*Appeal No. 12-56280*

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**IN THE**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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CITY OF LOMITA,

*Defendant/Appellant,*

vs.

ROBIN FORTYUNE,

*Plaintiff/Appellee.*

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On Appeal From the United States District Court
for the Central District of California
Hon. Dean D. Pregerson
Case No. 11-CV-6644

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# AMICUS CURIAE BRIEF FILED ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF APPELLANT

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# I.

## INTRODUCTION AND STATEMENT OF INTEREST

Founded in 1898, the League of California Cities (League) is an association of 467 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee (Committee), which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide, or nationwide, significance. The Committee has identified this case as being of such significance.

This case involves the interpretation and application of Title II of the Americans with Disabilities Act (Title II), 42 U.S.C. 12131 *et seq.*, and its implementing regulations, to on-street parking.[1] California cities have a compelling interest in the case because they expend significant resources on compliance with the access requirements of Title II to provide accessible facilities for the public. Thus, questions concerning accessibility of on-street parking are of vital interest to the League's members.

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[1] References to "on-street parking" are intended to refer to parking spaces that are perpendicular or angled (also referred to as "diagonal") to the sidewalk, as opposed to spaces that are parallel to the sidewalk, which are not at issue in this case.

Currently, without any directly applicable regulation or guidance, cities are in the difficult position of being unsure of their obligations to install on-street disabled parking. While draft, proposed guidelines exist that would provide such guidance, they have not been adopted. If cities are ordered to install and maintain on-street disabled parking in the absence of such enforceable guidelines or regulations, it will lead to inconsistent (and even potentially dangerous) construction of on-street disabled parking. In addition, it may expose cities to significant litigation by mandating that cities provide on-street disabled parking without supplying any methods for cities to determine if their efforts to comply would be deemed accessible by any court. Any newly installed or modified on-street disabled parking may likewise lead to a waste of limited public resources because, when standards are finally adopted, those disabled spots may have to be extensively modified to meet those standards.

Further, requiring on-street disabled parking without enforceable standards would not provide cities with reasonable notice to enable them to comply with Title II. The League and its members take their obligations to provide accessible services, programs and activities seriously and strive to serve the disabled members of their communities. However, requiring cities to provide on-street disabled parking without standards would not further those interests.

For these reasons, the League respectfully submits this Brief in support of Defendant/Appellant City of Lomita. All parties to the appeal, through their respective counsel, have consented to the filing of this amicus curiae brief. Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, the League avers that it is a nonprofit corporation which does not issue stock and which is not a subsidiary or affiliate of any publicly owned corporation. No party, or counsel for any party, authored the attached brief, in whole or in part, or made any monetary contribution toward the preparation or submission of the brief.

## II.

## ARGUMENT

When it enacted the Americans with Disabilities Act of 1990 (ADA), Congress sought to balance the societal interest in greater disabled access with the need to ensure the efficient use of limited public resources. The ADA directs the Attorney General of the United States to promulgate regulations to "implement" Title II. 42 U.S.C. § 12134 (2012). These regulations mandate that new construction or alterations be performed in conformance with the ADA Accessibility Guidelines (ADAAG) issued by the United States Architectural and Transportation Barriers Compliance Board (Access Board) and adopted by the Department of Justice. 28 C.F.R. § 35.151(c) (2011). The ADAAG were intended to establish uniform standards for accessible constructions of facilities.

Currently, there is no state or federal regulation addressing on-street disabled parking, and there are no enforceable access standards dictating how such parking should be designed, if required to be provided. The lack of standards and guidelines leaves California cities in a difficult position that would only be made worse if they were mandated to provide on-street disabled parking without enforceable standards. *See*, Appendix A to 28 C.F.R. part 36 (2011); Department of Justice, 2010 ADA Standards for Accessible Design (September 15, 2010), *available at* http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm.

## A. Requiring Cities To Provide On-Street Disabled Parking Without Any Standards Or Guidelines Is Contrary To The Purpose Of The ADA And Will Lead To Inconsistency In On-Street Parking

Congress specifically stated that the purpose of the ADA is, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1),(2) (2012). Requiring cities to provide on-street disabled parking in the absence of any standards is contrary to the stated purpose of the ADA that there would be, "clear, strong, consistent, and enforceable standards." Requiring cities to provide on-street disabled parking without standards also leaves cities in the difficult position of speculating what they must

do to comply with the ADA and cities should not be required to guess what they would need to do to comply. *See*, *United States of America v. AMC Entertainment, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008).

Similarly, requiring cities to provide on-street disabled parking without any standards will thwart Congress' express purpose of a, "comprehensive national mandate." 42 U.S.C. § 12101(b)(1) (2012). Determining how to install and construct accessible on-street parking involves considerably more than just the dimensions of disabled parking spots; it includes determining the number, location, and configuration of on-street disabled parking spots to be provided. However, there is no enforceable guidance, let alone, "clear, strong, consistent, and enforceable standards," on these issues. This will lead to inconsistency within a city and between cities. One city might provide on-street disabled parking mid-block, whereas another city might provide it on the end of the block. One city might provide on-street disabled parking only on one side of the street, whereas another city might provide it on both sides of the street. One city might provide on-street disabled parking only on every other block, whereas another city might provide it on every block. As discussed in greater detail *infra*, cities cannot rely on the ADAAG and/or the Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way as guidance and cities need to know in advance what construction and alterations will be sufficient to comply with Title II.

Furthermore, the regulations promulgated under Title II, "provide[] the standard for determining a violation of the ADA." *Pierce v. County of Orange*, 526 F.3d 1190, 1214 (9th Cir. 2008). Without specific standards adopted in the regulations, the obligation to "implement" Title II will be transferred from the Department of Justice to the courts, which will then be tasked with fashioning remedies for alleged violations on a case-by-case, city-by-city, jurisdiction-by-jurisdiction basis. As a result, a purportedly uniform federal regulation would end up requiring something different from city to city, without any uniformity, because courts will be tasked with coming up with technical standards for compliance.

Therefore, to fulfill legislative purposes and to prevent inconsistency, cities should not be required to provide on-street parking for the disabled until regulations have been adopted that provide clear standards for such parking.

### B. Requiring Cities To Provide On-Street Disabled Parking Without Any Guidance Or Standards Would Waste Cities' Limited Resources And Invite Litigation

Requiring cities to provide on-street disabled parking without any guidance or standards would waste cities' limited resources and invite expensive and time-consuming litigation, because there is no means for cities or disabled individuals to ascertain whether cities are in compliance with Title II. Likewise, cities cannot ensure that their compliance efforts will provide adequate access or will protect them from litigation.

Any disabled individual alleging discrimination may bring an enforcement action. 42 U.S.C. § 12131 (2012). If cities make modifications, in an effort to provide on-street disabled parking, they would not be protected from liability, despite their attempts at compliance. Preferences are highly subjective and therefore differ, even when looking at the installation of accessible facilities. Consequently, a disabled individual could bring an enforcement action if, in his or her subjective opinion, a city's on-street parking is not sufficiently accessible.

Courts will thus be tasked with assessing whether, in specific situations, cities provided "adequate" on-street disabled parking and cities would not be able to defend themselves by establishing that they complied with the standards, because there are no applicable standards. Cities will waste limited and valuable resources on litigation and may end up having to repeatedly redo on-street parking (and the corresponding structural components) if the courts decide that the city's on-street disabled parking is not sufficiently accessible in connection with a specific case.[2] Additionally, cities may also have to redo on-street parking when

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[2] Since a violation of the ADA also constitutes a violation of the California Disabled Person's Act (DPA) and the DPA provides for, among other things, monetary remedies, cities would also have to pay monetary damages if courts decide that a California city's disabled parking is not sufficiently accessible in connection with a specific case. Cal. Civ. Code §§ 54.1(d), 54.3 (Deering 2012). "When entities are not on notice that a design may be a violation of the ADA, the imposition of liability is unwarranted." *Daubert v. City of Lindsay*, No. 1:08cv01611 DLB, 2009 U.S. Dist. LEXIS 109063, at *12 (E.D. Cal. Nov. 23, 2009).

the regulations are adopted if the parking provided differs even marginally from the parking standards included in the adopted guidelines. This would result in significant waste of cities' limited resources.

Moreover, since courts will be required to use their discretion in determining what constitutes "accessible" on-street parking, courts will lack the ability to fashion the appropriate remedies. The appropriate scope of injunctive relief is guided by, "the rule that injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (revisiting equitable principles in light of class action lawsuits). "The primary concern . . . must be that the relief granted is not 'more burdensome than necessary to redress the complaining parties.'" *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) (*quoting Califano*, 442 U.S. at 702). Without standards, a court cannot assess whether the relief requested is, "more burdensome than necessary" to provide redress to the complaining party, and, as a result, a court cannot ascertain the appropriate relief to be granted.

Therefore, cities should not be required to provide on-street disabled parking until regulations have been adopted that provide clear and enforceable standards for such parking.

### C. Public Entities Cannot Reasonably Rely On ADAAG Or The Draft Right-Of-Way Guidelines To Ensure Compliance With Any On-Street Parking Obligations

More than a decade ago, the Access Board first proposed draft Public Right-of-Way Guidelines. Despite revised regulations and ADAAG Standards being adopted during that time, the draft right-of-way provisions were not incorporated into the new standards. *Public Rights-of-Way*, http://www.access-board.gov/prowac/ (last visited Nov. 2, 2012); United States Access Board, *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way*, 76 Fed. Reg. 44,664 (July 26, 2011) (to be codified at 36 C.F.R. pt. 1190), *available at* http://www.accessboard.gov/prowac/nprm.htm; Department of Justice, *2010 ADA Standards for Accessible Design* (September 15, 2010), *available at* http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm. These draft guidelines have been open for public comment on multiple occasions and yet, after more than a decade, they still have not been formalized. This delay may be attributed to the complexity of the design issues relating to public rights-of-way and the care being taken to ensure that standards, when imposed, will consider the interests of all of the constituent groups affected.

In July 2011, the Access Board again published draft accessibility guidelines for public right-of-ways which address on-street disabled parking, and requested comment on the draft guidelines. *Proposed Accessibility Guidelines for Pedestrian*

*Facilities in the Public Right-of-Way*, 76 Fed. Reg. 44,664 (July 26, 2011) (to be codified at 36 C.F.R. pt. 1190), *available at* http://www.accessboard.gov/prowac/nprm.htm. The public comment period for these draft accessibility guidelines closed February 2, 2012, yet the proposed guidelines have not been adopted. United States Access Board, *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way, Reopening of Comment Period*, 76 Fed. Reg. 75,844 (Dec. 5, 2011), *available at* http://www.access-board.gov/news/row-nprm-extension.htm.

Cities cannot dependably rely on the draft guidelines to comply with any on-street parking obligations. The guidelines are not enforceable until they are adopted through the regulatory process. 29 U.S.C. § 792 (2012); 42 U.S.C. § 12134 (2012); 28 C.F.R. §§ 35.104, 35.151 (2011). Further, it is possible that the Access Board may revise the proposed standards to incorporate the public's comments.[3] If, in fact, the specifications and plans do not depict accessible

[3] Notably, the proposed guidelines received approximately 597 public comments. *Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way Docket Folder Summary*, http://www.regulations.gov/#!docketDetail;D=ATBCB-2011-0004 (last visited November 2, 2012). Several public comments address the proposed regulations as they relate to perpendicular and angled parking spaces on the street, including comments that the access aisle depicted for angled parking spaces would not provide sufficient clearance to enter or exit a vehicle using a platform lift. *See, Public Comments Regarding Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way*,

parking, cities that had utilized the proposed guidelines would then be required to reconstruct their on-street parking, which would be time-consuming and waste cities' limited resources. Construction of on-street disabled parking requires more than painting blue stripes on asphalt or placing signage; it requires designing and constructing accessible pedestrian routes, curb ramps and blended transitions. When and if the Access Board's guidelines are finalized and adopted, cities will be able to assess, before the on-street parking is installed, how the parking must be designed and the construction must be performed. Until such time, cities are left attempting to foretell, potentially at their peril, what the Access Board's guidelines will actually require.

Similarly, cities cannot rely on the ADAAG parking lot/on-site requirements for on-street parking because there are different considerations for on-street parking, including the dimensions needed for traffic considerations, safety concerns, and availability of access routes. As noted by the United Stated District Court for the Eastern District of California:

> [E]xtending the lot/on-site parking requirements to on-street spaces would impose potential liability where there is no guiding regulation... it would be improper to assume that the same requirements for lot/on-site parking would apply to on-street parking. There are likely different considerations for on-street parking, the most obvious of which is the smaller amount of space within

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http://www.regulations.gov/#!docketBrowser;dct=PS;rpp=25;po=0;D=ATBCB-2011-0004 (last visited November 2, 2012).

> which to work imposed by the characteristics of an active street.

*Daubert v. City of Lindsay*, No. 1:08cv01611 DLB, 2009 U.S. Dist. LEXIS 109063, at *12 (E.D. Cal. Nov. 23, 2009). It is for this very reason that the Access Board has proposed guidelines directly addressing on-street parking for the disabled. Therefore, cities should not be required to provide on-street disabled parking until regulations have been adopted that clearly set forth the standards for such parking.

## III.

## CONCLUSION

For the foregoing reasons, cities should not be required to provide on-street parking for the disabled until regulations have been adopted that contain enforceable, clear standards to provide the parking and a reasonable time to implement the requirements.

Dated: November 8, 2012

Respectfully submitted,

/s/ Alison D. Alpert
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**CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1**

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that this Amicus Brief for the League of California Cities is in a proportionally spaced 14-point Times New Roman font; that the brief was produced on a computer using a word processing program; and that the program calculated that the brief contains 2,576 words.

Dated: November 8, 2012

/s/ Alison D. Alpert
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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 8, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. My office has mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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Dated: November 8, 2012

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