No. 09-1259

JUN 18 2010

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 IN OPPOSITION OF RESPONDENT

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING, JURISDICTION, AND OPINIONS BELOW

Respondent concurs in petitioner's statement as to the parties to the proceeding, jurisdiction and opinions below.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

FEDERAL STATUTES AND REGULATIONS

STATE STATUTES

Blank Page

STATEMENT OF FACTS

Petitioner John Lonberg sued the City of Riverside for violation of the Americans With Disabilities Act ("ADA"). Petitioner contended that the City failed to provide meaningful access to the public rights of way, i.e., sidewalks and streets. As the Ninth Circuit opinion notes, the district court divided the lawsuit into three phases. Phase I, the only phase at issue in this proceeding, concerned petitioner's claim that the City's plan to achieve ADA compliance did not meet the standards set forth in 28 C.F.R. § 35.150(d). The district court granted petitioner's request for a permanent injunction and ordered the City to prepare a transition plan that complies with § 35.150(d). (ER 1, 2.)[1] The City moved for a new trial, arguing for the first time that the ADA did not grant a private right of action and remedy for violation of the regulation in question. The district court denied the motion, finding that the regulation was properly enforceable under the ADA. The City appealed.

On June 26, 2009, the Ninth Circuit issued its published opinion reversing the permanent injunction. The majority opinion held that the ADA did not provide a private right of action or remedy based on a violation of the transition plan regulation. *Lonberg v. City of Riverside*, 571 F.3d 846, 851-52 (9th Cir. 2009).

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[1] Phase II of the case pertains to curb ramps and sidewalks and petitioner's claims of noncompliance with current accessibility regulations as well as damage claims under the California Disabled Persons Act. Cal. Civ. Code § 54.

Judge Silverman dissented on the ground that the City had waived the issue by failing to have asserted it earlier in the litigation. *Id.* at 852-53.[2] Petitioner sought panel rehearing and rehearing en banc, respondent filed opposition, and both panel and en banc rehearing were denied.

SUMMARY OF ARGUMENT

The petition presents no significant issue for review by this Court. There is no meaningful conflict among the circuits, no indication any decision will have an impact on a broad spectrum of cases, and the Ninth Circuit's decision is consistent with the governing authority of this Court.

First, there is no meaningful conflict among the circuits concerning the existence of a private right of action to enforce transition plan requirements under the ADA. The first federal appellate court to consider the issue, the Tenth Circuit, interpreting this Court's then fairly recent decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), concluded a private right of action could be brought to enforce transition plan regulations. *Chaffin v. Kan. State Fair Bd.*, 348 F.3d 850, 858 (10th Cir. 2003). Yet, not a single circuit has followed *Chaffin* in the intervening seven years. The Ninth, Sixth, and First Circuits have all concluded

[2] Petitioner did not raise the waiver issue on rehearing in the Ninth Circuit and has not raised it in this Court.

that the *Chaffin* court ignored a basic precept of *Sandoval*, i.e., that a federal regulation which imposes obligations over and above those specifically set forth in the authorizing statute, is not enforceable by private right of action. That Congress granted private parties the right to bring actions to eliminate specific barriers to access, does not support a private right of action to compel a public entity to comply with a later regulation requiring transition plans that, in a given case, may have nothing to do with whether or not there are actually barriers to access. *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901, 913-14 (6th Cir. 2004); *Iverson v. City of Boston*, 452 F.3d 94, 101 (1st Cir. 2006); *Lonberg v. City of Riverside*, 571 F.3d 846, 851-52 (9th Cir. 2009).

Given its orphan status among the appellate courts, and the clear criticism of its decision, it is foreseeable that the Tenth Circuit might well reconsider its position on private enforcement of transition plan regulations. This is especially true given the fact that its earlier decision was rendered without benefit of the thorough analysis of *Sandoval* that has since developed in the other circuits.

Moreover, there is no indication that the issue arises with any frequency in the lower courts. Petitioner cannot point to a multitude of actions awaiting clarification on this issue. Indeed, no published decisions concerning the issue are cited other than the four discussed above. There is nothing to justify this Court's intervention at this time.

Second, the decisions of the Ninth, First, and Sixth Circuits are fully consistent with this Court's decision in *Sandoval*. As noted, in *Sandoval*, the Court made it clear that there was no private right of action to enforce a federal regulation that imposed an obligation over and above that expressly imposed by the statute itself. As the Ninth Circuit here, and the First and Sixth Circuits have recognized, the ADA does not impose any direct obligation on public entities to create transition plans, and the existence of a transition plan has no impact on whether or not there are particular barriers to access in a given municipality. It is possible to have a transition plan yet still have barriers to access. Conversely, a public entity may not have a transition plan, but its facilities may well be free of barriers. Allowing enforcement of transition plan regulations through a private right of action imposes an obligation on local public entities over and above that directly imposed by the ADA. Permitting such enforcement essentially allows the Attorney General through promulgation of regulations, to, in the words of *Sandoval*, play the sorcerer and not simply the apprentice.

At most, petitioner has raised an issue that is the subject of an initial conflict among four appellate courts, with only a single court out of alignment. There is no indication of widespread confusion among the lower courts on any issue that arises with frequency. In time other circuits may weigh in, or the Tenth Circuit may reconsider its initial, and we

contend, improvident decision. But at this juncture, there is no need for intervention by this Court.

REASONS WHY CERTIORARI IS NOT WARRANTED

I. REVIEW IS NOT WARRANTED BECAUSE THERE IS NO MEANINGFUL CONFLICT AMONG THE FEDERAL APPELLATE COURTS CONCERNING AN ISSUE OF WIDESPREAD IMPORTANCE REQUIRING INTERVENTION BY THIS COURT.

Petitioner contends review is warranted because there is a split among the circuits concerning whether there is a private right of action to enforce the transition plan regulations of the ADA. As noted, only the Tenth Circuit has recognized such a cause of action, and it did so as the first court to even consider the issue. Since that time, three circuits have expressly rejected the Tenth Circuit's analysis, noting that the Tenth Circuit applied only a portion of this Court's decision in *Alexander v. Sandoval*.

Thus, at this point, only four circuits have addressed the issue at hand, and only a single circuit – the very first to consider the issue – has found in favor of a private right of action. And, its analysis has been sharply criticized by subsequent courts as being incomplete. A total of four federal circuit court opinions in the over 20 years since the enactment of the ADA does not suggest a widespread or significant

issue that requires resolution by this Court. This is particularly true given that the courts that have considered the issue have been almost uniform, with only a single court finding there to be a private right of action. Given the sharp criticism of the Tenth Circuit's opinion in *Chaffin*, it is not inconceivable that the Tenth Circuit itself, with the benefit of insight from sister circuits over the last four years, might come to a different resolution of the issue.[3] It therefore does not appear that intervention by this Court is necessary at this time.

Moreover, and significantly, petitioner does not point to any great prevalence of this issue in published decisions from the lower federal courts. There is no indication that these claims arise with any sort of ubiquity in the federal trial courts so as to require the intervention of this Court to clarify the law at this point. While petitioner and amici may well want to create a standalone cause of action to compel local public entities to adopt transition plans separate and apart from whether or not there are actual barriers to access or efforts to achieve that end, there is no indication of any sort of widespread attempt to bring

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[3] The Eleventh Circuit also recently rejected the *Chaffin* court's crabbed interpretation of *Sandoval*. In *American Ass'n of People With Disabilities v. Harris*, ___ F.3d ___, 2010 WL 1855851 (11th Cir. 2010), the court followed *Lonberg*, *Iverson* and *Ability Center* in concluding that under *Sandoval*, there was no private right of action under the ADA to enforce regulations concerning voting machines.

similar claims throughout the country.[4] Rather, as the instant case illustrates, at most, the transition plan issue is tangential to a main claim focusing on specific barriers to access.[5]

To the extent there is a conflict among the federal appellate courts, it may well be of transient nature, and concerns an issue that does not appear to be rampant among the lower federal courts, however much petitioner and his amici may wish to propagate it. The intervention of this Court is not warranted at this time.

II. REVIEW IS UNWARRANTED BECAUSE THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE ADA, THE GOVERNING AUTHORITY OF THIS COURT, AND THE WELL REASONED DECISIONS OF OTHER CIRCUITS.

Petitioner seeks review on the ground that the Ninth Circuit erred in concluding there could be no private right of action and remedy for violation of the transition plan regulation. Petitioner argues that the opinion is inconsistent with the general purposes of the ADA as set forth in 42 U.S.C. § 12132 (West

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[4] Amicus curiae Richard M. Skaff refers to a single action he has brought. (*See* Brief of Amicus Curiae Richard M. Skaff in Support of Petitioner at 20.)

[5] In another phase of this litigation, petitioner has brought claims for relief based upon specific purported barriers to access.

2009), and that the opinion is inconsistent with § 203 of Title II of the ADA, 42 U.S.C. § 12133 (West 2009), which authorizes a private right of action to enforce the ADA, as well as § 204, 42 U.S.C. § 12134 (West 2009), which directs the Attorney General to create regulations to "implement" the ADA. Yet, petitioner's argument does not withstand scrutiny and the case does not warrant review.

A. The Ninth Circuit Correctly Joined The First And Sixth Circuits In Concluding That The Plain Language Of The ADA, Interpreted Under The Guiding Principles Of *Alexander v. Sandoval*, Makes It Clear That There Is No Private Right Of Action To Enforce The Transition Plan Regulation At Issue Here.

As the Ninth Circuit's opinion noted, this Court's decision in *Alexander v. Sandoval* "sets forth the framework for determining whether a federal regulation is enforceable through a private right of action." *Lonberg*, 571 F.3d at 849. In *Sandoval*, a class of non-fluent English speakers sued a state department of public safety, alleging that its English-only driver's test violated a federal regulation that barred recipients of federal funding from using criteria or methods that have the effect of subjecting individuals to discrimination because of race, color, or national origin. *Sandoval*, 532 U.S. at 278-79. In reversing an injunction requiring the state to accommodate non-English speakers, the Court held that the

regulation in question could not be enforced by a private right of action. *Id.* at 293.

In so holding, the Court noted that the regulation was promulgated as a means to implement § 601 of Title VI of the Civil Rights Act of 1964 which bans recipients of federal funding from intentionally discriminating against individuals on the basis of race, color, or national origin. *Id.* at 278 (citing 42 U.S.C. § 2000d). The Court found that although Congress clearly intended § 601 to be enforceable through a private right of action, the regulation at issue was not subject to private enforcement because the regulation did not merely apply § 601's ban on intentional discrimination, but also "forbid conduct that § 601 permits," in that § 601 did not attempt to reach discrimination based on disparate-impact. *Id.* at 285. Thus, only regulations that effectuated the ban on intentional discrimination could be enforced through a private right of action. To allow enforcement of the regulation would "conjure up a private cause of action that has not been authorized by Congress." *Id.* at 291. As the Court emphasized, "[a]gencies may play the sorcerer's apprentice but not the sorcerer himself." *Id.*

In applying *Sandoval* to determine whether the transition plan regulation, 28 C.F.R. § 35.150(d) is enforceable through a private right of action, the Ninth Circuit focused on the statute it was intended to implement: "§ 202 of Title II of the ADA, which prohibits discrimination by public entities on the basis of disability." *Lonberg*, 571 F.3d at 851. As the court observed, § 202 "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.'" *Id.* (quoting 42 U.S.C. § 12132 (1990)).

The court noted that the "plain language of § 202 prohibits public entities from discriminating against qualified disabled individuals in its administration of services and programs" and that this "prohibition against discrimination is universally understood as a requirement to provide 'meaningful access.'" *Id.* (citation omitted). However, the court correctly observed that "[s]ection 202 says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access, nor does it create a private right to such a plan." *Id.*

In addition, as the court explained, "nothing in the language of § 202 indicates that a disabled person's *remedy* for the denial of meaningful access lies in the private enforcement of section 35.150(d)'s detailed transition plan requirements." *Id.*

The court therefore found that the regulation was not subject to enforcement through a private right of action because there was nothing to indicate that Congress intended private enforcement of a regulation that merely required creation of a plan. As the court explained:

> The 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. Indeed a public entity may be fully compliant with § 202 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. Conversely, a public entity may have a transition plan that complies with section 35.150(d), but may still be in violation of section 202 by, for example, failing to alter its sidewalks in a way that provides meaningful access.

Id. at 851-52 (footnote omitted) (citations omitted).

Indeed, as the court emphasized, petitioner's own efforts to enforce the regulation belied any intent to actually eliminate the particular barrier to access, because petitioner initially sought only a declaration that the City's transition plan was inadequate. *Id.* at 851 n.7.

The Ninth Circuit's opinion is consistent with decisions of both the First and Sixth Circuits which, consistent with *Sandoval*, examined § 35.150(d) in light of the specific purposes of the ADA as set forth in § 202. In *Ability Center of Greater Toledo v. City of Sandusky*, 385 F.3d 901, the Sixth Circuit held that while other regulations that specifically directed removal of particular architectural barriers would be privately enforceable under the ADA, § 35.150(d)'s transition plan regulation was not subject to private enforcement because while "failing to provide curb

cuts and other accommodations in the course of altering city streets and sidewalks in violation of [other regulations] denies the disabled meaningful access to public services by perpetuating architectural barriers that impede such access, failing to develop a transition plan in violation of § 35.150(d) does not in and of itself similarly hinder the disabled." 385 F.3d at 913-14. The court emphasized that "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 a redress." *Id.* at 914. As the court observed: "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." *Id.*

In *Iverson v. City of Boston*, 452 F.3d 94, the First Circuit similarly held there was no private right of action to enforce transition plan regulations. Applying *Sandoval*, the court explained that a regulation "that announces an obligation or a prohibition not imposed by the organic statute may not be enforced under the aegis of a statutory right of action." 452 F.3d at 101 (citing *Sandoval*, 532 U.S. at 284-85). As the court noted, the "dispositive question is whether the regulation either forbids conduct that the statute allows or imposes an obligation beyond what the statute mandates. If that question produces an affirmative answer, the regulation is not privately enforceable." *Id.*

The court in turn held that regulations directing a public entity to conduct a self-evaluation and, if necessary a transition plan, were not enforceable by a private right of action. *Id.* This is because "a municipality's failure to self-evaluate does not in and of itself render municipal services, programs, or activities inaccessible to disabled persons," in that it is "conceivable that a public entity may be in full compliance with Title II without observing the commands of the self-evaluation regulation." *Id.* Because the "regulation imposes a burden on public entities not imposed by Title II itself . . . [it] is not enforceable through the instrumentality of Title II's private right of action." *Id.*

As previously noted, the only circuit to uphold a private right of action for enforcement of transition plan regulations is the Tenth Circuit. In *Chaffin v. Kansas State Fair Board.*, 348 F.3d 850, the court held that the plaintiffs could privately enforce the self-evaluation plan and transition plan regulations because they "simply provide the details necessary to implement the statutory right created by § 12132 of the ADA. They do not prohibit otherwise permissible conduct." 348 F.3d at 858. Yet, as the court noted in *Iverson*, the *Chaffin* court did not correctly apply *Sandoval*. It observed that although the *Chaffin* court "appropriately recognized that 'regulations may not create a private cause of action where no such right was intended by Congress in the statute authorizing promulgation of such regulations,' it inexplicably disregarded *Sandoval's* corollary rule that regulations

which impose an obligation beyond the statutory mandate are not enforceable through the statutory right of action." 452 F.3d at 101-02 (citations omitted). The Ninth Circuit here similarly found that *Sandoval* requires "a more particularized review of the challenged regulation than was undertaken by the Tenth Circuit in *Chaffin*, in addition to a determination of whether the regulation effectuates the statutory right and corresponding remedy." *Lonberg*, 571 F.3d at 852.

The *Chaffin* court's analysis is flatly inconsistent with this Court's command in *Sandoval* that regulations cannot create privately enforceable rights beyond those created by the statute itself. As the Ninth Circuit here, the First Circuit and Sixth Circuit have recognized, transition plan regulations impose obligations on public entities over and above those imposed by the substantive provisions of the ADA itself. Hence, under *Sandoval*, they are not enforceable through a private right of action.

B. Neither Section 204 – 42 U.S.C. Section 12134 – Nor Section 203 – 42 U.S.C. Section 12133 – Supports Petitioner's Contention That Congress Intended To Create A Private Right Of Action To Enforce Transition Plan Regulations.

Petitioner contends that in holding that § 202 of the ADA did not evince congressional intent to create a private right of action to enforce transition plan regulations, the panel majority failed to apply § 204

of the ADA, 42 U.S.C. § 12134, which directs the Attorney General to create regulations to "implement" the chapter. According to petitioner, this provision somehow evinces congressional intention to create a private right of action to enforce transition plan regulations enacted by the Attorney General. (Cert. Pet. 14-17.) Specifically, petitioner contends that § 204, 42 U.S.C. § 12134, directs the Attorney General to create regulations implementing the act, further requires that such regulations duplicate those promulgated with respect to the Rehabilitation Act, and that such regulations include those concerning transition plans. *Id.* Petitioner's contention does not withstand scrutiny.

As a threshold matter, petitioner's apparent suggestion that § 204 in and of itself, without reference to § 202, somehow creates substantive rights enforceable in a private right of action under § 203, 42 U.S.C. § 12133, is untenable and directly conflicts with this Court's analysis in *Sandoval*. In finding no private right of action to enforce a particular regulation under Title VI, the Court rejected the plaintiff's contention that a statute directing federal departments and agencies to "effectuate the provisions of [§ 601]" of Title VI evinced congressional intent to create a private right of action to enforce any such regulations, even those that prohibited discrimination beyond that prohibited by § 601. *Sandoval*, 532 U.S. at 288-89. In addition to holding that the regulation in question did not in fact "effectuate" a right created by § 601 because it went beyond discrimination

prohibited by that provision, the Court found that § 602's exclusive focus on the obligation of federal agencies as opposed to those subject to regulation or potential beneficiaries dispelled any notion that § 602 created rights subject to a private right of action:

> [T]he focus of § 602 is twice removed from the individuals who will ultimately benefit from Title VI's protection. Statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.' Section 602 is yet a step further removed: it focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating.

Id. at 289 (citation omitted).

That is precisely the case with § 204 as well – it is directed to the Attorney General, the agent who "will do the regulating." *Id.* It has no substantive rights to enforce other than as defined in the provision, i.e. regulations that "implement" Title II of the ADA as set forth in § 202. *See* ADA § 204, 42 U.S.C. § 12134(a) ["the Attorney General shall promulgate regulations in an accessible format that implement this part"].

Indeed, the language of § 204 is virtually identical to the "authorizing" language at issue in *Sandoval*. There, the question was whether the particular regulation at issue "effectuated" the purposes of Title VI as set forth in § 601. Similarly here, as the Ninth

Circuit recognized, the question is whether the regulation at issue in fact "implements" the purposes of the ADA as set forth in § 202. As noted above, in a detailed and correct analysis, the Ninth Circuit observed that it did not, since the presence or absence of a transition plan had no substantive impact on actual accessibility – a public entity can have a plan but still have barriers to access, or, have no transition plan yet still be fully compliant. *Lonberg*, 571 F.3d at 851-52.

Contrary to petitioner's contention, § 204 simply directs the Attorney General to promulgate regulations that "implement" the right of access encompassed in § 202; the statute does not state that *any* regulation promulgated by the Attorney General "implements" § 202.[6] It cannot be construed as authorizing the Attorney General to create what petitioner and amici attempt to characterize as "rights" to participation and to notice concerning transition plans that, as the Ninth, First and Sixth Circuits have observed, impose obligations that are different than and additional to, the right of access expressly articulated by Congress in § 202. This would, as *Sandoval* noted, impermissibly allow the Attorney General to play the sorcerer, and not merely the apprentice. *Sandoval*, 532 U.S. at 291.

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[6] To paraphrase the Dormouse from Alice in Wonderland, "you might just as well say . . . that I breathe when I sleep is the same thing as I sleep when I breathe. . . ."

Nor, contrary to petitioner's contention, does § 204 expressly reference the particular Rehabilitation Act regulations concerning transition plans, much less specifically evince congressional intent to make such regulations enforceable through a private right of action. In fact, § 204 does not even direct the Attorney General to specifically adopt Rehabilitation Act regulations. Rather, subdivision (a) directs the Attorney General to promulgate regulations "that implement this part," and subdivision (b) simply states that any such regulations "shall be *consistent*" with regulations promulgated with respect to the Rehabilitation Act. 42 U.S.C. § 12134(a)-(b) (West 2009) (emphasis added). "Consistent with" is not the same as "identical to." At most, the provision evinces congressional intent that any regulation that implements the basic rights of the ADA as set forth in § 202 must be consistent, i.e., not conflict with, regulations applicable to facilities under the Rehabilitation Act. Contrary to petitioner's assertion, a requirement that a regulation "implementing" the rights encompassed in § 202 not conflict with federal regulations under the Rehabilitation Act is not the same as saying that regulations under the Rehabilitation Act necessarily implement the ADA.

Not surprisingly, in *Ability Center*, the Sixth Circuit rejected the notion that reference to the general regulatory scheme under the Rehabilitation Act could be interpreted as evincing congressional intent to allow private enforcement of transition plan regulations. 385 F.3d at 914. The court emphasized the

absence of any indication that "Congress viewed the creation of transition plans as integral to the achievement of the statute's aims 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 access to public services." *Id.*

As the Ninth Circuit recognized in its decision, the question here was whether the transition plan regulation at issue implemented the core rights of the ADA as set forth in § 202, or imposed different and additional burdens. *Lonberg*, 571 F.3d at 851-52. Consistent with the First and Sixth Circuits, the Ninth Circuit correctly reasoned that under the principles set forth by this Court in *Sandoval*, there was nothing to support the conclusion that Congress intended to create a private right of action to enforce regulations concerning transition plans that simply had no direct impact on the existence or nonexistence of barriers to access. While petitioner is certainly free to pursue, and is in fact pursuing damages under state law and other state and federal remedies in the district court arising from alleged specific barriers to access, there is no private right of action to enforce the transition plan regulation. Because the Ninth Circuit's decision is consistent with the express statutory language, controlling authority of this Court, and the majority of circuits to address the issue, there are no grounds warranting review.

CONCLUSION

For the foregoing reasons, respondent City of Riverside respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully,

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