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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ADVOCATES FOR AMERICAN DISABLED INDIVIDUALS, LLC, and David Ritzenthaler, dealing with Plaintiff's sole and separate claim, **Plaintiff;** **v.** **1639 40TH STREET, LLC,** **Defendant.**	**Case No. CV2016-090506** **PLAINTIFFS' RESPONSE TO STATE OF ARIZONA'S MOTION TO INTERVENE AS A LIMITED PURPOSE DEFENDANT** **(ORAL ARGUMENT REQUESTED)** **(Assigned to the Hon. David M. Talamante)**

Plaintiffs Advocates for American Disabled Individuals, LLC and David Ritzenthaler ("Plaintiffs") hereby file their Response to State of Arizona's Motion to Intervene as a Limited Purpose Defendant.[1]

The State has no standing to intervene as a matter of law, because it readily admits that it seeks to intervene only as a "nominal" defendant and that it "takes no position" as to the "particular" merits of

[1] By filing this Response, Plaintiffs do not waive their Rule 42(f) right to a change of judge as a matter of right. Plaintiffs filed a timely and proper Notice on August 22nd, 2016, by which they exercised that right. Rule 42(f) provides that the presiding judge shall immediately reassign the action at that time. Because this action has not been reassigned, and the court has indicated that it will not reassign the action, Plaintiffs are filing a special action requesting that the Court of Appeals enforce that right and also requesting a stay of this proceeding. Plaintiffs further reserve the right to argue that any proceedings or rulings made by this court in derogation of their Rule 42(f) right are nugatory.

these cases. The State has not investigated, nor does it actually intend to investigate, any of the disability-access violations alleged in these actions; and it has not filed actual complaints on any of them, such that it would have any legally-cognizable interest in these particular matters sufficient to meet the core "particularized injury" requirement of standing. Worse, the State admits that it has no intention of filing complaints, and that the only purpose of its intervention is to try to dismiss these actions, despite taking "no position" on their merits. It is clear that the Attorney General's true interest in intervention is to serve as a "co-counsel" for these private Defendants (in a political effort to curry favor with the business community), which is wholly improper and does not support judicial standing or a right to intervene.

Like any other litigant, the State must show standing, which requires that it show a "distinct," "personal, palpable injury," or a "particularized injury to [itself]." *Home Builders Ass'n of Cent. Arizona v. Kard*, 219 Ariz. 374, 377, 199 P.3d 629, 632 (Ct. App. 2008), *as amended* (July 10, 2008); *Fernandez v. Takata Seat Belts, Inc*., 210 Ariz. 138, 140, ¶ 6, 108 P.3d 917, 919 (2005); *Bennett v. Brownlow*, 211 Ariz. 193, 196, 119 P.3d 460, 463 (2005). The requirement is "rigorous." *Bennett v. Napolitano*, 206 Ariz. 520, 525, 81 P.3d 311, 316 (2003). In contrast to federal standing, the Arizona standing requirement originates in the Arizona Constitution's "express mandate" "that the legislative, executive, and judicial powers of government be divided among the three branches and exercised separately."[2] In other words, the underlying purpose to requiring standing in an Arizona court is mainly to prevent the court from having to address issues that would be more properly taken up by the executive or legislative branches, i.e. "political disputes" "in which courts are naturally reluctant to intrude." *Id.* The Attorney General's grievances about AID's authority to bring serial civil actions to enforce disability-access law—an authority that is clearly and indisputably established by both federal and state statute,[3]

[2] Article III of the Arizona Constitution provides: "The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others."

[3] *See* 42 U.S.C. § 12188(a), A.R.S. § 41-1492.08(A)(providing for private right of action to enforce ADA regulations under federal and state law, respectively).

regulation,[4] and published caselaw[5], even to the point of being encouraged by the court[6]—are more properly taken up with the legislature, and/or via its own rulemaking authority pursuant to A.R.S. § 41-1492.06. This Court is neither the prudent, nor the constitutionally-authorized forum for the Attorney General to litigate whether serial civil-rights litigators like AID should be allowed to exist. Further, "[a]n intervenor takes a case as he finds it, and is not permitted to enlarge the scope of the proceeding or raise new issues, thereby retarding the process of the main action." *Arizona Real Estate Dep't v. Arizona Land Title & Trust Co*., 9 Ariz. App. 54, 58, 449 P.2d 71, 75 (1968). Turning this lawsuit into a legislative policy debate between the Attorney General's Office and AID about AID's litigation practices will enlarge the scope of this proceeding substantially and raise entirely new issues, clearly retarding the progress of these otherwise straightforward ADA parking-access lawsuits.

I. The State Lacks a Cognizable Legal Interest Sufficient to Grant Standing to Intervene

By its own admission, what the State intends to do here is to litigate abstract constitutional and policy issues regarding AID's authority to bring suits instead of the Attorney General. The State claims

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[4] *See* 28 C.F.R. § 36.501, A.A.C. R10–3–401 *et seq.*, *especially* A.A.C. R10–3–405(L)("Failure to file an administrative complaint [with the Attorney General] pursuant to this Section does not prevent an aggrieved person from bringing a civil action in Superior Court pursuant to A.R.S. § 41–1492.08").

[5] *Bailey-Null v. ValueOptions*, 221 Ariz. 63, 69, 209 P.3d 1059, 1065 (Ct. App. 2009)(the "[Arizonans with Disabilities] Act separately authorizes both an aggrieved individual and the Attorney General to institute civil actions to redress discrimination." "By the express terms of the regulations, an aggrieved party need not avail herself of the administrative process provided by the Attorney General before bringing a civil action for discrimination under the Act," and "nothing in the Act or the regulations **provides for, much less requires**, any other administrative process as a prerequisite to a civil action." (Emphasis added.)

[6] "For the ADA to yield its promise of equal access for the disabled, it may indeed be necessary and desirable for committed individuals to bring serial litigation advancing the time when public accommodations will be compliant with the ADA." *Molski v. Evergreen Dynasty Corp*., 500 F.3d 1047, 1061-62 (9th Cir.2007) (per curiam).

"Further, some of the express purposes of A.R.S. § 41–1492 are to provide a clear and comprehensive state mandate for the elimination of discrimination against individuals with disabilities and to provide clear, strong, consistent and enforceable standards addressing discrimination….For the foregoing reasons [*inter alia*], we hold that a complainant is not required to exhaust her administrative remedies" before "seeking judicial remedies for claims based on…the Arizonans with Disabilities Act…" *Bailey-Null*, 221 Ariz. at 69–70, 209 P.3d at 1065–66.

that it "holds a twofold interest in this action…[1] ensuring the separation of powers memorialized in the Arizona Constitution...[and] [2] the State has a strong interest in how the Court interprets and applies [the] statutory scheme."[7] In general, the State's grievances can be reduced to complaining that serial litigators like Plaintiff "flood" the court with lawsuits, which the State baselessly claims are "improper and supported." (In fact, AID's inspectors physically visit and inspect *each and every* business before suit is filed, and identify and photograph parking-access violations prior to filing *every single case*. Then, at great expense, AID employs quality-control staff who review those reports and photographs to confirm violations, again prior to the filing of suit. Finally, AID principal David Ritzenthaler reviews a summary of the inspector and quality-control data, before approving the filing of suit against the defendants. [8] Whereas the State of Arizona, which is *statutorily* required to review businesses for ADA compliance on a regular basis,[9] does exactly none of this.) The State also contends that because AID actively and aggressively files serial complaints about ADA access, then this discourages people from filing complaints with the State, and from using the State's (publicly funded and inefficient) "conciliation process"[10] – a curious policy argument that amounts to complaining that AID is "out-competing" the AG in the ADA-enforcement business. The State then reveals its true colors when it complains that AID is being "merely enriche[d]" by litigation – a common refrain among defendants, who dislike that ADA law provides for attorneys' fees, costs, and other "litigation expenses" (including

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[7] Section "A" of the State's Motion, "The State's Interests," pages 7-9.

[8] Before filing its Motion, the State failed to conduct an independent investigation of AID's operations, or to even *contact* AID. It appears to have done nothing other than watch a TV report and meet with defense attorneys and business interests. AID expresses deep concern about the reckless character of the AGO's actions in connection with this suit and questions whether they rise to the level of illegal interference with Plaintiff's right to file suit against public accommodations under 42 U.S.C.A. § 12203, A.R.S. § 41-1492.10.

[9] *See* A.R.S. § 41-1492.09, discussed below.

[10] "By signaling to other potential plaintiffs that it is more profitable to initiate litigation than enter the State's conciliation process or other pre-litigation settlement process, the Plaintiff imperils the State enforcement regime established by the Legislature…" *See* Motion, page 8, lines 7-18.

expert witness costs, travel costs),[11] as well as damages,[12] to the prevailing plaintiff in an ADA enforcement suit.[13] Finally, the State seems to take issue with Plaintiff settling a large number of its cases without an "enforceable agreement or court order," which the State laments does little to develop the body of caselaw and *stare decisis*—another abstract argument that furnishes no evidence of a concrete, nonspeculative interest belonging to the State in this litigation. This argument is also acutely hypocritical, because the State complains in the same breath that AID essentially litigates "too much," and that it does not settle enough ("…Plaintiff's flood of improper and unsupported lawsuits are a direct threat to the State's enforcement duties…its tactics run contrary to the Legislature's expressed preference for resolving public accommodation and services complaints by means other than litigation, which applies equally to private action and State action"). In other words, the State complains that AID does not litigate to the point of judgment and appeal, but then complains that AID litigates at all. It is clear that the only thing the State really wants is for AID, and other serial private attorneys general, not to be able to prosecute disability-access complaints at all, even though federal and state statute expressly authorizes them to do so, and the courts not only condone but approve of it. This kind of policy sentiment should be directed toward Congress and the legislature, which created these provisions—and not to the courts, which are bound to interpret and apply them.

AID's cases – including the cases at bar – concern particular (and very real) complaints about ADA parking access violations by local businesses in the Valley. These violations include having none or inadequate handicapped parking spaces or signage; parking spaces that are not wide enough to be van

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[11] 42 U.S.C.A. § 12205; 28 CFR Pt. 36, App. C, § 36.505 ("Litigation expenses include items such as expert witness fees, travel expenses, etc.")

[12] A.R.S. § 41-1492.09(B)(2).

[13] The Attorney General's Office fails to appreciate that 1) AID, a charitable organization, is self-funded through the recovery of such funds, and that it uses them to continue to file valid enforcement actions; 2) AID requires that each and every defendant agree to voluntarily remedy all ADA violations in settlement, and that following settlement it can (and has) re-inspected those businesses and sued for breach of contract if the business did not comply; and 3) merely by suing businesses for ADA violations, AID incentivizes them to immediately and voluntarily remedy all ADA issues, because if they do not, then anyone with standing can sue them again—which is exactly what the intent of the ADA "private attorney general" provisions is.

accessible; and parking spaces that are not located as close as possible to building entrances. Plaintiff organization's members include but are not limited to three disabled motorists who reside in the Valley, who regularly drive on the Valley's streets, and who regularly utilize public accommodation parking in the course of driving; and who have, will, or may be forced (by the disablement of their vehicle) to pull over and park in any and all of the public accommodations sued. As things stand, disabled motorists simply avoid parking at businesses without proper access; and if an emergency situation arises in which they need to park quickly and to enter the business to seek emergency help, then it would be absurd to require them to 1) file and serve a lawsuit asking the court to order that the business comply, and 2) wait on a court injunction, all in the time before they have to pull over and park.

The Attorney General's Office has shown little to no regard for enforcing ADA compliance for decades. Further, businesses have widely taken a "wait and see if anybody sues" approach to ADA compliance, which wrongfully places the burden on the disabled community to ensure compliance with the law, and to bring grievances to court. This would be totally unacceptable in any other civil rights realm – imagine, for example, if businesses kept segregated bathrooms and "waited to see" if an African-American customer bothered to sue—but this attitude persists toward disability law, and courts must take caution not to protect it or act in service of it, but rather to serve the law. Because of these attitudes toward ADA enforcement—and the Attorney General's failure in enforcement—nearly every single business in the entire State of Arizona is currently non-compliant with ADA regulations in some respect, and have been for between six and twenty-six years. This has created what can only be described as a "triage" situation, in which organizations like Plaintiff have no choice but to "flood" the courts with litigation in order to enforce the law, and to prompt businesses to get into compliance. This is a direct consequence of the Attorney General Office's failure to enforce ADA laws for many years, and so it is particularly galling to see the Attorney General's Office not only continue to shirk its responsibilities in this case, but to actually ask to *dismiss* all of the lawsuits that AID has filed, and which the Attorney General's Office itself should have filed years ago.

Because any violation of ADA regulations demonstrates that a business has never consulted with an ADA expert—and that there are likely more violations—Plaintiff has and will continue to name

businesses that are identified as being out of compliance with ADA law in any respect, no matter how large or small the business may view the issue as being. Further, because of the large number of noncompliant businesses in the State of Arizona, AID simply cannot send in an expert to inspect every single aspect of every single business. It is not AID's responsibility to do that, or to have every business comply with the ADA – it is the responsibility of the business.

The greater point to all of this—and a point that surely is not lost on the Court by this point in the brief—is that this case will devolve into wide-ranging arguments about politics and policy if the Attorney General is allowed to intervene in this case on the grounds on which it has sought to intervene. The Court simply cannot and should not be asked to resolve such issues of policy, which is *exactly* what the "rigorous" standing requirement of the Arizona Constitution is intended to avoid. The kind of non-particularized, speculative policy arguments that the Attorney General has raised in its Motion to Intervene belong in the hands of legislative liaisons and state legislators, not lawyers and a superior court judge; and they are insufficient to grant standing to the State to intervene in this case. At best, the State alleges a speculative, generalized fear of harm to the "separation of powers," the body of *stare decisis*, and its "popularity" as an enforcer of ADA law. The State must demonstrate some "actual, concrete harm" that will come to it if it not allowed to intervene in this matter, "not merely some speculative fear of infringement." *Klein v. Ronstadt*, 149 Ariz. 123, 124, 716 P.2d 1060, 1061 (Ct. App. 1986). The State's only real interest in ADA enforcement arises when a complaint is filed with it, or when it conducts a "periodic compliance review" of actual businesses that are covered (or when it at least intends to do either one of these things). *See* A.R.S. § 41-1492.09.[14] The State has the burden of showing standing, and it fails to allege either that a complaint has been filed with the State concerning any business in this lawsuit, or that the State has undertaken a compliance review or otherwise

[14] "The attorney general shall investigate all alleged violations of this article…These allegations must be filed within one hundred eighty days after the occurrence or the termination of the alleged discriminatory practice…The attorney general shall undertake periodic reviews of compliance of covered entities under this article. If the attorney general concludes at any time after the filing of a complaint of alleged violation, or as a result of a periodic compliance review, that prompt judicial action is necessary to carry out the purpose of this article, the attorney general may file a civil action for appropriate temporary or preliminary relief pending final disposition of the complaint or compliance review."

investigated or intends to investigate any of the businesses in this lawsuit. In fact, the State admits that it has not undertaken any such investigation, and that it has no intention of doing so, since it "takes no position at this time as to whether an ADA or AZDA violation exists in any particular case," and it intends simply to dismiss the suits. On the other hand, AID actually *has* investigated the parking lots at issue, and its disabled motorists intend to and do have an actual interest in their use. Unless and until the State can establish an "actual, concrete" interest in enforcement with respect to the defendant businesses in this suit, then the State's interest is little more than speculative. If the State is allowed to participate, then its role will be no more than to act as a chorus of support for the defendants, and to express its general views that serial litigation should not exist. Its intervention will serve to protect absolutely no actual, concrete, non-speculative or legally cognizable interest of the State whatsoever.

Standing is a jurisdictional requirement and must be met, regardless of whether or not the party would be allowed to intervene under court rule. However, a review of the court rules on intervention also demonstrates that the State has no authority to intervene. The State has no authority to intervene under Rule 24(a), "Intervention of right," which provides for intervention "(1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." As the State concedes, there is no statute that grants it a right to intervene. Further, the State has no "interest relating to the property or transaction which is the subject of the action." "For the purposes of intervention of right, an applicant must show it has such an interest in the case that the judgment would have a *direct* legal effect upon its rights," and "[a] mere possible or contingent equitable effect is insufficient." *Woodbridge Structured Funding, LLC v. Arizona Lottery*, 235 Ariz. 25, 28, 326 P.3d 292, 295 (Ct. App. 2014)(emphasis original). As discussed above, the State's interest is speculative, generalized, and effectively non-existent.

The State also fails to meet the requirements of Rule 24(b), which allows for "permissive intervention": "1. [w]hen a statute confers a conditional right to intervene[;][and] and 2. [w]hen an

applicant's claim or defense and the main action have a question of law or fact in common." *Dowling v. Stapley*, 221 Ariz. 251, 272, 211 P.3d 1235, 1256 (Ct. App. 2009). "Courts must first decide whether Rule 24(b)(1) or (2) have been satisfied before granting permissive intervention." *Id.* The State fails to identify any statute that confers a conditional right to intervene, so intervention is not permissible under Rule 24(b)(1)—leaving the State to rely on Rule 24(b)(2). "To determine whether a party should be permitted to intervene under Rule 24(b)(2), courts consider whether intervention would unduly delay or prejudice the adjudication of the rights of the original parties. In addition, courts consider a number of factors such as the nature and extent of the intervenor's interest, his or her standing to raise relevant issues, legal positions the proposed intervenor seeks to raise, and those positions' probable relation to the merits of the case." *Id.* (internal citations omitted). This inquiry overlaps somewhat with the standing inquiry, as discussed above. Here, the State has no legally-cognizable interest in enforcing ADA violations with respect to these particular businesses, because it has not filed complaints with respect to them, it does not intend to do so, it has not investigated them, and it has no actual intention of investigating. The State essentially wishes to assert the private defendants' own interest in not being held accountable for violating the ADA, and it seeks to dismiss the actions for alleged Rule 11 and standing issues (which are unfounded). But those interests are fully represented by the defendants themselves, and it would be improper to allow the State to intervene merely to bolster the defendants' own particular defenses and to add its voice to their chorus. Allowing the State to intervene merely to serve as "co-counsel" for the Defendants, and with no legally-cognizable standing or interest of its own, is clearly prejudicial to Plaintiff, as Plaintiff will have to respond to arguments being made solely for the purpose of interfering with its suit, and that serve to protect no actual, concrete, legally-cognizable interest of the State in the matter. If the State wishes to participate on such a level, then it may certainly offer to lend assistance and support to the defendants outside of court, but it is judicially improper to allow the State to participate as a party merely to "represent" private defendants, where it has no legal authority to represent them or act on their behalf, and it has and no cognizable interest in the subject matter of this action. If the Court were to allow the State to participate on such gossamer-thin justifications, then it would set a very poor precedent of allowing the State to intervene in any litigation

where it unilaterally decides that the "public interest" or policy favors one side over the other, or that the State favors one side over the other, even though it has no concrete interest in the outcome. It is to enable the Attorney General's Office to serve as a freelance litigator, intervening to defend groups that the Attorney General simply favors, even though no statute imbues the Office with the authority to intervene on their behalf, and in fact the statutory scheme provides for exactly the opposite. Finally, as discussed above, the legal positions which the Attorney General intends to assert in this case have no relation to the merits (on which the Attorney General takes "no position"), and consist entirely of existential policy arguments about whether AID "should" have the right to file disability-access complaints – which not only expands the scope of this litigation unreasonably and prejudicially, but deserves to be made on the floor of the legislature or as comments to a proposed rule, and not in a courtroom. Further, the Attorney General's proposed Motion to Consolidate over one thousand lawsuits – which no actual litigant in those proceedings has requested, and which the State has no interest of its own in doing, except to "represent" those private litigants – will substantially expand the scope of this proceeding, which an intervenor must not be allowed to do. ("An intervenor takes a case as he finds it, and is not permitted to enlarge the scope of the proceeding or raise new issues, thereby retarding the process of the main action." *Arizona Real Estate Dep't*., 9 Ariz. App. at 58, 449 P.2d at 75.)

While not raised directly by the State's Motion (but fairly suggested by its overbroad reasoning), the doctrine of *parens patriae* also cannot be invoked by the State to support either standing or a right of intervention. The doctrine of *parens patriae* provides that the state may sue "to prevent or repair harm to its 'quasisovereign' interests," i.e. as the "trustee, guardian, or representative of *all* her citizens." *Hawaii v. Standard Oil Co. of Cal*., 405 U.S. 251, 258 (1972); *State of Louisiana v. State of Texas*, 176 U.S. 1, 19 (1900)(emphasis added). "In order to properly invoke this jurisdiction, the State must bring an action on its own behalf and not on behalf of particular citizens." *Hawaii*, 405 U.S. at 259 n.12. Here, the State seeks to intervene to bring a defense that does not truly belong to the State (since no cognizable State interest is implicated), but rather to bring a defense that belongs to a discrete number of businesses in Maricopa County that are in violation of disability-access laws. This is certainly not bringing an action on behalf of "all" of its citizens, but rather on behalf of group of particular defendants whom it favors as

against civil rights plaintiffs. This is not a proper exercise of the State's authority, nor does it genuinely support any standing by the State to intervene in this matter.

CONCLUSION

For all the foregoing reasons, the State lacks not only the authority, but also the standing to intervene in this matter, and to assert interests that in fact do not belong to the State, but rather to a discrete group of private defendants. The State's only asserted interests in this matter are not sufficiently concrete, immediate, or nonspeculative as to support intervention at this time. The State has not filed a complaint with respect to any of the businesses identified in this suit (or with respect to any of the businesses identified in its Motion to Consolidate), nor has it investigated or does it intend to investigate or file complaints against any. The interest which the State seeks to assert is clearly just the interest of private parties whose interests are already represented in this action; and to allow the State to intervene and participate would be merely to add another voice to their chorus. The State cannot be allowed to intervene in a case simply because it favors the interests of certain parties over others; and to allow it to intervene despite having no firm, cognizable interest in the suit would set a poor precedent of allowing the State to intervene in matters based only on political, public-policy contentions which belong in the province of the legislature, and not the courts.

RESPECTFULLY SUBMITTED this September 6, 2016.

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