*Appeal No. 12-56280*

**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 An Interlocutory Order of
the United States, District Court
for the Central District of California
Case No. 11-CV-6644
The Honorable Dean D. Pregerson

# AMICI CURIAE BRIEF FILED ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES AND THE LEAGUE OF OREGON CITIES IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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## I.

## INTRODUCTION AND STATEMENT OF INTEREST

Founded in 1898, the League of California Cities ("California League") is an association of 473 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 California 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 having such significance.

The League of Oregon Cities ("Oregon League") is an intergovernmental entity under ORS Chapter 190. Originally founded in 1925, the Oregon League is a voluntary statewide association representing all of Oregon's 242 incorporated cities. The Oregon League serves as the effective and collective voice of Oregon's cities and their authoritative and best source of information and training. The Oregon League fulfills its mission through advocacy for city government at the state and national levels and by providing information, technical assistance, and training to city officials and employees. The Oregon League has also identified this case as having statewide significance.

The issues raised in this case are of exceptional importance to the cities of the States of California and Oregon, and likely all public agencies across the Ninth Circuit and the nation. The Panel determined that under Title II of the Americans with Disabilities Act ("Title II"), 42 U.S.C. 12131 *et seq.*, and its implementing regulations, local governments are required to provide accessible on-street parking, despite a complete lack of guidance on how to implement that requirement.[1] California and Oregon cities have a compelling interest in the case because cities expend significant resources on compliance with Title II, to provide accessible services, programs and activities. As the Panel recognized, there are no applicable standards to guide local government agencies on how to make on-street parking accessible. Nevertheless, given the Opinion as it now stands, cities will be required to predict what will satisfy the ADA requirements, while facing significant potential for increased litigation without any ability to establish compliance with a recognized standard. In determining how to direct their limited resources, cities -- while obligated to create accessible on-street parking-- will have no assurance that these resources are being well-spent to appropriately serve disabled individuals, as ultimately their efforts may not comply with any newly

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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.

enacted standards for accessible on-street parking. Further, in the absence of enforceable guidelines or regulations, construction of on-street parking for the disabled will be inconsistent. The California League and the Oregon League (collectively, "Leagues") and their 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 parking for the disabled without standards would not further those interests.

For these reasons, the Leagues respectfully submit this Brief in support of Appellant City of Lomita's Petition for Rehearing En Banc. The Panel's Opinion presents a question of exceptional importance to each member city of the Leagues. Fed. R. App. P. 35(a)(2).

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Circuit Rule 29-2(a), all parties to the appeal, through their respective counsel, have consented to the filing of this Amici Curiae Brief. Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, the California 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. The Oregon League avers that is an intergovernmental entity formed under state law and is not a subsidiary or affiliate of any publicly owned corporation. No party, or counsel for

any party, authored this brief, in whole or in part, or made any monetary contribution toward the preparation or submission of the brief.

**II.**

**THE LEAGUE OF CALIFORNIA CITIES AND THE LEAGUE OF OREGON CITIES SUPPORT THE PETITION FOR REHEARING EN BANC TO ADDRESS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO CITIES**

The Panel held that Title II "requires local governments to provide accessible on-street parking [even] in the absence of regulatory design specifications for on-street parking." Slip Opinion, p. 3. The Panel's decision leaves California and Oregon cities in a difficult position. Of utmost importance to the Leagues and their member cities is what constitutes accessible on-street parking, and how cities can determine that they are providing accessible on-street parking such that they are effectively serving the disabled community and also protecting the cities from lawsuits. As the Panel recognized, the Court cannot provide that guidance and lower courts will be left to wrestle with these issues on a case by case basis.

Since the enactment of the ADA, cities have faced significant litigation over accessibility. Any disabled individual alleging discrimination may bring an enforcement action under Title II. 42 U.S.C. § 12131. If cities make modifications in an effort to provide accessible on-street parking, they will not be protected from liability, despite their best attempts at compliance, due to the lack of any standards.

Preferences are highly subjective and therefore may differ, even when looking at the installation of accessible facilities. Consequently, a disabled individual could bring an enforcement action if, in his or her opinion, a city's on-street parking is not sufficiently accessible. Thus, the result of the Panel's decision is that, not only will there be lawsuits based on a lack of any accessible on-street parking, but there will be lawsuits against cities trying in good faith to comply with the Panel's decision by providing on-street parking for the disabled. Moreover, cities will be unable to defend themselves from these lawsuits by establishing that they complied with the applicable standards in installing the parking spots, because there are no applicable standards with which to comply. Cities will waste limited and valuable resources on litigation and may end up having to repeatedly reconfigure on-street parking (and the corresponding structural components) if any particular court determines that the city's on-street parking is not sufficiently accessible.

Further, not only are cities faced with the prospect of claims for injunctive and declaratory relief and attorneys' fees, California cities also face the potential of significant penalties under State law. A violation of the ADA also constitutes a violation of the California Disabled Person's Act ("CDPA"), and the CDPA provides for, among other things, penalties. Therefore, California cities could also be required to pay penalties if individual courts decide that a city's on-street

parking for the disabled is not sufficiently accessible in connection with a specific case. Cal. Civ. Code §§ 54.1(d), 54.3.

Further, courts will not be able to establish a proper permanent remedy because there are no standards which can be identified for compliance. Courts will struggle with what to do in these cases, as the District Court in this case did. In its Order certifying the issue for Interlocutory Appeal, the District Court noted that the absence of express regulations or guidelines governing accessible on-street parking makes, "it [ ] [ ] very difficult to determine the appropriate remedy for the alleged ADA violation." ER 4. In its Opinion, the Panel noted that, "[i]f Fortyune prevails, in crafting a remedy, the district court will have to seriously consider what level of accessibility the City should have known was legally required for diagonal stall on-street parking." Slip Opinion, pp. 14-15, n. 14. The Panel's decision understandably provides no direction to the district courts, or to cities, on the required level of accessibility.

As the Panel recognized, no existing regulation or guideline addresses on-street parking. Slip Opinion, pp. 3, 9. Cities cannot dependably rely on the Access Board's draft guidelines to comply with any on-street parking obligations, as the guidelines were first proposed more than a decade ago and have never been

finalized or adopted.[2] The guidelines are not enforceable until they are adopted through the regulatory process, and given the prolonged time they have been in draft, and multiple comment periods, it is unclear when (if ever) these guidelines will be adopted in this or another format with different standards. 29 U.S.C. § 792; 42 U.S.C. § 12134; 28 C.F.R. §§ 35.104, 35.151. Construction of accessible on-street parking requires more than painting blue stripes on asphalt or placing signage; it requires designing and constructing the parking in connection with other accessible features. 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 Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG")[3] parking lot/on-

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[2] *Public Rights-of-Way*, http://www.access-board.gov/prowac/ (last visited Oct. 4, 2014); 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.

[3] The 1991 Standards for new Construction and Alterations under the ADA adopted the ADAAG (*see* 28 C.F.R. § 36 App. D.) and the 2010 Standards adopted

site requirements to construct 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 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).

Without any "clear, strong, consistent and enforceable standards" (42 U.S.C. section 12101(b)(1)), a determination that cities are required to provide accessible on-street parking leaves cities in the difficult position of speculating what they must do to comply with the ADA. 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).

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the updated ADAAG (*see* 36 C.F.R. part 1191 App. B and D.), effective March 15, 2012.

Individualized assessment without any standards will also lead to inconsistency in compliance between different cities, which does not further the ADA's purpose of ensuring that "consistent" standards address discrimination against disabled individuals. *See* 42 U.S.C. 12101(b)(1). One city might provide accessible on-street parking mid-block, whereas another city might provide it on the end of the block. One city might provide accessible on-street parking only on one side of the street, whereas another city might provide it on both sides of the street. One city might provide accessible on-street parking only on every other block, whereas another city might provide it on every block. Without regulations or guidelines, there would be no means to determine which if any of those plans for on-street parking would be considered accessible.

Furthermore, the regulations promulgated under Title II are intended to "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, requiring cities to provide accessible on-street parking would be an ineffective use of limited municipal resources funded by the taxpayers because there is no means for cities or disabled individuals to ascertain whether cities are in compliance with Title II. Cities that attempt now to construct accessible on-street parking may be required to later modify that parking to comply with newly adopted standards. There is no assurance that a new standard will not

be adopted or that cities' efforts will result in any "grandfathering". Likewise, cities may be required to modify current attempts at accessible on-street parking based on subsequent litigation and any court rulings. It is essential that limited city resources be directed at changes that actually improve disabled access in the community rather than at repeated reconstruction and litigation expenses.

## III.

## CONCLUSION

Therefore, the League of California Cities and the League of Oregon Cities support the Petition for Rehearing En Banc to consider this question of exceptional importance.

Dated: October 14, 2014

Respectfully submitted,

/s/ Alison D. Alpert
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Attorney for the League of California Cities
and the League of Oregon Cities

**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 Amici Curiae Brief for The League of California Cities and The League of Oregon 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 2,140 words.

Dated: October 14, 2014

/s/ Alison D. Alpert

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Attorneys for The League of California Cities and The League of Oregon Cities

**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 October 14, 2014.

On the date stated below, I served the documents via CM/EFC described above on the designated recipients through electronic transmission of said documents; a certified receipt is issued to filing party acknowledging receipt by CM/ECF's system. Once CM/EFC has served all designated recipients, proof of electronic service is returned to the filing party.

Dated: October 14, 2014

/s/ Alison D. Alpert
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