

December 4, 2023

Honorable Chief Justice Patricia Guerrero
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 *Martin v. THI E-Commerce, LLC*, No.
S282381

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 *Martin v. THI E-Commerce, LLC*. (“*Martin*”).

The Petition should be granted on a question of great importance to people with disabilities throughout California: the extent to which subdivision (f) of the California Unruh Civil Rights Act (“Unruh Act”), Cal. Civ. Code, § 51 *et seq.*, applies to standalone commercial websites.

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. DREDF has also participated as *amicus* in numerous cases considering the history and scope of the Americans with Disabilities Act (“ADA”), including *Laufer v. Acheson Hotels, LLC*, No. 22-429 (U.S. argued October 4, 2023), *Spector v. Norwegian Cruise Line Ltd.* (2005) 545 U.S. 119, and *PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661. 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.

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DREDF is joined in this letter by five additional organizations, including other California legal services-funded offices and organizations with experience and expertise relevant to understanding the history and scope of anti-discrimination mandates under state and federal law. These *Amici* are listed on page nine and include organizations that have co-authored or participated in *amicus* briefs in numerous important appellate cases involving the Unruh Act and ADA.

Importance of the Issues

The Fourth Appellate District erroneously determined that solely web-based businesses are not “public accommodations” under the ADA. This is a limited interpretation with which *Amici* do not agree, for reasons including those set forth in the compelling dissent of Justice Delaney and Appellants’ Petition for Review. Additionally, *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). It fails to acknowledge the liberal construction afforded the Unruh Act as a remedial statute. Finally, the District’s Opinion gives short shrift to the importance of access to the internet and commercial websites for people with disabilities and underestimates the extent to which excluding web-based businesses from the ADA’s broad scope of protection frustrates the Act’s purpose.

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

The Term “Place of Public Accommodation” Must be Interpreted Broadly Under the ADA

Amici join in the arguments made by Appellants and agree with the dissent of Justice Delaney as to the manner in which the term “place of public accommodation” should be interpreted under the ADA. The plain language of the statute suggests a more expansive interpretation than that adopted by the Panel Majority; at a minimum the term is ambiguous, as recognized in *Martinez v. Cot’n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1045 [29 Cal.Rptr. 712, 725], *review denied* (Nov. 9, 2022) (“Decades of conflicting federal case law interpreting [the term “place of public accommodation”] establishes that[] the term is ambiguous.”).

Amici also agree with Appellants that not enough “weight and respect” was provided to the Department of Justice’s interpretation and decades-long position on both the term itself, and on the ADA’s expansive coverage. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [78 Cal.Rptr.2d 1, 7, 960 P.2d 1031, 1037].) Rather, the Panel Majority relies heavily on the lack of rulemaking specific to internet and speculates that that lack of

rulemaking reflects an intent not to burden internet businesses. This speculation is misplaced. The ADA is a thoughtfully balanced statute that imposes only modest obligations on private businesses, including business that operate online. The notion that Congress has not provided safeguards for ADA claims involving the absence of auxiliary aids and services, or that the lack of rulemaking specific to the internet is an intentional protective measure for web-only businesses, is inaccurate.

Congress explicitly accounted for the potential hardships that remediation of violations could impose on businesses when it enacted the ADA. (*See* Hearing on S. 933 Before Committee on Small Business, 101st Cong. (1990).) Accordingly, the obligations the Act imposes are meager, reflecting the bare minimum required to ensure the ADA’s goal of “address[ing] major areas of discrimination faced day-to-day by people with disabilities.” (42 U.S.C. § 12101(b)(4).) Additionally, as the Supreme Court has recognized, Title III’s requirements are “subject to important exceptions and limitations.” (*Spector v. Norwegian Cruise Line Ltd.*, (2005) 545 U.S. 119, 129.) Among other safeguards, policies need not be modified if doing so would “fundamentally alter” the services or accommodations being offered (42 U.S.C. §§ 12182(b)(2)(A)(ii)-(iii)); and auxiliary aids and services are not required when they would “result in an undue burden,” (*id.* § 12182(b)(2)(A)(iii)). These exceptions and limitations were “the result of extensive scrutiny, debate, and compromise involving Members of Congress, the administration, and the business and disability communities.” (136 Cong. Rec. 17,366 (1990) [statement of Sen. Tom Harkin]. *See also* Statement by President George Bush Upon Signing S. 933, P.L. 101-336, *as reprinted in* 1990 U.S.C.C.A.N. 601 (July 26, 1990) [The ADA was crafted to “give the business community the flexibility to meet the requirements of the Act without incurring undue costs.”].)

The lack of rulemaking specific to the internet is not dispositive of whether web-only business are subject to the ADA. Recognizing the broad, remedial reach of the ADA, the Ninth Circuit has unequivocally and repeatedly held that “the lack of specific regulations cannot eliminate a statutory obligation.” (*See, e.g., 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]; *see also Gorecki v. Hobby Lobby Stores, Inc.* (C.D. Cal., June 15, 2017, No. CV 17-1131-JFW(SKX)) 2017 WL 2957736, at *4 (“The lack of specific regulations [regarding website accessibility] does not eliminate [defendant’s] obligation to comply with the ADA or excuse its failure to comply with the mandates of the ADA.”).) And web-based businesses, have long-standing statutory obligations to—among other things—avoid discrimination (28 C.F.R. § 36.201), and ensure that people with disabilities are not excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services (28 C.F.R. § 36.303).

As the Supreme Court recently observed, public accommodation laws, including those passed by Congress, “play a vital role in realizing the civil rights of all Americans.” (*303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2303 (2023).) “To limit the ADA's reach to a point short of goods and services that are only available on the Internet, where much if not most American consumer research and purchasing now occurs, would contravene Congress’ clearly-stated purpose of bringing disabled individuals into the economic mainstream of American life.” (*Tavarez v. Moo Organic Chocolates, LLC* (S.D.N.Y. 2022) 623 F.Supp.3d 365, 369, *motion to certify appeal denied* (S.D.N.Y. 2022) 641 F.Supp.3d 76.) As Justice Delaney acknowledges, the “clear, sweeping, comprehensive purpose and intent [of the ADA] is furthered by an interpretation which does not limit the [Act’s] application to brick-and-mortar public accommodations.”¹

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 *Martin* 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.

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, 76 [219 Cal.Rptr. 150, 152, 707 P.2d 212, 214], *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*

¹ The ADA’s legislative history, which reveals Congress's expectation that the statute would be responsive to developments in technology, is discussed briefly below at pp. 5-6, and is also extensively briefed by Appellants at pp. 33-41 of their Petition.

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, 793–794 [191 Cal.Rptr. 320, 322, 662 P.2d 427, 429].)

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 uncoded 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, 134, 707 P.2d 195, 196]; see also *Isbister v. Boys’ Club of Santa Cruz, Inc.*, *supra*, 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.’”].) 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.”].) Indeed, the whole of the legislation was intended to be “future driven[.]” (H.R.Rep. No. 101–485(II), *supra*, at p. 122; Sen.Rep. No. 101–116, 1st Sess., p. 67 (1989).)

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

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, 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 Fourth Appellate District in analyzing Appellants’ Unruh Act claim under Section 51(f). Accordingly, the petition for review should be granted.

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); *Tavarez v. Moo Organic Chocolates, LLC* (S.D.N.Y. 2022) 623 F.Supp.3d 365, 367, motion to certify appeal denied (S.D.N.Y. 2022) 641 F.Supp.3d 76 [a “place of public accommodation,” under Title III of the ADA includes public-facing websites that are not tethered to a physical location.”]. *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* Appellants’ Petition at 19-21, 26-27; Appellants’ Motion for Judicial Notice and the guidance, amicus briefs and settlements attached thereto. As discussed at pp. 2-3 of this *amici* letter, the Fourth Appellate District is overly dismissive of these authorities, and instead gives substantial—and unwarranted—weight to the fact that the DOJ has not yet “modernize[d] its regulations” to specifically address standalone websites.

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 1990.⁴ Web-based and web-only businesses are comfortably within the ambit of the Unruh Act’s coverage of “businesses of every kind whatsoever” and play a significant role in today’s marketplace. Indeed, the COVID-19 pandemic has put websites front-and-center in all aspects of society, accelerating existing trends. This is particularly true for web-based businesses and e-commerce. During the pandemic many brick-and-mortar businesses transitioned to providing goods and services via the Internet. (*See Sellers v. JustAnswer LLC* (2021) 73 Cal.App.5th 444, 464.) While some physical locations ultimately reopened, others remain as online-only offerings. At this point, “internet commerce is [] ubiquitous” in today’s society. (*Sellers v. JustAnswer LLC*, *supra*, 73 Cal.App.5th at 464). It is “practically unavoidable in daily life.” (*People v. Salvador* (2022) 83 Cal.App.5th 57, 67.) Illustrating its popularity and utility, United States retail e-commerce sales for 2022 reached an estimated \$1.03 trillion, and e-commerce now accounts for more than twenty percent of global retail sales.⁵

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, and relatively easy to alter. Yet, non-compliance with website accessibility standards is widespread⁶, 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

⁴ While only a few thousand websites were in existence in the early 1990s, there are over 200 million active websites in existence today. (*See Siteefy, How Many Websites Are There In The World?* <https://siteefy.com/how-many-websites-are-there/> (Last updated August 25, 2023); INTERNET LIVE STATS, *Total Number of Websites*, <https://www.internetlivestats.com/total-number-of-websites/> (last visited on December 1, 2023) [Internet Live Stats is part of the Real Time Statistics Project and has been cited by organizations including the World Wide Web Consortium (W3C)].)

⁵ U.S. Dep’t of Commerce, U.S. Census Bureau News, Quarterly Retail E-Commerce Sales, 4th Quarter 2022, Feb. 17, 2023, https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf; Marina Pasquali, E-commerce worldwide – statistics & facts, Statista, Feb. 27, 2023 <https://www.statista.com/topics/871/online-shopping/#topicOverview>.

⁶ *See* The WebAIM Million: The 2023 report on the accessibility of the top 1,000,000 home pages, available at <https://webaim.org/projects/million/#intro> (Accessed on November 29, 2023) (detecting Web Content Accessibility Guidelines (“WCAG”) 2.0 failures on 96.3 percent of home pages and 49,991,225 distinct accessibility errors across those pages, an average of 50.0 errors per page).

is Deaf or hard of hearing.⁷ The more the marketplace is transformed into a digital economy, the more obvious it is to the community of people with disabilities that they cannot participate due to inaccessible web design.

The impact of this exclusion is significant. Studies have revealed that access to and use of the Internet by people with disabilities is associated with improved wellbeing, better mental health and more beneficial health behaviors.⁸ Conversely, individuals with disabilities who experienced impeded access to the Internet were more likely to experience feelings of loneliness, more likely to experience suicidal thoughts, less likely to seek psychological help, more likely to smoke tobacco and engage in the excessive consumption of alcohol, and less likely to perform physical activity or participate in sports.⁹ These findings confirm an association between access to the Internet and various positive—and negative—aspects of the lives of persons with disabilities. These findings are also consistent with general studies showing that barriers in the service environment—which necessarily includes access barriers to web-based businesses—can lead consumers with disabilities to perceive that they are unwelcome and cause them to “feel excluded from the mainstream and perhaps unable to have agency in decisions that affect their daily lives.”¹⁰ “These feelings of unwelcoming and exclusion for consumers, and even groups of consumers, may serve as barriers to fulfilling the inclusive intent of the ADA.”¹¹

Considering the ubiquity of today's e-commerce, and the Internet's place as the “economic and social mainstream of American life” (*PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, 675), excluding websites and online businesses from the ADA’s reach would severely frustrate Congress's intent that individuals with disabilities be able to fully enjoy the goods and services available to members of the general public. Thus, 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.

⁷ <https://www.cdc.gov/ncbddd/disabilityandhealth/impacts/california.html>. Data Source: 2021 Behavioral Risk Factor Surveillance System.

⁸ Duplaga M, Szulc K. *The Association of Internet Use with Wellbeing, Mental Health and Health Behaviours of Persons with Disabilities*. Int J Environ Res Public Health. 2019 Sep 4;16(18):3252. doi: 10.3390/ijerph16183252. PMID: 31487949; PMCID: PMC6765797.

⁹ *Id.*

¹⁰ Stacey Menzel Baker *et. al.*, *How Consumers with Disabilities Perceive “Welcome” in Retail Servicescapes: A Critical Incident Study*, 23 J. OF SERV. MARKETING 160, 165-69 (2007) (“customers perceive welcome (or not) by evaluating signals in the servicescape that cue whether they belong”).

¹¹ *Ibid.*

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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

cc: Additional organizations joining this amicus letter:

Disability Rights Advocates
Disability Rights California
Impact Fund
National Federation of the Blind
National Federation of the Blind of California

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PROOF OF SERVICE

Martin v. THI E-Commerce, LLC., No. S282381
Fourth Appellate District, Division Three, No. G061234
Superior Court of Orange County, No. 0-2020-01176205-CU-CR-CJC

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 December 4, 2023, 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 December 4, 2023, in Berkeley, California.



Diana Vega

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SERVICE LIST

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