NATIONAL HOUSING LAW PROJECT
advancing housing justice

614 Grand Avenue, Ste. 320
Oakland, CA 94610
Telephone: 510-251-9400
Fax: 510-451-2300
nhlp@nhlp.org
www.nhlp.org

June 3, 2010

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

Re: *Elisheba Sabi v. Donald T. Sterling,*
No. B 205279 (183 Cal. App. 4th 916), Los Angeles Superior Court No. BC313345

REQUEST TO PARTIALLY DEPUBLISH OPINION CERTIFIED FOR PUBLICATION

Dear Chief Justice George and Associate Justices:

Pursuant to Rule 8.1125 of the California Rules of Court, the law firm of Brancart and Brancart, the National Housing Law Project ("NHLP"), Legal Aid Foundation of Los Angeles ("LAFLA"), and the law firm of McDermott Will & Emery LLP, respectfully submit this letter requesting depublication of Parts 5 and 6 of the opinion of the Court of Appeal for the Second Appellate District in *Elisheba Sabi v. Donald T. Sterling*, 183 Cal. App. 4th 916 (Cal. Ct. App. 2010)(Case No. B 205279)("*Sabi*"), certified for publication on April 8, 2010. A copy of the opinion is enclosed.

A. Statement of Interests

NHLP is a law and advocacy center established in 1968. For over 40 years, NHLP has been dedicated to advancing housing justice for the poor by using the power of the law to increase and preserve the supply of decent affordable housing, to improve existing housing conditions, including physical conditions and management practices, to expand and enforce low-income tenants' and homeowners' rights, and to increase access to housing for marginalized groups, such as the disabled. LAFLA is California's oldest and largest non-profit legal services organization and has actively represented low-income tenants for decades. The organization's primary constituencies are disabled persons, seniors, minorities, and immigrant families who LAFLA frequently represents in unlawful detainer actions as well as affirmative actions for wrongful eviction, housing discrimination, and uninhabitable conditions. McDermott Will & Emery is a premier international law firm with a diversified business practice with a strong commitment to pro bono representation on housing matters such as the instant case. Brancart & Brancart is a law firm specializing in fair housing enforcement. Our organizations represented the Appellant in this case. All of our organizations submit this request for depublication of Parts 5 and 6 of the *Sabi* decision because it will significantly reduce the rights of disabled persons to enforce their fair housing rights under California law.

B. Why *Sabi v. Sterling* Should be Depublished

Congress added disability as a protected class to the Fair Housing Act in order to make "a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream."[1] A key component of this commitment was giving disabled persons the right to a reasonable accommodation, i.e. a change in a rule, policy, practice or procedure that may be necessary to afford them an equal opportunity to use and enjoy a dwelling. 42 U.S.C. § 3604(b). A housing provider must grant a reasonable accommodation if it is both necessary and reasonable.[2] The right to a reasonable accommodation has been vital in fulfilling the commitment to ensuring that people with disabilities can live in the community, and not in institutional settings. For example, many disabled persons are able to remain in their homes because they are allowed the use of an assistive animal, a live-in aide, or an accessible parking spot. Without these accommodations, many disabled people would not be able to live in traditional housing units.

The *Sabi* decision threatens to unsettle California fair housing law, intended to provide at least as much protection as the federal Fair Housing Act, as it relates to the rights of disabled persons to obtain a reasonable accommodation to a change in a policy, practice, or procedure that prevents them from obtaining full use and enjoyment of housing. In *Sabi*, one of the issues addressed by the court of appeal was whether the Appellant's claim under California Disabled Persons' Act ("DPA"), Civil Code §54.1, was improperly dismissed by the trial court. As with California's Fair Employment and Housing Act ("FEHA"), Government Code §12927(c)(1), the DPA requires that a housing provider grant a reasonable accommodation request if it is reasonable and necessary for a disabled person to use and enjoy her home. This is a highly fact-specific inquiry. Sections 5 and 6 of the Opinion hold that in order for a reasonable accommodation to be necessary, a disabled person must be deprived of <u>*all*</u> use and enjoyment of their home – that the tenant would face eviction or denial of admission if not given the accommodation. Specifically, the court stated:

> It is not disputed that appellant resides in the apartment she rents from respondents. In fact, it affirmatively appears from the record that appellant and her family desisted from relocating elsewhere because the accommodations she has suit her needs. In other words, there is no interference with appellant's use and enjoyment of the premises that she is renting.

Sabi, slip op. at 28.

While the specific accommodation at issue in *Sabi* involved a landlord's decision to refuse a Section 8 housing choice voucher as a reasonable accommodation for the Appellant's disability, the decision's broad reasoning will negatively affect countless in-place tenants. Existing tenants who have difficulty performing daily life activities but do not otherwise face eviction without an accommodation would suffer because of this ruling. Not only does the court's analysis diminish California's commitment to ensuring that people with disabilities can live independently in the community,[3] but it also it conflicts with settled federal and state law. Because the ruling creates a substantial divide

[1] H.R.REP. NO. 100-711, at 18 (1988), as reprinted in 1988 U.S.C.C.A.N. 2173, 2179.
[2] The *Sabi* Opinion focuses on the definition of necessity as it relates to a disabled person's "use and enjoyment" of their home. In addition to being "necessary," a reasonable accommodation must be "reasonable," which means that the accommodation does not cause the housing provider an undue burden or fundamentally alter the nature of the program.
[3] *Olmstead v. L. C.* (98-536) 527 U.S. 581 (1999)(finding that unnecessary institutionalization of persons with disabilities constitutes *per se* discrimination under Title II of the Americans with Disabilities Act).

between state and federal fair housing law, it threatens California's substantial equivalency certification, which allows the state to receive millions of dollars annually to enforce fair housing law. For these reasons, explained in detail below, we urge the California Supreme Court to depublish Sections 5 and 6 of the *Sabi* decision.

1. California Fair Housing Law Must Provide at Least the Same Protections as Federal Law

When a court analyzes California fair housing law, it must look to the federal fair housing law for the base level of protection it affords to suspect classes. California Government Code § 12955.6 provides:

> Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 *et seq.*), or state law relating to fair employment and housing as it existed prior to the effective date of this section. Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.

Thus, FEHA must provide, at a minimum, the same protections as the Fair Housing Amendments Act ("FHAA"). *See also, Brown v. Smith*, 55 Cal. App. 4th 767, 780 (1997) ("FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination."); *Auburn Woods I Homeowners Association v. Fair Employment and Housing Commission*, 121 Cal. App. 4th 1578, 1590-1 (2004) ("*Auburn Woods*") (explaining that "the FHA provides a minimum level of protection that FEHA may exceed"). To be valid, state fair housing laws, such as the DPA, must provide the same level of protection as the FHAA. Indeed, the *Sabi* court acknowledges that the DPA provision is substantially identical to the FHAA reasonable accommodation provision (42 U.S.C. § 3604(f)(3)(B)) and the FEHA provision (Cal. Gov. Code § 12927(c)(1)). Despite this requirement, the *Sabi* court articulated a standard for adjudicating reasonable accommodation requests that radically deviates from both California and federal law.

2. The Opinion Conflicts With Federal Law Under the FHAA

The reasoning of the *Sabi* court's decision on the DPA claim threatens the validity of state law claims brought under the DPA and FEHA that are clearly viable under the FHAA. Federal law sets out a well-established standard for determining whether a reasonable accommodation is necessary. An accommodation must "affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995).[4]

Importantly, the standard articulated in *Bronk* does not require that an applicant or occupant of a housing unit be prevented physical access to or face loss of the housing in order to receive an accommodation. In fact, the United States Court of Appeals for the Ninth Circuit specifically rejected the argument that the refusal to accommodate must "deny" or "prevent" a person from residing in a unit. *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004) (finding that "interference with 'use and enjoyment;" satisfies the necessity standard). Not a single case in any jurisdiction holds that the

[4] *Bronk* remains one of the leading cases addressing the necessity standard with regard to reasonable accommodation. In fact, *Bronk* has been cited in over 100 cases nationwide.

reasonable accommodation concept affords protection from eviction only. In fact, a number of courts have held that a landlord violated the FHAA by refusing to provide a particular accommodation to an existing tenant who was not facing eviction. *See e.g., United States v. California Mobile Home Park Mgmt. Co*., 29 F.3d 1413 (9th Cir. 1994) (holding that landlord violated FHAA by refusing to accommodate its financial policies for an existing tenant); *Freeland v. Sisao*, 2008 U.S. Dist. LEXIS 26184 (E.D.N.Y. Apr. 1, 2008)(holding that existing tenant stated claim under FHAA when landlord refused to accept Section 8 voucher as reasonable accommodation for tenant's disability); *Shapiro v. Cadman Tower, Inc*., 51 F.3d 328, 333-6 (2d Cir. 1995)(holding that reasonable accommodation covers change in parking rules for existing tenant); *Samuelson* v. *Mid-Atlantic Realty Co., Inc.*, 947 F. Supp. 756, 759-62 (D. Del. 1996) (holding that reasonable accommodation covers changing date rent is due for *existing* tenant); and, *Bronk, supra* (holding *existing* tenant entitled to support animal as reasonable accommodation); *Compare Giebeler v. M&B Assocs. 343 F.3d 1143* (9th Cir. 2003) (holding that landlord violated FHAA by refusing to accommodate its financial policies for a *prospective* tenant). The premise of this standard is simple – if a housing provider's policy, practice, or procedure, makes it difficult for a person with a disability to engage in daily life activities and live independently, and, if the request for accommodation is reasonable, it must be granted.

The *Sabi* court radically broke with precedent by articulating a new and less protective standard interpreting the reasonable accommodation provisions of the DPA and FEHA. In Part 5 of the decision, the court stated that in order for a tenant to prevail on an accommodation claim, she must demonstrate that "but for the accommodation, she is likely to be denied an equal opportunity to enjoy the premises," while defining "use and enjoyment" under the DPA and FEHA narrowly to mean only the actual physical use or possession of a housing unit. *Sabi*, Slip. Op. at 29. Thus, the court found that because "[i]t is not disputed that appellant resides in the apartment she rents from respondents . . . [there is] no interference with appellant's use and enjoyment of the premises that she is renting." *Id*. at 28.

Although the court claims that it did not directly answer the question of whether the DPA is limited to cases involving physical access, its analysis and conclusion have this effect. In Part 6 of the decision, at pages 30-33, the *Sabi* court used the same faulty reasoning it used in Part 5. As noted earlier, this standard would illegally dismiss a number of accommodation requests. In addition to the accommodation requested by Mrs. Sabi (which was the landlord's acceptance of a Section 8 housing choice voucher), other examples include requests by existing tenants for an exception to a no-pet policy to allow an assistive animal, for an accessible parking space, and to add a family member to their lease. Restricting accommodations to actual physical use or possession of a housing unit directly conflicts with *Bronk* and its progeny, which only require an affirmative enhancement in the disabled plaintiff's life by ameliorating the effects of the disability. Following *Sabi* will lead to the refusal of all accommodations with the exception of those that result in denial of admission or lead to outright eviction.

3. <u>The Opinion Conflicts with FEHA and the Holding in *Auburn Woods*</u>

The *Sabi* court's narrow reading of the protections afforded by the reasonable accommodation provisions of the DPA and FEHA is untenably in conflict with FEHA and *Auburn Woods*. The reasonable accommodation concept guaranteed by FEHA, which requires a liberal construction (see Cal. Gov. Code §§12920), was closely examined in by the Third Appellate District in *Auburn Woods*. In that case, the court upheld a decision by the Fair Employment and Housing Commission ("FEHC") finding that the housing association unlawfully discriminated against disabled condominium owners by

refusing to make a reasonable accommodation to allow them to keep a companion dog in violation of Gov. Code §12927(c)(1). The plaintiffs in that case were existing occupants of the condominium at the time of their request. The holding of *Auburn Woods* rejects the argument and reasoning employed by the *Sabi* court that "use and enjoyment" of housing is restricted to actual possession:

> [The plaintiffs] presented evidence that their disabilities substantially limited their use and enjoyment of the condominium, and having a companion dog improved that situation. The fact that Jayne was capable of working and was sometimes able to function well at home does not mean that her disabilities did not interfere with the use and enjoyment of her home. A substantial limitation on use and enjoyment does not require an individual to be incapable of any use and enjoyment of her home.

Auburn Woods at 1595.

Auburn Woods, as required by Government Code § 12955.6, follows federal decisional law interpreting the reasonable accommodation provisions of the FHAA and has guided the reasonable accommodation analysis under California law for a number of years. The *Sabi* Opinion is in direct conflict with the holding in *Auburn Woods*. While the opinions of two appellate courts are not binding on each other,[5] the opinion of each is binding on all state trial courts,[6] thereby creating confusion for trial courts as to which precedent to follow. Because *Auburn Woods* aligns with settled federal decisional law, depublication of Sections 5 and 6 of the *Sabi* decision would eliminate such confusion.

4. Impact of the *Sabi* Opinion

Approximately 19% of non-institutionalized Californians[7] and 46% of tenant-based Section 8 voucher holders in the state have a disability.[8] Future application of Parts 5 and 6 of the *Sabi* Opinion will have two important negative consequences: 1) an increase in denials of reasonable accommodations under California law that would otherwise be valid under federal law; and 2) the loss of California's substantial equivalency certification.

The Department of Housing and Urban Development has the authority to certify a state or local fair housing agency with substantial equivalency. This certification means that a state "enforces a law that provides substantive rights, procedures, remedies, and judicial review provisions that are substantially equivalent to the federal Fair Housing Act." 42 U.S.C. § 3610(f)(3); 24 C.F.R. Part 115. Importantly, a certification provides the state Department of Fair Employment and Housing ("DFEH") with millions of dollars in funding to carry out its fair housing enforcement duties – vital funds given California's current budget crisis. Thus, DFEH is responsible for much of the fair housing enforcement in the state. The *Sabi* court's failure to follow precedent jeopardizes the state's certification, which is renewed every five years. Without the certification and the funding that it provides, the DFEH would

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[5] *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315 n.4 (1987); *Marriage of Shaban*, 88 Cal. App. 4th 398, 409 (2001).
[6] *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (1962); *Cuccia v. Superior Court*, 153 Cal. App. 4th 347, 353-54 (2007).
[7] U.S. CENSUS BUREAU, American Community Survey 2006-2008, http://factfinder.census.gov/servlet/ACSSAFFFacts?_event=Search&geo_id=&_geoContext=&_street=&_county=&_cityTown=&_state=04000US06&_zip=&_lang=en&_sse=on&pctxt=fph&pgsl=010.
[8] DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, HUD Resident Characteristics Report (2010), https://pic.hud.gov/pic/RCRPublic/rcrmain.asp.

have to drastically reduce its enforcement of fair housing rights, not just for people with disabilities, but for all protected classes.

Armed with the *Sabi* court's reasonable accommodation analysis, landlords and trial courts will deny reasonable accommodation requests and uphold such denials under California law when denials would not cause tenants to lose physical access to their apartments. While federal law will still apply, the ability to enforce state fair housing rights will be significantly diminished. At best, confusion will reign when assessing the necessity of reasonable accommodation requests under California law. At worst, housing providers will deny these requests, and tenants with disabilities who do not have access to experienced counsel will be forced to choose between leaving their home or remaining and struggling to complete daily life activities.

5. Conclusion

For all of these reasons, Brancart and Brancart, NHLP, LAFLA, and McDermott Will & Emery LLP respectfully request that this Court order Parts 5 and 6 of the *Sabi* decision depublished.

Respectfully submitted,

Catherine Bishop (SBN 59150)
Navneet Grewal (SBN 251930)
National Housing Law Project

Enclosure

cc: See attached Service List