

Case No. A166490

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE**

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Appellant,

v.

**POTTER HANDY LLP, MARK POTTER, RUSSELL HANDY, DENNIS
PRICE, AMANDA LOCKHART SEABOCK, CHRISTOPHER SEABOCK,
PRATHIMA PRICE, RAYMOND BALLISTER JR., PHYL GRACE,
CHRISTINA CARSON, ELLIOTT MONTGOMERY, FAYTHE
GUTIERREZ, ISABEL ROSE MASANQUE, BRADLEY SMITH,
TEHNIAT ZAMAN, JOSIE ZIMMERMAN, and DOES 1-100,**

Defendants-Respondents

Appeal from San Francisco Superior Court of the State of California
Hon. Curtis E. A. Karnow, Judge Presiding
Case No. CGC-22-599079

**APPLICATION OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA
CHAMBER OF COMMERCE TO FILE *AMICI CURIAE* BRIEF IN
SUPPORT OF APPELLANT**

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APPLICATION TO FILE AMICI CURIAE BRIEF

Amici curiae the Chamber of Commerce of the United States of America (the “Chamber”) and the California Chamber of Commerce (“CalChamber”) hereby apply pursuant to California Rule of Court 8.200(c) and this Court’s inherent powers for leave of Court to file the attached amici curiae brief in support of Appellant. (See *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1595 [“Courts have inherent power, separate from any statutory authority, to control the litigation before them and to adopt any suitable method of practice, even if the method is not specified by statute or by the Rules of Court.”].) “Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties.” (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14.)

As explained below, amici have a significant interest in the outcome of this case and believe that the Court would benefit from additional briefing on the issues addressed in the attached brief.¹

¹ No party or counsel for a party in the pending case authored the proposed amici curiae brief in whole or in part, and no entity or person, aside from amici, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members are in California or subject to the jurisdiction of California courts. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

CalChamber is a non-profit business association with approximately 14,000 members, both individual and corporate, representing 25 percent of the state's private sector and virtually every economic interest in the state of California. While CalChamber represents several of the largest corporations in California, 70 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

Litigation in California involving the Americans with Disabilities Act ("ADA") has long been rife with abusive and fraudulent tactics, including those

highlighted in this case. Shakedown ADA suits devastate small businesses, most of which lack the resources to vigorously defend themselves in court. Indeed, many small businesses have been forced to close their doors because of these abusive suits. Amici and their members thus have a significant interest in curtailing this unethical and unlawful conduct. As set forth in greater detail below, amici urge the Court to reverse the Superior Court's order and allow Appellants to pursue their UCL claims against Respondents.

Accordingly, amici respectfully requests that this Court accept and file the attached amici curiae brief.

Dated: September 14, 2023

Respectfully submitted,

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INTRODUCTION

The litigation privilege is, unquestionably, an important guardrail that protects “access to the courts” and preserves finality. (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1244.) Yet the litigation privilege “is not without limit,” and the Legislature has enacted several important statutory exemptions that allow disciplinary actions against attorneys for litigation misconduct. (*Id.* at 1241–42.) Specifically, as Appellants have explained, the Legislature authorized civil enforcement actions under the Unfair Competition Law (“UCL”) to punish attorneys for misconduct specifically proscribed by Business & Professions Code section 6128(a) and Rules of Professional Conduct sections 3.1(a)(1) and 3.3(a)(1).

Such misconduct is rampant in the field of ADA litigation. Courts and commentators alike have recognized that while the ADA was enacted with “good intentions,” the statute has been hijacked by a small cadre of plaintiffs’ attorneys and serial plaintiffs who have filed thousands of “quasi-extortionate” lawsuits against small businesses.² (See *Shayler v. 1310 PCH, LLC* (9th Cir. 2022) 51 F.4th 1015, 1017 [noting that the ADA’s private enforcement model has led to the “unforeseen consequences” of “widespread abuse” by serial

² Mark Pulliam, *The ADA Litigation Monster*, City Journal (June 13, 2017), <https://tinyurl.com/55kpmj57> [hereinafter *ADA Litigation Monster*].

plaintiffs and their attorneys].) These shakedown lawsuits often target the most vulnerable small businesses—*i.e.*, those with very small annual revenues—many of which are immigrant-owned mom-and-pop stores.

Because the ADA contains a one-way fee-shifting provision, small businesses targeted in these shakedown lawsuits confront the possibility of paying two sets of attorneys' fees—their own and the plaintiff's—if they are found liable for even minor technical infractions. And because California's Unruh Civil Rights Act provides \$4,000 in damages for violations of the ADA, small businesses hit with these lawsuits face a dismal choice: immediately settle for a “modest” amount or litigate and risk being bankrupted. Not surprisingly, most settle.

The enormous pressure to quickly settle ADA lawsuits enables plaintiffs and their counsel to get away with gross misconduct. As the complaint in this case demonstrates, ADA attorneys often file complaints replete with false standing allegations and other outright lies. But these pleadings are rarely tested in discovery because the targeted businesses typically settle shortly after being served. This misconduct is thus allowed to continue unchecked, harming small businesses, duping courts, and tainting the entire legal profession by association.

This action—brought by the People of California acting through the district attorneys of San Francisco and Los Angeles—thus provides a rare opportunity to hold some of the worst actors in this realm accountable for their misconduct. Indeed, it has already had a beneficial impact: Respondents’ ADA lawsuits slowed to a trickle shortly after the People filed their complaint. But if this Court affirms the trial court’s ruling, Respondents will likely resume their predatory practice of filing fraudulent complaints against small businesses in this state. Sadly, many of the businesses targeted by these predatory lawsuits will be forced to close, devastating their owners’ and employees’ livelihoods, and harming the communities they serve.

Accordingly, this Court should REVERSE the superior court’s order sustaining the demurrer and allow the People to pursue their civil UCL enforcement action against Respondents.

ARGUMENT

I. Small Businesses in California Have Been Targeted by Fraudulent ADA/Unruh Litigation for Decades, and the Situation Is Getting Worse

The ADA was passed in 1990 to create “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” (42 U.S.C. § 12101(b)(2).) Title III of the ADA, which applies to all “places of public accommodations,” prohibits discrimination “on the basis of

disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations[.]” (*Id.* § 12182(a).) Title III’s expansive definition of “places of public accommodations” has been interpreted to cover “[v]irtually every privately operated business or facility open to the public[.]” (Bradford W. Coupe, et al., *The Department of Justice’s Final Regulations Implementing Title III of the Americans with Disabilities Act*, 71 Ed. Law Rep. 353 (1992).)

Under Title III, unlawful discrimination includes (1) “a failure to make reasonable modifications in policies, practices, or procedures” necessary to provide access to businesses, and (2) “a 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)(ii), (iii).) California’s Unruh Civil Rights Act makes the “violation of the right of any individual under the federal Americans with Disabilities Act of 1990” a “violation under [the Unruh Civil Rights Act],” as well. (Civ. Code § 51(f).)

Although the ADA’s goal is laudable, a small handful of plaintiffs’ attorneys and serial plaintiffs have transformed ADA litigation into a “get-money-quick” scheme that provides few public benefits and primarily enriches

the lawyers involved. (*Shayler*, 51 F.4th at 1017.) The scheme employed in these shakedown suits is straightforward and effective:

First, plaintiffs’ attorneys find “shill plaintiffs” to visit small businesses for the sole purpose of filing a lawsuit. (See *Molski v. Mandarin Touch Rest.* (C.D. Cal. 2004) 347 F. Supp. 2d 860, 863 [describing the first step in the “scheme” as sending “a disabled individual to as many businesses as possible”].) These plaintiffs will sometimes visit a business to identify a deficiency, but often they file suit without ever having visited the targeted business—instead, the abusive ADA firms hire teams of assistants who visit businesses and generate “misleading receipts for future lawsuits.”³ Often the assistant does not even visit the business but merely takes a photograph from the street.⁴ The plaintiff will then allege that he was “deterred” from visiting due to the presence of “access barriers.”⁵ The complaints filed by these high-volume ADA firms typically include identical, boilerplate factual allegations. (See *Shayler*, 51 F.4th at 1018 [“A hallmark of abusive ADA litigation is the use of form complaints containing a multitude of boilerplate allegations of

³ Arthur Gaus, *ADA Lawsuits in California: A Gold Rush for Serial Filers*, U.S. Chamber of Commerce Inst. for Legal Reform (July 25, 2023), <https://tinyurl.com/bdzhz3df> [hereinafter *Gold Rush for Serial Filers*].

⁴ *Ibid.*

⁵ *Ibid.*

varying merit.”]; Code Civ. P. § 425.55(a)(2) [legislative finding that ADA “lawsuits are frequently filed against small businesses on the basis of boilerplate complaints, apparently seeking quick cash settlements rather than correction of the accessibility violation”].); *Peters v. Winco Foods, Inc.* (E.D. Cal. 2004) 320 F. Supp. 2d 1035, 1040–41 [noting plaintiff’s history of filing “form complaints” and “off the shelf filings of questionable merit”].)

Critically, abusive ADA complaints often contain false standing allegations asserting that the plaintiff has visited the targeted business and intends to return—even if the plaintiff (1) has never patronized the business, (2) has no intent to return, and (3) lives hundreds of miles away, making any future visit impractical or even impossible.⁶ For example, one serial ADA plaintiff alleged that he planned to return to the tavern he sued despite either knowing or being “willfully blind to the fact that this was false” because the business had closed. (*Langer v. Badger Co., LLC* (S.D. Cal. May 15, 2020, No. 18CV934-LAB (AGS)) 2020 WL 2522081, at *3 [concluding that this conduct, “[a]t the very least, [] amounts to a fraud on the Court”].) This misconduct is so rampant that when businesses do decide to litigate, instead of settling, courts often conclude that the plaintiff’s standing allegations are not credible. For example, in *Garcia v. Alcocer* (C.D. Cal. Dec. 1, 2021, No. 2:20-cv-08419-

⁶ *Id.*

VAP-(JEMx)) 2021 WL 5760300, the court ruled after a bench trial that the plaintiff's allegation that he intended to return to a check-cashing store he had sued was not credible. (*Id.* at *3.) As the court explained, the plaintiff would need to travel for 90 minutes, taking two trains and a bus, while passing several other check cashing stores to reach the defendant business. (*Id.* at *2.) The court also found it relevant that the plaintiff had sued 78 stores in August 2020 but could not recall the types of businesses he sued. (*Id.* at *3.)

Large corporate defendants would have little difficulty litigating such fraudulent cases to a successful conclusion. Indeed, a defendant with the resources to litigate could likely seek sanctions against the shill plaintiff and the attorney who signed the false complaint. But most small businesses faced with an ADA/Unruh lawsuit have little choice but to settle, regardless of whether the claim has any merit. For starters, the ADA guidelines promulgated by the Department of Justice “resemble a labyrinthine building code,” full of “well-meaning but confusing” provisions that leave many small businesses unsure of whether they are out of compliance and how to remedy any alleged violation.⁷ And because the ADA provides attorneys’ fees for

⁷ *ADA Litigation Monster*, *supra* note 2; *Hobbling Businesses*, *The Economist* (Apr. 25, 2015), <https://tinyurl.com/yahc69e5> [hereinafter *Hobbling Businesses*]; see also *How Small Businesses are Targeted with Abusive ADA Lawsuits*, U.S. Chamber of Commerce Inst. for Legal Reform (Oct. 12, 2022),

successful plaintiffs, the pressure to settle even frivolous ADA lawsuits is immense. After all, a business hit with an abusive ADA suit could be on the hook for thousands of dollars in attorneys’ fees if it attempts to litigate and is found liable for even a technical violation, such as having a ramp that is a few degrees too steep or tables whose clearance is a few inches too low. (*Cf.* SB 269 Leg. Sess. 2015–16 (2016) § 2 [amending Civil Code § 55.56 to establish that under certain conditions, certain specified (but not all) “technical violations are presumed not to cause a person difficulty, discomfort, or embarrassment for the purpose of an award of minimum statutory damages” for suits against “small business[es]”].)

Because extracting money from small businesses through ADA compliance suits is like “shooting fish in a barrel,”⁸ the number of ADA lawsuits nationwide has exploded over the past decade—increasing from 3,535 in 2013 to 12,298 in 2021.⁹ A limited number of serial plaintiffs account for

<https://tinyurl.com/3j3pcyz8> (“Mark hired three separate inspectors to assess Lola’s Chicken Shack violations. None could agree on what, if anything, Lola’s had done wrong. The confusion over specific violations made it impossible for the restaurant to provide any remedies to the ADA lawsuit claims.”)

⁸ *ADA Litigation Monster*, *supra* note 2.

⁹ See Br. for the Chamber of Commerce et al. in *Acheson Hotels LLC v. Laufer* (S. Ct. No. 22-429) 2023 WL 4030228, at *6–7 [citing data available at law.lexmachina.com, which contains all civil federal district court cases in PACER, except Prisoner Petitions and Social Security cases, pending since 2009].

most of this growth. (See *Shayler*, 51 F.4th at 1017 [describing “widespread abuse” by a small cadre of ADA plaintiffs and their counsel].) While the number of ADA cases filed by non-serial plaintiffs has remained relatively flat over the past decade, the number of cases filed by serial plaintiffs has jumped from 2,367 cases in 2013 to more than 10,000 in 2019, 2020, and 2021.¹⁰ In 2022, more than 85% of ADA lawsuits were filed by serial plaintiffs.¹¹ As even Congress has observed, this litigation is “driven by the ADA’s attorneys’ fees provision” rather than legitimate concerns about accessibility. (H.R. Rep. No. 115-539 at 6 (2017).) And as courts have recognized, “[t]his type of shotgun litigation undermines both the spirit and purpose of the ADA” because “the means for enforcing the ADA (attorney’s fees) have become more important and desirable than the end (accessibility for disabled individuals).” (*Brother v. Tiger Partner, LLC* (M.D. Fla. 2004) 331 F. Supp. 2d 1368, 1375.)

The situation is even worse in California. Unlike the ADA—which does not provide for damages—the Unruh Civil Rights Act provides \$4,000 in statutory damages per violation. (See *Arroyo v. Rosas* (9th Cir. 2021) 19 F.4th 1202, 1206.) “Violation’ in this context, means both a plaintiff’s personal initial encounter with a non-compliant access barrier” and any occasions where the

¹⁰ *Id.* at *7

¹¹ *Id.* See also Amy Yee, *U.S. Businesses Get Hit With Record Numbers of Disability Lawsuits*, Bloomberg (April 14, 2022), <https://tinyurl.com/2cjj6nhu>.

plaintiff was *deterred* from visiting by the presence of the barrier.¹² (See also *Johnson v. Moraya Inv. LLC* (N.D. Cal. Aug. 2, 2021, No. 19-cv-03772-DMR) 2021 WL 3291867, at *4–5.) A putative ADA/Unruh plaintiff thus need only plead that she went to a facility and encountered a barrier and that she would have returned but for the presence of the barrier to claim potentially tens of thousands of dollars in statutory damages. Given the interplay between the Unruh Civil Rights Act and the ADA, it is unsurprising that California has historically led the nation in ADA lawsuits.¹³

Most ADA cases settle soon after the complaint is filed. Indeed, ADA lawsuits in California have an 84% settlement rate, turning this type of litigation into little more than a numbers game.¹⁴ Respondents have played this game very successfully. Before they were hit with this UCL lawsuit, Respondents regularly filed numerous ADA complaints per day—on a single day in November 2021, they filed *ten complaints* against various small

¹² See *Gold Rush for Serial Filers*, *supra* note 3 (emphasis removed).

¹³ Matt Gonzales, *Record Number of Lawsuits Filed Over Accessibility for People with Disabilities*, SHRM (Mar. 23, 2022), <https://tinyurl.com/25p54e45>. That number fell considerably in 2022, the year in which the People initiated this lawsuit against Respondents. Minh Vu, et al., *ADA Title III Federal Lawsuits Numbers Are Down But Likely To Rebound in 2023* (Feb. 14, 2023), <https://tinyurl.com/29qdn2kt>.

¹⁴ *CHLA's ADA Protection Program*, California Hotel & Lodging Association (Mar. 8, 2023), <https://tinyurl.com/2s4ff9xt>.

businesses.¹⁵ Most of these cases settled—sometimes for a few thousand dollars, sometimes for much more.¹⁶ Respondents may not consider these amounts onerous, but for many small businesses, a few thousand dollars is “all they have,” making abusive lawsuits an existential threat to their businesses.¹⁷

Most serial ADA attorneys, including Respondents, disproportionately target immigrant-owned family businesses earning between \$50,000 and \$80,000 a year.¹⁸ Appellant’s complaint demonstrates how Respondents have particularly victimized the “Bay Area’s Chinese-American population that is home to large populations of immigrants, many of whom are monolingual speakers of Cantonese and other languages.” (Compl. at 49–51.) Many of these businesses were especially hard hit by “the COVID-19 pandemic, in part because of the widespread perception of the disease as a ‘Chinese virus.’”¹⁹

¹⁵ Hannah Albarazi, *COVID-19’s Impact on Businesses Fuels ADA Reform Debate*, Law360 (Nov. 14, 2021), <https://tinyurl.com/466kr9t8>.

¹⁶ *Gold Rush for Serial Filers*, *supra* note 3.

¹⁷ *On the Brink: Small Business Owners Can't Afford ADA Website Lawsuits*, Yahoo Finance (Apr. 7, 2023), <https://tinyurl.com/y36n444m>.

¹⁸ *Hobbling Businesses*, *supra* note 7.

¹⁹ Bob Egelko & Carolyn Said, *Disability lawsuits hit S.F. Chinatown and state. Are they helpful or a moneymaking scheme?*, San Francisco Chronicle (Aug. 2, 2021), <https://tinyurl.com/398yzwdy>. Nearly a third of California’s restaurants closed their doors permanently during the COVID-19 pandemic, and up to 1,000,000 people employed in the service industry lost their jobs. (Maggie

Respondents targeted these businesses when they were at their most vulnerable, hoping to extract settlements through the threat of extravagant litigation costs at a time of financial uncertainty and societal prejudice.

For example, one Palo Alto restaurant owner, Tony Han, recalled that 2020 was “the hardest year that everyone has ever worked in this industry.”²⁰ While Mr. Han’s restaurant was still recovering from the pandemic-induced losses, he was hit with one of Respondents’ boilerplate ADA lawsuits.²¹ The lawsuit alleged that the restaurant’s outdoor dining tables, which Mr. Han

Murphy, *The Impact the Pandemic Has Had on California Businesses*, California Business Journal (last visited Sept. 14, 2023), <https://tinyurl.com/mry9thrx>.) The Bay Area was especially hard hit. In San Francisco, roughly 50 percent of small businesses remained closed through the summer of 2021—one of the highest rates in the nation. (*Id.*) Meanwhile, Los Angeles County lost 437,000 jobs in 2020. (*LA County WDACS releases report on COVID-19 impact on local economy, recommendations to strengthen data-driven economic recovery efforts*, Workforce Development Aging and Community Services (last visited Sept. 14, 2023), <https://tinyurl.com/45kbf5uv>.) Businesses left the state at twice the rate in 2021 as during the previous year. (Lee Ohanian and Joseph Vranich, *California Business Exits Soared in 2021, and There Is No End in Sight*, Hoover Institution (Oct. 25, 2022), <https://tinyurl.com/ycxzvh4z>.) And though the pandemic has receded, small business openings are still down 40 percent compared to pre-pandemic levels. (Mike Vallante, *California Small Businesses are in Dire Straits*, California Globe (Mar. 28, 2022), <https://tinyurl.com/3e8tfze4> [hereinafter *California Small Businesses are in Dire Straits*].)

²⁰ Kevin Forestieri, *Spate of ADA lawsuits hits hundreds of local businesses still reeling from the pandemic*, The Almanac (Aug. 13, 2021), <https://tinyurl.com/bdd2xc3p>.

²¹ *Ibid.*

installed to comply with COVID regulations, violated the ADA.²² Mr. Han had no recollection of anyone with a wheelchair or service dog ever attempting to eat at his restaurant, much less being barred from service.²³ Yet because of the high costs of defending an ADA suit, Mr. Han had little choice but to settle.²⁴ Kakey Chang, another Asian-American business owner targeted in a post-COVID ADA suit described “finally see[ing] a light at the end of the tunnel” only to find that “somebody is trying to close it.”²⁵

Plaintiffs’ firms know that these small businesses cannot navigate the “complicated legal system, potential high fees[,] and language barriers” involved in litigating ADA lawsuits.²⁶ They do not “have the legal war chests of large corporations to prove most of these claims are frivolous.”²⁷ Serial ADA firms, including Respondents, deliberately target these types of businesses because they are more prone to accept a quick settlement demand than risk

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Sierra Lopez, *ADA lawsuits hit hard in San Mateo County*, The Daily Journal (Aug. 2, 2021), <https://tinyurl.com/2azx83st>.

²⁶ Han Li, *Chinatown Braces for a Potential Wave of Lawsuits Targeting Small Businesses*, The San Francisco Standard (Mar. 14, 2023), <https://tinyurl.com/4b5mvvy7> [hereinafter *Chinatown Braces for a Potential Wave of Lawsuits*].

²⁷ *California Small Businesses are in Dire Straits*, *supra* note 19.

losing their business through protracted litigation. Because they typically lack the resources to defend themselves, small businesses owners depend on state and local authorities to protect them from predatory legal shakedowns. That is precisely what San Francisco and Los Angeles district attorneys are doing here.

If the Court prevents Appellants from pursuing their civil enforcement action, the misconduct amici have described will further metastasize. Over the past several years, serial ADA firms have created a new cottage industry of “website accessibility” lawsuits. In such lawsuits, the plaintiff sends a demand letter asserting that a business’s website is not ADA compliant because it is not accessible to the blind, deaf, or people with other disabilities. Unlike typical ADA lawsuits, which at least require an alleged in-person visit, website accessibility targets can be identified by anyone with access to a computer or smartphone. An analysis of the costs to defend these types of cases estimated that small businesses can face costs of \$25,000, even when the plaintiff sends only a demand letter.²⁸ Using that conservative estimate and multiplying by the 265,000 demand letters received in 2020, the total cost to businesses faced

²⁸ *U.S. Businesses Potentially Spent Billions on Legal Fees for Inaccessible Websites in 2020*, Bureau of Internet Accessibility (Jan. 7, 2021), <https://tinyurl.com/yc7ap7x5>.

with this litigation was estimated at \$6.625 billion in just one year.²⁹ If ADA firms are allowed to file fraudulent website-accessibility claims safe in the knowledge that the litigation privilege will bar civil enforcement actions, the number of such lawsuits will continue to skyrocket.

II. Small Businesses Have Little Recourse to Address the Harms Caused by Abusive ADA Litigation Apart From This Suit

Respondents do not dispute that filing a complaint with allegations the attorney knows to be false is a violation of the attorney's ethical obligations. (See R. Prof. Conduct 3.1(a)(1) [prohibiting an attorney from bringing a claim without probable cause]; R. Prof. Conduct 3.3(a)(1) [prohibiting an attorney from knowingly making a false statement of fact or law to a court].) Respondents contend instead that this type of attorney misconduct should be "handled" "through State Bar disciplinary proceedings." (Resp. Br. at 35.) To be sure, some state bars have taken aggressive action against unethical ADA attorneys.³⁰ But Respondents have not identified any disciplinary action taken

²⁹ *Ibid.*

³⁰ For example, the State Bar of Arizona indefinitely suspended one attorney for his abusive litigation tactics in filing ADA lawsuits. (Ogletree Deakins, *Arizona Indefinitely Suspends Plaintiffs' Attorney Behind More Than 1,800 Title III Lawsuits* (July 13, 2018), <https://tinyurl.com/btydkefu>.)

by the California State Bar against unethical ADA attorneys over the past decade, and it is unlikely that many (if any) such examples exist.

As an initial matter, small businesses that promptly settle after being hit with ADA lawsuits are unlikely to file bar complaints. And even if they did, the State Bar would be unable to pursue corrective action without a court finding of wrongdoing. But even beyond that hurdle, the State Bar would be unlikely to act even if a small business *could identify* specific ethical violations. As courts have recognized, the State Bar has “long allowed patterns of serious misconduct, especially by prominent attorneys, to go unpunished for extended periods of time.” (*In re Yagman* (9th Cir. 2022) 38 F.4th 25, 32.) The State Bar’s Annual Discipline Report for 2020 indicates that 14,033 cases were closed by the Office of Chief Trial Counsel with no action.³¹ The California State Auditor delivered a report to the Governor and Legislature in April 2022 finding that the State Bar “failed to effectively deter or prevent some attorneys from repeatedly violating professional standards” and “prematurely closed some cases.”³² One attorney received 165 complaints over seven years, “many of

³¹ 2020 Annual Discipline Report of the State Bar of California (April 27, 2021), <https://tinyurl.com/4bmdr9ha>.

³² Auditor of the State of California, *The State Bar of California’s Attorney Discipline Process: Weak Policies Limit Its Ability to Protect the Public from Attorney Misconduct* (Apr. 14, 2022), <https://tinyurl.com/yy7wpdrp> [hereinafter *The State Bar of California’s Attorney Discipline Process*].

which the State Bar dismissed outright or closed after sending private letters to the attorney.”³³ The State Bar closed 87 complaints against another attorney spanning 20 years before finally seeking disbarment due to a federal conviction for money laundering.³⁴ And perhaps most egregiously, the State Bar received 136 complaints about disgraced attorney Tom Girardi between 1982 and 2020,³⁵ but failed to take any action, even though Girardi was sued multiple times during that period for embezzling millions of dollars in client funds.³⁶

Speaking for many, one attorney “wonder[ed] how the Bar can have any credibility going forward in the face of their misconduct spanning decades and their failure to hold people accountable even now.”³⁷ When “even egregious conduct is falling through the cracks,” the State Bar’s nominal ability to discipline unethical ADA attorneys is cold comfort to the thousands of small business owners subjected to shakedown lawsuits every year.³⁸ Unless and

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Joyce E. Cutler, *Girardi Criminal Charges Also Impugn California Bar, Critics Say*, Bloomberg Law (Feb. 2, 2023), <https://tinyurl.com/3fjh5ht3> [hereinafter *Girardi Criminal Charges*].

³⁶ Matthew Goldstein, *A Hall of Fame Lawyer, a ‘Real Housewife’ and a Stunning Fall*, The New York Times (Jan. 13, 2021), <https://tinyurl.com/3892aytc>.

³⁷ *Girardi Criminal Charges*, *supra* note 35.

³⁸ Joyce E. Cutler, *Tom Girardi Downfall Casts California Bar in Unflattering Light*, Bloomberg Law (July 11, 2022), <https://tinyurl.com/34hv59hf>.

until the State Bar makes “significant improvements” in its attorney discipline process, small businesses cannot rely on it to end abusive and unethical ADA litigation.³⁹

Respondents also assert that businesses hit with ADA lawsuits can “challenge the allegations with the vast array of options available to defendants in federal court,” including “Rule 11 sanctions.” (Rep. Br. at 10.) Again, there are certainly examples of federal courts disciplining unscrupulous attorneys and serial ADA plaintiffs.⁴⁰ And at least one attorney has been

³⁹ *The State Bar of California’s Attorney Discipline Process*, *supra* note 3231.

⁴⁰ For example, the District Court in Maryland suspended an attorney for committing ethical violations in filing hundreds of ADA tester cases, finding that the attorney’s conduct “unquestionably merits stiff sanction.” (See *In Re Tristan W. Gillespie* (D. Md. June 30, 2023, No. 21-mc-14) 2023 WL 4976173, at *17, *report and recommendation adopted*, ECF No. 14 (July 5, 2023).) The court’s disciplinary panel found that the attorney would regularly exaggerate how much time he spent on each complaint filed and would use these fraudulent time estimates during evidentiary hearings, settlement negotiations, and fee petition submissions. (*Id.* at *4, 6, 15.) The panel also expressed concern over the attorney’s failure to consult with his clients prior to filing complaints, dismissing cases, and confirming settlements. (*Id.* at *10, 12.) As the Committee explained, the attorney had “joined a pre-existing scheme that raises serious ethical concerns—including repeat clients, a compromised investigator, and a method for extracting unwarranted attorneys’ fees from targeted hotels based on a well-worn settlement script.” (*Id.* at *17.) In another case, a repeat ADA filer was suspended from practicing in the Western District of Texas and the State of New York because of his ethical violations. David Barer, *Austin ‘ADA’ attorney suspended from law practice in State of New York*, KXAN (Aug. 22, 2019), <https://tinyurl.com/r92k2cm7>.

successfully prosecuted for filing fraudulent ADA claims.⁴¹ But federal courts can perform their “gatekeeping functions” only if the defendant decides to litigate (Resp. Br. at 10), and most small businesses hit with shakedown ADA lawsuits cannot afford even to hire an attorney, much less conduct discovery that might lead to sanctions. Rather, to keep their businesses afloat, most defendants are forced to settle almost immediately.⁴² (See *Molski*, 347 F. Supp. 2d at 863 [explaining that the damages awards requested “would put many of the targeted establishments out of business”].)⁴³

Further, the imposition of sanctions in the few cases where defendants have pushed back have proven insufficient to deter high-volume ADA attorneys. Indeed, one federal district judge, the Hon. Vince Chhabria, has already found “clear and convincing evidence” that Respondents “conspired to lie to the Court” in an ADA filing. (See *Whitaker v. Peet’s Coffee, Inc.* (N.D. Cal.

⁴¹ See United States Attorney’s Office, Southern District of New York, *Attorney Pleads Guilty To Filing Fraudulent Lawsuits Under The Americans With Disabilities Act* (July 12, 2022) <https://tinyurl.com/2hdbary2>.

⁴² See *Chinatown Braces for a Potential Wave of Lawsuits*, *supra* note 266 (“because of the complicated legal system, potential high fees and language barriers, many immigrant businesses owners choose to settle” rather than litigate ADA shakedown suits).

⁴³ See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 73 Fed. Reg. 34508, at 34515 (June 17, 2008) (“small businesses are particularly vulnerable to title III litigation and are often compelled to settle because they cannot afford the litigation costs involved in proving whether an action is readily achievable.”)

Oct. 11, 2022, No. 21-cv-07698-VC) 2022 WL 6698328, at *4, 7.) As Judge Chhabria concluded, Respondents and their client—a serial plaintiff who has sued more than 1,800 businesses—engaged in “concerted, bad-faith sanctionable conduct once Peet’s sought dismissal of the ADA claim on standing grounds.” (*Id.* at *4 [“Once they were pushed on [their standing] allegation, [serial plaintiff] and [Respondent law firm] should have withdrawn their ADA claim, but they chose to double down on their lie instead.”].) Because of Respondents’ “egregious pattern of bad faith misconduct,” Judge Chhabria awarded defendant an “award of \$35,000 in sanctions.” (*Id.* at *7.) But this sanction pales in comparison to the millions of dollars Respondents and other ADA attorneys stand to make—and have made—from these shakedown lawsuits. (Compl. at 7.) The threat of sanctions in individual cases is thus not a sufficient deterrent to this volume business, and small businesses in California will continue to be terrorized by fraudulent ADA lawsuits if Appellants are barred from pursuing their civil enforcement action.

Nor can small businesses expect relief from Congress. Although “[c]ritics of ‘shakedown’ accessibility suits have long advocated a notification requirement, or grace period, prior to suing under Title III,” “influential disability groups oppose such reforms.”⁴⁴ And to date, Congress has shown

⁴⁴ *ADA Litigation Monster*, *supra* note 2.

little interest in amending the ADA to include procedural safeguards similar to those imposed by the California Legislature for Unruh claims.

This Court obviously cannot change the political realities that prevent common-sense amendments to the ADA in the near term. But it can ensure that the worst abusers of the ADA's plaintiff-friendly rules are held accountable to the People of California in this civil law enforcement action.

CONCLUSION

For the foregoing reasons, the superior court's order sustaining the demurrer should be REVERSED.

Dated: September 14, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204, I hereby certify that the attached amici curiae brief of the Chamber of Commerce of the United States of America and The California Chamber of Commerce consists of 4,728 words as counted by the Microsoft Word processing program used to generate the brief.

Dated: September 14, 2023

/s/Robert E. Dunn
Robert E. Dunn

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Santa Clara, State of California. My business address is 99 S. Almaden Blvd. Suite 600, San Jose, CA 95113.

On September 14, 2023, I served true copies of the following documents described as:

- **APPLICATION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT**
- **AMICI CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF APPELLANTS**

By Electronic Service: I electronically filed the documents with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on September 14, 2023, at San Jose, California.

/s/ Robert E. Dunn
Robert E. Dunn