U.S. Court of Appeals Docket No. 14-17521

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IVANA KIROLA, ET AL.,

Plaintiffs and Appellants,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Defendants and Appellees

BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT AND APPELLEE THE CITY AND COUNTY OF SAN FRANCISCO

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CONSENT OF PARTIES TO FILING

Counsel for amici certifies that all parties consent to the filing of this amici brief.

STATEMENT OF INTEREST OF AMICI CURIAE[1]

Amicus League of California Cities ("the League") is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents. 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 cities and identifies those cases that have statewide or nationwide significance.

Amicus International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation of municipal

[1] Pursuant to Fed. R. App. P. Rule 29(c)(5), amici certify that no counsel for either party authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person contributed money that was intended to fund preparing or submitting the brief.

legal matters. Its mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

Amicus California State Association of Counties is a non-profit corporation. Its membership consists of all 58 California counties. The Association sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide.

These amici ("City Amici") have identified this case as a matter affecting all local government entities. City Amici therefore present this brief as friends of the Court in support of defendant and appellee City and County of San Francisco (the "City"). Beyond the issue of standing, which they will not address here, City Amici will explain why the contentions put forth by Plaintiff Ivana Kirola ("Plaintiff") and her Amici, Legal Aid Society, et al. ("Legal Aid Amici"), regarding the intent and application of the Americans With Disabilities Act and similar state statutes would overturn an unwavering line of Ninth Circuit precedent and would have a deleterious effect on the efforts of all cities

to provide meaningful access to programs and services to all their residents, including those with disabilities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff and Legal Aid Amici have no monopoly on the goal of providing disabled persons the opportunity to live full and independent lives. Public entities such as the City have moved proactively and devoted substantial economic and human resources toward reaching that goal. Indeed, the City is renowned for its progressive efforts to create a haven for all without limitation.

But it can't happen as swiftly as some might want. Cities and counties can't print money. They must also provide law enforcement, fire protection, utilities, health and welfare, aid to the homeless, and other basic services to all their residents, disabled persons included. Infrastructure demands alone are staggering, amounting to tens of billions of dollars annually in California, and Proposition 13 requires elected leaders to delicately balance limited revenues against increasing demands for services and improvements.

Nevertheless, in this case the City, which was built on famously steep hills long before recognition of the special needs of disabled persons, has moved with remarkable speed and commitment to meet those needs. As the district court found, the City initiated formal disability access programs even before the

ADA was enacted, and in many respects the City's programs exceed ADA requirements. The City's programs are currently in ADA compliance and the City is spending $670 million on further infrastructure access. *Kirola v. City and Cnty. of San Francisco*, 74 F.Supp.3d 1187, 1205 (N.D. Cal. 2014) (*Kirola*). The City's elected leaders have not ignored their constituents with disabilities. If the City's efforts are not good enough to avoid the wide-ranging judicial intervention sought by Plaintiff and her Legal Aid Amici, then nothing is.

Contrary to Plaintiff's and Legal Aid Amici's portrayal, the sky is not falling. This case does not portend the end of ADA compliance. It does not, as Legal Aid Amici warn hyperbolically, "mark[] a clear regression in disability rights protections with devastating consequences not only to the class of persons with mobility disabilities in San Francisco but to all persons with disabilities in this country." (Legal Aid Amici 29.) Nor will the district court's decision result in public entities merely making plans to comply rather than actually complying with the ADA. (Legal Aid Amici 23-24.) As the district court found in this case in great detail, the City has not merely made plans. It has responded to the ADA proactively. It has made dramatic changes, is spending hundreds of millions of dollars, has responded to complaints with alacrity, and has created a robust infrastructure to deal with ADA issues. *Kirola*, 74 F.Supp.3d at 1202-16. An

unnecessary remedy should not be imposed in one case merely because Legal Aid Amici fear such a remedy might someday be necessary in some other case.

Accordingly, City Amici respectfully urge this Court to re-affirm its well-established precedent holding that with respect to programs, while a city is required to provide access to disabled persons, that access is evaluated across the program *in its entirety*, not facility by facility. It should not be the rule, as urged by Plaintiff, that every existing facility offering a program be ADA-compliant even if disabled persons have ready access to the programs at other equivalent facilities.

City Amici also urge this Court to affirm the principle that forward-looking equitable relief under the ADA, as with all equitable relief, is a matter within the district court's discretion. Where, as here, a city has already established a remarkable and far-reaching program for accommodating disabled persons in both public programs and facilities, judicial intervention is neither necessary nor appropriate. There is no point in ordering a city to do that which it has already done and is continuing to do and certainly not in granting the broad, class-wide, budget-busting injunctive and declaratory relief sought by Plaintiff here.

ARGUMENT

I. THIS COURT SHOULD RE-AFFIRM THAT THE TEST FOR ADA COMPLIANCE IS WHETHER A PUBLIC ENTITY'S PROGRAMS, VIEWED IN THEIR ENTIRETY, PROVIDE READY ACCESS FOR DISABLED PERSONS.

A. Plaintiff And Legal Aid Amici Misconstrue The District Court's Use Of The Term "In Its Entirety."

Plaintiffs and Legal Aid Amici have misinterpreted the district court's decision. They contend that the district court created a new, draconian standard of proof for ADA violations and erroneously denied equitable relief because the court required Plaintiffs to prove they have been denied access to the City's programs and facilities in their entirety. (Plaintiff's AOB 3.) As Legal Aid Amici put it, for example, the district court supposedly required Plaintiffs "to demonstrate that no part of the City's pedestrian right of way is accessible." (Legal Aid Amici Brief 14.)

The district court did no such thing. Plaintiff has taken the court's use of the word "entirety" out of context. The court in fact applied the familiar and proper rule that a public entity's programs should not be viewed in isolated instances, facility by facility, but rather "viewed in their entirety." The court thus correctly concluded that the ADA "does not require that each individual site

at which a public service is offered be accessible, so long as the program, activity or service, 'when viewed in its entirety,' is readily accessible." *Kirola*, 74 F.Supp.3d at 1236. The court further acknowledged that the ADA "emphasizes 'program access,' which entails reviewing the program or service in its entirety, as opposed to whether every element of a facility . . . is fully accessible." *Id.* at 1238.

As we next explain, the rule that the district court actually applied is the correct rule and one that this Court has frequently and unwaveringly stated as the correct rule.

B. As The District Court Correctly Understood, This Court – Following Supreme Court Precedent And Federal Regulatory Implementation – Holds That The Measure Of ADA Compliance Is Whether A Public Entity's Programs, *Viewed In Their Entirety*, Provide Ready Access For Disabled Persons.

The ADA provides that disabled persons shall not be "excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Plaintiff would have this Court rule that a city's programs are not ADA-compliant unless every existing facility in which the city's programs are offered is ADA accessible in every aspect. In other words, Plaintiff apparently argues that even though every disabled person has ready

access to parks and recreation programs, unless every one of the City's hundreds of parks and recreation facilities is fully-accessible, the City will be declared non-compliant and judicial intervention required. (See Plaintiff's AOB 11.)

That is not the principle upon which Congress adopted the ADA, nor upon which federal regulations have been promulgated, nor that the Supreme Court has acknowledged, nor that this Court follows.

The Supreme Court states the principle this way in *Tennessee v. Lane*, 541 U.S. 509 (2004):

> [A] public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services. [28 C.F.R.] § 35.150(b)(1). Only if these measures are ineffective in achieving accessibility is the public entity required to make reasonable structural changes. *Ibid*. And in no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service. §§ 35.150(a)(2), (a)(3).

541 U.S. at 532.

This Court, too, has repeatedly held that access to programs must be distinguished from access to individual facilities. *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1215 (9th Cir. 2008). A public entity must operate each *program* so that it is readily accessible to and usable by individuals with disabilities. *Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 987 (9th Cir.

2014) (football stadium bleachers not wheel-chair accessible, but alternative similar viewing areas were provided). ADA compliance therefore "does not depend on the number of locations that are wheelchair-accessible; the central inquiry is whether the program, '"when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."'" *Bird v. Lewis & Clark Coll.*, 303 F.3d 1015, 1021 (9th Cir. 2002), quoting *Barden v. City of Sacramento*, 292 F.3d 1073, 1075-76 (9th Cir. 2002), in turn quoting 28 C.F.R. § 35.150(a).

And in *Cohen v. City of Culver City*, 754 F.3d 690 (9th Cir. 2014), this Court summarized the applicable regulations as follows:

> 28 C.F.R. § 35.150 governs existing facilities. It requires the City to operate each program, service, or activity in a manner that, viewed in its entirety, is readily accessible to and usable by persons with disabilities. 28 C.F.R. § 35.150(a). To comply with this mandate, the City may make structural changes to its existing facilities, but it need not do so if other methods, such as relocating services to different buildings, would be effective. *Id.* § 35.150(b)(1). The City must prioritize methods of compliance that enable it to provide services to disabled persons in "the most integrated setting appropriate."

754 F.3d at 696.

Schonfeld v. City of Carlsbad, 978 F.Supp. 1329 (S.D. Cal. 1997), aff'd 172 F.3d 876 (9th Cir. 1999) (*Schonfeld*), illustrates the principle. The plaintiffs complained that one of three city hall restrooms was not ADA compliant, that a library drinking fountain and elevator were inaccessible, and that limited

parking and curb ramps made access to some other city facilities difficult. *Id*. at 1337-38. The City of Carlsbad countered with evidence that those facilities nevertheless offered meaningful access to city programs with other available bathroom and parking facilities and, in addition, over $1 million was being spent on sidewalk construction and more was in the pipeline. The district court in *Schonfeld* granted the city's summary judgment motion, finding that the plaintiffs failed to offer "persuasive evidence . . . that specifically challenged facilities, when each is viewed in its entirety, discriminate against or provide inadequate access for individuals with disabilities." *Id*. at 1339. This Court affirmed. *Schonfeld*, 172 F.3d 876.

In short, contrary to Plaintiff's argument, the ADA does not require that every park and recreation facility and sidewalk corner be accessible to disabled persons in every aspect. If a program, viewed in its entirety, provides ready access, it meets ADA standards.

C. This Court Should Continue To Follow Its Precedent And Hold That The ADA Does Not Require That A Public Entity Provide Identical Access To Every Person To Every Aspect Of Every Facility; A Public Entity Satisfies The ADA If Its Programs, Viewed In Their Entirety, Provide Meaningful Access For Disabled Persons.

City Amici submit that the principle this Court has applied in ADA cases is the right and sensible one. The question is and should be whether a public

entity offers ready access to its *programs*, not perfect access to every corner of every park and recreation facility. In this case, the City has 220 parks and recreation centers and over 2,000 miles of sidewalks. Public entities simply do not have the resources to render every existing facility fully ADA-compliant at warp speed and no matter what the cost, nor does the ADA require it.

With no record citations, Legal Aid Amici dwell on access to City recreation areas, including the Japanese Tea Garden, oak groves, wetlands, bird habitats, wildflowers and free-flowing creeks. (Legal Aid Amici Brief 18-19.) They cite Department of Justice regulations supposedly for the proposition that public entities are required "to provide access to all 'particular program features' and benefits offered by multi-facility programs such the City's parks, including its unique and special destination parks which provide program benefits not available at any other parks." (Legal Aid Amici Brief 17-18.)

First of all, the district court found that Plaintiffs failed to prove their claim in this regard. *Kirola*, 74 F.Supp.3d at 1257. Second, this Court will not find such terms as "unique and special destinations" or anything like them in the ADA regulations. There is no hard and fast rule for access to recreational areas; it all depends on the circumstances. The district court found that in this case the circumstances were such that equitable relief is unwarranted. What exactly would Legal Aid Amici have the City do to make every corner of the Japanese

Tea Garden's unique windy paths and stepping stones over pools wheel-chair accessible without fundamental alterations to the very nature of the facility? Federal regulations contemplate that such a facility need not be fully ADA – compliant if it would result in fundamental alternation in the nature of the facility. 28 C.F.R. § 35.150(a)(3) ("This paragraph does not . . . [r]equire a public entity to take any action . . . that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens"). Legal Aid Amici's argument is unhelpful to a decision in this case.

Legal Aid Amici rely on voting rights cases. (Legal Aid Amici Brief 9.) But Plaintiff does not allege she has been denied equal access to voting booths nor does she assert violation of any other constitutional right. The City respects her constitutional rights. The issue here is different, whether the City has met ADA requirements. The district court found that the City has met them.

Equally unhelpful is Legal Aid Amici's novel proposal for a "neighborhood" test for ADA compliance. (Legal Aid Amici Brief 9-10.) This test finds no support in the law or reason. Legal Aid Amici do not rely on cases or regulations, but instead on a study and a law review article. The study concludes that parks promote physical well-being of persons living nearby.

(Legal Aid Amici Brief 9, n.4.)[2] That might be true, but it would be true whether or not people living nearby were disabled. It does not follow that, without saying so, Congress intended a "neighborhood" test for ADA compliance.

The law review article Legal Aid Amici cite (Legal Aid Amici Brief 9-10) is a 2005-2006 empirical study of compliance with disabled parking laws at 50 public accommodations in Maryland. It does not even mention a "neighborhood" test for ADA compliance.[3]

The illogic of a "neighborhood" test should be apparent. It would mean if a city built one library anywhere in the city, it would have to build a library in every neighborhood and make them *all* readily accessible to disabled persons. That can't be what the ADA intends, and it would only discourage or prevent cities from building libraries at all.

Not only do Legal Aid Amici fail to offer a definition of a "neighborhood," no meaningful definition would even be possible.

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[2] GEOFFREY GODBEY & ANDREW MOWEN, NATIONAL RECREATION AND PARK ASSOCIATION, THE BENEFITS OF PHYSICAL ACTIVITY PROVIDED BY PARK AND RECREATION SERVICES: THE SCIENTIFIC EVIDENCE 6 (2010).

[3] Donald H. Stone, *You Take My Space, I Take Your Air: An Empirical Study of Disabled Parking and Motor Vehicle Laws for Persons with Disabilities*, 33 Ohio N.U.L. Rev. 665, 671 (2007).

A "neighborhood" is in the eye of the beholder. It might be a few square blocks or a few square miles. How would a city know whether every "neighborhood" has an ADA-compliant park?

City Amici urge this Court to adhere to its long-standing interpretation of the ADA, the implementing regulations, and similar state statutes. This Court should do so not only because of the Ninth Circuit's rules of precedent, *U.S. v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015) ("as a three-judge panel we are bound by prior panel opinions"), but also because the interpretation is the only right and sensible one.

II. THIS COURT SHOULD AFFIRM THAT TRIAL COURTS HAVE DISCRETION TO DENY CLASS-WIDE OMNIBUS EQUITABLE RELIEF AGAINST ISOLATED DEPARTURES FROM ADA GUIDELINES THAT DO NOT THREATEN FUTURE IRREPARABLE HARM.

Plaintiff and Legal Aid Amici apparently contend that, as a matter of law, the district court had to grant equitable relief regarding the few supposedly post-ADA non-compliant new construction features that they identify in their briefs. (See Plaintiff's AOB 62; Legal Aid Amici Brief 29.)

To begin with, Plaintiff and Legal Aid Amici have again stated the facts in their own favor, disregarding the district court's adverse factual findings. The

district court found Plaintiff's witnesses unpersuasive. Her experts were untrained and unreliable. Her lay witnesses were vague on the location and severity of alleged access limitations, particularly as to recreation centers and sidewalks. The court found the contrary testimony of the City's experts more persuasive. *Kirola*, 74 F.Supp.3d at 1258.[4]

Second, Plaintiff and Legal Aid Amici again ignore the controlling legal principles. Equitable relief is never granted as a matter of right. *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987) ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"). For injunctive relief, a plaintiff must show he or she faces a real or immediate threat of substantial or irreparable injury. *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 850 (9th Cir. 2001) (*Midgett*). And, when a plaintiff seeks to enjoin a public entity, it is the "well-established rule" that courts must afford the entity the widest latitude "in the dispatch of its own internal affairs." *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976). Indeed, "one of the most important considerations governing the

[4] For example, the City's accessibility expert, William Hecker, testified "that the curb ramp installation program does comply with the ADA. . . . San Francisco is doing what the Department of Justice Technical Assistance suggests that it should do." (3ER 2789; RT 479.)

exercise of equitable power is a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990).

In *Midgett*, for example, the court denied equitable relief for isolated instances of malfunctioning lift services on a public agency's transportation system. The court explained that the agency's "practices and procedures for ensuring ADA compliance further show that Plaintiff does not face a threat of immediate irreparable harm without an injunction," and the fact that "a local governmental agency with procedures already in place for monitoring lift performance and ADA compliance militates against a federal court's mandating substitute procedures of its own design to address the same issues." 254 F.3d at 850. *Accord Romero v. Los Angeles Cnty. Metro. Transit Authority*, 596 Fed.Appx. 584, 585 (9th Cir. 2015) ("The district court did not clearly err in finding that the plaintiffs have not demonstrated a likelihood of ongoing or future irreparable injury, especially in light of the evidence of measures taken by the MTA in response to the settlement of a prior ADA lawsuit").

As the district court found, the City has complied with the ADA and has an admirable multi-faceted program for ensuring future ADA compliance. Judicial intervention is not mandated. Indeed, to intervene in this case would only encourage other lawsuits, thus diverting scarce municipal resources from ADA compliance efforts to costly and ultimately non-productive litigation.

CONCLUSION

Amici League of California Cities, International Municipal Lawyers Association, and California State Association of Counties respectfully urge this Court to reject Plaintiff's and Legal Aid Amici's attempt to rewrite existing law on ADA compliance and to require district courts to grant equitable relief where none is necessary or appropriate to facilitate continuing compliance with the ADA and similar state statutes.

Dated: April 12, 2016

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, *amici curiae* are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B), because this brief contains 3,651 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the digital submissions have been scanned for viruses with Adobe Acrobat Pro, Version 10, and according to the program are free of viruses.

Date: April 12, 2016

s/ Marc J. Poster

Marc J. Poster

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2016, I electronically filed the foregoing BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT AND APPELLEE THE CITY AND COUNTY OF SAN FRANCISCO with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all the participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: April 12, 2016

/s/ Rebecca E. Nieto
Rebecca E. Nieto