

Amici curiae, Disability Rights Legal Center, Disability Rights Advocates, and the Impact Fund (collectively “*Amici*”) respectfully submit this motion for leave to file an amicus brief in support of Plaintiffs pursuant to Fed. R. App. P. 29. Plaintiffs do not oppose the filing of this brief.

INTEREST OF *AMICI*

Each of the *Amici* offers the Court a unique perspective on the impact of the district court’s decision on people with disabilities and public interest class actions. *Amici* are non-profit public interest organizations extensively involved in class actions, including class actions for people with disabilities. All of the amici share an interest in ensuring that people with disabilities can effectively vindicate their civil rights through class actions and that public interest law firms that conduct impact litigation can capably work to this end. *Amici*’s interests have been directly affected by the district court’s decision, which hinders these goals.

The Disability Rights Legal Center (DRLC) is a non-profit organization dedicated to promoting the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services. DRLC accomplishes its mission through many programs, including its Civil Rights Litigation Program that engages in impact litigation on behalf of people with disabilities. DRLC handles countless disability rights cases, including class actions challenging discrimination by government, business, and educational institutions.

The Impact Fund is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. It is also a California State Bar Legal Service Trust Fund Support Center, providing services to legal services projects across the state. In its funding role, The Impact Fund reviews requests for grants to cover expenses of complex litigation and frequently assists firms in finding financing, co-counsel, or other resources necessary to bring significant litigation. It offers training programs, advice and counseling, and amicus representation to nonprofit organizations regarding class actions and related issues. It also litigates class cases, including disability discrimination cases.

Disability Rights Advocates (DRA) is a non-profit legal center whose mission is to ensure dignity, equality and opportunity for people with all types of disabilities throughout the U.S. and worldwide. Making facilities throughout the country accessible to individuals with disabilities through negotiation and litigation, including class action litigation, is one of DRA's primary objectives.

REASONS WHY FILING AN *AMICUS* BRIEF IS DESIRABLE

Amici's brief is relevant and desirable, because it presents argument and statistical evidence regarding the harmful effects that the district court's decision will have on the civil rights of people with disabilities and the ability of public interest law firms to conduct impact litigation. *See* Fed. R. App. P. 29(b)(2).

Because this brief would serve the "classic role" of "bring[ing] relevant matter to

the attention of the Court that had not already been brought to its attention by the parties,” *Amici*’s motion should be granted. *See* Fed. R. App. P. 29 Advisory Comm.; *Funbus Systems, Inc. v. Cal. Pub. Util. Comm’n*, 801 F. 2d 1120, 1124-1125 (9th Cir. 1986) (citations omitted); *see also Neonatology Assocs. v. Commissioner*, 293 F.3d 128, 132-133 (3d. Cir. 2002) (Alito, J.) (discussing standards for acceptance of *amicus* briefs). *Amici* here – non-profit public interest organizations extensively involved in class actions, including class actions for people with disabilities – offer the Court relevant argument and data regarding the real-time effects that the district court’s decision will have on the civil rights of people with disabilities and public interest law firms that are not addressed in Plaintiffs’ Petition for Permission to Appeal. *Amici* will therefore provide a distinct and relevant analysis of the issues presented in the petition.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant their motion to file the attached *amicus curiae* brief.

Dated: October 21, 2009

s/ Shawna L. Parks
SHAWNA L. PARKS
DISABILITY RIGHTS LEGAL CENTER

Case No. 09-80158

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MIGUEL CASTANEDA, KATHERINE CORBETT, AND JOSEPH WELLNER,
ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs - Petitioners,

v.

BURGER KING CORPORATION

Defendants - Respondents.

On Appeal from the United States District Court
For the Northern District of California, San Francisco Division
Civil Action No. C 08-4262 WHA

**BRIEF OF DISABILITY RIGHTS LEGAL CENTER, DISABILITY
RIGHTS ADVOCATES AND THE IMPACT FUND AS *AMICI CURIAE* IN
SUPPORT OF PETITIONERS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* state that they are private 501(c)(3) non-profit organizations, that they are not publicly held corporations or other publicly held entities, and that they have no parent corporations. No publicly held corporation or other publicly held entity owns ten percent (10%) or more of any *Amicus* organization.

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I. *Amici* Statement of Interest

Amici are non-profit public interest organizations extensively involved in class actions, including class actions for people with disabilities.

The Disability Rights Legal Center (DRLC) is a non-profit organization dedicated to promoting the rights of people with disabilities and to heightening public awareness of those rights by providing legal and related services. DRLC accomplishes its mission through many programs, including its Civil Rights Litigation Program that engages in impact litigation on behalf of people with disabilities. DRLC handles countless disability rights cases, including class actions challenging discrimination by government, business, and educational institutions.

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mission is to ensure dignity, equality and opportunity for people with all types of disabilities throughout the U.S. and worldwide. Making facilities throughout the country accessible to individuals with disabilities through negotiation and litigation, including class action litigation, is one of DRA's primary objectives.

II. Introduction and Summary of Argument

The district court's decision in this matter will harm the ability of people with disabilities to vindicate their civil rights and the ability of public interest law firms to conduct impact litigation. First, the district court's decision significantly undermines the Americans with Disabilities Act's (ADA) goals of addressing inaction that discriminates against people with disabilities and providing people with disabilities relief on par with other minorities. Second, the district court incorrectly held that damages predominate over system-wide injunctive relief simply because of the presence of a claim for minimum statutory damages. Finally, the district court's holding that narrowed the scope of firms representing the class will impede public interest law firms' ability to conduct impact litigation. For these reasons, and as explained below, *Amici* respectfully request that the Court grant Plaintiffs' petition.

III. Argument

A. The District Court's Decision Is Contrary To The Purpose and Intent of The Americans with Disabilities Act.

1. The District Court’s Decision Significantly Undermines The Goals of the Americans with Disabilities Act.

The district court’s ruling is contrary to a central premise of the Americans with Disabilities Act (“ADA”), namely that *inaction* can be just as harmful to people with disabilities as affirmative conduct intending to discriminate. Congress intended that the ADA provide “a clear and comprehensive national mandate” with “enforceable standards” for the elimination of discrimination against people with disabilities in “critical areas” including access to public accommodations. 42 U.S.C. § 12101(b)(1)(2). Moreover, Congress specifically acknowledged as discriminatory the “failure to make modifications to existing facilities and practices.” *See* 42 U.S.C. § 12101(a)(2).

Indeed, the ADA’s legislative history is clear that it was intended to address inaction that results in discrimination. As Senator Harkin explained, “Discrimination made illegal under the ADA includes harms – such as segregation, exclusion, or denial of benefits, services, or other opportunities that are as effective and meaningful as those provided to others – resulting from actions or inactions that discriminate by effect as well as by intent or design.” 135 Cong. Rec. S4984, 4986. Similarly, the Committee on Labor and Human Resources stated that “Discrimination also includes harms resulting from the construction of transportation, architectural, and communication barriers and the adoption or

application of standards and criteria and practices and procedures based on thoughtlessness or indifference. . . .” S. Rep. No. 116, 101st Cong., 1st Sess., at 6 (1989).

As courts have noted: “Combating discrimination as it affects persons with disabilities requires recognizing, as Congress did in crafting the ADA, that often the most damaging instances in which rights of persons with disabilities are denied come not as the result of malice or discriminatory intent, but rather from benevolent inaction when action is required.” *Presta v. Peninsula Corridor Joint Powers Bd.*, 16 F.Supp.2d 1134, 1136 (N.D. Cal. 1998); *see also Matthews v. Jefferson*, 29 F.Supp.2d 525, 532 (W.D. Ark. 1998) (ADA addresses inaction and thoughtlessness); *Shultz By and Through Shultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222, 1225-26 (C.D. Cal. 1996) (finding “discriminatory inaction”). The district court thus overlooked not only Burger King’s (BKC) extensive common control, but also the scenario of inaction that Congress recognized as a form of pervasive discrimination the ADA was meant to remedy.

Additionally, Congress intended for the ADA to put disability rights on par with civil rights protection for other insular minorities. Unlike people who have experienced discrimination on the basis of other categories such as race, color, sex, national origin, or age, people with disabilities had no legal recourse to redress widespread discrimination and prejudice. 42 U.S.C. § 12101(a)(4). The ADA was

meant to fill this gap so that people with disabilities would not be trapped in the “inferior status” they have historically occupied in society. 42 U.S.C. § 12101(a)(6). The district court’s refusal to acknowledge the systemic discrimination in this matter undermines this purpose.

2. The District Court’s Decision Constitutes A Significant Departure From Relevant Case Law in This Area.

In light of the ADA’s intent, numerous courts have certified classes in cases that address systemic failures to correct architectural barriers at commonly held or affiliated public accommodations. As one court recognized, “Cases challenging an entity’s policies and practices regarding access for people with disabilities constitute the mine run of disability class actions certified under Rule 23(b)(2).” *Californians for Disability Rights v. California Dep’t of Transportation*, 249 F.R.D. 334, 344 (N.D. Cal. 2008). Indeed, a number of courts have held that where people with mobility disabilities encounter the barriers throughout commonly held or affiliated public accommodations, commonality is established. *See e.g., Moeller v. Taco Bell Corporation*, 220 F.R.D. 604, 609 (N.D. Cal. 2004); *Colorado v. Cross-Disability Coalition*, 184 F.R.D. 354, 359-360 (D. Colo. 1999); *Arnold v. UA Theatre Circuit Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994); *Park v. Ralph’s Grocery Co.*, 254 F.R.D. 112, 120-121 (C.D. Cal. 2008).

Furthermore, courts have held that inadequate guidelines and systemic

failure to correct discrimination constitutes an issue common to the class sufficient to warrant certification under 23(b)(2). *See Californians for Disability Rights*, 249 F.R.D. at 344-346. Individualized assessments are inappropriate where injunctive relief against the controlling entity is sought, and no evidence of a centralized policy compelling discrimination is necessary. *Id.* at 344-345.

Other courts have held that despite differences in architecture from location to location, it is sufficient for commonality under 23(b)(2) that accessibility barriers at various locations affect all mobility-impaired persons in the same way. *Park*, 254 F.R.D. 112 at 121; *see also Moeller*, 220 F.R.D. 604; *Arnold*, 158 F.R.D. at 449. Specifically, they impede mobility-impaired persons who try to access the various locations. *See Park*, 254 F.R.D. 112 at 120. The district court's decision constitutes a significant departure from previous cases law on this matter.

Moreover, this departure will have an extremely negative impact on the ability of people with disabilities to enforce their rights. People with disabilities typically are low-income, and therefore, often cannot afford to litigate their cases individually. Nationally, 21.4% of people with disabilities in the United States are below the poverty level. *See U.S. Census Bureau, Table S1801 – Disability*

Characteristics, 2005-2007 American Community Survey 3-Year Estimates.¹ As a result, people with disabilities have little or no resources to respond to the numerous legal problems they face. *See* Henry Rose, *Class Actions and the Poor*, 6 PIERCE L. REV. 55, 62 (2007). Class actions are therefore a crucial vehicle of change for people with disabilities. *Id.* at 62.

B. Damages Do Not Predominate Simply Because Of The Presence Of Minimum Statutory Damages.

When plaintiffs seek damages along with injunctive relief, the court will certify under Rule 23 (b)(2) based on the predominate form of relief sought by the class. *Molski v. Gleich*, 318 F. 3d 937, 949-950 (9th Cir. 2003). “In order to determine predominance, [courts] have focused on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the suit.” *Id.* at 950. Here, there is undisputed evidence that Plaintiffs’ primary interest is injunctive relief.

In addition, when the damages in question are statutory minimum damages provided by the Unruh Act, courts have consistently considered those damages as incidental to injunctive relief. *See Park*, 254 F.R.D. at 122; *Moeller*, 220 F.R.D. at 613; *Arnold*, 158 F.R.D. at 461-462. These damages are incidental because the purpose of such damages is to remedy violations of plaintiffs’ civil rights with a

¹ Available at http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2007_3YR_G00_S1801&-ds_name=ACS_2007_3YR_G00, last visited October 20, 2009.

minimum of proof. The California Legislature's purpose behind the Unruh Act "was to provide disabled Californians injured by violations of the ADA with the [monetary] remedies." *Munson v. Del Taco, Inc.*, 208 P.3d 623, 624 (Cal. 2009). It was also to "create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary invidious discrimination by such establishments." *Id.* at 626.

Moreover, because Plaintiffs' request is for statutory damages under the Unruh Act it requires only the barest minimum proof. Indeed, "[p]roof of actual damages is not a prerequisite to recovery of statutory minimum damages under California's Unruh Civil Rights Act." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835 (9th Cir. 2000). Due to the non-complex standard of proof required, Plaintiffs can easily obtain the necessary evidence to prove that the civil right violation has occurred. By essentially forcing the class to choose between their remedies – minimum damages or injunctive relief – the district court's decision undermines the purpose and intent of the California statutes.

C. The Court's Ruling that A Subset of Plaintiffs' Counsel Should Represent the Class Will Harm Public Interest Law Firms' Ability to Conduct Impact Litigation.

Although not addressed by Plaintiffs' petition, *Amici* are extremely concerned by the district court's apparent presumption that only one firm, or a subset of requested firms, need represent the class. *Amici* are also concerned that

DREDF – a well regarded nonprofit organization dedicated to the advancement of the rights of people with disabilities – was excluded by the district court as class counsel.² This decision will have a chilling effect on beneficial cooperation between nonprofit legal groups and private law firms, and undermines the unique role that public interest organizations play in cases such as this.

Non-profits often look to private firm co-counsel to assist in taking on important, resource-intensive suits, such as class actions against corporate defendants. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 131 (2004). Even the most prominent public interest organizations, face constrained budgets that generally cannot support the large expenses associated with major litigation. *Id.* Attorney's fees and cost awards may not be recovered for many years, if at all, and thus do not mitigate these expenses. *Id.*

The court's decision is particularly troubling given the current gap in legal services in California. For example, a recent report from the California Commission on Access to Justice shows that currently there are more than 8,000 Californians living below 125% of the poverty line for every legal aid lawyer. *See* Action Plan for Justice, Report of the California Commission on Access to Justice,

² The apparent presumption is in the district court's Sept. 25 order. The exclusion of DREDF is in the district court's Oct. 16 order, which was issued after the Oct. 9 Rule 23(f) petition was filed. Because the Oct. 16 order directly addresses the issue of class counsel appointment, which is an integral and required part of class certification, it is properly within the purview of this Court's Rule 23(f) review.

April 2007, at p. 32.³ This same report identified thousands of legal problems that Legal Services Corporation agencies were unable to address in 2005, including nearly 10,000 legal problems involving individual rights. *Id.* at p. 36. Class actions brought by public interest organizations are often the most efficient way to address systemic harms and increase access to representation for low-income Californians.

The district court's decision to limit class counsel to only a subset of plaintiff's counsel denies clients the valuable synergy of nonprofit and private legal skills that large-scale public interest litigation requires. Moreover, its decision to exclude DREDF as class counsel undermines the important role of nonprofits in such litigation, as such organizations frequently have the strongest contacts with class members and the deepest ties to the community affected by the suit. This Court should consider these serious implications in deciding whether to let the district court's decision stand.

IV. Conclusion

For the foregoing reasons, *Amici* respectfully request that the Court grant Plaintiffs' petition.

Dated: October 21, 2009

s/ Shawna L. Parks
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³ Available at http://calbar.ca.gov/calbar/pdfs/reports/2007_Action-Plan-Justice.pdf, last visited October 20, 2009.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 29(d) of the Federal Rules of Appellate Procedure, *Amici* certify that this amicus brief is 10 pages, which is no longer than one-half the maximum length authorized by the Rules for Plaintiffs' principal brief.

Dated: October 21, 2009

s/ Shawna L. Parks
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DISABILITY RIGHTS LEGAL CENTER

9th Circuit Case Number(s) 09-80158

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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