Case No. S162818

IN THE SUPREME COURT OF CALIFORNIA

KENNETH MUNSON,
Respondent,

v.

DEL TACO, INC., a California Corporation,
Petitioner.

Questions Certified From the United States Court of Appeals
For the Ninth Circuit
On Appeal from the United States District Court,
For the Central District of California,
Honorable Howard A. Matz, District Judge, Presiding

Case No. CV-05-5942 AHM (FMOx)

BRIEF OF AMICI CURIAE AIDS LEGAL REFERRAL PANEL, ASIAN AND PACIFIC ISLANDER WELLNESS CENTER, BIENESTAR, BLACK COALITION ON AIDS, COMMON GROUND–WESTSIDE HIV COMMUNITY CENTER, FACE TO FACE SONOMA COUNTY AIDS NETWORK, HIV/AIDS LEGAL SERVICES ALLIANCE, L.A. GAY & LESBIAN CENTER, RESOURCES FOR INDIAN STUDENT EDUCATION, INC., SAN FRANCISCO AIDS FOUNDATION, SAN JOAQUIN AIDS FOUNDATION AND SIERRA HEALTH RESOURCES, INC. IN SUPPORT OF RESPONDENT KENNETH MUNSON

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INTRODUCTION

California's Unruh Civil Rights Act ("Unruh Act") embodies this state's strong public policy against arbitrary discrimination and aims to eradicate discriminatory practices from California's community life. (Civ. Code, § 51.)[1] "The Act stands as a bulwark protecting each person's inherent right to full and equal access to all business establishments." (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167 [internal quotation marks omitted] (hereafter *"Angelucci"*).) The guarantees of the Unruh Act are critical to addressing the problem of HIV discrimination, which exacts a significant toll on affected individuals and larger disease prevention and intervention efforts. Amici, who include a number of California's HIV service and advocacy organizations, have significant concerns about the draconian interpretation of Section 51, subdivision (f) (hereafter "Section 51(f)") urged by Del Taco. Del Taco's argument that Section 51(f) claims require a showing of elevated discriminatory intent misreads the statute and would harm all disabled Californians who face discrimination in public accommodations, including those living with HIV.

Amici believe that the proper answers to the court's certified questions are found in the language of Section 51(f) and the Americans with Disabilities Act (hereafter "ADA"). (42 U.S.C. § 12181 et seq.)

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[1] All statutory references in this brief are to the California Civil Code unless otherwise stated.

Section 51(f) provides that plaintiffs who prove they have been discriminated against in violation of the ADA have established an Unruh Act violation. This court should adopt the straight-forward interpretation of the Unruh Act intended by the Legislature, which acted to provide Unruh Act remedies to those who prove a violation of the ADA without requiring proof of an extraneous intent element. This rule honors the statute's plain language and legislative history, as well as this state's venerable promise to banish harmful and arbitrary discrimination from its places of business. Amici also offer their expertise with the ADA to elaborate upon the varying intent standards that may be required for different ADA claims, which further illustrate Del Taco's faulty reasoning.

Large numbers of Californians living with HIV continue to face significant prejudice, fear and stigma, leading to discrimination in public accommodations. Such discrimination is not limited to physical barriers to access, and the questions before the court reach well beyond that context. Based on their extensive expertise with HIV-related discrimination and the remedies for that discrimination available under federal and state law, amici submit this brief to aid the court in answering the certified questions in a manner that is both consonant with the proper construction of the Unruh Act's disability protections and appropriately protective of Californians living with HIV.

ANALYSIS

I. PEOPLE LIVING WITH HIV CONTINUE TO NEED PROTECTIONS AGAINST DENIALS OF EQUAL ACCESS TO PUBLIC ACCOMMODATIONS IN CALIFORNIA.

A. HIV is a Disability That Affects Over 160,000 Californians.

Fair and equal treatment of Californians living with the human immunodeficiency virus ("HIV") is vitally important, as the number of Californians affected by HIV is significant and growing.[2] As of the end of 2006, more than 160,000 Californians were living with HIV. (California HIV/AIDS Research Program, University of California & California Department of Public Health, Office of AIDS, *California HIV Prevention Indicators: Brief Report #5* (Feb. 2008) p. 1, <http://chrp.ucop.edu/resources/prevention_indicators/prev_indicators_5_brief_report.pdf> [as of December 18, 2008] [estimating number based on reported cases of AIDS and HIV infection and estimates of number of Californians who had HIV but did not yet know it] (hereafter *"California HIV Prevention Indicators"*).)

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[2] The term "HIV" is commonly used to refer not only to the virus itself, but also to "HIV infection" or "HIV disease." The diagnosis of "AIDS" typically is used to refer to an advanced stage of HIV infection, but the terms "HIV" and "AIDS" are often used interchangeably and are sometimes referred to as "HIV/AIDS." (See, e.g., Centers for Disease Control and Prevention, U.S. Dept. Health & Human Services, *Living With HIV/AIDS*, <http://www.cdc.gov/hiv/resources/brochures/livingwithhiv.htm#q2> [as of Dec. 18, 2008].)

As early as 1994, the California Legislature recognized the importance of a state response to HIV's impact on Californians, finding that HIV had a significant effect on the state's residents and that the seroprevalence rate was increasing among several vulnerable populations, including people of color, at-risk youth and women. (Stats. 1994, ch. 683, § 1(b) [enactment creating California's Office of AIDS].) Unfortunately, the same effects and trends are seen today. "The estimated number of Californians living with HIV continues to increase, as does the number of persons living with AIDS," with increases occurring in all regions of California. (*California HIV Prevention Indicators* at p. 1; see also California Department of Public Health, Office of AIDS, HIV/AIDS Case Registry Section, *HIV/AIDS Surveillance in California*, at p. 2, <http://www.cdph.ca.gov/programs/aids/Documents/HIVAIDSMergedNov08.pdf> [as of December 18, 2008] [tabulating reported incidences of HIV infection, AIDS diagnoses, and AIDS-related deaths and showing steady increase in number of Californians with AIDS].) Moreover, today many racial and ethnic minority populations are disproportionately affected by HIV transmission rates. (See, e.g., Centers for Disease Control and Prevention, U.S. Dept. Health & Human Services, Morbidity and Mortality Weekly Report, *Update to Racial/Ethnic Disparities in Diagnoses of HIV/AIDS—33 States*, 2001-2005, 56(09);189-193, at p. 189 (March 9,

2007) <http://www.cdc.gov/hiv/resources/reports/mmwr/pdf/mm5609_update.pdf> [as of December 18, 2008] [black people accounted for more than 51% of the HIV infections diagnosed nationally from 2001 to 2005]; Office of AIDS, *Fact Sheet: HIV/AIDS Among California Latinos* (Oct. 2008) <http://www.cdph.ca. gov/programs/AIDS/Documents/FSLatino.pdf> [as of December 18, 2008] ["Over the past ten years, [California] Latinos have accounted for the largest increase in the number of persons living with AIDS."].)

As the number of Californians with HIV continues to grow, protections against disability discrimination remain vitally important.

B. Discrimination Against People Living with HIV is Widespread.

Stigma continues to attach to an HIV diagnosis and misunderstanding of HIV remains prevalent, resulting in persistent and alarming rates of bias against those living with HIV. "Large segments of the public remain uneducated about HIV and how it is transmitted," which promotes fear and antipathy that "often translate[s] into biased and discriminatory actions." (Waite et al., Journal of General Internal Medicine, *Literacy, Social Stigma, and HIV Medication Adherence* (June 19, 2008) 23(9): 1367-1372, at p. 1367 (hereafter *"Literacy, Social Stigma"*); see also Brooks et al., AIDS Patient Care and STDs, *Preventing HIV Among Latino and African American Gay and Bisexual Men in a*

Context of HIV-Related Stigma, Discrimination and Homophobia: *Perspectives of Providers* (2005) Vol. 19, No. 11, 737-744, at p. 738 (hereafter *"Preventing HIV"*) [referencing 2003 report of American Civil Liberties Union survey finding that HIV stigma has resulted in denials of medical treatment, privacy violations, and refusal of admittance to nursing homes].)

Research indicates HIV is viewed more negatively than many other stigmatized conditions, and fully one third of Americans have negative attitudes toward people living with HIV. (Rao et al., AIDS Behavior, *Stigma, Secrecy, and Discrimination: Ethnic/Racial Differences in the Concerns of People Living with HIV/AIDS* (2008) 12:265-271, at pp. 265-266; see also Kaiser Public Opinion Spotlight, *Attitudes About Stigma and Discrimination Related to HIV/AIDS* (August 2006), at pp. 7-8 <http://www.kff.org/spotlight/ hivstigma/upload/spotlight_aug06_ stigma.pdf> [as of December 18, 2008] [forty-three percent of people harbor one or more misconceptions about how HIV is transmitted, and people who harbor misconceptions are more likely to express discomfort about working with someone who is HIV positive].)

Courts have repeatedly recognized the link between stigma and discrimination experienced by people living with HIV. For example, the federal district court for the Eastern District of New York observed that

"HIV-infected persons necessarily struggle with many stresses in their lives, including . . . rejection of friends and family, stigma, and discrimination." (*Henrietta D. v. Giuliani* (E.D.N.Y. 2000) 119 F.Supp.2d 181, 186; see also, e.g., *Kinzie v. Dallas County Hosp. Dist.* (N.D. Tex. 2003) 239 F.Supp.2d 618, 639 [noting that people living with HIV "must deal with the social stigma of being HIV-positive" and "will likely be treated as . . . outcast[s] by many"]; *Hauser v. Volusia County Dep't of Corrections* (Fla. App.1 Dist. 2004) 872 So.2d 987, 991-992 [noting that "[t]he stigmatizing effect of being associated with the AIDS virus is so self-evident as to need no further elaboration"]; *Doe v. Chand* (Ill. App. 5 Dist. 2002) 781 N.E.2d 340, 352 (Welch, J., concurring) [discussing importance of remedies for violations of state HIV confidentiality provisions, which were included in the statute because "the legislature . . . recognized the social stigma that attaches" to individuals known to be infected with HIV, who "are pariahs, treated only slightly better than how people used to treat a leper who escaped from the colony."].)

C. People Living with HIV Are Denied Full and Equal Access to Public Accommodations.

People living with HIV face unlawful discrimination in every public arena, from employment and housing to the public accommodations they seek to access in the regular course of daily life. The ability of people with

HIV to access public accommodations without discrimination is profoundly important and strong antidiscrimination protections are crucial to them.

HIV discrimination has barred access to vital services, including health care. The leading United States Supreme Court case addressing an ADA HIV discrimination claim arose in the context of a dentist's refusal to provide services in his dental office to a woman living with HIV. (See *Bragdon v. Abbott* (1998) 524 U.S. 624 [118 S.Ct. 2196] [evaluating claim that dentist violated ADA by refusing to treat patient because she had HIV]; see also *Abbott v. Bragdon* (1st Cir. 1998) 163 F.3d 87 [affirming summary judgment for plaintiff on her discrimination claims on remand].) People with HIV continue to experience discrimination in accessing health care services. (See, e.g., Sohler et al., Public Health Reports, *Perceived Discrimination Among Severely Disadvantaged People With HIV Infection* (May-June 2007) 122: 347-355, at p. 350 [reporting results of survey of individuals with HIV living in transitional housing in New York City, including finding that almost one quarter reported experiencing discrimination in the healthcare system due to their HIV status]; Sears & Ho, The Williams Institute, *HIV Discrimination in Health Care Services in Los Angeles County: The Results of Three Testing Studies* (2006) (hereafter *"HIV Discrimination in Health Care"*) [reporting, *inter alia*, that

55 percent of obstetricians refused to treat patients living with HIV in Los Angeles County].)

In addition to health care denials, studies have documented denials of equal access to public accommodations such as day care and nursing homes for people living with HIV. (See, e.g., Bogart et al., AIDS Behavior, *HIV-Related Stigma among People with HIV and their Families: A Qualitative Analysis* (2008) 12:244-254, at pp. 244-245 (hereafter "*HIV-Related Stigma*") [describing prevalence of HIV discrimination, including in access to school, day care and housing].) A recent study of HIV discrimination in Los Angeles County found that public accommodations discrimination remains a widespread and serious problem. (*HIV Discrimination in Health Care*, [reporting, *inter alia,* that 46 percent of skilled nursing facilities refused to accept patients living with HIV in Los Angeles County].)

D. The Harms From HIV Discrimination Include Negative Impacts on Disease Prevention and Treatment Efforts.

HIV discrimination has significant public health implications because "[a] consequence of HIV-related stigma and discrimination is a negative effect on both HIV prevention efforts as well as care for individuals living with HIV." (*Preventing HIV,* at p. 737.) HIV stigma can lead people to avoid healthcare or forego antiretroviral medications, and has been linked to "elevated stress, depression, impaired immune response, and

high suicide rates." (*Literacy, Social Stigma*, at p. 1367; see also Bunn et al., AIDS Education and Prevention, *Measurement of Stigma in People with HIV: A Reexamination of the HIV Stigma Scale* (2007) 19(3), 198-208, at pp. 198-199 [fear of stigma has been associated with high-risk sexual behaviors, limited use of HIV services, and delays in HIV testing for high-risk individuals]; *HIV-Related Stigma,* at p. 244 [mothers living with HIV who report high levels of stigma have lower physical, psychological and social functioning, and high levels of depression].)

Bias against people living with HIV not only affects stigma avoidance by people with HIV, but can also "negatively affect the quality of care provided to HIV-positive individuals." (*Preventing HIV,* at p. 738.) For these reasons, reducing HIV stigma has "been acknowledged in nursing and the public health sector in general as imperative for primary and secondary prevention of HIV." (Buseh et al., Public Health Nursing, *Relationship of Symptoms, Perceived Health, and Stigma With Quality of Life Among Urban HIV-Infected African American Men* (Sept./Oct. 2008) Vol. 25, no. 5, pp. 409-419, at p. 416.)

The scourge of HIV discrimination adds an important dimension to the questions before the court, both because of the human cost imposed by unlawful denials of services and the broader toll on public health. A set of effective antidiscrimination laws – with remedies that effectively serve the

deterrence goals of such laws – is a critical part of the solution to this societal problem.

II. BOTH THE PLAIN STATUTORY LANGUAGE AND THE LEGISLATIVE HISTORY OF SECTION 51(F) DEMONSTRATE THE LEGISLATURE'S INTENT TO PROVIDE UNRUH ACT REMEDIES FOR ADA VIOLATIONS.

A. Under the Plain Language of the Unruh Act, a Plaintiff Seeking Damages for a Violation of Section 51(f) Must Prove Only the Elements Required to Establish That the ADA Has Been Violated.

The well-established rules of statutory construction are applied "so that [a court] may adopt the construction that best effectuates the purpose of the law." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 888 [internal quotation marks omitted].)[3] Courts "begin with the statutory language because it is generally the most reliable indication of legislative intent." (*Ibid.*) If the language is unambiguous, courts "presume the Legislature meant what it said, and the plain meaning of the statute controls." (*People v. Evans* (2008) 44 Cal.4th 590, 597 [internal quotation marks omitted].)

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[3] Amici are aware other amici curiae representing the interests of Californians with disabilities are presenting the court with statutory interpretation arguments. The amici represented here are providing the court with only a brief discussion of the relevant statutory construction principles, to help clarify the widespread confusion among lower state courts about how to apply these rules and to provide context for amici's complementary discussion of Section 51(f).

Section 51(f) "could not be clearer" in its statement that "'[a] violation of any right of any individual under the [ADA] shall also constitute a violation of this section.'" (*Wilson v. Haria & Gogri Corp.* (E.D. Cal. 2007) 479 F.Supp.2d 1127, 1137, quoting Section 51(f).) Therefore, once a plaintiff has met the proof requirements to establish an ADA violation, the plaintiff also has established a violation of the Unruh Act.

The conclusion that the Unruh Act does not impose any additional intent requirement for Section 51(f) claims is a result "mandated by the plain meaning of the Unruh Act's language, which states that a violation of the ADA is, *per se,* a violation of the Unruh Act." (*Lentini v. Cal. Ctr. for the Arts* (9th Cir. 2004) 370 F.3d 837, 847 (hereafter *"Lentini"*).) The plain language of Section 52 supports this result as well. Section 52, subdivision (a) (hereafter "Section 52(a)") provides for an award of damages against anyone who "denies, aids or incites a denial, *or* makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6." (§ 52(a) [emphasis added].) Once a plaintiff establishes that the defendant has discriminated in violation of the ADA, she has established that the defendant has "ma[de] [a] discrimination . . . contrary to Section 51." (*Ibid.*) In proving that violation, the plaintiff may have had to establish an intent to discriminate against someone with a disability – such as where the

defendant deliberately refuses to provide medical care to someone because she has HIV – or she may have established illegal discrimination without any showing of intent – such as where the defendant failed to remove an architectural barrier or purchased inaccessible vehicles. (See Section II.C., *infra,* discussing the various showings that may be required to prove different claims under the ADA.) To conclude that, after satisfying all the proof elements for a violation of the ADA, the plaintiff then must make an additional, possibly different showing of intent in order to recover for that violation is contrary to the explicit text of the statute and simply incorrect.

Del Taco urges the court to adopt an interpretation that would ignore the statute's plain language by divorcing the Unruh Act's remedies from its prohibition on discriminatory conduct. This construction, which was accepted by the Fourth Appellate District in *Gunther v. Lin* (2006) 144 Cal.App.4th 223 (hereafter *"Gunther"*), would frustrate the Legislature's express purpose in enacting Section 51(f). (*Id.* at p. 234 [holding that Section 51 has force *"independent"* of any remedies for its violation] [emphasis in original].) Under this interpretation, a prevailing plaintiff would be left with no benefit from having established an Unruh Act violation in addition to the ADA violation. This result would effectively undo the Legislature's action of providing disabled Californians with full Unruh Act remedies for ADA violations, and instead embrace the idea that

the Legislature intended "a law that is all bark and no bite." (*Wilson, supra,* 479 F.Supp.2d at p. 1138; see also *id.* at pp. 1137-1138 [citing legislative committee reports recording intent to provide Unruh Act damages remedies]; *Viking Pools v. Maloney* (1989) 48 Cal.3d 602, 609 [a court should not presume a legislative act to be "a meaningless and idle gesture"].)

This court has not shared *Gunther's* mistaken view that the Unruh Act is comprised of Section 51 only and not the remedy provisions in Section 52 (*Gunther, supra,* 144 Cal.App.4th at pp. 234-235), but instead accurately has recognized that the Unruh Act encompasses Section 52. (See, e.g., *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1148 (hereafter *"Harris"*) ["We consider in this case two issues involving interpretation of the Unruh Civil Rights Act (Civ. Code, §§ 51, 52; hereafter the Unruh Act or the Act"]; *id.* at p. 1151 ["Sections 51 and 52 were substantially revised in 1959 when they became the Unruh Act"].) The *Gunther* court's erroneous ruling on this issue should not guide the court's assessment of the questions pending now.

B. Extrinsic Aids, Including the Legislative History, Further Confirm the Legislature's Intent to Provide Unruh Act Damages for ADA Violations.

Were the court to determine that the Unruh Act's language is ambiguous, the court could "consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy." (*People v.*

Gonzalez (2008) 43 Cal.4th 1118, 1126; see also *Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [where a statute is ambiguous the courts look "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part"].) The extrinsic aids relevant here further confirm the availability of Unruh Act damages for ADA violations.

As noted above, the Unruh Act encompasses the enforcement section found in Section 52, an understanding clearly contemplated by the Legislature in its enactment of Section 51(f). Two legislative committee reports – a source that the court would be on "firm ground" to consider (*Gunther, supra,* at p. 244 n. 19) – state that Section 51(f) was intended to offer Californians Unruh Act remedies for ADA injuries:

> (1) "[T]he bill [adding subsection (f)] would: 'Make a violation of the ADA a violation of the Unruh Act. Thereby providing persons injured by a violation of the ADA with the remedies provided by the Unruh Act (e.g., right of private action for damages).'" (*Wilson, supra,* 479 F.Supp.2d at pp. 1137-1138, 1138 n. 14, quoting the Assembly Committee on Judiciary report on AB 1077 (as amended January 2, 1992, p. 2)); and,

(2) "[Section 51(f)] 'would make a violation of the ADA a violation of the Unruh Act. Thereby providing persons injured by a violation of the ADA with the remedies provided by the Unruh Act (e.g., right of private action for damages, including punitive damages).'" (*Id.*, quoting the Senate Committee on Judiciary report on AB 1077 (as amended June 1, 1992, p. 5).)

The Fourth Appellate District reached a decision in *Gunther* contrary to the result urged by amici here, but did so by misapplying this court's precedent and the traditional canons of statutory interpretation. *Gunther* relies heavily on this court's ruling in *Harris, supra,* 52 Cal.3d 1142, to interpret Section 51(f), but that reliance is misplaced. *Harris* did not address the question in *Gunther* and presented here: the extent of a business' duty to take extra steps to provide "full and equal" public accommodations to customers who are disabled, as specifically required by Section 51(f). In fact, Section 51(f) did not even exist when *Harris* was decided. (See Stats. 1992, ch. 913 (AB 1077) [enacting Section 51(f), the year following the *Harris* decision].) Rather, *Harris* addressed the difference between "intentional discrimination" and "disparate impact" in the sex discrimination context. (*Id.* at pp. 1170-1175.) Contrary to Del Taco's arguments, however, *Harris* also did not define "intent" in this

context, let alone suggest that different degrees of discriminatory "intent" entail different forms of Unruh Act liability.

Gunther's reliance on *Harris* to support its interpretation of Section 51(f) contravenes the well-established principle that "[t]he language used in an opinion is to be understood in the light of the facts and the issues then before the court, and cases are not authority for propositions not considered therein and actually adjudicated." (*Estate of Hafner* (1986) 184 Cal.App.3d 1371, 1385 [collecting statutory, judicial and secondary authorities]; *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386 [same], quoting *Elisa B. v. Superior Court* (2005) 37 Cal.4th 108, 118.)[4]

Gunther also misapplies a common rule of statutory interpretation when it holds that construing the Unruh Act to require an additional element of intent for disability discrimination claims is necessary to avoid

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[4] *Gunther's* conclusion and Del Taco's argument that the Legislature acquiesced in *Harris'* standard of intent for claims under Section 51(f) (*Gunther, supra,* 144 Cal.App.4th at pp. 236-239; Petitioner's Opening Brief ("POB"), p. 12) ignores the fact that *Harris* cannot be understood to have considered issues of disability discrimination. This argument also is flawed because even if the Legislature could be viewed as having acquiesced to some portion of *Harris* "it is impossible to know which part they acquiesced to." (*Wilson, supra,* 479 F.Supp.2d at p. 1141.) Further, "*Gunther's* discussion of legislative acquiescence is circular." (*Ibid.*) The Legislature can only be said to have acquiesced if one assumes in the first instance that its members agreed that *Harris'* analysis of Section 51 provides guidance for Section 51(f) claims. And yet, given the plain language of Section 51(f) and the clear legislative purpose recorded in the contemporaneous legislative history, as discussed above, "it [makes] no sense to say that the legislature acquiesced to a judicial construction entirely contrary to what it in fact intended." (*Ibid.*)

nullifying or rendering redundant the Disabled Persons Act (hereafter "the DPA"). (*Id.* at pp. 1139-1140, discussing § 54 et seq.) This argument, however, is unpersuasive because California has many overlapping, consistent laws that mutually reinforce its strong public policy of eradicating discrimination. For example, many of California's antidiscrimination laws provide multiple forms of protection against discrimination based on sexual orientation. Sexual orientation discrimination in rental housing is prohibited by both the Unruh Act (see, e.g., *Swann v. Burkett* (1962) 209 Cal.App.2d 685, 694-695) and the Fair Employment and Housing Act (hereafter "FEHA") (Gov. Code, §§ 12920, 12921(b)). Discrimination against sexual orientation in public schools is actionable under both the Unruh Act (see, e.g., *Davison v. Santa Barbara High Sch. Dist.* (C.D. Cal. 1998) 48 F.Supp.2d 1225; *Doe v. Petaluma City Sch. Dist.* (N.D. Cal. 1993) 830 F.Supp. 1560, 1581-1582), and the Education Code (Ed. Code, § 220 et seq. [prohibiting sexual orientation discrimination by educational institutions receiving public money or enrolling pupils receiving state financial aid].) California also prohibits sexual orientation discrimination in programs and activities administered by the state or its agencies that receive financial assistance from the state (Gov. Code, § 11135), an obligation that can overlap with the Unruh Act (§ 51 subd. (b)), FEHA (see, e.g., Gov. Code, § 12920), and state constitutional

guarantees (Cal. Const., art. I, § 7). The existence of overlapping antidiscrimination obligations does not strip any of these laws of their effectiveness or meaning, or change the scope the Legislature has given to each one. Rather, the overlaps simply make clear the state's strong interest in abolishing arbitrary discrimination. The same is true for denials of access or services to disabled persons because of their disability.[5]

C. Establishing a Violation of the ADA – and Thus Section 51(f) – Requires Different Proof Elements Depending on the Type of Denial of Full and Equal Enjoyment of Public Accommodations.

When the Legislature enacted subdivision (f) of Section 51, it explicitly incorporated into the state statute the ADA's prohibitions on disability discrimination. The ADA prohibits a range of behaviors – both actions and inactions, some intentional and some unintentional – that deny people with disabilities equal access to public accommodations.[6] The appropriate reading of the Unruh Act as providing specified remedies, including recovery of damages, for an ADA violation is even more

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[5] The Unruh Act and the DPA inevitably have some redundancy under either interpretation offered by the parties because both statutes prohibit intentionally discriminatory conduct. (*Wilson, supra,* 479 F.Supp.2d at pp. 1139-1140 ["the DPA authorizes damages for both intentional and unintentional discrimination, because intent is simply irrelevant under the statute . . . [accordingly,] the portion of the DPA covering intentional discrimination is inevitably redundant with the portion of the Unruh Act covering intentional discrimination"].)

[6] Title III of the ADA prohibits disability discrimination in the provision of public accommodations by private businesses. (42 U.S.C. §§ 12181-89.)

apparent when one considers the ADA's requirements for establishing a violation. As described below, the showing needed to establish that a defendant has discriminated unlawfully varies widely depending on the type of ADA violation claimed. The diversity of *prima facie* elements required for various ADA claims illustrates the illogic of imposing an additional intent element on the remedy for violations established by showing some form of intent, as well as for those established by proving a forbidden but "unintentional" denial of access.

The ADA broadly prohibits disability discrimination in the provision of public accommodations by providing:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(42 U.S.C. § 12182(a).)[7] Therefore, to establish that a violation of the ADA's prohibition on public accommodations discrimination has occurred, a plaintiff must show all of the following: "(1) [the plaintiff] is disabled within the meaning of the ADA; (2) the defendant is a private entity that owns, leases, or operates a place of public accommodation; and (3) the

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[7] Places of "public accommodation" are defined to include private entities or establishments falling within any of twelve categories, including establishments serving food or drink, places of entertainment, places of public gathering, service establishments (including hospitals and offices of health care providers), day care centers, and places of recreation. (See 42 U.S.C. § 12181(7)(A)-(L).)

plaintiff was denied public accommodations by the defendant because of her disability." (*Molski v. M.J. Cable, Inc.* (9th Cir. 2007) 481 F.3d 724, 730 [citing 42 U.S.C. §§ 12182(a)-(b)].)

The specific showing required to establish that the plaintiff was denied public accommodation "because of her disability," however, differs depending on the context. In some situations, a plaintiff must show that action was taken because the plaintiff has a disability; in others, that action was taken without any required knowledge of a disability or the impact on people with disabilities; and in others, that a failure to act has a prohibited impact on people with disabilities. (See 42 U.S.C. § 12182(b).) As Congress stated, the ADA was enacted to prohibit not only "outright intentional exclusion" of people with disabilities, but also "the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." (See 42 U.S.C. § 12101(a)(5) [setting forth congressional findings].) The language of the ADA clearly prohibits both intentional and unintentional conduct, and the plaintiff's required elements of proof depend on the type of denial of "full and equal enjoyment" at issue. (42 U.S.C. § 12182(a).)

A common context – and the one at issue in the present case – is the situation in which an individual with a disability is deprived of full and equal enjoyment due to the presence of physical barriers. Several provisions of the ADA address such situations; for example, the ADA is violated when the owner, lessor, or operator of the place of public accommodation:

> (a) fails to remove architectural barriers, "communication barriers that are structural in nature," or transportation barriers "where such removal is readily achievable" (42 U.S.C. 12182(b)(2)(A)(iv));[8]
>
> (b) fails "to design and construct [new facilities] that are readily accessible to and usable by individuals with disabilities," unless the entity "can demonstrate that it is structurally impracticable" to meet requirements specified by the statute and its regulations (42 U.S.C. § 12183(a)(1)); or
>
> (c) alters an existing facility "in a manner that affects or could affect the usability of the facility," unless the alterations are made such that, "to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with

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[8] The statute defines "readily achievable" to mean "easily accomplishable and able to be carried out without much difficulty or expense" and specifies some of the factors to be considered in determining if an action is readily achievable. (42 U.S.C. § 12181(9).) Where the entity demonstrates that removal is not "readily achievable," the public accommodation must be made available through alternative methods "if such methods are readily achievable." (42 U.S.C. § 12182(b)(2)(A)(v).)

disabilities." (42 U.S.C. § 12183(a)(2).)[9]

In such situations, the defendant has violated the ADA regardless of whether the defendant was aware of the impact its action or inaction would have on people with disabilities, and therefore the plaintiff's proof burden does not include any showing of intent to exclude or burden disabled people on the part of the defendant. So, for example, in an ADA case

> brought by a plaintiff with impaired mobility against a movie theatre for failing to accommodate her by not providing space for wheelchairs in the theatre, . . . the plaintiff need not show that the defendant was motivated by a desire to discriminate against disabled persons, i.e. that the theater failed to provide space for wheelchairs because the defendant is disabled. Rather, the plaintiff need only show that she is an individual with a disability and that because of her disability she was denied participation in or the benefit of a service provided by the theater. The failure to reasonably accommodate, without more, constitutes "discrimination" within the meaning of the ADA. 42 U.S.C. § 12182(b).

(*Dunlap v. Association of Bay Area Governments* (N.D. Cal. 1998) 996 F.Supp. 962, 965-966 [discussing, in dicta, the "paradigmatic Title III claim"].) In many instances, establishing that the ADA Accessibility Guidelines are not met is sufficient to establish the ADA was violated. (See, e.g., *Doran v. 7-Eleven, Inc.* (9th Cir. 2008) 524 F.3d 1034, 1048 [noting that a wheelchair-bound plaintiff "bears the burden of showing a violation of the ADA Accessibility Guidelines, the substantive standard of

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[9] The statute also imposes requirements related to the "path of travel" where alterations "affect or could affect usability of or access to an area of the facility containing a primary function." (42 U.S.C. § 12183(a)(2).) The situations in which the statute can be construed to require the installation of an elevator, however, are limited. (42 U.S.C. § 12183(b).)

ADA compliance"].)

Physical barriers to access, however, are not the only type of public accommodation discrimination encountered by people with disabilities, and the ADA prohibits other types of actions without requiring that the actor realize those actions will adversely affect people with disabilities. For example, the statute forbids the utilization of "standards or criteria or methods of administration" that "have the effect of discriminating on the basis of disability . . . or that perpetuate the discrimination of others who are subject to common administrative control." (42 U.S.C. § 12182(b)(1)(D).)

The ADA also prohibits actions that a defendant knows treat people with disabilities unequally. For example, refusing to admit an individual into a hospital for treatment of a severe allergic reaction because the individual has HIV, which has no bearing on the allergy or its proper treatment, constitutes a denial of the opportunity to receive medical treatment in violation of Section 12182(b)(1)(A)(i) of the ADA. (*Howe v. Hull* (N.D. Ohio 1994) 873 F.Supp. 72, 79.)

Discrimination under the ADA also occurs where, on the basis of a disability or disabilities of an individual or a class, the individual or class of individuals is:

(a) denied the opportunity "to participate in or benefit from the goods,

services, facilities, privileges, advantages, or accommodations of an entity" equally with other individuals (42 U.S.C. § 12182(b)(1)(A)(ii)); or

(b) provided "with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others (42 U.S.C. § 12182(b)(1)(A)(iii)).

A plaintiff also establishes a violation of the ADA where she proves that a defendant "fail[ed] to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford . . . goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities." (42 U.S.C. § 12182(b)(2)(A)(ii).) Thus, for example, a golf tournament violated the ADA where it refused to consider the disabled plaintiff's need for modification of the "no golf cart" rule in order to compete in a golf tournament. (*PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, 681-690 [121 S.Ct. 1879] [finding petitioner discriminated in the provision of a public accommodation after rejecting defense that such change in policy would fundamentally alter petitioner's golf tournaments].)

In addition, excluding or otherwise denying access to an individual or

entity violates the ADA if it is done "because of the known disability of an individual with whom the individual or entity is known to have a relationship or association." (42 U.S.C. § 12182(b)(1)(E); accord, *Kotev v. First Colony Life Insurance Co.* (C.D. Cal. 1996) 927 F.Supp. 1316, 1320-1323 [finding that plaintiff stated a claim under the ADA where he alleged that the defendant insurance company denied his application because his spouse had HIV].)[10]

Therefore, establishing that a defendant has violated the ADA – and thus violated Section 51(f) of the Unruh Act – is not a simple matter, and the proof elements a plaintiff must establish, which may include some showing of intentional conduct, vary depending on the context. It is not reasonable to read into the Unruh Act a requirement that a plaintiff who has met that evidentiary burden must then meet some *additional* intent standard in order to recover the damages promised by the statute's text for that proven discrimination.

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[10] Other provisions within Title III prohibit, *inter alia*, "the imposition or application of eligibility criteria that screen out or tend to screen out" individuals with disabilities (42 U.S.C. § 12182(b)(2)(A)(i)); the "failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services" (42 U.S.C. § 12182(b)(2)(A)(iii)); and, for specified transportation providers, purchasing or leasing vehicles that are not "readily accessible and usable by individuals with disabilities" or that do not comply with applicable Department of Transportation regulations (42 U.S.C. §§ 12182(b)(2)(B)(i), 12182(b)(2)(B)(ii), 12182(b)(2)(D)).

D. Section 52, subdivision (c), California Jury Instructions, and Newly Enacted Senate Bill 1608 Do Not Support Creation of an Extraneous Intent Requirement for Claims Under Section 51(f).

In its amicus curiae brief Los Burritos, Inc. ("Los Burritos") argues that the wording of Section 52, subdivision (c) (hereafter "Section 52(c)"), which authorizes injunctive relief for violations of the Unruh Act, supports the interpretation that intent is required for recovery under Section 52(a), which authorizes damages for Unruh Act violations. (Amicus Curiae Brief in Support of Appellant Del Taco, Inc. ("Los Burritos Brief"), p. 3-5.) However, the statute simply cannot sustain this interpretation.

In providing for injunctive relief, Section 52(c) refers to conduct "intended to deny the full exercise of [rights described in the Unruh Act]." (§ 52(c) [providing that where any person(s) has "engaged in conduct of resistance to the full enjoyment" of rights under Section 51, "and that conduct is of that nature and is intended to deny the full exercise of those rights," injunctive relief may be sought], quoted in Los Burritos Brief at p. 3.) Los Burritos views this as indicative of the Legislature's intent "that proof of intentional wrongdoing is required" in order for a plaintiff to be entitled to damages for an Unruh Act violation. (Los Burritos Brief at p. 5.) However, no comparable language appears in Section 52(a), which addresses entitlement to damages. (See § 52(a) [providing that "[w]hoever

denies, aids or incites a denial or makes any discrimination or distinction contrary to section 51" is liable for damages].)

Section 52(c) never has been construed to specify one standard of intent for the entire Unruh Act, and the court should not do so here. Moreover, to accept Los Burritos' argument would give many plaintiffs less relief under Section 51(f) than they would achieve under the ADA, as the ADA undisputedly allows for injunctive relief for some unintentional actions and inactions. This result would be clearly at odds with the Legislature's explicit intent to make California law at least as protective as the ADA. (*Gunther, supra,* 144 Cal.App.4th at p. 235 [the legislative intent was 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,'" quoting Stats. 1992, ch. 913, § 1].)

Los Burritos' argument that California Civil Jury Instruction 3020 and BAJI 7.92 provide the proper standard for Section 51(f) claims is similarly at odds with the broad remedial purposes of the Unruh Act. (Los Burritos Brief, pp. 6-7, 11-17.) A standard requiring that a public accommodation be motivated to exclude an individual based on his or her disability fails to comport with the California Legislature's stated intent, as

discussed above, to make California law at least as protective as the ADA. "Congress intended to protect disabled persons not just from intentional discrimination but also from thoughtlessness, indifference, and benign neglect." (*Lentini, supra,* 370 F.3d at pp. 846-847 [internal quotation marks omitted], also citing, 42 U.S.C. § 12101(a)(5) [stating congressional finding in ADA that the discrimination faced by people with disabilities includes "overprotective rules and policies, [and] failure to make modifications to existing facilities and practices"].)

Finally, the argument in Del Taco's reply brief that newly enacted California Senate Bill 1608 (the Construction-Related Accessibility Standards Compliance Act or "SB 1608") projects an intent standard onto Section 51 is entitled to no credence. (Petitioner's Reply Brief (hereafter "PRB"), pp. 6-8, discussing Stats. 2008, ch. 549.) SB 1608 is intended to improve education about disability access for architects and building inspectors, and to create a California Commission on Disability Access. (SB 1608, §§ 1, 7.) The enactment contains a fleeting statement that property owners are not required to hire a Certified Access Specialist (hereafter "CASp") to inspect their property, and a failure to hire a CASp is not admissible to prove a lack of intent to comply with the law. (SB 1608, § 3.) Despite SB 1608's application to *both* the Unruh Act and the California Disabled Person's Act (which does not require intent), Del Taco

argues that this is a targeted reference to the Unruh Act and requires intentional conduct for damages liability. Del Taco's interpretation overreaches. There is simply no support for Del Taco's attempt to use this language to impose an intent standard on claims of disability discrimination under the Unruh Act.

III. THE COURT SHOULD REJECT DEL TACO'S PROPOSED STANDARDS OF INTENT AS INCOMPATIBLE WITH THE REMEDIAL PURPOSES OF THE UNRUH ACT AND THE ADA.

A. The Court Should Not Adopt Either of the Alternative Standards of Intent Proposed by Del Taco.

The alternative standards proposed by Del Taco are strangers to over 60 years of Unruh Act jurisprudence and disregard the unique nature of disability discrimination. The standards should therefore be rejected as unsupported by Unruh Act jurisprudence.

1. Del Taco Cites No Persuasive Authority to Support its Proposed "Deliberate Conduct Designed to Exclude the Disabled" Standard.

Del Taco's primary proposed standard suggests that claims under Section 51(f) require a showing of "deliberate conduct designed to exclude the disabled." (Petitioner's Opening Brief (hereafter "POB"), p. 23.) Del Taco devotes only a thinly-sourced two-and-a-half pages of its opening brief to its proposed standard, asserting that only those who engage in deliberate conduct specifically designed to prevent the disabled plaintiff

from accessing the facility can be held liable for damages under the Unruh Act. (POB, pp. 23-25.)

Del Taco cites as support several cases in which it claims the courts found "deliberate[ly] discriminatory" practices, but neglects to explain why such findings would militate a new threshold standard for all other cases. (See POB, pp. 23-24, citing *Wilson v. Murillo* (2008) 163 Cal.App.4th 1124, 1130-1131; *Fortyune v. American Multi-Cinema, Inc.* (9th Cir. 2004) 364 F.3d 1075, 1083-1084; *Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520; *Lentini, supra,* 370 F.3d 837.) Del Taco not only "reads too much into the cited cases" (*Dibb v. County of San Diego* (1994) 8 Cal.4th 1200, 1213), but also reads them incorrectly. None of the cases discusses "deliberate" intent. *Lentini* found that intent is *not* necessary to state a claim for damages under Section 51(f). (*Lentini, supra,* 370 F.3d at p. 847). *Murrillo* contains no substantive discussion of Section 51(f). *Fortuyne* did not even involve an Unruh Act cause of action. Although the court in *Hankins*, relying on *Harris,* said that intentional discrimination must be proved, it gave no indication of the intent standard. The cases Del Taco relies on simply do not support its argument.

As the courts have already recognized, Del Taco's proposed standard of "deliberate conduct designed to exclude the disabled" is inconsistent with the broad remedial purposes of the Unruh Act and the

ADA. (*Duvall v. County of Kitsap* (9th Cir. 2001) 260 F.3d 1124, 1139 [rejecting a discriminatory animus standard under the ADA, and noting that several other circuit courts have rejected the discriminatory animus standard] (hereafter *"Duvall"*).)

Lacking any persuasive authority to support its position, Del Taco argues that the intent standard must be elevated because it is "virtually impossible" to ensure "textbook compliance" with ADA accessibility guidelines. (POB, p. 25.) Del Taco misunderstands the requirements of the ADA. In the few instances where it is impossible for a business to comply with the ADA's accessibility guidelines, the ADA does not impose liability. (See, e.g., 28 C.F.R § 36.402, subd. (c) [providing an infeasibility exception to the law's requirements]; 42 U.S.C. § 12182(b)(2)(A)(iv) [providing that the failure to remove architectural barriers is not discrimination where such removal is not readily achievable].)

No such circumstances were present here, however, where the modifications needed in Del Taco's pre-existing facility were "readily achievable." (*Molski v. Foley Estates Vineyard* (9th Cir. 2008) 531 F.3d 1043, 1046 [a public accommodation must remove "'architectural barriers in existing facilities . . . where such removal is readily achievable.'"], quoting 28 C.F.R. § 36.304, subd. (a).) The readily achievable standard is a flexible one, requiring a balancing of several factors on a case-by-case

basis. (28 C.F.R. § 36.104.) In fact, Del Taco handily was able to satisfy this requirement by widening its restroom doorway for a cost of $1,112.68, a mere fraction of the $75,000 it spent on a voluntary remodel of its facility. (*Munson v. Del Taco* (C.D. Cal. 2008) 2006 U.S. Dist. LEXIS 96658, *16.)[11]

Lacking support in the law, Del Taco argues not that its proposed standard is well-founded in Unruh Act jurisprudence, but rather that it should be adopted because of the specter of abusive litigation. Del Taco concludes that it is "painfully evident" that a high intent standard is necessary to prevent disabled plaintiffs from "railroading" businesses based on the "most minor of technical deviations." (POB, p. 29.)

Del Taco's position is not founded in the law.[12] Thoughtful decisions have eschewed the notion that courts – and by extension, individual public accommodations – may selectively choose which aspects of the law are serious and worthy of enforcement. (See, e.g., *Wilson, supra,* 479 F.Supp.2d at p. 1140 ["there is no basis in law for distinguishing

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[11] Del Taco seems to acknowledge that the ADA does not constitute the kind of draconian scheme it describes. (POB, p. 26 ["Even the ADAAG permits deviations from its guidelines if the alternative designs and technologies used will provide substantially equivalent or greater access to and usability of the facility."] [internal quotations omitted]; p. 27 ["Several courts in addition to *Gunther* have also noted that 'inadvertent' violations of the ADAAG do not necessarily constitute ADA violations"].)

[12] Recognizing that other amici curiae representing the interests of Californians with disabilities are providing a fuller discussion of these points, this brief summarizes them succinctly to underscore their importance.

between 'real' violations of the ADA and merely unintentional 'technical' violations"].) This court recently rejected the argument that purportedly abusive litigation warranted judicial reformation of the Unruh Act to make stating a claim more difficult. (*Angelucci, supra,* 41 Cal.4th 160 [declining defendant's argument that the court should require Unruh Act plaintiffs to affirmatively request equal treatment and be expressly denied before stating a claim].) Rather, California courts have recognized that it is "in the legislative halls" where the considerations can be "properly balanced against the economic burdens which of necessity will have to be borne by the private sector of the economy in providing a proper and equitable solution." (*Coronado v. Cobblestone Village Community Rentals, L.P.* (2008) 163 Cal.App.4th 831, 851 [internal quotation marks omitted].) Likewise, relying on arguments about abusive litigation to determine the questions presented here would produce unsound results.

2. Del Taco's Alternative "Deliberate Indifference" Standard is Equally Inapposite to Unruh Act and ADA Claims.

Del Taco proposes alternatively that, at a minimum, the court should not require any intent standard lower than deliberate indifference. (POB at pp. 29-37.) For this alternative suggestion, Del Taco not only selects a standard higher than those applied to most types of ADA claims, but also urges the most stringent formulation of that standard, without a persuasive explanation of why such a standard is compatible with the broad

antidiscrimination purpose of the Unruh Act. Del Taco locates this proposed standard in two cases involving claims under Title II of the ADA, the section prohibiting disability discrimination in the provision of services, programs, or activities of a public entity. (42 U.S.C. §§ 12131-34, 12141-50, 12161-65.) (See POB pp. 29-37, citing *Duvall, supra,* 260 F.3d 1124; *AP ex rel. Peterson v. Anoka-Hennepin Independent School Dist. No. 11* (D. Minn. 2008) 538 F.Supp.2d 1125 (hereafter *"Peterson"*)[13]

As discussed above, however, the ADA prohibits a range of behaviors, including intentional and non-intentional actions and failures to act. Del Taco provides no support for its claim that the Title II standard articulated in the two cases it cites is appropriate for all Section 51(f) claims, irrespective of the type of ADA violation at issue.[14] There is no suggestion in the case law or legislative history that such a result is either sensible or intended by the Legislature.

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[13] In contrast to Title II, which prohibits discrimination by public entities, *ibid.*, Title III of the ADA prohibits disability discrimination in the provision of public accommodations by private businesses. (42 U.S.C. §§ 12181-89.)

[14] Amici also note that Los Burritos misconstrues *Bass v. County of Butte* (9th Cir. 2006) 458 F.3d 978, 982-983 (cited in Los Burritos Brief, pp. 5-6.) Los Burritos argues that the Ninth Circuit's analysis in *Bass* means that the ADA's standards for establishing discrimination are irrelevant for establishing a violation of Section 51(f) of the Unruh Act. Los Burritos misreads this case. *Bass's* discussion is clearly limited to the question of whether an employment claim, based on violation of Title I of the ADA, may be stated under Section 51(f), a wholly separate inquiry from whether the ADA's standards of intent govern Section 51(f) equal accommodations claims. (*Id.* at pp. 982-983.)

Specifically, neither of the two cases on which Del Taco relies sheds light on why such a result should obtain under California's Unruh Act. In the *Duvall* opinion, the Court of Appeals for the Ninth Circuit adopted for the first time a deliberate indifference standard for claims under Title II of the ADA. (*Id.* at p. 1138.) No claim under California law was at issue.

The *Peterson* opinion was issued by the District Court of Minnesota. While *Peterson* goes to remarkable lengths to suggest a stringent deliberate indifference standard for Title II claims – positing that a plaintiff should show "conscious disregard" to state a claim (*Peterson, supra,* 538 F.Supp.2d. at p. 1147) – it is not the law of federal courts in the Ninth Circuit for claims under Title II of the ADA, and certainly does not suggest the appropriate standard for a Section 51(f) claim. No case has ever employed a "conscious disregard" standard to an Unruh Act claim, and not one published case has ever discussed that such a standard might apply to Unruh Act claims.

There is good reason this standard has never been considered suitable for any Unruh Act claim. Conscious disregard is one of the highest standards found in California law, and writing such a requirement into the statute would be very far afield of the liberal construction the Unruh Act requires to ensure "full and equal" access to public accommodations in California. (See, e.g., *Angelucci, supra,* 41 Cal.4th 160, 167 ["the [Unruh]

Act must be construed liberally in order to carry out its purpose"]; *Wilson, supra,* 479 F.Supp.2d at p. 1138 ["the Unruh Act must be interpreted 'in the broadest sense reasonably possible' in order to 'banish [discriminatory] practices from California's community life.'"], quoting *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 76.)[15] Moreover, "disability discrimination is simply different than other forms of discrimination" and liberal construction "is needed to banish the discriminatory practices" that people with disabilities encounter. (*Wilson, supra,* 479 F.Supp.2d at pp. 1138-1139.) This applies with particular force to people living with HIV, who face widespread discrimination, some of it rooted in animus, but much of it rooted in simple ignorance, confusion and misunderstanding of that disability.

For the reasons discussed in Section II, *supra,* amici submit that whether intent must be shown for a Section 51(f) claim and, if so, what standard applies, are questions answered by the underlying ADA violation.

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[15] Conscious disregard is, for example, statutorily defined as a measure of the "malice" or "oppression" required for punitive damages under Civ. Code, § 3294. No Unruh Act cases have ever required a finding of malice or oppression to state a claim.

CONCLUSION

The Unruh Act is intended as an "active measure" to eradicate arbitrary and invidious discrimination from California's business establishments. (*Angelucci, supra,* 41 Cal.4th at p. 167.) This guarantee carries a profound importance for the many Californians who must overcome discrimination based on their disabilities, including Californians living with HIV. This court should further the Unruh Act's purpose to proscribe this form of discrimination by affirming the simple, effective rule that the Legislature intended and wrote into the statute. Plaintiffs with a Section 51(f) claim who prove the elements of the underlying ADA violation are entitled to Unruh Act damages, without the need for proof of an extraneous intent element. Concluding that such plaintiffs are entitled to full remedies under the Unruh Act, without needing to prove some

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additional intent element is fully in accord with the language of the Unruh Act and its purposes, and the plain text and enactment history of Section 51(f) in particular.

Dated: December 19, 2008

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

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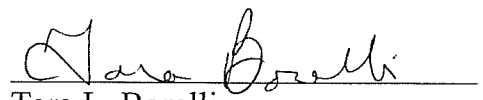
CERTIFICATE OF WORD COUNT
Cal. Rules of Court, Rule 8.204(c)(1)

Pursuant to California Rule of Court 8.520(c)(1), counsel for Amici Curiae hereby certifies that the number of words contained in this Amicus Brief, including footnotes but excluding the Table of Contents, Table of Authorities, and this Certificate, is 8862 words as calculated using the word count feature of the computer program used to prepare the brief.

Dated: December 19, 2008.



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DECLARATION OF SERVICE

I, Jamie Farnsworth, declare:

That I am a resident of the County of Los Angeles, California; that I am over eighteen (18) years of age and not a party to this action; that I am employed in the County of Los Angeles, California; and that my business address is 3325 Wilshire Blvd., Suite 1300, Los Angeles, CA 90010.

On December 19, 2008, I served a copy of the attached document, described as BRIEF OF AMICI CURIAE AIDS LEGAL REFERRAL PANEL, ASIAN AND PACIFIC ISLANDER WELLNESS CENTER, BIENESTAR, BLACK COALITION ON AIDS, COMMON GROUND–WESTSIDE HIV COMMUNITY CENTER, FACE TO FACE SONOMA COUNTY AIDS NETWORK, HIV/AIDS LEGAL SERVICES ALLIANCE, L.A. GAY & LESBIAN CENTER, RESOURCES FOR INDIAN STUDENT EDUCATION, INC., SAN FRANCISCO AIDS FOUNDATION, SAN JOAQUIN AIDS FOUNDATION AND SIERRA HEALTH RESOURCES, INC. IN SUPPORT OF RESPONDENT KENNETH MUNSON
on the parties of record by placing true and correct copies thereof in sealed envelopes, postage pre-paid, addressed as follows:

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I deposited this correspondence in a box regularly maintained by the U.S. Postal Service on this day. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing stated in this affidavit.

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

Dated: December 19, 2008

Jamie Farnsworth