U.S. Court of Appeals Docket No. 21-15621

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IVANA KIROLA, ET AL.,
Plaintiffs and Appellants,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Defendants and Appellees

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

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CONSENT OF PARTIES TO FILING

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

STATEMENT OF INTEREST OF AMICI CURIAE

Amicus League of California Cities ("Cal Cities") is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to cities and identifies those cases that have statewide or nationwide significance.

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

Amicus International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation of municipal legal matters. Its mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

These amici (collectively, "Local Government Amici") have identified this case as a matter affecting *all* local government entities throughout California and nationally. Local Government Amici therefore present this supporting Appellee City and County of San Francisco ("San Francisco").[1]

[1] Counsel for Amici certifies that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or any other person other than Amici, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. FRAP Rule 29(a)(4)(e).

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past 32 years, since the initial passage of the ADA, cities and counties throughout California have expended time and resources—often creating entire municipal departments—to comply with the ADA and other disability access requirements. And, as the trial court noted below, the City and County of San Francisco has been enormously successful in enacting and implementing thoughtful programmatic access since before this litigation began 15 years ago. But there is only so much that local governments can do with ever-dwindling budgets and ongoing challenges such as the housing crisis, public safety, the opioid crisis, and an ongoing pandemic. And considering San Francisco's adoption of a "sophisticated and robust infrastructure" to ensure program access and compliance with the ADA Accessibility Guidelines (ADAAG), plaintiffs' insistence on a court injunction here creates perverse incentives to compliance.

What Plaintiffs/Appellants seek from this Court not only contravenes existing law in this Circuit and elsewhere, but also would mire even the most diligent local governments in endless litigation. Nor would such

litigation be targeted to assist the members of the disabled community actually encountering conditions that might bar full access; rather, Plaintiffs here request that this Court *require* trial courts to order class-wide injunctive relief where neither the named class representative nor any member of the class has provided evidence of ever encountering a specific ADAAG violation.

This brief will focus on two arguments common to the interests of the numerous local governments represented by Local Government Amici. In short, amici request that this Court confirm that: 1) the 3-year statute of limitations applies to bar plaintiff Kirola's challenge to pre-2014 curb ramps with lips; and 2) district courts retain the discretion to deny class-wide injunctive relief where plaintiffs fail to prove at trial any systemic policy deficiency causing widespread harm to the class.

ARGUMENT

I. This Court Should Affirm the District Court's Correct Application of the Statute of Limitations and Claims Accrual

Appellants' position in this case is that even in the absence of evidence that any class member—let alone the single named class

representative— first encountered a "lipped" curb ramp within the statute of limitations period, and where the policy of installing "lipped" ramps was discontinued before the limitations period in this case, the mere existence of noncompliant curbs is a "continuing violation." The revival of stale Title II ADA claims in such circumstances would defeat the very purpose of having a statute of limitations in Title II cases at all. Local governments with limited resources simply cannot face both their known, ongoing obligations to fund public safety, public health, and numerous other necessary functions while also facing uncertain and perpetual liability for Title II ADA claims.

Statutes of limitations exist to protect defendants against stale claims. *See, e.g.*, *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944) ("The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.") This policy underlying statutes of limitations applies especially to local governments, which must balance

their budgets each year and therefore must attempt to anticipate potential expenses from legal claims, whether damages or onerous attorney fee liability or costly construction related to injunctive relief. *See, e.g.*, Tyler T. Ochoa & Andrew J. Wistrich, The Puzzling Purposes of Statutes of Limitation, 28 Pac. L.J. 453, 469 (1997) ("Statutes of limitation, by reducing uncertainty, can help individuals and businesses reduce the out-of-pocket costs associated with uncertainty, and allow those resources to be allocated to more socially beneficial uses").

Appellants and their amici take the position that the statute of limitations does not begin to run at the very earliest until after a plaintiff has encountered an ADAAG violation. Dkt. 15-1 (Brief of Disability Rights Education and Defense Fund and Nineteen Other Organizations ("DREDF brief") at 18-19; Dkt. 23 (Appellants' Opening Brief) at 31-34. Local Government Amici agree, as does San Francisco. Dkt. 32 (Answering Brief of Appellees City and County of San Francisco) at 16-17. But what Appellants and their amici elide is the trial court's finding that neither the class representative nor any of the class members provided evidence that

they had first encountered a "lipped" curb ramp within the limitations period. *Id.* at 15.

Nor do Appellants and their amici contend with the difference between Title II ADA actions and Title III actions insofar as application of continuing violations to extend the limitations period. While applying the continuing violations doctrine in Title III ADA cases makes sense, given the requirement in those cases that business owners have a continuing duty to remove access barriers, Title II requires *program access*, which does not require the removal of individual non-compliant features. Dkt. 32 at 16-17.

Should this Court agree with Appellants and hold that in Title II cases, the limitations period for suits against municipal entities re-opens each time a class member encounters an individual ADAAG non-compliant feature *despite* overall program access and prior encounters or knowledge of the barriers, local governments' already starved budgets and carefully crafted priorities for furthering access will be unduly taxed.

The correct application of the statute of limitations, as shown by the trial court, does not circumscribe litigants' ability to bring meritorious

cases. As Plaintiffs' amici note, "[w]here failure to comply with access standards constitutes a continuing violation, either due to 'serial' or 'systematic' violations, the statute of limitations does not commence until the discriminatory conditions cease." Dkt. 15-1 at 10, quoting *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 822 (9th Cir. 2001). But Plaintiffs' amici ignore when applying this standard that there has been a failure of proof in this case, where the trial court found that San Francisco cured the "lipped" curb ramp policy—where San Francisco installed ramps pursuant to a state-required[1] design—that San Francisco ceased installing more than three years before this litigation commenced; in such instances, it would be error for a trial court to apply the continuing violations doctrine to revive claims brought pursuant to a stale and self-corrected policy.

And, while the plaintiffs involved in *this case* are appropriately barred from bringing this action, where they have not alleged that they first

[1] As discussed in San Francisco's brief, and apparent from the record below, the "lipped" curb ramps were required by California statute to comply with state disability access law to ensure accessibility for vision-impaired individuals.

encountered noncompliant conditions prior to the limitations period, this does not necessarily doom *future* plaintiffs who encounter such barriers for the first time from bringing suits for relief within the limitations period. In *Frame v. City of Arlington*, the Fifth Circuit held that "the plaintiffs' cause of action accrued when they knew or should have known they were being denied the benefits of the City's newly built or altered sidewalks." 657 F.3d 215, 238-39 (5th Cir. 2011) (en banc). Accordingly, under *Frame*, plaintiffs are time barred if they failed to sue within the limitations period after their claim *first* accrued.[2] *Id.* This does not, as Plaintiffs' amici contend, "forever bar[]" suits related to conditions "constructed or altered more than three years before filing" an action. Dkt. 15-1 at 9. Rather, proper application of the statute of limitations to private Title II actions to enforce ADAAG compliance means that after well over a decade, a municipality should be able to rely on the statute of limitations to bar plaintiffs from bringing stale

[2] As San Francisco correctly notes, this means that here, any plaintiff who knew or should have known about San Francisco's lipped curb ramps prior to July 17, 2004 was barred from challenging their compliance with ADAAG. Dkt. 32 at 17.

claims, and that such actions require evidence that a plaintiff has encountered or learned of the condition for the first time within the limitations period. Amici respectfully submit that this is the correct balance between the policy behind enforcing statutes of limitations and requiring local governments to correct ADAAG violations that are the subject of timely suits. Further, while the enforcement capacity of state and federal agencies is not without limits, in egregious cases access violations outside the limitations period may be remedied via actions by those governmental entities.

II. This Court Should Affirm that District Courts Retain Discretion to Deny Class-Wide Injunctive Relief Where ADAAG Violations are Non-Systemic and Were Not Encountered by the Class Representative.

The district court correctly exercised its discretion below to deny Appellants' request for broad injunctive relief, finding instead that the lone class representative failed to demonstrate that she encountered ADAAG violations and that any isolated non-compliant conditions found by Appellants' experts were non-pervasive and could not be attributed to citywide policies or practices. Dkt. 32 at 35-36. Appellants now contend

that the district court erred and that it instead was *required* to award systemwide injunctive relief. Such a holding would not only be contrary to established law related to injunctive relief, but would also heap burdensome and costly compliance upon local governments without *any* showing that a single individual (let alone a class) had been harmed by the isolated deviations from ADAAG.

Courts do not grant equitable relief as a matter of right. *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987) ("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law."). A plaintiff seeking injunctive relief must instead show that they face a real or immediate threat of substantial or irreparable injury. *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Oregon*, 254 F.3d 846, 850 (9th Cir. 2001). Courts are especially reluctant to grant injunctive relief against public entities; it is the "well- established rule" that courts must give such entities broad discretion to "dispatch [their] internal affairs." *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976). This is because "one of the most important considerations governing the exercise of equitable power is a

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

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

Here, after a full multi-week bench trial, the trial court found that San Francisco had not only fulfilled its obligations under the ADA but that it also has a "sophisticated and robust" program for ensuring future ADA compliance. *Kirola v. City & County of San Francisco*, 74 F.Supp.3d at 1202 (N.D. Cal. 2014.) Likewise, the trial court found that though ADAAG non-compliant conditions did exist in various areas of San Francisco, neither the named plaintiff nor any class member provided evidence that they had encountered those conditions during the limitations period. Dkt. 32 at 35-36.

Requiring trial courts to award class-wide injunctive relief under these circumstances—to remedy isolated ADAAG violations that no class member has encountered or been harmed by—would leapfrog such violations in priority for remedy over conditions already prioritized due to complaints or policy determinations by the entity. This is exactly backwards from the priorities that public entities can and *should* have for fixing ADAAG non-compliant conditions—starting with those that impact

the disability community, rather than those that have only been discovered by an expert witness for litigation purposes.

Nor will this Court's upholding of the trial court's exercise of discretion "encourage non-compliance with ADAAG" or chill private enforcement of the ADA, as Plaintiffs' amici suggest. Dkt. 15-1 at 26-30. In cases where a plaintiff or class representative provides competent evidence of pervasive ADAAG violations or barriers to programmatic access, courts certainly can—and do—provide injunctive relief under Title II. But where there is a failure of proof, especially in a case where the public entity has demonstrated not only its good faith and deep commitment to ensuring access to the disabled community, district courts must be allowed discretion to fashion—or wholly deny—injunctive relief. Requiring injunctive relief based on the trial record in this case would create the exact perverse incentives that the DREDF amici say that they fear. If an injunction is inevitable, notwithstanding a local government's "sophisticated and robust" infrastructure for ADA compliance, the successful provision of program access, and the absence of any systemic

policy deficiency causing widespread harm to the class, then local governments may be better off not attempting ADA compliance on their own, but might wait to be sued for a court to specify the local governments' obligations under the ADA.

CONCLUSION

Amici League of California Cities, International Municipal Lawyers Association, and California State Association of Counties respectfully urge this Court to uphold the trial court's correct application of the statute of limitations, and to decline to *require*—rather than to allow—injunctive relief where none is necessary or appropriate.

Dated: October 5, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
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