U.S. Court of Appeals Docket No. 13-56216

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK WILLITS, JUDY GRIFFIN, BRENT PILGREEN and COMMUNITIES ACTIVELY LIVING INDEPENDENT AND FREE ("CALIF"), on behalf of themselves and all others similarly situated,

Plaintiffs and Respondents,

vs.

CITY OF LOS ANGELES, a public entity,

Defendant and Petitioner.

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF LOS ANGELES ON ISSUE CERTIFIED FOR INTERLOCUTORY REVIEW

[Rule 29, Federal Rules of Appellate Procedure; Circuit Rule 29-3]

The United States District Court
For the Central District of California
Case No. CV 10-5782 CBM-RZ
The Honorable Consuelo B. Marshall, Judge Presiding

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INTRODUCTION AND SUMMARY OF ARGUMENT

The League of California Cities respectfully submits this brief as amicus curiae in support of defendant and appellant City of Los Angeles on an issue certified by this Court for interlocutory review: Whether the City, charged with violating disability access standards of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) for more than 10,000 miles of City sidewalks, may assert an "undue burden" defense with regard to sidewalks that were already built when the Rehabilitation Act was adopted?

The League of California Cities 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, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

In this brief, League will offer a broader perspective for the Court as to why Congress could not have intended that the Rehabilitation Act would impose undue burdens on cities, especially in light of the staggering costs it would have imposed for repairing and retrofitting then-existing sidewalks — and theoretically all other

public facilities — at the expense of all other basic and vital local governmental programs such as police, fire, utilities, welfare and education. Both the Supreme Court and the Department of Justice, which is charged with implementing access rules for public entities, have always assumed there is an undue burden defense for existing facilities.

This brief was not authored by counsel for any of the parties in this action, nor did any party contribute money intended to fund the preparation or submission of this brief, nor has any other person contributed money intended to fund the preparation or submission of the brief.

ARGUMENT

DENYING AN UNDUE BURDEN DEFENSE TO CITIES CHARGED WITH VIOLATING DISABILITY ACCESS PROVISIONS OF THE REHABILITATION ACT WITH REGARD TO FACILITIES CONSTRUCTED BEFORE THE ACT WAS ADOPTED WOULD BE ILLOGICAL AND HAVE CATASTROPHIC FINANCIAL AND SOCIAL CONSEQUENCES THAT CONGRESS DID NOT INTEND.

This case concerns claims asserted under both the Rehabilitation Act of 1973 and Title II of the Americans With Disabilities Act ("ADA") regarding repair and retrofitting of public sidewalks to provide better access to persons with disabilities. The two Acts adopt essentially the same rule against discrimination, but the ADA applies to a broader scope of public entities and to public accommodations. The district court granted partial summary judgment to the plaintiffs, ruling that, unlike the broader ADA which has been interpreted to provide an undue burden defense, the Rehabilitation Act affords no such defense to a claim regarding sidewalks constructed before Congress passed the Act.

Amicus curiae League of California Cities respectfully submits that the district court's decision is illogical and would have catastrophic consequences that Congress could never have intended.

A. The Rehabilitation Act And The ADA Address The Same Concerns And Should Not Be Read To Contradict Each Other.

The Rehabilitation Act of 1973 (29 U.S.C. § 794) prohibits discrimination based on disability in public programs and services by cities and other public entities that receive any federal financial assistance of any kind, including funding for education, health, public safety, public welfare, and low-income housing. In other words, it applies to almost all cities and other public entities throughout the nation.

Title II of the ADA of 1992 (42 U.S.C. § 12132) expands those same disability discrimination standards to public accommodations and public entities that do not receive federal assistance. The Department of Justice, which is charged with implementing the ADA for public entities, adopted regulations that expressly provide for an undue burden defense to claims as to existing facilities. 28 C.F.R. § 39.150 (a)(2). The DOJ provided that its regulations should not be construed to apply a lesser standard than the standards applicable under the Rehabilitation Act. 28 C.F.R. 35.103 (a). If the ADA cannot have lesser standards than the Rehabilitation Act, and the ADA offers an undue burden defense, it follows that the Rehabilitation Act must offer an undue burden defense as well.

The district court went barely further than to read the language of the Rehabilitation Act to reach its conclusion that that it affords no undue burden defense to public entities that receive federal assistance for facilities existing

before the Act was adopted. Finding no undue burden defense spelled out there, the court thought that Congress could not have intended one. (Appellant's Excerpts of Record (EOR) 8-9.) Interpreting Congressional intent starts with the literal words of the statute, but it does not end there. Other circumstances evidencing Congressional intent can overcome even apparently straight-forward terms. *Scheidler v. Nat'l Org. of Women, Inc.*, 547 U.S. 9, 22-23 (2006).

One of the relevant circumstances in statutory interpretation is context. The context here includes Title II of the ADA, in which Congress addresses the same concerns for disabled persons' access to the same facilities and other facilities. As in this case, disability rights suits against public entities are routinely brought under both Title II and the Rehabilitation Act. Congress simply could not have intended that the two laws act at cross-purposes. That would be completely illogical. Statutes that deal with precisely the same subject matter should be interpreted harmoniously, and a later act can therefore be regarded as a legislative interpretation of the earlier act. *United States. v. Stewart*, 311 U.S. 60, 64 (1940).

Absent clear congressional intent to the contrary (and there is none here), its laws should not be construed to be illogical, vain or meaningless, *Int'l Ass'n of Machinists & Aerospace Workers v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1057 (9th Cir. 2004) (related statutes should not be so construed to contradict each other), nor may a statute be construed "so as to make

any part of it part of mere surplusage," *United States v. Mehrmanesh*, 689 F.2d 822, 829 (9th Cir. 1982).

As the City's merits brief details, the Supreme Court and the Department of Justice have always assumed there is an undue burden defense in disability access cases. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 412 (1979) (section 504 does not require modifications that would result in "imposing undue financial and administrative burdens"); *Sch. Bd. Of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287, n. 17 (1987) (accommodation is not reasonable if it imposes undue financial burden); 28 C.F.R. § 39.150 (under ADA, agencies not required to take any action that would result in "undue financial and administrative burdens").

For this reason alone, the district court's ruling should be set aside. But as the League next explains, there is another equally valid reason to construe the Rehabilitation Act in a common sense manner.

B. Congress Could Not Have Intended That Disability Access Rights Would Automatically Trump All Other Local Governmental Services Such As Police, Fire, Utilities And Education.

Further evidence that Congress did not intend to preclude an undue burden defense to a Rehabilitation Act claim regarding existing facilities is that the Act made no provision for funding local public entities' repair and retrofitting required by the Act. Congress must have known that repair and retrofitting costs for existing programs and services would be enormous.

The enormity of the challenge is exemplified by this case. Plaintiffs' complaint is not limited to providing sidewalk access ramps. They also seek repair and retrofitting of cracked, crumbled, steep, sunken or uneven rights of way, and removal of physical obstacles such as signs, utility light poles, newspaper dispensers, bus stop benches, and apron parking. (EOR 93-94.) Presumably a street without a sidewalk would require a redesign and construction of a sidewalk from scratch.

There are over 172,000 miles of public roads in California, of which over 140,000 are maintained by cities and counties.[1] Most of those with streets and roads with sidewalks were constructed prior to 1977. In the City of Los Angeles alone, there are over 10,000 miles of sidewalks with 4,600 miles currently in need of repair at an estimated cost of $1.2 billion. With no federal funds available, between 2000 and 2008 Los Angeles was able to repair on average only 67 miles of sidewalks a year. At that pace, it would take 69 years to repair all existing sidewalks.[2]

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[1] State of California Department of Transportation, 2011 California Public Road Data, Table 1, p. 4, www.dot.ca.gov/hq/tsip/hpms/hpmslibrary/prd/2011prd/2011prd.pdf.

[2] Donald Shoup, Fixing Broken Sidewalks, *Access*, No. 36, at 30-32, www.uctc.net/access/36/access-36brokensidewalks.pdf.

On the other side of the ledger, Congress must have known that funding at the local level is a "pie-in-the-sky" ideal. Cities can't print money. They obtain their revenues from finite sources, and their ability to generate additional revenues is limited by numerous legal, political and economic constraints. Some cities manage to stay afloat only by fiscal triage. Most tax revenues are already inextricably dedicated to vital municipal functions other than facility repairs. In California, nearly 25% of total local expenditures is devoted to police and fire services and nearly 21% to providing water, gas and electricity to their citizens. Only 7.58% of total expenditures is allocated to all infrastructure repairs.[3] Unfortunately, even fiscal triage has not been enough to save some cities. In recent years, the California cities of Vallejo, Stockton and Mammoth Lakes, as well as the County of San Bernardino, have declared bankruptcy, resulting in defaults in bond and pension payments.

This is not just a problem in California. In 2012, a National League of Cities study reported that municipal revenues nationwide have declined six years in a row. Municipal reserves have declined by over 25% over four years. The continuing fiscal pressures on cities include declining tax bases, infrastructure costs, employee-related costs for health care, pensions and wages and cuts in state

[3] John Chiang, California State Controller, 2012 Cities Annual Report, pp. xx-xxi, Figures 16-17, www.sco.gov.ca/Files-ARD-Local/LocRep/1011cities.pdf.

and federal aid. The study concluded that "[r]evenue and spending shifts in 2011 and 2012 continue to paint a stark fiscal picture for America's cities."[4]

If the district court's ruling were upheld, it would mean that all cities must repair and retrofit all pre-existing sidewalks to meet Rehabilitation Act disability access standards regardless of cost.[5] Tens of thousands of miles of sidewalks would have to be reconstructed with no financial assistance from the same Congress that adopted the Rehabilitation Act. Some repairs might be minimal, but others would clearly pose an undue burden.

And that is just the cost of sidewalk repair and retrofitting. In theory, the district court's ruling would apply not just to sidewalks but all public buildings, programs and services. Remediation projects would "jump the line" for funding at the expense of education, health, safety, housing, and welfare programs of at least equal importance. The already difficult task of balancing the planning and constructing of local public improvements against maintaining the large array of equally important local public programs would become exponentially more

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[4] Michael A. Pagano, et al., National League of Cities, Research Brief on America's Cities, September 2012, p. 2, www.nlc.org/Documents/Find City Solutions/Research Innovation/finance/city-fiscal-conditions-research-brief-rpt-Sep12.pdf.

[5] Cities that have constructed facilities after the adoption of the Rehabilitation Act have been able to incorporate disability access into the initial design and at reasonable cost. Repair and retrofitting, and paying for it, is exponentially more difficult and costly.

difficult, as would the basic task of financial planning, given concerns that public agencies may have about accepting, or even applying for, any form of federal financial assistance — a key component in any public entity's financial stability.

CONCLUSION

For the foregoing reasons, the League of California Cities respectfully urges the Court to hold that the City of Los Angeles may assert an undue burden defense as to sidewalks existing when section 504 of the Rehabilitation Act was adopted, as Congress must have intended.

DATED: December 26, 2013

Respectfully submitted,

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By: /s/

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LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29, Federal Rules of Appellate Procedure and Circuit Rule 29-3, the undersigned hereby certifies that:

1.This brief is accompanied by a motion for leave to file amicus curiae brief pursuant to Rule 29, Federal Rules of Appellate Procedure and Ninth Circuit Rule 29-3 and contains 1.982 words.

2.This brief complies with the type size and type face requirements of Federal Rule of Appellate Procedure 32. The brief has been prepared in proportionally spaced typeface 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C)(i), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/

9th Circuit Case Number(s) 13-56216

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