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VIA FEDERAL EXPRESS

Chief Justice & Associate Justices
California Supreme Court
340 McAllister Court
San Francisco, California 94102

Re: Response to "*Request to Depublish Center For Bio Ethical Reform, Inc. v. The Irvine Company* (2019) 37 Cal.App.5th 97"

Dear Chief Justice & Associate Justices:

We write to respond to the letter submitted to this Court by Attorney Daniel Berko dated August 30, 2019. In his letter, Attorney Berko requests that "the court depublish" the case of *Center for Bio-Ethical Reform, Inc. v. The Irvine Co., LLC*, 37 Cal. App. 5th 97 (2019) (hereinafter referred to as "*CBR*"). Attorney Berko's request to depublish the entire case should be rejected.

As Attorney Berko correctly notes, "The main focus of the [*CBR*] decision is an examination of whether certain restrictions on political activities at shopping malls owned by the Irvine Company are constitutional." (Berko Ltr. at 2). Indeed, *CBR* is an important decision upholding the free speech rights of private citizens under Article I, § 2 of the California Constitution. *See CBR*, 37 Cal. App. 5th at 104-10. And the unique importance of this right under the California Constitution, *see, e.g., Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899, 910 (1979) (holding that this provision of the California Constitution grants broader rights than the First Amendment), strongly counsels against depublishing this decision.

Moreover, the *CBR* decision is exceptionally important because it properly rejected prior appellate court *dicta* that the trial court relied upon to improperly restrict the appellants' free speech rights. *See CBR*, 37 Cal. App. 5th at 108 ("Irrespective of whether the *H-CHH* [*Assocs. v. Citizens for Representative Gov't*, 193 Cal. App. 3d 1193 (Cal. Ct. App. 1987)] court's statement was in line with the law at the time it was decided more than three decades ago, recent United States Supreme Court precedent requires we reach a different conclusion.").

In sum, in light of the importance that this Court places upon the right to freedom of speech under the California Constitution and the importance of the *CBR* decision in upholding this right, it would be a mistake to depublish what is principally a decision involving the application of Article I, § 2 of the California Constitution.

In his letter, Attorney Berko does not appear to take issue with any of the above. Rather, his concern lies with the appellate court's denial of the appellants' request for civil damages under § 52 of the California Civil Code.

To begin, contrary to Attorney Berko's suggestion, there was nothing "frivolous" about the appellants' request for statutory damages. (Berko Ltr. at 2 [asserting that the "claims appears to have been frivolous"]). Understandably, Attorney Berko, who was not a counsel of record in this case, is likely not familiar with the entire record.

As we argued below, pursuant to § 52.1 of the California Civil Code, "Any individual whose exercise or enjoyment of rights secured by the [California Constitution] has been interfered with, or attempted to be interfered with, as described in subdivision (a)," may file a civil action seeking damages, including statutory damages under § 52 of the California Civil Code. Cal. Civ. Code § 52.1(b).

Subdivision (a) provides that "[i]f a person or persons, whether or not acting under color of law, interferes by *threat*, *intimidation*, or *coercion*, or attempts to interfere by *threat*, *intimidation*, or *coercion*, with the exercise or enjoyment by any individual or individuals of rights secured by the [California Constitution]," the person is liable. Cal. Civ. Code § 52.1(a) (emphasis added). And § 52 provides for statutory damages in the amount of $25,000. Cal. Civ. Code § 52(b)(2).

In its order denying The Irvine Company's motion to strike this claim, the trial court correctly stated:

> Civil Code § 52(b)(2) allows a private plaintiff to recover the civil penalty, and in *L.A. Co. Metro. Transp. Auth. v. Superior Court* (2004) 123 Cal. App. 4th 261, 276, the court held that the civil penalty in Civil Code § 52(b)(2) is somewhat compensatory in nature, thereby making it to some extent like statutory damages. *The court explained that the civil penalty would help ensure that the plaintiff will receive a minimum amount of compensation even if there are little or no actual damages sustained. Id.* The court also held that *the legislature wanted to encourage private parties to seek redress, and make it more economically attractive for them to sue. Id.* at 270-71. Thus, this court concludes that the legislative intent is consistent with allowing a plaintiff whose rights are violated under Civil Code §

52.1(b) to seek the $25,000 civil penalty set forth in Civil Code § 52(b)(2) as damages.

[AA, Vol. I, pp. 102-03] [emphasis added]. We believe that this is the correct application of the law, and we do not believe that Attorney Berko would take exception to it. Insofar as this Court would like to correct any contrary *statement* of the law set forth in the *CBR* decision, the appellants would not object. Moreover, as set forth below, the correct *application* of the law in light of the record on appeal compels the conclusion that the appellate court erred by not awarding the appellants statutory damages.

Clearly, there was a violation of the appellants' rights secured by the California Constitution, and in light of the public policy as expressed by the legislature in the statutory scheme at issue [*i.e.*, per the trial court, *supra*, "the civil penalty would help ensure that the plaintiff will receive a minimum amount of compensation even if there are little or no actual damages sustained" and "the legislature wanted to encourage private parties to seek redress, and make it more economically attractive for them to sue"], an award of statutory damages would be appropriate in this case.

Here, The Irvine Company, through its agents, threatened to treat the appellants as unlawful trespassers if they engaged in their constitutionally protected activity at its shopping centers, thereby interfering with, and in fact halting, the appellants' expressive activity. The Irvine Company is a powerful and wealthy company (*i.e.*, this is not a case involving a single, private individual or a small, powerless entity) that has a small army of private security at its disposal to enforce its rules (and it has deployed this security in response to the appellants' expressive activity at another location owned by the company). [RT, Vol. I, pp. 30:20-26 to 31:1-25; 109:1-26 to 112:1-16]. The Irvine Company's "code of conduct" makes it clear that the appellants were subject to arrest for violating the company's unlawful speech restrictions. [RT, Vol. I, pp. 31:26 to 33:1-3]. The Irvine Company's rules make clear that an "arrest" may be used to "remove" the speaker from its property. [AA, Vol. I, pp. 197, 226, 240, 301, 313]. In a letter to the appellants, The Irvine Company's counsel expressly stated that "[b]ased on the foregoing, we can only conclude that you intend to protest in violation of our rules. As such, we will understand your group's conduct to be trespassory in nature and the owner reserves the right to resort to its various remedies." [AA, Vol. I, pp. 198-99]. These remedies include, among others, physically removing the appellants by ejecting them from the premises or having them arrested, including a citizen's arrest. *See, e.g., Hamburg v. Wal-Mart Stores, Inc.*, 116 Cal. App. 4th 497, 508 (Cal. Ct. App. 2004) ("A protestor who refuses to comply with reasonable 'time, place and manner' restrictions can, in appropriate circumstances, be enjoined by the landowner from carrying out expressive activities, or even ejected from the premises.") (citing *In re Cox*, 3 Cal. 3d 205, 217 (1970)). And during the meeting held between the appellants and The Irvine Company's representatives in February 2015, the appellants were told that they would be subject to arrest if they engaged in their proposed expressive activity at the company's shopping centers. [RT, Vol. I, pp. 30:2-26 to 35:1-12; 65:8-26 to 68:1-10; 76:17-26; 82:6-9; 98:2-26 to 99:1-11; 103:17-26 to 105:1-4]. These threats are made all the more harmful and injurious by the fact that police officers "who take custody of a person arrested by a private person are not required to correctly adjudge whether the citizen who made the arrest was justified in doing so." *Hamburg*, 116 Cal. App. 4th at 511-12.

In sum, it was reasonable (and correct, not "frivolous") for the appellants to fear that they would be physically removed, against their will, from The Irvine Company's shopping centers for

engaging in their constitutionally protected speech activity, and the appellants reasonably (and correctly) understood that The Irvine Company, a powerful and influential organization in the community, had the ability to carry out its threat.

In conclusion, The Irvine Company's threats were an effort to intimidate, coerce, and ultimately prevent (successfully) the appellants from engaging in their protected speech activity in direct violation of § 52.1. At a minimum, they were an "*attempt to interfere*" with the appellants' constitutional rights via "threat, intimidation, or coercion." As a result, The Irvine Company should be held liable for statutory damages.

In the final analysis, the appellate court was incorrect as a matter of law and fact when it held that the appellants were not entitled to an award of statutory penalties under § 52.1. However, the main focus of the appellate court's decision—the conclusion that The Irvine Company violated the appellants' free speech rights secured by the California Constitution—should not be disturbed and should remain as a published decision.

Sincerely,

Robert J. Muise, Esq.
Counsel for Appellants

cc: See attached proof of service.