Missouri Law Review

Volume 86 | Issue 2 Article 17

Spring 2021

Meaningful Access: True Equality or Frightening Reality?

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NOTE

Meaningful Access: True Equality or Frightening Reality?

Childress v. Fox Assocs., LLC Childress, 932 F.3d 1165 (8th Cir. 2019).

Mackenzie L. Stout[*]

I. INTRODUCTION

"It's too good to be true" summarizes the decision in *Childress v. Fox Associates, LLC*. The *Childress* court admirably aimed to create a more accessible society for individuals with disabilities but may have unintentionally created the exact opposite. Courts require public accommodations to provide "meaningful access" to individuals with disabilities in order to comply with the Americans with Disabilities Act ("ADA").[1] However, "meaningful access" is an unclear, evolving standard. The *Childress* decision strayed from precedent by heightening the standard for meaningful access to a level equal to identical access. While this heightened standard strives for the goal of true equality, it consequently shifts the focus of courts' decisions to the sufficiency of a claimed affirmative defense – that is, the requested accommodation would pose an undue buden. Analyzing a case based on the sufficiency of an affirmative defense – especially in the context of ADA Accommodations – is detrimental because it forces courts to determine whether an accommodation must be provided at all, instead of deciding *what degree* satisfies meaningful access. The

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1. Person-first language is preferred when describing individuals with disabilities. Therefore, the description "individuals with disabilities" has been incorporated in this Note. *See* Tara Haelle, *Identity-First vs. Person-First Language is an Important Distinction*, ASSOCIATION OF HEATH CARE JOURNALISTS (July 31, 2019), https://healthjournalism.org/blog/2019/07/identity-first-vs-person-first-language-is-an-important-distinction/ [https://perma.cc/8BZS-SZ66]; *see, e.g.*, Alexander v. Choate, 469 U.S. 287, 301 (1985) (providing that "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers"); PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001).

framework for analyzing meaningful access set forth by the *Childress* decision may create detrimental impacts long into the future.

Recognizing the need to create an accessible society for all people, this Note highlights the positive strides the *Childress* Court aimed to establish, but it also discusses the dangers this decision creates within litigation as future decisions turn on the sufficiency of affirmative defenses. Part II of this Note describes the facts, the lower court's determination, and the ultimate holding in *Childress*. Part III provides the legal background of the ADA and the United States Court of Appeals for the Eighth Circuit's legal precedent for "meaningful access" leading up to this decision. Part IV details the majority's decision to increase the standard for meaningful access for public accommodations to comply with ADA requirements and the dissent's criticism of the majority's deviation from precedent and the future impacts of this decision. Part V comments on the specific ways this decision strays from prior decisions within the Eighth Circuit and discusses the future implications of this new standard.

II. FACTS AND HOLDING

Fox Associates, LLC ("Fox Theater") is a large historic theater in St. Louis, Missouri which hosts a variety of live Broadway shows.[2] In April 2016, Childress contacted Fox Theater to request captioning for a performance of *Rent*, a Broadway show scheduled to perform in May 2017.[3] Although Fox Theater provided an American Sign Language ("ASL") interpreter at each production, Childress preferred closed captioning because she was able to "experience the writer's original dialogue and lyrics" compared to receiving the lyrics through an interpreter.[4] Fox Theater denied this request and said it did not offer closed captioning at its shows and did not plan to in the future.[5] Following that denial, in June 2016, Childress filed suit in the United States District Court for the Eastern District of Missouri under Title III of the ADA.[6] Plaintiff alleged Fox Theater violated Title III of the ADA by failing to provide patrons with hearing impairments with

2. Childress v. Fox Assocs., LLC Childress, 932 F.3d 1165, 1168 (8th Cir. 2019).

3. *Id.*

4. "Open" captioning includes visual captions that are automatically applied for all viewers to see. Comparatively, with "closed" captions, viewers can turn these captions on or off. John F. Waldo, *The ADA and Movie Captioning: A Long and Winding Road to an Obvious Destination*, 45 Val. U. L. Rev. 1033, 1040 (2011) (stating that individuals with hearing impairments tend to prefer open captioning); *Childress*, 932 F.3d at 1168.

5. *Id.*

6. *See* 42 USC § 12182; *Childress*, 932 F.3d at 1169

"meaningful access" to the theater's productions.[7] Plaintiff sought injunctive relief and wanted Fox Theater to be ordered to "provide open or closed captioning at all performances of theatrical productions; publicize the availability of captioning and provide means to request captioning; enable persons to purchase tickets to captioned performances by non-telephonic means, including by electronic mail; and provide hands-free, line-of-sight captioning devices."[8]

After the complaint was filed, Fox Theater offered to amend its policies to offer a single captioned performance for each Broadway production if the patron requested the captioning within two weeks of the show.[9] Additionally, Fox Theater adjusted its ticket offerings to allow purchases through non-telephonic means for hearing-impaired patrons.[10] Despite making these adjustments, Fox Theater stated the captioned showing would only occur during the day on a designated Saturday for each tour.[11] Childress believed a single showtime did not satisfy meaningful access as compared to the numerous showtimes non-disabled individuals could attend.[12] Due to the persistent inequalities and difficulties even after Fox Theater's adjustments, Childress argued its policies still violated the ADA.[13]

Both parties filed for summary judgment. Plaintiff argued the opportunities to participate in only one showing for each Broadway production is unequal to the multiple showtimes and dates available to non-disabled patrons.[14] Plaintiff claimed this policy violated § 12181(b)(1)(A)(ii) and § 12181(b)(2)(A)(iii) of the ADA because the absence of auxiliary aids and services caused the unequal treatment of individuals with hearing

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7. The term "hearing impairments" and "hearing impaired individuals" is used to reflect the language the court used in its opinion in *Childress*. *See e.g.*, *Childress*, 932 F.3d at 1168–70.

8. Childress v. Fox Assocs., LLC, 4:16 CV 931 CDP, 2018 WL 1858157, at *1 (E.D. Mo. Apr. 18, 2018), *aff'd sub nom*, Childress v. Fox Assocs., LLC Childress, 932 F.3d 1165 (8th Cir. 2019).

9. *Childress*, 932 F.3d at 1169; *Childress*, 4:16 CV 931 CDP, 2018 WL 1858157, at *2.

10. *Childress*, 932 F.3d at 1169

11. *Id.* Fox Theater accommodated Childress's request for a second captioned performance of *School of Rock*, but explicitly stated it would not grant similar requests in the future. *Id.*

12. *Id.* The term "non-disabled" is used as recommended by Student Accessibility Services as Brown University. *See Student Accessibility Services (SAS)*, BROWN UNIVERSITY, https://www.brown.edu/campus-life/support/accessibility-services/resources-teaching-students-disabilities/appropriate-terminology [https://perma.cc/Q9G4-HYS9] (last visited Apr. 5, 2021); *see also* Equality Training, *The Art of Respectful Language,* http://www.equalitytraining.co.uk/images/news/language_of_respect.pdf [https://perma.cc/9BGF-VWRH].

13. *Childress*, 932 F.3d at 1170.

14. *Id.* at 1169; Childress v. Fox Assocs., LLC, 4:16 CV 931 CDP, 2018 WL 1858157, at *4 (E.D. Mo. Apr. 18, 2018).

impairments.[15] Further, Plaintiff believed Fox Theater was required to provide closed captioning for each request in order to provide "equal opportunity to the same benefit," subject only to ADA's "undue burden" affirmative defense.[16]

Fox Theater argued its prior modifications to the existing policies were reasonable and therefore complied with the "meaningful access" requirement.[17] First, Fox Theater argued it provided meaningful access to its shows by captioning one performance of each production.[18] Fox Theater contended that one captioned production was reasonable because of the expense of a live, in-person reporter to transcribe the words, lyrics, and other sounds which was required for captioning.[19] In essence, Fox Theater was nominally invoking the ADA's undue burden affirmative defense, which holds that a defendant need not provide requested accommodations when doing so would cause it financial hardship.[20] However, Fox apparently waived the right to formally assert this defense because it refused to turn over financial information in discovery, which would have been necessary for a determination of hardship.[21] Although Fox Theater attempted to argue the affirmative defense of undue burden on appeal, at the district level, the defense had not been officially raised below and was therefore waived.[22] Second, Fox Theater claimed that requiring captioning for each request is not a reasonable modification to its policies, practices, and procedures.[23]

The district court granted Plaintiff's motion for summary judgment and denied Defendant's motion.[24] The court clarified that the provision of the ADA applicable to the present lawsuit was 42 U.S.C. § 12182(b)(2)(A)(iii), which governs the failure to provide auxiliary aids to individuals with disabilities.[25] Then, the court stated that to prevail on a Title III ADA Discrimination claim the plaintiff must prove: (1) discrimination on the basis

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15. *Childress*, No. 4:16 CV 931 CDP, 2018 WL 1858157, at *3–4..

16. *Id*.

17. *Id*. at *4; *see also Childress*, 932 F.3d at 1170.

18. *Childress*, No. 4:16 CV 931 CDP, 2018 WL 1858157, at *5.

19. *Childress*, 932 F.3d at 1169.

20. 42 USC § 12182(b)(2)(A)(iii); *see also Childress*, No. 4:16 CV 931 CDP, 2018 WL 1858157, at *3.

21. *Childress*, 932 F.3d at 1169–70, 1172.

22. *Id.* at 1172. "Fox presents no argument or evidence that "undue burden" or "fundamental alteration" excuses its failure." *Childress*, 2018 WL 1858157, at *4.

23. *Childress*, 932 F.3d at 1170.

24. *Id.*

25. *Id.;* 42 U.S.C. § 12182(b)(2)(A)(iii) (describing discrimination as "a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden").

of a disability (2) in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of the Fox Theater (3) by Fox Theater's owner, lessor, or operator.[26]

Analyzing arguments presented by both parties, the district court determined Fox Theater did not provide "meaningful access" by captioning only one showing per tour because that did not provide hearing impaired individuals with equal opportunity to the same benefit – show offerings – as non-disabled individuals as required under § 12182(b)(2)(A)(iii).[27] The court reasoned "a non-disabled, hearing person has the benefit of an expansive selection of performances to attend at the Fox Theater and is not limited to only one performance on a date preselected by the venue."[28]

Following its declaration that Fox Theater was in violation of the ADA, the district court granted injunctive relief.[29] The court ordered Fox Theater to:

> provide open or closed captioning at all performances of theatrical productions where captioning is requested at least two weeks in advance; publicize the availability of captioning and provide a means to request the accommodation; enable persons to purchase tickets to captioned performance by non-telephonic means (including electronic mail); and provide hands-free, line-of-sight captioning devices in areas designated as accessible seating, and handheld captioning devices in all other seating.[30]

Lastly, the court concluded by noting Fox Theater failed to assert an affirmative defense of undue burden or fundamental alteration.[31]

Fox Theater appealed the grant of Plaintiff's motion for summary judgment.[32] On appeal, Fox Theater argued the district court erred in granting Plaintiff's motion for summary judgment and denying its motion because hearing-impaired individuals received meaningful access to Fox Theater's productions.[33] In response, Plaintiff argued Fox Theater did not provide "meaningful access" to its productions by only captioning one show per tour as compared to the numerous showtimes available to non-disabled individuals.[34]

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26. Fox does not dispute it is a place of public accommodation and is subject to ADA requirements. *Childress*, 932 F.3d at 1170 n. 5.

27. *Childress*, 932 F.3d at 1169.

28. *Childress*, LLC, No. 4:16 CV 931 CDP, 2018 WL 1858157, at *4.

29. *Id.* at *5–6.

30. *Id.* at *6.

31. *Id.* at *4.

32. *Childress*, 932 F.3d at 1170.

33. *Id.*

34. *Id.* at 1171.

The Eighth Circuit affirmed the district court's grant of summary judgment in favor of Plaintiff.[35] The court concluded Fox Theater's policy of offering a single closed-captioned performance denied individuals with hearing impairments an equal opportunity to gain the same benefit as persons without hearing impairments.[36] Therefore, the policy did not provide individuals with hearing impairments with equal opportunity or "meaningful access" to the benefits of the Fox Theater.[37] The court noted that even though Fox Theater failed to provide meaningful access, it could have prevailed by raising an affirmative defense at the district level and proving that captioning each requested performance would cause an undue financial burden.[38] However, because Fox Theater failed to assert such defense at the district level, the court refrained from further analysis on the matter.[39] The court concluded by providing a caveat to its decision stating "nothing precludes Fox Associates from bringing its own lawsuit and seeking to modify the district court's order in this case" if the requested captioning reached the level of an undue burden in the future.[40]

The *Childress* Court concluded that absent an affirmative defense, when an individual with a disability is faced with limited availability of public offerings because of a lack of auxiliary aids, the individual does not receive equal opportunity to the benefit and, therefore, the public accommodation has failed to provide "meaningful access" as required by the ADA.[41]

III. LEGAL BACKGROUND

This Part discusses the legal framework of the ADA and courts' interpretation of this statute. Subpart A discusses the enactment of the ADA and focuses on Title III which governs places of public accommodations. Subpart B describes the "meaningful access" standard which courts use to determine whether public accommodation's provided aids and accommodations comply with the ADA. Subpart C discusses two common affirmative defenses against ADA claims – the undue burden and fundamental alteration defenses. Finally, Subpart D illustrates the evolution of the Eighth Circuit's standard of "meaningful access" over the years.

35. *Id.* at 1173.
36. *Id.* at 1172.
37. *Id.*
38. *Id.* at 1171.
39. *Id.* at 1171–72.
40. *Id.* at 1172.
41. *Id.*

A. Americans with Disabilities Act

The ADA was enacted on January 26, 1990.[42] The enactment was sparked by Congress's realization that a "compelling need" existed for an official mandate to eliminate discrimination against individuals with disabilities and integrate them "into the economic and social mainstream of American life."[43]

The ADA is an expansive statute which forbids discrimination against individuals with disabilities in major areas of public life including employment (Title I), public services (Title II), and public accommodations (Title III).[44] Although these categories are inherently broad, specific places like theaters and concert halls are well-recognized "public accommodations."[45] Section 12182 (b)(2)(A)(iii) – the provision of the ADA relevant in this case – prohibits public accommodations from denying disabled individuals "full and equal enjoyment of the goods, services, facilities, advantages, or accommodations."[46] A public accommodation violates the ADA by failing to take measures to ensure individuals with disabilities are not denied "services, segregated, or otherwise treated differently . . . because of the absence of auxiliary aids and services."[47] Nevertheless, a public accommodation's failure to make necessary adjustments to ensure complete accessibility does not violate the ADA if taking such measures would cause an undue burden or fundamentally alter the nature of the good or service.[48]

A public accommodation must determine what auxiliary aid or service needs to be provided to ensure "effective communication" for an individual with a disability.[49] Effective auxiliary aids must be accessible, provided in a timely manner, and maintain the privacy and independence of the disabled individual.[50]

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42. Gathright-Dietrich v. Atlanta Landmarks, Inc., 452 F.3d 1269, 1273 (11th Cir. 2006).

43. 42 U.S.C.A. § 12101(a)(5); S. REP. NO. 101–16 (1989); H.R. REP. NO. 101–485, pt. 2, at 50 (1990).

44. PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001).

45. 42 U.S.C. § 12181(7)(C) (1990).

46. 42 USC § 12182(a), (b)(2)(A)(iii) (1990).

47. § 12182(b)(1)(A)(iii) (1990).

48. *Id.*

49. 28 C.F.R. § 36.303(c).

50. § 4:97. Effective communication must be ensured, 1 Americans with Disab.: Pract. & Compliance Manual § 4:97; *see also* Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 343 (11th Cir. 2012) (explaining that "proper inquiry" regarding "necessary" auxiliary aids and services is whether the aid provides equal opportunity to same benefit).

B. The "Meaningful Access" Standard

Under Title III of the ADA, a public accommodation must provide auxiliary aids and services for individuals with disabilities if such aids or services are necessary to enjoy "meaningful access" to the accommodation.[51] Courts conduct a fact-based inquiry to determine whether an individual with a disability has received "meaningful access."[52] A public accommodation's refusal to provide auxiliary aids and services does not automatically create a violation of the ADA.[53] Such refusal only violates the ADA if the aid is necessary for a disabled individual to receive "meaningful access."[54] Therefore, if a court determines an aid is required for an individual to receive meaningful access, the public accommodation must provide the requested aid unless doing so would be an undue burden or fundamentally alter the nature of the provided benefit.[55]

C. Affirmative Defenses to ADA Claims

There are two common affirmative defenses raised by public accomodations: (1) undue burden, or (2) fundamental alteration of its goods or services.[56] The burden to prove an affirmative defense is on the place of public accommodation,[57] and if a defendant fails to raise an affirmative defense at the district court level, this constitutes a waiver of such defense on appeal.[58]

The "undue burden" defense raised by the public accommodation is analyzed using a fact-based inquiry which determines whether providing the requested aids and accommodations would cause significant difficulty or expense.[59] To make this determination, courts identify the nature and cost of the proposed accommodation along with the financial resources of the place of public accommodation.[60] This identification requires courts to additionally consider the number of persons employed by the public accommodation and the effect the request may have on the site's workplace and operation safety.[61]

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51. Argenyi v. Creighton Univ., 703 F.3d 441, 449 (8th Cir. 2013).

52. *Id.*

53. Durand v. Fairview Health Servs., 902 F.3d 836, 842 (8th Cir. 2018).

54. *Id.*

55. PGA Tour, Inc. v. Martin, 532 U.S. 661, 688 (2001).

56. *See* Roberts *ex rel.* Roberts v. KinderCare Learning Ctrs., Inc., 86 F.3d 844, 847 (8th Cir. 1996); McGann v. Cinemark USA, Inc., 873 F.3d 218, 230–31 (3d Cir. 2017).

57. *McGann*, 873 F.3d at 231.

58. Warner Bros. Ent., Inc. v. X One X Prods., 840 F.3d 971, 980 (8th Cir. 2016).

59. McGann, 873 F.3d at 231 (remanding case to district court to conduct fact intensive inquiry of undue burden).

60. *Id.*

61. Roberts *ex rel.* Roberts, 86 F.3d at 846.

An example of the Eighth Circuit finding that a requested accommodation would cause an undue burden can be seen in *Roberts ex rel. v. KinderCare Learning Centers, Inc*. [62] In *Roberts ex rel.*, the court determined that requiring a one-on-one assistant for a child with a disability at KinderCare's child care center amounted to an undue burden.[63] The court determined it was an undue burden because KinderCare would have to hire another employee to assist with this task, and it would cost $205 per week to pay the employee while the child was only paying $105 in tuition.[64] Additionally, evidence of KinderCare's hardship was proven through previous closures of other locations due to financial difficulties.[65] Lastly, KinderCare provided proof of their limited budget, solidifying its defense that the requested accommodation would cause an undue burden.[66]

Alternatively, if a defendant raises the affirmative defense of fundamental alternation, it must prove the accommodation would "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered."[67] The Eighth Circuit requires a high standard to satisfy the fundamental alteration defense.[68] In *PGA Tour, Inc. v. Martin*, Martin, a golfer, suffered from a circulatory disease which made it difficult for him to walk.[69] Although the PGA Tour typically required golfers to walk the golf course, Martin requested an accommodation to drive the golf-cart from hole to hole due to his illness.[70] PGA Tour refused Martin's accommodation by arguing this adjustment would be a fundamental alteration of the nature of the competition.[71] The United States Supreme Court ruled in favor of Martin and rejected the fundamental alteration defense because it noted that the golf cart provided Martin the ability to compete in a competition he would otherwise not be able to because of his disability, and did not fundamentally alter the competition itself.[72]

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62. Roberts *ex rel.* Roberts, 86 F.3d at 847.

63. *Id.* at 846.

64. *Id.*

65. *Id.* at 845.

66. *Id.*

67. 42 U.S.C. § 12182(b)(2)(A)(iii).

68. PGA Tour, Inc. v. Martin, 532 U.S. 661, 683 (2001); *see also* McGann v. Cinemark USA, Inc., 873 F.3d 218, 219–20 (3d Cir. 2017) (rejecting argument that providing an interpreter at movie theater would be a fundamental alternation of theater's services because the theater did not previously provide such accommodation in its normal course of business. The court noted that an interpreter did not cause significant changes to the video, audio, or physical environment).

69. *PGA Tour, Inc.*, 532 U.S. at 668.

70. *Id.* at 669.

71. *Id.* at 670.

72. *Id.* at 690.

D. The Historically Low Bar to Satisfy Meaningful Access

Over the years, many cases handed down by the Eighth Circuit indicated that public accomodations do not have to meet a high threshold to prove that the plaintiff received meaningful access.[73] In 2009, the Eighth Circuit analyzed "meaningful access" in *Mason v. Correctional Medical Services, Inc*.[74] In *Mason*, a prisoner with visual impairments alleged the jail failed to provide him with meaningful access to the prison benefits because of the lack of auxiliary aids and services.[75] The jail provided Mason with an assistant to help him read in the library and use the recreation center, but Mason alleged this was not meaningful access because the library did not have braille material, and the assistant was not always available when he wanted to use the prison's resources.[76] Although Mason was limited with his access to the library and recreation center, the court determined Mason was still provided with meaningful access and the did not need to provide braille or other computer software system.[77]

Two years later, the court analyzed meaningful access in *Loye v. County of Dakota*.[78] In *Loye*, the County had to notify its residents after a local mercury contamination.[79] The plaintiffs, local hearing-impaired residents, sued the County and alleged it failed to provide meaningful access to the communication relaying the news of the contamination because an interpreter was not available for each message.[80] The County moved for summary judgment and the district court granted its motion, determining that meaningful access was satisfied because the plaintiffs received effective communication during "relevant periods."[81] On appeal, the judgment was affirmed, and the court concluded meaningful access was achieved even though the availability of the interpreter was limited.[82]

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73. Mason v. Corr. Med. Servs., Inc., 559 F.3d 880, 887 (8th Cir. 2009).

74. *Id*.

75. *Id.* at 883.

76. *Id.* at 887.

77. *Id.*

78. Loye v. Cty. of Dakota, 625 F.3d 494, 496 (8th Cir. 2010) (analyzing meaningful access until Title II which covers governmental entities. This case is used as a support because Title II and III require a similar "meaningful access" standard).

79. *Id.* at 495.

80. *Id.* at 496.

81. The court determined the Plaintiffs received effective communication without an interpreter during the decontamination process through lip reading and gesturing because the County was acting in response to an emergency. *Id.* at 496–99. During the large group meetings, the County provided an interpreter which satisfied effective communication. *Id.* at 498. Lastly, during the family meetings, an interpreter was provided at two of the three meetings which was deemed as effective communication. *Id.* at 499–501.

82. *Id.* at 501.

The Eighth Circuit furthered its precedent that "meaningful access" may be satisfied with minimal or sporadic accommodations in *Argenyi v. Creighton University*.[83] In *Argenyi*, the district court granted Creighton's motion for summary judgment and determined the plaintiff, a hearing-impaired medical student, received meaningful access when he was provided with one of the three requested hearing accommodations under Title III of the ADA.[84] The student requested a Communication Access Real-Time machine to transcribe spoken words on a computer screen; a translator for his labs; and an FM system which would transmit sound into his ears from a selected group of students.[85] Despite this request, Creighton only provided the FM system.[86] The plaintiff alleged this single accommodation did not "provide for meaningful participation or independence as a student" and the single accommodation put him at a disadvantage academically.[87] On appeal, the Eighth Circuit described a seemingly low standard for meaningful access by stating that aids and services provided to individuals with disabilities were not required to produce an "identical result or level of achievement for handicapped and nonhandicapped persons."[88] The court further explained such accommodations only had to afford individuals with disabilities "equal opportunity to the same benefit."[89] After providing this description, the court ultimately reversed the district court's grant of summary judgment and remanded the case finding a genuine issue of material fact existed as to whether the plaintiff was denied an equal opportunity to benefit from the medical school.[90]

The Eighth Circuit maintained a seemingly low standard for meaningful access in *Durland v. Fairview Health Services* when it determined that a public accommodation satisfied meaningful access even when the provided accommodations could recognizably be improved.[91] In *Durland*, the plaintiffs, a mother and father, both suffered from hearing impairments.[92] The plaintiffs sued the hospital for failing to provide meaningful access to the

83. Argenyi v. Creighton Univ., 703 F.3d 441, 451 (8th Cir. 2013).

84. *Id.*

85. *Id.* at 444. FM Systems ("Radio Aids") assist individuals with hearing impairments by picking up sound close to its source and transmitting the noise to the individual in an improved, clearer manner by reducing background noise. *FM Systems*, HEARING LINK, (last visited Nov. 2, 2020), https://www.hearinglink.org/living/loops-equipment/fm-systems/ [https://perma.cc/2YLP-G6AM].

86. *Argenyi*, 703 F.3d at 444.

87. *Id.*

88. *Id.* at 449 (quoting Loye v Cnty. of Dakota, 625 F.3d 494, 499 (8th Cir. 2010)).

89. *Id.* (quoting Loye v Cnty. of Dakota, 625 F.3d 494, 499 (8th Cir. 2010)).

90. *Id.* at 448.

91. Durand v. Fairview Health Servs., 902 F.3d 836, 843 (8th Cir. 2018).

92. *Id.* at 839.

hospital's communication when their son was a patient.[93] To communicate with plaintiffs, the hospital provided an interpreter and offered a TTY machine,[94] but the plaintiffs declined use of the TTY machine.[95] The court explicitly acknowledged the hospital's accommodations could have been improved, but the paintiffs still received the communication, therefore, they received meaningful access to the hospital's services.[96]

IV. INSTANT DECISION

This Part details the Eighth Circuit's decision in *Childress*. Subpart A discusses the majority's decision to affirm the lower court's grant of summary judgment in favor of the Plaintiff. Subpart B explains the dissent's strong criticism of the majority's decision and its caution about the future impacts that may result.

A. Majority

The majority defined "meaningful access" as the equal opportunity for an individual with a disability to gain the same benefit as an individual without a disability.[97] Additionally, the majority stated if an individual requires an auxiliary aid or service to receive that same benefit, then the public accommodation must provide an aid, but it can decide which form of aid it supplies.[98] Following this rule, the court noted the large exception that a public accommodation does not have to provide the auxiliary aid or service if doing so would cause an undue burden or fundamental alteration the nature of the provided benefit.[99]

The majority's decision to affirm the district court resulted from Fox Theater's failure to offer additional captioned showtimes for each Broadway tour.[100] The court determined this single offering "excludes individuals with hearing impairments from 'the economic and social mainstream of American

93. *Id.*

94. A TTY machine is a special device for hearing-impaired individuals where messages can be typed back and forth to communicate. *What is a TTY?*, ABOUTTTY.COM, http://www.abouttty.com [https://perma.cc/39NR-GV82] (last visited Sept. 21, 2020).

95. Durand, 902 F.3d at 840.

96. *Id.* at 842.

97. Childress v. Fox Assocs., LLC, 932 F.3d 1165, 1171 (8th Cir. 2019) (quoting Argenyi v. Creighton, 703 F.3d 441, 449 (8th Cir. 2013)).

98. *Id*.

99. *Id*.; 42 U.S.C. § 12182(b)(2)(A)(iii).

100. The second showing for *School of Rock* was provided with a disclosure by Fox Theater that this was an exception to its policy and it would not grant similar requests in the future. *Childress*, 932 F.3d at 1171.

life[,]'" which furthers the discrimination that the ADA sought to abolish.[101] Therefore, the court determined Fox Theater did not provide meaningful access for individuals with disabilities compared to non-disabled patrons who can choose from a variety of showtimes.[102] The court acknowledged the plaintiffs assertion that Fox Theater's existing ASL interpreter at each show did not satisfy meaningful access for hearing impaired individuals because the third party prevented them from experiencing the author's dialogue personally.[103] Although the court concluded Fox Theater violated the ADA and failed to provide meaningful access, it noted Fox Theater could have prevailed by raising the affirmative defense of undue burden and proving the expense of captioning, but it refused to explicitly raise that defense.[104] Although the court ruled in favor of the Plaintiff, it provided a caveat to its decision by stating Fox Theater could bring its own lawsuit in the future to modify the district court's orders if the requests for captioning reached the level of an undue burden.[105]

B. Dissent

The dissent expressed its concern for the majority's decision by opening with a strong declaration: "[A] litigation strategy can result in bad law leading to unforeseen consequences."[106] The dissent claimed the majority's expansion of the meaningful access standard strayed from precedent and "undercut" the standard set before by the Eighth Circuit.[107] Moreover, the dissent argued the conclusion reached in *Childress* was a result of Fox Theater's purposeful failure to raise the affirmative defense of undue burden in its motion for summary judgment, even though it clearly recognized the substantial cost of a live captioning.[108] The dissent would have upheld the Eighth Circuit's precedent of a lower standard for meaningful access, which only required a public accommodation to provide "necessary aids," not every aid requested.[109]

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101. *Id.* at 1172 (quoting McGann v. Cinemark USA, Inc., 873 F.3d 218, 230 (8th Cir. 2017)).

102. *Id.* at 1171.

103. *Id.* at 1168.

104. Fox Theater explicitly stated that it was "not asserting the affirmative defense [ ] of 'undue burden' ...." Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment at 7, Childress v. Fox Assocs., LLC, No. 4:16 CV 931 (E.D. Mo. Jan. 22, 2018); Childress, 932 F.3d at 1171–72. The court pointed out Fox Theater expressly stated that adding the additional captioned shows was not a fundamental alteration, so this defense was also waived. *Childress*, 932 F.3d at 1172 n.7.

105. *Id.* at 1172.

106. *Id.* at 1174 (Grasz, J., dissenting).

107. *Id.*

108. *Id.*

109. *Id.*

Along with the criticism of the majority's decision to deviate from precedent, the dissent feared the implications that may result from the majority's decision.[110] The dissent believed the law governing ADA compliance requires courts to decide the extent of necessary aids that must be provided to achieve meaningful access without considering possible affirmative defenses.[111] The dissent opposed the majority's heightened standard for meaningful access and argued that by requiring Fox Theater to accommodate each request for captioning, "meaningful access" became a requirement of identical access.[112] Further, by increasing this standard to such a high degree, the dissent warned that cases would be forced to turn on the validity of affirmative defenses, and therefore, decisions could result in the absence of an accommodation altogether.[113]

The dissent argued that Fox Theater did provide meaningful access through its ASL interpreter and other accommodations and it did not violate the ADA because the standard is meaningful, not identical, access.[114] Therefore, with this lower standard, the dissent claimed meaningful access was satisfied because individuals with hearing impairments could attend a specified showing for each Broadway show.[115]

V. COMMENT

The decision in *Childress* diverges from precedent in the Eighth Circuit by increasing the standard for meaningful access.[116] Previously, under *Argenyi*, defendants could satisfy meaningful access without providing each requested accommodation.[117] Additionally, as *Argenyi* indicated, an accommodation could arguably provide meaningful access regardless of how beneficial the aid was for the individual.[118] Moreover, under *Mason*, the Eighth Circuit determined meaningful access was satisfied even when the accommodations were provided in a limited capacity and on sporadic occasions.[119] The court reiterated the notion that if there was *some* way to access the accommodation, regardless of its frequency or beneficial results, meaningful access was achieved.[120] These cases illustrate the court's prior

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id*.

115. *Id.* at 1175.

116. *Id.*

117. Argenyi v. Creighton Univ., 703 F.3d 441, 449 (8th Cir. 2013).

118. *Id.*

119. Mason v. Corr. Med. Servs., Inc., 559 F.3d 880, 887–88 (8th Cir. 2009).

120. *See, e.g.*, *id.* at 888 (meaningful access satisfied even when the hearing-impaired prisoner's assistant was not always available); Loye v. Cty. of Dakota, 625

focus on the ultimate benefit received from an accommodation compared to the manner in which the benefit was obtained.[121]

Moving away from a previously low requirement for "meaningful access," the *Childress* Court heightened the standard to require not only meaningful, but apparently identical, access for individuals with disabilities, absent proof of an affirmative defense.[122] Unlike the single accommodation which initially sufficed in *Argenyi,* or the clear recognition that provided aids could be improved in *Durland*, the *Childress* Court required Fox Theater to provide more than one accommodation because the additional aids provided an increased benefit.[123] The *Childress* decision sought to ensure that individuals with disabilities can obtain the same benefit in the best manner possible, which often requires multiple aids and accommodations.[124]

After *Childress*, a public accommodation cannot simply provide an adequate accommodation to satisfy meaningful access, it must provide numerous accommodations of the highest quality. This shift in requirement is evidenced by the court's refusal to settle on the ASL interpreter Fox Theater previously provided.[125] The court increased the meaningful access standard to an apparently "identical access" standard by requiring Fox Theater to provide captioning at each requested performance, thereby giving patrons with hearing impairments the same freedom to choose from a variety of showtimes.[126] The *Childress* Court focused on the ultimate benefit individuals with disabilities received while also ensuring equality in the manner that the benefit was obtained using proper aids and accommodations.[127]

While the decision in *Childress* provides hope for a future where "meaningful access" amounts to truly equal access for individuals with disabilities utilizing the best aids and accommodations, this heightened standard may lead to undesirable consequences in litigation. The *Childress* decision requires public accommodations to provide equal, seemingly identical, access for individuals with disabilities.[128] The majority reached this conclusion without regard to the potential cost of compliance for the defendant because the Fox Theater refused to assert the undue burden defense.[129] This refusal is perplexing, and is likely explained by the fact that

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F.3d 494, 499 (8th Cir. 2010) (meaningful access was satisfied when the interpreter was not provided at each meeting for hearing-disabled residents).

121. *Mason*, 559 F.3d at 888.

122. *See* Childress v. Fox Assocs., LLC, 932 F.3d 1165, 1174 (8th Cir. 2019) (Grasz, J., dissenting).

123. Argenyi v. Creighton Univ., 703 F.3d 441, 445 (8th Cir. 2013); Durand v. Fairview Health Servs., 902 F.3d 836, 842 (8th Cir. 2018).

124. *See Childress*, 932 F.3d at 1171.

125. *Id.*

126. *Id.* at 1174–75 (Grasz, J., dissenting).

127. *Id.* at 1171 (majority opinion).

128. *See id.* at 1174 (Grasz, J., dissenting).

129. *Id.* at 1171–72 (majority opinion).

Fox Theater did not want to produce financial records during discovery.[130] Despite recognizing this importance for true equality, the court protected itself with a safeguard by stating Fox Theater can bring its own claim in the future to adjust the district court's ruling if the captioning requests resulted in an undue burden.[131]

This caveat could lead to endless litigation as Fox Theater or similarly situated defendants seek to modify current accommodations any time financial difficulties arise. Furthermore, proving these financial difficulties upon refiling may be even easier for the public accommodation due to the imposition created the heightened "meaningful access" standard. The public accomodation's seamless path to proving an "undue burden" could prevail as an affirmative defense to an accommodation altogether, or at the very least, reduce the accomodations currently provided. The court's safeguard instills constant fear that current aids and accommodations could be stripped away at any moment based on these future claims.

At first blush, the overall decision in *Childress* seems generally positive for the disability rights community. However, as the dissent rightfully indicated, the impacts this decision may have in litigation could directly contradict the goal of creating a more accessible society.[132] A heightened standard for meaningful access provides a gold standard where all individuals, regardless of a disability, are afforded identical access and equal opportunity to the benefit of a public accommodation. However, this increased standard simply forces the weight of the argument to the affirmative defense of undue burden. The higher the standard for meaningful access, the more likely the accommodation is to create an undue burden. While Fox Theater refused to assert this defense, it is likely – indeed almost certain – that most future ADA defendants will.

As this new standard plays out in litigation, cases may turn on the sufficiency of affirmative defenses which would be frightening as the success of these claims could result in a complete lack of accommodation or aid provided. For example, with this heightened standard, plaintiffs are likely to prevail in proving that a public accommodation has not satisfied this high standard for meaningful access, but the danger lies from this point forward.[133] Once a plaintiff prevails, this leaves the case to turn on the sufficiency of a defendant proving an affirmative defense, which will only be easier given the heightened (and presumably more expensive) compliance requirements. Thus, *Childress* may have set ADA plaintiffs up to win the battle but lose the war.

Prior to the *Childress* decision, meaningful access was determined by what degree of an accommodation needed to be provided – at what point

130. *Id.* at 1172 n.7.

131. *Id.* at 1172.

132. *Id.* at 1174 (Grasz, J., dissenting).

133. *Id.* at 1174–75.

meaningful access was obtained.[134] Could the public accommodation achieve meaningful access by providing three of four requested accommodations? The analysis ended before reaching an affirmative defense. Now, relying heavily on the success of an affirmative defense in response to the heightened standard, courts may determine defendants do not have to provide any sort of aid or accommodation because of the "burden" which may result from satisfying such a high standard for meaningful access. This outcome is scary for individuals with disabilities and society overall. Furthermore, even if the affirmative defense fails, the *Childress* decision leaves the door open for defendants to refile in the future if a financial burden develops from complying with this new heightened standard. This caveat could create never ending litigation and a constant threat of accommodations disappearing in the future. Therefore, what seems like a positive increase in the requirement for meaningful access could create detrimental realizations as this new standard unfolds in litigation.

VI. CONCLUSION

The *Childress* decision increased the standard of meaningful access by requiring public accommodations to provide individuals with disabilities an equal, seemingly identical, access to achieve the same benefit as non-disabled individuals. This decision strayed from prior determinations in the Eighth Circuit and made admirable strides for a future where all individuals, regardless of disability, receive identical means of access to achieve the same benefit. Although *Childress* created an admirable "gold standard" for meaningful access, the practicalities of such a high standard may result in future litigation turning on the sufficiency of an affirmative defense which dangerously creates an all or nothing battle.

134. *See, e.g.,* Argenyi v. Creighton Univ., 703 F.3d 441, 449 (8th Cir. 2013); Durand v. Fairview Health Servs., 902 F.3d 836, 842 (8th Cir. 2018).