No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Americans with Disabilities Act's transition-plan regulations, 28 C.F.R. § 35.150(d), are enforceable by private right of action.

PARTIES TO THE PROCEEDING

The caption to the case contains the names of all of the parties to the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John Lonberg respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 571 F.3d 846. App. 1a. The order denying the petition for rehearing en banc is unreported. *Id.* 59a. The orders of the United States District Court for the Central District of California are also unreported. *Id.* 15a; *id.* 17a; *id.* 33a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and § 1343 over petitioner's federal civil-rights claims, and the district court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over petitioner's state-law claims. The court of appeals had jurisdiction under 28 U.S.C. § 1291 to review the district court's final judgment, and under 28 U.S.C. § 1292(a) to review its entry of a permanent injunction. The court of appeals filed its opinion on June 26, 2009, and it denied, on January 15, 2010, petitioner's timely filed petition for rehearing en banc. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Section 202 of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 (hereinafter "§ 12132"), which prohibits public entities from discriminating against qualified individuals with a disability in the administration of services and programs. In its entirety, § 12132 states:

> § 12132. Discrimination. Subject to the provisions of this subchapter, 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.

This case also involves Section 203 of the ADA, 42 U.S.C. § 12133 (hereinafter "§ 12133"), which created a private cause of action to enforce the ADA by incorporating the remedies, procedures, and rights of 29 U.S.C. § 794a. In its entirety, § 12133 states:

> § 12133. Enforcement. The remedies, procedures, and rights set forth in section 794a of title 29 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.

Finally, this case involves Section 204 of the ADA, 42 U.S.C. § 12134 (hereinafter "§ 12134"), which directed the Attorney General to promulgate regulations consistent with the transition plan regulations for the Rehabilitation Act, 28 C.F.R. § 39.150(d). In pertinent part, § 12134 states:

§ 12134. Regulations. (a) In general. Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. . . . (b) Relation to other regulations. . . . With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

INTRODUCTION

This case involves a recognized and mature circuit split over an issue of substantial and recurring importance—whether the ADA's transition-plan regulation, 28 C.F.R. § 35.150(d), is enforceable by private cause of action. The Ninth Circuit panel below agreed with the First and Sixth Circuits that § 35.150(d) is not privately enforceable. App. 6a (citing *Ability Ctr. of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004), and *Iverson* v. *City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006)). In so holding, the panel reversed the district-court decision, which had followed the Tenth Circuit in concluding that § 35.150(d) is privately enforceable. App. 6a (citing *Chaffin* v. *Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003)). The importance of the question presented to advancing the goals of the ADA, and the uncertainty in the law that the split of authority creates, counsel strongly in favor of granting the petition.

When Congress creates a private right of action to enforce a statute, it necessarily intends to create a private right of action to enforce regulations implementing that statute. *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). Here, it is undisputed that Congress created a private right of action to enforce the ADA. 42 U.S.C. § 12133. So the only question is whether § 35.150(d)'s transition-plan requirements implement the ADA. They plainly do. In enacting the ADA, Congress expressly required the Attorney General to adopt transition-plan requirements similar to those already in place for the Rehabilitation Act. 42 U.S.C. § 12134. And that is precisely what § 35.150(d) accomplishes. Moreover, as explained further below, the transition-plan requirements are critical to implementing the ADA. Without compre-

hensive transition plans that identify barriers to access, public entities cannot proactively resolve accessibility issues. The natural result is that millions of people with disabilities will be unable to participate in public services, programs, and activities unless they file suit, the very scenario that Congress sought to prevent when it enacted §§ 12132, 12133, and 12134. Accordingly, this Court should adopt the Tenth Circuit's holding that § 35.150(d) is privately enforceable and should reject the contrary holdings of the First, Sixth, and Ninth Circuits.

The circuit split over the issue of § 35.150(d)'s private enforceability engenders uncertainty for public entities and results in differing treatment of claimants depending on the circuit where they live. In addition, the issue presented is one of immense practical importance. As this Court noted in *Tennessee* v. *Lane*, 541 U.S. 509, 511 (2004), the sheer volume of passive discrimination against persons with disabilities "was an appropriate subject for prophylactic legislation." And, as catalogued in the *amici curiae* briefing below, there are numerous lawsuits currently pending against public entities just on the narrow issue of sidewalk accessibility, lawsuits that would be wholly unnecessary if cities created and implemented transition plans as the law requires. The Ninth Circuit's decision adversely affects the rights and lives of many and is directly contradicted by the plain language of the ADA. This Court should grant the petition and reverse.

STATEMENT

A. The ADA's statutory and regulatory scheme

Congress enacted the ADA in 1990 to address the "serious and pervasive" isolation of and discrimination against millions of Americans with a physical or mental disability. 42 U.S.C. § 12101(a). Congress specifically tailored Title II of the ADA to address "passive" or "exclusionary" discrimination by local and state governments, particularly those governments' failure to modify structural barriers to disability inclusion. See HR Rep No. 101-485(II), 101st Cong., 2d Sess. 95-96 (1990), reprinted in 1990 USCCAN 378.

Section 12132 prohibits public entities from discriminating against qualified individuals with a disability in the administration of services and programs. 42 U.S.C. § 12132. As the Ninth Circuit recognized below, the prohibition "is universally understood as a requirement to provide 'meaningful access.'" App. 10a.

Due to the passive discrimination that Title II is designed to remedy, § 12133 expressly authorizes a private right of action to "[a]ny person alleging discrimination on the basis of disability in violation of section 12132. . . ." Important for purposes of Mr. Lonberg's suit here, available remedies include injunctive relief. *Barnes* v. *Gorman*, 536 U.S. 181, 187 (2002).

Transition-plan requirements have their genesis in § 12134, which required the Attorney General to "promulgate regulations" by July 26, 1991, that were consistent with the Rehabilitation Act regulations already in effect for federally conducted activities. 42 U.S.C. § 12134(a), (b) (citing 28 C.F.R. § 39.101 *et*

seq.). Among the regulations Congress specifically directed the Attorney General to implement was a regulation that requires public entities to develop transition plans that identify physical obstacles limiting access to the entities' programs and activities, and that explain how and when those obstacles will be removed. See 28 C.F.R. § 39.150(d). Accordingly, the regulations the Attorney General promulgated require certain public entities (i.e., those entities that would need to make "structural changes to facilities" to meet ADA standards) to "develop . . . a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. § 35.150(d). At a minimum, such a plan must identify physical obstacles that limit accessibility; describe the methods that will be used to make facilities accessible; create an implementation schedule; and indicate the government official responsible for plan implementation. 28 C.F.R. § 35.150(d)(3).

The Disability Rights Section of the U.S. Department of Justice's Civil Rights Division has identified failure to develop transition plans as one of the ADA's most "common problems." The ADA and City Governments: Common Problems (Oct. 9, 2008), available at http://www.ada.gov/comprob.htm [hereinafter "Common Problems"]. As the Department of Justice observes, when transition plans are not developed, "city governments are ill-equipped to implement accessibility changes required by the ADA," and the city "can only react to problems rather than anticipate and correct them in advance." *Id.* The necessary result is that "people with disabilities cannot participate in or benefit from the city's services, programs, and activities." *Id.* This is the exact harm that Congress sought to prevent when it enacted § 12132 and made it privately enforceable.

B. John Lonberg is being denied access to streets and sidewalks.

Petitioner John Lonberg is a resident of the City of Riverside, California. He is a man with paraplegia who uses a wheelchair for mobility. Mr. Lonberg uses the City's public streets and sidewalks on a regular and ongoing basis to, among other things, take his grandchildren to sporting events, patrol the streets as a Handicap Parking Patrol Officer, attend church, accompany his grandchildren to school, and go to Kaiser Hospital.

The City of Riverside is a municipal corporation and charter city of the State of California that is subject to the ADA. By federal mandate, the City was supposed to have a transition plan in place by July 26, 1992, 28 C.F.R. § 35.150(d)(1), and was required to bring its facilities into ADA compliance no later than January 26, 1995, 28 C.F.R. § 35.150(c). Yet, more than 15 years later, the City acknowledges that there are still "thousands" of unlawful barriers to Mr. Lonberg's mobility throughout the City. After examining the evidence, the district court concluded that the City "has engaged in *a pervasive pattern of violating Title II* of the ADA and the regulations related thereto." App. 30a (emphasis added).

The physical obstacles that Mr. Lonberg encounters within the City prevent him from using certain City streets and sidewalks, or require him to risk his health and safety by going around or through obstacles. The district court concluded that the challenges Mr. Lonberg faces due to these obstacles "cause him irreparable harm." App. 20a.

C. Petitioner's suit and the District Court's grant of an injunction against the City

Mr. Lonberg initiated his lawsuit in 1997. The district court divided the litigation into three phases. At issue in this appeal is phase one, concerning Mr. Lonberg's claim that the City lacked an adequate transition plan as 28 C.F.R. § 35.150(d) requires.

On June 12, 2000, the district court first concluded, as a matter of law, that the City lacked an adequate transition plan addressing the thousands of barriers to accessibility within the City. The City amended its plans in November 2000 and again in July 2001, but the district court held that these plans likewise failed to meet the requirements of ADA Title II and its accompanying regulations. In so ruling, the district court noted that the City had not raised the issue whether § 35.150(d) is enforceable by a private citizen by means of a federal lawsuit. But the court noted that several district courts had held that such a private right of action exists, at least where the plaintiff seeks injunctive relief. App. 43a (citing *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 539 (W.D. Ark. 1998); *Schonfeld* v. *City of Carlsbad*, 978 F. Supp. 1329 (S.D. Cal. 1997); *McCready* v. *Michigan State Bar*, 881 F. Supp. 300 (W.D. Mich. 1995)).

On March 21, 2006, the district court entered a permanent injunction against the City, requiring it to prepare a transition plan that complies with the ADA and 28 C.F.R. § 35.150. App. 15a. The City then moved for a new trial, arguing for the very first time—after a decade of litigation—that Mr. Lonberg did not have a right to privately enforce § 35.150(d). The district court denied the City's motion on the merits, reaching the same conclusion as the Tenth

Circuit's decision in *Chaffin* v. *Kansas State Fair Board*, 348 F.3d 850, 858 (10th Cir. 2002), that § 35.150(d) is privately enforceable.

D. The Ninth Circuit's decision

The City appealed, and a divided panel of the Ninth Circuit reversed, holding that § 35.150(d) does not create a private right of action. (The dissenting judge would have affirmed based on waiver. App. 13a.) The panel majority, acknowledging that other "circuits have split" on the issue, App. 6a, declined to follow the Tenth Circuit's lead in *Chaffin*, choosing instead to follow the Sixth and First Circuit decisions in *Ability Center of Greater Toledo* v. *City of Sandusky*, 385 F.3d 901, 914 (6th Cir. 2004), and *Iverson* v. *City of Boston*, 452 F.3d 94, 102 (1st Cir. 2006). In so ruling, the majority failed entirely to analyze either the ADA provision directing the Attorney General to promulgate a transition-plan regulation, 42 U.S.C. § 12134, or the provision creating a private cause of action to enforce the ADA, 42 U.S.C. § 12133.

Mr. Lonberg petitioned for rehearing en banc, and on July 17, 2009, the panel unanimously ordered the City to file a response. App. 58a. On January 15, 2010, the panel majority voted to deny the petition, with one judge recommending that the petition be granted. App. 59a. The petition for rehearing en banc also received a split vote but failed to garner the support of a majority of the nonrecused, active judges of the Ninth Circuit. *Id.*

REASONS FOR GRANTING THE PETITION

This Court should review the Ninth Circuit's decision because the circuits are split over the recurring and important issue whether a person with a disability has a private right of action to enforce the ADA's transition plan regulation, 28 C.F.R. § 31.150. As a result of the panel majority's ruling below, millions of individuals with a disability who live in or visit the Ninth Circuit (or the Sixth and First Circuits that the panel majority followed), will inevitably be barred from participating in or benefiting from city services, programs, and activities, the very type of passive discrimination that Congress sought to remedy in enacting the ADA.

The Ninth Circuit's decision is also inconsistent with the plain text of §§ 12133 and 12134. Even though Congress identified a specific transition-plan regulation as necessary to implement the ADA (§ 12134), and expressly created a private right to enforce the ADA (§ 12133), the panel majority failed to address either of these sections in concluding that the regulation could not be enforced by private action. That conclusion was error.

Finally, the Ninth Circuit's decision conflicts with this Court's decision in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). In *Sandoval*, this Court stated that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be enforced as well." *Id.* Here, Congress specifically created a right that implements § 12132 by directing the Attorney General to promulgate regulations requiring a transition plan, thereby demonstrating that Congress intended both to create the right to a transition plan, see 42 U.S.C. § 12134,

and a private right of action to enforce the transition plan, see *id.* § 12133. And the authoritative regulations do just that by "effectuat[ing]" the prohibition against "discrimination on the basis of disability by public entities" by requiring public entities to "develop a transition plan." See 28 C.F.R. §§ 35.101 & 35.150(d). Because Congress intended to provide a private right of action to enforce the ADA transition-plan regulation, such regulation is privately enforceable under *Sandoval*.

I. The Ninth Circuit's decision furthers a split among the federal circuits on an issue of recurring and substantial importance.

The Ninth Circuit recognized its decision furthered a clear circuit split as to whether § 35.150(d) creates a private right of action. App. 6a. The Ninth Circuit aligned itself with the Sixth Circuit in *Ability Center*, and the First Circuit in *Iverson*. In so ruling, the Ninth Circuit reversed the district court, which had reached the same conclusion as the Tenth Circuit in *Chaffin*.

The Tenth Circuit's opinion in *Chaffin* correctly rejects the panel majority's conclusion here that § 35.150(d) somehow creates a new right that cannot be found in Title II. In the Tenth Circuit's view, the regulation "simply provide[s] the details necessary to implement the statutory right created by [§ 12132] of the ADA." 348 F.3d at 858. This conclusion is consistent with the federal government's, view that the "common problem" of a city's failure to prepare a transition plan leads to the denial of city services, programs, and activities to individuals with disabilities, the very problem that Congress tried to correct by enacting § 12132. Common Problems, *supra*.

The importance of the issue presented and the millions of individuals it affects counsel strongly in favor of this Court's resolution of the split in authority. In circuits such as the First, Sixth, and Ninth, that have held there is no private right of action to enforce § 35.150(d), an apparent lack of federal resources to enforce the regulation will allow cities and other local governments to ignore their duty to prevent discrimination on the basis of disability. That is how the City of Riverside has reached the year 2010, some 15 *years* after it was supposed to be ADA compliant, with thousands upon thousands of physical barriers to access still in place. Wasteful litigation over the question presented also is sure to occur in circuits that have not yet addressed the issue. This Court should grant certiorari now to resolve the conflict and ensure that the ADA is uniformly applied throughout the country.

II. The Ninth Circuit's decision contravenes the text of the Americans with Disabilities Act and this Court's decision in *Sandoval*.

Congress clearly expressed its intent in the ADA to provide a private cause of action to enforce the transition-plan regulation. Indeed, Congress specifically authorized the regulation in the statutory text to give effect to the ADA's prohibition on discrimination against persons with a disability.

First, Congress in the ADA prohibited public entities from discriminating against persons with a disability: "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. As the Ninth Circuit noted, "[t]his

prohibition against discrimination is universally understood as a requirement to provide 'meaningful access.'" App. 10a. The City of Riverside admits it is a public entity subject to this prohibition.

Second, Congress provided a private right of action to enforce the ADA's prohibition against discrimination. The section immediately following the prohibition, a section entitled "Enforcement," states that "[t]he remedies, procedures, and rights set forth in section 794a of title 29 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." 42 U.S.C. § 12133. The Ninth Circuit agrees that "[§ 12132] is enforceable through a private right of action," App. 9a, and the City has not disputed that point.

Third, Congress directed the Attorney General to promulgate regulations to implement the ADA's discrimination prohibition, and that direction specifically called for regulations requiring transition plans. Section 12134(a) states that "the Attorney General shall promulgate regulations . . . that implement this part"—with "this part" referring to § 12131 through § 12134. Accordingly, the Attorney General promulgated in 28 C.F.R. Part 35 regulations that state that "[t]he purpose of this part"—consisting of 28 C.F.R. § 35.101 to § 35.189—"is to effectuate subtitle A of title II of the Americans with Disabilities Act"—i.e., 42 U.S.C. § 12131 through § 12134—"*which prohibits discrimination* on the basis of disability by public entities." 28 C.F.R. § 35.101 (emphasis added). This statement of purpose demonstrates the Attorney General's interpretation that *all* of the regulations in Part 35, including both its

"[g]eneral prohibitions against discrimination," *id.* § 35.130, and its regulations addressing "[e]xisting facilities" and transition plans, *id.* § 35.150, effectuate the prohibition against discrimination found in 42 U.S.C. § 12132. See *Alexander* v. *Sandoval*, 532 U.S. 275, 284 (2001) ("[R]egulations, if valid and reasonable, authoritatively construe the statute itself." (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984))). In other words, the Attorney General promulgated these regulations under § 12132, and that interpretation of the ADA, as reflected in 28 C.F.R. § 35.101, is entitled to *Chevron* deference.

Furthermore, Congress went so far as to specify the content of those regulations: "with respect to 'program accessibility, existing facilities' . . . , such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations." 42 U.S.C. § 12134(b). By referring to 28 C.F.R. Part 39, which includes regulations promulgated under the Rehabilitation Act, Congress thus purposely referred to 28 C.F.R. § 39.150, which (as echoed in the text of § 12134(b)) is entitled "Program accessibility: Existing facilities." And as the following chart shows, the Attorney General followed Congress's express directive by adopting in § 35.150(d) a regulation that was consistent with—and in fact extremely similar to—28 C.F.R. § 39.150.

28 C.F.R. § 39.150 (Rehabilitation Act)	28 C.F.R. § 35.150 (ADA)
(d) Transition plan. In the event that structural changes to facilities will be undertaken to	(d) Transition plan. (1) In the event that structural changes to facilities will be under-

achieve program accessibility, the agency shall develop, by April 11, 1985, a transition plan setting forth the steps necessary to complete such changes. . . .	taken to achieve program accessibility, a public entity that employs 50 or more persons shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes. . . .
The plan shall, at a minimum–	(3) The plan shall, at a minimum–
(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;	(i) Identify physical obstacles in the public entity's facilities that limit the accessibility of its programs or activities to individuals with disabilities;
(2) Describe in detail the methods that will be used to make the facilities accessible;	(ii) Describe in detail the methods that will be used to make the facilities accessible;
(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and	(iii) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.	(iv) Indicate the official responsible for implementation of the plan.

Congress thus specifically indicated through the plain text of 42 U.S.C. § 12134 its intent to implement § 12132's anti-discrimination provision by requiring public entities to prepare and implement transition plans, and Congress even required that such plans meet certain requirements. Despite the fact that § 12134 specifically directs the Attorney General to implement § 12132 by adopting transition-plan regulations, the Ninth Circuit never addressed § 12134 in its opinion.

Fourth, this Court has explained that when Congress creates a private right of action to enforce a statute, it necessarily intends to create a private right of action to enforce regulations implementing that statute. In *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), this Court stated that "[a] Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute [i.e., the regulation] to be enforced as well." *Id.* Here, Congress specifically created a right that implements § 12132 by directing the Attorney General to promulgate regulations requiring a transition plan, thereby demonstrating that Congress intended both to create the right to a transition plan, see 42 U.S.C. § 12134, *and* a private right of action to enforce the transition plan, see *id.* § 12133. And the authoritative regulations do just that by "effectuat[ing]" the prohibition against "discrimination on the basis of disability by public entities" by requiring public entities to "develop a transition plan." See 28 C.F.R. §§ 35.101 & 35.150(d). Just as this Court in *Sandoval* did "not

doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section," 532 U.S. at 284, here too there should be no doubt that the transition-plan regulations implementing § 12132's ban on discrimination fall squarely within a cause of action to enforce § 12132. Under *Sandoval*, therefore, Congress intended to provide a private right of action to enforce the ADA transition-plan regulations. *Chaffin*, 348 F.3d at 858 ("The [transition-plan] regulations simply provide the details necessary to implement the statutory right created by § 12132 of the ADA. They do not prohibit otherwise permissible conduct.") (citation omitted).

In its decision below, the Ninth Circuit acknowledged that "regulations effectuating the statute's clear prohibitions or requirements are enforceable through the statute's private right of action." App. 9a. That acknowledgment should have been the end of its analysis, because the transition-plan regulations effectuate rights specifically laid out in the text of the ADA. See 42 U.S.C. §§ 12132, 12134. But in spite of the clear language of the ADA, the Ninth Circuit concluded that the ADA transition-plan regulation "is not enforceable through [§ 12132's] private right of action because the obligations it imposes are nowhere to be found in [§ 12132's] plain language." App. 11a. The Ninth Circuit reached this conclusion only by ignoring § 12134 and by misreading *Sandoval*.

In *Sandoval*, this Court considered whether Title VI regulations prohibiting a disparate impact could be enforced through a private right of action granted under a statute that forbade only intentional discrimination. "Both the Government and respondents

argue[d] that the *regulations* contain rights-creating language and so must be privately enforceable," but this Court explained that the right must be created by statutory text. 532 U.S. at 291. Noting that "§ 601 prohibits only intentional discrimination," *id.* at 280, this Court concluded that § 601 did not create a right to be free from a disparate impact: "It is clear now that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore [make] clear that the private right of action to enforce § 601 does not include a private right of action to enforce these regulations." *Id.* at 285. After analyzing the statute, this Court "found no evidence anywhere in the text to suggest that Congress intended to create a private right to enforce regulations promulgated under § 602." *Id.* at 291. "Language in a regulation," this Court continued, "may invoke a private right of action that Congress through statutory text created, but it may not create a right Congress has not." *Id.*

In contrast here, Congress did, through the statutory text, create the right to a transition plan. Section 12134 specifically provides that the regulations "implement this part," which includes § 12132, and expressly requires the ADA regulations to be consistent with the Rehabilitation Act regulations that require a transition plan. See 42 U.S.C. § 12134(b) ("[S]uch regulations shall be consistent with regulations . . . in [28 C.F.R. part 39]."); see also 28 C.F.R. § 39.150(d) (requiring agencies to develop . . . a transition plan setting forth the steps necessary to complete such changes"). And § 12133 creates a private right of action to address violations of § 12132. Furthermore, the Attorney General authoritatively interpreted § 12134's specific requirement that he adopt transition-plan regulations as effectuating

§ 12132's discrimination prohibition. Under *Sandoval*, then, Congress's clear intent to create a private right of action to enforce the discrimination prohibition demonstrates that it also intends that the regulation implementing that prohibition be enforceable by a private right of action.

The Ninth Circuit also based its ruling on the conclusion that "[t]he existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access." App. 10–11a. That argument disregards the fact that Congress created the right to a transition plan in the ADA and authorized aggrieved individuals to seek an injunction enforcing that right. And the facts of this case demonstrate exactly why Congress imposed this requirement. Congress placed the burden on public entities to "[i]dentify physical obstacles . . . that limit" accessibility, 28 C.F.R. § 35.150(d)(3)(i), so that an individual with a disability would not have to encounter dangerous or impassible obstacles during the course of ordinary life, and then be forced to litigate each one on a case-by-case basis to provide access. Accord Common Problems, *supra*. In short, Congress required public entities to provide a roadmap through the minefield, not just a right to sue after stepping on a mine.

Here, for example, because the City violated the regulation by failing to complete its transition plan by July 26, 1992 and by failing to take steps necessary to achieve compliance with the plan, 28 C.F.R. § 35.150(d)(3), Mr. Lonberg has spent the last 18 years of his life risking tipping over in his wheelchair, getting stuck, or getting hit by traffic when he cannot travel on the sidewalks, without even being

provided information about which intersections and sidewalks to avoid. This case demonstrates Congress's wisdom in allowing private citizens to sue to require a city to develop a transition plan, rather than requiring such citizens to themselves identify and be injured by each individual obstacle before they could seek redress.

The Ninth Circuit also contended that "a public entity may be fully compliant with [§ 12132] without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy." App. 11a. That is of course not this case, but in any event, the transition-plan regulation does not apply when a public entity is fully compliant: a transition plan is necessary only "[i]n the event that structural changes to facilities will be undertaken to achieve program accessibility." 28 C.F.R. § 35.150(d). Thus, a fully compliant public entity would not need to make structural changes and would not need to develop a transition plan. And while the Ninth Circuit correctly notes that a public entity with a transition plan could still violate § 12132, that does not justify disregarding this statutorily created requirement. Moreover, having the plan would both provide individuals with a disability with notice of the obstacles remaining in their community, which would help them avoid the obstacles, and would provide those individuals with the right to participate in the process of prioritizing the removal of the obstacles. 28 C.F.R. § 35.150(d). Having a transition plan would give effect to those rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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