No. 14-920

In The

Supreme Court of the United States

CITY OF LOMITA, CALIFORNIA,

Petitioner,

v.

ROBIN FORTYUNE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE THE LEAGUE OF CALIFORNIA CITIES AND THE LEAGUE OF OREGON CITIES IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici curiae represent cities across California and Oregon. The issues raised in this case are of exceptional importance to the cities of the States of California and Oregon, and all public agencies across the nation. The Ninth Circuit 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. 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 Ninth Circuit recognized, there are no applicable standards to guide local government agencies on how to make on-street parking accessible. Nevertheless, given the decision 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.

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[1] No counsel for a party authored this brief in whole or in part, and neither such counsel nor any party made a monetary contribution intended to fund the preparation or submission of the brief. Per Supreme Court Rule 37.2, the parties in this case have granted consent to Amici to file this amicus curiae brief; counsel for Amici timely gave notice of intent to file this brief.

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 California League is a nonprofit corporation which does not issue stock and which is not a subsidiary or affiliate of any publicly owned corporation.

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 Oregon League is an intergovernmental entity

formed under state law and is not a subsidiary or affiliate of any publicly owned corporation.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision held 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. *Fortyune v. City of Lomita,* 766 F.3d 1098, 1102-1103 (9th Cir. 2014). The decision determined that on-street parking is a "program" of cities and must be accessible, despite a complete lack of guidance on how to implement that requirement. *Id.*

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 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.

ARGUMENT

WHETHER CITIES ARE REQUIRED TO PROVIDE ACCESSIBLE ON-STREET PARKING UNDER TITLE II IS AN ISSUE OF EXCEPTIONAL IMPORTANCE TO CITIES IN CALIFORNIA, OREGON AND ACROSS THE COUNTRY

The Ninth Circuit 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." *Fortyune, supra,* 766 F.3d at 1102. The Ninth Circuit'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 Ninth Circuit 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, as a result of the Ninth Circuit's decision, 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 Ninth Circuit'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, 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." Appendix ("App.") 29. In its decision, the Ninth Circuit noted that, "[i]f Fortyune prevails, in crafting a remedy, the district court will have to consider carefully what level of accessibility the City should have known was legally required for diagonal stall on-street parking." *Fortyune, supra,* 766 F.3d at 1106 n. 13. The Ninth Circuit's decision understandably provides no direction to the district courts, or to cities, on the required level of accessibility.

As the Ninth Circuit recognized, no existing regulation or guideline addresses on-street parking. *Fortyune, supra,* 766 F.3d at 1103. 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] Construction of accessible on-street parking requires more than painting blue stripes on asphalt

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[2] *Public Rights-of-Way*, http://www.access-board.gov/prowac/ (last visited October 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.

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-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. *See 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. § 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

[3] The 1991 Standards for new Construction and Alterations under the ADA adopted the ADAAG (*see* 28 C.F.R. Pt. 36 App. D) and the 2010 Standards adopted the updated ADAAG (*see* 36 C.F.R. Pt. 1191 App. B and D), effective March 15, 2012.

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).

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). 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. 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.

CONCLUSION

The Court should grant the petition for writ of certiorari, and reverse the Ninth Circuit's decision.

Respectfully submitted,

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