October 7, 2022

Honorable Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amicus Letter of California Legal Services & Nonprofit Organizations in Support of Petition for Review in *Martinez v. Cot'n Wash, Inc*., No. S276363

Dear Honorable Chief Justice & Associate Justices:

Pursuant to Cal. Rules of Court, rule 8.500(g), California Legal Services and nonprofit organizations respectfully submit this amicus letter in support of the petition for review ("Petition") in *Martinez v. Cot'n Wash, Inc*., 81 Cal. App. 5th 1026 ("*Martinez*").

The petition should be granted on two questions of great importance to people with disabilities throughout California: (1) the extent to which subdivision (f) of the California Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code, § 51 *et seq*., applies to websites; and (2) what constitutes "intentional" discrimination under subdivision (b) of the Unruh Act, particularly in a website accessibility case.

Interest of Amici

Amicus Disability Rights Education & Defense Fund (DREDF) is a nonprofit law and policy center recognized for its expertise in California and federal civil rights laws. DREDF has participated as *amicus* in numerous cases considering the history and scope of the Unruh Act, including in *White v. Square, Inc.* (2019) 7 Cal.5th 1019, and *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661. In *White*, this Court cited the Unruh Act's "broad preventive and remedial purposes" in finding that a person suffers discrimination under the Act when they visit a website with an intent to use its services but encounter an exclusionary policy or practice that prevents them from using those services. In *Munson*, this Court considered the intent of the Legislature in adding subdivision (f) in 1992. For three decades, DREDF has received funding as part of the California legal services system, giving it intimate knowledge of the issues of consequence to the communities that we serve.

DREDF is joined here by six additional organizations, including other California legal services-funded offices and other organizations with experience and expertise relevant to understanding the history of state law mandates. These *Amici* are listed on page 7 and include organizations that

have co-authored or participated in amicus briefs in various important appellate cases addressing Unruh Act issues.

Importance of the Issues

The Second Appellate District erroneously determined that the Unruh Act's coverage of websites under California Civil Code section 51(f) is limited by recent federal case law holding that solely web-based businesses are not "public accommodations" under the Americans with Disabilities Act ("ADA").[1] *Amici* contend that the District's Opinion runs afoul of the Unruh Act's legislative history and the intent of the California Legislature when it incorporated the ADA in subdivision (f), and fails to acknowledge the construction afforded the Unruh Act as a remedial statute.

Additionally, *Amici* contend, the District's Opinion fails to analyze what does or does not constitute intent under the Unruh Act and instead mischaracterizes plaintiff's claim as "disparate impact," foreclosing an assessment of intentional conduct in website development and maintenance.

Accordingly, and for the other reasons set forth by Appellant, *Amici* urge the Court to grant the Petition for Review.

A Brief History of the Unruh Act and the Incorporation of Section 51(f)

The Unruh Act, Cal. Civ. Code, § 51 *et seq*., falls within California's proud tradition of civil rights laws. It provides, in pertinent part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Cal. Civ. Code § 51(b) ["Section 51(b)"].) While Section 51(b) is an important part of California's civil rights canon as to all diversity characteristics, the *Martinez* case focuses largely on Section 51(f), a provision specific to disability nondiscrimination, which incorporated the then-newly enacted federal ADA into state law. As Section 51(f) was added in 1992, what is most relevant here is the state of both federal and California legislative intent and case law as of that date.

[1] A limited interpretation with which *Amici* does not agree, for the reasons set forth in Appellant's Petition for Review.

Enacted in 1959, the Unruh Act was passed in response to a series of appellate court decisions that narrowly construed the civil rights provisions of California's then-existing public accommodation statute. The Unruh Act was passed with the intent of "banish[ing discrimination] from California's community life." (*Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 75 [219 Cal.Rptr. 150, 707 P.2d 212], as modified on denial of reh'g (Dec. 19, 1985).) The original version of the bill extended its antidiscrimination provisions to "all public or private groups, organizations, associations, business establishments, schools, and public facilities." (*See* Assem. Bill No. 594, as introduced Jan. 21, 1959.) Later versions dropped all the specific enumerations except "business establishments" but added to the latter phrase the modifying words "of every kind whatsoever." This phrasing was acknowledged by this Court to be "indicative of an intent by the Legislature to include therein all private and public groups or organizations [specified in the original bill] that may reasonably be found to constitute 'business establishments of every type whatsoever.'" (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795–796 [191 Cal.Rptr. 320, 662 P.2d 427].)

In 1992, the Legislature further amended section 51 to, among other changes, add the paragraph that became subdivision (f), specifying that "[a] violation of the right of any individual under the Americans with Disabilities Act of 1990 (Public Law 101–336) shall also constitute a violation of this section." (Stats.1992, ch. 913, § 3, p. 4284; see Stats.2000, ch. 1049, § 2 [adding subdivision designations].) The general intent of the legislation was expressed in an uncodified section: "It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the Americans with Disabilities Act of 1990 (Public Law 101–336) and to retain California law when it provides more protection for individuals with disabilities than the Americans with Disabilities Act of 1990." (Stats.1992, ch. 913, § 1, p. 4282.)

At the Time Section 51(f) was Enacted, Both California and Federal Law were Interpreted Broadly

During the period in which it was considering AB 1077 in 1992, the California Legislature was acting against a backdrop of broad interpretations of both California and federal law. In multiple pronouncements in the 1980s, this Court emphasized that the Unruh Act must be liberally construed to effectuate its remedial purpose. (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28 [219 Cal.Rptr. 133, 707 P.2d 195]; *see also Isbister v. Boys' Club of Santa Cruz, Inc.* 40 Cal.3d at 75–76, [noting that the "Legislature's desire to banish such practices from California's community life has led this court to interpret the Act's coverage 'in the broadest sense reasonably possible.'"].)

Moreover, at the time of the Section 51(f) incorporation, federal law was also expansive in scope. Consistent with the state law mandate for broad construction in 1992, the California Legislature intended to incorporate the broadest interpretation of the law *at the time*. And *at the time* Congress made clear its intention that the ADA adapt to changes in technology. (*See* H.R.Rep. No. 101-485(II), at p. 108 (1990), reprinted in 1990 U.S. Code Cong. & Admin. News, pp. 303, 391 ["The Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times."].)

Numerous federal courts have subsequently recognized that the federal instruction to "keep pace with the rapidly changing technology of the times" must be understood to include coverage of websites.[2] The U.S. Department of Justice ("DOJ") has been similarly clear on this point, on numerous occasions over numerous years.[3] The Second Appellate District is overly dismissive of these authorities, giving substantial weight to the fact that the DOJ has not yet "modernize[d] its regulations" to specifically address standalone websites. But the Ninth Circuit has repeatedly held that "the lack of specific regulations cannot eliminate a statutory obligation," given the broad, remedial reach of the ADA. (*Robles v. Domino's Pizza, LLC* (9th Cir. 2019) 913 F.3d 898, 909 [citing *Fortyune v. City of Lomita* (9th Cir. 2014) 766 F.3d 1098, 1102].)

Given this legislative backdrop, Section 51(f) of the Unruh Act must be construed liberally and interpreted as requiring access to standalone websites. California is not bound by the narrow view of website coverage recently adopted by a handful of federal district courts and the Ninth Circuit. The California legislature has not indicated any intent to incorporate those federal cases,

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[2] Numerous cases applying the ADA to the internet have acknowledged this intent. (*See e.g., Andrews v. Blick Art Materials, LLC* (E.D.N.Y. 2017) 268 F.Supp.3d 381, 395 [ADA's " 'broad mandate' " and its "'comprehensive character' are resilient enough to keep pace with the fact that the virtual reality of the Internet is almost as important now as physical reality alone was when the statute was signed into law."]; *Mejico v. Alba Web Designs, LLC,* 515 F.Supp. 424, 434 (W.D. Va. 2021); *Wright v. Thread Experiment, LLC,* 2021 WL 243604 at *3 (S.D. Ind. 2021); *Gathers v. 1-800-Flowers.com, Inc.*, 2018 WL 839381 at *3 (D.Mass. 2018); *Del-Orden v. Bonobos, Inc.* (S.D.N.Y., Dec. 20, 2017, No. 17 CIV. 2744 (PAE)), 2017 WL 6547902, at p. *9 ["Congress's purposes in adopting the ADA would be frustrated were the term 'public accommodation' given a narrow application, under which access to the vast world of Internet commerce would fall outside the statute's protection."]); *Gniewkoski v. Lettuce Entertain You Enters., Inc.*, 251 F.Supp.3d 908, 915) (W.D. Pa. 2017); *National Federation of the Blind v. Scribd Inc.* (D.Vt. 2015) 97 F.Supp.3d 565, 575; *Nat'l Ass'n of the Deaf v. Netflix, Inc.* 200 (D. Mass. 2012) 869 F. Supp. 2d 196, 200.) *See also, Panarra v. HTC Corp.*, Case No. 6:20-CV-6991-FPG, 2022 WL 1128557 (W.D.N.Y. 2022) (applying ADA to virtual reality).

[3] *See* Appellant's Petition at 34-39; Appellant's Motion for Judicial Notice and the guidance, amicus briefs and settlements attached thereto.

or the limitations articulated therein. Rather, it is bound by the state law "liberal construction" mandate, and the federal instruction to "keep pace" with technology that it incorporated in 1992. These instructions were not fully considered by the Second Appellate District in analyzing Appellant's Unruh Act claim under Section 51(f). Accordingly, the petition for review should be granted.

The Second Appellate District Takes an Overly Narrow View of Intent

To succeed on an Unruh Act claim not based on an ADA violation, a plaintiff must allege facts that demonstrate "willful, affirmative misconduct" and provide more than "the disparate impact of a facially neutral policy on a particular group." (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 853-854 [31 Cal.Rptr.3d 565, 115 P.3d 1212].) However, "evidence of disparate impact [may] be probative of intentional discrimination in some cases." (*Ibid*, italics omitted.)

In its Opinion, the Second Appellate District mischaracterizes plaintiff's claim as "disparate impact" and fails to analyze what does and does not constitute intent under the Unruh Act, thereby needlessly foreclosing an assessment of intentional conduct in website development and maintenance. (*See e.g.,* Opinion at 8-9 [the "failure to address [a] disparate effect ... cannot establish [an] intent to discriminate."].) This is of significant concern to *Amici*.

For example, this Court has previously recognized there are instances where "mere quiescent inaction" may constitute actionable discrimination under the Unruh Act. (*See Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 171 [59 Cal.Rptr.3d 142, 158 P.3d 718] [citing *Crowell v. Isaacs* (1965) 235 Cal.App.2d 755, 757, and discussing the example of an agent's failure to show a home to African–American potential purchasers].)[4] Other courts have acknowledged that Section 51(b) "can encompass a claim for intentional discrimination in the form of a failure to provide reasonable accommodation to a person with a disability." (*See Glasby v. Mercy Housing, Inc*. (N.D. Cal., Oct. 25, 2017, No. 17-CV-02153-DMR) 2017 WL 4808634, at *6 [citing *Gutierrez v. Gonzalez*, (C.D. Cal. Apr. 26, 2017, No. 2:17-cv-01906-CAS(Ex)), 2017 WL 1520419, at *6]. *See also Skochko v. Mercy Housing, Inc*. (N.D. Cal., Aug. 15, 2022, No. 20-CV-08659-JSC) 2022 WL 3357836, at *13 [holding that a reasonable jury could find "willful, affirmative misconduct" under Section 51(b) where the plaintiff's disabilities were known to the defendants; the plaintiff directly asked the defendants for accommodations, which were refused; the plaintiff experienced a lack of access; and the defendants did not

[4] The Court in *Angelucci* also rejected the argument that an individual must demand equal treatment and be refused to state a claim under the Act. 41 Cal.4th 160, 171.

reasonably explore the feasibility of providing the requested accommodations].) The Second Appellate District's opinion, as currently articulated, conflicts with and narrows these decisions.

Additionally, the Second Appellate District gives insufficient attention to the fact that the cases it relies on in reaching its conclusions in *Martinez* – including *Koebke* – involve defendants who engaged in corrective action, whereas the Defendant-Appellee in *Martinez* is alleged to have failed and refused to take corrective action, even after receiving actual notice that Appellant could not access their website. (FAC at ¶¶ 16, 24, 28-30.) The District gives short shrift to this distinction, when a reasonable jury could find that these and other facts developed through discovery in the case are enough to show intent for purposes of the Act.

Finally, the Second Appellate District does not properly consider the fact that the Web Content Accessibility Guidelines ("WCAG") are well-established industry guidelines for making websites accessible. Choosing to build or alter a website without complying with these guidelines excludes people with disabilities. This choice can, in some cases, be an *active* decision that constitutes actionable discrimination under the Act. The Second Appellate District appears to foreclose such a possibility.

It is essential for California Courts to properly analyze intent under the Unruh Act. Intent in the disability discrimination context is often nuanced and often will not include overt animus. Intentional discrimination based on disability can arise from a knowing choice not to comply with established technical standards, a refusal to accommodate, or a conscious interference with access. On this basis, the Petition for Review should be granted.

Access to Web-Based Businesses is Essential to People with Disabilities

While the Internet was not widely prominent enough to be explicitly named in civil rights statutes in 1992, it is precisely the type of "rapidly changing technology" anticipated by the federal ADA in 1990.[5] Web-based and web-only businesses are comfortably within the ambit of the Unruh Act's coverage of "businesses of every kind whatsoever." Indeed, the COVID-19

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[5] While only a few thousand websites were in existence in the early 1990s, there are almost two billion active websites today. See *Total Number of Websites*, INTERNET LIVE STATS, https://www.internetlivestats.com/total-number-of-websites/ Internet Live Stats is part of the Real Time Statistics Project and has been cited by organizations including the World Wide Web Consortium (W3C).

pandemic has put websites front-and-center in all aspects of society, accelerating existing trends.[6]

Website accessibility is key to creating a more inclusive society. It eliminates barriers that restrict an individual's access to information, education, financial institutions, stores, entertainment, employment, housing, civic participation, and much more. Websites are created and maintained in real time; they are not buildings erected long before the adoption of access standards. Yet, non-compliance with website accessibility standards is widespread[7], denying equivalent access to millions of Californians, including the 5% of the population that is Blind or low vision and the 4% of the population that is Deaf or hard of hearing.[8] In light of such widespread exclusion, the importance of ensuring web access for people with disabilities cannot be overstated. California must lead the way, through robust enforcement of its civil rights laws.

Conclusion

Amici respectfully request that the Court grant review to fulfill the intent of the California Legislature in incorporating the broad protections of the ADA, and to protect the State's long-standing commitment to expansive civil rights protections for all of its residents.

Respectfully Submitted,

Michelle Uzeta
Of Counsel
Disability Rights Education & Defense Fund

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[6] COVID-19 has infected over 10,412,352 Californians as of October 5, 2022. (https://covid19.ca.gov/state-dashboard/) Over the course of this multi-year pandemic several aspects of society – most notably the marketplace – were forced to abruptly shut down and/or modify their business model to include, or exclusively focus on, internet-based sales.

[7] See The WebAIM Million: The 2022 report on the accessibility of the top 1,000,000 home pages, available at https://webaim.org/projects/million/#intro (Accessed on September 25, 2022) (detecting Web Content Accessibility Guidelines ("WCAG") 2.0 failures on 96.8 percent of home pages and 50,829,406 distinct accessibility errors across those pages, an average of 50.8 errors per page).

[8] https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/california.html Data Source: 2020 Behavioral Risk Factor Surveillance System.

cc: Additional organizations joining this amicus letter:

Disability Rights Advocates
Disability Rights California
Disability Rights Legal Center
Impact Fund
National Federation of the Blind
World Institute on Disability

PROOF OF SERVICE

Martinez v. Cot'n Wash, Inc., No. S276363
Second Appellate District, Division One, No. B314476
Superior Court of Los Angeles County, No. 20STCV33139

I, the undersigned, declare that I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3075 Adeline Street, Suite 210, Berkeley, CA 94703.

On October 7, 2022, I served the following document:

AMICUS LETTER OF CALIFORNIA LEGAL SERVICES & NONPROFIT ORGANIZATIONS IN SUPPORT OF PETITION FOR REVIEW

on the interested parties in this action addressed as follows:

SEE ATTACHED LIST FOR METHOD OF SERVICE

[X] BY MAIL: The envelope was mailed with postage thereon fully prepaid.
I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice the correspondence is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Berkeley, California, in the ordinary course of business. I am aware on the motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

[X] BY E-MAIL OR ELECTRONIC TRANSMISSION: A copy of the documents was sent through the Court's authorized e-filing service TrueFiling. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on October 7, 2022, in Berkeley, California.

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Diana Vega

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