CASE NO. 17-1456

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEPHEN HAMER,	)
	)
Plaintiff – Appellant,	)
	)
v.	)
	)
CITY OF TRINIDAD,	)
	)
Defendant – Appellee.	)

On Appeal from the United States District Court
For the District of Colorado
The Honorable Magistrate Judge Nina Y. Wang, Presiding
D.C. No. 1:16-CV-02545-NYW

MOTION OF THE COLORADO MUNICIPAL LEAGUE FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF SUPPORTING DEFENDANT – APPELLEE, CITY OF TRINIDAD, AND AFFIRMANCE OF THE DISTRICT COURT'S ORDER

The Colorado Municipal League ("CML" or "the League"), by the undersigned counsel and pursuant to Fed. R. App. P. 29(a)(3), files this Motion for Leave to File an *Amicus Curiae* Brief Supporting Defendant – Appellee, City of Trinidad ("the City"), and Affirmance of the District Court's Order. CML's proposed brief is attached to this Motion as **Exhibit 1**.

CML was formed in 1923. The League is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 169 of the 171 statutory municipalities, and the lone territorial charter city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

CML's participation as *amicus curiae* is intended to provide the Court with a statewide municipal perspective because the outcome of this case will impact all cities and towns in Colorado. As public entities, all Colorado municipalities are subject to Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* ("ADA").[1] Most Colorado municipalities also receive federal funds subjecting them to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("RA").[2] Indeed, the outcome of this appeal will impact all public entities within this Circuit because they are all subject to the ADA.

CML's proposed brief demonstrates that adopting the continuing violation theory, and thereby saving Mr. Hamer's otherwise time-barred ADA and RA

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[1] Title II of the ADA applies to "public entities" regardless of population or size and includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131.

[2] Section 504 of the Rehabilitation Act applies to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A "program or activity" includes "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." *Id.* § 794(b).

claims against the City, will effectively eliminate the statute of limitations in abrogation of important policy considerations and result in endless liability for public entities. It will also delay increased accessibility and exacerbate the already large fiscal and operational burdens public entities face regarding their facilities, streets, and other infrastructure. For these reasons and all of the reasons stated in the City's Brief, CML urges the Court to reject the continuing violation theory in this case and affirm the District Court's Order.

Counsel for the City has communicated to counsel for CML that he conferred with counsel for Mr. Hamer on March 20, 2018 and Mr. Hamer does not consent to the filing of CML's proposed brief as *amicus curiae*, necessitating this Motion.

REQUEST FOR RELIEF

Accordingly, CML requests leave of court pursuant to Fed. R. App. P. 29(a)(3) to file the attached *Amicus Curiae* Brief Supporting Defendant – Appellee, City of Trinidad, and Affirmance of the District Court's Order.

Respectfully submitted,

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I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;
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(3) the digital submissions have been scanned for viruses with the System Center Endpoint Protection, which is a real-time protection, Virus definition version 1.263.1989.0 and Spyware definition version 1.263.1989.0 and according to the program are free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2018, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

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AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE SUPPORTING DEFENDANT – APPELLEE, CITY OF TRINIDAD, AND AFFIRMANCE OF THE DISTRICT COURT'S ORDER

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April 4, 2018

EXHIBIT 1

CORPORATE DISCLOSURE STATEMENT

The Colorado Municipal League has no parent corporation and no publicly traded stock. No publicly held corporation owns any part of it.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Colorado Municipal League ("CML" or "the League"), by the undersigned counsel and pursuant to Fed. R. App. P. 29, submits this *Amicus Curiae* Brief supporting Defendant – Appellee, City of Trinidad ("the City"), and affirmance of the District Court's Order dismissing Plaintiff – Appellant Stephen Hamer's ("Mr. Hamer") claims on statute of limitations grounds.

CML was formed in 1923. The League is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 169 of the 171 statutory municipalities, and the lone territorial charter city, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

CML's participation as *amicus curiae* is intended to provide the Court with a statewide municipal perspective because the outcome of this case will impact all cities and towns in Colorado. As public entities, all Colorado municipalities are subject to Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131 *et seq.* ("ADA").[1] Most Colorado municipalities also receive federal funds subjecting them to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794

[1] Title II of the ADA applies to "public entities" regardless of population or size and includes "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131.

("RA").[2] Indeed, the outcome of this appeal will impact all public entities within this Circuit because they are all subject to the ADA. For this reason, CML does not distinguish between Colorado municipalities and other public entities in this Brief because the impacts will be the same for all public entities.

As CML demonstrates below in this Brief, adopting the continuing violation theory, and thereby saving Mr. Hamer's otherwise time-barred ADA and RA claims against the City, will effectively eliminate the statute of limitations in abrogation of important policy considerations and result in endless liability for public entities. It will also delay increased accessibility and exacerbate the already large fiscal and operational burdens public entities face regarding their facilities, streets, and other infrastructure. For these reasons and all of the reasons stated in the City's Brief, CML urges the Court to reject the continuing violation theory in this case and affirm the District Court's Order.

[2] Section 504 of the Rehabilitation Act applies to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). A "program or activity" includes "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." *Id.* § 794(b).

STATEMENT OF CONTRIBUTION TO BRIEF

No party's counsel authored this Brief in whole or in part. No party, party's counsel, or person other than CML, its members, or its counsel contributed money that was intended to fund preparing or submitting this Brief.

ARGUMENT

A. Adopting the Continuing Violation Theory for ADA and RA Claims Will Effectively Eliminate the Statute of Limitations in Abrogation of Important Policy Considerations

1. Statutes of Limitations Have a Necessary Purpose

Statutes of limitations serve an important public interest. As the United States Supreme Court has explained:

> Statutes of limitation, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments … protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

U.S. v. Kubrick, 444 U.S. 111, 117 (1979) (internal citations and quotations omitted); *see also Heck v. Humphrey*, 997 F.2d 355, 357 (7th Cir. 1993), *aff'd,* 512 U.S. 477 (1994) (Posner, J.) ("policy of the statute of limitations … is to bar stale suits").

The Supreme Court has long instructed courts not to construe a statute of limitations "so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. Instead, statutes of limitations should be regarded as a "'meritorious defense, in itself serving a public interest.'" *Id.* (quoting *Guaranty Trust Co. v. United States,* 304 U.S. 126 (1938)). Although

"statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims, … that is their very purpose." *Id.* at 125. As this Court has said, "[t]here is nothing peculiar about ruling that a potentially meritorious argument is barred by delay in raising it." *United Food & Commercial Workers Int'l Union, Local No. 7 v. King Soopers, Inc.*, 743 F.3d 1310, 1314 (10th Cir. 2014) (citing *Kubrick*).

2. *Adopting the Continuing Violation Theory Will Effectively Eliminate the Statute of Limitations for ADA and RA Claims*

The District Court correctly found that when Mr. Hamer waited to file suit until October 2016, he missed the limitations deadline by at least one to six months. J.A. 688; Dist. Ct. ECF No. 67 at 26.[3] ("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."). Indeed, Mr. Hamer does not dispute his ADA and RA claims are subject to Colorado's two-year statute of limitations. J.A. 678; Dist. Ct. ECF No. 67 at 16. Instead, Mr. Hamer argues the Court should adopt the continuing

[3] As noted in the City's Response Brief, the District Court's Order in the Joint Appendix is corrupted or otherwise unreadable. Therefore, CML cites to both the Joint Appendix and the District Court's ECF number and attaches a copy of the Order to this Brief.

violation theory to save claims he clearly knew about and could have brought against the City within the limitations period.

Adopting the continuing violation theory in this case will have broad impacts well beyond preserving the limitations period for Mr. Hamer's claims here. In this case, Mr. Hamer did not miss the statutory deadline by years or decades. When a statute of limitations acts as a claims bar, it can be very compelling to consider exceptions which may provide the claimant relief. However, and to be clear, if the Court adopts this theory in this case, there will be nothing to prevent the assertion of other claims against public entities for barriers the claimants first encountered and have known about during the decades since passage of the ADA in 1990 and the RA in 1973. In effect, adopting the continuing violation theory in this case is tantamount to eliminating the two-year statute of limitations on any claims for as long as the alleged barrier to public access was constructed, installed, or improved.

3. Eliminating the Statute of Limitations Prejudices Public Entities and Will Increase Litigation and Risk

As the Supreme Court pointed out in *Kubrick*, allowing plaintiffs to bring claims long after the actionable conduct occurs prejudices the judicial system and parties because, over time, witnesses are less likely to be available to testify, memories fade, and important documentary evidence may become unavailable. 444 U.S. at 117. Public entity defendants will be especially prejudiced by witness

unavailability and faded memories due to employee and elected official turnover. Public entities will have no choice but to expend considerable resources to retain and store otherwise inconsequential records in perpetuity to defend against ADA or RA claims brought long after the claims accrued. Beyond the impossible task of defending decades' old decisions and facts, an open-ended claims period will likely increase legal action against public entities and risk exposure.

Much like governmental immunity statutes aim to limit public entities' potential liability, statutes of limitations enable public entities to manage risk and provide effective and efficient government services. *See, e.g.*, *Lee v. Dep't of Health*, 718 P.2d 221, 227-28 (Colo. 1986) (Colorado Governmental Immunity Act's limitation of liability "proceeds from actual differences in the magnitude and character of the functions assumed by public entities and in the effect of greater potential liability exposure on the public entity's ability to continue its governmental functions" and "is reasonably related to the governmental objective of providing fiscal certainty in carrying out the manifold responsibilities of government"). When liability is limited to barriers first encountered in the preceding two-year period, public entities can reasonably evaluate their exposure for ADA and RA claims based on the number of existing barriers. Adopting the continuing violation theory will remove the certainty a statute of limitations necessarily brings public entities to establish procedures, priorities, and

appropriations to address risk exposure and continue the business of government at the same time.

The Court should reject the continuing violation theory for ADA and RA claims and preserve the important public interest served by statutes of limitations. Prompt presentation of claims benefits the parties and the judicial system. Plaintiffs can achieve their objective of improved accessibility more quickly. Public entity defendants will be better able to manage their liability and continue providing important government services. And finally, courts will not be tasked with adjudicating years- or decades-old claims based on missing or unreliable evidence.

B. Adopting the Continuing Violation Theory Will Result in Unlimited Liability for Public Entities

Adopting the continuing violation theory for ADA and RA claims will create perpetual liability for public entities. Rather than encouraging plaintiffs to present their claims promptly, a plaintiff could file suit at any time in the future after compiling years' or decades' worth of claims against the public entity regardless of when the barrier was first encountered. Indeed, plaintiffs could inflate their damages simply by intentionally delaying their claims. Rather than being able to remove a barrier relatively close in time to when the plaintiff first encountered it and suffered the discriminatory act, public entities will face very costly and time-consuming litigation for claims spanning decades that the public entity should have

had the opportunity to remedy sooner. As a result of this unlimited liability, public entities will be unable to anticipate or estimate liability that is ultimately borne by taxpayers.

If the continuing violation theory is held to apply to ADA and RA claims, municipalities and other public entities will face unlimited liability until each and every barrier within their jurisdiction is removed. Complete compliance is virtually unattainable due to the various fiscal and operational constraints imposed on public entities discussed in Section D below. The ADA also does not require complete accessibility for existing facilities. 28 C.F.R. § 35.150 (every "public entity shall operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is *readily* accessible") (emphasis added). Indeed, the ADA "does not … [n]ecessarily require a public entity to make *each of* its existing facilities accessible" or "[r]equire any public entity to take any action that it can demonstrate would result in a fundamental alteration … or in undue financial administrative burdens." *Id.* (emphasis added). Exceptions to complete compliance such as structural impracticability and technical infeasibility also exist for new construction and alterations under the ADA. *Id.* § 35.151 ("Full compliance with the requirements of this section is not required where a public entity can demonstrate that it is structurally impracticable to meet the requirements."); 2010 ADA Standards for Accessible Design § 202.3 (Dep't of Justice, Sept. 15, 2010)

("In *alterations*, where compliance with applicable requirements is *technically infeasible*, the *alteration* shall comply with the requirement to the maximum extent feasible.") (emphasis in original), *available at* https://www.ada.gov/regs2010/2010 ADA Standards/2010ADAstandards.htm.

Mr. Hamer argues that adopting the continuing violation theory will not result in unlimited liability because public entities can seek to exclude damages for barrier encounters beyond the limitations period. Appellant's Br. at 30. Mr. Hamer's argument, however, fails to acknowledge that the recoverable damages for barrier encounters inside and outside the limitations period *are the same*.

The primary remedies for successful ADA and RA plaintiffs are injunctive relief, forcing removal of the barrier and attorneys' fees. 42 U.S.C. § 12133 (adopting RA remedies for ADA claims); 29 U.S.C. § 794(a)(2) (adopting remedies under Title VI of the Civil Rights Act of 1964 for RA claims). Compensatory damages are not available under the ADA or the RA absent intentional discrimination. *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999). Punitive damages are also not available for ADA or RA claims. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

A favorable award of injunctive relief and attorneys' fees against a public entity for a barrier encountered within the limitations period, therefore, will be identical to a favorable award under the continuing violation theory for the same

barrier encountered outside the limitations period – *i.e.*, injunctive relief requiring removal of the barrier and attorneys' fees. Thus, applying the continuing violation doctrine to ADA and RA claims will result in unlimited liability as long as the barrier exists.

The Court should resist imposing unlimited liability on public entities by rejecting the continuing violation theory. The relief sought, accessibility, should be provided sooner rather than later.

C. Adopting the Continuing Violation Theory Thwarts the Ability of Governmental Entities to Properly Implement the ADA

An unfavorable decision against a public entity under the continuing violation theory could immediately force states, counties, cities, and towns to remove years' or decades' worth of barriers throughout the jurisdiction as a result of a single plaintiff's lawsuit. In addition to imposing insurmountable financial and operational burdens on public entities as discussed in Section D, this result will thwart the ADA's intent to allow public entities to remove barriers over time.

1. The Statute of Limitations Encourages Prompt Discovery

As demonstrated above in Section B, adopting the continuing violation theory will offer an incentive to plaintiffs to wait to assert ADA and RA claims because allowing claims to accrue will inflate total damages. That thwarts the very purpose of the remedies under the ADA and the RA by delaying increased access for persons with disabilities through barrier removal. A definitive limitations

period, on the other hand, motivates plaintiffs to give prompt notice of their claims to public entities after encountering a barrier for the first time and suffering the discrete discriminatory act. Public entities are also motivated by a definitive statute of limitations to remove barriers promptly after the barriers are brought to their attention, while simultaneously giving public entities a better opportunity to estimate and manage their liability exposure.

2. *The ADA Encourages Proactive Identification of Barriers and Incremental Remedies*

Regulations implementing the ADA, first promulgated in 1991, did not require public entities to remove all existing barriers overnight. Public entities were instead directed to perform a self-evaluation and then prepare a transition plan for removing existing barriers over time. 28 C.F.R. §§ 35.105 & 35.150. These regulations permitted public entities to create a multi-year plan for removing barriers. *Id.* § 35.150(d) ("if the time period of the transition plan is longer than one year, [public entity must] identify steps that will be taken during each year of the transition period"). In fact, some barriers are not required to be removed until the facility containing the barrier is altered. *Id.* § 35.151(b) (facilities altered after January 26, 1992 must be made readily accessible to and usable by individuals with disabilities when they are altered). Public entities have relied on these regulations to plan for and phase barrier removal and alteration for almost 30 years.

Although public entities should strive to remove all barriers as quickly as possible, multi-year plans are necessary due to the budget and operation constraints explained in Section D. Indeed, in its 2010 guidance and section-by-section analysis of 28 C.F.R. § 35.150, the Department of Justice reconfirmed the understanding that "public entities have flexibility in addressing accessibility issues." 28 C.F.R. Part 35 app. A.

The only way for public entities to limit liability and defend against claims spanning years or decades under the continuing violation theory will be to remove each and every barrier immediately and completely in direct contradiction to the ADA, the RA, and implementing regulations. This theory removes the necessary iterative and dialectic dynamic between public entities and the public. Further, applying the continuing violation theory to ADA and RA claims assumes an omniscient viewpoint exists from which public facilities and infrastructure may be evaluated at one point in time. This contradicts the reality of public life in America: there is no state of perfection. Rather, government must constantly update its services and infrastructure to make government meaningful and accessible to the public. This will be extremely challenging for public entities of all sizes.

D. Adopting the Continuing Violation Theory Will Exacerbate Already Significant Fiscal and Operational Burdens on Public Entities

Public entities already face heavy fiscal and operational burdens regarding ADA and RA compliance efforts. As stewards of taxpayer dollars, public entities are necessarily risk adverse. They are accountable for utilizing finite (and often insufficient) financial resources to the greatest extent possible, while balancing a plethora of competing needs and priorities. Indeed, citizens expect that their tax dollars will be budgeted and spent appropriately to provide necessary services to the community and maintain the public entity's assets and infrastructure. Public entities must predict and prioritize their community's needs to ensure limited funds are maximized. For this reason, the budget process is and must be forward-looking, not just to the immediate budget year, but to several budget years in the future.

Unfortunately, dwindling tax revenues or unexpected liabilities can quickly derail even the most robust transition plan. Aside from budget shortfalls, unpredictable catastrophes such as wildfires or floods can force public entities to shift funds from planned accessibility improvements to essential services such as police and fire protection. Labor and materials costs that increase beyond budgeted amounts also significantly impede a public entity's ability to perform planned improvements. It is not surprising that funding shortages and constraints in operating budgets have caused many public entities to struggle with ADA compliance and fall behind on the construction, operation, and maintenance of

public facilities and infrastructure. The truism is true: America's public infrastructure is deteriorating due to a paucity of capital budget resources. This reality impacts public entities' ability to come into compliance with the ADA.

In Colorado especially, capital and capital maintenance budget challenges are often aggravated by weather conditions. Due to its colder climates, Colorado public entities must deal with the unavoidable and unpredictable freeze-thaw cycles on their streets, sidewalks, and curb ramps. Freeze-thaw occurs when water that has seeped into concrete repeatedly contracts (usually overnight when temperatures are coldest) and expands (usually during the day when the sun is out and temperatures are warmer). Freeze-thaw causes concrete to crack and deteriorate more rapidly than when temperatures are above freezing and conditions are more consistent. *See, e.g.*, *Martin Marietta Materials, Inc. v. Kansas Dep't of Transp.*, 810 F.3d 1161, 1167 (10th Cir. 2016) (describing freeze-thaw and its effects); *Harleysville Worcester Ins. Co. v. Paramount Concrete*, 123 F. Supp. 3d 282, 287 (D. Conn. 2015) ("Shrinking and swelling caused by freeze/thaw cycles can be particularly destructive."). Freeze-thaw resistant materials are available (at a premium cost, of course), but the meteorological and geological processes cannot be entirely avoided. *Harleysville Worcester Ins. Co.*, 123 F. Supp. 3d at 287.

Freeze-thaw shortens the lifespan of concrete requiring more frequent repair, thereby causing public entities with climates conducive to these cycles to suffer

greater materials and maintenance costs. This, in turn, further contributes to the backlog of accessibility improvements. An inability to predict how "bad" a particular freeze-thaw cycle will be makes budgeting for these additional costs even more difficult. *See, e.g.*, *Richter v. Coll. of Du Page*, 3 N.E.3d 902, 910 & 911 (Ill. App. Ct. 2013) (university's "wait-and-see" approach to performing freeze-thaw sidewalk repairs was reasonable due to the "random, continual movement of the slabs of concrete" that "sometimes cure themselves" and the fact that "a premature physical correction could backfire when a slab shifts again").

Public entities have extensive capital operations and maintenance burdens as well. Due to limited funding, public entities must be able to prioritize, plan for, and complete accessibility improvements in a manner that is both resource- and time-efficient. It is more efficient and effective to plan for and complete accessibility improvements by identifying and removing barriers within certain geographical areas at a time, bidding out larger projects or groups of smaller projects, rather than running work crews and cement trucks back and forth across the entire jurisdiction in a piecemeal fashion. Nonetheless, most public entities fund on-call programs to respond to citizen requests for barrier removal on a case-by-case basis. Typically, these on-call requests will be relatively confined to a certain geographic location near the citizen's home or work. Adopting the continuing violation theory, and thereby allowing plaintiffs to file suit to remove barriers spanning years and

possibly vast areas of a state, county, city, or town, will disrupt public entities' ability to perform accessibility improvements in a strategic, resource- and time-efficient manner.

Most public entities have infrastructure that pre-dates the ADA. Although this existing infrastructure may not currently be required to comply with the ADA, it will inevitably need to be made compliant when adjacent facilities are constructed or altered. 28 C.F.R. § 35.151(b) (facilities altered after January 26, 1992 must be made readily accessible to and usable by individuals with disabilities when they are altered). This is an additional factor public entities must consider when planning and budgeting for future improvements.

If the Court adopts the continuing violation theory in this case, public entities could immediately be forced to remove a long list of barriers spread out across an entire jurisdiction that a plaintiff may have compiled over the span of decades. The Court's holding will affect not only concrete infrastructure, but rather, all of the public entity's facilities, programs, services, and activities. Such an order will have devastating effects on public entities of all sizes and jeopardize funding for essential public services.

The Court should reject the continuing violation theory to avoid these undesirable results.

CONCLUSION

Subjecting public entities to unlimited liability ultimately borne by taxpayers goes against the important public interest served by statutes of limitations and could disrupt essential public services. The better result is to reject the continuing violation theory and require plaintiffs to promptly present their ADA and RA claims for barriers first encountered within the limitations period. This will encourage public entities to act promptly upon notice of the claims and allow them to plan and budget for additional barrier removal with taxpayer funds in the most efficient and effective way.

For all of the reasons stated above and in the City's Brief, CML urges the Court to reject the continuing violation doctrine for ADA and RA claims and affirm the District Court's Order dismissing Mr. Hamer's claims on statute of limitations grounds.

Respectfully submitted,

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I hereby certify that with respect to the foregoing:

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I hereby certify that on April 4, 2018, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following and hand delivered seven (7) hard copies to the court within two (2) business days:

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ATTACHMENT

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 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.

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[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.

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

[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].

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. 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 non-moving 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. *See* [#41-1 at 161:1–4,[4] 162:8–12, 163:23–25, 167:1–9]. Due to his confinement in a motorized

[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].

[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.

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 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 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] Instead, the court focuses on the narrower issue of the timeliness of Mr.

[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.*

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 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

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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 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.

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 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 F. App'x 916, 919 (10th Cir. 2016) (unpublished); *Canfield v. Douglas Cty.*, 619 F. App'x 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 F. App'x 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 F. App'x 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 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

[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].

(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]

DATED: December 1, 2017

BY THE COURT:

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

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