July 7, 2025

To: The Honorable Thomas Umberg, Chair, Senate Judiciary Committee
Members, Senate Judiciary Committee

RE: AB 649 (Lowenthal), as Amended May 12, 2025 – OPPOSE – Makes it difficult for small businesses to recover attorneys' fees from bad actor lawyers and to qualify for right to cure

While the Civil Justice Association of California (CJAC) and the below-listed organizations appreciate the well-meaning intent of **AB 649**, the current version of the bill would create too much risk and uncertainty for California's smallest businesses and potentially create more challenges and liability for them under the ADA, Unruh Civil Rights Act, and the Unfair Competition Law.

Therefore, this coalition respectfully **OPPOSES AB 649** for the following reasons:

1. **The bill eliminates an important deterrent to abusive disability access litigation in California by making it nearly impossible to recover attorneys' fees from bad actor lawyers.**

   A top concern is that AB 649 would revise Civil Code Section 55 which currently allows either prevailing party to recover attorneys' fees from the losing party. The bill would instead disallow business defendants from recovering attorneys' fees unless the court finds that the plaintiff's claim was "frivolous, unreasonable, or groundless." It is almost impossible to meet this standard because many abusive lawsuits filed against small businesses allege technical violations (e.g., paint color is not right, mirror is slightly too high) that are not "frivolous" since they violate the letter of the law.

As a result, valiant small businesses who decide to reject extortionate settlements and instead incur tens of thousands of dollars to fight abusive lawsuits in court will have almost no chance to recover attorneys' fees even if they win.[1] With the attorneys' fees deterrent removed, attorneys will have free rein to piggyback damages claims onto Section 55's lower standing requirements to expand the number of lawsuits they can bring. This will only exacerbate California's lawsuit abuse problem.

2. **We are very concerned that businesses that opt into AB 649's Small Business Right to Cure Program would face landmines and new forms of liability.**

Small businesses need protections from abusive lawsuits, not legislation that creates a right to cure that is costly, complicated, and fraught with potential pitfalls and traps. We are concerned that the Small Business Right to Cure Program ("SBRCP") created under AB 649 would harm rather than help participating small businesses for the following reasons:

a. **To even participate in the SBRCP, small businesses would need to pay as much as $3000 or more for a new CASp report in 2026 or after.**

To qualify for the SBRCP program, a business would have to pay for a new CASp inspection sometime after January 1, 2026 — even if it had already fully passed a CASp inspection on all counts earlier this year. The expense and delay of obtaining CASp reports (many of which cost in excess of $3,000 and can take months to receive after the initial call) continues to be a huge problem for small businesses. Many CASps are already overburdened with responding to current litigation-related requests, so this bill would likely create a "run" on CASp inspections and reports, making it even harder for defendants in litigation matters needing quick CASp info.

b. **Small businesses participating in the SBRCP would be required to provide CASp inspection reports and documents related to improvements within 72 hours of oral or written demands.**

Any business that participates in the SBRCP would be required to make available a site inspection report from a Certified Access Specialist ("CASp") along with "[a]ll building permits and all other documents related to improvements, including improvements that did not require a permit, such as the resurfacing or restriping of parking lots, that evidence alteration, modification, or structural repair" to any member of the public who requests it (***even orally***) within 72 hours of the request. Imagine a busy restaurant or salon getting multiple requests during business hours or right before a holiday weekend.

c. **AB 649 makes no exception for modifications that are impossible, technically infeasible, and/or not readily achievable to make.**

The current bill language provides that: "[i]f the defendant has failed to correct, within 120 days of the date of the inspection, ***all*** construction-related violations in the structure or area that are noted in the CASp report, *the defendant shall not receive* ***any*** *protection from*

[1] See, e.g., ADA cases that have sought attorney's fees under a federal statute with the "frivolous, unreasonable, or groundless" standard: *Kohler v. Flava* (2015) 779 F.3d 1016, 1020 (Retailer who refused to settle and won at trial court and appellate levels against prolific ADA filer who sued hundreds of business on basis that a dressing room bench could be no longer than 48 inches in length, denied fees because claim was not "totally and completely without merit"); *Gibson v. Office of Att'y Gen., State of Cal.* (9th Cir. 2009) 561 F.3d 920, 929 ("Because Plaintiffs raised a question that was not answered clearly by our precedent, we hold that their claim was not frivolous").

liability for minimum statutory damages . . .” (emphasis added). However, established case law recognizes that certain improvements are not “readily achievable” (i.e., “easily accomplishable and able to be carried out without much difficulty or expense”) for a given defendant to make at a given location.[2]

Most businesses that are sued under the ADA are in older structures with one or more conditions that cannot be modified without unreasonable expense, if at all. For example, the entire sidewalk in many older complexes have cross-slopes that may be slightly too steep and could cost hundreds of thousands of dollars to correct. In other locations, conditions cannot be brought into compliance at any price.

But under AB 649, a business could make all other improvements perfectly and still be precluded from the SBRCP because of a single impossible change, even if plaintiff’s claim is for a different issue. Also, AB 649 makes no allowance for small business lessees who do not have the legal right or obligation to make significant alterations to a building structure.

d. **Many small businesses would need to pay thousands of dollars they do not have to hire a lawyer to ensure the CASp uses the correct legal standards.**

Aside from the cost of a new CASp report, small businesses would also likely need to retain a lawyer highly specialized in ADA compliance to make sure the inspection report can stand up to second-guessing that would be allowed by AB 649. Under AB 649, a small business could be deprived of all benefits under the SBRCP if a CASp report allegedly uses an incorrect standard or overlooks a standard. Again, this would happen even if plaintiff’s claim has no connection with the alleged incorrect standard in the report. AB 649 fails to consider that CASps may reasonably disagree on what the correct standard is and courts may as well. And if a CASp gets it wrong, the state-licensed CASp should be held accountable — not the hapless small business that hired them.

e. **AB 649 creates a new form of UCL liability for small businesses.**

Under AB 649, if a business inaccurately represents that it is protected under the SBRCP, it could be sued under California’s Unfair Competition Law (“UCL”). While small businesses should not misrepresent their SBRCP status, a new UCL cause of action is unwarranted. Also, the conditions of participation in SBRCP are so challenging that it will not be difficult for any business to suddenly become disqualified (e.g., missing a request to provide copies of a CASp inspection report and related documents). The last thing small businesses need is another way to be sued by unscrupulous lawyers.

f. **The bill would exclude a wide swath of accessibility lawsuits from its protections.**

AB 649 excludes any claims in which the plaintiff alleges a violation that is “intentional” or related to policies, practices, or procedures or seeks special damages for personal injuries or property damage. Many plaintiffs routinely allege personal injuries in ADA claims.[3] Also, countless complaints allege that the defendant has a policy of not complying or “intended” to

[2] See, e.g., *Ronald Moore v. Robinson Oil Corp*. (9th Cir. 2014) 588 F. App'x 528, 529, *Rodriguez v. Barrita* (2014) 10 F.Supp.3d 1062, and *Mannick v. Kaiser Found. Health Plan, Inc.* (N.D. Cal. June 9, 2006) No. 03-5905, 2006 WL 1626909, at *12, *15.

[3] See, e.g., *Molski v. Evergreen Dynasty Corp*. (9th Cir. 2007) 500 F.3d 1047, rehearing denied (2008) 521 F.3d 1215 (prolific filer claimed to have been injured in hundreds of ADA lawsuits involving inanimate objects).

be out of compliance because otherwise they would have made changes.[4] As the bill currently reads, these rote, cookie-cutter allegations could deprive a business of all SBRCP protections.

For the foregoing reasons, we respectfully **OPPOSE AB 649** but look forward to continuing discussions the author's office to craft a balanced solution that protects California's smallest businesses while still maintaining the incentive to expedite accessibility improvements.

If you have any questions or need further information, please contact: Chris Micheli at (916) 743-6802, cmicheli@snodgrassmicheli.com.

Sincerely,

Kyla Christoffersen Powell
President and Chief Executive Officer

On behalf of the below-listed organizations:

Civil Justice Association of California – Kyla Christoffersen Powell
Acclamation Insurance Management Services – Philip Vermeulen
Allied Managed Care – Philip Vermeulen
Associated General Contractors of California – Matthew Easley
Brea Chamber of Commerce – Tanya Huynh
Building Owners and Managers Association of California – Matthew Hargrove
California Business Properties Association – Matthew Hargrove
California Chamber of Commerce – Ashley Hoffman
California Hotel and Lodging Association – Lynn Mohrfeld
California Justice Alliance, APC – David Peters
California Retailers Association – Sarah Pollo Moo
Carlsbad Chamber of Commerce – Bret Schnazenbach
Coalition of Small and Disabled Veteran Businesses – Philip Vermeulen
Commercial Real Estate Development Association of California – Matthew Hargrove
Denco Family, Inc. – Ritu Portugal
Flasher Barricade Association – Philip Vermeulen
Greater Conejo Valley Chamber of Commerce – Danielle Borja
Greater High Desert Chamber of Commerce – Mark Creffield
Independent Hospitality Coalition – Eddie Navarrette
Long Beach Area Chamber of Commerce – Jeremy Harris
National Federation of Independent Business – Tim Taylor
Newport Beach Chamber of Commerce – Steve Rosansky
Oceanside Chamber of Commerce – Scott Ashton
Porterville Chamber of Commerce – Kristy Martin
Tulare Chamber of Commerce – Donnette Silva Carter
Wine Institute – Anna Ferrera

cc: Assemblymember Josh Lowenthal
Margie Estrada, Chief Counsel, Senate Judiciary Committee
Morgan Branch, Senate Republican Caucus

[4] See, e.g., *Modern Development v. Navigators Insurance* (2003) 111 Cal.App.4th 932).