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Supreme Court of California
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S266254

IN THE CALIFORNIA SUPREME COURT

BRENNON B., Petitioner,

vs.

SUPERIOR COURT, CONTRA COSTA, Respondent,

WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT, etc, et al., Real Parties in Interest.

After a Decision by the First Appellate District, Division 1, Case No. A157026
Contra Costa Superior Court, Case No. MSC16-01005
The Hon. Charles Treat, Presiding

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER; AMICI CURIAE BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Cal. Rules of Ct., rule 8.208, the Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. The remainder of the amici are individuals with no corporate or business affiliations. Amici and their counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that amici and their counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: September 15, 2021

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APPLICATION FOR PERMISSION TO FILE AMICI BRIEF

A. <u>Consumer Attorneys of California</u>

Amicus curiae Consumer Attorneys of California (CAOC) seeks permission to file the accompanying brief as a friend of the Court. (Cal. Rules of Court, rule 8.520 subd. (f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. CAOC's members represent individuals and small businesses in various types of cases including class actions and individual matters affecting such individuals and entities such as claims for personal injuries and property damage. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees, and injured victims in both the courts and the Legislature.

CAOC has participated as amicus curiae in precedent-setting decisions shaping California law. (*See, e.g.*, *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; *Ramos v. Brenntag Specialties, Inc.* (2016) 63 Cal.4th 500; *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348; *Duran v. U.S. Bank Nat'l Assoc.* (2014) 59 Cal.4th 1; *Rose v. Bank of America, N.A.* (2013) 57 Cal.4th 390; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004; and *In re Tobacco II Cases* (2009) 46 Cal.4th 298.)

CAOC is familiar with the issues before this Court and the scope of their presentation in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context

of the issues presented. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.) While the briefs submitted by Petitioners address the issues presented, CAOC submits its brief to emphasize the importance of correctly interpreting and resolving the ambiguity in the interplay between the Unruh Civil Rights Act, Civil Code section 51, subdivision (f), the remedies provided under the Unruh Civil Rights Act pursuant to Civil Code section 52, subdivision (a), the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, et seq. ("the ADA"), and the importance of preserving the right of citizens to hold public entities, and public schools in particular, responsible for discriminatory practices.[1]

B. <u>The Individual Amici</u>

The individual amici are or were students and are currently the plaintiffs in litigation against the State Center Community College District and Fresno City College, both of which are public entities, for discriminatory practices in the accommodation of the students' disabilities.

The named individuals are all hearing-impaired. While attending classes at Fresno City College, Center Community College District, the school district was required, under the ADA, to provide them with "effective communication." The assistance provided was the presence of interpreter aides trained in

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[1] No party or its counsel authored any part of this brief. Except for CAOC and its counsel here, no one made a monetary contribution, or other contribution of any kind, to fund its preparation or submission. (Cal. Rules of Ct., rule 8.520 subd. (f)(4).)

American Sign Language ("ASL") to communicate the teacher's lectures for them. But the defendants failed to consistently and fully provide the ASL interpreters as needed by the students; rather, an ASL interpreter would frequently be available for only part of a class period and would then be reassigned to another class to communicate for a different student. Thus, each student may have been provided ASL interpreters for as little as one-half of the class period.

The individual amici have asserted claims under the Unruh Civil Rights Act based on the defendants' failure to accommodate their disabilities.

As such, the named individuals all have a direct interest in the issues being addressed by this Court.

C. Request to Submit Amici Brief

Based on the importance of these issues, and the amici's direct interest in the resolution of the issues presented, amici respectfully request that the attached amicus brief be filed.

Dated: September 15, 2021

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AMICI BRIEF OF CONSUMER ATTORNEYS, ET AL.

INTRODUCTION

This amici brief is primarily directed to answering the second question this Court asked in granting review, i.e., can a public school district be sued under the Unruh Civil Rights Act ("the Act" or "the Unruh Act") when the alleged discriminatory conduct is actionable under the Americans with Disabilities Act of 1990 (42 U.S.C. section 12010, et seq.)

To answer that question, this Court must choose between competing lines of case authority either incorporating or rejecting violations of the ADA as per se violations of California's Unruh Civil Rights Act, pursuant to Civil Code section 51, subdivision (f) ("the Act" or "the Unruh Act"). (*Cf*., *Sullivan v. Vallejo City Unified School Dist*. (1990) 731 F. Supp. 947 ("Sullivan") with *Zuccaro v. Martinez Unified School District* (N.D. Cal. Sept. 27, 2016, No. 16-cv-02709 EDL, 2016 WL 10807692) ("*Zuccaro*").)

To effectuate the express statutory goals of the federal ADA, as well as California's broad remedial goal to end discrimination, the answer must be that, yes, a public school district is subject to enforcement of ADA mandates through Unruh Act claims. Uncoupling the ADA from the Unruh Act will impermissibly defeat the state and federal statutory goals of ending disability discrimination in California and will hamper private enforcement of the Act.

But in order to effectively address the issue, this Court should, as a preliminary matter, establish a clear demarcation between the various civil rights acts, e.g., the Unruh Civil Rights Act, the Tom Bane Civil Rights Act, Civil Code section 52.1 and the Ralph Civil Rights Act, Civil Code section 51.7. As the court in *Stamps v. Superior Court* (2006) 136 Cal.App.4d 1441, 1449 ("*Stamps*") confirmed, the Unruh Act's boundaries are poorly defined. "Before we reach our destination, we gently observe a point that is beyond controversy: The courts generally have done a poor job of describing the various components of the [Unruh] Act." (*Id.*)

The confusion arises, in part, because Civil Code section 51, subdivisions (a) and (f) of the Unruh Act are enforced by Civil Code section 52, subdivision (a).[2] Likewise, Civil Code section 52, subdivision (a) is often confused with, and considered a part of the "Tom Bane Civil Rights Act," Civil Code section 52.1, and/or the "Ralph Civil Rights Act of 1976," Civil Code section 51.7. Establishing the nature and scope of the Unruh Act's remedies is essential before this Court can appropriately address the split of authority underlying the necessary analysis.

This careful distinction between the various statutes also undermines Respondents' argument that the statutory damages afforded under the Unruh Act through Civil Code section 52, subdivision (a) constitute "exemplary" "punitive" or "penalty" damages, which cannot be imposed on a public entity under

[2] Unless otherwise indicated all further undesignated statutory references are to the Civil Code.

Government Code section 818. As such, Respondents conclude, the Unruh Act cannot, on its face apply to public schools.

But the damages available under section 52, subdivision (a) are not "punitive," "exemplary" or "penalty" damages; rather, they are a statutory damage established by the Legislature to be applied in the discretion of the judge or jury awarding damages for discriminatory misconduct. The Act provides a "floor" of actual damages or $4,000 in statutory damages for a violation, which is available even when there are no compensatory damages proven. Thus, so long as the judge or jury finds that a violation occurred, the defendant will be subject to the statutory damages, even if there is no proof that the violation caused actual damages to the plaintiff, and no proof that the conduct constituted fraud, malice, or oppression or that the conduct was intentional or even reckless.

LEGAL DISCUSSION

1.
THIS COURT SHOULD ADOPT THE ANALYSIS IN *SULLIVAN V. VALLEJO CITY UNIFIED SCHOOL DISTRICT* IN FINDING THAT A PUBLIC SCHOOL IS A "BUSINESS ESTABLISHMENT" FOR PURPOSES OF THE UNRUH ACT

One of the issues in this case relates to the consideration of whether violations of the ADA can function as per se violations of the Unruh Act. *Cf.*, *Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal. 1990) 731 F. Supp. 947 (*"Sullivan"*) and *Zuccaro v. Martinez Unified School District* (N.D. Cal. Sept. 27, 2016) 2016 No. 16-cv-02709 EDL,) ("*Zuccaro")*.

California's express statutory commandment in Government Code section 12926.1 adopts federal anti-disability discrimination protections (including the ADA) as only a floor of protections, while promoting California's laws as enhancing or increasing the ADA's protections. Similarly, the plain language of Civil Code section 51, subdivision (f) controls and ADA violations remain per se violations of the Unruh Act as previously held by this Court in *Munson* v. *Del Taco* (2009) 46 Cal.4th 661, 675). Accordingly, *Sullivan* should resolve the issue, thereby promoting California and the United States' goals of eliminating disability discrimination.

Following *Sullivan's analysis* will: 1) promote the ADA's express goals and preamble; 2) promote California's broad nondiscrimination goals; 3) effectuate injunctive relief; 4) protect the California Attorney General's ability to independently and affirmatively litigate federal ADA claims; 5) ensure statutory compliance with federal and state ADA implementing regulations (including California's Education Code); 6) provide discrimination victims "fair compensation;" and, 7) promote a vigorous private bar to prosecute civil rights claims to effectuate our federal and state anti- discrimination goals.

This all comports with the ADA's "saving clause," 42 U.S.C. section 12201(b) which provides that: "[n]othing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter." Consistent with the Unruh Act and Government Code section 12926.1, federal preemption yields to the more protective state laws facilitating anti-disabled discrimination protections for people with disabilities in California.

Conversely, applying *Zuccaro's* analysis will: 1) frustrate the ADA's comprehensive goals; 2) limit or narrow the Unruh Act's broad powers to end invidious discrimination; 3) hamper the issuance of injunctive and/or preventative relief; 4) curtail the California Attorney General's independent ability to file and affirmatively prosecute federal ADA claims; 5) erode statutory

compliance with federal and state ADA implementing regulations; 6) preclude the full enforcement of California's Education Code where it overlaps with the Unruh Act; 7) deny discrimination victims "fair compensation;" 8) deter a vigorous private bar from coalescing to prosecute civil rights claims, thereby defeating our federal and state anti-discrimination mandates; and, 9) further deny victims of discrimination experienced attorneys to counsel and vindicate their legal rights to be free from discrimination.

Further, should *Zuccaro's* analysis control so-called "accidental discrimination" claims, i.e., "disparate treatment, disparate impact, or failure to make a reasonable accommodation" (see, e.g., *Payan v. Los Angeles Community College District* (C.D. Cal. October 16, 2018) 2018 WL 6164269), it will simply become too risky for civil rights attorneys to prosecute.

This will be the result because, first, *Zuccaro* will strip away the Unruh Act's minimum floor of statutory damages. Few plaintiffs will proceed forward with little or no prospect of any monetary recovery no matter how upset they may be regarding the alleged underlying discriminatory treatment. Far fewer claimants will come forward than would claimants seeking at least minimum statutory damages. Thus, any potential damages award will have to proceed under the ADA title II's, "deliberate indifference" standard.

The second problem with *Zuccaro* is that California courts have yet to adopt a clearly defined "deliberate indifference"

standard. Public entities and schools routinely argue in our Superior Courts that the "deliberate indifference" standard requires that the school or its agents must "intend" to cause the claimant harm in order to satisfy this presently poorly defined "deliberate indifference" state standard. The combination of no minimum damages for per se Unruh Act violations, and a presently poorly defined "deliberate indifference" standard would be disastrous for discrimination victims who lack substantial associated compensatory damage claims, such as a serious personal injury or lost earnings claims. Disability discrimination claims lacking substantial associated damages are too labor and cost intensive to prosecute on an individual basis. The risks to claimants and their counsel grossly outweigh their potential benefits, no matter how egregious the underlying alleged discriminatory conduct.

As such, this Court should adopt the *Sullivan* analysis, concluding that ADA violations are per se violations of the Unruh Act.

2.
BY MAKING VIOLATIONS OF THE ADA ACTIONABLE UNDER THE UNRUH ACT, THE UNRUH ACT IS MORE EXTENSIVE THAN MERELY PROTECTING FROM DISCREIMINATION IN "BUSINESS ESTABLISHMENTS"

Even assuming Civil Code section 51, subdivision (b) is found by this Court to exempt public schools from enforcement

under the Unruh Act, that does not end the query. That is because subdivision (b) is not the only enforcement provision. Rather, the remedies available under the Unruh Act, as specified in Civil Code section 52, subdivision (a), are also actionable under the Unruh Act for violations of the ADA under section 51, subdivision (f).

Respondents would have this Court read subdivision (f) together with subdivision (a,) thereby requiring that actions for discrimination are limited to "business establishments." But that is not a supportable construction of the statute, as Petitioners and others have argued.

Rather than reiterate statutory construction analysis provided by the parties or others, these amici seek to focus on the public policy concerns that a narrow construction of subdivision (f) would raise.

Both the Unruh Act and the ADA have long been praised as important tools in the fight against discrimination of every kind. And while the provisions of each of them overlap (see e.g., ADA, title III prohibiting discrimination in public accommodations, like section 51, subdivision (b)), the reality is that the ADA is broader. For example, assume this Court concludes that a public school is not a "business establishment" and thus discrimination in a public school cannot be challenged under section 51, subdivision (b). But the ADA's title II *does* prohibit discrimination in public schools. That, in turn, means discrimination in a public school in California becomes actionable under section 51, subdivision (f),

and the remedies under section 52, subdivision (a) become available.

The public policy justifications for concluding that ADA violations are actionable under section 51, subdivision (f) irrespective of whether they are actionable under section 51, subdivision (b) are significant. There can be no question that discrimination occurs in public schools. The facts in this case exemplify that, as do the individual amici's situation.

Here, the individual amici are hearing-impaired students in a public community college. Under the ADA, they are entitled to "effective communication" assistance, which, in this case comes in the form of an ASL interpreter to communicate for them during class. But, as alleged in their complaint, they are not, in fact, consistently provided with the necessary translator assistance. A translator may be in class with one student for half the class, then leave to help another student in a different class for a portion of that class's time. That means that neither student can effectively attend their entire class and their learning is necessarily shortchanged.

An action under the ADA is not an effective, practical option because only compensatory damages are recoverable under title II and only upon a showing of "deliberate indifference." But, enforcement of the ADA's provisions barring disability discrimination in schools, when effected through section 51, subdivision (f) can incentivize the change needed to level the playing field for these hearing-impaired students.

Without the use of section 51, subdivision (f), any challenges by these students are less effective. There is no incentive to bring an action only under the ADA, because no damages are available unless deliberate indifference can be proven. The Attorney General has opined that primary enforcement of the ADA and the related Unruh Act standards falls upon "private parties" and the "United States Attorney General." (Opinion No. 93-203, Office of the Attorney General, State of California, July 14, 1993.)

The issues regarding employing statutory damages against ADA title II public entities to promote barrier removal for disabled access previously reached this Court in the context of non-compliant public sidewalks. (*Beauchamp v. City of Long Beach* (9th Cir. 2013) 730 F.3d 986.) In *Beauchamp*, just as in this case, the case settled before this Court had an opportunity to issue its ruling. But the Ninth Circuit's order seeking this Court's review of the case is illuminating to the issues here.

In *Beauchamp*, the plaintiff quadriplegic wanted to cross the street near his residence to eat at Pizza Hut. The streets in his neighborhood did not comply with ADA standards, thereby restricting his safe movement. The plaintiff filed suit under the related Disabled Persons Act ("DPA") to effectuate barrier remediation and sought statutory damages under the DPA, which, just like the Unruh Act, establishes that a violation of the ADA is also a per se violation of the Unruh Act. (See, *Munson*, *supra.*) The DPA, however, has a $1,000.00 floor for statutory

damages (Civ.C. § 54.3, subd. (a)), whereas the Unruh Act has $4,000.00, floor for statutory damages.

The trial court ruled that the public sidewalk was non-complaint with ADA standards and, that as a matter of law, the City of Long Beach ("City") committed discrimination against Beauchamp on 440 occasions during the relevant statutory period. Accordingly, Beauchamp sought a minimum statutory damage award of $440,000.00, or $1,000.00 per violation. But the trial court awarded Beauchamp only $17,000.00 in statuary damages.

Beauchamp appealed to the Ninth Circuit Court of Appeals. Presented with a novel question of state law, the Ninth Circuit found that "[i]t is not clear how the California Supreme Court would analyze the situation in this case: on the one hand, Beauchamp continued to travel the same routes knowing there were barriers that denied him access, on the other hand, after 17 years, the City has still failed to remove the barriers in the sidewalks in his neighborhood." (*Id.*, at 993.) The Ninth Circuit certified the question to this Court for guidance. After discussing several potential alternatives, the Ninth Circuit sought this Court's assistance, noting, "[t]he consequences of taking any of these approaches will have a significant impact on both the fisc of public entities and the ability of disabled individuals to enforce their rights." (*Id.*)

The Ninth Circuit struggled with the tension between potentially awarding Beauchamp $440,000.00 for the discrimination he suffered, and the fact that the City *still* had not

fixed the sidewalks near Beauchamp's home *for 17 years*, thereby limiting his ability to safely travel around his neighborhood. (*Ibid.*)

In discussing the concept of a "violation" the Ninth Circuit reasoned: "'[T]o interpret the words 'each violation' to authorize a $2,500 sanction for each and every failure . . . would result in an unreasonable or oppressive statutory penalty,' while on the other hand, 'to take all violations constituting evidence of a business practice in violation of a particular rule or regulation and count them as only one violation would be equally unreasonable (citations omitted)." (*Beauchamp*, at 991.)

The Ninth Circuit recognized the importance of balancing the defendant's misconduct and culpability against and the need to achieve the statute's deterrent purpose. (*Ibid.*)

Next, the court framed its proposed solution, i.e., that the trial courts should use a "circumstances-based" analysis to determine what penalties were justified based on the defendant's conduct. (*Id.*, at 991.) Under that rubric, the Ninth Circuit suggested, trial courts can assess the "offense" so that it comports with the defendant's culpability. (*Id.*, at 991-992.)

Finally, the Ninth Circuit proposed, if the trial court suspects that a penalty is excessive, "as applied" to a given case, i.e., the defendant has lesser culpability, the court may apply state and federal due process standards to ensure that the penalty is not "impermissibly disproportionate 'to the conduct' or to the defendants' 'net worth.' " (*Id.*)

The Ninth Circuit's proposed solution in *Beauchamp* provides the trial courts with a fair, equitable and practical solution to the issues here, without the need to either question the plain language of section 51, subdivision (f), or place schools (as title II entities) beyond the reach of the Unruh Act's expressed mandate to end disability discrimination.

Amici suggest that, should the appellate court's holding in this case be affirmed, thereby placing schools outside of the Unruh Act's reach, it can be expected that: 1) every other title II public entity, e.g., the City of Long Beach, will similarly demand that they too be placed beyond the reach of Unruh Act's broad anti-discrimination mandates; and, 2) attacks will be waged upon the other Unruh Act protected classes, such as discrimination based on race, gender, sexual orientation, national origin, etc., as similarly beyond the Unruh Act's grasp when applied to public entities. Such an assault on the Unruh Act's broad remedial goals is insupportable and must be rejected before it can take hold and spread its roots well beyond the narrow issue in this case.

And the *Beauchamp* solution is workable in the real world. Assuming, for example, that the *Beauchamp* trial court found $440,000.00 excessive. Under the *Beauchamp* approach the trier of fact would confirm that 1) *Beauchamp* was the victim of discrimination and 2) the total number of incidents of discrimination he suffered. The trier of fact would then impose statutory damages under the statutory mandate; and, if the court determined that the statutory damages were impermissibly

disproportionate as compared the defendant's culpability, the court could hold a hearing and take evidence to determine if the statutory damages were excessive in light of state and federal due process concerns.

This approach has the additional benefit of creating a clear record for appellate review of the trial court's conduct. The plaintiff will have a clear finding of discrimination, including the number of discriminatory incidents. The trier of fact will impose the statuary damages, and the trial court is free to have a hearing to decrease the statutory damages, if excessive. Once the trial process is complete, the appellate court can review the record and make any additional findings as the law requires.

This is a balanced approach because *Beauchamp* first protects the plain language of section 51, subdivision (f) by confirming that any ADA violations remain per se violations of the Unruh Act. It next protects public entities from excessive verdicts in the appropriate case as overseen by our courts. This approach avoids the need to start creating exceptions to section 51, subdivision (f) which are not contemplated in the statute. Further, this approach will cut off and preclude the anticipated parade of public entities coming to court demanding the same "*Brennon B.*" exception given to schools. Should that occur, Beauchamp may never safely reach that Pizza Hut.

The *Beauchamp* approach is also equitable to plaintiffs. In cases where the trier of fact finds liability against a defendant, but awards no damages, the Unruh Act steps in and directs the court to award minimum statutory damages. For example, in

Payan v. Los Angeles Community College District (C.D. Cal. October 16, 2018) 2018 WL 6164269, two visually impaired students sued the defendant school only under title II of the ADA and Section 504 of the Vocational Rehabilitation Act of 1973. The students did not sue for Unruh Act violations. The trial court determined, as a matter of law that the defendant discriminated against both Payan and co-plaintiff Mason. Next, the court put the issue of damages to a jury trial. [See, Request for Judicial Notice, Exhibit A.]

The jury returned a $40,000.00 for Payan, but a zero verdict for Mason. [See Request for Judicial Notice, Exhibit B.] Both Payan and Mason were found, as a matter of law, to have suffered disability discrimination under the ADA while attending Los Angeles City College. Mason, however, would receive no damages for the discrimination she experienced. Would the lack of a compensatory damages award motivate other blind students to come forward and sue to bring about changes in colleges? Would the lack of Mason's compensatory damages embolden other colleges to disregard the need of other blind or visually impaired students laboring under the expectation that they too will not be liable to blind person whom they discriminate against?

To better effectuate the purposes of the Unruh Act, and the ADA as incorporated into the Unruh Act, let's assume that Payan and Mason filed Unruh Act claims along with the ADA and section 504 claims. Payan was awarded $40,000.00. As to Payan the jury *could* (but is not required to under the CACI verdict

form) award a statutory damage of any sum between $0.0 and $120,000.00 (i.e., three times the actual damages as permitted under § 52, subd. (a)).

Further, assuming a jury did award Payan the full $120,000.00 as a statutory damage, the *Beauchamp* approach affords the trial court an opportunity, after holding a hearing and conducting the appropriate analysis, to evaluate the total damage award in relation to the defendant's culpability, thereby ensuring that the total damage award is not excessive.

The *Beauchamp* approach also benefits plaintiffs in Mason's position. Here, the trier of fact returned a verdict that a confirmed victim of disability discrimination should receive zero compensatory dollars. This is both insulting to Mason and, when publicly disseminated, will (1) frustrate implementation of the statute, (2) embolden some to do wrong under the belief that they can "get away with it" and, (3) most importantly, frustrate the statutory goal of ending disability discrimination.

Assume that: 1) Mason had pled an Unruh Act claim; 2) the trial court found, as a matter of law, that Mason suffered three incidents of discrimination on three different days; and, 3) a jury awarded Mason zero compensation. Under these hypothetical facts, the *Beauchamp* approach would afford the court the ability to award Mason at least a floor of $4,000.00 in statutory damages pursuant to Civil Code section 52, subdivision (a), and, depending on the defendant's culpability, the court could also impose an additional $4,000.00 for each violation, totaling $12,000.00, as a matter of law.

Under this approach Mason's rights would be vindicated with between $4,000.00 and $12,000.00 in statutory damages. This approach better serves the Unruh Act's statutory objective of ending disability discrimination.

Moreover, when publicly disseminated, such an award will promote rather than defeat the statutory goals. That, in turn, discourages others from engaging in discriminatory conduct based on the understanding that they cannot "get away with it." Again, all with a view towards effectuating the statutory goal of ending disability discrimination.

This hypothetical is predicated upon a relevant, current case that portends poorly for the disabled and the accomplishment of the Unruh Act's goals if the Act is uncoupled from ADA violations. Schools and public entities may become optimistic that they can turn back people with a variety of disabilities, including vision impairments, hearing impairments, and other physical disabilities from obtaining meaningful trial results.

More importantly, uncoupling the Unruh Act from the ADA will make obtaining plaintiff's verdicts more difficult, as in Mason's case. This, in turn, will become a disincentive for the private bar to prosecute Unruh Act disability discrimination claims. Accordingly, it will become even more challenging for disabled people to find competent representation to prosecute their justifiable claims.

3.

THE DAMAGES AVAILABLE UNDER THE UNRUH ACT ARE STATUTORY DAMAGES, NOT EXEMPLARY, PUNITIVE OR PENALTY DAMAGES AND, AS SUCH, GOVERNMENT CODE SECTION 818 DOES NOT IMMUNIZE PUBLIC ENTITIES FROM UNRUH ACT CLAIMS

One of the Respondents' arguments is that the Unruh Act cannot apply to public entities because the remedies available under the Act include punitive, exemplary or penalty damages, which are precluded in an action against a public entity under Government Code section 818. But Respondents are wrong, because the only damages available under the Unruh Act are actual damages, *statutory damages* and attorney fees and costs. (Civ. C. section 52, subd. (a).)

A. **<u>Determining the nature of the damages available under the Unruh Act requires distinguishing between the various California civil rights statutes</u>**.

As the *Stamps* court recognized, there is substantial confusion and misunderstanding of the overlap between the civil rights statutes contained in the Civil Code. The confusion arises, in part, because Civil Code section 51, subdivisions (a) and (f) (i.e., part of the Unruh Act) are enforced by Civil Code section 52, subdivision (a). But section 52, subdivision (a) is often,

erroneously, considered to be a part of the "Tom Bane Civil Rights Act," Civil Code section 52.1, and/or the "Ralph Civil Rights Act of 1976," Civil Code section 51.7. Civil Code section 51.7, subdivision (b)(1) discusses the rights enumerated in "Section 51." Civil Code section 52.1, subdivision (c) also provides aggrieved persons with the rights and remedies afforded by Civil Code section 52, subdivision (a).

Given the overlap between these various civil code sections, their interconnected numbering and complimentary purposes, the *Stamps* court understood how these statues could become intertwined and confused. While cataloging the efforts of our California courts and the federal district courts to properly define the Unruh Act's scope and breadth *Stamps* rightly concluded that "an erroneous denotation that includes one measure as part of another may obscure differences that are legally very significant. This is what appears to have happened to the Unruh Civil Rights Act, which is increasingly treated as an omnibus antidiscrimination statute no longer limited to merely ensuring equal access to accommodations." (*Stamps*, at 1450.)

This, the *Stamps* court noted "creates a problem, for the provisions now seen as parts of the Unruh Civil Rights Act do not all share the same common law provenance." (*Ibid.*) Clearing up this confusion between the Unruh Act, the Tom Bane Civil Rights Act and the Ralph Civil Rights Act of 1976 will help define the Unruh Act's remedies, which is necessary in light of Respondents' erroneous labeling of the damages available under

Civil Code section 52, subdivision (a) as "treble damages" primarily awarded as "exemplary damages" or "punitive damages" which Respondents argue cannot be imposed on them as a public entity under the provisions of Government Code section 818. (ABM, pg. 21 and 25.)

But the damages available under the Unruh Act are no such thing; rather, they are *statutory damages*, i.e., damages imposed for violations of the statute, not because any fraud, malice or oppression have been alleged or proven. Indeed, as this Court confirmed in *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 670, "a plaintiff proceeding under section 51, subdivision (f) may obtain statutory damages on proof of an ADA access violation *without the need to demonstrate additionally that the discrimination was intentional*." If damages can be awarded even in the absence of intentional misconduct, they cannot rationally be classified as punitive or exemplary.

The Unruh Act is *only* Civil Code § 51 which is enforced through Civil Code section 52, subdivisions (a), (c), (d), (e), (f), (g), (h), and (i). Civil Code section 52, subdivision (a) allows Unruh Act discrimination victims the actual damages incurred and, in the discretion of the judge or jury, up to a maximum of three times their actual damages as *statutory damages*, i.e., damages imposed under the terms of the statute. And that these are statutory damages, as distinct from punitive or exemplary damages, is confirmed by the statutory mandate that the damages awarded must be *"in no case less than four thousand dollars* ($4,000)." (Section 52, subd. (a).) Thus, if a

disabled person is discriminated against, but does not incur any *actual* damages, the judge or jury must still award a floor of no less than $4,000 in statutory damages.

This is exemplified by the circumstances affecting the individual amici on this brief. As noted above, they are hearing-impaired students who require ASL interpreters to communicate for them in class. As alleged in their complaint, the school only provided aides for less than the full class time, frequently leaving the students without any assistance. Even if a jury found there were no actual damages from the discrimination (because, for example, the students did not hire their own ASL interpreters), the students would still be entitled to recover the minimum *statutory* damages provided for in section 52, subdivision (a) for violations the ADA, through the Unruh Act.

Additionally, Civil Code section 52, subdivisions (b), (b)(1) and (b)(2) all exclude claims predicated on Civil Code section 51 for the remedies found in those sections, i.e., "*actual damages*" pursuant to Civil Code section 52, subdivision (b); "*exemplary damages*" pursuant to Civil Code section 52, subdivision (b)(1); and, a civil *penalty* of twenty-five thousand dollars ($25,000.00) awarded to the victims denied the rights provided by section 51.7 or 51.9 pursuant to subdivision (b)(2). (*Id.*) Civil Code section 52.1 likewise has its own $25,000 civil penalty. Thus, in section 52, subdivision (b), the Legislature itself expressly distinguished between punitive damages, penalty damages and the type of statutory damages available under section 52, subdivision (a). (See, also, *Stamps,* fn. 13.)

Hence, a proper understanding of *Stamps* confirms that victims of discrimination pursuant to the Ralph Civil Rights Act of 1976 and Tom Bane Civil Rights Act shall have the right to seek "exemplary damages" *and* a $25,000.00 "civil penalty" that is unavailable to victims seeking relief solely under the Unruh Act. Given that the Legislature has carved out separate remedies for the Unruh Act, Ralph Civil Rights Act of 1976 and Tom Bane Civil Rights Act violations, Respondents' argument that Unruh Act remedies are the equivalent of "punitive," "exemplary" or "penalty" damages is insupportable.

B. **Case law supports the conclusion that statutory damages are not punitive, exemplary or penalty damages and may be imposed on a public entity without violating the mandates of Government Code section 818**.

Case law confirms the distinction between statutory damages and punitive or exemplary damages. The amount of "no less than actual damages" and up to "three times actual damages" is itself a statutorily set sum or "statutory damage" to be determined by the jury (or trier of fact) as set by the legislature. (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1598 ("*Beeman*").)

(1) <u>Non-public entity cases distinguishing statutory damages and punitive, exemplary or penalty damages</u>.

Beeman is a landlord/tenant case that arose in San Francisco, California. Burling purchased Beeman's leasehold and evicted him pursuant to the owner's right to evict a tenant so he could personally occupy the leasehold. San Francisco, however, enacted a rent ordinance requiring that when a tenant is evicted, the landowner must occupy the unit for 12 consecutive months, or the evicted tenant can sue the landlord for not less than three times actual damage, injunctive relief and other relief as afforded by the court. Burling lived in the leasehold for less than 12 consecutive months. Beeman filed suit for breach of the rent ordinance and took a default judgment against Burling, which included an award of three times his mental suffering. Burling moved to set aside the default judgment, making arguments nearly identical in form as Respondents' arguments here. Namely, the judgment was punitive in nature and otherwise ran afoul of Civil Code section 3294. The *Beeman* court quickly disposed of these arguments by detailing the contours of how "statutory damages" are different than punitive damages: "The problem with appellant's argument is that it erroneously equates punitive damages with statutory damages, and assumes the two are awarded based on the same standards. (*Id*. at 1598).

As *Beeman* explained: "Appellant correctly points out that the judge or jury, as the case may be, has the authority to decide

whether and what amount of punitive damages should be awarded. (*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 387-388) In contrast, a legislative body sets statutory damages; while the fact finder must still determine whether such damages are to be awarded, if they are granted *the amount is fixed by statute*. Statutory damages may either take the form of penalties, which impose damages in an arbitrary sum, regardless of actual damages suffered or, as in the instant case, may provide for the doubling or trebling of the actual damages as determined by the judge or jury. (6 Witkin, Summary of Cal. Law (9th ed. 1987) Torts §§ 1332-1333, at pp. 790-791.) Thus, while both exemplary damages and statutory damages serve to motivate compliance with the law and punish wrongdoers, they are distinct legal concepts, one of which is entrusted to the factfinder, the other to the Legislature. The numerous statutes specifically providing for treble damages testify to the fact that the Legislature never intended Civil Code sections 3294 and 3295 to restrict its ability to set the appropriate damage award in particular areas." *(Beeman*, at 1597-1598, emphasis added, citations omitted).

Beeman instructs that statutory damages are a distinct legal concept established by the Legislature, not a jury. The trier of fact's role is only to determine if the prescribed conduct occurred, and then award appropriate damages within the damage range set by the Legislature. The Unruh Act, unlike the Ralph Civil Rights Act of 1976 and Tom Bane Civil Rights Act, does not award a "penalty" or arbitrary sum following the

prohibited conduct; rather it imposes a set statutory damage amount.

Thus, as *Beeman* confirms, there is a distinction between statutory damages on the one hand (which are the damages available under the Unruh Act) and exemplary, punitive or penalty damages on the other hand.

(2) <u>Public entity cases also distinguish between statutory damages and punitive, exemplary or penalty damages</u>.

Multiple public entities have sought to bar Unruh Act claims and similarly situated anti-discriminations statues by asserting Government Code section 818, and failed. See, for example, *Gatto v. County of Sonoma* (2002) 98 Cal. App. 4th 744 [A county fair and county law enforcement personnel were subjected to Unruh Act liability]; *Kizer v. County of San Mateo*, (1991) 53 Cal. 3d 139 [Section 818 did not immunize county against statutory penalty because the penalties were not primarily punitive and their purpose was to secure obedience to statutes and regulations that assured policy objectives.]; *Rutledge vs. County of Sonoma* (N.D. CA 2008) 2008 WL 2676578, at *17-18, ["[t]he County defendants argue that the cause of action "improperly includes reference to the Civil Code sections, and their remedies, and as such is improperly pleaded." The court responded that "[t]he fact that the third cause of action seeks civil penalties or punitive damages under the Unruh Act is not a basis for dismissing the entire claim."] *K.M.*

v. Tustin Unified Sch. Dist. (9th Cir. 2013) 725 F.3d 1088, fn. 1 [holding that a violation of the ADA is a per se violation of the Unruh Act.].

In *Los Angeles County Metropolitan Transportation Authority v. Superior Court (Lyons)* (2004) 123 Cal.App.4th 261, a public entity's bus driver first taunted a homosexual patron and later ran him down and beat him as he fled the bus and bus driver. The bus driver cracked the bus rider's ribs and pulled out clumps of his hair before being restrained. Later the bus rider filed suit pursuant to Civil Code section 52.1's threat of violence provision, seeking a $25,000.00 penalty. The public entity interposed their objection that Gov. Code section 818 precluded the imposition of a $25,000 penalty against the bus driver. The trial court rejected the public entity's arguments. In analyzing damages under section 52 subdivision (b)(2), the court concluded that civil penalties for violation of section 52.1 could be recovered against a public entity, confirming that "the civil penalty also helps to ensure that plaintiffs receive ample compensation, irrespective of their actual damages. Because of these important *non-punitive remedial functions*, section 52, subdivision (b)(2), does not fall within the scope of government immunity under section 818. To hold otherwise would compromise private parties' ability to litigate claims under section 51.7 and thus undercut the legislative intent behind providing a statutory recovery to which plaintiffs are automatically entitled to upon proof of liability, regardless of actual damages. This conclusion is also fully supported by

relevant case law dealing with the application of section 818 in different factual contexts (emphasis added)." (*Id.* at 276.)[3]

Sullivan v. *Vallejo City Unified School Dist.,* (1990) 731 F. Supp. 947, held that the California Civil Code regarding disability discrimination applies to public schools, and that plaintiffs are entitled to their protection. (*Id.* at 959.) At footnote 11, the *Sullivan* court explained the importance of imposing statutory remedies under California's civil rights statutes on public entity defendants:

> "Defendants' argument that California Civil Code 54.2 has no application where the handicapped person does not require the services of the dog to attain access to a public facility cannot be countenanced. Defendants readily concede that there is a strong state policy in California, evidenced by numerous legislative enactments, to integrate disabled individuals into society on a full and equal basis. See, e.g., Cal.Civ.Code 51, 54.1, 54.2, 55; Cal.Penal Code 365.5. These provisions

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[3] Clarification on this issue is also important in light of current CACI instructions. CACI instructions currently conflate use of a "penalty" with a damages range. *Cf.* CACI Verdict Form 3030, question No. 5 with CACI 3067, which properly instructs the jury on the range of statutory damages, but calls the statutory damage a penalty. Likewise, Verdict Form 3030 invites the jury to award a "penalty" against the defendant, but does not specify an arbitrary range for the penalty. That is because the range is not a penalty, it is a statutory damage. It is to be hoped that the Court's decision in this case will clarify this issue for the benefit of the CACI committee.

> would have no meaning were they construed to permit a public facility to substitute its own judgment as to whether a disabled person requires the assistance of an auxiliary aid, whether it be a service dog or a wheelchair, to gain access to its premises. Under this theory, *a public facility could ban wheelchairs from its premises as long as it provided attendants to carry mobility impaired [sic] persons from place to place*. The guarantees embodied in both California Civil Code 54.1 and the anti-discrimination mandate of section 504 *must mean more than this* [emphasis added]." (*Id.*, emphasis added.)

And as succinctly stated by the court in *D.K. v. Solano County Office of Educ.* (2009) 667 F. Supp. 2d 1184, "a per se rule immunizing local school districts for acts occurring on school grounds [for ADA liability]" is inconsistent with the purpose of the ADA as to do so would encourage school districts to "escape all liability." (*Id.* at 1192.)

Finally, even if the Unruh Act's statutory damages could be characterized as a "penalty," that does not assist Respondents. In *Kizer v. County of San Mateo* (1991) 53 Cal. 3d 139, this Court addressed the very question of whether a statutory penalty was barred by either the Tort Claims Act or Government Code section 818, and concluded that it was not: "Nowhere in the Tort Claims Act does the Legislature

indicate an intention to immunize public entities from monetary sanctions authorized by the Legislature and imposed for failure to observe minimum health and safety standards adopted to protect and prevent injury to patients. Granting immunity to public entities from the penalties would be contrary to the intent of the Legislature to provide a citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state." (*Id*., at 146.)

Specific to Government Code section 818, this Court completely resolved any contention that punitive damages are equivalent to a statutory penalty:

> In our view, Government Code section 818 was not intended to proscribe all punitive sanctions. Instead, the section was intended to limit the state's waiver of sovereign immunity and, therefore, to limit its exposure to liability for actual compensatory damages in tort cases. The Tort Claims Act must be read against the background of general tort law. (See Van Alstyne, Cal. Government Tort Liability Practice (1980) § 2.7, p. 36.) Against that background, the Tort Claims Act does not apply to the type of sanction that the Legislature has imposed in this case to enforce the Act's regulatory scheme. Under the Long-Term Care, Health, Safety, and Security Act of 1973, the essential prerequisite to liability is a violation of some minimum health or safety standard rather than "injury" or "damage." Consequently, we do not believe that the Legislature intended the

> immunity created by Government Code section 818 to apply to statutory civil penalties expressly designed to enforce minimum health and safety standards.

(*Kizer*, at 146-147.)

The same analysis applies here: Where a defendant violates an anti-discrimination statute, a "sanction" under section 52, subdivision (a), i.e., a statutory damage, can be imposed.

This Court further distinguished those types of damages from damages barred under Government Code section 818: "The County argues that the statutory civil penalties imposed under the Long-Term Care, Health, Safety, and Security Act are primarily punitive and hence cannot be recovered from a public entity. We disagree. Government Code section 818, upon which the County's argument is based, 'exempts public entities from liability for punitive or exemplary damages.' (Cal. Law Revision Com. comment to Gov. Code, § 818.) In tort actions, damages are normally awarded for the purpose of compensating the plaintiff for injury suffered, i.e., restoring the plaintiff as nearly as possible to his or her former position, or giving the plaintiff some pecuniary equivalent. [Citation.] When, however, the defendant's conduct is outrageous, additional damages may be awarded to punish the defendant and to deter such conduct in the future. [Citations.] Punitive or exemplary damages 'are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious ....' [Citations.] In California, as at common law, actual damages are an absolute predicate for an award of exemplary or punitive

damages. [Citations.] Even nominal damages, which can be used to support an award of punitive damages, require actual injury. [Citations.] When punitive damages are appropriate, they are awarded in a discretionary amount by the trier of fact, who may consider evidence of the defendant's financial condition (inadmissible in the compensatory damage phase of the trial), and only after a defendant has been found guilty of oppression, fraud, or malice. (Civ. Code, § 3295, subd. (d)" (*Kizer, supra*, at 147.)

Thus, this Court continued:

> Civil penalties under the Act, unlike damages, require no showing of actual harm per se. Unlike damages, the civil penalties are imposed according to a range set by statute irrespective of actual damage suffered. [Citations.] Moreover, civil penalties, unlike punitive damages, are imposed without regard to motive and require no showing of malfeasance or intent to injure. [Citation.] The civil penalties under the Act can be imposed for negligent conduct and it is not necessary for the Department to allege or prove that a health facility's actions in violating specific health and safety regulations are malicious, wilful, or even intentional. Whereas damages serve to compensate the victim, the civil penalties under the Act are to be applied to offset the state's costs in enforcing the health and safety regulations. (§ 1428, subd. (j).)

> While the civil penalties may have a punitive or deterrent aspect, their primary purpose is to secure obedience to statutes and regulations impose to assure important public policy objectives. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398 [149 Cal.Rptr. 375, 584 P.2d 512]; see also, *Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1598 [265 Cal.Rptr. 719] ["Thus, while both exemplary damages and statutory damages serve to motivate compliance with the law and punish wrongdoers, they are distinct legal concepts, one of which is entrusted to the factfinder, the other to the Legislature."].) The focus of the Act's statutory scheme is *preventative.* Section 1424 protects patients from "imminent danger" or "substantial probability" of harm (class A violations) and even from situations having a "direct and immediate relationship to the health, safety, and security of patients" (class B violations). Under its licensing authority, the Legislature has mandated standards to ensure quality health care. The regulations establish that what the Legislature and the Department are seeking to impose are measures that protect patients from actual harm, and encourage health care facilities to comply with the applicable regulations and thereby *avoid* imposition of the penalties. (See, generally, Cal. Code Regs., tit. 22, § 72001 et seq.)

(*Kizer, supra*, at 147-148.)

That analysis is directly applicable to Respondents' arguments here. Even characterizing the statutory damages

allowed under the section 52, subdivision (a) as a "penalty," *Kizer* makes it unequivocally clear that such penalties are not the equivalent of punitive or exemplary damages barred by Government Code section 818 and do not impair the ability of a trier of fact to impose such statutory damages on a public entity.

Kizer fundamentally undermines Respondents' arguments and warrants a finding by this Court that a statutory damage under the Unruh Act is no precluded under section 818.

CONCLUSION

Whatever approach this Court takes in addressing the issues presented, the paramount consideration must be to protect the validity and utility of all the disability discrimination statutes enacted by both California and Congress. Impinging on any of those rights – making any of them more difficult to enforce – will have untoward consequences for disabled Californians and, as a result, for our society as a whole.

Dated: September 15, 2021

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Pursuant to Cal. Rules of Ct., rule 8.204, subd. (c)(1), counsel of record certifies that this Application to File and Amicus Brief of Consumer Attorneys of California is produced using 13-point Century Schoolbook type, including footnotes, and contains 9413 words. Counsel relies on the word count provided by Microsoft for Mac Word word processing software.

DATED: September 15, 2021

By: *Sharon J. Arkin*
SHARON J. ARKIN

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Sharon J. Arkin
SHARON J. ARKIN

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Supreme Court of California

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