PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEPHEN HAMER, Plaintiff - Appellant, v. CITY OF TRINIDAD, Defendant - Appellee. ---------- COLORADO MUNICIPAL LEAGUE, Amicus Curiae	No. 17-1456

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:16-CV-02545-NYM-KMT)

(Filed May 15, 2019)

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Wynetta P. Massey and Lindsay M. Rose, Special Counsel for Colorado Municipal League, Office of the City Attorney, Colorado Springs, Colorado, and Dianne M. Criswell, Attorney for Colorado Municipal League, Denver, Colorado, filed a brief for Amicus Curiae in support of Defendant-Appellee.

Before **BRISCOE**, **BACHARACH**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

Title II of the Americans with Disabilities Act ("ADA") mandates 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, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Similarly, section 504 of the Rehabilitation Act of 1973 ("RA") mandates in part that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

Today we consider exactly when and how a public entity violates these two statutes.[1] The answer, in turn, affects how the applicable statutes of limitations operate. Does a public entity violate Title II and section 504 only when it *initially* constructs or creates a non-compliant service, program, or activity? If so, a single statute of limitations accrues from the day a qualified individual with a disability first discovers he or she has been injured by the service, program, or activity. The statute of limitations, in this scenario, would bar any lawsuit brought after the limitations period ends.

Or does a public entity violate Title II and section 504 *repeatedly* until it affirmatively acts to remedy the non-compliant service, program, or activity? In that situation, a qualified individual's initial discovery that he or she has been injured does not trigger just one statute of limitations that bars any lawsuit brought after the limitations period ends. Rather, because the public entity commits a new violation (and the qualified individual experiences a new injury) each day that it fails to act, the statute of limitations effectively functions as a "look-back period," Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1028-29 (10th Cir. 2007), restricting an individual's right to relief to those injuries suffered (1) during the limitations period immediately prior to filing suit and (2) while the suit is pending.

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[1] Unless we say otherwise, when we use the term "public entity," we are referring to both public entities under Title II and programs or activities that receive federal financial assistance under section 504.

We hold that a public entity violates Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act each day that it fails to remedy a noncompliant service, program, or activity. As a result, the applicable statute of limitations does not operate in its usual capacity as a firm bar to an untimely lawsuit. Instead, it constrains a plaintiff's right to relief to injuries sustained during the limitations period counting backwards from the day he or she files the lawsuit and injuries sustained while the lawsuit is pending. Because the district court applied a different and incorrect standard, we reverse and remand for further proceedings.

I.

Plaintiff Stephen Hamer resides in Trinidad, Colorado; is confined to a motorized wheelchair due to what he characterizes as "severe bilateral ankle problems"; and, for purposes of this appeal, is a qualified individual with a disability under Title II of the ADA and section 504 of the RA. He does not own a car or otherwise use public transportation. Instead, he primarily utilizes the City of Trinidad's public sidewalks to move about in his wheelchair.

Plaintiff contends many of the City's sidewalks and the curb cuts allowing access onto those sidewalks do not comply with Title II of the ADA and section 504 of the RA. Indeed, at a City Council meeting he attended in April 2014, Plaintiff informed City officials that he had personally counted seventy-nine

non-compliant sidewalks and curb cuts throughout the city. Further, at the end of that same month, Plaintiff filed an ADA complaint with the United States Department of Justice ("DOJ") informing the government about the state of the City's sidewalks and curb cuts.

Plaintiff continued to lodge informal ADA and RA complaints at City Council meetings over the next few months. And at some point after he lodged his ADA complaint with the DOJ, the DOJ audited the City and discovered multiple noncompliant sidewalks and curb ramps. Apparently in response to Plaintiff's multiple complaints and the results of the DOJ's audit, City officials actively began repairing and amassing funding to further repair non-compliant sidewalks and curb cuts.

Even so, Plaintiff nonetheless filed the present lawsuit against the City on October 12, 2016, for violations of Title II of the ADA and section 504 of the RA. Like the complaint he filed with the DOJ, Plaintiff complains of the City's allegedly deficient sidewalks and curb cuts. He thus seeks a declaratory judgment that the City's sidewalks and curb cuts violate the ADA and RA, injunctive relief requiring City officials to remedy the City's non-compliant sidewalks and curb cuts, monetary damages, attorneys' fees, and costs.

The district court granted summary judgment to the City on statute-of-limitations grounds. The district court first observed that because neither Title II nor section 504 explicitly provided for a statute of limitations, Colorado's general two-year statute of limitations

governed Plaintiff's claims. See E.E.O.C. v. W.H. Braum, Inc., 347 F.3d 1192, 1197 (10th Cir. 2003) ("Where Congress creates a cause of action without specifying the time period within which it may be brought, courts may infer that Congress intended the most analogous state statute of limitations to apply."); see also Colo. Rev. Stat. § 13-80-102 (establishing Colorado's general two-year statute of limitations). The district court then noted the general rule in federal court that "[t]he statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." Alexander v. Oklahoma, 382 F.3d 1206, 1215 (10th Cir. 2004) (alteration in original) (quoting Indus. Constructors Corp. v. U.S. Bureau of Reclamation, 15 F.3d 963, 969 (10th Cir. 1994)). With that rule in mind, the district court concluded that Plaintiff must have "discovered" or "encountered" the City's non-compliant sidewalks and curb cuts no earlier than October 12, 2014—i.e., two years before the day he filed his lawsuit—to survive summary judgment.

The district court determined, however, that Plaintiff's claims most likely accrued in April 2014 when Plaintiff first raised his concerns about the City's sidewalks and curb cuts at the City Council meeting and with the DOJ. In any event, the district court also determined that Plaintiff's claims must have begun to accrue "at the very latest[] in August 2014" when he raised his concerns at a City Council meeting for the final time. At one of these two points—either April or August 2014—Plaintiff was undoubtedly "aware of the

nature and extent of the City's discrimination." Thus, because both of these dates occurred before October 12, 2014, the district court held that the two-year statute of limitations barred Plaintiff's Title II and section 504 claims.

The district court explicitly rejected Plaintiff's argument that the continuing violation doctrine could salvage his claims from being untimely. This doctrine applies "'when the plaintiff's claim seeks redress for injuries resulting from a series of separate acts that collectively constitute one unlawful act,' as opposed to 'conduct that is a discrete unlawful act.'" Sierra Club v. Okla. Gas & Elec. Co., 816 F.3d 666, 672 (10th Cir. 2016) (quoting Shomo v. City of New York, 579 F.3d 176, 181 (2d Cir. 2009)). Stated differently, "one violation continues when 'the conduct as a whole can be considered as a single course of conduct.'" Id. (quoting Birkelbach v. SEC, 751 F.3d 472, 479 n.7 (7th Cir. 2014)). The utility of the continuing violation doctrine lies in the fact that as long as one of the separate wrongful acts contributing to the collective conduct "occurs within the filing period," a court may consider "the *entire* time period"—including those separate acts falling outside the filing period—"for the purposes of determining liability." Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002) (emphasis added).

An important caveat to the continuing violation doctrine, however, is that it "is triggered 'by continual unlawful acts, not by continual ill effects from the original violation.'" Mata v. Anderson, 635 F.3d 1250, 1253 (10th Cir. 2011) (quoting Parkhurst v. Lampert, 264

F. App'x 748, 749 (10th Cir. 2008) (unpublished)). And according to the district court, the allegedly unlawful acts at issue in Plaintiff's lawsuit—"the construction and alleged lack of maintenance of noncompliant sidewalks and curb cuts"—were discrete, as opposed to continual, acts. As a result, the district court concluded that "any subsequent injury caused by the City's failure to remediate these issues" after Plaintiff discovered or encountered them simply amounted to "continual ill effects" of those original violations. Thus, the district court reasoned that the continuing violation doctrine could not apply to Plaintiff's claims.

The district court also denied Plaintiff's additional argument that, regardless of whether the continuing violation doctrine applied, his claims remained timely because the City "violate[d] both statutes each day" that it failed to remedy its non-compliant sidewalks and curb cuts. In Plaintiff's opinion, such repeated violations meant that he suffered injuries each day he was unable to access the sidewalks and curb cuts until the day he filed suit. Under this theory, the two-year statute of limitations did not bar Plaintiff's suit completely. Instead, he could obtain relief for injuries he suffered after October 12, 2014, but not for any injuries he suffered before that day.

The district court rejected Plaintiff's argument, concluding that "it [was] insufficient to rely solely on the continued inaccessibility of the City's sidewalks and curb cuts" for Plaintiff to show he suffered an injury or injuries after October 12, 2014. Indeed, the district court again characterized the continued

inaccessibility as "continued ill effects" of Plaintiff's original encounters or discoveries of the City's alleged discrimination. The district court therefore reaffirmed its belief that Plaintiff needed to point to "*discrete acts* of discrimination he encountered since October 12, 2014," to survive summary judgment. And because Plaintiff had not directed the district court to any evidence suggesting that he encountered or discovered any new, non-compliant sidewalks and curb cuts after October 12, 2014, the district court stood firm in its conclusion that Plaintiff's Title II and section 504 claims were untimely.

Plaintiff now appeals the district court's ruling that Colorado's two-year statute of limitations bars his Title II and section 504 claims.[2] Our jurisdiction arises under 28 U.S.C. § 1291, and our review is de novo. Sierra Club, 816 F.3d at 671. Further, because Title II and section 504 essentially "involve the same substantive standards, we analyze them together." Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch., 565 F.3d 1232, 1245 (10th Cir. 2009).

II.

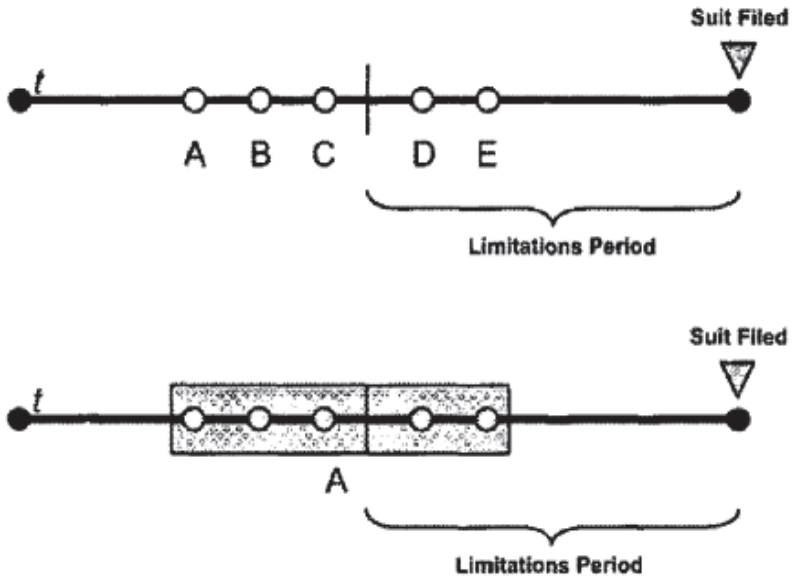
Before launching into our analysis, we first take a moment to explain in more detail the difference between the two arguments Plaintiff made in the district

[2] Neither party disputes that the applicable limitations period is two years in length or that it derives from section 13-80-102 of the Colorado Revised Statutes. We thus assume the same for purposes of this appeal.

court and how that difference affects our ultimate disposition of his appeal.

As discussed above, the "continuing violation" doctrine—Plaintiff's first argument to the district court—tethers conduct from both inside and outside the limitations period into one single violation that, taken as a whole, satisfies the applicable statute of limitations.[3] Sierra Club, 816 F.3d at 672. To help illustrate this concept, we borrow a useful visual aid from attorney Kyle Graham's law review article "The Continuing Violations Doctrine":

[3] Unlike the typical custom in our circuit, other courts and scholars have sometimes added a word and referred to this doctrine as the "pure" continuing violation doctrine. See, e.g., White v. Mercury Marine, Div. of Brunswick, Inc., 129 F.3d 1428, 1430 (11th Cir. 1997); Kyle Graham, The Continuing Violations Doctrine, 43 Gonz. L. Rev. 271, 283 (2008).

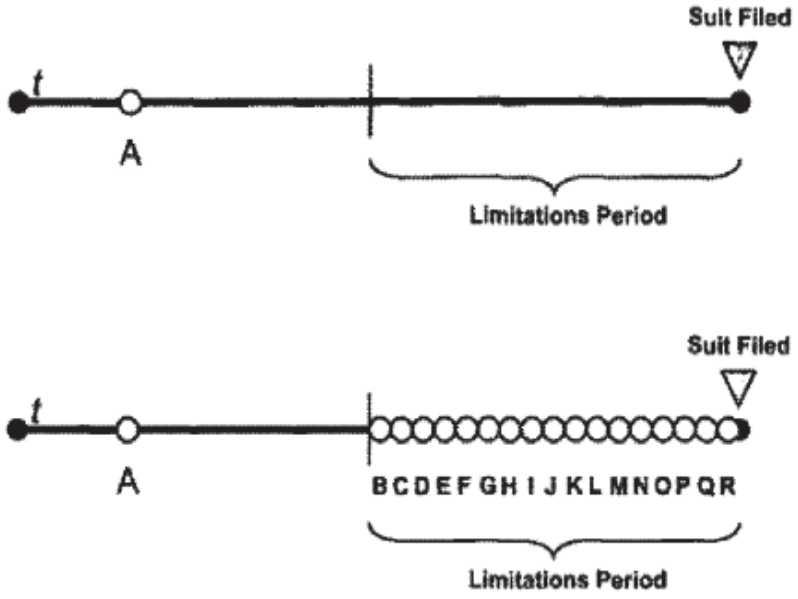


This figure "illustrates how [the continuing violation doctrine] combines otherwise discrete occurrences A through E, of which only D and E occurred within the limitations period, into a single, timely claim A." Kyle Graham, The Continuing Violations Doctrine, 43 Gonz. L. Rev. 271, 280 (2008).

By contrast, we have referred to the second argument Plaintiff made to the district court as the "repeated violations" doctrine.[4] Sierra Club, 816 F.3d at 671. Unlike the continuing violation doctrine, the repeated violations doctrine "*divides* what might otherwise represent a single, time-barred cause of action

[4] Other courts and scholars have sometimes referred to this doctrine as the "modified" continuing violation doctrine. See, e.g., White, 129 F.3d at 1430; Graham, supra, at 283.

into several separate claims, at least one of which accrues within the limitations period prior to suit." Graham, supra, at 275 (emphasis added). That division, in turn, "allows recovery for only that part of the injury the plaintiff suffered during the limitations period"; recovery for the part of the injury suffered outside of the limitations period, however, remains unavailable. White v. Mercury Marine, Div. of Brunswick, Inc., 129 F.3d 1428, 1430 (11th Cir. 1997); see also, e.g., Figueroa v. D.C. Metro. Police Dep't, 633 F.3d 1129, 1135 (D.C. Cir. 2011) (addressing how repeated violations influence the statute of limitations); Provident Mut. Life Ins. Co. of Phila. v. City of Atlanta, 864 F. Supp. 1274, 1284-85 (N.D. Ga. 1994) (describing an instance of the repeated violations doctrine at work and observing that the plaintiff "may secure only actual damages incurred within the [limitations period] preceding the date upon which the action was filed"); Russo Farms, Inc. v. Vineland Bd. of Educ., 675 A.2d 1077, 1084 (N.J. 1996) (same). Mr. Graham again provides a useful visual aid that illustrates just how this doctrine operates. As shown below, the repeated violations doctrine "transforms what would otherwise represent a single, time-barred claim A into a series of fresh claims, identified as claims B, C, D, etc." Graham, supra, at 281.



Notably, although Plaintiff argued in the district court that both the continuing violation doctrine and the repeated violations doctrine could make timely his claims under Title II of the ADA and section 504 of the RA, on appeal he argues only for application of the repeated violations doctrine.[5] Indeed, in his Opening Brief, Plaintiff argues that

> *[e]ach time* [he] was denied access to [the sidewalks and curb cuts], the City of Trinidad committed discrimination within the meaning of

[5] Plaintiff, in other words, abandoned his continuing violations argument on appeal. We thus do not consider it. See United States v. Yelloweagle, 643 F.3d 1275, 1280 (10th Cir. 2011) ("[W]here [an appellant] raises an issue before the district court but does not pursue it on appeal, we ordinarily consider the issue waived.").

> the ADA/§ 504 and a claim for damages arose under the statute. [Plaintiff] experienced recurrent discrimination by the City of Trinidad both inside and outside of the statute of limitations period. *Accordingly, [Plaintiff] had some claims that are timely and some that are time barred*.

Pl.'s Opening Br. 7 (emphases added). This language is a clear reference to the repeated violations doctrine.

Although Plaintiff abandons the continuing violation doctrine on appeal, the City continues to view the case in that context. In the City's view, the Supreme Court's analysis of the continuing violation doctrine in National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002), is controlling. In Morgan, the Supreme Court considered how statutes of limitations apply to various claims under Title VII of the Civil Rights Act of 1964. For hostile work environment claims, the Supreme Court held that "consideration of the entire scope of [the] claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." Id. at 105. The Supreme Court reasoned that hostile work environment claims "cannot be said to occur on any particular day" and instead "occur[ ] over a series of days or perhaps years." Id. at 115. Because "[s]uch claims are based on the cumulative effect of individual acts," "[i]t does not matter . . . that some of the component acts of the hostile work

environment fall outside the statutory time period." Id. at 115, 117.

The City argues that Morgan precludes us from applying the continuing violation doctrine to Plaintiff's Title II and section 504 claims because the City subjected him to only "discrete acts of discrimination" that "did not require proof" of the cumulative effect of individual acts. Def.'s Resp. Br. 11. Although that argument is correct, it misses the mark insofar as it assails an argument Plaintiff does not make on appeal. Contrary to the way the City frames the issue, Plaintiff does not contend that he should be able to aggregate separate acts into one single, comprehensive violation. Instead, he argues that he may recover for injuries he suffered inside of the limitations period but not for injuries he suffered outside of the limitations period—that is, he is arguing for application of the repeated violations doctrine. Morgan, therefore, is inapposite to this appeal because it did not involve the repeated violations doctrine. Indeed, the language of that case—e.g., that hostile work environments are made up of "component acts" and "are based on the cumulative effect of individual acts"—makes it clear it was immediately concerned with interpreting and applying the continuing violation doctrine.

The City further relies on our unpublished decision in Rhodes v. Langston University, 462 F. App'x 773 (10th Cir. 2011). In Rhodes, the plaintiff argued that the alleged Title II and section 504 violations at issue could not "be tied to specific dates as all were on-going events." Id. at 780. He thus argued that the district

court erred in concluding that the applicable two-year statute of limitations barred *any* of his claims—including those based on acts that occurred outside of the limitations period—because they amounted to "a continuation . . . of related and repetitive unlawful acts or practices" that only concluded within that two-year period. Id. Although we ultimately determined that the plaintiff's argument had no merit, that determination does not bear upon the outcome of Plaintiff's current appeal before us today. Like the Supreme Court's language in Morgan, our language in Rhodes shows that we were concerned in that case with whether the continuing violation doctrine, not the repeated violations doctrine, applied to Title II and section 504 claims. Thus, the City's attempt to analogize Plaintiff's arguments to Rhodes is equally unconvincing.

Finally, the City directs us to Foster v. Morris, 208 F. App'x 174 (3d Cir. 2006) (unpublished). In that case, the Third Circuit concluded that the continuing violation doctrine, not the repeated violations doctrine, does not apply to Title II claims. See, e.g., id. at 177 ("The continuing violations doctrine is an equitable exception to a strict application of a statute of limitations where the conduct complained of consists of a pattern that has only become cognizable as illegal over time."); id. at 177-78 ("When a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." (internal quotation marks

and alterations omitted)). And interestingly enough, although Foster did not address the repeated violations doctrine outright, Foster's underlying reasoning actually supports—or, at the very least, leaves room open for—that doctrine in the Title II and Section 504 context. Indeed, the Third Circuit concluded that the plaintiff in that case was "still entitled to recover for any violations that occurred during" the limitations period even though he could not recover for any violations that occurred outside that period. Id. at 178. That logic is perfectly consistent with the repeated violations doctrine. So no matter how we slice it, Foster cannot help the City.[6]

Because none of the cases the City cites resolve whether the repeated violations doctrine applies to Plaintiff's claims under Title II and section 504, we

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[6] Although neither party cites it, we also note that the Fifth Circuit's decision in Frame v. City of Arlington, 657 F.3d 215 (5th Cir. 2011) (en banc), does not bear on Plaintiff's present appeal. The Frame court held that a single cause of action accrues under Title II and section 504 when the plaintiff "has sufficient information to know that he has been denied the benefits of a service, program, or activity of a public entity." Id. at 238. One may think that holding amounts to a rejection of the repeated violations doctrine. But the question whether the repeated violations doctrine applies to Title II claims was not before the court in Frame. Indeed, Frame *only* considered whether a Title II cause of action accrues when the plaintiff discovers he has been injured or when the public entity engaged in the wrongful act that caused the injury. Id. at 238-40. Nothing in its holding rejects or is inconsistent with the repeated violations doctrine. Thus, for our purposes today, Frame is of limited value.

turn to the statutory text to decide this matter of first impression in our circuit.

III.

We hold that the repeated violations doctrine applies to claims under Title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973. As we explain below, a public entity repeatedly violates those two statutes each day that it fails to remedy a non-compliant service, program, or activity. Accordingly, a qualified individual with a disability is excluded from the participation in, denied the benefits of, and subjected to discrimination under the service, program, or activity each day that she is deterred from utilizing it due to its non-compliance. She stops suffering a daily injury only when the public entity remedies the non-compliant service, program, or activity or when she no longer evinces an intent to utilize it. The practical effect is that, once the individual sues under Title II or section 504, the statute of limitations bars recovery only for those injuries she incurred outside of the limitations period immediately preceding the day of suit; it does not, however, bar recovery for injuries she incurred within that limitations period or after she files suit.

A.

Our starting point is the plain language of Title II and section 504. See Levorsen v. Octapharma Plasma, Inc., 828 F.3d 1227, 1231 (10th Cir. 2016). If that

language is "clear and unambiguous," then "our duty is simply to enforce the statute that Congress has drafted." United States v. Brown, 529 F.3d 1260, 1264 (10th Cir. 2008) (quoting United States v. Ortiz, 427 F.3d 1278, 1282 (10th Cir. 2005)). Significantly, though, "the meaning of statutory language, plain or not, depends on context." First Nat'l Bank of Durango v. Woods (In re Woods), 743 F.3d 689, 694 (10th Cir. 2014) (quoting United States v. Villa, 589 F.3d 1334, 1343 (10th Cir. 2009)). We thus need not constrain ourselves to the "language itself" in determining whether Title II and section 504 clearly and unambiguously convey when and how often a public entity violates these two statutes. Salazar v. Butterball, LLC, 644 F.3d 1130, 1137 (10th Cir. 2011) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). Rather, we may also look to "the specific context in which that language is used" and "the broader context of the statute as a whole." Id. (quoting Robinson, 519 U.S. at 340). Both the text and structure of the statutes guide our decision today.

Consider first the specific language. Title II mandates 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, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Likewise, section 504 mandates in part that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

Obviously, neither of these statutes state outright when or how often a public entity violates them. They simply command that no qualified individual may "be excluded" from, "be denied" the benefits of, or "be subjected" to discrimination under a service, program, or activity. With that said, that language is phrased in the present tense (albeit in the passive voice), which suggests that a qualified individual who *currently* experiences discrimination under Title II or section 504 suffers an injury. And so the same language also suggests that a qualified individual suffers new discrimination and a new injury *each day* that she cannot utilize a non-compliant service, program, or activity—even if the barriers giving rise to her claim were ones she encountered before. After all, if sidewalks and curb cuts actually do constitute a service, program, or activity of a public entity—a question that we express no opinion on today—a qualified individual with a disability would still "be excluded" from utilizing any given sidewalk or curb cut each day that it remained non-compliant.[7] Likewise, that same individual would still "be denied" the benefits of that sidewalk or curb cut when she encountered it a day ago just as much as when she first encountered it a year ago. Cf. Pickern v. Holiday Quality Foods Inc., 293 F.3d 1133, 1136 (9th Cir. 2002) (interpreting the phrases "is being subjected to" and "is about to be subjected to" in the enforcement

[7] We assume only for the purposes of this appeal that sidewalks and curb cuts constitute a service, program, or activity.

provision of Title III of the ADA and concluding that they "make[] clear that either a continuing or a threatened violation of the ADA is an injury within the meaning of the Act"); Scherr v. Marriott Int'l, Inc., 703 F.3d 1069, 1075-76 (7th Cir. 2013) (relying on Pickern and concluding the same).

To the extent any real or perceived gaps remain in the statutory text, the Supreme Court's Title II jurisprudence fills them. In Tennessee v. Lane, 541 U.S. 509 (2004), the Supreme Court recognized "that failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion." Id. at 531 (citing 42 U.S.C. § 12131(2)). Title II therefore imposes "an affirmative obligation to accommodate persons with disabilities." Id. at 533.[8]

This "duty to accommodate," id. at 532, solidifies that Title II (and, by extension, section 504) clearly and unambiguously conveys that a non-compliant service,

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[8] As Plaintiff points out, numerous regulations implementing the ADA reflect this principle. See, e.g., 28 C.F.R. § 35.133(a) ("A public entity shall maintain in operable working condition those features of facilities and equipment that are *required to be readily accessible to and usable by* persons with disabilities. . . ." (emphasis added)); id. § 35.150(a) ("A public entity shall 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." (emphasis added)); id. § 35.150(d) (allowing public entities to create a multi-year plan to remove existing barriers); id. § 35.151(b)(1) ("Each facility or part of a facility . . . shall . . . *be altered* in such manner that the altered portion of the facility *is readily accessible to and usable by* individuals with disabilities." (emphases added)).

program, or activity gives rise to repeated violations.[9] Failing to act in the face of an affirmative duty to do so axiomatically gives rise to liability. Cf., e.g., Restatement (First) of Torts § 284 (1934) ("Negligent conduct may be . . . a failure to do an act which is necessary for the . . . assistance of another and which the actor is under a duty to do."); Restatement (Second) of Torts § 824 (1979) ("The conduct necessary to make the actor liable for . . . nuisance may consist of . . . a failure to act under circumstances in which the actor is under a duty to take positive action. . . ."). Further, if the actor under the affirmative duty *keeps* failing to act while the underlying problem remains unremedied, then every day's inaction amounts to a new violation. Cf., e.g., Grant, 505 F.3d at 1028 (observing that continuing temporary nuisances "give[] rise over and over to new causes of action" until they are abated (internal quotation marks and alteration omitted)). Thus, even though "adverse effects resulting from" a single, original violation do not trigger the repeated violations doctrine when they do not constitute violations in their own right, Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 628 (2007), overturned on other grounds by The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No.

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[9] In addition to the fact that we analyze Title II and section 504 claims together, Miller ex rel. S.M., 565 F.3d at 1245, the language of the RA itself also suggests an affirmative duty to accommodate. See, e.g., 29 U.S.C. § 701(c)(2) (requiring "the use of accessible formats" for qualified individuals with disabilities); see also Alexander v. Choate, 469 U.S. 287, 301 (1985) (observing that qualified individuals with disabilities under the RA are entitled to "meaningful access" and "reasonable accommodations").

111-2, 123 Stat. 5 (2009), claims under Title II (and section 504 by extension) do not fit that rubric. Rather, a public entity *does* commit a "new violation" each day that it fails to remedy a non-compliant service, program, or activity. The affirmative, ongoing duty that Title II and section 504 place upon it mandates as much. Id.[10, 11]

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[10] The City notes and relies on the Fourth Circuit's opinion in A Society Without A Name v. Virginia, 655 F.3d 342 (4th Cir. 2011), which concluded that a claim under Title II did not trigger the principles of the repeated violations doctrine because that claim only gave rise to "the continuing ill effects of [one] original violation." Id. at 348-49. We do not find that case persuasive, however, because it never factored in the mandate that Title II imposes an affirmative duty to accommodate. See id.

[11] At this point, we believe that an analogy to temporary nuisance claims—one of the "touchstone" instances of the repeated violations doctrine at work, Graham, supra, at 308—can further illustrate our rationale. A temporary nuisance exists "[w]here the injury from the alleged nuisance . . . is of a continuing or recurring character." 58 Am. Jur. 2d Nuisances § 221 (2018). "In such a case, every day's continuance is a new nuisance," id., that "gives rise over and over to new causes of action," Grant, 505 F.3d at 1028 (internal quotation marks and alteration omitted). The practical effect is that "a new statute of limitations begins to run . . . after *each* new injury," 58 Am. Jur. 2d Nuisances § 253 (2018) (emphasis added), and the *final* statute of limitations accrues only when the temporary nuisance is remedied once and for all. See Grant, 505 F.3d at 1028. Thus, so long as the temporary nuisance continues unabated, a plaintiff bringing suit is effectively doing so on "day one" of a new limitations period, which enables her to seek damages for past injuries sustained "within the limitations period immediately prior to suit." Id. (internal quotation marks omitted).

So too here. Each time a qualified individual with a disability is excluded from, denied the benefits of, or subjected to discrimination under a service, program, or activity, he suffers an injury

The broader statutory context of the ADA and RA bolsters this conclusion. Consider, for example, 42 U.S.C. § 12101, which outlines Congress's express statutory purposes for enacting the ADA. There, Congress noted that "the Nation's proper goals regarding individuals with disabilities are to assure . . . full participation . . . for such individuals." 42 U.S.C. § 12101(a)(7). Congress made a similar conclusion earlier when it enacted 29 U.S.C. § 701, which lists the purposes of the RA. In that statute, Congress noted that it hoped to achieve "full inclusion and integration in society" for individuals with disabilities and that an entity charged with carrying out the RA should always consider "the principle[] of . . . full participation of the individuals." 29 U.S.C. § 701(a)(6)(B), (c)(3).

Congress's goals of full participation, inclusion, and integration for qualified individuals with disabilities are consistent with and suggestive of the repeated violations doctrine. A qualified individual is not a full participant or fully included in a service, program, or activity if she cannot utilize it in a similar way as persons without disabilities, and that does not change simply because she was deterred from utilizing the service, program, or activity many times before. What matters is whether the individual can fully participate

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under Title II and section 504. For the reasons we explained above, this injury is not a one-time event; rather, it repeatedly occurs so long as the service, program, or activity remains noncompliant and the qualified individual is aware of that and deterred from utilizing it. So when a Title II or section 504 plaintiff brings suit, he is essentially doing so on the first day of a new limitations period.

now in the service, program, or activity. The repeated violations doctrine, in turn, accounts for that reality—and, for that matter, encourages public entities to comply with their affirmative and ongoing obligations to accommodate—by giving a qualified individual an avenue for relief any moment that he or she cannot fully participate or is not fully included in a service, program, or activity.

Congress further observed in enacting the ADA that "the *continuing existence* of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous. . . ." 42 U.S.C. § 12101(a)(8) (emphasis added). It also noted that it hoped "to address the major areas of discrimination *faced day-to-day* by people with disabilities." Id. § 12101(b)(4) (emphasis added). Similarly, when it previously enacted the RA, Congress had discerned that "individuals with disabilities *continually encounter* various forms of discrimination." 29 U.S.C. § 701(a)(5) (emphasis added). This language demonstrates that Congress understood that a public entity could repeatedly cause a qualified individual with a disability to suffer an injury from the same service, program, or activity. Certainly, nothing in the text of Title II or section 504 suggests otherwise.

The statutory text and the Supreme Court's pronouncements make one thing clear: Congress did not design the ADA or the RA so that a public entity could forever prevent a qualified individual with a disability

from utilizing a service, program, or activity. Yet the City argues for that exact result. The City contends that because Plaintiff filed suit more than two years after he first encountered the allegedly non-compliant sidewalks and curb cuts, the statute of limitations forever bars him from forcing the City to live up to its affirmative duty and correct those barriers. That proposition simply cannot fit within the language, structure, and purpose of the ADA or the RA.

In conclusion, based on the plain language of Title II of the ADA and section 504 of the RA, Supreme Court jurisprudence interpreting Title II, and Congress's express statutory purposes in enacting the ADA and RA, we hold that Title II and section 504 clearly and unambiguously require us to acknowledge they are subject to the repeated violations doctrine.[12] Accordingly,

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[12] Because Title II and section 504 are unambiguous in this regard, we have no reason to consider "the underlying public policy" of either statute. United States v. Manning, 526 F.3d 611, 614 (10th Cir. 2008) (quoting United States v. LaHue, 170 F.3d 1026, 1028 (10th Cir. 1999)); see also id. ("If the statutory language is clear, our analysis ordinarily ends."). Even so, we observe as a side note that applying the repeated violations doctrine to claims under Title II and section 504 serves the interests of efficiency. In Title II and section 504 cases, "more than just the rights of the plaintiff before the court are at stake." Graham, supra, at 321. Indeed, many other qualified individuals with disabilities also benefit from a ruling favorable to the plaintiff. To use this case as an example, if Plaintiff were to succeed in requiring the City of Trinidad to further remedy its sidewalks and curb cuts, other individuals who use wheelchairs would likewise reap the rewards. So if we were not to apply the repeated violations doctrine to Plaintiff's claims and therefore forever bar those claims on statute of limitations grounds, "a substantively similar but timely suit brought by a different plaintiff"—namely, another qualified

each time a qualified individual with a disability encounters or "actually become[s] aware of" a non-compliant service, program, or activity "and is thereby deterred" from utilizing that service, program, or activity, he or she suffers discrimination and a cognizable injury. Pickern, 293 F.3d at 1136-37. So long as the service, program, or activity remains non-compliant, "and so long as a plaintiff is aware of [that] and remains deterred," the qualified individual's injury repeats. Id. at 1137. A defendant, therefore, cannot brandish the statute of limitations in its usual manner as a shield that fully protects he, she, or it from suit. But the defendant can wield the statute of limitations as a sword that chops off damages arising before the limitations period comes into play.

B.

The City of Trinidad and the Colorado Municipal League ("the League") as *amicus curiae* both claim that our ruling today will effectively "nullify the statute of limitations." Def.'s Resp. Br. 24.

Not so for several reasons. For starters, both the City and the League conflate the repeated violations doctrine and continuing violation doctrine—or at least

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individual unable to utilize the City's sidewalks and curb cuts—"could land in [this Court's] lap soon thereafter." Id. Thus, although the clear and unambiguous language of these two statutes carries the day, we note the inherent good sense in "entertaining the claim[s] at hand" but limiting Title II and section 504 plaintiffs "to only those damages suffered within the limitations period and, perhaps more important, to injunctive relief." Id.

conflate which of the two Plaintiff is arguing for on appeal—which likely has contributed to that belief. See supra. But setting that point aside, we "will look beyond the plain language of a statute *only* if the result is an absurd application of the law." Brown, 529 F.3d at 1265 (emphasis in original). Observing that the repeated violations doctrine applies to Title II and section 504 claims, however, does not result in any absurd statute-of-limitations outcomes. Indeed, the statute of limitations still has an important role to play even when the repeated violations doctrine applies to a claim. Namely, although the statute of limitations does not bar an untimely lawsuit in its entirety in such an instance, it nonetheless limits the plaintiff's ability to recover damages to only those injuries incurred during the limitations period immediately preceding suit (the plaintiff, of course, can also recover damages for any injuries incurred after filing suit).[13] White, 129 F.3d at

[13] Theoretically, the statute of limitations *could* still function as a complete bar to an untimely lawsuit even when the repeated violations doctrine applies. Suppose, for instance, a plaintiff was first deterred from utilizing a service, program, or activity in 2009 and tries to bring a lawsuit in 2019 for violations of Title II and section 504 against the public entity responsible. But also suppose the plaintiff concedes that in 2016 the public entity completely and entirely remedied the noncompliant service, program, or activity. Assuming a two-year statute of limitations applies, it would entirely bar the plaintiff's claims even though the repeated violations doctrine also applies to his claims. Indeed, the public entity's *last* possible repeated violation (and the plaintiff's *last* possible injury) would have occurred in 2016 before the remedy went into place, which means that the statute of limitations would have run at some point in 2018. Accordingly, the 2019 lawsuit would be untimely because the plaintiff could not point to a

1430. By contrast, the repeated violations doctrine prevents a plaintiff from recovering damages for every injury she suffered throughout history that relates to the non-compliant service, program, or activity.[14] Cf., e.g., Foster, 208 F. App'x at 178. If Plaintiff, for example, had first discovered the City's non-compliant sidewalks and curb cuts in 1996 but still brought suit in 2016, he would not be able to recover damages for every injury he sustained throughout those twenty years; he would be restricted to those injuries he suffered after October 12, 2014. This in itself substantially limits a public entity's liability under Title II and section 504.

What's more, Title II and section 504 plaintiffs are able to recover damages only in the unusual case. Our circuit requires proof of intentional discrimination before a plaintiff can recover compensatory damages under section 504, Havens v. Colo. Dep't of Corr., 897 F.3d 1250, 1263 (10th Cir. 2018), and we have suggested that as much is required under Title II, Moseley v. Bd. of Educ. of Albuquerque Pub. Sch., 483 F.3d 689, 693 (10th Cir. 2007) (noting that Tenth Circuit precedent suggests, but does not explicitly hold, "that proof of

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violation or injury that occurred in the two years prior to the day he files suit.

We mention this scenario only to illustrate that it is possible. Our immediate concern, however, is with cases where the public entity has not remedied the noncompliant service, program, or activity. In such instances, the public entity *is* still committing violations, and the qualified individual with a disability *is* still suffering injuries.

[14] The continuing violation doctrine *would* allow for such a recovery. See Morgan, 536 U.S. at 105.

intentional discrimination is required for compensatory damages under Title II"); see also Miraglia v. Bd. of Supervisors of La. State Museum, 901 F.3d 565, 574 (5th Cir. 2018) ("To recover compensatory damages for disability discrimination under Title II of the ADA, a plaintiff *must* also show that the discrimination was intentional." (emphasis added) (internal quotation marks omitted)). And punitive damages are categorically unavailable for suits under Title II and section 504. Barnes v. Gorman, 536 U.S. 181, 189 (2002). So Title II and section 504 plaintiffs are hard-pressed to receive any monetary damages unless they can prove that a service, program, or activity is intentionally discriminatory toward individuals with disabilities, which is surely the exception rather than the rule. This stands as an additional limitation of a public entity's liability under Title II and section 504.

We agree with the City and the League, though, that the repeated violations doctrine will manifest itself by keeping public entities on the hook for injunctive relief as the years go by. After all, if a court grants an injunction requiring a public entity to remedy a program, service, or activity, we have a difficult time seeing just how the court or public entity could divvy that injunction up in a way that limits it to injuries the plaintiff incurred within the limitations period. See Holmberg v. Ambrecht, 327 U.S. 392, 396 (1946) (observing that equitable relief "eschews mechanical rules").

But the availability of injunctive relief itself does not raise any red flags. As we described above, when Congress outlined its purposes and goals in enacting

the ADA and RA, it expressly noted that it sought full participation, inclusion, and integration in society for individuals with disabilities. By remaining on the hook for injunctive relief—as its affirmative obligation to accommodate requires—a public entity is incentivized to remedy non-compliant services, programs, or activities in a reasonable yet efficient manner to ensure that full participation. And along those same lines, Plaintiff makes an excellent point: "public entities . . . have the ultimate option to avoid liability" by "simply mak[ing] their programs, services, and activities accessible for persons with disabilities." Pl.'s Opening Br. 30; see also Frame v. City of Arlington, 657 F.3d 215, 239 (5th Cir. 2011) (en banc) ("The City may avoid liability whenever it chooses simply by building sidewalks right the first time, or by fixing its original unlawful construction. In other words, the City is not liable forever; it is responsible only for correcting its own mistakes.").

Further, as far as injunctive relief is concerned, we note that a qualified individual with a disability no longer suffers an injury once he stops "assert[ing] an intent to return to the particular place (or places) where the violations are alleged to be occurring." Scherr, 703 F.3d at 1074, 1076; see also Frame, 657 F.3d at 238 ("[A] disabled individual has no standing to challenge an inaccessible sidewalk until he can show actual, concrete plans to use that sidewalk." (internal quotation marks omitted)); Barney v. Pulsipher, 143 F.3d 1299, 1306 n.3 (10th Cir. 1998) ("A 'plaintiff cannot maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise

injured in the future.'" (quoting Facio v. Jones, 929 F.2d 541, 544 (10th Cir. 1991))). Although this implicates Article III standing, Scherr, 703 F.3d at 1073-76, the practical effect of that lack of intent would insulate a public entity from a Title II or section 504 lawsuit seeking prospective injunctive relief. To use an extreme example, if Plaintiff were to move away from the City of Trinidad and had no intent to return, he would no longer be suffering any injury—and, consequently, would lack standing to bring a suit for prospective injunctive relief—regardless of whether the City remedied the sidewalks and curb cuts that allegedly injured him in the past. And even if a qualified individual still suffers an injury after many years, we note that at some point the doctrine of laches may come into play. See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 960 (2017) ("Laches is 'a defense developed by courts of equity' to protect defendants against 'unreasonable, prejudicial delay in commencing suit.'" (quoting Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 667, 678 (2014)). This further cuts against the City's and the League's arguments that public entities will be exposed to unlimited liability.

As a final note, we are not unsympathetic to the City's and the League's arguments that public entities are constrained by limited budgets that do not easily lend themselves to the constant ability to remedy ADA and RA issues.[15] But again, liability for monetary

[15] The City contends that adopting the repeated violations doctrine will cause this inability to remedy ADA and RA issues,

damages is infrequent, which significantly softens the impact of our ruling today. See supra. And if a public entity truly is not liable, or if that entity has already taken significant steps to remedy or can establish that it has multi-year plans in place to remedy a non-compliant service, program, or activity—as the City has apparently done in this case—a factfinder will be able to ferret that out when deciding the merits of any given case. See, e.g., Rife v. Okla. Dep't of Pub. Safety, 854 F.3d 637, 643 (10th Cir. 2017) (observing that fact-finders find facts weighing on liability). Indeed, at least two other circuits have endorsed either the repeated violations doctrine or continuing violation doctrine in the context of ADA Title III claims, but neither the City nor the League have directed us to any evidence suggesting that places of public accommodation located in those circuits have faced significant hardship by the courts' respective applications of the doctrines. See Pickern, 293 F.3d at 1136-37; Scherr, 703 F.3d at 1075-76.

Thus, the City's and the League's concerns are unsubstantiated.

IV.

The district court did not recognize the impact of the repeated violations doctrine on Plaintiff's claims

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but it is mistaken. Even without the repeated violations doctrine, qualified individuals with disabilities who have encountered the City's non-compliant services, programs, or activities within the past two years could just as easily bring lawsuits against the City. So the danger about which the City complains exists even under their own interpretation of the law.

under Title II of the ADA and section 504 of the RA. Instead, it concluded that Plaintiff could not "rely solely on the continued inaccessibility of the City's sidewalks and curb cuts" to survive dismissal under Colorado's two-year statute of limitations.

This was error. Because the district court applied an incorrect standard, it could not determine under the proper framework how the two-year statute of limitations affected Plaintiff's claims. As a court of review, we will not decide that inquiry for the first time on appeal. Pignanelli v. Pueblo Sch. Dist. No. 60, 540 F.3d 1213, 1218 (10th Cir. 2008). We thus remand the case to the district court to decide in the first instance under the framework set forth in this opinion which of Plaintiff's injuries he may seek relief for and which of those he may not. In so doing, the district court will necessarily need to determine which of the City's sidewalks and curb cuts Plaintiff has actually been deterred from utilizing.[16]

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[16] In issuing these instructions on remand, we emphasize once again that we take no stance on the question whether sidewalks and curb cuts qualify as a service, program, or activity of a public entity. We also issue these instructions cognizant of the fact that the district court *assumed*—much like we did—that sidewalks and curb cuts qualify as a service, program, or activity of a public entity so that it could reach the "narrower" and "dispositive" statute of limitations question. For those reasons, the district court may now find it necessary to definitively decide on remand whether sidewalks and curb cuts qualify as a service, program, or activity of a public entity, and it should not read anything in this opinion as preventing it from doing so.

For the reasons set forth above, we REVERSE and REMAND for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02545-NYW

STEPHEN HAMER,

Plaintiff,

v.

CITY OF TRINIDAD,

Defendant.

MEMORANDUM OPINION AND ORDER

Magistrate Judge Nina Y. Wang

This matter comes before the court on Plaintiff Stephen Hamer's ("Plaintiff" or "Mr. Hamer") Motion for Partial Summary Judgment (or "Plaintiff's Motion") [#42,[1] filed July 3, 2017] and Defendant City of Trinidad's ("Defendant" or "City") Motion for Summary Judgment (or "Defendant's Motion") [#43, filed

[1] Plaintiff filed his Motion for Partial Summary Judgment under Level 1 restriction, given that several attached exhibits include Plaintiff's medical records. The court granted Plaintiff's Motion to Restrict Access to his medical records, but directed Plaintiff to file a redacted version of his Motion for Partial Summary Judgment and restricted documents, which are located at docket entry [#47]. For clarity purposes, in citing to Plaintiff's Motion for Partial Summary Judgment, the court cites to the restricted document [#41], but does not cite to any restricted information. This is also true of any other documents similarly filed under Level 1 restriction.

July 5, 2017]. The undersigned considers the Motions pursuant to 28 U.S.C. § 636(c) and the Order of Reference dated November 28, 2016 [#14]. Upon careful review of the Motions and associated briefing, the applicable case law, the entire case file, and the comments offered during the October 5, 2017 Motions Hearing, the court DENIES Plaintiff's Motion and GRANTS Defendant's Motion for the reasons stated herein.

PROCEDURAL BACKGROUND

On October 12, 2016, Plaintiff initiated this action by filing his Complaint, alleging violations of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 *et seq.*, and section 504 of the Rehabilitation Act of 1973 ("RA"), 29 U.S.C. § 794 *et seq.* [#1]. Mr. Hamer alleges that the City has "discriminated against and subjected [him] to unlawful or hazardous conditions due to the absence of accessible curb ramps within the City's pedestrian right of way." [*Id.* at ¶ 1]; *see also* [*id.* at ¶ 18]. Defendant filed its Answer to Plaintiff's Complaint on November 10, 2016. [#11].

The case proceeded through discovery, and the Parties timely filed the instant cross-Motions for Summary Judgment. [#18; #19]. In his Motion, Plaintiff seeks summary judgment as to whether: (1) he has standing to pursue this action; (2) he is a "qualified individual" under both the ADA and the RA; (3) the City's sidewalks and curb cuts are a "program, service, or activity" under Title II of the ADA and section 504

of the RA; (4) the City must comply with the RA; and (5) the City violated the alteration requirements of 28 C.F.R. § 35.151, the maintenance of accessible feature requirements of 28 C.F.R. § 35.133, and the program access requirements of 28 C.F.R. § 35.150. [#41 at 18].[2]

For its part, the City also moves for summary judgment, arguing that: (1) sidewalks and curb cuts are not "services" or "programs" under the ADA or RA and, accordingly, Plaintiff's claims fail as a matter of law; (2) in the alternative, to the extent that the court finds that Mr. Hamer's claims are cognizable under the ADA and the RA, it is entitled to summary judgment as to its defense of undue burden; and (3) Plaintiff's claims are barred by the applicable statute of limitations. [#43].

On October 5, 2017, the undersigned held oral argument, and took the Motions under advisement. [#65]. The Motions are now ripe for resolution.

LEGAL STANDARD

Summary judgment is appropriate only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp.*

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[2] Plaintiff reserves the following issues for trial: (1) the full extent of the City's noncompliance with the ADA and accompanying injunctive and declaratory relief; (2) whether the City intentionally discriminated against Plaintiff to warrant damages; and (3) the full amount of Mr. Hamer's compensatory damages. [#41 at 18].

v. Catrett, 477 U.S. 317, 322 (1986); *Henderson v. Inter–Chem Coal Co., Inc.*, 41 F.3d 567, 569 (10th Cir. 1994). "A 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986)). Whether there is a genuine dispute as to a material fact depends upon whether the evidence presents a sufficient disagreement to require submission to a jury or conversely, is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 248–49; *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000); *Carey v. U.S. Postal Service*, 812 F.2d 621, 623 (10th Cir. 1987). A fact is "material" if it pertains to an element of a claim or defense; a factual dispute is "genuine" if the evidence is so contradictory that if the matter went to trial, a reasonable party could return a verdict for either party. *Anderson*, 477 U.S. at 248. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat. Bank of Ariz. V. Cities Service Com*, 391 U.S. 253, 289 (1968)).

"The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670–71 (10th Cir. 1998) (citing *Celotex*, 477 U.S. at

323). The movant can achieve this by pointing the court to a lack of evidence for the nonmovant on an essential element of the nonmovant's claim. *Id.* at 671. Once the movant meets this initial burden, the nonmovant assumes the burden to put forth sufficient evidence to demonstrate the essential elements of the claim such that a reasonable jury could find in its favor. *See Anderson*, 477 U.S. at 248; *Simms v. Okla. Ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Conclusory statements based merely on speculation, conjecture, or subjective belief are not competent summary judgment evidence. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). The nonmoving party's evidence must be more than "mere reargument of [her] case or a denial of an opponent's allegation," or it will be disregarded. *See* 10B Charles Alan Wright, et al., Federal Practice and Procedure § 2738 at 356 (3d ed.1998).

MATERIAL FACTS

The following facts are drawn from the instant Motions, and are undisputed for the purposes of this analysis.[3] Mr. Hamer, a resident of the City of Trinidad, Colorado, is confined to a motorized wheelchair and is a qualified individual with a disability under the ADA.

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[3] Defendant has indicated that, to the extent that this matter proceeds beyond summary judgment, it may challenge whether Mr. Hamer is a qualified individual with a disability under the ADA and RA. [#43 at 2 n.3].

See [#41-1 at 161:1–4,[4] 162:8–12, 163:23–25, 167:1–9]. Due to his confinement in a motorized wheelchair, Mr. Hamer does not drive or utilize public transportation; his "primary means of public transportation" are the City's public sidewalks. [#41-6 at ¶ 2]. The City has approximately "154 miles of sidewalk and approximately 1300 curb cuts." [#43-2 at 17, ¶ 5]. Mr. Hamer's claims focus solely on the City's noncompliant sidewalks and curb cuts. *See*, *e.g.*, [#1; #43-1 at 4, 63:12–15; #51 at 206:4–7].

In April 2014, Mr. Hamer attended a City Council meeting where he complained about ADA accessibility throughout the City, and noted seventy-nine (79) specific noncompliant curb cuts and sidewalks. [#43-1 at 9]. Over the next six months, Mr. Hamer levied multiple informal grievances at City Council meetings. *See* [*id.* at 10–14]. For instance, he noted that several public picnic tables and some commercial tables, located near the sidewalks, obstructed the thirty-six (36) inch path of travel requirement under the ADA, that the restrooms at City Hall were inaccessible to the disabled, that City residents do not stop at crosswalks for people in wheelchairs, and that several buildings were inaccessible to people in wheelchairs or scooters. *See* [*id.*]. To date, Defendant has completed several projects aimed at renovating the noncompliant sidewalks and

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[4] When citing to a transcript, the court uses the document number assigned by the CM/ECF system but cites to the transcript's original page and line number, except when citing to Defendant's combined exhibits where the court also identifies the page number generated by the CM/ECF system.

curb cuts identified by Mr. Hamer, as well as other compliance projects. *See* [#49-1 at 150:9–23, #43-1 at 16, 82:10–19].

Plaintiff also filed an ADA complaint with the United States Department of Justice ("DOJ") on or about April 29, 2014. [#43-1 at 17–19]. The ADA complaint alleged that the City lacked the proper personnel to ensure ADA compliance within the City, that the sidewalks and curb cuts were noncompliant with ADA regulations, and that several City buildings were inaccessible to those in wheelchairs like Mr. Hamer. [*Id.*]. At some point following his ADA complaint with the DOJ, the DOJ began an ADA audit of the City. *See* [#41-2 at 21:4–7, 23:2–25, #41-3 at 59:5–60:14; #41-16]. Relevant here, the DOJ audit identified at least five (5) newly constructed or altered curb ramps that were noncompliant. *See* [#41-16 at 4–5]. Upon inspection of approximately 178 curb ramps and 55 sidewalks in "high use" areas, Plaintiff's engineering expert Nicholas Heybeck ("Mr. Heybeck") opined that approximately 67 percent of the surveyed curb ramps were noncompliant with the 1991 and 2010 DOJ ADA Standards for Accessible Design ("ADAAG") and the 1997 Uniform Federal Accessibility Standards ("UFAS"), and that "large areas of sidewalks . . . were found to be non-compliant." [#41-8 at 13].

In anticipation of a consent decree (or other similar agreement) with the DOJ, Defendant sought to "amass funding" for the 2017 City budget of between $500,000 to $1 million to "address the most critical curb cuts immediately." [#43-2 at 8, 34:15–23]. The

City must also set aside $600,000 to ameliorate other ADA compliance issues noted by the DOJ—this is in addition to the $550,000 spent by the City in 2016 to repair major downtown sidewalks and curb cuts as well as $800,000 planned for repairs in 2017. *See* [*id.* at 18, ¶¶ 7, 9]. According to the City's engineering expert Mike Kibbee ("Mr. Kibbee"), it would cost the City $913,618.74 to repair and/or renovate twenty-one (21) "intersections in the downtown area." [#43-2 at 17, ¶ 4; *id.* at 12–16; #41-14].

Plaintiff then initiated this action on October 12, 2016. [#1]. Plaintiff seeks declaratory judgment that Defendant's sidewalks and curb cuts violate the ADA and RA, injunctive relief requiring the City to alter and/or modify its sidewalks and curb cuts to comply with the ADA and RA, as well as compensatory damages and attorney's fees under the ADA. [*Id.* at 16–18].

ANALYSIS

I. Statutory Framework

Title II of the ADA commands, "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[.]" 42 U.S.C. § 12132. A viable claim under the ADA requires Mr. Hamer to prove (1) he is a qualified individual with a disability; (2) he was excluded from participation in or the benefits of the City's services, programs, or activities; and (3) such exclusion was due to his disability. *J.V. v. Albuquerque Pub. Sch.*,

813 F.3d 1289, 1295 (10th Cir. 2016). "The ADA requires more than physical access to public entities: it requires public entities to provide '*meaningful access*' to their programs and services." *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007) (emphasis in original). Likewise, section 504 of the RA prohibits exclusion from the participation in, the denial of benefits to, or the discrimination of a "qualified individual with a disability . . . under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). In addition to the three elements identified under the ADA, a viable RA claim requires Mr. Hamer to also prove that the "program or activity" receives federal funding. *See Hollonbeck v. United States Olympic Comm.*, 513 F.3d 1191, 1194 (10th Cir. 2008).

Both the ADA and the RA allow private citizens to sue for damages for alleged statutory violations. *See Guttman v. Khalsa*, 669 F.3d 1101, 1109 (10th Cir. 2012) (citing 42 U.S.C. § 12133 (incorporating by reference 29 U.S.C. § 794(a))). "Because these provisions involve the same substantive standards, [courts] analyze them together." *Miller ex rel. S.M. v. Bd. of Educ. Of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1245 (10th Cir. 2009) (citation omitted); *see Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1102 (10th Cir. 1999) ("Because the language of disability used in the ADA mirrors that in the Rehabilitation Act, we look to cases construing the Rehabilitation Act for guidance when faced with an ADA challenge."). With this framework in mind, the court now turns to the Parties' arguments—first considering

standing before turning to the merits of other issues raised by the Parties.

II. Standing

Federal courts are courts of limited jurisdiction and, as such, "are duty bound to examine facts and law in every lawsuit before them to ensure that they possess subject matter jurisdiction." *The Wilderness Soc. v. Kane Cty., Utah*, 632 F.3d 1162, 1179 n.3 (10th Cir. 2011) (Gorsuch, J., concurring). Under Article III of the United States Constitution, federal courts only have jurisdiction to hear certain "cases" and "controversies." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). In addition to any argument by the Parties, this court has an independent obligation to satisfy itself that it has subject matter jurisdiction. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006). Indeed, standing cannot be assumed. *See Colorado Outfitters Ass'n*, 823 F.3d at 543–44. Therefore, while standing is not formally a "claim" that is subject to summary disposition, this court addresses it first to determine whether it may exercise subject matter jurisdiction over this action.

To satisfy Article III's case or controversy requirement, Mr. Hamer must establish: (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood of redressability by a favorable decision. *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1214–15 (10th Cir.

2017) (citations and quotation marks omitted); *accord Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 551–52 (10th Cir. 2016) (emphasizing that "a disabled individual claiming discrimination under the ADA" must establish Article III standing to invoke federal court jurisdiction (citations and internal quotation marks omitted)).

Yet in certain circumstances, a plaintiff must also satisfy the requirements of prudential standing—"judicially self-imposed limits on the exercise of federal jurisdiction." *The Wilderness Soc'y*, 632 F.3d at 1168 (internal citations and quotations omitted); *cf. Niemi v. Lasshofer*, 770 F.3d 1331, 1345 (10th Cir. 2014) (explaining that prudential standing is not jurisdictional and may be waived). To establish prudential standing, a plaintiff must (1) assert her own rights, rather than those belonging to third parties; (2) demonstrate that her claim is not simply a "generalized grievance;" and (3) show that her grievance falls within the zone of interests protected or regulated by statutes or constitutional guarantee invoked in the suit. *See Bd. of Cty. Comm'rs of Sweetwater Cty. v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (citations omitted). "Thus, prudential standing often depends on whether the statutory provision upon which a claim is based 'properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *In re Thomas*, 469 B.R. 915, 921 (B.A.P. 10th Cir. 2012) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). While most cases consider standing at the time of the filing of the original pleading, "Article III demands that that [sic]

an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 726 (2013) (internal quotation marks omitted)).

A. Qualified Individual

Mr. Hamer moves for summary judgment on the issue of whether he is a qualified individual under the ADA. [#41 at 12 & n. 40]. "[A]s a threshold matter, any plaintiff asserting a claim under the ADA must establish he or she is a 'qualified individual with a disability.'" *Lanman v. Johnson Cty., Kansas*, 393 F.3d 1151, 1156 (10th Cir. 2004). As discussed above, Defendant does not dispute, for the purposes of summary judgment, that Mr. Hamer is a qualified individual under the ADA. [#43 at 2 n.3]. Nonetheless, Mr. Hamer seeks summary judgment in his favor on the issue of being a "qualified individual." But "[i]t is well-settled that Rule 56 permits a party to seek summary judgment only as to an entire claim; a party may not seek summary judgment on a portion of a claim." *Powers v. Emcom Assoc., Inc.*, No. 14-cv-03006-KMT, 2017 WL 4102752, at *1 (D. Colo. Sept. 14, 2017) (collecting cases). While it would be dispositive had Defendant moved for summary judgment on the basis that Mr. Hamer is *not* a qualified individual, an affirmative finding in favor of Mr. Hamer that he *is* a qualified individual under the ADA as a matter of law is not dispositive as to any entire claim before the court. Accordingly, the court DENIES Plaintiff's Motion as to the issue of qualified individual, and assumes for the

purposes of the instant motions that Mr. Hamer is a qualified individual.

B. Injury-in-fact

"Injury in fact involves invasion of a legally protected interest that is concrete, particularized, and actual or imminent." *Citizen Ctr. v. Gessler*, 770 F.3d 900, 910 (10th Cir. 2014). That is, the injury must affect Mr. Hamer in a personal and individual way, and it must actually exist. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548–49 (2016). Conjectural or hypothetical injuries or future injuries that are not certainly impending are insufficient. *See Brown v. Buhman*, 822 F.3d 1151, 1165 (10th Cir. 2016); *Colo.Outfitters Ass'n*, 823 F.3d at 544 ("[A] plaintiff must offer something more than the hypothetical possibility of injury. . . . [T]he alleged injury [cannot be] too speculative").

Moreover, the nature of the relief sought, i.e., retrospective or prospective, dictates what a plaintiff must prove to establish injury in fact. For prospective relief, "the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future." *Tandy v. City of Wichita*, 380 F.3d 1277, 1283 (10th Cir. 2004) (reiterating that the "injury must be 'certainly impending' and not merely speculative." (citation omitted)). Conversely, retrospective relief requires that a plaintiff "suffered a past injury that is concrete and particularized." *Id.* at 1284.

Here, Plaintiff seeks both retrospective and prospective relief. [#1]. As to his retrospective relief, there

is no dispute that Mr. Hamer has suffered a concrete and particularized injury in the past. The record indicates several instances where Plaintiff encountered inaccessible sidewalks and curb cuts throughout the City. *See*, *e.g.*, [#41-7 at 1–5; #41-14; #41-16 at 4–5; #43-1 at 9–14, 17–18; #43-2 at 2, 13–16; #51 at 189:4–13, 281:7–10]. Similarly, the court concludes that Mr. Hamer satisfies the injury in fact requirement for his prayer for prospective relief. As explained, it is undisputed that several sidewalks and curb cuts remain noncompliant. *See Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1177 (10th Cir. 2009) (recognizing standing for prospective relief requires continuing injury). Yet, Mr. Hamer must still establish that *he* faces a real and immediate threat of future injury due to the City's noncompliant sidewalks and curb cuts. *See DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197 (10th Cir. 2010). In the context of claims under Title II of the ADA, the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") has explained that "averred intent" to utilize a public entities services "several times per year" or per month are not "[s]peculative, 'someday' intentions [that] do not support standing to seek prospective relief." *Tandy*, 380 F.3d at 1284 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). Rather, this intent "suggests a concrete, *present* plan to use [the public entity's services] several times *each* year, including the year in which [the plaintiff] made that statement." *Id.* (emphasis in original); *see also id.* at 1285 (distinguishing this case from the *Lujan*-plaintiffs' "mere intent to return to foreign countries at some indefinite future time." (internal

quotation marks and citations omitted)). *See also Colo. Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1211 (10th Cir. 2014) (extending *Tandy* to Title III claimants).

Mr. Hamer attests that "the public sidewalks are [his] primary means of public transportation," as he does not own a motor vehicle and the City does not provide public transportation. [#41-6 at ¶ 2]. He further attests that the inaccessible sidewalks and curb cuts make it "difficult for [him] to safely utilize the sidewalks," and that he is "often forced to ride [his] mobility device in the street along with the vehicle traffic." [*Id.* at ¶¶ 3–4]; *see also* [#51 at 189:18–20]. At his deposition, Mr. Hamer testified that the inaccessibility of the City's sidewalks and curb cuts "impact[ ] what [he] is able to do and when," [#51 at 187:18–19], and that he encounters inaccessible sidewalks and curb cuts throughout the City on a daily basis, [*id.* at 188:1–5]. Plaintiff also indicated that there are no curb cuts at several intersections on his route to the grocery store, requiring him to travel an extended route in the street with vehicular traffic. *See* [#41-7 at 2, ¶ E.]; *see also* [#41-1 at 200:4–21]. The court is satisfied that Mr. Hamer has demonstrated an injury that is concrete and present, and not one "'that is contingent upon speculation or conjecture.'" *Lippoldt v. Cole*, 468 F.3d 1204, 1218 (10th Cir. 2006) (quoting *Tandy*, 380 F.3d at 1283–84); *cf. Kirola v. City & Cty. of San Franciso*, 860 F.3d 1164, 1174–75 (9th Cir. 2017) (holding the plaintiff demonstrated an injury in fact for prospective relief under Title II by testifying that she encountered

several sidewalks and curb cuts that were noncompliant with the ADA and was deterred from future attempts to access these services for this reason). Based on the foregoing, Mr. Hamer has also established an injury in fact for purposes of his prospective relief.

C. Causation and Redressability

Finally, there is no dispute that the City's inaccessible sidewalks and curb cuts are the cause of Plaintiff's injury, and that a favorable decision will redress Mr. Hamer's injury, i.e., force the City to remediate its noncompliant sidewalks and curb cuts. *See Cortez v. City of Porterville*, 5 F. Supp. 3d 1160, 1165–66 (E.D. Cal. 2014) (concluding the plaintiff's injury was traceable to the defendant's "failure to 'provide accessible pedestrian pathway,' " an injury redressable by a favorable ruling). Thus, Mr. Hamer has standing to proceed with his claims under the ADA and the RA. *See Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002).

D. Standing Versus Right to Relief

In so ruling, the court recognizes that each Party moves for summary judgment on whether sidewalks and curb cuts constitute a "service, program, or activity" under the ADA or a "program or activity" under the RA. *Compare* [#41 at 21–22] *with* [#43 at 6–15]. Like the issue of qualified individual, this issue is dispositive if Defendant prevails on its argument that Mr. Hamer lacks standing because sidewalks and curb cuts

are not services, programs, or activities that give rise to a cognizable private right of action under Title II of the ADA or section 504 of the RA [#43 at 13, 14]. This issue is not dispositive, however, if Plaintiff prevails on his contrary argument that sidewalks are services, programs, or activities under Title II of the ADA and section 504 of the RA.

While some courts and litigants have intertwined the two concepts, this court finds that it is more appropriate to consider them as distinct—one pertaining to the court's jurisdiction and one pertaining to a plaintiff's right to relief. Indeed, standing is rooted in the principle that federal courts have jurisdiction to hear only "cases" and "controversies" such that the plaintiff must be "the proper party to bring this suit[.]" *Raines v. Byrd*, 521 U.S. 811, 818 (1997). And although this inquiry "often turns on the nature and source of the claim asserted," *Warth v. Seldin*, 422 U.S. 490, 500 (1975), it "in no way depends on the merits of the [plaintiff's] contention that particular conduct is illegal" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (internal quotation marks and citation omitted). To that end, "an interest can support standing even if it is not protected by law (at least, not protected in the particular case at issue) so long as it is the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) (noting, "that lack of protection goes to the merits, not standing.").

As it applies here, Mr. Hamer may have standing to sue for the alleged discrimination (which the court

agrees he does), yet he may not be entitled to the relief sought under Title II of the ADA or section 504 of the RA. The City submits that the court could find in its favor on the services, programs, or activities issue by concluding that Plaintiff lacks standing *or* that Plaintiff's claims fail on the merits, *see* [#43; #49 at 7 n.2, 10–11], "[s]ince Mr. Hamer has not alleged a cognizable violation of 42 U.S.C. § 12132, he has no injury to a legally protected interest." [#43 at 14].

After consideration of the issue, the court concludes that the question of whether sidewalks and curb cuts constitute a public entity's services, programs, or activities is more appropriately considered as an issue related to Mr. Hamer's right to relief, not his standing under the ADA or the RA. And because this court need not resolve this issue to adjudicate the instant motions for summary judgment, it declines to do so in light of the lack of clearly dispositive Circuit precedent.[5]

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[5] This court notes, however, that the weight of authority favors a finding that sidewalks do constitute services under Title II of the ADA and section 504 of the RA. *See*, *e.g.*, *Babcock v. Michigan*, 812 F.3d 531, 543 (6th Cir. 2016) (Rogers, J., concurring) (recognizing that sidewalks may constitute a "service" because they are "critical to the everyday transportation needs of the general public") (discussing *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 907, 912 (6th Cir. 2004) (holding that 28 C.F.R.§ 35.151 was enforceable through a private right of action requiring the City to install newly constructed sidewalks that were accessible to the disabled)); *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014) ("A city sidewalk is therefore a 'service, program, or activity' of a public entity within the meaning of Title II.") (citing *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002)); *Frame v. City of Arlington*, 657 F.3d 215, 240 (5th Cir. 2011) ("For the reasons stated, we hold that the

Instead, the court focuses on the narrower issue of the timeliness of Mr. Hamer's claims because such issue is dispositive.[6] *See Dames & Moore v. Regan*, 453 U.S. 654, 660 (acknowledging the "necessity to rest [the Court's] decision on the narrowest possible grounds of deciding the case."); *accord Rodriguez v. City of Chicago*, 156 F.3d 771, 778 (7th Cir. 1998) (Posner, J., concurring) ("If the judges are dubious about the broad ground, then they will do well to decide only on the narrow ground"). Accordingly, for purposes of its statute of limitations analysis only, the court assumes without deciding that Plaintiff has stated a cognizable cause of action under Title II of the ADA and section

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plaintiffs have a private right of action to enforce Title II of the ADA and § 504 of the Rehabilitation Act with respect to newly built and altered sidewalks."); *Mason v. City of Huntsville, Ala.*, No. CV-10-S-02794-NE, 2012 WL 4815518, at *8 (N.D. Ala. Oct. 10, 2012) (holding that Title II prohibited discrimination against disabled persons in the provision of public sidewalks, curb ramps, and parking areas); *cf. Young v. City of Claremore, Okla.*, 411 F. Supp. 2d 1295, 1304 (N.D. Okla. 2005) ("[T]he Court finds that use of the streets, roadways, and highways located in the City of Claremore for purposes of transportation constitutes a public service, program, or activity under the ADA."); *Scharff v. Cty. of Nassau*, No. 10 CV 4208 DRH AKT, 2014 WL 2454639, at *7 (E.D.N.Y. June 2, 2014) (holding that "installing and maintaining pedestrian crossing signals at crosswalks . . . falls within the scope of Title II and the Rehabilitation Act."). *But c.f. Babcock v. Michigan*, 812 F.3d 531 (6th Cir. 2016) (distinguishing *Frame* and holding that defects in facilities were not services, and, accordingly, the plaintiff did not have a private right of action under Title II of the ADA).

[6] For this reason, the court does not consider the Parties' merits-based arguments or the City's undue burden defense.

504 of the RA, and turns to the application of the statute of limitations.

III. Statute of Limitations

Neither Title II nor the RA provides a statute of limitations. "Where Congress creates a cause of action without specifying the time period within which it may be brought, courts may infer that Congress intended the most analogous state statute of limitations to apply." *E.E.O.C. v. W.H. Braum, Inc.*, 347 F.3d 1192, 1197 (10th Cir. 2003). Accordingly, Colorado's two-year statute of limitations applies to Mr. Hamer's ADA and RA claims. *See Ulibarri v. City & Cty. of Denver*, 742 F. Supp. 2d 1192, 1213 (D. Colo. 2010) (citing *Hughes v. Colo. Dep't of Corr.*, 594 F. Supp. 2d 1226, 1235 (D. Colo. 2009)) (further citation omitted); *accord Baker v. Bd. of Regents of State of Kan.*, 991 F.2d 628, 631–32 (10th Cir. 1993) (analogizing RA claims to § 1983 claims, and holding that the Kansas two-year statute of limitations for personal injury claims controlled).

When a defendant moves for summary judgment based on an affirmative defense, it is the defendant's burden to demonstrate the absence of a factual dispute as to the defense asserted; the plaintiff must then "demonstrate with specificity the existence of a disputed fact," as a failure results in the affirmative defense barring the plaintiff's claims. *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997). Here, the City avers, "Mr. Hamer was clearly aware of alleged ADA/RA violations throughout the City in April of 2014, but failed

to bring suit until October of 2016;" thus, the applicable two-year statute of limitations bars his claims. *See* [#43 at 17]. At the latest, according to the City, Mr. Hamer "had knowledge of the exact basis for this lawsuit on April 29, 2014," the date he filed his complaint with the DOJ. *See* [*id.* at 19; #43-1 at 17–19].

Plaintiff responds that the two-year statute of limitations does not preclude his claims for two reasons. First, the continuing violation theory applies to his claims under 28 C.F.R. §§ 35.150 (governing the accessibility of existing facilities) and 35.133 (governing the maintenance of readily accessible facilities). [#54 at 15]. Second, the City "committed numerous ADA violations in the two years before Mr. Hamer filed suit." [*Id.*]. The court addresses each argument in turn, and rejects the continuing violation theory as applied to Plaintiff's claims and finds that Plaintiff's claims are untimely.

A. Continuing Violation Theory

The continuing violation theory "is a creation of federal law that arose in Title VII cases[,]" *Thomas v. Denny's Inc.*, 111 F.3d 1506, 1513 (10th Cir. 1997), and "permits a Title VII plaintiff to challenge incidents that occurred outside the statutory time limitations of Title VII if such incidents are sufficiently related and thereby constitute a continuing pattern of discrimination[,]" *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994). Typically, this doctrine applies to hostile work environmental [sic] claims. *See*, *e.g.*, *Nat'l R.R.*

Passenger Corp. v. Morgan, 536 U.S. 101, 115–21 (2002) (Title VII); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1185–86 (10th Cir. 2003) (Title I). In this context, such claims are "composed of a series of separate acts that collectively constitute one 'unlawful employment practice[,]'" meaning the discriminatory conduct "cannot be said to occur on any particular day." *Hansen v. SkyWest Airlines*, 844 F.3d 914, 923 (10th Cir. 2016) (quoting *Morgan*, 536 U.S. at 115, 117). That said, discrete discriminatory acts each start their own statute of limitations clock for purposes of filing a timely suit. *See Daniels v. United Parcel Serv., Inc.*, 701 F.3d 620, 628 (10th Cir. 2012) (citations omitted).

Plaintiff argues that his claims under 28 C.F.R. §§ 35.150 and 35.133 are subject to the continuing violation theory, because each claim requires an examination of the circumstances as a whole, not discrete acts. *See* [#54 at 17–18]. The City counters that the continuing violation theory is inapplicable, because any accessibility barriers are "permanent," i.e., discrete acts, and, nonetheless, even if the continuing violation doctrine applied to his 28 C.F.R. § 35.150 claim, he knew of the alleged discrimination no later than April 29, 2014. [#61 at 9–10]. For the reasons stated below, the court agrees that the continuing violation theory is inapplicable to Plaintiff's claims.

As explained, the continuing violation theory typically applies to hostile work environment claims. *E.g.*, *Boyer v. Cordant Techs., Inc.*, 316 F.3d 1137, 1138–40 (10th Cir. 2003). Indeed, the Tenth Circuit has rejected its application to discrimination claims pursuant to 42

U.S.C. § 1981. *See Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1193 n.2 (10th Cir. 2002). Nor has it ever "formally adopted [] the doctrine for § 1983 actions," *Gosselin v. Kaufman*, 656 Fed.Appx. 916, 919 (10th Cir. 2016) (unpublished); *Canfield v. Douglas Cty.*, 619 Fed.Appx. 774, 778 (10th Cir. 2015) (unpublished) ("[T]his court has never held that the continuing-violation doctrine applies to § 1983 cases."), or *Bivens* claims, *see Silverstein v. Fed. Bureau of Prisons*, No. 07-CV-02471-PAB-KMT, 2011 WL 4552540, at *9 (D. Colo. Sept. 30, 2011). And to this court's knowledge, the Tenth Circuit has yet to adopt it in the context of Title II.

Nonetheless, at least two Circuit Courts of Appeal have endorsed the continuing violation theory in the context of Title III claims. In *Pickern v. Holiday Quality Foods, Inc.*, the Ninth Circuit held, "[s]o long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury of the ADA continues." 293 F.3d 1133, 1137 (9th Cir. 2002). In so holding, the Ninth Circuit concluded that Mr. Pickern's Title III claims against a grocery store, seeking prospective injunctive relief, were timely though his only entry of the store occurred outside California's one-year statute of limitations applicable to Title III claims. *Id.* The Seventh Circuit adopted this reasoning in *Scherr v. Marriott International, Incorporated*, wherein the Seventh Circuit held that Ms. Scherr's Title III claims were timely, because she was allegedly aware of continued ADA violations at the defendant's hotel even though she filed her suit nearly

four-years after she visited the noncompliant hotel. 703 F.3d 1069, 1075–76 (7th Cir. 2013) ("Because the violations Scherr alleges are continuing, the applicable statute of limitations does not bar her claim."). Several district courts have also applied the continuing violation theory to Title II claims on the theory that denial of meaningful access to services, programs, or activities continues so long as the barrier(s) still exist. *See*, *e.g.*, *Mosier v. Kentucky*, 675 F. Supp. 2d 693, 698 (E.D. Ky. 2009) ("Governments continue to discriminate against persons with disabilities by providing court proceedings without interpreters or auxiliary aids. Therefore, so long as Plaintiff is denied meaningful access to Defendants' programs, the violation of the ADA continues. Plaintiff asserts that barriers still exist; thus, Plaintiff asserts a claim that falls within the statute of limitations."); *Eames v. S. Univ. & Agric. & Mech. Coll.*, No. 09-56-JJB, 2009 WL 3379070, at *3 (M.D. La. Oct. 16, 2009) (applying *Pickern* to the plaintiff's Title II claims, because the plaintiff asserted that the barriers to the defendant's programs still existed despite his lack of attempts to access those programs); *hip (Heightened Indep. & Progress), Inc. v. Port Auth. of New York & New Jersey*, No. CIV.A. 07-2982(JAG), 2008 WL 852445, at *3 (D.N.J. Mar. 28, 2008) ("Defendant's construction of a public transportation entrance that is inaccessible to disabled persons, and its failure to remedy the improper construction, constitutes a continuing violation.").

Plaintiff asks this court to align itself with those that have applied the continuing violation theory to

similar Title II claims, arguing that because "the injurious conditions persist to this day[,]" Mr. Hamer's program accessibility (28 C.F.R. § 35.150) and maintenance of accessible features (28 C.F.R. § 35.133) claims are timely. *See* [#54 at 17–18]. Respectfully, the court declines to do so, based on the circumstances presented in this case.

As mentioned, "plaintiffs are now expressly precluded from establishing a continuing violation exception for alleged discrete acts of discrimination occurring prior to the limitations period, even if sufficiently related to those acts occurring within the limitations period." *Davidson*, 337 F.3d at 1185. Further, the continuing violation theory "is triggered by continual unlawful acts, not by continual ill effects from the original violation." *Mata v. Anderson*, 635 F.3d 1250, 1253 (10th Cir. 2011) (citations and internal quotation marks omitted). Such is the case here—the construction and alleged lack of maintenance of noncompliant sidewalks and curb cuts constitute discrete acts of discrimination, any subsequent injury caused by the City's failure to remediate these issues are continual ill effects of that original violation. *Id.* The court finds several cases persuasive on this point.

First, in *Rhodes v. Langston University*, the Tenth Circuit considered, among other issues, the timeliness of plaintiff's ADA and RA claims. 462 Fed.Appx. 773, 779–80 (10th Cir. 2011) (unpublished). The plaintiff complained of specific classroom accessibility and overheating problems in the fall of 2006, and again in the spring of 2007—barriers that resulted in the overuse

of his prosthetic leg, which required separate surgeries in 2006 and 2008. *Id.* at 780. Mr. Rhodes filed suit on August 12, 2009, and the district court held that any claims accruing prior to August 12, 2007, were time barred. *Id.* Neither party disputed the applicability of Oklahoma's two-year statute of limitations; the plaintiff, however, argued that his claims did not accrue until he left the defendant's nursing program in 2008 and, thus, the defendant's discriminatory acts were "on-going" for purposes of the statute of limitations. *Id.* The Tenth Circuit rejected Mr. Rhodes's argument, and held that his "complaints represent discrete accessibility issues rather than a continuation by [the defendant] or related and repetitive unlawful acts or practices." *Id.*

Relatedly, in *A Society Without A Name ("ASWAN") v. Virginia*, the Fourth Circuit considered the applicability of the continuing violation theory to ASWAN's Title II claim against the defendants. 655 F.3d 342, 348–49 (4th Cir. 2011). ASWAN alleged that the defendants' decision to open a homeless shelter miles away from downtown Richmond constituted discrimination under Title II, because the general public regarded homeless people as being disabled and the defendants were trying to exclude the homeless from the defendants' services, programs, and activities. *Id.* at 345. The defendants opened the homeless shelter on February 5, 2007, and ASWAN filed suit on February 17, 2009. *Id.* at 344–45. The Fourth Circuit first concluded that Virginia's one-year statute of limitations applied to ASWAN's ADA claim and, second, that

ASWAN's ADA claim was untimely. *Id.* at 348. ASWAN, however, argued that the defendants' conduct, i.e., the continued operation of the homeless shelter and the addition of new services offered, constituted a continuing violation of the ADA. *Id.* The Fourth Circuit disagreed. Rather, the court held, "[t]he fact that the [homeless shelter] is still located on Oliver Hill Way and continues to offer services to the homeless . . . does not amount to a continuing violation, but rather amounts to the continuing effect of the original decision to locate the [homeless shelter] on Oliver Hill Way." *Id.* at 349 (citation omitted). Thus, the Fourth Circuit held that ASWAN's ADA claim was time barred.

The Third Circuit reached a similar conclusion in *Foster v. Morris*, wherein Mr. Foster, a partial paraplegic confined to a wheelchair, brought suit under Title II, challenging the lack of handicap accessible facilities at the Franklin County Prison ("Franklin"). 208 Fed.Appx. 174, 176 (3rd Cir. 2006) (unpublished). Though incarcerated elsewhere, Mr. Foster was transferred to Franklin for various lengths of time prior to court proceedings. *Id.* It was undisputed that Franklin's cells could not fit Mr. Foster's wheelchair through their entrances, that the toilets were not the proper height and lacked grab bars, and that Franklin lacked handicap accessible showers. *Id.* Though Mr. Foster had been repeatedly transferred to Franklin, whose facilities remained inaccessible, the Third Circuit held that Mr. Foster could only recover for injuries that occurred within the applicable two-year statute of

limitations under Pennsylvania law. *Id.* at 177. This was because Franklin's accessibility barriers "had a degree of permanence such that they put [Mr.] Foster on notice of his duty to assert his rights each time he was transferred to Franklin. Thus, the continuing violations doctrine is inapplicable in this case." *Id.* at 178.

Finally, in a case nearly identical to this action, the Western District of Pennsylvania rejected the application of the continuing violation theory to the plaintiffs' ADA and RA claims that challenged the accessibility of sidewalks and curb cuts in Pennsylvania cities. *See Voices for Independence ("VFI") v. Pennsylvania Dep't of Transp.*, No. CIV.A. 06-78 ERIE, 2007 WL 2905887, at *4–12 (W.D. Pa. Sept. 28, 2007). The court explained, "a noncompliant curb ramp is the type of condition which partakes of permanence and should trigger an awareness on the part of a qualified plaintiff who is denied access that he should assert his rights." *Id.* at *11. Further, the consequences of a public entity's installation of noncompliant sidewalks and curb cuts continues despite any continued intent to discriminate. That is, "[o]nce a defective curb cut is installed, the consequences for disabled persons encountering that site continue whether or not another defective curb cut is installed elsewhere." *Id.* Nor did the court accept the plaintiffs' arguments that noncompliant sidewalks and curb cuts constituted an "overarching" policy of discrimination such that the continuing violations theory applied. *Id.* at *12.

Thus, this court concludes that the continuing violation theory is inapplicable to Mr. Hamer's ADA and

RA claims. The City's failure to (1) remediate noncompliant sidewalks and curb cuts, (2) build new and/or alter its sidewalks and curb cuts in compliance with the ADA, or (3) maintain accessible sidewalks and curb cuts all constitute *discrete* acts of discrimination. Each time Mr. Hamer encountered a noncompliant sidewalk or curb cut he knew of the City's discrimination, and any subsequent injury sustained by the City's lack of remediation is merely the continued ill effect of the original discriminatory act. *See Mata*, 635 F.3d at 1253; *accord VFI*, 2007 WL 2905887, at *11. Each act, therefore, triggers a new statute of limitations even if related to issues throughout the City. *Davidson*, 337 F.3d at 1184.

A similar conclusion is warranted as to Mr. Hamer's maintenance of accessible facilities claim (28 C.F.R. § 35.133). Though Mr. Hamer makes much of the notion that "there is no 'discrete act' which would clearly trigger the statute of limitations" for this claim, he clarified at oral argument that this claim encompassed the City's failure to implement any maintenance plan and/or protocol at all. *E.g.*, [#66 at 25:16–23, 26:11–20, 32:13–25]. Indeed, this court acknowledged that not every chip or crack equates to an ADA or RA violation that requires immediate remediation, *see* [*id.* at 26:6–20]; thus, any lack of a maintenance plan and/or protocol constitutes a discrete act. Again, any lingering injury from this act does not amount to continued unlawful acts but, rather, the ill effects of the original wrong. *See ASWAN*, 655 F.3d at 349.

Nor is the court convinced that the City's entire system of noncompliant sidewalks and curb cuts somehow constitutes an overarching policy of discrimination, or one that requires this court to examine the system as a whole such that the continuing violation theory applies. At oral argument, Mr. Hamer appeared to accept this conclusion, and argued that, absent the continuing violation theory, he can still recover for injuries sustained after October 12, 2014, two years before filing this suit. *See*, *e.g.*, [#66 at 31:11–22]. Accordingly, the court now considers when Mr. Hamer's ADA and RA claims accrued for purposes of the applicable two-year statute of limitations.

B. Accrual of Plaintiff's ADA and RA Claims

While state law governs the applicable limitations period, federal law governs when Mr. Hamer's claims accrued. *See Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004). "[T]he federal common law rule on when a statute of limitations begins to run is that it is when the plaintiff *discovers*, or by exercise of *due diligence* would have discovered, that he has been injured and who caused the injury." *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1212 (10th Cir. 2001) (emphasis in original) (citations and internal quotation marks omitted). Accordingly, Mr. Hamer's ADA and RA claims accrued when he discovered, i.e., encountered, the specific noncompliant City sidewalks and curb cuts. *See Frame*, 657 F.3d at 238 (holding, "the plaintiffs' cause of action accrued when they knew or should have known they were being denied the

benefits of the City's newly built or altered sidewalks."); *VFI*, 2007 WL 2905887, at *16 ("In the context of this case, this means that, as to any given Plaintiff, his or her cause of action under Title II accrued when the Plaintiff discovered or should have discovered that a particular curb face denied him or her proper access in violation of the ADA.").

For purposes of this analysis, then, the relevant inquiry becomes whether Mr. Hamer encountered/discovered the City's alleged discrimination within the two-years preceding this suit, i.e., October 12, 2014. It is therefore immaterial *when* the City newly constructed or altered its sidewalks and curb cuts. *See Frame*, 657 F.3d at 239 (rejecting the contention that the claim accrues when the city builds or alters its sidewalks); *VFI*, 2007 WL 2905887, at *14–15 (same). Rather, the court must be satisfied that Mr. Hamer actually suffered discrimination within two years of filing suit and, as discussed above, it is insufficient to rely solely on the continued inaccessibility of the City's sidewalks and curb cuts to make this requisite showing.

Defendant argues that Plaintiff's claims are untimely because, at the latest, Mr. Hamer was aware of the City's alleged discrimination on April 29, 2014, the date Mr. Hamer filed a complaint with the DOJ. *See* [#43 at 18–19; #61 at 10]. Further, absent the continuing violation theory, Mr. Hamer fails to identify any violations within the applicable two-year statute of limitations. [#61 at 10]. The court respectfully agrees.

Mr. Hamer moved to the City in or about March 2014. [#43-1 at 2, 11:11–18; #51 at 150:5–8]. On April 1, 2014, Plaintiff attended a City Council meeting, and testified that he "counted 79 ADA violations with just the sidewalks and curb cuts." [#43-1 at 9]. Mr. Hamer gave an example of a four-way intersection where only one of the four curbs contained a ramp accessible to persons in wheelchairs, and that a curb cut in front of the home he wanted to buy lacked any sidewalk. [*Id.*]. He continued by noting issues with the entrance to the City Hall Annex building, and expressed dismay at the City's lack of an ADA compliance coordinator. [*Id.*]. Then, on April 29, 2014, Mr. Hamer emailed an ADA complaint to the DOJ. *See* [*id.* at 17–19]. Mr. Hamer levied four general grievances against the City: (1) the lack of an ADA coordinator; (2) the lack of an official tasked with investigating ADA complaints; (3) the lack of an ADA grievance procedure; and (4) the lack of any "self-evaluation of its services, activities, programs, and facilities for ADA compliance or [ ] any kind of ADA transition plan." [*Id.* at 17]. Plaintiff's DOJ complaint continued that "[t]here are no sidewalks in many parts of the City;" that there were only a few curb cuts in the downtown area; that there were several intersections with no curb ramps; that sidewalk obstructions and barriers "make passage in a wheelchair impossible," and forces him into the street; that several City buildings were inaccessible; and that "[e]very service, every program, and every activity for every department of the City [ ] fails to comply with the ADA." [*Id.* at 17–18]. Mr. Hamer raised similar complaints with the City

Council at meetings in May, June, and August of 2014. *See* [*id.* at 9–14; #51 at 130:12–22, 143:24–144:5].

Based on the undisputed facts, Mr. Hamer's ADA and RA claims accrued on April 29, 2014, or, at the very latest, in August 2014, when he again raised his concerns about the City's ADA compliance at the City Council meeting. At this point, Mr. Hamer was aware of the nature and extent of the City's discrimination. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("[T]he limitations period generally begins to run at the point when the plaintiff can file suit and obtain relief." (citation and internal quotation marks omitted)). *See also* [#51 at 207:7–10 (Q: "So as of April 29th, 2014, you believed you had sufficient knowledge [of the City's noncompliant sidewalks and curb cuts] to request assistance from the [DOJ], correct?" A: "I did.")]. Mr. Hamer forwards no argument that he was unaware of any particular violation that he now alleges he encountered after August 2014.

According to Plaintiff, this fact is not fatal to his claims because the City's sidewalks and curb cuts remain noncompliant; thus, he can recover for injuries occurring after October 12, 2014. At oral argument, the court pushed Mr. Hamer on this point: if the continuing violation theory does not apply to his alleged injuries, where does the court draw the line for purposes of the statute of limitations? *See* [#66 at 11:15–21, 14:16–19]. In response, as in his briefs, Plaintiff averred that the statute of limitations would bar only damages sustained prior to October 12, 2014, but, because the City's sidewalks and curb cuts remained inaccessible, he

could still sue for injuries suffered since October 12, 2014. *See* [*id.* at 13:4–11 ("it is an ongoing violation—not even just a continuing violation theory, but the fact that it's never been corrected."), 13:19–14:15, 14:20–15:4]. As discussed above, this court finds that the continued inaccessibility of the City's sidewalks and curb cuts satisfies the injury requirement for prospective relief; however, Plaintiff fails to address the requirement that a specific injury occurred within the applicable two-year statute of limitations. Plaintiff points the court to no such injury such that the court can determine which of Mr. Hamer's claims are timely. Because the court has concluded that the continuing violation theory does not apply to Mr. Hamer's ADA and RA claims, Mr. Hamer must establish *discrete acts* of discrimination he encountered since October 12, 2014, for statute of limitations purposes. *See Daniels*, 701 F.3d at 628. It is insufficient to rely solely on the continued ill effects of the City's original acts of discrimination to satisfy his burden on summary judgment.

Plaintiff also cannot rely on his expert report to satisfy his burden. Though the report identifies several sidewalks and curb cuts that are noncompliant, it does not appear that Plaintiff was present for Mr. Heybeck's survey of the City. *See* [#49 at 17]. Rather, the report simply confirms the existence of a live case and controversy, but does not support Plaintiff's assertions that his claims are timely simply because the City's sidewalks and curb cuts remain noncompliant. Relatedly, although the DOJ reported that the City altered the curb ramps on the east and wide side of Commercial

Street south of Purgatoire River Bridge in 2015, *see* [#41–16 at 4–5; #41-3 at 59:19–25, 60:10–21], the date of the construction or alteration does not control when Plaintiff's claims accrue as to these discrete acts of discrimination. *See Frame*, 657 F.3d at 239 (rejecting the contention that the claim accrues when the city builds or alters its sidewalks); *VFI*, 2007 WL 2905887, at *14–15 (same). And other than noting that these curb ramps were altered in 2015, Plaintiff again fails to direct the court to any evidence that he actually encountered *these* instances of discrimination. *See* [#66 at 13:5–6 ("I haven't gone intersection by intersection and asked [Mr. Hamer] . . . which he learned about. . . . And there are the emails . . . by Mr. Hamer saying that everything is in violation")]. The undisputed evidence suggests that the City has resolved any lingering issues with these curb ramps; thus, any alleged discrimination as to these curbs is now moot.[7] *See* [#49-3 at ¶ 3].

Ultimately, the undisputed evidence reveals that Mr. Hamer's ADA and RA claims are untimely. As explained, in April, May, June, and August of 2014, Mr. Hamer repeatedly expressed his concerns with the inaccessibility of the City's sidewalks and curb cuts, including the City's lack of any official responsible for ensuring the City's compliance with the ADA. *See generally* [#43-1]. While it is true that many of the issues Plaintiff identified remain uncorrected, this alone does

[7] In fact, it appears these are the only sidewalks and/or curb cuts Plaintiff can identify as being subject to the new construction/alteration standard. *See* [#41 at 24; #54 at 18].

not satisfy his burden that he "demonstrate with specificity the existence of a disputed fact" as to the City's statute of limitations defense. *Hutchinson*, 105 F.3d at 564. Plaintiff fails to direct the court to any evidence demonstrating any injury sustained since October 12, 2014, and fails to carry his burden to rebut Defendant's statute of limitations summary judgment argument. Accordingly, this court concludes that summary judgment in favor of Defendant is appropriate as to Plaintiff's ADA and RA claims on statute of limitations grounds.

CONCLUSION

For the reasons stated herein, **IT IS ORDERED** that:

(1) Plaintiff's Motion for Partial Summary Judgment [#42] is **DENIED**;

(2) Defendant's Motion for Summary Judgment [#43] is **GRANTED**;

(3) Summary Judgment be entered in favor of Defendant and against Plaintiff, and that Plaintiff's Complaint [#1] be **DISMISSED with prejudice**; and

(4) The Clerk of the Court **ENTER** Final Judgment in favor of Defendant and against Plaintiff and **TERMINATE** this case accordingly, with each party bearing its own costs and fees.[8]

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[8] While costs should generally "be allowed to the prevailing party," Fed. R. Civ. P. 54(d)(1), the district court may in its

DATED: December 1, 2017

BY THE COURT

s/ Nina Y. Wang
Nina Y. Wang
United States Magistrate Judge

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discretion decline to award costs where a "valid reason" exists for the decision. *See*, *e.g.*, *In re Williams Securities Litigation-WCG Subclass*, 558 F.3d 1144, 1147 (10th Cir. 2009) (citations omitted). Because the questions presented in this matter were unique, this court declines to award fees to Defendant. *See Cantrell v. Int'l Bhd. of Elec. Workers, AFL-CIO, Local 2021*, 69 F.3d 456, 459 (10th Cir. 1995) (noting that there is no abuse of discretion when the district court denies fees where the "issues are close and difficult," or where the prevailing party is only partially successful).

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEPHEN HAMER, Plaintiff - Appellant, v. CITY OF TRINIDAD, Defendant - Appellee. ---------- COLORADO MUNICIPAL LEAGUE, Amicus Curiae.	No. 17-1456

ORDER

(Filed Jun. 12, 2019)

Before **BRISCOE**, **BACHARACH**, and **CARSON**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk