

Case No. 06-55781

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN LONBERG,

Plaintiff/ Appellee,

vs.

CITY OF RIVERSIDE,

Defendant/ Appellant.

On Appeal From The U.S. District Court For The Central District of California,
Case No. EDCV 97-0237 SGL (AJWx).

**BRIEF AMICI CURIAE OF THE CIVIL JUSTICE ASSOCIATION OF
CALIFORNIA, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES,
AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT
OF DEFENDANT/APPELLANT AND FOR REVERSAL.**

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QUESTION PRESENTED

Does the regulation adopted by the Attorney General, 28 C.F.R. § 35.150(d), requiring cities to undertake “self-evaluations” and develop “transition plans” to ease access for disabled persons to public roads, sidewalks and facilities pursuant to Title II of the Americans with Disabilities Act (42 U.S.C. § 12101 *et. seq.*, “ADA”), confer upon disabled persons a private right of action against municipalities for its enforcement?

INTRODUCTION

A. Importance of Issue and Interest of *Amici*

The issue presented is not novel – three circuit courts having already expressed themselves on it¹ – but its importance to the administration of justice

¹ Compare *Ability Ctr. of Greater Toledo v. City of Sandusky*, 3853d 901, 913-15 (6th Cir. 2004) and *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006)(holding transition plan regulation not (continued...))

cannot be gainsaid. For once a court implies a civil remedy from an express public policy statute, which is what plaintiff-appellee persuaded the court below to do for him, the fun has just begun. As one scholar put it, courts must soon address thereafter a host of related questions:

Who [is] to have standing to bring private actions? Who c[an] be sued? What exactly . . . constitute[s] the duty imposed? What [is] needed to show a violation of the duty and causation of injury? What [is] the measure of damages [to] be?²

These queries, raised frequently and answered differently by our Court for different statutes during what is known as the expansive period for implication of civil remedies (pre-1975), have been increasingly nipped-in-the-bud since the Court's retrenchment to a more stringent "statutory intent" requirement for implication of private rights of action post-1975 to the present. Now courts are loath to imply a civil remedy absent clear Congressional intent that they do so, an intent the Court rarely finds when faced with Congressional silence or ambiguity on the subject.

Whether intent to imply a private action for enforcement of a city's duty to develop a self-evaluation and transition plan can be limned from the language of the ADA and controlling case authority interpreting same, is the issue this case presents, one that, as already mentioned, has been addressed by other circuits, with

¹(...continued)
enforceable by private implied civil remedy), *with Chaffin v. Kansas State Fair Board*, 348 F.3d 850, 857-60 (10th Cir. 2003) (holding self-evaluation and transition plan regulations enforceable by private implied right of action).

² See, e.g., Robert C. Clark, *CORPORATE LAW* § 8.10.5, at 336-37 (1986).

two courts saying “no” and one “yes.”

Amici are three organizations with a vital interest in the question presented. All support the principles animating the ADA but decry overreaching actions brought against their members under it because of perceived uncertainties in the scope and application of the statute. In a free government clarity and predictability are central principles. If the people dislike the law as it is, they can change it; but they must know what the law is before they can act intelligently. Accordingly, amici support decisions about the nature of implied civil actions under the ADA that clarify the ground rules for determining the adjudicatory consequences of legislative action in this important field. If Congress wants its legislative actions to create or deny private rights of action, it should know what it must do to achieve its objectives, and this case presents an opportunity to provide that clarification.

The Civil Justice Association of California (“CJAC”) is a thirty-year old non-profit organization whose hundreds of members include businesses, professional associations and local governments. CJAC’s primary purpose is to educate the public about ways to improve the fairness, efficiency, economy and certainty of laws that determine who gets what, from whom, and under what circumstances when the wrongful conduct of one allegedly occasions harm to another. Toward these ends, CJAC has petitioned the Legislature, the courts and the People themselves for changes in the law that further the principles.

The California State Association of Counties (“CSAC”) is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County

Counsel's 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 and has determined that this case is a matter affecting all counties.

The League of California Cities ("LCC") is an association of 478 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, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

Amici believe the literal language and a literate reading³ of the ADA favors administrative and political remedies between the pertinent federal funding agencies and the allegedly errant municipalities, not a private right of action by an aggrieved disabled person who wants some municipality to develop what he feels is an "adequate" self-assessment and transition plan. The consequence of this reading of the law provides disabled persons with viable private rights of action to enforce Title II when they can show harm from the complained of practices, but leaves municipalities free to decide politically and economically how to best meet their obligations under the ADA knowing that they can be held accountable when they fail to do so. To hold to the contrary and allow private enforcement of this regulation not only runs counter to Congressional intent, it wastes badly

³ Roger Traynor, *Reasoning in a Circle of Law* (1970) 56 *V.A.L.REV.* 739, 749.

needed resources to primarily benefit lawyers and professional plan writers, not the disabled.

B. Factual and Statutory Context Giving Rise to Issue Presented

Though the issue presented is purely one of law, it does not arise full-blown like a phoenix from the ashes, but is rooted in undisputed facts and a statutory context which limit its resolution.

Plaintiff-appellee is a paraplegic resident of the City of Riverside who is required to use wheelchairs, both manual and battery-powered, for his mobility. It is undisputed that he is an individual for whom the ADA spreads its protective umbrella and that appellant, the City of Riverside, is a municipality covered by the ADA. Plaintiff brought suit in federal district court in 1997 naming the City of Riverside as a defendant under the ADA and cognate state statutory provisions for both damages⁴ and injunctive relief. Specifically, the issue of concern herein is plaintiff's injunctive relief from the court below requiring the City to modify its Transition Plan and other features on streets and sidewalks in the City that provide for public rights of way (i.e., sidewalks and streets).

The regulation upon which plaintiff relies, and the court premised its decision in his favor, was adopted by the Attorney General and requires the City, a public entity covered by Title II of the ADA, to prepare a self-evaluation plan on the accessibility of disabled persons to public facilities and thoroughfares within its jurisdiction and a "transition plan" to correct any deficiencies spotted in the "self-evaluation plan." (28 C.F.R. § 35.150(d).) Nothing in the text of the

⁴ Cal. Civ. C. § 54, the California Disabled Persons Act; and Cal. Civ. C. § 52, the Unruh Civil Rights Act.

ADA itself, however, makes any reference to the duty of a municipality to either prepare a self-evaluation or transition plan; it instead requires cities like appellant to make its programs and services accessible to individuals with disabilities. “Title II of the ADA does not itself require a public entity such as City to prepare or implement a Transition Plan regarding its existing facilities.”⁵ Instead, Title II of the ADA provides that “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.) While the City did prepare self-evaluation and transition plans, plaintiff contended they were “inadequate” to assure compliance of existing facilities with the ADA’s program accessibility requirement, and the court agreed.

SUMMARY OF ARGUMENT

The regulation adopted by the Department of Justice to require municipalities to develop self-evaluation and transition plans to enhance accessibility of disabled persons to public facilities finds no mention in the text of the ADA. It is, therefore, a regulation that imposes obligations not imposed generally by the ADA and, as such, is not enforceable by a private right of action.

That the regulation in question should not be read to give rise to a private right of action is the lesson of a long line of Court opinions disfavoring the implication of such remedies absent clear Congressional intent to the contrary, which is lacking for this particular provision. Well-reasoned opinions from two

⁵ *Lonberg v. City of Riverside*, Findings of Fact and Conclusions of Law, U.S. Dist Ct., Central Dist. of Calif., No. EDCV 97-00237-RT(AJWx), entered Mar. 20, 2006. p. 6.

different circuit courts and three different district courts are consistent in finding that no private right of action should be implied from 28 C.F.R. § 35.150(d), the self-evaluation and transition plan regulation at issue herein. The only authority to the contrary is an outlier opinion from the 10th Circuit that, unlike those to the contrary, fails to distinguish between regulations that are mandated by statute and those that impose obligations not mentioned in the governing statute.

Denial of a private right of action in this instance does not deprive disabled persons of their right to prosecute municipalities for failing to remove architectural barriers to the accessibility of public facilities. To the contrary, it simply leaves cities free to prepare or not prepare transitions plans in response to federal administrative requirements, knowing that they can be held directly accountable to disabled persons for conduct that occasions them real harm under the protective provisions of the ADA.

LEGAL DISCUSSION

I. THE REGULATION REQUIRING MUNICIPALITIES TO ADOPT SELF-EVALUATION AND TRANSITION PLANS FOR ENHANCING ACCESS OF DISABLED PERSONS TO PUBLIC FACILITIES PURSUANT TO TITLE II OF THE ADA DOES NOT PROVIDE AN IMPLIED CIVIL REMEDY FOR DISABLED INDIVIDUALS FOR ENFORCEMENT.

A. Consistent with a Trend of Supreme Court Opinions Disfavoring the Creation of Private Rights of Action, An Implied Private Cause of Action under Title II of the ADA Should be Denied Because there is no Clear Legislative Intent to Create it.

The Court's statutory implication doctrine traditionally reflects a fundamental deference to congressional intent about remedies. The intensity of that deference, however, has varied over time. Before 1975, the Court showed a

willingness to imply rights of action as long as they furthered Congress' statutory purposes. Since 1975, the Court increasingly requires evidence of Congress' intent to provide a private remedy and has essentially abandoned judicial discretion in this area, exhibiting a marked reluctance to create new causes of action.

The shift from judicial hospitality toward the implication of private actions to reticence about creating them can be traced chronologically in a series of high Court opinions which provide valuable guidance for the resolution of the question presented. *Cort v. Ash*, 422 U.S. 66 (1975) is the watershed opinion, announcing a new four-factor test that attempted an amalgam of earlier implication law and emphasized a more rigorous scrutiny of congressional intent:

In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. [1] First, is the plaintiff "one of the class for whose especial benefit the statute was enacted" . . . that is, does the statute create a federal right in favor of the plaintiff? [2] Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . [3] Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And [4] finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?⁶

⁶ 422 U.S. at 78. Applying this test, the *Cort* held that a federal criminal statute prohibiting corporations from making certain electoral contributions could not support an implied private action for damages in favor of a corporate shareholder against corporate directors. *Id.* at 68-69, 77-85.

Cannon v. University of Chicago, 441 U.S. 677 (1979), however, soon sounded a retrenchment from *Cort*. While finding an implied private remedy under section 901(a) of the Title IX of the Education Amendments of 1972, *Cannon* stressed the unusual nature of the case because *all* four factors found necessary to implicate a private right of action in *Cort* were satisfied. *Cannon* gave primacy to Congress’ intent to “have a private remedy available to the persons benefitted by its legislation” (*id.* at 717) and viewed the *Cort* factors as merely “indicative of such an intent.” (*Id.* at 688.) *Cannon* concluded with a prod to Congress, noting that “the far better course” is for the legislature to “specify” when it intends private enforcement of statutory rights. (*Id.* at 717.)

Justice Rehnquist, in his *Cannon* concurrence, elevated this invitation into notice to Congress that it should no longer rely upon the courts to fill remedial gaps in federal statutes: “[T]his Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.” (*Id.* at 718.) Justice Powell’s forceful *Cannon* dissent fortified this warning, criticizing *Cort* as violating the separation of powers, and arguing that “[the *Cort*] factors were meant only as guideposts for answering a single question, namely, whether Congress intended to provide a private cause of action.” Justice Powell concluded that “[a]bsent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.” (*Id.* at 731, 740 (Powell, J., dissenting).)

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) furthered the Court’s active disavowal of federal court remedial prerogatives, even if consistent with Congress’ statutory purpose. The *Touche Ross & Co.* opinion made clear the

Court's task is "limited solely to determining whether Congress intended to create the private right of action" (442 U.S. at 568) and that it was up to Congress, not the courts, "to fill any hiatus . . . left in this area." (*Id.* at 579.) Justice Rehnquist, writing for the Court, stated that the "ultimate question is one of congressional intent, not one of whether the Court thinks it can improve upon the statutory scheme that Congress enacted into law." (*Id.* at 578.)

Thompson v. Thompson, 484 U.S. 174 (1988) continued judicial disapproval of implying private rights of action from silent or ambiguous statutes on the subject. In that case the Court refused to imply a cause of action under the Parental Kidnaping Prevention Act of 1980, finding congressional intent to be the "focal point" and "ultimate issue." (*Id.* at 179.) Justice Scalia, while concurring in the Court's judgment, wrote separately to emphasize his disagreement with the Court's "dictum denying the necessity of an actual congressional intent to create a private right of action, and in referring to *Cort v. Ash* . . . as though its analysis had not been effectively overruled by our later opinions." (*Id.* at 188.) He observed the Court had "long since abandoned its hospitable attitude toward implied rights of action," (*id.* at 190) and concluded by recommending that the Court "should get out of the business of implied rights of action altogether." (*Id.* at 192.) By the time of *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989) Justice White, writing for a Court denying a private cause of action under Title VII of the Civil Service Reform Act of 1978, held Congress "undoubtedly . . . aware" by this time that the Court had "departed" from its once favorable attitude towards statutory implication and now resolved this issue "by a straightforward inquiry into whether Congress intended to provide a private cause of action." (*Id.*

at 536.)

This trend against judicial implication of private civil remedies whenever Congress does not make clear its intent to the contrary culminated, for purposes of the issue in this case, with *Alexander v. Sandoval*, 532 U.S. 275 (2001). In that opinion the Court addressed the scope of private causes of action available under § 601 of Title VI of the Civil Rights Act of 1964, which parallel the remedies, procedures and rights available under Title II of the ADA.⁷ *Sandoval* concerned whether the plaintiffs could, as private parties, proceed on a disparate impact claim pursuant to a regulation adopted by the Attorney General pursuant to § 602, 42 U.S.C. § 2000d-1. The Court had already determined that Congress intended private individuals be able to sue to enforce § 601, which prohibits discrimination on the ground of race, color or national origin . . . under any program or activity receiving Federal financial assistance.” However, *Sandoval* emphasized that § 601 prohibits only intentional discrimination, while the disparate impact regulation went beyond intentional discrimination. Hence the private cause of action available for enforcing § 601 did not extend to enforcing the disparate impact regulation.

Sandoval controls this case because it makes clear that if the regulation in question simply effectuates the express mandates of the controlling statute, then the regulation may be enforced through the private cause of action available under

⁷ Title II states that “[t]he remedies, procedures, and rights set forth in § 505 of the Rehabilitation Act (29 U.S.C. § 794a), shall be the remedies, procedures and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.” § 203, 42 U.S.C. § 12133. Section 505 of the Rehabilitation Act, in turn, adopts “[t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964.” 29 U.S.C. § 794a(a)(2).

that statute. If, however, the regulation imposes an obligation or prohibition that is not imposed generally by the controlling statute, a private plaintiff cannot enforce it through a private cause of action. While § 202 of Title II is enforceable through a private cause of action,⁸ and this applies to regulations promulgated thereunder that serve as a mechanism for imposing affirmative architectural standards on public entities,⁹ it does not extend to regulations that impose obligations not explicitly contemplated by Title II. It does not extend to 28 C.F.R. § 35.150(d), the regulation involved herein which requires municipalities to develop and adopt self-evaluation and transition plans.

B. The Self-Evaluation and Transition Plan Obligations Imposed on Municipalities by 28 C.F.R. § 35.150(d) are Beyond What the ADA Mandates.

Nothing in the text of Title II requires public entities to conduct self-evaluations or adopt transition plans. That is an undisputed conclusion of law by the district court.¹⁰ It is also the conclusion of all but one of several federal courts that have considered this precise issue and found, as a result, that no private right of action should be implied to enforce 28 C.F.R. § 35.150(d).

Iverson v. City of Boston, *supra*, 452 F.3d 94 is the most recent opinion to consider the issue and reject plaintiff's attempt to enforce the self-evaluation and transition plan requirements in the Attorney General's regulation. The first circuit court, per Judge Selva, held that "an implementing regulation, on its own, cannot create a private right of action." (*Id.* at 100.) Moreover, if "the regulation . . .

⁸ *Barnes v. Gorman*, 536 U.S. 181, 184-85 (2002); see, *e.g.*, 28 C.F.R. § 35.151.

⁹ *Tennessee v. Lane*, 541 U.S. 509 (2004).

¹⁰ See fn 5, *ante* at p. 6.

imposes an obligation beyond what the statute mandates,” “the regulation is not privately enforceable.” (*Id.* at 101.) *Iverson* found that “the self-evaluation and transition plan regulations impose obligations on public entities different than, and beyond, those imposed by the ADA itself. Consequently, those regulations may not be enforced through the instrumentality of the private right of action available under Title II.” (*Id.* at 102.)

Iverson referenced and relied upon both *Sandoval*, *supra*, 532 U.S. 275 and the Sixth Circuit opinion in *Ability Center*, *supra*, 385 F.3d 901 in reaching its conclusion. In *Ability Center* the court, per Judge Gibbons, recognized that while development of a transition plan “may ultimately facilitate compliance with Title II,” “there is no indication that a public entity’s failure to develop a transition plan [seriously] harms disabled individuals” or that a public entity cannot make its services, programs or activities accessible to qualified disabled persons without first developing a transition plan. (*Id.* at 914.) As *Iverson* further explained:

Conducting a self-evaluation may facilitate compliance with the strictures of Title II – but a municipality’s failure to self-evaluate does not in and of itself render municipal services programs, or activities inaccessible to disabled persons. Put another way, it is altogether conceivable that a public entity may be in full compliance with Title II without observing the commands of the self-evaluation regulation. Given this state of affairs, we hold that the self-evaluation regulation imposes a burden on public entities not imposed by Title II itself and, therefore, is not enforceable through the instrumentality of Title II’s private

right of action.¹¹

Similarly, *Ability Center* said of § 35.150(d) that it

[M]ay create a procedural requirement that encourages public entities to consider and plan ways in which they will accommodate the disabled, and it may ultimately facilitate compliance with Title II, but there is no indication that a public entity's failure to develop a transition plan harms disabled individuals, let alone in a way that Title II aims to prevent or redress. Indeed, it is conceivable that a public entity could fully satisfy its obligations to accommodate the disabled while at the same time fail to put forth a suitable transition plan.¹²

Ability Center opined that “perhaps § 35.150(d) would be enforceable through Title II’s private cause of action if there were a stronger, more explicit indication from the statute itself that Congress viewed the creation of transition plans as integral to the achievement of the statute’s aim or that Congress considered a public entity’s failure to adopt such a plan as a form of discrimination against disabled individuals or as a failure to provide them with meaningful services.” (385 F.3d at 914.) Finding no such language, however, the opinion concludes correctly that “there is no indication . . . Congress conceptualized [this] of transition plans or the failure to adopt them in this manner.” (*Id.*)

District courts that have considered this precise issue have reached the same conclusion. “[T]here is no private right of action to enforce the self-evaluation and transition plan requirements set forth in the regulations accompanying Title

¹¹ *Iverson, supra*, 452 F.3d at 101.

¹² 385 F.3d at 914.

II.” (*Matthews v. Jefferson*, 29 F.Supp.2d 525, 539-40 (W.D. Ark. 1998).) “There is no private right of action to enforce the self-evaluation and transition-plan requirements set forth in the regulations accompanying Title II.” (*Deck v. City of Toledo*, 76 F.Supp.2d 816, 823 (N.D. Ohio 1999).) “[No] statutory basis to assert a cause of action based solely on a public entity’s failure to conduct a self-evaluation or develop a proper transition plan.” (*Ross v. City Gatlinburg*, 327 F.Supp.2d 834, 844 (E.D. Tenn. 2003).

The only opinion at odds with the aforementioned authorities that have addressed the issue is the 10th Circuit opinion in *Chaffin*, *supra*, 348 F.3d 850. But *Chaffin* suffers itself from obvious deficiencies. It inexplicably disregards *Sandoval*’s holding that regulations which impose an obligation beyond the statutory mandate are not enforceable through the statutory right of action; and it does not engage in a separate analysis for each regulation in dispute. Rather, *Chaffin* considers the regulations accompanying Title II collectively, finding that they “simply provide the details necessary to implement the statutory right created by § 12132 of the ADA” and “do not prohibit otherwise permissible conduct.” (348 F.3d at 858.) As amici have demonstrated, however, there is a distinction between regulatory violations that, by themselves, would deny the disabled meaningful access to public services and those, like the regulation at issue here, that would not.

CONCLUSION

Plaintiff has no right to prosecute a private right of action against the City of Riverside for its failure to adopt a self-evaluation plan and transition plan pursuant to a federal regulation that does not conform to the text of the ADA. Accordingly, the Court should vacate and reverse the district court's permanent injunction requiring the City to develop and adopt a transition plan to plaintiff's liking.

Dated: April 16, 2007

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), Fed. R. App. P. 29(d) and 9th Cir. R. 32-1 the attached amici brief is proportionally spaced, has a typeface of 14 points and contains 4500 words.

Dated: April 16, 2007

Fred J. Hiestand
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 16, 2007 I caused true and correct (two) copies of the foregoing BRIEF AMICI CURIAE OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA, THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND THE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT/APPELLANT AND FOR REVERSAL to be deposited in the United States Mail, first class postage prepaid, addressed to:

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