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January 8, 2009

Hon. Ronald M. George, Chief Justice and  
Associate Justices  
Supreme Court of California  
350 McAllister Street  
San Francisco, CA 94102

Re: *Surrey v. TrueBeginnings, LLC* (No. S169370)

Dear Chief Justice George and Associate Justices:

A Petition for Review has been filed in this case. Pursuant to Rule of Court 8.1125, I am writing on behalf of Disability Rights Advocates, Disability Rights Education & Defense Fund, Disability Rights Legal Center, Equal Rights Advocates, the Impact Fund, Lawyers' Committee for Civil Rights of the San Francisco Bay Area, Legal Aid Society – Employment Law Center, and Public Advocates to urge this Court to depublish the Court of Appeal's decision.

We are nonprofit organizations who engage in civil rights litigation and advocacy, including efforts to challenge discrimination on the basis of race, national origin, gender, disability, and other protected bases.

The Court of Appeal's decision, imposing a requirement for Unruh Civil Rights Act claims that a claimant pay a discriminatory price in order to obtain standing, is utterly inconsistent with civil rights law in general and the Unruh Act as interpreted by this Court. It creates an unprecedented standing requirement that would confer immunity on the worst violators and require victims of unlawful practices to engage in futile acts.

More than 30 years ago, the United States Supreme Court held that victims of illegal discrimination need not engage in futile acts in order to assert claims of discrimination. In upholding the right of "deterred applicants" to seek relief, the Court explained:

If an employer should announce his policy of discrimination by a

sign reading “Whites Only” on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer’s actual practices. . . . When a person’s desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

*Int’l Bhd. of Teamsters v. United States* (1977) 431 U.S. 324, 365-366.

The standing of “chilled” or deterred persons to seek relief for discrimination claims is not limited to claims under Title VII of the Civil Rights Act of 1964. This long-recognized principle has been applied in a broad range of statutory and constitutional contexts, including actions under the Unruh Act. *See Lentini v. Cal. Ctr. for the Arts* (9th Cir. 2004) 370 F.3d 837, 847-48 (applying deterrence principle to Unruh Act claims for disability discrimination); *Pickern v. Holiday Quality Foods, Inc.* (9th Cir. 2002) 293 F.3d 1133, 1136-37 (discussing the deterrence principle in the context of the Americans with Disabilities Act); *Gutowsky v. County of Placer* (9th Cir. 1997) 108 F.3d 256, 260 (applying the principle to claims brought under 42 U.S.C. § 1983); *Pinchback v. Armistead Homes Corp.* (4th Cir. 1990) 907 F.2d 1447, 1451-52 (applying the principle to housing discrimination claims brought under 42 U.S.C. §§ 1981 & 1982). It has also been explicitly adopted by a California court applying California law. *See, e.g., Alch v. Superior Court* (2004) 122 Cal. App. 4th 339, 383-387 (age discrimination claim under Fair Employment & Housing Act); *see also* Cal. Civil Code § 3532 (“The law neither does nor requires idle acts.”).

The Unruh Act must be interpreted “in the broadest sense reasonably possible.” *Ibister v. Boys’ Club of Santa Cruz, Inc.* (1985) 40 Cal. 3d 72, 76 (quoting *Burks v. Poppy Constr. Co.* (1962) 57 Cal. 2d 463, 468). Providing relief for persons deterred by invidious discrimination comes well within this mandate, as this Court implicitly recognized in *Angelucci v. Century Supper Club* (2007) 41 Cal. 4th 160, 169-70: “It would be absurd to conclude that such civil rights act violations occurred only where the African-American patrons expressly demanded that their treatment be equivalent to that accorded the White patrons in those situations.”

These considerations led Judge Thelton Henderson to conclude that the Unruh Act provides relief to persons with disabilities deterred from attending movie theaters that had access barriers. *See Arnold v. United Artists Theatre*

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*Circuit, Inc.* (N.D. Cal. 1994) 866 F. Supp. 433. Judge Henderson explained that if such claims were not allowed under the Unruh Act, “the most egregious violators would largely escape liability . . . since, where it is well-known that a particular establishment has no adequate accommodations for disabled persons, few disabled would-be patrons would make the futile and probably humiliating gesture of showing up and asking to be accommodated.” *Id.* at 438.<sup>1</sup>

The lower court did not consider or address the concepts of deterrence or futile gestures. It did not cite *Teamsters*, *Lentini*, *Alch*, or *Arnold*. While the present case involves gender price differentials, the lower court’s opinion is not so limited. If left on the books, the decision would bar claims under the Unruh Act by those deterred by the most outrageous conduct. It would impose a new requirement under the Unruh Act that individuals must pay discriminatory prices, seek admission where it is impossible to enter, or otherwise engage in pointless and potentially humiliating gestures. Such requirements would be utterly at odds with the purpose of the Unruh Act. It is not for the courts to rewrite statutes to impose new requirements, as this Court very recently reminded us. *See Vasquez v. State* (2008) 45 Cal. 4th 243, 253.

We urge the Court to depublish this decision.

Sincerely,



Brad Seligman

Cc: Counsel of Record

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<sup>1</sup> Last year the Legislature expressly incorporated this concept of deterred claims into the Unruh Act in S.B. 1608, which added section 55.56 to the Civil Code. The new section explicitly allows disability access claims under the Unruh Act and the Disabled Person Act (Civil Code § 54.3) where the plaintiff “was deterred from accessing a place of public accommodation on a particular occasion.” Cal. Civil Code § 55.56(b).

1 **PROOF OF SERVICE**

2 I, Tony Dang declare that:

3 I am employed at the Impact Fund, 125 University Avenue, Suite 102, Berkeley,  
4 California, 94710. I am over the age of 18 years and not a party to this action. On January 9,  
5 2009, I served a true and correct copy of the following document(s):

6 **Request to Depublish Pursuant to Rule 8.1125**

7 Hon. Ronald M. George, Chief Justice and  
8 Associate Justices  
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23  Via Hand Delivery to the Supreme Court of California

24  Via First Class Mail to All Interested Parties

25   
TONY DANG  
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