was excluded from participation or denied benefits was not necessary to resolve the issues on appeal.

78. *See Sheehan*, 135 S. Ct. at 1773.

79. *See, e.g.*, Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 45 (2d Cir. 1997).

gram, or activity as unnecessary "hair-splitting."[80] Similarly, the Eleventh Circuit concluded that the "catch-all" clause does not limit Title II to conduct occurring in a public entity's services, programs, or activities, but "'prohibits all discrimination by a public entity, regardless of the context,'" which meant the court did not have to determine which category arrests fell into.[81]

By contrast, the Sixth and Tenth Circuits have concluded that the "catch-all" clause does not expand Title II's coverage, because the statute defines a "qualified individual" in relation to whether they meet the essential eligibility requirements "'for the receipt of *services* or the participation in *programs* or *activities* provided by a public entity.'"[82] The Sixth Circuit nonetheless concluded that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does."[83]

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80. *Id.*

81. Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1085–86 (11th Cir. 2007) (quoting Bledsoe v. Palm Beach Cty. Soil & Water Conserv. Dist., 133 F.3d 816, 822 (11th Cir. 1998)).

82. *See* Elwell v. Oklahoma *ex rel.* Bd. of Regents of Univ. of Okla., 693 F.3d 1303, 1308 (10th Cir. 2012) (quoting 42 U.S.C. § 12131(2) (2012)); *see also* Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998) (concluding the discrimination must relate to a service, program, or activity, otherwise it would be "quite unclear how we would determine if a plaintiff is a [qualified individual with a disability]"). The Ninth Circuit similarly concluded that the "catch-all" clause does not expand the types of government functions and does not apply to employment discrimination. *See* Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1176 (9th Cir. 1999). In *Zimmerman*, the Ninth Circuit reasoned that the "catch-all" serves only to identify "two different phenomena," namely that "Congress intended for the second clause to prohibit *intentional* discrimination, whereas it intended for the first clause to prohibit *disparate treatment* of the disabled." *Id.* (quoting Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996)). The court concluded that "both clauses prohibit discrimination by a public entity in providing its services, programs, and activities." *Id.*

83. *Johnson*, 151 F.3d at 569. The Tenth Circuit seemingly disagrees because it gives significance to the fact that the Rehabilitation Act defines "programs or activities" to include all operations of government, but Title II did not incorporate that definition. *See Elwell*, 693 F.3d at 1307 (reasoning that "[i]f Congress had wanted to prohibit discrimination in *all* aspects of a public entity's operations, it easily could have said just that—indeed, it has in other anti-discrimination statutes. *See, e.g.*, 20 U.S.C. § 1687(1)(A) (Title IX) (defining "program or activity" to mean "all of the operations of . . . [any] instrumentality of a State or of a local government"); 29 U.S.C. § 794(b)(1)(A) (Rehabilitation Act) (same)").

C. Program Accessibility

Title II's regulations set out a "program accessibility" standard that applies to a public entity's facilities:

> [N]o qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.[84]

The regulations define "facilities" in brick and mortar terms: "Facility means all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located."[85] The regulations then describe different standards that apply to existing facilities as opposed to new construction and alterations of existing facilities.

For services, programs, and activities that take place in existing facilities, the public entity must "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities."[86] The public entity does not, however, have to make "each of its existing facilities accessible to and usable by individuals with disabilities."[87] The regulations provide a safe harbor to facilities that are in compliance with earlier "technical and scoping specifications" and have not been altered since March 15, 2012.[88] Existing facilities also do not have to take actions that would "threaten or destroy the historic significance of an historic property"[89] or "result in a fundamental alteration in the nature of a service, program, or activity or in

84. 28 C.F.R. § 35.149 (2018).

85. *Id.* § 35.104.

86. *Id.* § 35.150(a) (emphasis added).

87. *Id.* § 35.150(a)(1).

88. *Id.* § 35.150(b)(2).

89. *Id.* § 35.150(a)(2).

undue financial and administrative burdens."[90] Public entities are thus provided with a certain degree of flexibility in how they comply with Title II's mandates, although they must consider alternative methods of delivering the services, programs, or activities in ways that do not pose an undue burden or fundamentally alter the nature of the government function.[91]

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90. *Id.* § 35.150(a)(3). Even if the public entity can argue either undue burden or fundamental alteration, however, the regulations require the entity to consider alternative methods of delivering the services, programs, or activities. *Id.* (providing that 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"); *id.* § 35.150(b)(3) (establishing alternative methods of achieving program accessibility "[i]n cases where a physical alteration to an historic property is not required because of paragraph (a)(2) or (a)(3) of this section"). The regulations suggest methods of alternative compliance:

> A public entity may comply with the requirements of this section through such means as redesign or acquisition of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. A public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. A public entity, in making alterations to existing buildings, shall meet the accessibility requirements of § 35.151. In choosing among available methods for meeting the requirements of this section, a public entity shall give priority to those methods that offer services, programs, and activities to qualified individuals with disabilities in the most integrated setting appropriate.

Id. § 35.150(b)(1).

91. *Id.* § 35.150(a)(3) (providing that 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"); *see also supra* note 90.

The DOJ's Technical Assistance Manual also instructs that alternative locations be considered when resolving a potential conflict between the integration mandate and the program accessibility standard:

> The integrated setting requirement may conflict with the obligation to provide program accessibility, which may not necessarily mandate physical access to all parts of all facilities (see II-5.0000).

The obligations imposed on new construction and alterations of existing facilities are considerably more demanding.[92] New construction and alterations of existing facilities must more strictly comply with the 2010 ADA Standards for Accessible Design, which consists of the 2004 ADA Accessibility Guidelines ("ADAAGs") and the additional requirements found in 28 C.F.R. § 35.151.[93] New construction must fully comply with those standards unless the public entity can demonstrate it would be "structurally impracticable" to do so.[94] Alterations that affect or could affect the usability of all or part of an existing facility must comply with those standards "to the maximum extent feasible."[95]

As a result of these distinctions, courts have held that public entities may in some instances conduct their activities in inaccessible facilities. For example, the Eastern District of Pennsylvania consid-

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> Provision of services to individuals with disabilities in a different location, for example, is one method of achieving program accessibility. Public entities should make every effort to ensure that alternative methods of providing program access do not result in unnecessary segregation.
>
> ILLUSTRATION: A school system should provide for wheelchair access at schools dispersed throughout its service area so that children who use wheelchairs can attend school at locations comparable in convenience to those available to other children. Also, where "magnet" schools, or schools offering different curricula or instruction techniques are available, the range of choice provided to students with disabilities must be comparable to that offered to other students.

DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL II-3.4200 (1993), https://www.ada.gov/taman2.html [hereinafter TECHNICAL ASSISTANCE MANUAL].

92. 28 C.F.R. § 35.150(a)(2)–(3) (2012).

93. DEP'T OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN (Sept. 15, 2010), https://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm. As noted above, the regulations provide a safe harbor to facilities that are in compliance with the older 1991 "technical and scoping specifications" and that have not been altered since March 15, 2012. 28 C.F.R. § 35.150(b)(2)(i) (2012).

94. 28 C.F.R. § 35.151(a)(2) (2018).

95. *Id.* § 35.151(b)(1). The regulations define "usability" by exclusion: "For the purposes of this section, alterations to windows, hardware, controls, electrical outlets, and signage shall not be deemed to be alterations that affect the usability of or access to an area containing a primary function." *Id.* § 35.151(b)(4)(i)(B).

ered "whether, despite its inclusion of a number of health care providers who practice in inaccessible facilities, [the Pennsylvania public health-care program] is an accessible program, and if not, whether requiring *every* participating provider to practice in an accessible office is necessary to ensure . . . accessibility."[96] The court distinguished between provider offices that had been built or altered after the ADA's effective date and those which had not.[97] The State had to ensure that the providers who practiced in offices that were constructed or altered after the relevant effective date were readily accessible to individuals with disabilities.[98] The State was not required to ensure readily accessible provider offices if those offices had been built prior to the ADA's effective date and not altered after that date.[99] Those providers were, however, required to provide their same medical services to individuals with disabilities at an alternative, readily accessible location.[100]

D. "Meaningful Access"

Absent new construction or an alteration to an existing facility—which as noted above are subject to more stringent standards—a service, program, or activity is readily accessible if the individual has been provided with "meaningful access" to that service, program, or activity.[101] This standard does not emanate from either the statute or its regulations but from a Supreme Court decision in a § 504 case.[102]

In *Alexander v. Choate*, the Court rejected a claim that Tennessee violated § 504 when it reduced the number of in-patient hospital days it would pay under its Medicaid program.[103] The plaintiffs as-

96. Anderson v. Dep't of Pub. Welfare, 1 F. Supp. 2d 456, 463 (E.D. Pa. 1998).

97. *Id.* at 469.

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* Alexander v. Choate, 469 U.S. 287, 301 (1985).

102. *See* K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1102 (9th Cir. 2013) ("The phrase 'meaningful access' derives not from the text of the ADA or its implementing regulations, but from the Supreme Court's opinion in *Alexander v. Choate*." (citing Alexander v. Choate, 469 U.S. 287 (1985))).

103. *Choate*, 469 U.S. at 289, 309.

serted the reduction would have a discriminatory impact on recipients with disabilities, as individuals with disabilities disproportionately require longer hospital stays than individuals without disabilities.[104] The main question in the case was whether § 504 required proof of intent to discriminate against those with disabilities or whether evidence of disparate impact was sufficient.[105] The Court answered equivocally: "[W]e assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[106] The Court then addressed whether Tennessee's rule had an unjustified impact.

The Court reasoned that the answer to that question depended on whether Tennessee law "provided . . . meaningful access to the benefit" in question.[107] The benefit itself could not be defined in a way to effectively deny access to individuals with disabilities, and the State may be required to make reasonable accommodations to assure meaningful access.[108] At the same time, the law did not require "equal results."[109] The Court employed a formal equality test that looked at whether the State's "criteria [had] a particular exclusionary effect on the handicapped."[110] The Court found none because the statute was "neutral on its face"—it applied equally to those with and those without disabilities.[111] The Court then found the policy provided meaningful access to individuals with disabilities:

> [N]othing in the record suggests that the handicapped in Tennessee will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule. The reduction in inpatient coverage will leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available

104. *Id.* at 289–90.
105. *Id.* at 292.
106. *Id.* at 299.
107. *Id.* at 301.
108. *Id.*
109. *Id.* at 304.
110. *Id.* at 302.
111. *See id.*

> for their use, with both classes of users subject to the same durational limitation.[112]

In other words, because the benefit was provided equally to both those with and without disabilities, and the coverage was "effective,"[113] there was no direct evidence that the change was intended to disparately affect individuals with disabilities.

As Professors Francis and Silvers have observed, *Choate* did not further define what "benefit meaningfully" meant: "While it is clear from the decision that 'no benefit' would fail the 'meaningful' test and that equality of results is more than would be required, the decision did not go beyond these sketchy boundaries."[114] They suggest that the meaningful access cases require individuals with disabilities be provided an equal opportunity to benefit from the at-issue service, program, or activity, which they define as "benefits of roughly equal serviceability for disabled and non-disabled alike."[115] Lower courts have acknowledged that public entities need to do more than merely open the door to individuals with disabilities but disavow comparing the results obtained by those individuals to the results ob-

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112. *Id.* (footnote omitted).

113. *Id.*

114. Leslie Pickering Francis & Anita Silvers, *Debilitating* Alexander v. Choate*: "Meaningful Access" to Health Care for People with Disabilities*, 35 FORDHAM URB. L.J. 447, 453 (2008). The lack of concrete guidance has led to such lower court reasoning as the Western District of Washington's conclusion that a fishing captain had meaningful access to a fishery program despite a new rule that prevented him from using an accommodation, because the new rule "only affect[ed] *at most* 30% of his income" from the program, and he could apply for a medical exemption from the rule two out of every five years. Fairweather Fish, Inc. v. Pritzker, No. C14-5685 BHS, 2016 WL 6778781, at *6 (W.D. Wash. Nov. 16, 2016) (citation omitted). The court framed its conclusion as the plaintiff having meaningful access to the program, although it seemed to be applying a balancing test for the harm to the plaintiff compared to the impact of "setting aside" the rule. *Id.* The court thus seems to have conducted a cost-benefit analysis that read the defendant's affirmative undue burden defense into the basic requirement that individuals with disabilities be afforded meaningful access to the government program. There is no basis in the statute or regulations for this type of cost-benefit comparison. *Cf.* 29 C.F.R. app. § 1630.15(d) (2018) (rejecting in employment discrimination cases a cost-benefit analysis that compares the cost of the employee's salary to the cost of an accommodation).

115. Francis & Silvers, *supra* note 114, at 477.

tained by individuals without disabilities.[116] As the next section will establish, the meaningful benefit standard has played a significant role in judicial gatekeeping of Title II claims, along with the definition of "program, service, or activity."

III. JUDICIAL GATEKEEPING OF TITLE II CLAIMS

The operative language of Title II offers courts multiple opportunities to gatekeep—opportunities courts have been taking. Most courts articulate the Title II prima facie case in terms similar to this:

> [T]o establish a violation of Title II, the plaintiffs here must demonstrate: (1) that they are qualified individuals within the meaning of the Act; (2) that they are being excluded from participation in, or being denied benefits of, services, programs, or activities for which the Secretary is responsible, or are otherwise being discriminated against by the Secretary; and (3) that such exclusion, denial of benefits, or discrimination is by reason of their disability.[117]

As noted above, plaintiffs' early difficulties meeting the first element have largely been resolved by the expanded definition of disability under the ADAAA.[118] The third element addresses causation, and a

116. *See, e.g.*, Henrietta D. v. Bloomberg, 331 F.3d 261, 274 (2d Cir. 2003) ("[O]ur cases speak simply in terms of helping individuals with disabilities access public benefits to which both they and those without disabilities are legally entitled, and to which they would have difficulty obtaining access due to disabilities; the cases do not invite comparisons to the results obtained by individuals without disabilities.").

117. *See, e.g.*, Lightbourn v. County of El Paso, 118 F.3d 421, 428 (5th Cir. 1997); *see also supra* note 12.

118. *See supra* notes 11–12 and accompanying text. This element also requires that plaintiffs show they meet the essential eligibility requirements for the government service, program, or activity. A common context where this issue arises is alleged disability discrimination by academic institutions and testing entities. *See, e.g.*, Powell v. Nat'l Bd. of Med. Exam'rs, 364 F.3d 79, 87 (2d Cir. 2004) ("Even assuming for purposes of our review, that plaintiff met the definition of being a disabled person under the [ADA], she still did not present evidence showing she was otherwise qualified to continue to be a medical student at UConn.").

court reaches it only if a court finds the second element is met.[119] The second element is now seeing judicial responses similar to the disability element during the pre-ADAAA days. Courts are parsing this element and dismissing cases because the plaintiff has not identified a covered government function.[120] This avoids the merits questions in Title II cases, namely whether the proposed modifications to policies and practices are reasonable, and whether the burden of proof shifts to the public entity to establish undue burden, fundamental alteration, or direct threat.[121] Even if the cases are not dismissed at the prima facie stage, by parsing the elements of § 12132, courts can re-characterize the at-issue service, program, or activity, or the benefits thereof, and have a substantial effect on the meaningful access analysis.[122]

There are several ways courts engage in this parsing. First, courts "hair-split" to find plaintiffs simply have not alleged a service, program, or activity of the public entity. Second, courts find plaintiffs have not alleged the denial of a benefit or an opportunity to participate in a government program. Third, courts view the claim as alleging a lack of "facilities access" to an existing facility, rather than access to the public entity's services, programs, or activities. The following sections address each of these in turn.

A. Hair-Splitting "Service, Program, or Activity"

Initially, courts carved out certain government functions that they believed the ADA did not intend to cover. Courts rejected Title

119. I have written elsewhere on the ADA's causation standards, including the "necessity-causality" standard articulated by some courts under Title II. *See* Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 MISS. L.J. 67, 111–19 (2013).

120. *See infra* Section III.A.

121. *See* 28 C.F.R. § 35.130(b)(7) (2016) (requiring public entities to make reasonable modifications to policies and practices when necessary to avoid discriminating based on disability); *id.* § 35.150(a)(3) (setting out the public entity's defenses that a change to an existing facility would fundamentally alter the nature of the public entity's services, programs, or activities, or result in an undue financial or administrative burden); *see also* Tennessee v. Lane, 541 U.S. 509, 531–32 (2004) (describing Title II as requiring only "'reasonable modifications'" to public entities' services).

122. *See infra* Part IV.

II claims involving zoning,[123] prisons,[124] and termination of parental rights[125]—often with limited reasoning beyond the court's conclusion that none of those were services, programs, or activities of a public entity.[126] The first major case to disagree and criticize parsing whether something was a service, program, or activity came out of the Second Circuit.[127] The case, *Innovative Health Systems, Inc. v. City of White Plains*, raised a zoning issue in which the plaintiff sought an injunction against the City of White Plains' decision to revoke a building permit for a drug and alcohol rehabilitation center.[128] The City argued that the plaintiff should not have been granted a preliminary injunction against its zoning board's decision because zoning was not a service, program, or activity of the City.[129] The Second Circuit disagreed, holding broadly that Title II applies to all "normal function[s] of a governmental entity," and zoning was without question a normal government function.[130]

To find the proper approach to this threshold element, the Second Circuit first looked to the Rehabilitation Act's definition of

123. *See* United States v. City of Charlotte, 904 F. Supp. 482, 484 (W.D.N.C. 1995) (holding zoning decisions are not programs, services, or activities covered by Title II of the ADA).

124. *See, e.g.*, Torcasio v. Murray, 57 F.3d 1340, 1352 (4th Cir. 1995) (finding it not clearly established for qualified immunity purposes whether prisons are subject to the reasonable accommodation requirements of Title II).

125. *See In re* Antony B., 735 A.2d 893, 899 (Conn. App. Ct. 1999) ("[T]he ADA neither provides a defense to nor creates special obligations in a [parental rights] termination proceeding.").

126. *See In re* B.S., 693 A.2d 716, 720 (Vt. 1997) (citations omitted) ("Title II, which deals with public services, provides that '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.' TPR proceedings are not 'services, programs or activities' within the meaning of Title II of the ADA, 42 U.S.C. § 12132."); *see also* White v. Colorado, 82 F.3d 364, 367 (10th Cir. 1996) ("For the same reasoning relied upon in [a § 504 case], we hold that the ADA does not apply to prison employment situations either.").

127. Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44–45 (2d Cir. 1997), *superseded on other grounds by* Zervos v. Verizon N.Y. Inc., 252 F.3d 163, 171 n.7 (2d Cir. 2001) (characterizing parsing arguments as "hair-splitting" and drawing "arbitrary distinction[s]").

128. *Innovative Health Sys., Inc.*, 117 F.3d at 40–42.

129. *Id.* at 44.

130. *Id.*

"program or activity," which included "all of the operations" of a public entity.[131] The court then approved the district court's use of the dictionary definition of "activity": a "natural or normal function or operation."[132] The court thus concluded that "both the ADA and the Rehabilitation Act clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity."[133] Moreover, the court suggested that it was not even necessary to make that determination, because § 12132's "catch-all" clause "does not limit the ADA's coverage to conduct that occurs in the 'programs, services, or activities' of the City."[134] Because the "catch-all phrase [] prohibits all discrimination by a public entity, regardless of the context," the court characterized the City's argument as unnecessary "hair-splitting."[135]

Some courts have adopted *Innovative Health*'s approach, moving on from whether the plaintiff has identified a normal government function with little discussion and evaluating whether the plaintiff was qualified for and received meaningful access to that government function.[136] Other courts, however, continue to parse the type of service, program, or activity alleged by the plaintiff. In most of these

131. *Id.*

132. *Id.* (quoting Innovative Health Sys., Inc. v. City of White Plains, 931 F. Supp. 222, 232 (S.D.N.Y. 1996)).

133. *Id.*

134. *Id.* at 45.

135. *Id.* at 44–45. The Second Circuit also noted that the Department of Justice's *Technical Assistance Manual* specifically referred to zoning as an example where a city may be required to reasonably modify its policies, practices, and procedures. *Id.* at 45 (citing TECHNICAL ASSISTANCE MANUAL, *supra* note 91, § II-3.6100, illus. 1).

136. *See, e.g.*, Bircoll v. Miami-Dade Cty., 480 F.3d 1072, 1084–85 (11th Cir. 2007) (finding that the court "need not enter the circuits' debate about whether police conduct during an arrest is a program, service, or activity" because the "catch-all phrase [] prohibits all discrimination by a public entity, regardless of the context," and instead evaluating in detail whether the plaintiff meaningfully participated at each stage of contact with the police) (quoting Bledsoe v. Palm Beach Cty. Soil & Water Conserv. Dist., 133 F.3d 816, 822 (11th Cir. 1998)); Vance v. City of Maumee, 960 F. Supp. 2d 720, 732 (N.D. Ohio 2013) (adopting with limited analysis the plaintiff's characterization that the City's service was "meaningful driveway access" and not City's claim it was "garage access for homeowners with garages accessible from [a particular street]").

cases, they take what I call a granular approach.[137] They use the narrowest aperture through which to view the government's actions. This allows the court to either find that no normal function of government is at issue, or that no service or benefit was similarly available to others.

In a few other cases, the problem is not the court's granular parsing of the government function but rather the court's recasting the function in broader terms, which combined with the program accessibility standard denies the plaintiff access to benefits offered to others without disabilities.[138] It does not make any difference whether the court adopts the otherwise broad "normal function of government" standard. Essentially, courts can manipulate the at-issue government function to find the sweet spot for avoiding the underlying question of whether a modification of policies, practices, or physical facilities would be reasonable. In other words, the hair-splitting that the Second Circuit decried determines the outcome of the disability discrimination claim. All of this makes it more difficult for individuals with disabilities to obtain the equal access to public facilities envisioned by Title II.

1. The Granular Approach

The granular approach to the second element of the prima facie case looks at the alleged service, program, or activity, or the benefit individuals receive therefrom, so narrowly that courts find the plaintiff's claim is not something Title II covers. This is how, for example, the Fifth Circuit held Texas was not responsible for the discriminatory acts of a third party that it licensed and regulated, because the court found the public entity did not provide the service, program, or activity that discriminated against the plaintiff.[139] The court acknowledged that Title II's regulations prohibit public entities from indirect discrimination through contractual and licensing arrangement with third

137. *See infra* Section III.A.1.

138. *See infra* Section III.A.2.

139. *See* Ivy v. Williams, 781 F.3d 250, 255 (5th Cir. 2015), *cert. granted sub nom.* Ivy v. Morath, 136 S. Ct. 2545 (2016), *and vacated and remanded as moot sub nom.* Ivy v. Morath, 137 S. Ct. 414 (2016). The court characterized the case as "close." *Id.*

parties,[140] but the way the court characterized the at-issue service allowed the court to sidestep that rule.

The case, *Ivy v. Williams*, involved Texas's driver's licensing system, specifically its driver's education requirement.[141] The only way to get a driver's license in Texas is to submit a driver's education certificate; and the only way to get that certificate is to complete a course offered by a private driving school that is licensed by the Texas Education Agency ("TEA").[142] The TEA does not require that the driving schools make their drivers' education programs accessible to individuals with disabilities.[143] The plaintiff in *Ivy*, who was deaf, brought a class action suit on behalf of Texas residents who were effectively precluded from obtaining a driver's license when the private schools refused to accommodate them.[144]

A majority of the Fifth Circuit framed the plaintiff's threshold burden as having to show that the State of Texas provided "driver education" as a service, program, or activity.[145] This allowed the majority to cabin the State's involvement in the process, even as the majority agreed Title II applied to "'all the operations of' a public entity" and defined "operate" broadly.[146] The majority found the State itself did not "operate or perform driver education."[147] Similarly, it found the State did not "provide" driver education.[148] While a strong dissent disagreed that the State was merely passive in licensing drivers' education schools,[149] the whole debate arises because the court parsed the

140. *See id.* at 255–56 (discussing 28 C.F.R. § 35.130(b)(1), (b)(1)(v) (2016)).

141. *Id.* at 252.

142. *Id.*

143. *Id.*

144. *Id.* at 252–53. The private driver education school was a party to the original suit, but the plaintiff later dismissed the school. *See id.*

145. *Id.* at 255.

146. *Id.* (citation omitted) ("In the context of interpreting this definition, we have explained that 'Webster's Dictionary broadly defines "operations" as "the whole process of planning for and operating a business or other organized unit," and defines "operation" as "a doing or performing esp[ecially] of action."'").

147. *Id.*

148. *Id.* at 256.

149. *See id.* at 261 (Weiner, J., dissenting) (arguing that the State's "role in driving safety is anything but remote or marginal"); *see also* Tara Knapp, Commentary, *Ditching Your Duty: When Must Private Entities Comply with Federal Antidiscrimination Law?*, 12 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 219, 231–32 (2017)

government function to a granular level. The court focused on whether the State was responsible for the actions of a licensed entity, rather than asking whether the government operation—here, driver's licensing—was a normal function of government; and if so, did the State make the licensing process readily accessible to individuals with disabilities.

If the *Ivy* majority had addressed the issue the latter way, the Title II regulation prohibiting the State from discriminating "directly or through contractual, licensing, or other arrangements"[150] would have more clearly applied. The focus would have been on the State's actions in operating its driver's licensing program and not the private party's operation of its driving school in isolation.[151]

(critiquing the Fifth Circuit's interpretation of "provides" as "without a thoughtful foundation").

150. 28 C.F.R. § 35.130(b)(1) (2016).

151. Similarly, another regulation the majority dismissed would have been more clearly relevant, namely that states are prohibited from "providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries" of the state's program. *See* 28 C.F.R. § 35.130(b)(1)(v) (2016); *see also Ivy*, 781 F.3d at 255–56 (quoting § 35.130(b)(1)(v)). The majority dismissed both regulations because they hinged on an "aid, benefit, or service" that the public entity provided, and again, the majority stated the State did not provide driver's education. *See id*. Because of the way the *Ivy* majority parsed the service or activity at issue, it saw the DOJ's interpretive guidance as bolstering its conclusion. *See id.* at 256 (citing TECHNICAL ASSISTANCE MANUAL, *supra* note 91, § II-3.7200). That interpretive guidance indicates that:

> The State is not accountable for discrimination in the employment or other practices of XYZ company, if those practices are not the result of requirements or policies established by the State.
>
> Although licensing standards are covered by title II, the licensee's activities themselves are not covered. An activity does not become a "program or activity" of a public entity merely because it is licensed by the public entity.

TECHNICAL ASSISTANCE MANUAL, *supra* note 91, § II-3.7200. This comes immediately after the following illustration and should be considered in context:

> ILLUSTRATION: A State prohibits the licensing of transportation companies that employ individuals with missing limbs as drivers. XYZ company refuses to hire an individual with a missing limb who is "qualified" to perform the essential functions of the job, because he is able to drive safely with hand controls. The State's licensing requirements violate title II.

Similarly, despite also ruling that "the phrase 'services, programs, or activities' encompasses virtually everything that a public entity does,"[152] the Sixth Circuit in more than one recent decision took a granular approach to identifying the relevant service, program, or activity, or the benefit therefrom, which in turn lead it to dismiss the Title II claims. In *Jones v. City of Monroe*,[153] the Sixth Circuit rejected a claim that the City violated Title II in the way it designated free parking spaces in its downtown area.[154] The plaintiff in *Jones* worked downtown and had a mobility impairment that kept her from being able to walk or use her manual wheelchair to cover more than a short distance.[155] The City had several downtown parking lots designated for free parking but restricted employees to certain lots that were too far away for the plaintiff to use.[156] There were a substantial number of closer parking spaces, including eleven adjacent to the plaintiff's office building.[157] Those spots were reserved for one-hour parking, not all day as sought by the plaintiff.[158]

Id. To the *Ivy* majority, this guidance meant that unless the State directed the private entity to discriminate by adopting a requirement or policy for the private entity to follow, the State would not be responsible for the private entity's discriminatory actions. *See Ivy*, 781 F.3d at 256 (reasoning that the plaintiff's claim was "at most that TEA's *failure* to establish requirements or policies . . . allowed private driver education schools to be inaccessible"). That reasoning seemingly disregards that the guidance is talking about licensing arrangements quite different from the one posed in the Fifth Circuit case. The driving school was carrying out a function on behalf of the State, rather than a more passive State connection such as licensing transportation companies to operate within the State. Contrary to the majority's assertion, the case was indeed about the State's failure to ensure its licensing scheme was readily accessible to individuals with disabilities. *Cf.* King v. Marion Cir. Ct., No. 1-14-CV-01092-JMS-MJD, 2016 WL 3031085, at *8 (S.D. Ind. May 27, 2016) *rev'd and remanded*, 868 F.3d 589 (7th Cir. 2017) (finding privately funded mediation program was a judicial service because of how intertwined it was with the state court system).

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

153. 341 F.3d 474 (6th Cir. 2003), *abrogated on other grounds by* Anderson v. City of Blue Ash, 798 F.3d 338, 357 n.1 (6th Cir. 2015).

154. *Id.* at 481 (denying request for preliminary injunction).

155. *Id.* at 475.

156. *Id.*

157. *Id.* at 482 (Cole, J., dissenting).

158. *Id.* at 475 (majority opinion).

The plaintiff sought to enjoin the City from enforcing its one-hour limitation on an accessible spot as a reasonable modification of its downtown parking program.[159] The Sixth Circuit took issue with the way the plaintiff characterized the benefit at issue. According to the *Jones* court, "the benefit is not appropriately defined as free downtown parking generally, but rather as the provision of all-day and one-hour parking in specific locations."[160] Having redefined the program benefits in this granular way, the court then employed formal equality analysis to conclude the plaintiff had the same access to "all-day parking" that everyone else had and the same limitation on use of "one-hour parking" as well.[161] This hair-splitting effectively avoided addressing the meaningful access issue; namely, the plaintiff (unlike her colleagues without disabilities) had no meaningful ability to use the free all-day parking provided by the City.[162]

More hair-splitting occurred in *Babcock v. Michigan*, in which the Sixth Circuit rejected a Title II claim brought by a state employee with a physical disability who had difficulty accessing a Michigan office building owned by a public entity and leased by the State.[163] The building housed the plaintiff's place of employment, a government agency.[164] The plaintiff alleged that "the slope of ramps at building entrances and the lack of handrails at entrances" denied her access to her place of work due to her degenerative neuromuscular disorder that impaired her walking ability.[165] Although the main issue in *Babcock* was whether Eleventh Amendment immunity protected the State of Michigan from suit under Title II, the Sixth Circuit believed that under the Supreme Court's ruling in *Tennessee v. Lane*, it first had to identify the specific state conduct that supported a Title II claim.[166]

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159. *See id.* at 476–77; *id.* at 481 (Cole, J., dissenting).

160. *Id.* at 477 (majority opinion) (citing Alexander v. Choate, 469 U.S. 287, 303 (1985)).

161. *Id.* at 478.

162. As the dissenting opinion in *Jones* observed, "Parking is only meaningful insofar as it provides individuals with access to their destinations." *Id.* at 485 (Cole, J., dissenting).

163. Babcock v. Michigan, 812 F.3d 531, 532–33 (6th Cir. 2016).

164. *Id.* at 532.

165. *Id.* at 533.

166. *See id.* at 534–35. In *Lane,* the Supreme Court found that Title II validly abrogated Eleventh Amendment immunity for some, but not all, claims for damages

The Sixth Circuit found that the plaintiff failed to allege a service, program, or activity provided by the State of Michigan because she needed to do more than allege the facility was inaccessible.[167] The court believed that Title II's regulations created a distinction between facilities and services, programs, or activities.[168] Instead of focusing on the State's actions in owning and leasing building space as a normal function of a government entity, and thus the relevant activity at issue, the court characterized the plaintiff's "position as arguing that the design features identified in her complaint, such as the slope of ramps and lack of handrails, are services, programs, or activities."[169] Having hair-split her claim in this fashion, the court successfully cabined the plaintiff's claim: "facility accessibility is not, standing alone, a cognizable claim under [Title II]; rather, the inquiry is tied to whether that facility's inaccessibility interferes with access to public services, programs, or activities."[170]

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against the State. Tennessee v. Lane, 541 U.S. 509, 532–34 (2004). According to the Sixth Circuit, *Lane* required courts to identify that state conduct was at issue and then determine if it fell within the category of cases *Lane* suggested could appropriately be pursued. *See Babcock*, 812 F.3d at 535.

167. *Babcock*, 812 F.3d at 536.

168. The court quoted the language from several Title II regulations in support of its reading. *See id.* at 535–36 (quoting 28 C.F.R. §§ 35.149, 35.150(a)(1), 35.150(b), 35.151(b)(4)(i)). The court believed these sections differentiated a public entity's "facilities" from its services, programs, and activities. *Id.* at 535. For example, § 35.149 provides that:

> [N]o qualified individual with a disability shall, because a public entity's *facilities* are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the *services, programs, or activities* of a public entity, or be subjected to discrimination by any public entity.

28 C.F.R. § 35.149 (2018) (emphasis added). Section 35.151(b)(4)(i)—which applies when public entities alter existing facilities in a way that affects the usability of an area where a primary function is carried out—defines "primary function" as "a major activity for which the facility is intended" and includes "offices and other work areas in which the activities of the public entity using the facility are carried out." *Id.* § 35.151(b)(4)(i). The other two sections reference the program accessibility standard and a public entity's ability to offer its services in alternative locations if its structures are inaccessible. *See id.* § 35.150(a), (b)(1). None of these sections suggest that public entities lack any obligation to make facilities accessible.

169. *Babcock*, 812 F.3d at 535.

170. *Id.* at 536.

Hair-splitting, if it goes granular enough, can reach the level of absurdity. To illustrate, a federal district court rejected a Title II claim brought by a paraplegic man who had been detained in a county jail cell and who could not use the toilet in the cell because he needed a catheter to urinate.[171] The jail officials made no effort to assess his physical condition before they left him in the cell for "a considerable period of time."[172] The court characterized the government function at issue, not as providing access to appropriate bathroom facilities while detained, but as "provision of a catheter."[173] Although ultimately the court might have concluded the jail had no obligation to provide a catheter as an auxiliary aid or service, because it is of a personal nature,[174] by focusing so granularly on the catheter at the prima

171. Harkless v. Brazoria Cty., No. 3:14-CV-329, 2016 WL 1702595, at *7 (S.D. Tex. Apr. 28, 2016). The *Harkless* court also characterized the ADA claim as asking whether the county knew he needed a catheter and intentionally denied it, or "intentionally failed to accommodate him." *Id.* at *6. *But see generally* Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417 (2015) (discussing how courts erroneously require showings of intent in reasonable accommodation cases).

172. *Harkless*, 2016 WL 1702595, at *1. Harkless, the plaintiff, knocked on the cell window to get the jailers' attention, which apparently led the jailers to enter his cell, grab his wheelchair and push him to another, windowless cell, where they lifted him out of the wheelchair and onto the floor, stripped him of his clothes, and then left him there in a pool of his own urine. *Id.* After he was released, he obtained medical treatment that revealed they had fractured his right leg during those events. *Id.*

173. *Id.* at *7. The court's language also indicates the plaintiff must identify a specific benefit that was denied, rather than just showing he was excluded from participating. *See id.* (criticizing plaintiff for "not specifically delineat[ing] the 'benefit' he alleges" to have been denied).

174. *See* TECHNICAL ASSISTANCE MANUAL, *supra* note 91, § II-3.6200. This section provides:

> A public entity is not required to provide individuals with disabilities with personal or individually prescribed devices, such as wheelchairs, prescription eyeglasses, or hearing aids, or to provide services of a personal nature, such as assistance in eating, toileting, or dressing. Of course, if personal services or devices are customarily provided to the individuals served by a public entity, such as a hospital or nursing home, then these personal services should also be provided to individuals with disabilities.

facie stage, the court did not address the jail's obligation to make alternative arrangements that would have allowed the plaintiff to access a toilet. The granular approach thus allows courts to avoid considering the merits of access claims and the feasibility of alternative means of providing that access.

2. The Macro View

Not all cases in which courts hair-split involve a court insisting the service, program, activity, or benefits be evaluated at a granular level. In some cases, courts refuse to consider the specific program asserted by the individual with a disability and instead take a macro view of what they see as one unitary program. This macro view can be especially problematic in light of the program accessibility standard that allows less than identical access to be meaningful.[175] The case outcome then depends on the court's level of tolerance for unequal access. Such was the situation in a case arising out of the Maryland federal district court, in which a plaintiff who used a wheelchair brought suit when he was precluded from attending a state bar association section meeting held at an inn that had an inaccessible entrance.[176] The University of Maryland owned and rented the inn to the bar association for the event.[177] The plaintiff asserted the relevant service was renting the inaccessible inn, but the court instead viewed the relevant service as "renting out by the University of its dining and meeting facilities to outside entities."[178] This allowed the University to point to other dining facilities that it made available for rent that were wheelchair accessible.[179] Because the court accepted that macro view of the program as the relevant measuring stick, the court con-

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Id. As the last line suggests, there would be a fact issue regarding what toileting services the jail customarily provides and what alterations may be permitted for the plaintiff to make use of them.

175. *See* 28 C.F.R. § 35.150(a)(1) (2012) (not requiring a public entity to make each existing facility it operates accessible if the program when viewed in its entirety is readily accessible); *see also supra* Section II.C.

176. Levy v. Mote, 104 F. Supp. 2d 538, 541 (D. Md. 2000). The plaintiff also alleged a lack of accessible parking. *Id.*

177. *Id.*

178. *Id.* at 547.

179. *See id.*

cluded that "[t]he University was not required to make each separate facility accessible to disabled persons, so long as services, programs or activities were readily accessible when viewed in their entirety."[180]

The essence of this approach is that one component of a program need not be accessible if the program as a whole can be considered accessible, even if the lack of access means the individual with a disability does not have the same opportunities to participate as others. If the court characterizes what the plaintiff seeks as a mere component of a larger program, the court can downplay the effects of that program's inaccessible aspects. That reasoning animated the Ninth Circuit's decision rejecting a parent's claim alleging alternate seating at his child's football game was inadequate because it did not give him access to the bleachers where other fans sat together and rooted for the team.[181] The court, while acknowledging that Title II applied to "anything a public entity does," nonetheless concluded that "experiences that are merely incidental to normal government functions are not fairly characterized as government programs."[182] The court described the program in a macro sense—"football games."[183] Access to the football games meant being seated where the parent could see

180. *Id.*

181. *See* Daubert v. Lindsay Unified Sch. Dist., 760 F.3d 982, 987–88 (9th Cir. 2014).

182. *Id.* at 987 (emphasis omitted) (quoting Barden v. City of Sacramento, 292 F.3d 1073, 1076 (9th Cir. 2002)).

183. *See id.* ("Here, the School District offers football games as a public program, and the bleachers are one part of the facility in which that program takes place."). The unitary approach does not necessarily spell defeat for plaintiffs. For example, the Eastern District of Pennsylvania adopted a unitary view of the City of Philadelphia's voting program, rejecting the argument that every local polling place where voters were assigned must be accessible. Kerrigan v. Phila. Bd. of Election, No. 07-687, 2008 WL 3562521, at *13 (E.D. Pa. Aug. 14, 2008) ("Philadelphia's program of voting comprises its entire voting program, encompassing all of its polling locations throughout the City, as well as its alternative and absentee ballot programs."). Nonetheless, the court found the plaintiffs sufficiently alleged lack of meaningful access because local polling locations were places "where voters may vote with their neighbors, meet election judges and party officials, and obtain information from representatives of the candidates." *Id.* at *17. This led the court to conclude that the City's relying on an alternative ballot process instead of making local polling places readily accessible failed to afford individuals with disabilities the opportunity to vote in the most integrated setting. *See id.* at *17–18.

what was happening on the field.[184] Thus, whether they accomplish it by taking a granular approach or a macro view, courts are engaging in hair-splitting of the services, programs, activities, and benefits provided by public entities to dismiss plaintiffs' access claims.

B. Failing to Find a "Benefit" or Lack of "Participation"

Beyond hair-splitting the exact service, program, activity, or benefit provided by the public entity, courts in some cases simply fail to see the government performing a function that benefits the plaintiff or in which the plaintiff participates. Title II prohibits both denying the benefits of a service, program, or activity and denying participation in those services, programs, or activities.[185] *Yeskey* rejected the State's argument that state prisons fall outside Title II's coverage because prisoners cannot be said to benefit from them.[186] The Court found several ways that prisoners do indeed benefit from the prison system: "recreational 'activities,' medical 'services' and educational and vocational 'programs.'"[187] The Court found no basis in the statute's broad language for a distinction based on who was provided the benefit.[188] *Yeskey* should discourage courts from excluding certain types of government actions from Title II's coverage because they do not think that coverage seems right, but some courts still do just that; the employment discrimination cases are a primary example.[189] Some

184. *Daubert*, 760 F.3d at 987. The court noted that seating was available in front of and to the side of the bleachers and in other areas where spectators congregate. *See id.* at 988. It is not clear whether spectators actually did congregate in any of those other locations.

185. *See* 42 U.S.C. § 12132 (2012).

186. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998).

187. *Id.*

188. *See id.*

189. Some of the same can be seen in cases involving termination of parental rights ("TPR") and arrests, but those cases do not necessarily reflect wholesale exclusion of any related claims from Title II. In TPR cases, some courts distinguish between the TPR decision and earlier obligations to provide parents with reunification services appropriately tailored to their disabilities. *See, e.g.*, Lucy J. v. State, 244 P.3d 1099, 1115 (Alaska 2010) (reasoning that Title II applies to family reunification services to be offered prior to the actual TPR). In arrest cases, some courts distinguish law enforcement activities pre- and post-securing the scene. *See* Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) ("Title II does not apply to an of-

courts also require plaintiffs to demonstrate that the public entity "does" something that denies them the opportunity to benefit or participate. Mere "passive" government functions do not suffice. The following sections address both of these circumstances.

1. Categorically Excluding Employment Discrimination

Writ large, *Yeskey* does not favor wholesale exclusion of government activities from Title II's scope, absent explicit direction to do so in the statute. Nonetheless, several circuits categorically reject any Title II coverage for employment discrimination claims.[190] In the majority of circuits to have addressed the issue, courts find that public employment discrimination claims are governed exclusively by Title I.[191] To a certain degree this is based on the fact that Title I is more comprehensive and explicitly addresses employment claims, while Ti-

ficer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."); *see also* Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law."). This section looks at cases where courts do not make any such distinctions.

190. The Second, Fourth, Seventh, Ninth, and Tenth Circuits have held that employment discrimination claims under the ADA must exclusively be brought under Title I. Reyazuddin v. Montgomery Cty., 789 F.3d 407, 421 (4th Cir. 2015); Brumfield v. City of Chicago, 735 F.3d 619, 626 (7th Cir. 2013); Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 171 (2d Cir. 2013); Elwell v. Oklahoma *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1313 (10th Cir. 2012); Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1178 (9th Cir. 1999). While the Third and Sixth Circuits do not appear to have decided the issue directly, at least one other circuit views them to "have expressed the view that Title I is the exclusive province of employment discrimination within the ADA." *Elwell*, 693 F.3d at 1314 (first citing Menkowitz v. Pottstown Mem'l Med. Ctr., 154 F.3d 113, 118–19 (3d Cir. 1998); and then citing Parker v. Metro. Life Ins. Co., 121 F.3d 1006, 1014 (6th Cir. 1997)). The Eleventh Circuit has held employment discrimination claims can be brought under Title II. *See* Bledsoe v. Palm Beach Cty. Soil & Water Conserv. Dist., 133 F.3d 816, 822 (11th Cir. 1998) (concluding that "employment coverage is clear from the language and structure of Title II"); s*ee also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 n.1 (2001) (acknowledging the split but not resolving it).

191. *See supra* note 190.

tle II does not.[192] At the same time, however, that rationale alone is not sufficient to preclude a Title II claim because the language in Title II is capacious, and Congress clearly contemplated some overlapping coverage—as it also did for the ADA and the Rehabilitation Act.[193] Nonetheless, courts have held that Title II is unambiguous in not covering employment discrimination claims.[194] The Seventh Circuit succinctly revealed the underlying reason: "employment is not ordinarily conceptualized as a 'service, program, or activity' of a public entity."[195] Courts have justified this view with a couple of questionable explanations tied to whether there is some kind of benefit at issue or whether there is something in which the public participates.

One explanation these courts have offered is simply that the public entity provides no benefit when the entity hires someone, nor do members of the public participate in a government function when they are hired to work for the government.[196] This explanation rests on an artificial distinction between the government function itself and hiring individuals to carry out that function, as seen in a Tenth Circuit decision explaining why public employment is not a "benefit":

> "Services" are ordinarily understood as acts "done for the benefit . . . of another." We don't doubt that universities undertake a wide range of acts designed to benefit their students, both in the classroom and beyond. A university may offer academic instruction, meals and living quarters, even places to play and make friends—doing all of these things to benefit its students. A university may employ people as a means to provide these

192. *See Zimmerman*, 170 F.3d at 1177 (emphasizing that Congress "crafted extensive employment-specific provisions in Title I" and "omitted any mention" of it in Title II).

193. *See Bledsoe*, 133 F.3d at 821 (setting out the "[e]xtensive legislative commentary" showing Congress contemplated Title II to apply to employment discrimination and Title II's overlap with § 504, which "was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that Section 504 applied to other forms of discrimination in addition").

194. *See Brumfield*, 735 F.3d at 626 ("Title II unambiguously does not apply to the employment decisions of state and local governments.").

195. *Id.*

196. *See* Elwell v. Oklahoma *ex rel.* Bd. of Regents of the Univ. of Okla., 693 F.3d 1303, 1306–07 (10th Cir. 2012).

> benefits. But one doesn't usually think of employing people as itself a benefit a university seeks to provide, as some sort of end in and of itself.[197]

Explaining why it did not find the plaintiff to be participating in a program, the court framed it "a matter of plain language" that the statute meant "denying access to a public program like social security. Or, in the university context, denying access to, say, a foreign exchange program."[198]

The court then drew a distinction between the program and the employees hired to carry out the program: "But we don't ordinarily understand employees who help make programs possible as themselves participating in or receiving their benefits. The phrase 'programs of a government entity' refers to its 'project[s] or scheme[s]'—not, usually at least, to the employment of those needed to effect [sic] an agency's projects and schemes."[199]

The second, related explanation these courts have offered is one that creates an "inputs"/"outputs" distinction that has no basis in the language of the statute. The "inputs"/"outputs" distinction holds that Title II covers only the "outputs" of a public entity, such as social service programs, parks and recreational programs, and the like.[200] Although courts taking this approach acknowledge that § 12132(2)'s

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197. *Id.* at 1306–07 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (2002); and then quoting 15 OXFORD ENGLISH DICTIONARY 34 (2d ed. 1991) ("The work or duty of a servant; the action of serving a master.")).

198. *Id.* at 1307.

199. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1812 (2002); and then quoting 12 OXFORD ENGLISH DICTIONARY 589 (2d ed. 1991) ("a planned series of activities or events")). The court acknowledged that "activity" seems to be a broader term but rejected construing it to "rope in everything the entity does," because that would make "the earlier listed terms 'services' and 'programs' . . . superfluous, eaten up by the all-encompassing term 'activities.'" *Id.*

200. *See Elwell*, 693 F.3d at 1306 ("A university's services, programs, and activities might include courses in Bach, biophysics, or basket weaving—outputs provided to its students—but not the professors, piano tuners, or other people needed to make those offerings possible."); *see also* Bledsoe v. Palm Beach Soil & Water Conserv. Dist., 942 F. Supp. 1439, 1444 (S.D. Fla. 1996), *rev'd sub nom.* Bledsoe v. Palm Beach Cty. Soil & Water Conserv. Dist., 133 F.3d 816 (11th Cir. 1998) (citations omitted) (describing outputs as community services like "foster care programs and bond financing for housing projects," as well as "parks, recreational facilities, and similar government services").

"catch-all" clause broadens the scope of what the statute reaches on its face,[201] they side-step that by looking to § 12131(2)'s definition of "qualified individual with a disability," which requires the individual to "meet[] the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."[202] This, they assert, requires some kind of action on the part of the public entity, which in turn sets the stage as something from which the individual can benefit or in which the individual can participate.[203] The Ninth Circuit's reasoning is illustrative:

> Obtaining or retaining a job is not "the receipt of services," nor is employment a "program[] or activit[y] provided by a public entity." Again, the "action" words in the statute assume a relationship between a public entity, on the one hand, and a member of the public, on the other. The former provides an output that the latter participates in or receives.[204]

The first cases making this "input"/"output" distinction were decided pre-*Yeskey* when courts were still carving out certain aspects of government operations, like zoning, from Title II coverage.[205] The Court in *Yeskey* rejected a similar argument that prisoners cannot be said to receive the "benefit" of any "service, program, or activity."[206] The Court also rejected distinctions not found in the language of the statute, in that case voluntary versus involuntary participation.[207] In contrast to the circuit courts finding that Title II "unambiguously" did not include government employment, *Yeskey* found "the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt."[208] "Without any exception" translates

201. *See* Brumfield v. City of Chicago, 735 F.3d 619, 627 (7th Cir. 2013); *Elwell*, 693 F.3d at 1308.

202. *See Brumfield*, 735 F.3d at 625, 627 (first quoting 42 U.S.C. § 12131(2) (2012); and then quoting Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169, 1176 (9th Cir. 1999)).

203. *See Zimmerman*, 170 F.3d at 1175–76.

204. *Id.* at 1176 (emphasis omitted).

205. *See, e.g.*, *Bledsoe*, 942 F. Supp. at 1444.

206. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 210 (1998).

207. *Id.* at 211.

208. *Id.* at 209.

beyond the prison context. Employment of workers is a normal function of government, and there is no language in Title II that indicates Congress intended to exclude it. Yet none of the post-*Yeskey* decisions reconcile the Supreme Court's reasoning in that case with their wholesale exclusion of employment discrimination claims.[209]

Unfortunately, the Supreme Court may have muddied the waters with its recent decision in *City & County of San Francisco v. Sheehan*.[210] The Court granted certiorari in *Sheehan* to determine whether Title II "requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody."[211] After oral argument, the Court dismissed the grant of certiorari as improvidently granted after San Francisco apparently conceded Title II would require accommodations during arrests in some circumstances.[212] The Court suggested it saw "an important question" whether § 12132's language "applies to arrests," one which "would benefit from briefing and an adversary presentation."[213] It is not clear whether the Court is signaling that it might potentially wholesale exclude arrests from Title II, or

209. Interestingly, a district court within the Seventh Circuit subsequently highlighted the incoherence of using "output" as the criteria for a government function by allowing a correctional facility inmate to sue under Title II when he was denied employment at the correctional facility due to his disability. London v. Schwochert, No. 14-CV-0124, 2015 WL 5172894, at *3 (E.D. Wis. Sept. 2, 2015). The district court found a prison job to be an "output" of the prison given the Supreme Court's holding in *Yeskey*. *Id.* The court dismissed the appeal. *Id.* at *5.

210. 135 S. Ct. 1765 (2015). At least one commentator suggests that the Court's most recent Title II decision, *Sheehan v. City & County of San Francisco*, was a missed opportunity for the Court to address whether any wholesale exclusions are proper based on threshold considerations. *See* Shanna Rifkin, Note, *Safeguarding the ADA's Antidiscrimination Mandate: Subjecting Arrests to Title II Coverage*, 66 DUKE L.J. 913, 922–24 (2017) (discussing the lower court split on whether Title II applies to discriminatory arrests and calling *Sheehan* a "missed opportunity").

211. *Sheehan*, 135 S. Ct. at 1772.

212. *See id.* San Francisco argued that the plaintiff in that case was not a qualified individual entitled to an accommodation under Title II because she posed a direct threat to the health and safety of others at the time she was arrested. *Id.* at 1772–73.

213. *Id.* at 1773.

whether its main concern is the on-the-street, prior to the scene being secure, context.[214]

2. Failing to Find the Public Entity Has "Done" Something

Echoing themes from the employment cases, some courts conclude that activities of public entities fall outside the normal function of government if the court cannot find the public entity "does" something. For example, the Sixth Circuit in *Babcock v. Michigan* used this rationale to explain why its decision was consistent with its otherwise broad interpretation of services, programs, and activities.[215] *Babcock* rejected a state government employee's Title II claim that she was discriminatorily denied access to her workplace in an office building owned by an entity of the State of Michigan.[216] The court explained that "[w]hat [the court] encounter[ed] here is not something that the State of Michigan 'does,' but rather the facility in which that something is done."[217] Thus, the court saw the plaintiff's claim as seeking facilities access, which was subject to a much narrower set of obligations than the duty to accommodate.[218] To sustain her Title II claim, the court suggested that the plaintiff needed to focus on what each entity in the office building provided and allege a denial of access to those as services, programs, or activities of the State.[219]

A similar search for government action can be seen in a decision by a federal district court in California, albeit one in which the court allowed the plaintiff's Title II claim to proceed.[220] The plaintiff requested that the City of Torrance designate a space on the street in front of her apartment building as handicapped parking.[221] The City refused and argued that it did not have an on-street parking program

214. *See* Rifkin, *supra* note 210, at 925 (suggesting that in *Sheehan*, "Justice Alito made a nonbinding yet helpful suggestion that arrests should be characterized as an 'activity'").

215. *See* Babcock v. Michigan, 812 F.3d 531, 540 (6th Cir. 2016).

216. *Id.* at 532.

217. *Id.* at 540.

218. *See id.*; *see also infra* Section III.C.

219. *Babcock*, 812 F.3d at 540.

220. Bassilios v. City of Torrance, 166 F. Supp. 3d 1061 (C.D. Cal. Dec. 4, 2015).

221. *Id.* at 1064.

because, in essence, it did nothing with respect to on-street parking in residential areas.[222] The City argued that to find a program here would mean something as passive as owning a vacant lot would also subject the City to Title II liability.[223] Rather than rejecting the City's "vacant lot" argument because property ownership is a normal function of government, the court instead deemed the test to be whether the alleged government activity "serve[d] any purpose."[224] The court's theory was that maintaining streets were activities or programs because they facilitated public transportation.[225] Like in the employment cases, the court emphasized action words: "[t]he City built, maintains, and regulates its streets."[226] By contrast, it reasoned, owning a vacant lot in the City "is simply not something the City does, and it appears to serve no public need, so it is not subject to Title II."[227] In other words, the court can further limit Title II's reach by increasing the burden on plaintiffs to identify something the court recognizes as a public benefit or a program in which the public can participate.

C. Service or Facility?

As alluded to above, *Babcock v. Michigan* exemplifies another form of gatekeeping as well: characterizing claims as "facilities access[]" claims to which less strict standards apply for existing facilities.[228] As discussed previously, under the program accessibility regulations, public entities are required to operate their services, programs, and activities so that they are readily accessible to individuals with disabilities, but public entities are not necessarily required to make each of their existing facilities accessible.[229] "Necessarily" should be read in context with another part of the regulations that allows "delivery of services at alternate accessible sites . . . or any other

222. *Id.* at 1066.

223. *Id.* at 1073–74.

224. *Id.* at 1073.

225. *Id.*

226. *Id.*

227. *Id.* at 1074.

228. *See generally* Babcock v. Michigan, 812 F.3d 531 (6th Cir. 2016); *see also supra* text accompanying notes 215–19.

229. *See supra* notes 87–88 and accompanying text.

methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities."[230] Courts have emphasized that the existing-facility standard gives public entities more flexibility in the way they can comply with the ADA, at least until that facility is altered.[231] When a court, such as the Sixth Circuit, characterizes a case as a "facilities access" case, it is suggesting that the plaintiff is seeking more than the law requires the public entity to provide.

A Fifth Circuit sidewalk case illustrates how courts can gatekeep by characterizing a claim as seeking facility access. *Frame v. City of Arlington*, a panel decision later overturned by the court sitting en banc, initially characterized sidewalks as "infrastructure" or facilities, and not services of a city in and of themselves.[232] The court then explained why it believed the difference matters:

> Because the statute mandates modifications only where an individual with a disability cannot access a service, program, or activity, the regulations requiring modifications to sidewalks, curbs, and parking lots in instances where these facilities do not prevent access to some service, program, or activity do not effectuate a statutory mandate.[233]

In other words, if sidewalks are facilities rather than services, an inaccessible sidewalk would be something the City must address only if it prevented access to one of the City's services, programs, or activities.[234] Inaccessible sidewalks might exist throughout a city, for ex-

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230. 28 C.F.R. § 35.150(a)(1), (b)(1) (2012).

231. *See, e.g.*, Greer v. Richardson Indep. Sch. Dist., 472 F. App'x 287, 291 (5th Cir. 2012) (describing Title II's program accessibility standards for existing facilities as "less stringent and more flexible than for new facilities").

232. *See, e.g.*, Frame v. City of Arlington (*Frame II*), 616 F.3d 476, 485–86 (5th Cir. 2010) *overruled by* 657 F.3d 215 (2011) (en banc) (reasoning that when a city creates a sidewalk, it "creates an 'apparatus for . . . meeting a general demand,' but it does not perform 'work . . . by a public official'") (quoting MERRIAM-WEBSTER THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993)).

233. *Id.* at 488.

234. *See id.* at 484 (remanding plaintiffs' claims to the extent they allege they were hindered from accessing such things as "parks, public schools, and polling stations").

ample, but only raise ADA liability if they prevent a citizen with a disability from obtaining the services of a particular government office. By contrast, if sidewalks are a service provided by a public entity, there would be no such limitation. The en banc decision in *Frame* takes the latter approach, finding that either building and maintaining sidewalks, or the sidewalks themselves, were a service provided by the City.[235]

Courts base this supposed need to distinguish facilities from services, programs, or activities on the language in 28 C.F.R. § 35.149:

> Except as otherwise provided in § 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.[236]

Because that regulation refers to inaccessible facilities as a reason a person may be excluded from participation in or denied the benefits of a service, program, or activity, some courts read this to mean an inaccessible facility cannot in and of itself be the government function

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235. *See* Frame v. City of Arlington (*Frame III*), 657 F.3d 215, 226–27 (5th Cir. 2011) (en banc). Even in that en banc decision, however, the City's obligation was limited to newly constructed or altered sidewalks. *Id.* at 228 ("When a newly built or altered city sidewalk is unnecessarily made inaccessible to individuals with disabilities, those individuals are denied the benefits of safe transportation and a venerable public forum."). The Ninth Circuit took it one step further and held that because "maintaining public sidewalks is a normal function of [government]," existing sidewalks must also be readily accessible under the program accessibility regulations. Barden v. City of Sacramento, 292 F.3d 1073, 1076–77 (9th Cir. 2002); *cf.* Scharff v. County of Nassau, No. 10 CV 4208(DRH)(AKT), 2014 WL 2454639, at *7–8 (E.D.N.Y. June 2, 2014) (finding that "installing and maintaining pedestrian crossing signals at crosswalks" constitutes a normal function of government subject to Title II's requirements, applicable to existing crosswalks as well as newly constructed and altered crosswalks).

236. 28 C.F.R. § 35.149 (2018); *see also* Babcock v. Michigan, 812 F.3d 531, 535–36 (6th Cir. 2016) (quoting 28 C.F.R. § 35.149); *Frame III*, 657 F.3d at 245–46 (Jolly, J., dissenting) (citing § 35.149 for the proposition that "a city violates the law by having inaccessible facilities *only if* those facilities deny disabled individuals access to a service").

from which the person is excluded or denied.[237] There has to be some other service, program, or activity, or some other benefit that is denied. The Sixth Circuit's rationale in *Babcock v. Michigan* illustrates how this works.[238]

The Sixth Circuit characterized the plaintiff's claim as relating to "alleged design defects" in the state office building and reasoned that there is "a distinction between services, programs, or activities and the facilities in which they are administered."[239] The court further noted the regulations:

> [P]rovide that a public entity may comply with the ADA without altering a structure, such as by "reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites . . . or any other methods that result in making its services, programs, or activities readily accessible."[240]

The court concluded that "[t]hese regulations strongly suggest that a private cause of action exists to remedy the exclusion from participating in or deriving benefit from public services, programs, or activities, but not [to] remedy the lack of certain design features of a facility."[241]

The facility or service dichotomy was also instrumental in the Ninth Circuit's decision in *Daubert v. Lindsay Unified School District*, which affirmed the dismissal of a parent's Title II claim that he was denied access to the fan bleachers at a high school football game.[242] The bleachers had not been modified after the ADA's effec-

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237. *See supra* note 235.

238. *See generally Babcock*, 812 F.3d 531.

239. *Id.* at 535.

240. *Id.* at 536 (quoting 28 C.F.R. § 35.150(b) (2012)). The court also cited 28 C.F.R. § 39.150(a)(1), which reflects the basic rule that an existing facility need not make each of its existing facilities accessible as long as the program or activity as a whole is readily accessible. *Id*. (citing 28 C.F.R. § 39.150(a)(1) (2012)).

241. *Id.* The Sixth Circuit qualified its holding by stating "[t]his is not to suggest that the ADA does not extend to the alleged design defects of [the building], but merely that plaintiff may not remedy them through private action without alleging interference with a service, program, or activity." *Id.* The court reached a similar conclusion on the plaintiff's § 504 claim. *See id.* at 540 (reasoning that § 504 distinguishes between programs or activities and the facilities in which they take place).

242. 760 F.3d 982, 987 (9th Cir. 2014).

tive date.[243] Apparently recognizing that the lack of modification would limit the school's obligation to alter them under the facility standards, the plaintiff argued the experience of gathering with fans in the stadium-style bleachers was itself a program to which he was denied access.[244] The court, while acknowledging that Title II applied to anything a public entity does, nonetheless concluded that "experiences that are merely incidental to normal government functions are not fairly characterized as government programs."[245] Applying the program accessibility standard to the game as a whole, the court concluded that football games at the school were readily accessible to wheelchair users.[246] It was sufficient that there were alternative seating locations available, and "at least three" of those locations allowed unobstructed views.[247]

The Fifth Circuit, in a similar case involving a parent seeking to enjoy a child's game with other fans, recognized that segregating parents with disabilities to alternative locations apart from other fans would not provide those parents with equal access to the school's program, but nonetheless held the parent failed to state a claim.[248] The wheelchair seating was adjacent to or in front of the bleachers, which the court found sufficient to provide program access.[249] The

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243. *Id.* at 984.

244. *Id.* at 985, 987.

245. *Id.* at 987.

246. *See id.* at 988 (concluding that the school complied with Title II "so long as it provides program access to its football games").

247. *Id.*

248. Greer v. Richardson Indep. Sch. Dist., 472 F. App'x 287, 293 (5th Cir. 2012). The court characterized the parent's theory this way:

> "'[P]rogram access' is more than just the ability to watch the football game at the Berkner B stadium. Instead program access requires that a disabled individual such as Greer not only be able to watch the game but also experience the game from the general admission public bleachers so as to not be separated from other attendees."

Id.

249. *Id.* The bleachers were inaccessible because spectators were required to climb a flight of stairs. *Id.* at 288. The Fifth Circuit suggested the alternative seating was sufficient because it was close to the bleachers rather than "far removed from . . . companions and other attendees," and the plaintiff did not have to sit alone behind goal posts. *Id.* at 293.

court reasoned that the parent's claim "conflate[d] . . . *facility* deviations from ADAAG standards, which are applicable to newly constructed or modified facilities, with [the school district's] obligation to provide *program* access at an existing facility."[250] Despite recognizing that segregating wheelchair users from other fans would fall short of program access, the court defined the program broadly as "watching a football game."[251] The court did not look at what steps the school district might have been able to take to make the bleachers accessible or assess the burden on the school to do so; instead, the court focused more broadly on whether the school had provided alternative locations where the parent and a companion could watch the game.[252] Any other steps were apparently relegated to "facilities" modifications, not program access. Indeed, the court explicitly stated that what the parent sought "would render the 'program access' standard meaningless."[253]

Not every court agrees with a demarcation line between facilities access and program access or that the ADAAGs are irrelevant if the physical structure has not been altered post-ADA. The United States District Court for the Eastern District of New York concluded that while non-compliance with the ADAAGs is not dispositive, the guidelines "can still provide guidance" regarding whether an existing facility is readily accessible.[254] That court allowed a claim to proceed that alleged the Nassau Veterans Memorial Coliseum was not readily accessible by individuals with disabilities because the number of wheelchair seating locations was insufficient.[255] Among other things, the court considered the number of accessible seats a newly built are-

250. *Id.* at 293.

251. *Id.* at 295 (reasoning that the plaintiff failed to show how deviations from the ADAAGs "prevent[ed] her or other disabled individuals from accessing the program at Berkner B, i.e., watching a football game").

252. *See id.*

253. *Id.* at 294. The plaintiff in *Greer* did not make the case any easier by the fact her expert focused on technical violations of the ADAAGs. If the expert had testified to modifications that could have been readily made that would have allowed her to sit with others in the bleachers, the facilities versus program issue might not have been as starkly presented.

254. Brown v. County of Nassau, 736 F. Supp. 2d 602, 617 (E.D.N.Y. 2010) (Bianco, J.) (collecting cases).

255. *Id.* at 603–04.

na would be required to provide under the ADAAGs.[256] The ADAAGs bolstered the plaintiff's claim that there were plausible modifications that could be made.[257] Similarly, a different judge sitting in the Eastern District of New York (without citing the previous decision) recognized that Title II applied to a county's existing crosswalks.[258] The county, however, was able to assert that modifying those crosswalks to include Accessible Pedestrian Signals would fundamentally alter the nature of its program.[259]

The courts have found several different ways to engage in gate-keeping under Title II, whether it is hair-splitting what is a service, program, or activity of a public entity; refusing to recognize how the public benefits from or participates in a public function; or categorizing a claim as seeking facilities access rather than access to a government function. As the next section establishes, beyond the threshold issue of whether the plaintiff has properly identified a covered government function, this gatekeeping also impacts what public entities are required to do to provide meaningful access to that government function.

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256. *Id.* at 617–18.

257. *Id.* at 619. A related issue is whether a public entity has any obligation to make something readily accessible if there is no regulation requiring it. Courts have approached this in a couple of different ways. One is to use formal equality principles—if the public entity provides a service to individuals without disabilities, it must provide the same service to individuals with disabilities. *See* Lang v. Crocker Park LLC, No. 1:09 CV 1412, 2010 WL 3326867, at *5 (N.D. Ohio Aug. 20, 2010) (reasoning that although the ADAAGs have no express requirement to provide on-street parking, once the public entity provides that parking to those without disabilities, it may be required to provide it to those with disabilities). Another is to find the meaningful access standard applies regardless of whether a specific regulation addresses the issue. *See* Fortyune v. City of Lomita, 766 F.3d 1098, 1104 (9th Cir. 2014) (quoting the 1994 Supplement to TECHNICAL ASSISTANCE MANUAL, *supra* note 91, II–6.2100) ("If no standard exists for particular features, those features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other [T]itle II requirements, including program accessibility.").

258. *See* Scharff v. County of Nassau, No. 10 CV 4208(DRH)(AKT), 2014 WL 2454639, at *1 (E.D.N.Y. June 2, 2014) (Hurley, J.).

259. *Id.* at *12.

IV. GATEKEEPING SHIFTS THE METRIC FOR MEANINGFUL ACCESS

Meaningful access means that individuals with disabilities have the right to more than "any minimal access."[260] Individuals with disabilities should be provided an equal opportunity to participate in or benefit from a government function.[261] But how a court defines the service, program, or activity, or the benefit that the individual seeks, can have a distinct impact on what the public entity must do to provide that meaningful access. When courts hair-split, they shift the metric and make it much more difficult, if not impossible, for the Title II claim to proceed.

The metric for determining meaningful access relates directly to how the court characterizes the service, program, or activity at issue. For example, in a case seeking the opening of an alleyway, a federal district court refused to adopt the City's granular approach to defining the service it provided, which would have made the plaintiff's requested accommodation unnecessary.[262] The plaintiff, a City resident with mobility restrictions, asked the City to open up the alleyway behind her house so she could build a driveway that would allow her to access her house without having to navigate painful steps to the street.[263] Among other things, the City argued she was not qualified to have access to the alley because her garage entrance did not face the alley, and that the accommodation (opening the alley) was not necessary for meaningful access because she had access to the same benefit as other residents—namely, "garage access for

260. *See* Francis & Silvers, *supra* note 114, at 453 (quoting Alexander Abbe, Comment, *"Meaningful Access" to Health Care and the Remedies Available to Medicaid Managed Care Recipients Under the ADA and the Rehabilitation Act*, 147 U. PA. L. REV. 1161, 1188 (1999)).

261. *See id.*

262. Vance v. City of Maumee, 960 F. Supp. 2d 720, 732 (N.D. Ohio 2013).

263. *Id.* at 724. Her evidence established that without alley access, the only way for her to get into her home was through paths of travel involving either eleven or eighteen steps (due to the slope of the lot on which the home sat), which became less feasible as her health deteriorated. *See id.* Although a city ordinance permitted citizen petitions to open or improve alleyways, the City rejected her request. *Id.* at 725, 728. After the plaintiff brought suit against the City, the City installed a barricade that prevented her from driving on the portion of the alley behind her home. *Id.* at 725.

homeowners with garages accessible from [the street]."[264] The court rejected both of those assertions and defined the service instead as "driveway access."[265] That changed the meaningful access metric:

> The City provides driveway access to Plaintiff's non-disabled neighbors via curb cuts. The curb cuts enable Plaintiff's neighbors easily to access their homes. To have equally meaningful driveway access to her home, Plaintiff needs to be able to park her car on the portion of her property that sits at the same elevation as her back door.[266]

In other words, the City provided a service (driveway access) that one group of people (those without disabilities) accessed a certain way (curb cuts). Another group (those with disabilities) might need to be provided with a different means of access (alley access). If the court had adopted the City's granular approach to the service, alley access for houses with garages facing the alley, the court's metric would have been much narrower, and the plaintiff would not have been able to show she was denied meaningful access.

Metric-shifting occurs even when the court does not take a granular approach. Because the program accessibility standard directs the court to view the program "in its entirety,"[267] if the court chooses to take a more macro view of the program, that also can shift the metric. This is illustrated in *Levy*, the case involving the inaccessible inn at the University of Maryland. The plaintiff asserted the relevant service was renting out the inaccessible inn, but the court instead characterized it as "renting out by the University of its dining and meeting facilities to outside entities."[268] With this metric in place, the court invoked the broad program accessibility standard: "[t]he University was not required to make each separate facility ac-

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264. *Id.* at 728, 732.

265. *Id.* at 731. The court cited *Johnson v. City of Saline*'s broad definition of services, programs, and activities. *Id.* In *Johnson*, the court noted the broad definition "encompasses virtually everything that a public entity does." Johnson v. City of Saline, 151 F.3d 564, 569 (6th Cir. 1998).

266. *Id.* at 732–33.

267. Levy v. Mote, 104 F. Supp. 2d 538, 541 (D. Md. 2000). The plaintiff also alleged a lack of accessible parking. *Id.*

268. *Id.* at 547.

cessible to disabled persons, so long as services, programs or activities were readily accessible when viewed in their entirety."[269]

Similarly, in the inaccessible bleachers cases, the courts adopted a macro view of the program (football game access rather than fan bleachers access), which meant that when viewed in its entirety, the program (the game) was accessible to parents with disabilities.[270] The fact that the school denied the parents the experience of joining with other fans to root for the team was "merely incidental," something that program access does not address.[271]

The same consequences attach when courts define the benefit of a service, program, or activity. The Sixth Circuit's decision in *Jones v. City of Monroe*[272] illustrates how focusing on the specific benefit, not more broadly on what service, program, or activity the City was conducting, allows the court to narrow the scope of the public entity's obligations. As described more fully above, *Jones* raised issues about access to free parking in downtown Monroe, Michigan.[273] The court concluded the plaintiff was not discriminatorily denied access to parking near her office building because that parking was not intended to benefit employees.[274] Rather, the court found the benefit was intended for visitors who needed parking nearby the businesses they were patronizing.[275] By focusing on the benefit, the court was able to distinguish between the types of parking lots. The plaintiff was not qualified for the court's narrowly constructed benefit of "one-hour parking," because its goal was to "help downtown businesses by making parking spaces in close proximity to them more readily available."[276] A strong dissent in the case more properly framed the claim as denying meaningful access to "parking services."[277] The dissent agreed that all-day parking and one-hour parking are two different benefits, but the plaintiff's claim was that she

269. *Id.*

270. *See* Daubert v. Lindsay Unified Sch. Dist., 760 F.3d 982, 987 (9th Cir. 2014); Greer v. Richardson Indep. Sch. Dist., 472 F. App'x 287, 293 (5th Cir. 2012).

271. *See Daubert*, 760 F.3d at 987.

272. 341 F.3d 474 (6th Cir. 2003).

273. *See supra* notes 153–62 and accompanying text.

274. *See Jones*, 341 F.3d at 479.

275. *Id.*

276. *Id.* at 478.

277. *Id.* at 485 (Cole, J., dissenting).

was denied access to the former.[278] The dissent reasoned the plaintiff was "altogether excluded from meaningful access to the service" because, unlike her fellow downtown employees, she had no free parking accessible to her.[279]

Two decisions arising from the same case out of the Northern District of Texas clearly demonstrate that how the court defines the benefit determines the viability of a meaningful access claim.[280] The plaintiff in *Van Velzor v. City of Burleson* alleged the City was failing to enforce Texas laws governing accessible parking and assistance with refueling at gas stations.[281] The district court initially granted the City's motion to dismiss on the grounds that the benefit at issue was "police enforcement of laws, considered generally," and the plaintiff had meaningful access even if some specific aspects of the laws relating to disability were not enforced.[282] The court looked to how *Alexander v. Choate* defined the benefit in that case, i.e., "a package of health care services" rather than the more specific fourteen-day limit on hospital benefits.[283] Adopting a similarly broad definition, the court characterized the plaintiff's claim as insubstantial:

> There may be instances where the lack of meaningful access to police services is so extreme that a court could find a reasonable modification necessary to prevent discrimination. For example, if a police department systematically refused to respond to calls for service at an institution populated with disabled individuals, then a court might be able to find that a reasonable modification to department practice or policy would be required to prevent discrimination. But here, the non-enforcement of two statutory provisions does not rise to this level, and a conclusion from this court that modification is required to provide greater access to police en-

278. *Id.*

279. *Id.*

280. Van Velzor v. City of Burleson (*Van Velzor I*), No. 3:12-CV-2508-G, 2013 WL 3579339, at *5–7 (N.D. Tex. July 12, 2013); Van Velzor v. City of Burleson (*Van Velzor II*), 43 F. Supp. 3d 746 (N.D. Tex. 2014).

281. *Van Velzor I*, 2013 WL 3579339, at *1–2.

282. *Id.* at *6.

283. *Id.* (quoting Alexander v. Choate, 469 U.S. 287, 303 (1985)).

> forcement would intrude too greatly on the department's enforcement discretion.[284]

The court accordingly dismissed the claim but allowed leave to amend.[285] When the plaintiff amended and refiled, and the City again moved to dismiss, the court took the opportunity to reconsider.[286]

Upon reconsideration, the court decided that *Choate*'s concern was that the plaintiffs were arguing for equal results from the benefit the State offered, rather than "the *scope* of what constitutes a benefit or service under the ADA."[287] This time, the court cited the Fifth Circuit's en banc decision in *Frame*, which decided that sidewalks could be a service or benefit to the public.[288] The court explained:

> [*Frame*] considered the sidewalk alone to be a benefit, rather than focusing broadly on that sidewalk as a part of a city's entire portfolio of public works projects and evaluating whether disabled persons had meaningful access to the entirety of the city's public works. In other words . . . a service or benefit, such as a sidewalk, can also be part of a larger category of services or benefits provided by a public entity, such as public works and thoroughfares.[289]

The court cited other examples where "courts have analyzed discrete portions of law enforcement activities as separate services or benefits," such as post-arrest transportation, police response to mental health related service calls, police interviews, use of force in police enforcement and arrests, and most relevantly, enforcement of handicap parking ordinances.[290] Having shifted the metric back, the court

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284. *Id.* at *6.

285. *Id.* at *9.

286. *Van Velzor II*, 43 F. Supp. 3d at 750.

287. *Id.* at 754.

288. *Id.* at 754 (citing *Frame III*, 657 F.3d 215 (en banc)).

289. *Id.*

290. *Id.* at 754–55 (first citing Gorman v. Bartch, 152 F.3d 907, 913 (8th Cir. 1998); then citing Hobart v. City of Stafford, 784 F. Supp. 2d 732, 756–57 (S.D. Tex. 2011); then citing Salinas v. City of New Braunfels, 557 F. Supp. 2d 771, 775 (W.D. Tex. 2006); then citing Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 235 (M.D. Pa. 2003); and then citing Indep. Living Res. Ctr., Inc. v. City of Wichita, No. 00-1190-WEB, 2002 WL 539037, at *3 (D. Kan. Mar. 15, 2002)).

was now of the opinion there was no legal impediment to looking at enforcement of parking and traffic laws distinctly from "police enforcement as a whole."[291]

Metric-shifting has implications even earlier in a case. A federal district court in one of the sidewalk cases concluded the plaintiff lacked standing to sue because she failed to show injury in fact.[292] The plaintiff argued injury in fact should be found in the lack of meaningful neighborhood access to sidewalks.[293] The court rejected that metric and instead reasoned that the program accessibility standard meant the plaintiff had to show inaccessibility that "amounted to a wholesale denial of 'meaningful access.'"[294] The court viewed the program as the public entity's entire "public right-of-way system."[295] The plaintiff had similar difficulties with her claims that certain libraries and parks were not accessible to her.[296]

There is, accordingly, a close relationship between what a court defines as the relevant government function, the benefit provided by that function, and what amounts to meaningful access to that function. Courts can control the scope of a Title II case at the front end, which may allow them to avoid shifting the burden of proof to the public entity on the back end. The next section examines what may be motivating the hair-splitting and metric-shifting.

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291. *Id.* at 755.

292. Kirola v. City & Cty. of San Francisco, 74 F. Supp. 3d 1187, 1239–49 (N.D. Cal. 2014).

293. *Id.* at 1236. The plaintiff pointed to three sidewalks where she had personally encountered barriers to use. *Id.* at 1240.

294. *Id.* at 1236–37.

295. *Id.* at 1202.

296. *See id.* at 1240–41.

V. AS WITH TITLE I UNDER THE ORIGINAL ADA, CONCERNS ABOUT SPECIAL TREATMENT ARE ANIMATING JUDICIAL DECISIONS UNDER TITLE II

By shifting the metric on the front end, courts avoid considering on the back end whether public entities can take reasonable steps to provide individuals with disabilities an equal opportunity for access. In other words, courts avoid shifting any burden of proof to the public entity. Commentators have identified judicial hostility to the accommodation mandate as the reason for narrowly construing the ADA in employment cases,[297] and that same hostility may be animating the Title II cases.

Courts have indicated they believe enforcing the accommodation mandate would confer special, or preferential, treatment on individuals with disabilities.[298] While the Supreme Court rejected the lower courts' concerns about preferential treatment,[299] it also insisted the protected class needed to be "interpreted strictly to create a demanding standard for qualifying as disabled."[300] The ADAAA in its findings and purposes rejected that narrow reading of the Act.[301] At

297. *See* Travis, *supra* note 5, at 1692 (describing courts as "focused on limiting the impact of the ADA's accommodation mandate"); *see also* Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19, 22–24 (2000) (suggesting the judicial backlash against the ADA stems from "a failure to comprehend and therefore to accept the premises underpinning the statute").

298. *See, e.g.*, Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 484 (8th Cir. 2007) (citation omitted) (refusing to grant an individual with a disability reassignment to a vacant position as a reasonable accommodation because it would be "'affirmative action with a vengeance'"); *see also* Porter, *supra* note 2, at 13–14 (attributing judicial narrowing of the ADA to the belief that its reasonable accommodation mandate "confers special treatment on individuals with disabilities"); Waterstone, *supra* note 7, at 1819–20 (describing courts as hesitant about the accommodation mandate because they view it as "an unwelcome species of affirmative action").

299. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397 (2002) ("By definition any special 'accommodation' requires the employer to treat an employee with a disability differently, *i.e.*, preferentially.").

300. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

301. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553 (2008) (rejecting the strict definition of disability in *Toyota Motor Mfg.*).

least one circuit has persisted in relying on its pre-ADAAA case law expressing concerns about preferential treatment.[302] Some commentators have expressed concerns that courts are now taking an overly restrictive approach under Title I regarding whether an employee is a qualified individual who can perform the essential functions of the job, driven by the courts' concerns about the scope of the burden imposed by the accommodation mandate.[303]

There are similar concerns expressed in Title II cases regarding special treatment and the burden imposed on public entities by a duty to accommodate. For example, the Eleventh Circuit characterized an individual who had difficulty walking—who sued to obtain a parking space nearer to a municipal government building in a lot reserved for county commissioners and senior management officials—as "seek[ing] to gain an advantage over non-disabled parkers."[304] A federal district court summed up the principle it gleaned from the parking cases as individuals with disabilities not being "entitle[d] . . . to special parking access not available to the general public."[305] Another federal district court emphasized formal equality principles in a suit brought by an individual with a mobility impairment who had been

302. *See* Knutson v. Schwan's Home Serv., Inc., 711 F.3d 911, 916 (8th Cir. 2013) (citing *Huber*, 486 F.3d at 484, for a general rule that employers are not required to reassign individuals with disabilities to vacant positions under the ADA). "Reassignment to a vacant position" is specifically mentioned in the ADA as something that may be a reasonable accommodation. *See* 42 U.S.C. § 12111(9)(B) (2012).

303. *See* Porter, *supra* note 2, at 69–70 (postulating that courts prefer to use the inquiry into the plaintiff's qualifications and the essential functions of the job to grant summary judgment rather than evaluate whether an accommodation is reasonable); Travis, *supra* note 5, at 1706 (finding a "risk that 'non-qualified' may replace 'non-disabled' as the new gate-keeping mechanism erected by opponents . . . who continue to view the ADA as a welfare statute for a minority group rather than a civil rights law").

304. Kornblau v. Dade Cty., 86 F.3d 193, 194 (11th Cir. 1996).

305. Means v. St. Joseph Cty. Bd. of Comm'rs, No. 3:10-CV-003 JD, 2011 WL 4452244, at *7 (N.D. Ind. Sept. 26, 2011). The *Means* court then characterized the plaintiff's claims about an insufficient number of accessible parking spots close to the courthouse this way: "[T]he only plausible inference from [the plaintiff's] evidence and argument is that he is seeking a special parking benefit—access to free, all-day parking in the immediate vicinity of the Courthouse." *Id.*

called to be a juror.[306] The court found the available parking was "facially neutral" because the plaintiff was provided access to the same parking facility that all other jurors were provided.[307]

Not all cases explicitly reveal the courts' concerns about preferential treatment. *Jones v. City of Monroe*, for example, does not directly invoke special treatment language in holding the plaintiff failed to establish she was denied access to parking, but its reasoning is couched in terms that emphasize she was seeking something other than equal treatment.[308] The court emphasized the parking rules were "facially neutral" and the plaintiff had "equal access" to "park there if she chooses."[309] The court characterized her claim as requiring the City "to provide her an all-day parking place in the exact location she requires."[310] The court asserted it would be a "'fundamental and unreasonable change'" for the City to have to forego enforcing its parking ordinances just for her.[311]

Even in cases in which the court permits a Title II claim to move forward, that same court may nonetheless express skepticism about Title II's scope. For example, despite finding that hearing-impaired parents had stated a claim they were not provided meaningful access to school-initiated parent-teacher conferences, the Federal District Court for the Southern District of New York also expressed

306. Mitchell v. City of Kalamazoo, No. 4:05-CV-57, 2006 WL 3063433 (W.D. Mich. Oct. 26, 2006).

307. *Id.* at *6. The court's subsequent rationale for allowing the county to keep spaces close to the building limited to "maintenance, law enforcement, county officials, and deliveries" also raised the theme of special treatment: the court found that the policy was "not geared towards favoring arbitrary classes of people but rather are reserved for those groups of people who need quick access to the building to facilitate the court's operations." *Id.*

308. Jones v. City of Monroe, 341 F.3d 474, 478 (6th Cir. 2003).

309. *Id.*

310. *Id.* at 480. By contrast, the dissent characterized the City's program as "provid[ing] free and accessible all-day parking for everyone else," but not the plaintiff because her disability made her unable to access the program. *Id.* at 483 (Cole, J., dissenting).

311. *See id.* at 480 (quoting Dadian v. Village of Wilmette, 269 F.3d 831, 838–39 (7th Cir. 2001) (reasoning that requiring a city not to enforce its one-hour rule is a fundamental alteration of that rule). The dissenting judge correctly pointed out that accommodating the plaintiff did not mean the City could no longer enforce its ordinance. *See id.* at 490 (Cole, J., dissenting).

concern about the scope of its ruling.[312] The court indicated it was "somewhat troubled by the notion that the school district, and in turn the taxpayer, should bear the financial burden of providing hearing impaired parents with an interpreter to ease their participation in all of the plethora of school-sponsored activities."[313] The court's characterizing access as "easing" the parents' participation, rather than as fundamental to equal access, may explain why the court was troubled.

Thus, hair-splitting Title II at the prima facie level permits courts to avoid shifting the burden to the public entity to demonstrate that there are no plausible modifications it can make. The court might outright dismiss a Title II claim because it finds the plaintiff failed to identify a service, program, activity, or benefit.[314] Alternatively, the court might find the prima facie requirement is met but redefine the metric so that under the program accessibility standard, plaintiffs have sufficiently equal access.[315] Either way, there is evidence their motivations are similar to their gatekeeping-definition of "disability" prior to the ADAAA.

VI. NEITHER *ALEXANDER V. CHOATE* NOR *CITY & COUNTY OF SAN FRANCISCO V. SHEEHAN* SUPPORT THE LOWER COURTS' HAIR-SPLITTING

The Supreme Court's decision in *Alexander v. Choate*,[316] and to a lesser degree its truncated decision in *City & County of San Francisco v. Sheehan*,[317] each raise issues about the plaintiffs' prima facie showing that they were denied access to the benefit of or participation in a public entity's service, program, or activity. Neither case, however, supports the type of hair-splitting seen in the lower court opinions.

Choate considered a fourteen-day limitation on in-patient treatment for Medicaid patients in Tennessee, a change from the

312. Rothschild v. Grottenthaler, 716 F. Supp. 796, 800 (S.D.N.Y. 1989).

313. *Id.*

314. *See supra* Section III.A.

315. *See Jones*, 341 F.3d at 481 (concluding that the plaintiff's "requested modification, whether characterized as assignment of a particular parking location or immunity from prosecution, is not a reasonable accommodation required under the ADA").

316. 469 U.S. 287 (1985).

317. 135 S. Ct. 1765 (2015).

State's prior twenty-day rule.[318] The plaintiffs alleged that change would have a disproportionate effect on individuals with disabilities because of their greater need for in-patient care.[319] The Court concluded that the rule did not deny individuals with disabilities meaningful access to in-patient services, which meant the plaintiffs failed to establish a disparate impact.[320] In doing so, the Court articulated the benefit provided by Tennessee's Medicaid program as the individual services offered, rather than "adequate health care" more broadly.[321] It is not clear from *Choate* whether the plaintiffs directly argued "adequate health care" or whether the Court took that from the plaintiffs' argument that the State had to provide more than fourteen days in order not to have a disparate impact on individuals with disabilities.[322]

More to the point, the Court was not parsing the language of § 504 or its regulations.[323] There was no issue that the program in question was Tennessee's Medicaid program, and the parties were clear that the particular rule at issue was the fourteen-day limitation on in-patient care. Cases like *Jones v. City of Monroe* cite *Choate* too broadly, suggesting that the Court set a rule against amorphously defined benefits.[324] The Court's reasoning in *Choate*, however, leans heavily on how Medicaid regulations allow states to define the scope of coverage, as long as it is in the best interests of recipients.[325] The

318. *Choate*, 469 U.S. at 289.

319. *Id.* The statistical evidence showed that 27.4% of individuals with disabilities required more than fourteen days of in-patient care as compared to only 7.8% of individuals without disabilities. *Id.* at 290.

320. *Id.* at 302–06.

321. *See id.* at 303 (reasoning that the "package of services has the general aim of assuring that individuals will receive necessary medical care, but the benefit provided remains the individual services offered—not 'adequate health care'").

322. *See id.* The Court placed adequate health care in quotations, but it lead off by speculating about the import of the plaintiffs' theory that more treatment time was required: "At base, such a suggestion must rest on the notion that the benefit provided through state Medicaid programs is the amorphous objective of 'adequate health care.'" *Id.*

323. *See supra* text accompanying notes 287–89.

324. *See* Jones v. City of Monroe, 341 F.3d 474, 477–78 (6th Cir. 2003) (citing *Choate*, 469 U.S. at 303).

325. *See Choate*, 469 U.S. at 303–04.

specificity of the health benefits context makes it difficult to generalize *Choate*'s approach.

The same thing can be said about the Supreme Court's reasoning in *City & County of San Francisco v. Sheehan*. The Court in that case signaled its displeasure that both parties agreed the ADA applies to arrests, which was the essence of the question on which the Court granted certiorari.[326] But beyond that, the Court did not clearly indicate it wished to engage in hair-splitting whether arrests were a normal function of government. Nor did the Court clearly indicate it was inclined to reject the "normal function" definition in favor of some other rule. The issue the Court apparently wished to consider did not necessarily exclude applying the ADA to some aspects of arrests, as this reasoning from the case demonstrates:

> When we granted review, we understood this question to embody what appears to be the thrust of the argument that San Francisco made in the Ninth Circuit, namely that "Title II *does not apply* to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."[327]

Although the Court framed the issue as whether the ADA "applied," there is a good argument that the qualifiers in the Court's language ("on-the-street responses" and "prior to the officer's securing the scene and ensuring that there is no threat to human life") would be necessary predicates to finding the ADA not to apply. That would leave room for distinguishing arguments and coverage of some types of arrests. Moreover, the Court could resolve the issue on the merits rather than on the definitional end. The Court simply gave no hint of a rationale for parsing service, program, or activity.

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326. *See* City & Cty. of San Francisco v. Sheehan, 135 S. Ct. 1765, 1773 (2015) ("Whether the statutory language quoted above applies to arrests is an important question that would benefit from briefing and an adversary presentation. But San Francisco, the United States as *amicus curiae*, and Sheehan all argue (or at least accept) that § 12132 applies to arrests. No one argues the contrary view. As a result, we do not think that it would be prudent to decide the question in this case.").

327. *Id.* at 1772 (citations omitted).

Unfortunately, the Court's previous decision in *Pennsylvania Department of Corrections v. Yeskey*[328] lends no particular clarity on whether hair-splitting on the front end is appropriate. In *Yeskey*, the Court emphasized that the ADA contains no exceptions.[329] Prisons are public entities and the Court broadly imagined the services, programs, and activities that take place within those prisons.[330] The Court disagreed that the voluntariness of the participation mattered.[331] Its breadth of reasoning suggests the Court may agree that Title II addresses itself to all normal functions of government. But at the same time, the Court arguably left room to argue that even if law enforcement is a public entity, the plaintiff still needs to pinpoint a service, program, or activity in which the public participates or from which they benefit. Here, too, the Court offered nothing that could explain how arrests were not an activity in which a citizen participates, albeit involuntarily.

Any wholesale exclusion of a government activity from Title II would in fact run contrary to two other Supreme Court decisions. First, in the Court's seminal decision in *School Board of Nassau County v. Arline*, the Court declined to read the broad language of § 504 to wholesale exclude contagious individuals.[332] The Court emphasized throughout its analysis that Congress intended a broad definition of disability and that reading an exclusion into the statute would undermine that goal.[333] Congress later positively cited *Arline* in the findings and purposes section of the ADAAA.[334] Second, in its

328. 524 U.S. 206 (1998).

329. *Id.* at 209 (reasoning that "the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt").

330. *See id.* at 209–10 (quoting the definition of "public entity" from 42 U.S.C. § 12131(1)(B) (2012)).

331. *Id.* at 211.

332. *See* Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273, 285 (1987) ("The fact that *some* persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act *all* persons with actual or perceived contagious diseases.").

333. *See id.* at 284–86.

334. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(3), 122 Stat. 3553 (2008) (stating one purpose of the Amendments Act was "to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v.*

more recent decision in *U.S. Airways, Inc. v. Barnett*, the Court again declined to find something, in that case seniority systems, excluded from ADA coverage.[335] *Barnett*, in fact, provides a potential model for what the Court may ultimately decide in future cases like *Sheehan*—Title II applies to law enforcement activities but it is per se unreasonable to modify the officer's actions to accommodate an individual with a disability before a scene is secured.[336]

VII. THE THRESHOLD INQUIRY SHOULD BE A LIMITED INQUIRY INTO WHETHER THE GOVERNMENT ACTIVITY AS ARTICULATED BY THE PLAINTIFF IS A NORMAL FUNCTION OF GOVERNMENT

Whether plaintiffs get to the merits of an access issue should not be tied to a protracted evaluation of whether there is a government service, program, activity, or benefit at issue. Nor should courts use a meaningful-benefit analysis to avoid engaging in a proper accommodation analysis. Most cases should instead center on whether the modification sought is reasonable or whether it poses an undue burden, works a fundamental change to the function at issue, or poses a direct threat to the health and safety of others.[337] In other words, most

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Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973").

335. *See* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 399 (2002) (concluding the ADA would not "automatically deny" reassignment to a vacant position if it violates a seniority plan).

336. *See id.* at 403–05 (finding it ordinarily unreasonable for a disability reassignment to trump a seniority plan but providing that employees may show special circumstances exist not to enforce the seniority plan). This argument presupposes that the Court wishes to avoid the individualized assessment that would otherwise be required of officers during every on-the-street encounter. For a recent analysis of how the ADA might recognize a duty to accommodate during an arrest, see generally Rifkin, *supra* note 210.

337. In other words, courts should follow the law as outlined by the Supreme Court when it found Congress adopted a remedy that was congruent and proportional to the wrong at issue:

> Title II does not require States to employ any and all means to make [its] services accessible to persons with disabilities, and it does not require States to compromise their essential eligibility criteria for public programs. It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eli-

Title II cases should follow the same process Congress had in mind for Title I cases post-ADAAA.

In the Title II cases discussed in this Article, the plaintiffs sought an equal opportunity to participate in their communities. The plaintiffs in the parking cases sought access to government office buildings that other citizens could access without difficulty or access to their homes from a public right of way that posed no particular difficulty to other residents.[338] The plaintiffs in the sidewalk cases requested the community's sidewalks, readily used by other members of the public, be made readily accessible to citizens with mobility impairments.[339] The plaintiffs in the stadium bleachers cases sought access to the same experience available to parents and other fans: group participation in a sports game.[340] Hair-splitting whether these individuals sufficiently identified a service, program, or activity, or strictly defining the benefits thereof, obscures the public entity's failure to provide them equal opportunity to enjoy what other citizens had readily available.

While there are courts that refuse to hair-split and move expediently to the merits of the Title II claim,[341] this Article demonstrates

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> gible for the service. As Title II's implementing regulations make clear, the reasonable modification requirement can be satisfied in a number of ways. In the case of facilities built or altered after 1992, the regulations require compliance with specific architectural accessibility standards. But in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.

Tennessee v. Lane, 541 U.S. 509, 531–32 (2004) (citations omitted).

338. *See supra* text accompanying notes 153–70, 279–90.

339. *See supra* text accompanying notes 232–36.

340. *See supra* text accompanying notes 242–53.

341. *See, e.g.*, Vance v. City of Maumee, 960 F. Supp. 2d 720, 728 (N.D. Ohio 2013) (reasoning simply that "opening or improving alleys is a service the City pro-

that this is not consistently the case. Even when the court accepts a broadly defined government function, it can shift the metric by narrowly identifying the benefits provided by that government function, which then limits what is required to provide meaningful access to that benefit.[342] What we end up with is something akin to what happened with the definition of disability under the original ADA—courts are protecting public entities from having to modify their policies and practices that deny equal access.

Jones v. City of Monroe again illustrates this.[343] The court articulated the City's purpose for its one-hour parking ordinance as encouraging patrons to shop downtown.[344] Once it identified that basis for the ordinance, the court never questioned the right of the City to enforce it (to the contrary, it expressed concerns about not enforcing it),[345] nor did it ask the City for evidence of whether setting aside one spot for employees with disabilities in the closest parking area would diminish patronage of the downtown businesses. The court believed the City may validly have such an ordinance, and that intrinsically led the court to resist closely examining the effect of a waiver of the ordinance.

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vides to the public generally—'any person' may petition" for it before turning to the question of the reasonableness of the requested modification).

342. *See supra* text accompanying notes 270–91.

343. 341 F.3d 474 (6th Cir. 2003).

344. *Id.* at 478.

345. *Id.* at 480 (reasoning that "a waiver [of the time limitation ordinance] would also require Monroe to cease enforcement of an otherwise valid ordinance, which by its very nature requires a fundamental alteration of the rule itself"). The court also asserted that the one-hour time limitation was fundamental to the parking scheme. *Id.* Of course, this was because the court was looking granularly at the benefit and had parsed out two different ones, free all-day parking and free one-hour parking. The court then treated the case as if the plaintiff was seeking access to one-hour parking specifically. *See id.* As the dissent noted, the question should have been whether asking the City to designate 1 out of 110 one-hour slots as available to individuals with disabilities for all-day parking fundamentally altered the City's downtown parking scheme. *See id.* at 489 (Cole, J., dissenting).

When courts engage in gatekeeping similar to that in *Jones*, the substantive law languishes.[346] *Jones* reached the merits, but by cabining the plaintiff's claim on the front end, the court avoided a meaningful analysis of the City's parking system.[347] The same thing was true in the Fifth Circuit's decision in *Ivy v. Williams*, where the court held Texas had no obligation to make drivers' education accessible to deaf and hearing-impaired citizens.[348] By employing a granular view that Texas neither provided nor contracted with a third party to provide drivers' education, that court preempted the question of what meaningful access to drivers' licensing requires. The result is that individuals with disabilities in Texas do not have an equal opportunity to obtain an important public benefit.

In the facilities access cases, the ADA requires facilities to be readily accessible, but gatekeeping prevents that analysis. In cases like *Babcock v. Michigan*, the court insists on an absolute distinction between an inaccessible facility and a public entity's services, programs, or activities.[349] *Babcock* required the plaintiff to identify something more than the fact that she was unable to access a government office building,[350] and the State never had to address why it

346. I made essentially this same point about employment claims under Title I prior to the ADAAA. *See* Cheryl L. Anderson, *"Deserving Disabilities": Why the Definition of Disability Under the Americans with Disabilities Act Should Be Revised to Eliminate the Substantial Limitation Requirement*, 65 MO. L. REV. 83, 144 (2000).

347. Similarly, the court in another parking access case did not require the city to justify why "county commissioners and certain senior management officials of the County" needed the closest parking spaces that otherwise would have made a courthouse accessible to visitors with disabilities, nor what impact designating a space for those visitors would have. *See* Kornblau v. Dade Cty., 86 F.3d 193, 194 (11th Cir. 1996). The court seemed to believe the status of those individuals spoke for itself. *See id.*

348. Ivy v. Williams, 781 F.3d 250, 258 (5th Cir. 2015) (finding the Texas Education Agency did not provide driver education as a service, program, or activity of the State), *vacated as moot*, Ivy v. Morath, 137 S. Ct. 414 (2016) (Mem).

349. Babcock v. Michigan, 812 F.3d 531, 535 (6th Cir. 2016).

350. *See id.* In a footnote, the Sixth Circuit noted that the plaintiff had not alleged that her employment was a "service, program, or activity." *Id.* at 538 n.6. Because the plaintiff had left her job at some point prior to the oral arguments in the case, the Sixth Circuit concluded any such argument would be moot. *See id.* The court did not indicate whether it would have recognized public employment as a service, program, or activity. *Id.* at 538–39. As noted above, at least one court believes

could not provide her that access. *Babcock* should have asked whether the plaintiff had alleged readily achievable alterations that would have provided her meaningful access to that government office building.[351]

Indeed, there is precedent for this approach—the United States Supreme Court recognized it in *Tennessee v. Lane*, when the Court indicated the first question about older facilities is whether there are alternative, accessible ways to provide the services; but if that cannot be done effectively, then "the public entity [is] required to make reasonable structural changes."[352] Looking at the substantive merits of these claims will not lead to imposing the stricter ADAAG requirements on existing facilities in lieu of the program accessibility standard, as some courts apparently fear. While those guidelines can inform what is readily achievable, a court working within the program accessibility standard can afford public entities appropriate flexibility.[353] The broader assertion here is that the public entity should be required to establish why a plausible modification is an undue burden or fundamentally alters a service, program, or activity. That is the question the ADA by design asks courts to consider.[354]

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the Sixth Circuit would not recognize such a claim. *See supra* note 190. The plaintiff also argued that the building housed a court of appeal, which would clearly fall under Title II, but the Sixth Circuit concluded she had not alleged that she was required or sought to access that court. *Babcock*, 812 F.3d at 539.

351. *See* 28 C.F.R. § 35.149 (2012) (requiring public entities to make their facilities readily accessible to individuals with disabilities); Tennessee v. Lane, 541 U.S. 509, 532 (2004) (providing that a public entity must consider reasonable modifications to its services but if there are no effective modifications, then it must consider structural changes to its facilities).

352. *Lane*, 541 U.S. at 532.

353. *See* Brown v. County of Nassau, 736 F. Supp. 2d 602, 616–17 (E.D.N.Y. 2010) (noting that while plaintiffs cannot make out a prima facie violation of Title II with the ADAAG standards alone, they can provide guidance on whether a facility is readily accessible). In *Brown*, the court took note of how disproportionate the number of wheelchair accessible seats were in the Nassau Coliseum to what would be required in a new construction under the ADAAGs, while still finding the City did not have to have the exact number required under those standards. *See id.* at 617.

354. *See* Fortyune v. City of Lomita, 823 F. Supp. 2d 1036, 1038 (C.D. Cal. 2011) (reasoning that "detailed regulations can help public entities and courts determine compliance, but where none are on point, we fall back to the general statutory requirement, not out of its coverage").

Public entities are, of course, given flexibility in how they provide access under the program accessibility standard.[355] But inherent in this grant of flexibility should be an expectation of thoughtfulness. Public entities should use their flexibility to find ways to provide access, not avoid it. By avoiding the merits of accommodation claims in Title II cases, courts do not give public entities sufficient incentive to address accessibility issues. It may instead give them perverse incentive not to modify existing structures. For example, in the case where the court deemed the social experience of attending a football game "merely incidental" and not part of a public entity's service, program, or activity, the court excused the school from having to consider whether any changes to the structure of the bleachers were feasible.[356] The school was well-advised to keep the bleachers as they were. That is a problem with the program accessibility standard, and it shows how courts can influence what it means to benefit meaningfully. Courts can reconcile the regulations on existing facilities with equal access claims; there is no good reason courts should resolve such cases by finding the plaintiff has failed to state a Title II claim at the prima facie level.

It took congressional action to right the ship when courts took "disability" off course. That should not be necessary to prevent a similar shipwreck of Title II. When it next has the opportunity to consider Title II's threshold requirements, the Supreme Court should see the ADAAA as an object lesson for how to construe any of the threshold requirements of the Act under any of the three titles.[357] Ac-

355. *See* 28 C.F.R. § 35.150(b)(1) (2012).

356. *See* Daubert v. Lindsay Unified Sch. Dist., 760 F.3d 982, 987–88 (9th Cir. 2014).

357. The ADAAA's findings and purposes speak broadly to all aspects of the ADA, not just employment claims under Title I. For example, Congress's stated purpose was "to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations." ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553 (codified as amended at 42 U.S.C. § 12102 (2008)) (located under "Historical and Statutory Notes"). The use of the word "entities" rather than "employers" is telling. *See id.* § 2(a)(1) (finding that the original ADA was intended to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage generally); *id.* § 2(a)(2) (finding that "in enacting the ADA, Con-

cordingly, the courts should generally not closely scrutinize the plaintiff's framing of the service, program, or activity in which the plaintiff alleges discrimination. Nor should the courts insist on redefining the benefits of the government function so that the meaningful benefit standard becomes meaningless.

Plaintiffs will always bear the burden of showing discrimination; if a plaintiff fails to define a clear and concrete government function, she may find it difficult to show how, under the program access standard, she did not have meaningful equal access to that function. Alternatively, if a plaintiff hones in on a specific aspect of a government function, he may find it difficult to overcome a public entity's affirmative defenses to the modifications the plaintiff seeks.[358] In either case, however, the focus is where it should be: whether the modification is reasonable and necessary, or would pose an undue burden or fundamentally alter the government function.

VIII. CONCLUSION

It is of little surprise that the same reluctance to engage in accommodation analysis seen in the employment discrimination cases appears in the public entity cases as well. Indeed, it would have been a surprise if it had not, given the obvious federalism concerns when Congress regulates state governmental actions. Title II balances those concerns through the more flexible program accessibility standard, but under that standard, courts interpret "meaningful access" to government functions as a ceiling rather than a floor. Because of that, combined with the parsing of covered government functions and what it means to benefit or participate in those functions, individuals with disabilities face formidable hurdles to overcome as they seek an equal opportunity to participate in what most citizens take for granted. Congress enacted the ADA to make the broader society more accessi-

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gress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society").

358. For example, in the parking cases, see *supra* text accompanying notes 153–70, a public entity might succeed in establishing that designating parking in certain locations for individuals with disabilities would undermine a specific need for certain officials to have quick access. Cases like *Jones v. City of Monroe*, however, do not ask the public entity to do enough to justify their assertions. 341 F.3d 474 (6th Cir. 2003).

ble to individuals with disabilities. Courts should bear in mind how far afield they took Title I before the same thing happens to Title II.