No. 09-1259

In The
Supreme Court of the United States

JOHN LONBERG,

Petitioner,

v.

CITY OF RIVERSIDE,

Respondent.

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

BRIEF OF *AMICUS CURIAE* RICHARD M. SKAFF IN SUPPORT OF PETITIONER

ANDREW J. DHUEY
Attorney at Law
456 Boynton Avenue
Berkeley, CA 94707
(510) 528-8200

CHARLES G. WENTWORTH
Counsel of Record
WENTWORTH LAW OFFICES P.C.
460 N. Main Street, Suite 204
Glen Ellyn, IL 60137
(630) 469-9600
charles@wentworthlawoffices.com

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

This case presents the Court with an opportunity to recognize that 28 C.F.R. § 35.150(d)(1) creates a private right of action in individuals to enforce its requirement that public entities establish Self-Evaluation and Transition Plans. Such a holding would resolve a mature circuit split between the First, Sixth, and now Ninth Circuits on the one hand, and the Tenth Circuit on the other.

The resolution of this question is incredibly important to *amicus* Richard M. Skaff because of his many roles as a leader in the business community, as a public official, as an advocate for disability rights, and as an individual with disabilities who has had to bring suit himself to enforce the ADA's requirements in the jurisdictions where he lives and works. Failure to address the split will mean that individuals with disabilities residing in the First, Sixth, and Ninth Circuits will be forced to litigate enforcement of the ADA's requirements on an after-the-injury, curb-by-curb basis rather than a preemptive change that

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus curiae* or his counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2, *amicus*' counsel of record gave each party's attorney at least ten days' written notice of the intent to file this brief, and the parties' correspondence consenting to the filing of this brief has been filed with the Clerk's office.

would affect global changes throughout the offending jurisdictions.

As a former mayor and town council member, a leader in the business community, the director of a disability-access non-profit corporation, and a paraplegic, Mr. Skaff is uniquely qualified to address the issues facing both public entities *and* individuals with disabilities.

Mr. Skaff's business leadership began in the 1970s when he managed a large 250-seat restaurant on Fisherman's Wharf in San Francisco and served on the Board of the Golden Gate Restaurant Association. He later spent five years as the Executive Director of the Fisherman's Wharf Port Tenants Association.

In 1981, Mr. Skaff was elected to the Town Council of Corte Madera, California, and later served as Mayor until 1985. During that time, he served on the Marin County Council of Mayors and Council Members, as the founder and Chairperson of the Ross Valley Paramedics Authority (County of Marin), and as Program Developer for Access Marin. In that last position, he consulted with City, County, and State building departments, as well as other State and local agencies, architects, engineers, and individuals with disabilities to ensure that these entities were compliant with the ADA's mandates.

Later, he was hired by Mayor Diane Feinstein to create a new program for the San Francisco Bureau of Building Inspection and assure its enforcement of California Building Code access requirements. He

was appointed as a Chief Building Inspector for the City's Bureau of Building Inspection and was responsible for the Bureau's enforcement of State access codes. He also did plan and site review of public and private projects, trained Building Inspectors and Public Works personnel, including architects, engineers, and project managers, and represented the City on the State Architect's Advisory Committee creating State access codes.

Mr. Skaff then became the Disability Access Coordinator for the San Francisco Department of Public Works, taking responsibility to see that the required access features were included in the design and construction of the City's public buildings and facilities.

In 1998, at the request of Mayor Willie Brown, Mr. Skaff opened the Mayor's Office on Disability as the Deputy Director. While there, he oversaw the development and implementation of the City's Self-Evaluation and Transition Plan. He also managed the resolution of public complaints regarding physical accessibility within City facilities, provided plan and site review of all new and remodeled City-funded or owned facilities, and participated in multiple State and Federal code committees. Among these were three of the U.S. Architectural and Transportation Barriers Compliance Board Advisory Committees, including recreation, vessel access, and public rights-of-way.

While working for the City, Mr. Skaff travelled to New York City to give testimony before its Housing and Building Committee about the effect of building and other safety codes on people with disabilities. He continued serving in the Mayor's Office until 2004, when he retired.

All of these public-sector achievements came after Mr. Skaff became a paraplegic as a result of a fall in 1978, leaving him paralyzed below the waist and necessitating that he use a wheelchair for mobility. Shortly after his accident, Mr. Skaff founded the Marin Center for Independent Living (now one of 28 such independent living centers in California) where he oversaw efforts to create accessible communities in Marin County and its eleven cities. In 2006, after retiring from the City of San Francisco, Mr. Skaff founded Designing Accessible Communities, a non-profit organization dedicated to creating universally accessible environments. He currently serves as the organization's Executive Director.

Mr. Skaff's experience as a business person, a civil servant, a director of multiple non-governmental organizations, and a person with a disability gives him a unique understanding of both the implications of State and Federal regulations as they relate to people with disabilities, and the effective implementation of regulations in public and private buildings and facilities. He has developed access code training for major U.S. cities, written City-wide access policies, and resolved public complaints regarding physical accessibility. And he has created and presented

code and regulatory trainings throughout the United States, including in Baton Rouge at the request of the Louisiana Governor's Office shortly after Hurricane Katrina.

Mr. Skaff has also traveled extensively to lecture on accessibility and disability rights, presenting training materials about access, public rights-of-way, and emergency-related issues to groups in Japan, Portugal, and Ecuador, locales that previously had no regulations requiring physical access or the protection of the rights of individuals with disabilities. His input was instrumental in the creation of new access laws and policies in those countries.

Finally, Mr. Skaff has, on multiple occasions, had to personally bring suit to enforce the ADA's requirements to allow him access to public spaces, even in municipalities where he once served as an elected official. He is thus personally familiar with the roadblocks – both figurative and literal – that public entities place in the way of persons with disabilities.

It is with this background that Mr. Skaff urges the Court to grant the Petitioner's request and issue the writ of certiorari to the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit panel below has already acknowledged that its opinion, as well as those of the First and Sixth Circuits, is squarely in conflict with that of the Tenth Circuit regarding the enforceability by a private individual of the ADA's transition-plan regulations. Pet. at 11-21 (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Lonberg v. City of Riverside*, 571 F.3d 846 (9th Cir. 2009); *Iverson v. City of Boston*, 452 F.3d 94 (1st Cir. 2006); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004); *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850 (10th Cir. 2003)). And the Eleventh Circuit recently reached a similar result as the First, Sixth, and Ninth Circuits, albeit with respect to a different regulation. *American Assoc. of People with Disabilities v. Harris*, Case No. 07-15004, ___ F.3d ___ (11th Cir., May 11, 2010), *available at* http://www.ca11.uscourts.gov/opinions/ops/200715004.pdf [hereinafter "*Harris* Slip Opinion"] at 12-27 (holding that 28 C.F.R. § 35.151(b) does not create private right of action).

Rather than repeating that analysis, Mr. Skaff argues that the establishment of a Self-Evaluation and Transition Plan is the only way to affect the meaningful changes anticipated, and required, by the ADA. He gives specific examples of how the existence (or lack of) a transition plan has affected his own efforts to make changes in public entities, both from inside the system as a public official, and from the outside as an individual with disabilities and a plaintiff in ADA litigation.

Unless individuals are allowed to bring private rights of action to require that public entities adopt transition plans, the ADA's non-discrimination goals will be frustrated. Plaintiffs will be forced to litigate on after-the-injury, curb-by-curb bases rather than compelling public entities to preemptively interact with the disability community, enabling public officials to understand what must be done to comply with the ADA's mandates, and thereby create plans that address those needs globally. The Court should therefore grant Petitioner's request for a writ of certiorari to resolve the circuit split.

I. Compliance with the ADA's Requirements by Public Entities Is Virtually Impossible Without the Establishment of a Proper Self-Evaluation and Transition Plan.

The Ninth Circuit erred when it speculated that the "existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services." *Lonberg*, 571 F.3d at 851. Quite to the contrary, and as the DOJ's Civil Rights Section recognizes, "When self-evaluations are not conducted and transition plans not developed, city governments are ill-equipped to implement accessibility changes required by the ADA." *The ADA and City Governments: Common Problems* (Oct. 9, 2008), *available at* http://www.ada.gov/comprob.htm. In other words, unless a public entity has a complete assessment of its facilities, services, and programs, it is impossible for the entity to effectively plan, budget, and

prepare for the changes necessary to meet the ADA's requirements. *See id*. Without a Self-Evaluation and Transition Plan, "people with disabilities cannot participate or benefit from the city's services, programs, and activities." *Id*.

Most importantly, the creation of a transition plan forces public entities to review their properties, facilities, and programs so that they know what they have. Transition plans are not only there to protect the rights of individuals with disabilities. They are also necessary for the public entities to protect themselves from future litigation by identifying areas of improvement and forcing the entities to create a plan to address those shortfalls. Only after a plan has been completed can an entity demonstrate that it is in fact complying with the ADA's mandates.

It is for these reasons that the regulations required public entities to adopt Self-Evaluation and Transition Plans *by January 26, 1993*. 28 C.F.R. § 35.150(d)(1). But as of yet, only a very small portion of jurisdictions have taken the time necessary to develop a plan adequate to address the needs of their communities.

At the time the ADA was adopted, the Attorney General knew that these plans would be necessary "[i]n the event that structural changes to facilities [were] undertaken to achieve program accessibility." *Id*. In anticipation of this, the regulations mandated that transition plans contain, "at a minimum," the following four parts:

- Identification of physical obstacles limiting accessibility of individuals with disabilities to programs and facilities;
- A detailed description of the methods that will be used to make the facilities accessible;
- Specification of a schedule for taking steps necessary to come into compliance; and
- Naming the official responsible for implementation of the plan.

Id.

One example of the importance of these self-evaluations is seen in the instruction provided to State and local transportation departments. The Federal Highway Administration teaches that an "ADA transition plan is intended to identify system needs and integrate them with the State's planning process." *Questions and Answers About ADA/Section 504*, *available at* http://www.fhwa.dot.gov/civilrights/ada_qa.htm.

Moreover, the DOJ's Technical Assistance Manuals explain to State and local governments how to put into practice the regulations. *Title II Technical Assistance Manual*, *available at* http://www.ada.gov/taman2.html [hereinafter "ADA Manual"]. Specifically, the ADA Manual gives extensive instruction on how public entities are to create and use transition plans. *Id*. § II-8.2000, Self-evaluation. The manual instructs that an entity "should be mindful that

although its policies and practices may appear harmless, they may result in denying individuals with disabilities the full participation of its programs, activities, or services." *Id*. This is exactly the harm that Title II of the ADA was intended to remedy.

And these instructions to State and local authorities from the Federal government's administrative bodies also recognize the importance of having transition plans in place, both to evaluate current efforts and to plan for future changes. Indeed, the ADA Manual notes that once a public entity identifies the areas of concern in its communities, "it should take *immediate* remedial action to eliminate the impediments to full and equivalent participation." *Id*. (emphasis added). Further, the manual points out that "[s]tructural modifications . . . should be made as expeditiously as possible, but no later than January 26, 1995" – now more than 15 years ago. *Id*. Thus the Tenth Circuit correctly held that the ADA grants to individuals private rights of action, allowing them to bring suit to compel public entities to establish such plans. *Chaffin*, 348 F.3d at 858. This is because the requirements of the regulations and "the type of discrimination prohibited [by them] fall[ ] squarely within the type prohibited by the ADA itself." *Id*. at 859.

That the regulations implement the ADA is clear. Indeed, the Ninth Circuit acknowledged as much, observing that "Section 35.150(d) was promulgated by the Attorney General pursuant to § 204 of the ADA . . . in order to implement § 202." *Lonberg*, 571 F.3d at

851 n.6. Yet, that court still illogically held that the regulations do not create a private right of action. It reached this decision in part because a public entity could be ADA compliant without having a transition plan in place, "in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy." *Id*. at 851.

But the Ninth Circuit's concern was misplaced. Under the hypothetical situation where a public entity is already "fully compliant with § 202 without ever having drafted a transition plan," *id*., meaningful access would have *already* been provided, so there would be no need for litigation and nothing to remedy.

The importance of creating and maintaining effective transition plans is again underscored by the Federal government's ADA Manual, which it developed to help State and local government programs and services comply with ADA requirements. Building on the four "minimum" required categories outlined in 28 C.F.R. § 35.150(d)(1), the manual contains an additional thirteen areas of "careful examination" that public entities should analyze in doing their self-evaluations. ADA Manual § II-8.2000, Self-evaluation. These thirteen areas are as follows:

1. Physical barriers to access.
2. Modification of policies where necessary to avoid exclusion, and justifications for exclusion where no modification will be made.

3. Effective means of communication "with individuals with impaired hearing or speech", such as through TDDs "or equally effective telecommunication systems."

4. "[R]eaders for individuals with visual impairments; interpreters or other alternative communication measures . . . for individuals with hearing impairments; and amanuenses for individuals with manual impairments."

5. Evacuation procedures from public facilities during an emergency.

6. Written and audio-visual materials to ensure that they are not offensive or demeaning.

7. Historic preservation programs to give priority to methods that provide physical access.

8. Proper and expeditious decision-making concerning not becoming ADA compliant due to a fundamental change in the nature of an activity or the imposition of an undue financial burden.

9. Access to public meetings for individuals with mobility impairments.

10. Non-discrimination in employment practices.

11. ADA-compliant construction requirements for new construction and alteration of existing facilities.

12. Proper training for public employees regarding full participation of individuals with disabilities.

13. Distinguishing between former and current drug users when setting policies denying participation in programs based on drug usage.

Id. If, as the Ninth Circuit determined, the ADA "says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access," *Lonberg*, 571 F.3d at 851, then why would the government have felt it necessary to issue such a thorough explanation of what the transition plan should entail? The answer is that the ADA *does* obligate public entities to produce such plans, and the regulations *do* create private rights of action for individuals to ensure that this obligation is carried out.

In explaining how a self-evaluation should be conducted, the ADA Manual further instructs public entities to examine their "policies and practices [as] reflected in [their] laws, ordinances, regulations, administrative manuals or guides, policy directives, and memoranda." *Id*. Moreover, it directs that public entities review practices that "may not be recorded and may be based on local custom." *Id*. The requirement that modifications relate to practices as well as written policies is especially important in ensuring that meaningful changes are made. Indeed, as this Court has noted, the ADA requires modifications necessary to ensure "meaningful access," *Southwestern*

Comty. College v. Davis, 442 U.S. 387, 410 (1979), which by its nature includes the ways the policies are actually implemented and not simply the words put down on paper by the public entities.

Also, the adoption of a transition plan allows members of the community, both individuals with disabilities and otherwise, to discuss what areas of improvement are most critical. Although there is no required public-comment period, entities "are strongly encouraged to consult with individuals with disabilities and organizations that represent them to assist in the self-evaluation process." ADA Manual § II-8.2000, Self-evaluation. When done properly, the public entity is able to evaluate what needs exist and set a plan to deal with them in an organized and efficient manner. Thus, an effective transition plan *must* have public input, and the public entities must first take the time and effort to put one in place for there to be anything to comment on.

The importance of having transition plans in place cannot be underestimated. As the Eleventh Circuit recently recognized in analyzing another of the ADA's enabling regulations, "New facilities constructed for use by public entities must be accessible, [28 C.F.R.] § 35.151(a); alterations of existing facilities must also be accessible, *id*. § 35.151(b)." *Harris* Slip Opinion at 26.

But what that court ignored, as did the First, Sixth, and Ninth Circuits, is that those buildings do not magically build themselves with the required

accommodations. The ADA's enacting regulations are necessary to the effective implementation of the statute because they give public officials an opportunity to interact with the disability community in a way that they, in all likelihood, have never done before. This in turn educates the officials about the disability community and forces them to look at the entities' programs and facilities in ways that they never would have otherwise. Such interaction is at the heart of the ADA, helping public officials understand how members of the disability community function both physically and cognitively, and giving those officials the empathy that they need to implement the meaningful access that this Court has recognized the ADA was designed to bring about. *Davis*, 442 U.S. at 410.

It is extremely important that individuals be allowed to bring suit to compel public entities to establish and maintain the requisite transition plans. This Court should thus issue the writ, and bring the First, Sixth, and Ninth Circuits into conformity with the Tenth.

II. Mr. Skaff's Experience Both as a Public Official and as a Private Litigant Demonstrates the Importance of Forcing Public Entities to Establish and Maintain Self-Evaluation and Transition Plans.

Mr. Skaff has wide-ranging business and public sector experience, during which he has worked extensively to see that public entities become and remain

compliant with the ADA's mandates. As noted above, his business experience began in the 1970s, followed by nearly 25 years of public service as an elected and appointed official. And all of that service came after Mr. Skaff suffered a fall that left him paralyzed from the waist down. This injury led him to focus his energies on creating environments that are accessible to people with disabilities, as a leader in both the public and private sectors.

In all of these capacities, and additionally as a private litigant suing public entities to enforce the ADA's requirements, Mr. Skaff has seen the necessity of establishing effective Self-Evaluation and Transition Plans. Having such a plan makes all the difference in ensuring that a public entity is able – and in fact does – create meaningful access.

A. Mr. Skaff's Experience Shows the Wisdom Behind the Regulations' Requirement that Transition Plans Must be in Place to Effectively Locate and Correct ADA Violations.

The proper implementation of a transition plan is critical for a public entity attempting to comply with the ADA's mandates. As noted above, an effective transition plan allows a public entity to protect itself from potential litigation by forcing it to take preemptive action to safeguard individual rights – something that can only happen if the public entity knows what buildings, programs, and facilities need to be

updated and has taken the time to discuss those facilities with members of the disability community to establish a timeline for updating and repairing the most critical needs.

Indeed, while Mr. Skaff oversaw the process of developing San Francisco's Self-Evaluation and Transition Plan, the City learned of multiple properties and facilities that it previously had no record of. Had it not taken the time to perform a self-evaluation, the City never would have learned of those locations. It never would have determined whether those facilities were in compliance with the ADA's requirements, and if not, what needed to be done to reach full compliance. By completing its review, the City was able to insulate itself from litigation regarding those facilities by including them in the plan to update all of its buildings and programs.

On the other hand, Mr. Skaff has seen first-hand the problems that develop when a public entity fails to follow the transition-plan regulations. He has repeatedly encountered situations where both new construction and renovations have been built that, notwithstanding the statutes and regulations, did not comply with the ADA's mandates. As a result, he is not so naïve as to believe that the mere existence of a requirement in a statute or regulation is enough to ensure that that requirement will necessarily be met. *C.f. Harris* Slip Opinion at 26.

For example, the California Department of Transportation ("Caltrans") recently updated the traffic

and pedestrian signals on Lombard Street in San Francisco – an expansive combined high-volume highway and local roadway that runs through the City. The ADA requires that when any modifications of this nature are made, they must be accessible. *See id.* In this case, pedestrian signals were required to be accessible for all individuals, including blind pedestrians. But none of Caltrans' upgrades to Lombard Street met ADA requirements, the agency having failed to include audio warning signals for individuals with visual impairments.

When Mr. Skaff learned of the problem, he contacted the District Office serving the Bay area to ask why the job was not done properly. He was told that, if he had simply called the Office before the work had been completed, the agency would have gladly made the modifications correctly. But if Caltrans had taken the time to do a proper Self-Evaluation and Transition Plan with input from the disability community *prior to the start of this project*, the agency would have understood what was required and needed, and probably would have made the proper modification to begin with.

Instead, Caltrans did not have the necessary knowledge or policies in place to properly design this project, let alone the understanding that comes from interaction with the disability community that would have come from interaction with the disability community during development of a proper Self-Evaluation and Transition Plan. Thus, it created a signal situation at a number of intersections that

blind pedestrians would find difficult – if not impossible – to navigate. The end result is that Caltrans will now have to engage in expensive remedial efforts, a cost that could and should have been avoided entirely had the agency simply developed and used a transition plan.

And had Caltrans officials taken the time to put together a valid transition plan, they would not have needed Mr. Skaff to call and inform them – after the renovation had been completed – that it had been done improperly. Unfortunately, this is not an isolated incident. But if individuals with disabilities are not allowed to enforce the Self-Evaluation-and-Transition-Plan requirements through a private right of action, it may become an increasingly more frequent occurrence.

The ADA's requirement that transitions plans be put in place is as much about encouraging – indeed mandating – interaction between public officials and the disability community as it is about making sure that buildings are constructed with the proper number of ramps. Until those officials are forced, by court order if necessary, to sit down and include the disability community in the planning process, incidents such as the upgrade of Lombard Street will continue. The ADA was meant to help individuals with disabilities be recognized and included by the general public. The Self-Evaluation and Transition Plan is the precise mechanism by which that is supposed to happen, and if public officials are not willing to engage in that interaction on their own, the only way to

make it happen is to allow private litigants to enforce the requirement through litigation.

B. Without a Proper Transition Plan Already in Place, Individuals with Disabilities are Forced to Litigate ADA Violations on an After-the-Injury, Curb-by-Curb Basis.

In addition to his professional encounters with transition plans, Mr. Skaff has personally felt the effects of the Ninth Circuit's ruling that individuals are unable to enforce the ADA regulation's transition-plan requirement. For example, Mr. Skaff is currently in litigation with the town of Corte Madera over its multiple instances of non-compliance with ADA mandates. *Skaff v. City of Corte Madera*, Case No. 4:08-cv-05407 SBA (N.D. Cal.) (docket entries available on PACER). In his Complaint, Mr. Skaff described encountering various barriers to access throughout the City. He requested that Corte Madera "remove all such barriers to access for persons with disabilities," and further asked for an injunction ordering the City to establish and enforce a curb ramp schedule as part of its transition plan. *Skaff* Compl. ¶ 17 (Docket Entry No. 1).

The town moved for judgment on the pleadings under Rule 12(c), arguing that – just as in the instant case – Mr. Skaff has no private right of action to enforce the City's transition plan. The district court then granted that motion, relying in part on the

Ninth Circuit's decision in *Lonberg*. *Skaff* Order at 3-4 (Docket Entry No. 25).

As a result, Mr. Skaff's recovery is now limited to those particular curbs, sidewalks, ramps, and other barriers to access that he has already identified in his daily movements and in the litigation. To affect any other change throughout the City, he must shoulder the incredible burden as a wheelchair user to inspect *every curb ramp in the City* to determine whether they comply with the law. And then he must initiate new litigation related to each and every one of those non-conforming locations.

The inefficiency created by the Ninth Circuit's erroneous opinion is staggering. Corte Madera could simply comply with the Congressional mandate to create and enforce a Self-Evaluation and Transition Plan that methodically lists, prioritizes, budgets, and plans for the correction of *all* barriers to access in the City. Or, if it were located in the Tenth Circuit, Mr. Skaff could request that the district court order that the City create and enforce such a plan.

But after the Ninth Circuit's decision, Mr. Skaff and any individuals with disabilities who live, work, or visit Corte Madera must litigate ADA compliance on a curb-by-curb basis, one stretch of sidewalk at a time.

Every single time a person with a disability encounters a new barrier, that person has been deprived of the public access that Congress intended Title II to ensure. Contrary to the Ninth Circuit's conclusion,

then, the lack of a transition plan does, *by itself*, deny a person with disabilities access to a public entity's services. Granting certiorari and reversing the Ninth Circuit's erroneous decision will not simply resolve a mature and important circuit split. It will also effectuate Congressional intent and give full meaning to Title II.

If the Ninth Circuit is correct, then responsibility for enforcement of the ADA is placed solely on the shoulders of the DOJ. In 1999, the Department engaged in Project Civic Access, whereby it took a small sampling of 100 cities throughout the country to spot-check those public entities for compliance with ADA mandates. *See Project Civic Access*, *available at* http://www.ada.gov/civicac.htm. One of those municipalities was San Rafael, a town only five miles from Mr. Skaff's home.

While investigating San Rafael, the Department discovered numerous violations of the ADA and learned that the City's transition plan and its implementation of it were inadequate. The DOJ then entered into a settlement agreement with the City, in which it required that San Rafael make various changes and improvements to its programs and facilities. *Settlement Agreement Between the United States of America and the City of San Rafael, California, Under the Americans with Disabilities Act, DJ# 204-11-272*, *available at* http://www.ada.gov/SanRafaelSA.htm.

But while Mr. Skaff welcomes such settlement agreements and hopes that more are forthcoming, it is ludicrous to believe that the DOJ will be able to complete inspection of every building, program, and facility in the millions of public entities throughout the nation. The reality is that meaningful access will only come about when individual plaintiffs are allowed to force the same types of settlement agreements with public entities on their own, without having to wait for the DOJ to appear at the doorstep of every offending municipality. In short, leaving enforcement of transition plans in the hands of the DOJ will only guarantee that individuals such as Mr. Skaff are never be able to receive the meaningful access that the ADA was designed to provide.

CONCLUSION

In establishing the ADA's transition-plan requirements, Congress and the Attorney General intended that the regulations set a preemptive course to correcting ADA non-compliance in public entities. By failing to recognize this key facet of the legislation, the First, Sixth, and Ninth Circuits have put an incredible burden on the courts, the public entities, and most importantly, the individual litigants with disabilities who the law was intended to protect.

The Tenth Circuit reached the proper decision in determining that individuals have a private right of

action to enforce the ADA's transition-plan requirements by requesting an injunction ordering public entities to establish transition plans.

For all of these reasons and those set forth in the petition, the Court should issue a writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

ANDREW J. DHUEY
Attorney at Law
456 Boynton Avenue
Berkeley, CA 94707

CHARLES G. WENTWORTH
Counsel of Record
WENTWORTH LAW OFFICES P.C.
460 N. Main Street, Suite 204
Glen Ellyn, IL 60137
charles@wentworthlawoffices.com

Counsel for Amicus Curiae

MAY 2010