Case No. 21-15621

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.

Appeal from the United States District Court,
Northern District of California
Case No. C 07-03685-SBA
Hon. Saundra Brown Armstrong

BRIEF OF DISABILITY RIGHTS EDUCATION AND DEFENSE FUND AND NINETEEN OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL, REMAND AND REASSIGNMENT

Claudia Center, Legal Director, SBN 158255
Michelle Uzeta, Of Counsel, SBN 164402*
Disability Rights Education & Defense Fund
3075 Adeline Street, Suite 210
Berkeley, CA 94703
Email: muzeta@dredf.org
Tel: 510.644.2555

*Counsel of record. *This brief is filed using the CM/ECF account for Michelle Uzeta, Law Office of Michelle Uzeta, michelle@uzetalaw.com, as the Ninth Circuit CM/ECF system does not permit separate accounts for separate affiliations.*

FULL LIST OF AMICI CURIAE

1. Disability Rights Education and Defense Fund
2. American Association of People with Disabilities
3. The Arc of the United States
4. Civil Rights Education and Defense Fund
5. The Coelho Center for Disability Law, Policy and Innovation
6. Communication First
7. Disability Rights Advocates
8. Disability Rights Bar Association
9. Disability Rights California
10. Disability Rights Legal Center
11. Disability Voices United
12. Learning Rights Law Center
13. Impact Fund
14. National Association of the Deaf
15. National Disability Rights Network
16. National Federation of the Blind Inc.
17. National Federation of the Blind of California Inc.
18. Public Interest Law Project
19. United Spinal Association

20. Washington Civil and Disability Advocate

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Congressional Materials

Rules

Other Authorities

CONSENT OF THE PARTIES TO THE FILING FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(2)

This motion is filed with the consent of Guy B. Wallace, counsel for Plaintiffs-Appellants, and James M. Emery, counsel for Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* certifies that no *Amici* has a parent corporation and that no publicly held corporation owns 10 percent or more of any *Amici's* respective stock.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

The undersigned certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or any other person other than *Amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief.

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici are organizations that represent and advocate for the rights of people with disabilities. *Amici* have extensive policy and litigation experience and are recognized for their expertise in the interpretation of civil rights laws affecting

individuals with disabilities including the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, and Section 504 of the Rehabilitation Act, ("Section 504"), 29 U.S.C. § 794. Collectively and individually, *Amici* have a strong interest in ensuring that the ADA is properly interpreted and enforced, consistent with Congress's remedial intent to eliminate discrimination and address segregation and exclusion.

Given these strong interests, the March 12, 2021, Order of the Honorable Saundra Brown Armstrong granting the Defendants' Motion for Judgment ("Order") is of significant concern to *Amici*. The Order incorrectly calculates the statute of limitations for Title II claims, minimizes the importance of disability access and compliance with the ADAAG, ignores well-established regulatory requirements, and evaluates the plaintiff class's entitlement to injunctive relief in a manner that runs afoul of the goals the ADA.

The experience, expertise, and unique perspective of *Amici* make then particularly well suited to assist this Court in resolving the important legal issues presented in this case.

The individual *Amici* are described in the attached Addendum.

ISSUES PRESENTED AND STATEMENT OF THE CASE

Amici incorporate by reference the Issues Presented and Statement of the Case in the Brief for Plaintiffs-Appellants ("Plaintiffs").

SUMMARY OF ARGUMENT

The ADA was passed by Congress in 1990, and ushered in a new era of civil rights, by acknowledging and seeking to end the discrimination encountered by individuals with disabilities. "In studying the need for such legislation, Congress found that 'historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.'" *PGA Tour, Inc. v. Martin,* 532 U.S. 661, 674–75 (2001) (quoting 42 U.S.C. § 12101(a)(2)). Congress also found that "discrimination against individuals with disabilities persists in such critical areas as . . . recreation . . . and access to public services" and that the various forms of discrimination encountered includes "the discriminatory effects of architectural . . . barriers, . . . failure to make modifications to existing facilities and practices, . . . and relegation to lesser services, programs, activities, benefits, . . . or other opportunities." 42 U.S.C. § 12101(a)(3) and (5). This discrimination, exemplified in exclusion, segregation, physical barriers, and relegation to lesser services, was found to have placed

individuals with disabilities at a disadvantage and inferior status in society. *Id.* § 12101(a)(5)-(6).

Congress also recognized that "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination." *Id.* § 12101(a)(4).

In response to these findings, the far-reaching purpose of the ADA was pronounced boldly and unequivocally by Congress: "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.* § 12101(b)(1)-(2). *See also, PGA Tour, Inc. v. Martin*, 532 U.S. at 674 ("Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals.") Thus, Congress' intent was not only to codify the rights of people with disabilities, but also to promote inclusion and end discrimination as a result of strong enforcement of the statute. H.R. REP. No. 101-485, 40, 1990 U.S.C.C.A.N. 303, 322 ("the rights guaranteed by the ADA are meaningless without effective enforcement provisions.")

As a "remedial statute, designed to eliminate discrimination against the disabled in all facets of society," the ADA "must be broadly construed to

effectuate its purposes." *Kinney v. Yerusalim*, 812 F. Supp. 547, 551 (E.D. Pa). *See also, Noel v. New York City Taxi & Limousine Comm'n*, 687 F.3d 63, 68 (2d Cir. 2012) ("As a remedial statute, the ADA must be broadly construed to effectuate its purpose" of providing "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"); *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014) (Courts "construe the language of the ADA broadly to advance its remedial purpose."). In this matter, the Order of the district court frustrates the ADA's remedial purposes in ways that are of significant concern to the disability rights community. First, the court interprets the statute of limitations for Plaintiffs' Title II claims incorrectly, by failing to apply the appropriate accrual date and incorrectly applying the continuing violations doctrine. Second, the court downplays the importance of disability access and compliance with ADAAG, frustrating the goals and objectives of the ADA. Third, the court disregards the City's regulatory obligation to install ADAAG complaint curb ramps when resurfacing streets. Fourth, despite confirming numerous ADAAG violations in the City's facilities, the court refuses to order injunctive relief, citing, in part, to the City's vague, uncertain, and unenforceable transition plan. If permitted to stand, this Order will compound the discrimination to which Plaintiffs have been subjected, encourage non-compliance with accessibility standards, and chill private enforcement for years to come.

ARGUMENT

I. The District Court Incorrectly Calculated the Date Upon Which Plaintiffs' ADA Claims Accrued.

The Ninth Circuit has recognized a three-year statute of limitations for claims asserted under Title II of the ADA. *Sharkey v. O'Neal*, 778 F.3d 767 (9th Cir. 2015). Although the district court properly acknowledged this three-year window, it erred in calculating the date upon which Plaintiffs' claims regarding the City's inaccessible curb ramps accrued. Specifically, the district court failed to apply the appropriate accrual date and incorrectly applied the continuing violations doctrine. If permitted to stand, the district court's Order sets a precedent that frustrates the purposes of the ADA and prolongs the injustice and injury experienced Plaintiffs due to the City's construction, operation, and maintenance of inaccessible public facilities.

A. Failure to Apply the Appropriate Accrual Date.

The Ninth Circuit has acknowledged that the statute of limitations runs from *each encounter* the disabled person has with the unlawful barrier. In *Pickern v. Holiday Quality Foods*, 293 F.3d 1133 (9th Cir. 2002), the Ninth Circuit reversed the district court's dismissal on statute of limitations grounds of a wheelchair user's challenge to physical barriers at a place of public accommodation. The appellate court rejected the defendant's argument that the statute of limitations began to run when the disabled patron first became aware of the barrier, noting the

plaintiff stated that barriers deterred him from entering the store just before filing suit. "So long as the discriminatory conditions continue, and so long as a plaintiff is aware of them and remains deterred, the injury under the ADA continues." *Id*. at 1137.

Similarly, in *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC,* 753 F.3d 862 (9th Cir. 2014), the Ninth Circuit rejected the defendants' argument that the statute of limitations began to run the first time the deaf plaintiffs were denied an interpreter, ruling instead that a new claim accrued with each denial. "Even if the alleged violations were the result of a discriminatory policy, that would not render the Ervines' claims for discrete discriminatory acts untimely. … [E]ach and every discrete discriminatory act causes a new claim to accrue under Section 504 of the Rehabilitation Act[.]" *Id.* at 871.

The Tenth Circuit reached the same conclusion in *Hamer v. City of Trinidad*, 924 F.3d 1093 (10th Cir. 2019), a case factually similar to the instant appeal. In *Hamer*, the Tenth Circuit undertook an analysis of the plain language of Title II of the ADA, Supreme Court jurisprudence interpreting Title II, and Congress's express statutory purposes in enacting the ADA in holding that "each time a qualified individual with a disability encounters or 'actually become[s] aware of' a non-compliant service, program, or activity 'and is thereby deterred' from utilizing that service, program, or activity, he or she suffers discrimination and a cognizable

injury," starting the statute of limitations anew. *Id*. at 1107 (citing and quoting from *Pickern*, 293 F.3d at 1136-37). As the Circuit explained:

> [A] public entity repeatedly violates [Title II and Section 504] *each day* that it fails to remedy a non-compliant service, program, or activity. ... [A] qualified individual with a disability is excluded from the participation in, denied the benefits of, and subjected to discrimination under the service, program, or activity *each day* that she is deterred from utilizing it due to its non-compliance. She stops suffering a daily injury only when the public entity remedies the non-compliant service, program, or activity or when she no longer evinces an intent to utilize it.

Id. at 1103 (emphasis added).

Textually, the Circuit concluded that the statute's present-tense formulation —individuals may not "*be excluded*" or "*be denied*" or "*be subjected*"— suggests that the law targets an individual's current experience of discrimination rather than a public entity's past discriminatory act. *Id*. at 1104. *See also, Guy v. LeBlanc*, No. 18-223, 2019 WL 4131093, at *4 (M.D. La. Aug. 29, 2019) (citing *Hamer* and finding that Congress's use of the present tense in Title II of the ADA "suggests that a new claim accrued on each day the [defendant] failed to correct a non-compliant service, program, or activity").

As to context, the Circuit looked to the purpose of Title II of the ADA, which, the Supreme Court has confirmed, imposes "an affirmative obligation to accommodate persons with disabilities." *Tennessee v. Lane*, 541 U.S. 509, 533 (2004). This "duty to accommodate," the Circuit reasoned, "clearly and

unambiguously conveys that a non-compliant service, program, or activity gives rise to repeated violations." *Hamer*, 924 F.3d at 1105.

The statutory text of Title II and the Supreme Court's pronouncements examined in *Hamer* make one thing clear: Congress did not design the ADA so that a public entity could forever prevent a qualified individual with a disability from utilizing a service, program, or activity. Yet, by characterizing Plaintiffs' claim as merely "the continuing impact from the City's former policy of installing curb ramp lips" (1-ER-17), the district court's Order commands exactly such a result.

According to the district court, Title II's statute of limitations forever bars Plaintiffs from being able to challenge barriers constructed or altered more than three years before the filing of this action, despite the continuing impact of those barriers and notwithstanding the City's affirmative and ongoing duties to avoid discrimination under Title II.[1] The district court's reasoning, if allowed to stand, would prevent any person with a disability from challenging any facility (or portion of a facility) newly constructed or altered after January 26, 1992 in

[1] Including the duty to ensure that new construction and alterations commenced after January 26, 1992, be readily accessible to and usable by individuals with disabilities; the duty to maintain in operable working condition those features of facilities that are required to be readily accessible to and usable by persons with disabilities; and the duty to remediate noncomplying new construction and alterations. 28 C.F.R. § 35.151; 28 C.F.R. § 35.133; 28 C.F.R. § 35.151(c)(5).

violation of applicable accessibility standards unless it was newly constructed or altered within the three years preceding the challenge. The fact that barriers constructed or altered outside of that three-year window but after January 26, 1992, cause qualified individuals with disabilities to presently *"be excluded"* from participation, *"be denied"* benefits, services, or access to programs or activities, and/or *"be subjected"* to discrimination would be considered immaterial. Such a proposition simply cannot fit within the language, structure, and remedial purpose of the ADA. *See, Hamer*, 924 F.3d at 1107 (10th Cir. 2019).

B. Incorrect Application of the "Continuing Violation" Doctrine.

In addition to being timely under an appropriate accrual analysis, Plaintiffs' claims are timely under a traditional "continuing violation" theory. Where failure to comply with access standards constitutes a continuing violation, either due to "serial" or "systemic" violations, the statute of limitations does not commence until the discriminatory conditions cease. *See, e.g.*, *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 822 (9th Cir. 2001). Here, the evidence shows that the City has a current policy and practice of "failing to maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities" *and* failing to remediate noncomplying new construction and alterations, violating both 28 C.F.R. § 35.133 and 28 C.F.R. § 35.151(c)(5). The factual record in this case, discussed in detail in

Plaintiffs' Opening Brief, shows that the City resurfaced streets after January 26, 1992, triggering the obligation to provide ADAAG-compliant curb ramps.[2] *See, Kinney v. Yerusalim*, 9 F.3d 1067, 1075 (3d Cir. 1993); 28 C.F.R. § 35.151(i). The City's failure to install, remediate and maintain these curb ramps so they are "readily accessible to and useable by persons with disabilities" by allowing excessively high lips and other inaccessible conditions to persist is a current, and ongoing, discriminatory policy. So long as this policy exists, the injury to Plaintiffs continues. *Pickern*, 293 F.3d at 1137.

II. The District Court's Trivialization of the Importance of ADAAG Compliance in Newly Constructed and Altered Facilities Reflects Ableism and Frustrates the Goals and Objectives of the ADA.

The district court has minimized Plaintiffs' claims and the importance of access to public facilities for disabled people throughout this litigation. In its Order on Defendant's Motion for Judgment, the district court downplayed the City's widespread non-compliance with accessibility standards, characterizing them as "accessibility challenges," and described the widespread barriers encountered by Plaintiffs as "imperfections." (1-ER-54). The District Court also disregarded ADAAG violations confirmed to exist in the City's libraries and denied relief regarding the same because "[t]here are hundreds if not thousands, of measurements specified in ADAAG that govern restrooms and buildings,

[2] Opening Brief, ECF No. 11-2, 57-63. *See also*, Section III, *infra*.

respectively." (*Id*.) The district court's indifference towards Plaintiffs' federally protected rights and the impact inaccessible facilities have on the daily lives of disabled people, reflect ableism and set an improper precedent.[3]

A. Ensuring the Physical Accessibility of Public Facilities is One of the Most Critical and Uncompromising Purposes of the ADA.

Congress enacted the ADA on the premise that discrimination against people with disabilities is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Cohen*, 754 F.3d at 694 (citing *Alexander v. Choate*, 469 U.S. 287, 295 (1985)). Accordingly, as this Court has recognized, the ADA proscribes not only "obviously exclusionary conduct," but also "more subtle forms of discrimination — such as difficult-to-navigate restrooms and hard-to-open doors — that interfere with disabled individuals' full and equal enjoyment" of public places and accommodations. *Id.* at 694 (citing *Chapman v. Pier 1 Imps. (U.S.) Inc*., 631 F.3d 939, 945 (9th Cir. 2011)).

This Court previously decried the district court for "improperly criticiz[ing] Kirola's experts because they 'dwelled on minor variations,' rather than 'focusing

[3] On the meaning of "ableist" and "ableism," *see*, *Dan Goodley*, Dis/Ability Studies: Theorizing Disablism and Ablism 21 (2014) (explaining that ableism "privileges able-bodiedness; promotes smooth forms of personhood and smooth health; creates space fit for normative citizens; encourages an institutional bias towards autonomous, independent bodies; and lends support to economic and material dependence on neoliberal and hyper-capitalist forms of production").

on overall accessibility'" when "avoiding 'minor variations' is exactly what ADAAG requires of new or altered facilities." *Kirola v. City & Cty. of San Francisco ("Kirola II"),* 860 F.3d 1164, 1181 (9th Cir. 2017). Ensuring the accessibility of newly constructed and altered facilities through enforcement of ADAAG's minimum guidelines is one of the most critical and uncompromising purposes of the ADA. Plaintiffs' claims must be considered within this important context.

B. The ADAAG are the "Minimum Guidelines" for Accessible Design Under Title II of the ADA.

Congress empowered the Architectural and Transportation Barriers Compliance Board ("the Board"), an independent federal agency,[4] to issue "minimum guidelines" for accessible design for Titles II and Title III of the ADA. 42 U.S.C. § 12204(a). Congress was clear that it intended "a high degree of convenient accessibility" and that minimum guidelines do not mean "minimal accessibility." 56 Fed. Reg. 35408, 35411 (July 26, 1991) (citing H.R. REP. 101-485, 118, 1990 U.S.C.C.A.N. 303, 401). The guidelines the Board developed in response to this Congressional mandate were the ADAAG; issued simultaneously with the adoption of the Title II regulations by the Department of Justice ("DOJ")

[4] 29 U.S.C. § 792(a)(1).

in 1991.[5] *Id.* at 35694; 28 C.F.R. Part 36, App. D. In 2004, the Access Board completed a comprehensive update of the 1991 ADAAG, which the DOJ adopted in 2010. *See*, 28 C.F.R. Part. 36, App. B. These constitute the Department's regulations for compliance with Titles II and III of the ADA and "establish a national standard for minimum levels of accessibility in all new facilities." *Chapman*, 631 F.3d at 945 (citing *Indep. Living Res. v. Or. Arena Corp.*, 982 F.Supp. 698, 714 (D.Or.1997)).

"The ADAAG is a comprehensive set of structural guidelines that articulates detailed design requirements to accommodate persons with disabilities." *Daubert v. Lindsay Unified School Dist.*, 760 F.3d 982, 986 (9th Cir. 2014). It sets forth the *minimum requirements* – both scoping and technical - for newly designed and constructed or altered State and local government facilities to be readily accessible to and usable by individuals with disabilities.[6] 28 C.F.R. Part 36, App. A. Accordingly, this Court has held that "obedience to the spirit of the ADA" does not excuse noncompliance with the ADAAG's requirements. *See*, *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 923 (9th Cir.2001). "The ADAAG's requirements are as precise as they are thorough, and the difference between compliance and

[5] The Department of Justice was charged with promulgating regulations consistent with the Board's minimum guidelines. 42 U.S.C. 12134(c); 42 U.S.C. § 12186(c).
[6] That the ADAAG is intended to be the "minimums" desired by Congress is well documented. *See*, 56 Fed. Reg. 35408, 35411 (July 26, 1991); 63 Fed. Reg. 2000 (Jan. 13, 1998); 69 Fed. Reg. 44084 (July 23, 2004).

noncompliance with the standard of full and equal enjoyment established by the ADA is often a matter of inches." *Chapman*, 631 F.3d at 945-46.

In light of this Congressional history, the barriers resulting from the City's non-compliance with ADAAG – particularly the barriers to the sidewalks and curbs – can hardly be characterized "minor" or mere "inconveniences." "Obstructed sidewalks exclude disabled persons from ordinary communal life and force them to risk serious injury to undertake daily activities. This is precisely the sort of 'subtle' discrimination stemming from 'thoughtlessness and indifference' that the ADA aims to abolish." *Cohen*, 754 F.3d at 700 (quoting *Chapman*, 631 F.3d at 944-45).

C. Ensuring that Newly Constructed and Altered Public Facilities Comply with the ADAAG is Essential to Effectuating the Remedial Purposes of the ADA.

Title II's general rule is "no qualified individual with a disability shall, by reason of such disability, 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. It is well established in this Circuit that "[a]n individual is excluded from participation in or denied the benefits of a public program [in violation of the ADA] if 'a public entity's facilities are inaccessible to or unusable by individuals with disabilities.'" *Daubert*, 760 F.3d at 987 (quoting 28 C.F.R. § 35.149). *See also, Barden v. City of Sacramento*,

292 F.3d 1073, 1075 (9th Cir.2002) ("[o]ne form of prohibited discrimination is the exclusion from a public entity's services, programs, or activities because of the inaccessibility of the entity's facilit[ies].")

"In defining accessibility, Title II's implementing regulations distinguish between newly constructed or altered facilities, which are covered by 28 C.F.R. § 35.151, and existing facilities, which are covered by 28 C.F.R. § 35.150." *Daubert*, 760 F.3d at 985.

For services, programs, and activities that take place in existing facilities, the public entity must "operate each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). The public entity does not, however, have to make "each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(1). The regulations allow public entities to utilize a variety of methods to render existing facilities "readily accessible," including the "reassignment of services to accessible buildings" and the "delivery of services at alternate accessible sites," among others. *Id.* § 35.150(b); *see also, Tennessee v. Lane*, 541 U.S. at 511 ("Title II does not require States to employ any and all means to make ... services accessible or to compromise essential eligibility criteria for public programs. It requires only 'reasonable modifications' that would not fundamentally alter the nature of the

service provided, and only when the individual seeking modifications is otherwise eligible for the service.").

The obligations imposed by the regulations on new construction and alterations are considerably more demanding. *See*, 28 C.F.R. § 35.151. New construction must fully comply with ADA Accessibility Standards unless the public entity can demonstrate it would be "structurally impracticable" to do so. *Id.* § 35.151(a)(2). Alterations that affect or could affect the usability of all or part of an existing facility must comply with those standards "to the maximum extent feasible." *Id.* § 35.151(b)(1).

The distinction between existing facilities and new construction and alterations "was intended to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how best to make access available." *See, Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000). The regulations emphasize that "[a] public entity is not required to make structural changes in existing facilities where other methods are effective in achieving compliance." 28 C.F.R. § 35.150(b)(1). As the Supreme Court has acknowledged, for older facilities "structural change is likely to be more difficult." *Tennessee v. Lane*, 541 U.S. at 532. *See also,* Earl B. Slavitt & Donna J. Pugh, *Accessibility Under the Americans with Disabilities Act and Other Laws: A Guide to Enforcement and Compliance* 53–54 (2000); 28 C.F.R. Part 35, App. A § 35.150

(under Title II, "the concept of program access will continue to apply with respect to facilities now in existence, because the cost of retrofitting existing facilities is often prohibitive"). Thus, these different obligations represent an important regulatory compromise that must be respected and enforced: public entities are not required to retrofit existing facilities if there are less costly ways in which to provide access, and so long as facilities constructed or altered after January 26, 1992, are built to be accessible.

III. Evidence of Street Resurfacing after January 26, 1992 is Sufficient to Satisfy the Threshold Burden of Showing that Adjacent Curbs are Subject to the ADAAG.

Amici do not wish to repeat the arguments made in Plaintiffs' Opening Brief pertaining to factual errors made by the district court. However, *Amici* do want to briefly one very specific error: the district court's failure to acknowledge the City's obligation to install ADAAG compliant curb ramps when resurfacing streets after January 26, 1992, and related failure to recognize how evidence of such resurfacing within the statutory period demonstrates this obligation without regard to the construction or alteration date of the adjacent curb ramps.

Since January 26, 1992, the ADA has required public entities to install curb ramps when constructing or altering streets. *See*, 28 C.F.R. § 35.151(i)(1) ("Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a

street level pedestrian walkway.") A street is "altered" when it is resurfaced. *Kinney*, 9 F.3d at 1075. *See also,* Disability Rights Section, Civ. Rights Div., United States Dep't of Justice & United States Dep't of Transp., Fed. Highway Admin, *Joint Technical Assistance on the Title II of the Americans with Disabilities Act Requirements to Provide Curb Ramps when Streets, Roads, or Highways are Altered Through Resurfacing*, https://www.ada.gov/doj-fhwa-ta.htm (last modified on July 8, 2013). Thus, when a city resurfaces its streets, it is required to install curb ramps adjacent to those streets that comply with ADAAG. *Id. See also,* 28 C.F.R. § 35.151(a)(1), (b)(1) (when a public entity resurfaces a street, it must "design[ ] and construct[curb ramps] in such manner that [they are] readily accessible to and usable by individuals with disabilities," but only "to the maximum extent feasible.").

Here, Plaintiffs' geographic information systems expert Erich Seamon conducted a review of the City's 2011 Curb Ramp Information System ("CRIS") and repaving data and found that on streets resurfaced *after* January 26, 1992: (1) 4,262 curb ramps had excessive slopes violating ADAAG; (2) 1,152 curb ramps had excessive lips violating ADAAG; (3) 1,667 curb ramps did not have a top level landing in violation of ADAAG, and (4) 2,236 curb ramps had no bottom level

landing in violation of ADAAG. (3-ER-5).[7] This testimony was supported by the City's witnesses. *See, e.g.*, testimony of Ken Spielman, Project Manager for the City's Department of Public Works. (10-ER-2499-2501) (admitting that the City did not install curb ramps in compliance with ADAAG when repaving portions of Geary Boulevard in 2003).

Evidence that a curb ramp is adjacent to a street resurfaced *after* January 26, 1992, is sufficient to establish that the curb ramp should comply with ADAAG. *See, Kinney*, 9 F.3d at 1075 (requiring the installation of ADAAG compliant curb ramps when resurfacing streets after January 26, 1992) and *Kirola II*, 860 F.3d at 1182 (holding that curb ramps constructed or altered after January 26, 1992, are "within ADAAG's purview"). Despite this fact, the district court inexplicably determined that Plaintiffs had "failed to satisfy the threshold burden of showing that the curb ramps examined are subject to ADAAG." (1-ER-19). This is reversable error. When a street has been resurfaced after January 26, 1992, the accompanying curb ramps must comply with ADAAG as a matter of law and is alone sufficient to trigger ADAAG applicability. An ADA plaintiff should not be burdened with having to separately establish the specific date that the curb ramp was installed or altered; that is nothing more than superfluous information.

[7] This testimony was also incorrectly attributed by the district court to another of Plaintiffs' experts, Jeffrey Scott Mastin. (1-ER-18-19). *See also*, Opening Brief, 5ECF No. 11-2, 58.

IV. The District Court's Failure to Order Injunctive Relief was Improperly Based on the City's Transition Plan and will Both Chill Private Enforcement and Deter Voluntary Compliance.

A. Injunctive Relief is the Primary Mechanism for Redressing Violations of the ADA.

The ADA is unique amongst federal antidiscrimination statutes in that it provides a means to restructure the physical environment of public facilities to make such facilities readily accessible to and useable by people with disabilities – that is, injunctive relief. This statutory remedy is a critical component of Title II of the ADA, and a driving force behind private enforcement.

Upon establishing a violation of Title's accessibility provisions, an aggrieved party is entitled to seek an order of injunctive relief – including barrier removal. 42 U.S.C. § 12133.[8] The availability of compensatory damages requires a showing of "deliberate indifference" or another form of intentional discrimination[9],

[8] By statute, the remedies for violations of the ADA, 42 U.S.C. § 12133, are linked to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, and include injunctive relief. The remedies under both statutes are to be construed similarly. *Ferguson v. City of Phoenix*, 157 F.3d 668, 673 (9th Cir. 1998), *as amended* (Oct. 8, 1998).

[9] *See, e.g., Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001) (requiring that plaintiffs show deliberate indifference to support compensatory damages). *See also*, Matthew D. Taggart, *Title II of the Americans with Disabilities Act After Garrett: Defective Abrogation of Sovereign Immunity and Its Remedial Impact*, 91 Calif. L. Rev. 827, 865 n.216 (2003) (collecting cases in which courts have held that intentional discrimination is required for collecting compensatory damages under Title II).

making injunctive relief the primary, and most effective mechanism for redressing violations of the statute.

B. The District Court Erred in Relying on the City's Transition Plan as a Basis for Denying Plaintiffs' Claim for Injunctive Relief.[10]

The district court's reliance on the City's transition plan in denying Plaintiffs' request for injunctive relief was improper. The district court wrongly determined that remediation of the violations of long-standing accessibility requirements is an issue that "lies with the City's Transition Plan or the City's maintenance or grievance procedures." (1-ER-17). For the reasons set forth below, the City's transition plan cannot be deemed a sufficient response to the harms experienced by Plaintiffs resulting from the City's non-compliant newly constructed and altered curb ramps. Injunctive relief is necessary.

The structure and language of the Title II regulations make clear that an entities' transition plan need only address barriers in "existing" facilities. *Compare* 28 C.F.R. § 35.150 *with* 28 C.F.R. § 35.151. The transition plan is a means of ensuring program accessibility for such facilities, a less stringent standard of accessibility than that applicable to new construction and alterations. *Id. See also,* discussion at Section II. B, *supra.* Consistent with this purpose, the City's current

[10] The district court is alleged to have made multiple errors of fact and law in analyzing Plaintiffs' entitlement to injunctive relief. These errors are dealt with comprehensively in the Opening Brief of Plaintiffs-Appellants.

Americans with Disabilities Act Transition Plan for Curb Ramps and Sidewalks ("Curb Ramp Transition Plan") provides:

> "Given a program as broad and comprehensive as a curb ramp program, the City will follow the concept of Program Access under Title II of the ADA. ... Program Access does not necessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities, as long as the program as a whole is accessible. **Under this concept, the City may choose not to install curb ramps at some locations (or to install them as a lower priority later), as long as a reasonable path of travel is available even without those curb ramps.**

(18-ER-4813) (Emphasis added). This Plan "reflects [the] current policies and programs" of the City. (18-ER-4799). If the City is permitted to simply comply with the less stringent program access standards for existing facilities as reflected in its Curb Ramp Transition Plan, the non-compliant newly constructed and altered curb ramps complained of by Plaintiffs may never be remediated.

Additionally, reliance on a public entity's transition plan would inject untenable uncertainty and delay into compliance with new construction and alteration requirements. The implementing regulations give priority to walkways serving state and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas. 28 C.F.R. § 35.150(d)(2). This means that if the City's non-compliant newly constructed or altered curb ramps are located at intersections falling outside of these priority areas, they may not be prioritized for remediation for years, if at all.

This uncertainty is amplified by the fact that the City ranks curb ramps for remediation within these location-based priority areas based on its own internal scoring system. Curb ramps deemed "safe" according to this scoring system are set as the "last and lowest priority for replacement," even if they fail to meet accessibility standards. (18-ER-4810). Ramps with excessively high lips -such as those identified by Plaintiffs- that are otherwise in good condition, will fall in this "last and lowest" category despite presenting ongoing barriers and dangers to wheelchair users.[11]

The City's Curb Ramp Transition Plan is also subject to budget restrictions and changes in funding priorities, whereas there is no "undue burden" defense to the requirement that newly constructed and altered curb ramps comply with the ADA's accessibility standards. *See, Willits v. City of Los Angeles*, 925 F. Supp. 2d 1089, 1094 (C.D. Cal. 2013) ("Title II of the ADA provides an undue financial burden defense for facilities already in existence as of January 26, 1992, **but not for facilities constructed or altered after that date**. 28 C.F.R. § 35.150.") (Emphasis added.). This is noteworthy. The City's Curb Ramp Transition Plan relies on "significant funding and commitments from the City's 10 Year Capital

[11] Regardless how excessively high the lip is (e.g., 1 inch or 5 inches), the City's scoring system only deducts 5 of 100 possible points for a high lip. A curb ramp is considered "safe" with a score of 95; only ramps with a score of 75 or lower are prioritized and planned for repair. (6-ER-1474-75; 7-ER-1682; 17-ER-4578).

Plan." (18-ER-4798). The Capital Plan "recommends" (rather than guarantees) funding related to curb ramp installation and repair under both its Renewal Program and Enhancement Projects, but expressly acknowledges that "extraordinary circumstances due to COVID-19 may make [this funding] challenging." City and County of San Francisco, *FY2022-31 Capital Plan*, 159, 165, https://www.onesanfrancisco.org/the-plan-2022/overview (last accessed on April 24, 2022).[12]

In addition to, or perhaps because of, the above-described prioritization framework and funding uncertainties, the City's Curb Ramp Transition Plan does not contain any specific deadlines for completion, a fact the district court itself has acknowledged. *See, Kirola v. City & Cty. of San Francisco*, 74 F. Supp. 3d 1187, 1243 (N.D. Cal. 2014) ("the City's curb ramp transition plan does not contain a specific deadline for completion"). Thus, the promise of timely and complete relief via the City's Transition Plan is nothing more than illusory. And as the legal maxim goes, "justice delayed is justice denied."

[12] Under Fed. R. Civ. P. 201, courts can take judicial notice of "[p]ublic records and government documents available from reliable sources on the Internet," such as websites run by governmental agencies. *See, Daniels–Hall v. National Education Association*, 629 F.3d 992, 999 (9th Cir. 2010).

Finally, the City's Curb Ramp Transition Plan is not enforceable. This Court has held that there is no private right of action to enforce the transition plan regulation of the ADA. *Lonberg v. City of Riverside*, 571 F.3d 846, 851 (9th Cir. 2009) ("nothing in the language of § 202 indicates that a disabled person's remedy for the denial of meaningful access lies in the private enforcement of section 35.150(d)'s detailed transition plan requirements").

C. Limiting the Availability of Injunctive Relief will Encourage Non-Compliance with ADAAG and Chill the Private Enforcement Upon Which the ADA Heavily Relies.

Congress chose to make private enforcement "the primary method of obtaining compliance with the [ADA]." *Doran v. 7-Eleven, Inc*., 524 F.3d 1034, 1039-40 (9th Cir. 2008) (quoting *Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 209 (1972)); *see also*, 42 U.S.C. § 12133 (providing private right of action for injunctive relief and compensatory damages against public entities that violate Title II of the ADA). Understandably so, as "the ADA regulates more than 600,000 businesses, 5 million places of public accommodation, and 80,000 units of state and local government."[13] The pace of government litigation cannot keep up with this broad reach. *See*, Samuel Bagenstos, *The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation*, 54 UCLA L. Rev. 1, 9-10

[13] Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 Law & Soc'y Rev. 493, 499-500 (2006).

(2006) (noting that government enforcement resources are limited, and the DOJ disability rights enforcement unit is understaffed). The Attorney General clearly does not have the resources to take on each and every accessibility violation. *See*, Adam A. Milani, *Wheelchair Users Who Lack "Standing": Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA*, 39 Wake Forest L. Rev. 69, 110-13 (2004) (describing factors limiting the ability of the Attorney General to bring enforcement actions under Title II and III of the ADA). Public enforcement of Title II suffers from factors including a lack of staff, *see*, Bagenstos, *supra* at 9, lack of resources, *see*, Michael Waterstone, *A New Vision of Public Enforcement*, 92 Minn. L. Rev. 434, 436, 450-451 (2007), and the fact that the political environment at any one time often dictates the amount of effort the Department of Justice invests in civil rights enforcement, *id*., at 436. Simply stated, without private litigants, the ADA's promise of equality and inclusion would be nothing more than a lofty dream.

Despite Congressional intent to facilitate private enforcement and create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1)-(2), ADA access cases brought under Title II are inherently risky and difficult for the private bar to bring. In addition to the limitations on obtaining damage remedies, mentioned above in Section IV.A., there is a risk related to the ability to recover attorneys' fees, *see*,

Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res., 532 U.S. 598 (2001), and adjudication of such cases often takes years and extensive resources.[14] As a result of these risks and hurdles, the ADA is a chronically under-enforced statute. *See,* Michael Waterstone, *The Untold Story of the Rest of the Americans with Disabilities Act,* 58 Vand. L. Rev. 1807, 1854 (2005) (arguing that "[c]ombined with survey data and other social science research showing that people with disabilities are still at the margins of society in areas covered by Titles II and III, these low numbers demonstrate under-enforcement of these Titles ... [and] demonstrated noncompliance."); Ruth Colker, *The Disability Pendulum: The First Decade of the Americans with Disabilities Act*, 188 (2005). Most private plaintiffs are not willing to stick-out the litigation process with mere hope for a favorable ruling. National Council on Disability, *Implementation of the ADA: Challenges, Best Practices and New Opportunities for Success* 169 (2007) ("Few civil rights plaintiffs, no matter how self-motivated and justified by circumstances, have sufficient resources of time, money, and specialized training to successfully bring and maintain a federal lawsuit by themselves.") Indeed, this action was filed some 14 years ago, has been incredibly hard fought – including two appeals – and, despite Plaintiffs having established multiple violations of accessibility standards the district court has still denied them

[14] *See*, *e.g.*, the cases listed at note 15, *infra.*

any and all relief. If courts are permitted to further reduce or weaken the strong incentives for private enforcement that do exist – like the promise of mandatory injunctive relief upon establishment of violations of long-standing accessibility standards – the result will inevitably be less private enforcement of the ADA.

The district court's approach to the legal issues in this case will deter, if not prevent, people with disabilities and their counsel from bringing and obtaining relief in these important, meritorious civil rights cases against public entities. This, in turn, will lead to less enforcement, less access, and less integration.

It is essential to keep in mind that the ADA was enacted, and the requirements for new construction and alterations adopted, *over 30 years ago*. The City is presumed to have had notice of its obligations throughout this time. *Duvall v. Cty. of Kitsap*, *supra* note 10, at 1139 ("When the plaintiff has alerted the public entity to his need for accommodation ***(or where the need for accommodation is obvious, or required by statute or regulation)***, the public entity is on notice that an accommodation is required....") (emphasis added); *see also, A.G. v. Paradise Valley Unified Sch. Dist.* No. 69, 815 F.3d 1195, 1207 (9th Cir. 2016) ("the fact that an accommodation was legally required by statute or regulation serves as an independent basis to establish notice"). Yet rather than recognize that the City remains out of compliance with its new construction and alteration mandates, the district court's order relieves the City of liability based on vague, uncertain, and

unenforceable plans, *see,* Section IV.B., *supra*, "goals," "continuing progress towards program access," and "additional improvements . . . scheduled to be completed shortly," *Kirola,* 74 F. Supp. 3d at 1207, 1253, 1257. Uncertain plans, vague goals, and unenforceable promises of future work are of no value to people with disabilities who must struggle daily with inaccessible facilities and programs. If such a low standard of accessibility is required, public entities will have no incentive to comply with ADAAG at the time they undertake the new construction or alterations of facilities.[15] The more stringent accessibility requirements of section 35.151 will be gutted. A public entity will only have to articulate a "plan" towards future compliance to successfully evade legal challenge. Such a delay in access and integration cannot stand. It is not what Congress intended.

[15] Public entities do not need incentives not to comply with Title II; noncompliance until sued is already the norm. *See, e.g., Barden v. City of Sacramento,* 292 F.3d 1073 (9th. Cir. 2002); *Willits, et al. v. City of Los Angeles,* Case No. 2:10-cv-05782-CBM-MRW; *Independent Living Center of Southern California, et al., v. City of Los Angeles,* Case No. CV 12-0551 FMO (PJWx); *Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729 (9th Cir. 2021).

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that: (1) the judgment of the district court be reversed, (2) this matter be remanded for further proceedings to properly evaluate the scope of injunctive relief to which the plaintiff class is entitled; and (3) the district court be instructed to enter an order of injunctive relief to remediate all access violations identified in newly constructed or altered facilities falling within the class definition.

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

Dated: APRIL 29, 2022

STATEMENT OF RELATED CASES

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

CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE RULE 32(g)(1)

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6). The brief contains 6904 words, excluding the items exempted by Fed. R. App. P. 32(f), as counted using Microsoft Word for Mac, Version 16.57, and uses a proportionally spaced typeface and 14-point font. This brief is accompanied by Form 8, in compliance with Circuit Rule 32-1(e).

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

Dated: APRIL 29, 2022

ADDENDUM
STATEMENT OF INTERESTS OF *AMICI CURIAE*

Disability Rights Education and Defense Fund: The Disability Rights Education and Defense Fund (DREDF) based in Berkeley, California, is a national law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979, DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

American Association for People with Disabilities: The American Association of People with Disabilities (AAPD) works to increase the political and economic power of people with disabilities, and to advance their rights. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 60 million Americans with disabilities.

The Arc of the United States: The Arc of the United States (The Arc), founded in 1950, is the Nation's largest community-based organization of and for people with intellectual and developmental disabilities (IDD). Through its legal advocacy and public policy work, The Arc promotes and protects the human and civil rights of people with IDD and actively supports their full inclusion and participation in the community throughout their lifetimes.

Civil Rights Education and Defense Fund: The Civil Rights Education and Enforcement Center ("CREEC") is a national nonprofit organization.

CREEC's mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. Consistent with CREEC's mission, it is critical that people with disabilities have access to all programs, services, and benefits of public entities, including the pedestrian right-of-way. CREEC has extensive experience in the enforcement of Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) including repeatedly engaging in litigation to ensure accessibility of cities' pedestrian rights-of-way to people with mobility disabilities. CREEC believes the arguments in this brief are essential to realize the full promise of the ADA and Section 504.

The Coelho Center for Disability Law, Policy and Innovation: The Coelho Center for Disability Law, Policy and Innovation collaborates with the disability community to cultivate leadership and advocate innovative approaches to advance the lives of people with disabilities. We envision a world in which people with disabilities belong and are valued, and their rights are upheld. The Coelho Center was founded in 2018 by former Congressman Anthony "Tony" Coelho, original sponsor of the Americans with Disabilities Act.

Communication First: Communication First is a national, disability-led nonprofit organization based in Washington, DC, dedicated to protecting the human, civil, and communication rights and advancing the interests of the

estimated 5 million people in the United States, including California, who cannot rely on speech to be heard and understood due to disability. Communication First's mission is to reduce barriers, expand equitable access and opportunity, and eliminate discrimination against our historically marginalized population in all aspects of community and society, including education.

Disability Rights Advocates: Disability Rights Advocates ("DRA") is a non-profit public interest center that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA has long championed the rights of people with disabilities to use sidewalks as essential to independence and integration, including in Barden v. City of Sacramento, 292 F.3d 1073 (9th Cir. 2002) and American Council of the Blind of New York v. City of New York, 495 F. Supp. 3d 211 (S.D.N.Y. 2020).

Disability Rights Bar Association: The Disability Rights Bar Association ("DRBA") was started by a group of disability rights counsel, law professors, legal nonprofits and advocacy groups who share a commitment to effective legal representation of individuals with disabilities. Members of DRBA commonly believe that the fundamental civil rights of people with disabilities are inadequately represented in our society and that litigation and other legal advocacy strategies play a highly effective and necessary role in enforcing and advancing the rights of people with disabilities. DRBA strongly supports this case because it believes the

regulations promulgated by the Department of Justice under the Americans with Disabilities Act should be given deference to realize Congress's intent that individuals with disabilities be permitted full access to the public rights of way through the removal of artificial barriers as clearly mandated by those DOJ regulations.

Disability Rights California: Disability Rights California is the state and federally designated protection and advocacy system for California, with a mission to advance the legal rights of people with disabilities pursuant to Welf. & Inst. Code § 4900 et seq. Disability Rights California was established in 1978 and is the largest disability rights advocacy group in the nation. It has represented people with disabilities in litigation and individual advocacy regarding their rights to equal access to the public right of way and other public places. In the past fiscal year alone, Disability Rights California assisted more than 23,000 disabled individuals throughout California.

Disability Rights Legal Center: Disability Rights Legal Center (DRLC) is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle with ignorance, prejudice, insensitivity, and lack of legal protections in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in obtaining the benefits, protections, and equal opportunities guaranteed to them

under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Unruh Civil Rights Act, and other state and federal laws. DRLC's mission is to champion the rights of people with disabilities through education, advocacy and litigation. DRLC is generally acknowledged to be a leading disability public interest organization. DRLC also participates in various amici curie efforts in a number of cases affecting the rights of people with disabilities.

Disability Voices United: Disability Voices United (DVU) is a California statewide advocacy organization directed by and for individuals with disabilities and their family members. DVU advocates for choice and control, meaningful outcomes and systems that are inclusive, equitable and accountable. Consequently, DVU has a strong interest in supporting the implementation and enforcement of the ADA in order to ensure full inclusion, including access to public spaces and facilities.

Learning Rights Law Center: Learning Rights Law Center ("Learning Rights") is a legal services organization that fights to achieve education equity by protecting the rights of underserved students with disabilities throughout Southern California. Learning Rights provides representation, advice, advocacy and training to children and their families, including by filing systemic disability discrimination litigation against California public entities, primarily, school districts. Learning

Rights is uniquely aware of the significant barriers preventing persons with disabilities from accessing public services and facilities. Repeated violations of the ADA have a profoundly negative, long-lasting impact on individuals with disabilities and their families. The district court's ruling, if allowed to stand, disregards the ADA's core purpose of eliminating and redressing discrimination by ignoring the often ongoing, repeating violations of discriminatory practices and the denial of any relief to plaintiffs despite acknowledging violations of the ADA.

Impact Fund: The Impact Fund is a nonprofit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in a number of major civil rights cases brought under federal, state, and local laws, including cases challenging employment discrimination; unequal treatment of people of color, people with disabilities, and LGBTQ people; and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

National Association of the Deaf: The National Association of the Deaf (NAD), founded in 1880 by deaf and hard of hearing leaders, is the oldest national civil rights organization in the United States. As a non-profit serving all within the

USA, the NAD has as its mission to preserve, protect, and promote the civil, human, and linguistic rights of more than 48 million deaf and hard of hearing people in this country. The NAD is supported by affiliated state organizations in 48 states and D.C. as well as affiliated nonprofits serving various demographics within the deaf and hard of hearing community. Led by deaf and hard of hearing people on its Board and staff leadership, the NAD is dedicated to ensuring equal access in every aspect of life including, but not limited to, health care and mental health services, education, employment, entertainment, personal autonomy, voting rights, access to professional services, legal and court access, technology, and telecommunications.

National Disability Rights Network: The National Disability Rights Network (NDRN) is the non-profit membership organization for the federally mandated Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the US Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan

Southern Paiute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

National Federation of the Blind Inc.: The National Federation of the Blind (NFB) is the oldest, largest and most influential membership organization of blind people in the United States. With tens of thousands of members, and affiliates in all fifty states, the District of Columbia, and Puerto Rico, the ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. Since its founding in 1940, the NFB has devoted significant resources toward advocacy, education, research, and development of programs to ensure that blind individuals enjoy the same opportunities enjoyed by others. The NFB is keenly interested in this case because the organization believes the regulations promulgated by the Department of Justice under the Americans with Disabilities Act should be given deference to realize Congress's intent that individuals with disabilities be permitted to live the lives they want through the removal of artificial barriers. In particular, the NFB believes that the blind and all others with disabilities should have full and equal access to the public rights of way.

National Federation of the Blind of California Inc.: The National Federation of the Blind of California ("NFBC") is a duly organized nonprofit association of blind Californians. It is the California State affiliate of the National

Federation of the Blind. NFB of California's mission is to promote the vocational, cultural, and social advancement of the blind; to achieve the integration of the blind into society on a basis of equality with the sighted; and to take any other action which will improve the overall condition and standard of living of the blind. The enforcement of accessible design standards is critical to NFBC and its members who wish to participate in society through proactive design instead of reactive litigation.

Public Interest Law Project: The Public Interest Law Project is a California non-profit corporation certified as a state support center to local legal services programs by the State Bar. PILP provides advocacy support, technical assistance and training to local legal services offices throughout California on issues related to affordable housing and fair housing, public benefits and civil rights. Our practice includes representation of persons with mobility impairments who are denied access to critical programs and benefits as have been the class members in this action.

United Spinal Association: United Spinal Association, founded by paralyzed veterans in 1946, is dedicated to enhancing the quality of life of all people living with spinal cord injuries and disorders (SCI/D), including veterans, and providing support and information to loved ones, care providers and

professionals. United Spinal Association is a VA-accredited veterans service organization (VSO) serving veterans with disabilities of all kinds.

Washington Civil and Disability Advocate: Washington Civil & Disability Advocate ("WACDA") is a Washington state non-profit public interest law firm whose primary goal is to advocate for the civil rights of traditionally marginalized populations, especially people with disabilities. WACDA primarily litigates cases under Titles I, II, and III of the Americans with Disabilities Act. WACDA engages in substantial public interest work such as providing disability education and awareness efforts, including informing the disability community on disability rights by regularly conducting disability awareness and "know your rights" presentations as well as by providing information and referral services for people with disabilities and conducting legislative advocacy on behalf of the disability community.

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2022, I electronically filed the foregoing AMICUS CURIAE BRIEF OF THE DISABILITY RIGHTS EDUCATION AND DEFENSE FUND AND NINETEEN OTHER ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS AND URGING REVERSAL, REMAND AND REASSIGNMENT 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 that service will be accomplished by the appellate CM/ECF system.

Respectfully Submitted,

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND

By: s/ Michelle Uzeta
Michelle Uzeta
Attorney for Amici Curiae

Dated: APRIL 29, 2022