No. 12-56280

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBIN K. FORTYUNE,

Plaintiff-Appellee

v.

CITY OF LOMITA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLEE AND URGING AFFIRMANCE

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STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12132 *et seq.*, and regulations promulgated pursuant to Title II, require a city to provide public on-street parking reasonably accessible to, and usable by, individuals with disabilities where no current ADA regulation specifically addresses this obligation.

INTEREST OF THE UNITED STATES

This case concerns the scope of protection provided by Title II of the ADA, 42 U.S.C. 12132, and federal regulations. The Department of Justice is authorized to bring a civil action to enforce Title II, 42 U.S.C. 12133, and to promulgate regulations to implement Title II, 42 U.S.C. 12134. Accordingly, the United States has a strong interest in how courts interpret this statute and our accompanying regulations. The United States has filed amicus briefs in prior appeals that addressed the similar issue of whether a city is obliged under Title II to make public sidewalks accessible to individuals with disabilities where there was no regulation that specifically addressed the accessibility of sidewalks. See *Frame* v. *City of Arlington*, 657 F.3d 215 (5th Cir. 2011), cert. denied, 132 S. Ct. 1561 (2012); *Barden* v. *City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003). The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE CASE

1. Plaintiff Robin Fortyune is a California resident with physical disabilities that require him to use a wheelchair for mobility. E.R. 32.[1] He has visited several stores within the City of Lomita (the City). E.R. 33. Fortyune contends that none

[1] This brief uses the following abbreviations: "E.R. ___" for the defendant's Excerpts of Record; and "Br. __" for the defendant's opening brief filed with this Court.

of the public on-street diagonal stall parking spots the City provides are accessible to people with disabilities. E.R. 33. In practical terms, this means, among other things, that none of the diagonal stall parking spots have an access aisle allowing an individual in a wheelchair to enter and exit his vehicle. E.R. 33. This lack of accessible public parking for individuals with disabilities, Fortyune alleges, causes him to experience great difficulty, discomfort, and fear for his safety when parking in the City. E.R. 33.

In 2011, Fortyune filed a complaint in Los Angeles County Superior Court alleging that the City of Lomita's lack of accessible on-street public parking for individuals with disabilities violated Title II of the ADA, as well as the California Disabled Persons Act, Cal. Civ. Code § 54 *et seq.* (West 2012), which incorporates violations of the ADA as violations of California law.[2] E.R. 32-35. The City removed the case from the Superior Court to the United States District Court for the Central District of California and moved to dismiss Fortyune's complaint. E.R. 21-30.

2. The district court denied the City's motion to dismiss. E.R. 5-10. The court first stated that the language of Title II prohibits a public entity, such as the

[2] Fortyune voluntarily dismissed his claim that the City does not provide public on-street parallel parking accessible to individuals with disabilities. E.R. 6 n.1.

City, from denying individuals with disabilities the benefits of its "services, programs, or activities." E.R. 7. The court then found that Title II's implementing regulations require such services, programs, or activities be readily accessible to and usable by individuals with disabilities, and "detail requirements for particular public services, programs, and activities, providing specificity to the ADA's general mandate." E.R. 7. The court held that Fortyune stated a claim for relief under Title II, despite the lack of a current regulation that explicitly addresses public on-street parking, because "[i]t is a violation of the statute itself to deny a public service to individuals with disabilities" and "all public services must be readily accessible to such individuals." E.R. 8. The court reasoned that "where none [of the regulations] are on point, we fall back to the general statutory requirement" that discrimination against persons with disabilities be eliminated. E.R. 8. The court found support for its determination in the Ninth Circuit's decision in *Barden* v. *City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003), which held that maintenance of public sidewalks is subject to Title II even though no regulation specifically addressed sidewalk accessibility. E.R. 8-9. The court then certified the order for interlocutory appeal under 28 U.S.C. 1292(b), which this Court accepted. E.R. 1-4.

SUMMARY OF ARGUMENT

Title II of the ADA requires that a city, when it provides public on-street parking, must provide some public on-street parking reasonably accessible to, and usable by, individuals with disabilities despite the lack of a current ADA regulation directly addressing this obligation. Under the plain language of Title II, provision and maintenance of public on-street parking is a "service, program, or activity" of the City, the benefits of which the City cannot deny to individuals with disabilities. 42 U.S.C. 12132. Title II's implementing regulations regarding program accessibility, supported by the Department of Justice's Title II Technical Assistance Manual (TA Manual) that interprets those regulations, confirm this view: on-street parking is a facility that the City must make readily accessible to, and usable by, individuals with disabilities. 28 C.F.R. 35.149.

Contrary to the City's argument, the lack of a regulation directly addressing the accessibility of on-street parking merely reflects that specific guidelines on this matter are in development, and will supplement the existing accessibility obligation when the Department adopts them. In the absence of a current regulation, the City must look to analogous standards for parking facilities for guidance on how to satisfy its statutory obligation to provide accessible on-street parking. Finally, Title II's application to this case is supported by relevant case law, most notably this Court's decision in *Barden* v. *City of Sacramento*, 292 F.3d

1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003), which similarly held that public sidewalks are a "service, program, or activity" within the language of Title II.

ARGUMENT

TITLE II OF THE ADA REQUIRES A CITY THAT PROVIDES PUBLIC ON-STREET PARKING TO MAKE SOME OF THAT PARKING REASONABLY ACCESSIBLE TO, AND USABLE BY, INDIVIDUALS WITH DISABILITIES

A. The Provision And Maintenance Of Public On-Street Parking Constitute "Services, Programs, Or Activities" Under Title II's Plain Language

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, * * * 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. Title II of the ADA is based on requirements of Section 504 of the Rehabilitation Act, 29 U.S.C. 794. See *Pierce* v. *County of Orange*, 526 F.3d 1190, 1217 n.27 (9th Cir.) ("Title II of the ADA was expressly modeled after § 504 of the Rehabilitation Act of 1973, and essentially extends coverage to state and local government entities that do not receive federal funds.") (citation omitted), cert. denied, 555 U.S. 1031 (2008). Section 504 defines "program or activity" as "*all the operations of* * * * a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C. 794(b)(1)(A) (emphasis added). The same phrase in the ADA, expanded to

include "services" as well, is at least as broad. See 42 U.S.C. 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [section 504] or the regulations issued by Federal agencies pursuant to such title.").

Consistent with this statutory language, this Court construed Title II's prohibition of discrimination in services, programs, or activities to cover "anything a public entity does." *Lee* v. *City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (quoting *Yeskey* v. *Pennsylvania Dep't of Corr.*, 118 F.3d 168, 171 & n.5 (3d Cir. 1997), aff'd, 524 U.S. 206 (1998)) (addressing mental health services provided by correctional facilities to those incarcerated). This Court held this interpretation is necessary "to effectively implement the ADA's fundamental purpose of 'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Hason* v. *Medical Bd.*, 279 F.3d 1167, 1172 (9th Cir. 2002) (alteration in original) (quoting *Arnold* v. *United Parcel Serv., Inc.*, 136 F.3d 854, 861 (1st Cir. 1998)).

Because the provision and maintenance of public on-street parking is "[some]thing a public entity does," *Lee*, 250 F.3d at 691, it easily falls within Title II's statutory language. First, provision and maintenance of on-street parking for individuals to use for personal, commercial, or other reasons is a "service[]" that a city provides to its residents, business, and visitors. Much like the sidewalks at

issue in *Frame* v. *City of Arlington*, 657 F.3d 215 (5th Cir. 2011), cert. denied, 132 S. Ct. 1561 (2012), and *Barden* v. *City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002), cert. denied, 539 U.S. 958 (2003), did for pedestrians, on-street parking allows drivers to access shops and businesses, places of employment, and government offices and facilities. See *Frame*, 657 F.3d at 226 (observing that "[t]he construction or alteration of a city sidewalk is work * * * done for the benefit of * * * pedestrians and drivers" and "when a city builds or alters a sidewalk, it helps meet a general demand for the safe movement of people and goods"). In addition, the provision of on-street parking is dependent on government "activities" ranging from the initial construction of the on-street parking to its maintenance. The provision of on-street parking is also a city "program." When an individual with a disability is denied the use of the city's on-street parking because there are no individual parking spots accessible to individuals with disabilities, that individual is "excluded from" and "denied the benefits of" the "services, programs, or activities of a public entity" and "subjected to discrimination by [such an entity]." 42 U.S.C. 12132.

B. Title II's Regulations Subject Public On-Street Parking To Accessibility Requirements

1. The Regulatory Definition Of "Facility" Includes Public On-Street Parking

The Department of Justice's Title II implementing regulations reinforce and implement the statute's mandate of non-discrimination. The regulations reiterate that "[n]o qualified individual with a disability shall, on the basis of disability, * * * be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity." 28 C.F.R. 35.130(a). Applying this general prohibition against discrimination to "facilities," the program-accessibility regulation provides that no individual with a covered disability "shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity." 28 C.F.R. 35.149. The regulations expressly define "[f]acility" to include "all or any portion of * * * roads, walks, passageways, [and] parking lots." 28 C.F.R. 35.104. Any group of parking spaces qualifies as a parking lot. See Merriam-Webster's Collegiate Dictionary 901 (11th ed. 2005) (defining "parking lot" as "an area used for the parking of motor vehicles"). On-street diagonal stall parking thus constitutes a parking lot that a public entity must make accessible to, and usable by, individuals with disabilities by providing some accessible parking. See pp. 22-

24, *infra*. In addition, on-street parking is a portion of the road, and individuals with disabilities may not be denied the benefits of on-street parking because of its inaccessibility. A contrary interpretation of the regulations that excludes coverage of on-street parking would lead to the untenable result that some stall parking spaces that happen to be in an off-street parking lot must be accessible to and usable by individuals with disabilities, but no stall parking space that happens to be on the street must be similarly accessible.

The Title II program-accessibility regulation further requires that for existing facilities, a public entity must "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). For new or altered construction – *i.e.*, construction after January 26, 1992 – a public entity must ensure that "[e]ach facility or part of a facility" is "designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities," 28 C.F.R. 35.151(a)(1), or "altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities," 28 C.F.R. 35.151(b)(1). These provisions, read together, require any portion of a new or altered road or parking lot to be accessible and usable by individuals with disabilities; therefore, a public entity must make the portion of that road used for parking accessible to and usable by

individuals with disabilities by providing some accessible parking. Existing on-street parking, "when viewed in its entirety[,]" must also be accessible to and usable by individuals with disabilities. 28 C.F.R. 35.150(a). Because there is no evidence that these regulations "are arbitrary, capricious, or manifestly contrary to the statute," they should be given "controlling weight." *McGary* v. *City of Portland*, 386 F.3d 1259, 1269 n.6 (9th Cir. 2004).

The TA Manual, which interprets the Title II regulations, further supports the view that the existing Title II regulations cover on-street parking even without a current regulation that explicitly addresses this obligation. The TA Manual provides, in relevant part, that "[i]f no standard exists for particular features, those features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other title II requirements, *including program accessibility*." The Americans with Disabilities Act: Title II Technical Assistance Manual § II-6.2100 (1994 Supp.) (emphasis added), available at http://www.ada.gov/taman2up.html. The TA Manual thus mandates that on-street parking – a facility under the regulations – be accessible to individuals with disabilities. Because nothing in Title II's implementing regulations suggests that the TA Manual is inconsistent with the regulations – indeed, as noted above, the plain language of the regulations indicates that on-street parking must be accessible

to individuals with disabilities – this interpretation is entitled to substantial deference. See *McGary*, 386 F.3d at 1269 n.8.

2. The Lack Of Accessibility Standards Specific To Public On-Street Parking Does Not Mean That It Is Not Covered By Title II Or Its Regulations

The City has not attempted to address the plain language of Title II or its implementing regulations in its opening brief. Its brief acknowledges (Br. 1-2) "the general mandate of Title II of the ADA requiring a public entity to make its services, programs, or activities accessible to" individuals with disabilities. Instead, the City argues (Br. 13-15) that it need not make any of its on-street parking accessible to individuals with disabilities solely because there is no *specific* regulation addressing this obligation. This argument is without merit.

First, the City's suggestion (see Br. 12-13) that regulations alone establish a public entity's obligations under Title II is incorrect. The language of Title II creates rights that must be respected and obligations that must be followed. See *Wong* v. *Regents of Univ. of Cal.*, 410 F.3d 1052, 1055 n.1 (9th Cir. 2005). Compliance with its statutory language can hardly depend on promulgation of specific agency regulations, absent specific statutory language saying precisely that. Title II's implementing regulations have the force of law. See *Shotz* v. *City of Plantation*, 344 F.3d 1161, 1179 (11th Cir. 2003); *Helen L.* v. *DiDario*, 46 F.3d 325, 332 (3d Cir.), cert. denied, 516 U.S. 813 (1995). Regulations usually *explain*

statutory language; the language in the statute must be followed. See *Save Our Valley* v. *Sound Transit*, 335 F.3d 932, 943 (9th Cir. 2003) (observing that "[a]s an agency interpretation of a statute, a regulation may be relevant in determining the scope of the right conferred by Congress" in context of conclusion that Section 1983 plaintiffs must show that a statute, not a regulation, confers an individual right).

Indeed, *Pierce*, which the City cites (Br. 12) in support of its view that regulations alone establish a public entity's obligations under Title II, instead supports our view of the relationship between a statute and its implementing regulations. In that case, this Court quoted and cited 42 U.S.C. 12132, then stated that "[i]t is undisputed that Title II applies to the Orange County jails' services, programs, and activities for detainees" and that "[t]he regulations promulgated under Title II spell out the obligations of public entities." *Pierce*, 526 F.3d at 1214. By quoting the last statement out of the context of this Court's discussion, the City fails to see this Court's position that Title II establishes statutory obligations, and that the Department of Justice's Title II regulations with the force of law provide detail on what these obligations entail.[3]

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[3] The City also cites (Br. 12) this Court's decision in *George* v. *Bay Area Rapid Transit*, 577 F.3d 1005, 1012 n.10 (9th Cir. 2009), for the proposition that regulations "provide[] the standard for determining a violation of the ADA." In *George*, this Court quoted this fragment in the context of its approval of the

(continued…)

The City's misunderstanding of the relationship between Title II and its implementing regulations causes it to misconstrue (Br. 14) the meaning of the latter's "silen[ce]" on the issue of accessibility of on-street parking. First, there is no such "silen[ce]." Title II's regulations with the force of law flesh out Title II's statutory requirements. The lack of current standards that directly address the obligation of a public entity to provide accessible on-street parking in no way establishes that on-street parking is outside the scope of Title II. Current regulations provide substantial guidance. See 28 C.F.R. 35.104, 35.149-35.151.[4]

(…continued)
defendant's citation of several cases "that hold that a defendant cannot be liable for the design of a facility if it comports with the implementing regulations." 577 F.3d at 1012 & n.10. Nowhere in *George* does this Court hold that regulations, rather than statutory language, alone establish the legal obligations that public entities must follow.

[4] The Architectural and Transportation Barriers Compliance Board (Access Board) has been developing the pertinent ADA Accessibility Guidelines (ADAAG) in stages and has not yet completed its task. See Public Rights-of-Way: Background (setting forth rulemaking history), available at http://www.access-board.gov/prowac/status.htm. The Access Board is an independent federal agency that develops minimum guidelines for the ADA that serve as the basis for binding "standards" issued by the Department of Justice. See 42 U.S.C. 12134, 12204. The Access Board recently proposed guidelines requiring a minimum number of on-street parking spaces accessible to individuals with disabilities per total on-street parking spaces and setting forth technical requirements for such spaces as part of its guidelines for the Public Right-of-Way. See Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way, 76 Fed. Reg. 44,664, 44,677 (proposed July 26, 2011) (to be codified at 36 C.F.R. Pt. 1190 App.). The comment period closed on February 2, 2012, and the Access Board is currently
(continued…)

Until the process of establishing specific accessibility standards for on-street parking is complete, public entities have a degree of flexibility in complying with Title II's more general requirements of program accessibility and non-discrimination. Given the physical similarities between on-street diagonal stall parking and parking lots, see pp. 9-10, *supra*, the existence of analogous standards for parking facilities in the 2010 ADA Standards for Accessible Design for Titles II and III rebuts the City's argument (Br. 18-21) that it is without meaningful guidance as to how to achieve accessibility for on-street parking. See 2010 ADA Standards for Accessible Design (2010 Standards) § 208, § 502, available at http://www.ada.gov/regs2010/2010ADAStandards/2010ADAstandards.htm; 28 C.F.R. 35.104 (defining the 2010 Standards as the requirements set forth in Appendices B and D to 36 C.F.R. Part 1191 and the requirements contained in 28 C.F.R. 35.151). Compliance with these standards provides evidence of accessibility. See Access Board, Technical Bulletin: Using ADAAG (Using ADAAG Bulletin) ("Facilities for which there are no specific ADAAG criteria are nevertheless subject to other ADA requirements, including the duty to provide equal opportunity. In many cases it will be feasible to provide access by incorporating basic elements specified in ADAAG. * * * Where appropriate

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(…continued)
reviewing comments. The City therefore is correct that this process has not yet resulted in any guidelines that explicitly address on-street parking.

standards exist, they should be applied."), available at http://www.access-board.gov/adaag/about/bulletins/using-adaag.htm. To the extent that the standards addressing parking facilities do not directly conform to on-street parking, a public entity should nonetheless look to them to achieve accessibility to the satisfaction of the court adjudicating the entity's compliance with Title II. If the eventual Department of Justice standard addressing accessible on-street parking is less stringent than the accessible parking ordered by a court, the public entity may request that the court modify its order. See Fed. R. Civ. P. 60(b).

The City's conclusory statement (Br. 15) that "applying the design standards for lot or garage parking to on-street parking clearly is not a workable solution" does not undermine this position. Given Title II's expansive coverage, see pp. 6-8, *supra*, and the length of time it takes for the Access Board to finalize an accessibility guideline and the Department of Justice to adopt it as a standard, see p. 14 n.4, *supra*, pp. 18-19, *infra*, a public entity's "services, programs, or activities" often will be subject to accessibility requirements without a corresponding regulation setting forth exactly what accessibility entails. As here, in the absence of a regulation specifically addressing the issue before it, the Using ADAAG Bulletin indicates that a public entity can best satisfy this mandate by applying the accessibility guideline that covers the most analogous situation. It is therefore irrelevant that the design standards for parking facilities are not exactly

on point because on-street stall parking is not identical in every respect to stall parking in a parking lot. It is enough that the existing regulations provide a template for the City to apply and to modify as needed to achieve accessibility of its on-street parking.

No more persuasive is the City's related contention (Br. 19-20) that requiring accessibility of on-street parking without a regulation specifically addressing parking "will devolve into a case by case analysis" that "presents an unworkable situation for public entities and, as well, courts attempting to resolve litigation involving on-street parking." Determining whether any given parking is accessible to individuals with disabilities is no doubt a highly fact-specific inquiry. The ADA nonetheless requires covered entities and courts to make these sorts of inquiries all the time to determine whether the statute's mandate of eliminating discrimination against individuals with disabilities is being fulfilled in a particular instance. See, *e.g.*, *Fortyune* v. *American Multi-Cinema, Inc.*, 364 F.3d 1075, 1083-1084 (9th Cir. 2004) (determining that plaintiff's requested modification to defendant's policy pursuant to Title III was reasonable after undertaking "fact-specific, case-by-case inquiry"). The City's objection, therefore, hardly warrants ignoring or overruling Title II's coverage of on-street parking. If anything, the existence of analogous standards for parking facilities makes the task of

determining whether on-street parking is accessible easier for both courts and public entities than a fact-based inquiry that begins on a clean slate.

The process by which accessibility guidelines for correctional facilities were developed by the Access Board and adopted by the Department of Justice illustrates the fallacy of the City's position. The Access Board published a notice of proposed rulemaking for guidelines specific to correctional facilities in 1992, and issued a final rule in 1998. See Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities, 63 Fed. Reg. 2000 (Jan. 13, 1998). The Department of Justice only recently adopted these guidelines as standards, over a decade later. See Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,183 (Sept. 15, 2010) (to be codified at 28 C.F.R. 35.152). Prisons, nonetheless, have long been subject to Title II, see *Pennsylvania Department of Corrections* v. *Yeskey*, 524 U.S. 206 (1998), based on clear statutory language. Likewise, when the guidelines addressing on-street parking are finalized and are adopted by the Department of Justice as a regulation – thus becoming standards, see 28 C.F.R. 35.104 – they will provide additional guidance and specificity to the *existing* obligation. See *Reich* v. *Montana Sulphur & Chem. Co.*, 32 F.3d 440, 445 (9th Cir. 1994) (holding that lack of specific OSHA regulations addressing situation did not preclude OSHA investigation because such

regulations "may amplify and augment" the OSH Act's general duty clause, "but they do not displace OSHA's statutory obligation to continue to enforce the general duty clause as a minimum standard").

The Access Board is in the process of developing specific guidelines on on-street parking that, when the Department of Justice adopts them, will supplement the existing accessibility obligation. This process buttresses, rather than undermines, the plain language of Title II and its regulations. These factors together give public entities notice that Title II encompasses on-street parking, refuting the City's argument (Br. 18) that requiring such entities to provide on-street parking accessible to, and usable by, individuals with disabilities implicates due process concerns.

C. Relevant Case Law Supports The View That Title II Covers Public On-Street Parking

Relevant case law also supports the United States' position that Title II covers the provision of on-street parking despite the lack of a specific regulation directly addressing this obligation. In *Barden*, this Court addressed the similar issue of whether sidewalks were a "service, program, or activity" within the language of the ADA, and therefore subject to the program-access requirements set forth at 28 C.F.R. 35.149-35.151, even though no regulation "specifically address[ed] the issue of accessibility of sidewalks." 292 F.3d at 1077. In answering this question affirmatively, this Court first interpreted the "services,

programs, or activities" language of Title II to encompass maintaining public sidewalks accessible to individuals with disabilities, because maintaining public sidewalks is a "normal function of a city." *Id.* at 1076-1077. This Court found further support for this position in the relevant regulation's requirement of curb ramps in pedestrian walkways, which "reveals a general concern for the accessibility of public sidewalks, as well as a recognition that sidewalks fall within the ADA's coverage, and would be meaningless if the sidewalks between the curb ramps were inaccessible." *Id.* at 1077. Finally, this Court deferred to the Department of Justice's interpretation of its own regulations, under which sidewalks are covered. *Ibid.*

The logic of *Barden* applies to the issue of accessibility of on-street parking under Title II. First, *Barden* confirms our interpretation of the "services, programs, or activities" statutory language of Title II to include the provision and maintenance of on-street parking, which, like the maintenance of sidewalks, is a "normal function of a city." *Barden* also supports our argument that, to the extent that Title II's regulations do not directly address on-street parking, a court should defer to the Department of Justice's interpretation finding that on-street parking is subject to Title II's accessibility requirement. Perhaps most importantly, as the district court recognized, *Barden* stands for the proposition that the existence of a specific regulation is not a prerequisite to a public entity's obligation under Title II

to make its "services, programs, or activities" accessible to individuals with disabilities. The lack of a current ADA regulation specifically addressing the obligation of the City to provide on-street parking that is accessible to individuals with disabilities does not absolve the City of its statutory obligation.

The City's attempt (Br. 16-17) to differentiate *Barden* is without merit. As it does for this case, the City ignores the significance of Title II's plain language, which was this Court's primary justification for its conclusion that sidewalks are subject to Title II's accessibility mandate. See *Barden*, 292 F.3d at 1076-1077. The City's statement (Br. 17) that "the existing regulations at issue in *Barden* clearly contemplated sidewalk accessibility" is contravened by *Barden* itself, which observed that "[t]he regulation is ambiguous because while it does not specifically address the accessibility of sidewalks, it does address curb ramps." 292 F.3d at 1077. That this Court resolved this ambiguity in favor of Title II's coverage of sidewalks underscores its bottom line that a regulation specifically addressing a particular "service[], program[], or activit[y] of a public entity," is not necessary for Title II to apply.

In concluding that Title II covers sidewalks, this Court in *Barden* deferred to the Department of Justice's interpretation of the regulations, which the Department set forth in an amicus brief. See 292 F.3d at 1077. The Department's view here that Title II and its regulations encompass on-street parking comes to this Court in

the same context, belying the City's argument (Br. 17) that *Barden* is distinguishable because the Department of Justice has not taken a position on whether Title II requires a public entity to provide on-street parking accessible to individuals with disabilities. Indeed, the City's contention is false even absent this amicus brief, as the Department's TA Manual interpreting Title II's regulations – which is readily available to the public via the internet – has long mandated a public entity design and operate a facility such as on-street parking to meet Title II's program-accessibility requirement even where direct design standards do not exist. See pp. 11-12, *supra*.

The decisions of district courts that have directly addressed the issue of accessibility of on-street parking further support our position. In *Lang* v. *Crocker Park*, No. 09-cv-1412, 2010 WL 3326867 (N.D. Ohio Aug. 20, 2010) (unpublished), at issue was whether the city of Westlake, Ohio, violated Title II by failing to provide on-street parking accessible to individuals with disabilities in the neighborhood of Crocker Park. *Id.* at *1. The defendants contended, as the City does here, that they were not liable under Title II because the ADA regulations do not expressly require them to provide accessible on-street parking. *Id.* at *2. In rejecting this argument and denying the defendants' motion to dismiss, the district court relied upon 28 C.F.R. Part 36, App. A § 4.1.2(5)(a) (2010), which provides accessibility guidelines for parking lots. *Id.* at *3. The district court observed that

although Section 4.1.2(5)(a) referred to "lots" rather than on-street parking, the regulation "appears to encompass any given 'parking area.'" *Ibid.* Accordingly, the court concluded, "this provision suggests that while on-street parking is not required, Defendant may be required, under certain circumstances, to provide on-street parking for those who are disabled when they provide on-street parking for non-disabled visitors." *Ibid.*

In *Means* v. *St. Joseph County Board*, No. 10-cv-003, 2011 WL 4452244 (N.D. Ind. Sept. 26, 2011) (unpublished), the district court granted summary judgment to the defendants on plaintiff's Title II claim that defendants failed to provide a sufficient number of on-street parking spots accessible to individuals with disabilities near two county buildings. *Id.* at *6. The court first assumed that the City of South Bend is required to provide on-street parking accessible to individuals with disabilities if it provides on-street parking. *Ibid.* The court then relied upon the City of South Bend's undisputed evidence that the percentage of accessible parking spots significantly exceeded the Accessibility Guidelines' requirements for new construction of parking lots and parking garages in rejecting the plaintiff's claim. *Ibid.* *Means* thus supports the view that a public entity has the obligation to provide accessible on-street parking even without a specific regulation setting forth this obligation, and that it is appropriate for a court to rely

upon the ADA Standards for Accessible Design (referred to therein as ADAAG) in determining whether a public entity has satisfied this obligation.

CONCLUSION

This Court should affirm the district court's denial of the City's motion to dismiss and hold that Title II requires a city to provide accessible public on-street parking to individuals with disabilities.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d), because it contains 5,324 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman font.

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Date: January 29, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2013, I electronically filed the foregoing Brief for the United States as Amicus Curiae Supporting Appellee and Urging Affirmance with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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