No. S249248

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT E. WHITE,

Plaintiff and Petitioner

v.

SQUARE, INC.,

Defendant and Respondent.

On Certification from the U.S. Court of Appeals for the Ninth Circuit
No. 16-17137

U.S. District Court for the Northern District of California
No. 3:15-cv-04539 JST

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Plaintiff Robert E. White ("White") candidly admitted in the Ninth Circuit that "he suffered no tangible, concrete injury" from the terms of service that he challenges on the basis of "occupational discrimination." (Square's Motion and Request for Judicial Notice, RJN003.) That concession only makes sense, for it is undisputed that White never signed up for the payment card processing services offered by Defendant/Respondent Square, Inc. ("Square"), and never attempted to process a transaction through that service. To the contrary, White acknowledged that he merely visited Square's website and reviewed its terms of service, "elect[ing] not to" agree to those terms. (CA9 Excerpts of Record ("ER") 141; Second Amended Complaint ("SAC") ¶14.) The upshot is that White was never a patron or customer of Square, and was never actually subjected to the terms that he claims "discriminate" against him as a bankruptcy lawyer. (*Ibid.*) Despite this admitted lack of any concrete injury, White insists the Unruh Civil Rights Act permits him not only to sue Square for "occupational discrimination" (*ibid.*), but also to represent a class of plaintiffs who similarly were never subjected to Square's terms of service. Indeed, because these claims rest on the notion that merely *viewing* Square's terms online constitutes discrimination, White maintains the class is entitled to statutory penalties, in $4,000 increments, for thousands of purported violations—"not less than *one billion in minimum statutory liability*." (ER 144; SAC ¶28, italics added.)

If these allegations sufficed for standing, they would portend sweeping Unruh Act class actions, challenging online terms of service accessible by millions of people on the basis of hypothetical discriminatory injuries. But that is not the law. This Court made clear in *Angelucci v. Century Supper Club* that "a plaintiff cannot sue for discrimination in the

abstract, but must actually suffer the discriminatory conduct." ((2007) 41 Cal.4th 160, 175.) A discriminatory injury, this Court explained, "occurs when the discriminatory policy is *applied* to the plaintiff—that is, at the time the plaintiff patronizes the business establishment." (*Ibid.*) Here, White contends that "the intangible injury he suffered would be *the inherent harm of discrimination in and of itself,*" and that it is enough he "was *deterred* from signing up with Square when he learned of the prohibition." (RJN002-003, RJN007, italics added.) That is precisely the sort of abstract injury this Court has rejected, for White's claim is grounded in the notion that he *would have* suffered discrimination *if* he had actually signed up for Square's service. On White's theory, it was his awareness and review of the terms "in and of itself" that "deterred him" from subscribing. (*Ibid.*) Yet, those allegations show, at most, that White may potentially face the alleged discrimination, not that he "actually suffer[ed] the [alleged] discrimination." (Cf. *Angelucci*, *supra*, 41 Cal.4th at p. 175.)

The deficiencies in White's allegations and theory of discriminatory injury confirm that his answers to the Ninth Circuit's Certified Questions are flatly wrong, and risk drawing the courts into uncharted standing territory. Blackletter principles of standing, the text of the Unruh Act, and decades of precedent applying the statute all make clear that the answer to the first Question is *no*: a plaintiff lacks "statutory standing to bring a claim under the Unruh Act" if the plaintiff alleges only that he "visit[ed] a business's website with the intent of using its services, encounter[ed] terms and conditions that [purportedly] deny the plaintiff full and equal access to its services, and then depart[ed] without entering into an agreement with the service provider." (CA9 Opinion ("Op.") 3-4.) That is because the Act limits private plaintiff standing in damages actions to "any person *denied* [equal] rights," and in injunction actions to "any person *aggrieved* by the

conduct" interfering with public accommodations rights. (Civ. Code § 52, subds. (a), (c), italics added.) This language requires that the plaintiff show he was "actually denied full and equal treatment by a business establishment," and that he personally was a "victim[]" of discrimination. (*Angelucci*, *supra*, 41 Cal.4th at p. 175.)

A plaintiff who alleges that he subjectively intended to patronize a business, but merely "encounter[ed]" its terms of service ("TOS") online (Op. 4) has not shown he was actually and personally "aggrieved" or "denied [equal] rights" by the TOS. It follows that the answer to the Circuit's second, related Certified Question is *yes*: to state a cognizable Unruh Act injury, the plaintiff must show "some further interaction with the business or its website" (*ibid.*) that actually subjected him to the TOS's allegedly discriminatory policy. Although the facts will vary, a plaintiff will generally meet that standard by showing that he patronized the defendant's business by subscribing to, or signing up for, its service, or by engaging in some other transaction making the TOS applicable to him. Failing that, the plaintiff must show that the defendant applied its discriminatory policy on a particular occasion to prevent him *personally* from becoming a patron in the first place.

While e-commerce has revolutionized the marketplace and made the Internet a common medium for businesses and consumers, this Court need not, and should not, devise special standing rules for Unruh Act claims arising from e-commerce. The wide variation in website and application design would make particularized e-commerce rules unworkable. And the general rule requiring a plaintiff to show the defendant individually discriminated against him as a patron availing himself of goods and services, or in preventing him from becoming a patron, is firmly grounded

in principles developed in longstanding brick-and-mortar cases. In particular, the cases reflect three principles defining an Unruh Act injury:

First, a plaintiff "who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing." (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1133.) Rather, the plaintiff must show he "present[ed] himself or herself to a business establishment, and [was] personally discriminated against." (*Id.* at pp. 1133-1134.) In other words, the plaintiff must show not only that he was aware of the defendant's discriminatory policy, but also that the business applied the policy to him personally as a patron or to bar him from becoming a patron.

Second, an Unruh Act plaintiff may not rest on a hypothetical or potential injury, but must establish concrete discrimination on a particular occasion. Courts consistently have recognized that the plaintiff must demonstrate a discriminatory injury that is "concrete and actual rather than conjectural or hypothetical." (*Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 417.) The plaintiff must show more than the possibility that he might suffer discrimination in future transactions with the defendant; he must show that he was "actually denied equal access on a particular occasion." (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1224.) Nor is it enough that a plaintiff subjectively sought to patronize the business and was "deterred" by the mere existence of the policy. (RJN002.) The Unruh Act requires an actual act of discrimination, not an anticipated one, and there would be no practical way of distinguishing injured plaintiffs from uninjured people who visited the website if subjective deterrence alone were enough.

This leads to a third key principle: consistent with general standing rules, the plaintiff must point to an injury personal to him, distinct from the generalized interests of third parties or the general public. The plaintiff's claim must rest on a "special interest that is greater than the interest of the public at large." (*Surrey*, *supra*, 168 Cal.App.4th at p. 417.) Because the Unruh Act's right to equal accommodations is "individual [in] nature," (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 34), it neither permits plaintiffs to assert injuries suffered by others, nor provides a judicial remedy for "plaintiffs whose civil rights ha[ve] not been personally violated" (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1384).

These principles collectively refute White's contention that it is enough for a plaintiff to "encounter" TOS online while "visit[ing] a business's website with the intent of using its services." (Opening Brief ("POB") 20 [quoting Op. 3-4].) Such a showing establishes, at most, that the plaintiff "learned about" the TOS (*Osborne*, *supra*, 1 Cal.App.5th at p. 1133), an alleged harm that is "abstract" and falls short of being actually "subjected to" the challenged terms (*Angelucci*, *supra*, 41 Cal.4th at p. 175). Any "injury" flowing from viewing the TOS does not establish a "personal" injury sufficiently distinct from the interests of the general public or third parties to support standing (*Osborne*, *supra*, 1 Cal.App.5th at p. 1134).

The "further" interaction giving rise to a discriminatory injury in this situation will depend on the circumstances, and Square agrees that a "bright-line" rule is neither necessary nor practicable here. (Cf. POB 48-62.) But a plaintiff who, in contrast to White, alleges facts showing he subscribed to or signed up for the defendant's business, or engaged in an online transaction with it, will generally establish that any discriminatory

policy in the TOS was "applied to [him]" at the time he "patronize[d] the business." (Cf. *Angelucci*, *supra*, 41 Cal.4th at p. 175.) The same is true of a plaintiff who, while not a patron or customer, alleges facts showing he attempted to patronize the business, but was "personally discriminated against" when the defendant applied its policy to thwart him. (Cf. *Osborne*, *supra*, 1 Cal.App.5th at pp. 1133-1134.)

While White touts the "merits" of his claim as a factor supporting standing (POB 24), his allegations and theory of discrimination underscore the importance of requiring that Internet-based claims, like brick-and-mortar claims, be backed by a showing of concrete efforts to patronize and concrete discrimination. This is not a case where the plaintiff has asserted discrimination on the basis of a class expressly protected by the Unruh Act (such as race, gender, or sexual orientation) or recognized by this Court's precedents. Rather, White asserts that Square's Seller Agreement effects "occupational discrimination" against him and other "bankruptcy attorneys" (POB 8), a novel claim that would require the courts to assess whether a person's occupation as a bankruptcy attorney is comparable to the "personal characteristics" garnering the Act's protection, and the extent to which it implicates a business's legitimate interests "in maintaining order, complying with legal requirements, and protecting a business reputation or investment." (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162.) That is a complex and fact-bound issue, which is why, contrary to White's suggestion, the courts have reached different results on occupation discrimination claims. Yet, White would have the courts adjudicate the theory on allegations that do not establish a discriminatory injury—and, indeed, do not clearly establish "occupational discrimination" *at all*. That result runs headlong into this Court's standing precedents, which apply the justiciability requirements like standing to

ensure "that the issues [presented] will be framed with sufficient definiteness to enable the court to ... dispos[e] of the controversy." (*Pac. Legal Found. v. Cal. Coastal Comm'n* (1982) 33 Cal.3d 158, 170.)

If all this were not enough, White's proposed subjective awareness and deterrence rule would fundamentally distort both the Unruh Act and standing law. It would flout the Legislature's decision to limit private actions to people "aggrieved" or "denied [equal] rights," and upset its carefully-drawn remedial scheme. That scheme allows only the Attorney General, District Attorneys, and City Attorneys to bring enforcement suits to redress the "inherent harm of discrimination in and of itself" that lies at the core of White's claim. (RJN007.) It would require courts not only to adjudicate hypothetical disputes presented by individual plaintiffs, but also to confront broad-based class actions that seek upwards of "billion[s]" in penalties (ER 144; SAC ¶28) on behalf of class members who suffered no concrete discriminatory injury. The effect of White's rule would be to create a special e-commerce rule of Unruh Act standing, inviting individual and class action suits brought on behalf of people who never were patrons of the defendant's business, and whose attempt to patronize it consists of mere web-browsing activities that could just as well be taken by the general public. This Court should reject it.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Square is based in San Francisco. (ER 138; SAC ¶2; Op. 4.) It provides Internet-based services that, among other things, allow merchants (referred to as "sellers") to process card payments without opening up a merchant account directly with Visa, Master Card, or other payment card companies. (ER 138; SAC ¶5.) Using Square's proprietary

card readers and software applications, sellers can convert their smart phones, tablets, and computers into payment card processors, submitting charges, receiving payments, and transmitting receipts to customers, all electronically. The service has gained enormous popularity, and sellers that use Square now number in the millions.

To use Square's service, a seller must sign up for an account and agree to Square's Terms of Service and Seller Agreement, among other written agreements.[1] A seller may sign up by visiting Square's website and agreeing to Square's Terms of Service. (See Op. 4-5.) Square does not charge a subscription or admission fee to sign up for its managed payment services; rather, it charges a flat fee and/or fixed percentage for each payment card transaction. (*Ibid.*)

The Seller Agreement imposes certain restrictions on the use of Square's payment processing service. Among other things, it bars sellers from "accept[ing] payments in connection with the following businesses or business activities," and lists a variety of prohibited business transactions. (ER 139; SAC ¶6.) These range from "(6) infomercial sales" and "(11) rebate based businesses" to "(14) betting ...," "(22) sales of [] firearms," and "(27) escort services." (*Ibid.*) At issue here is Square's restriction on using its service in connection with payments to "(28) bankruptcy attorneys or collection agencies engaged in the collection of debt." (*Ibid.*)

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[1] While there have been changes to Square's website since the time White filed suit, Square here adheres to White's operative allegations in the SAC. Square accordingly refers to the relevant agreement as the "Seller Agreement," which was its title at the time White filed suit and the title used in the SAC (ER 138; SAC ¶5); that agreement is now known as "Payment Terms."

Plaintiff Robert White alleges he is a bankruptcy attorney who sought to use Square's service but "refused" to agree to its Seller Agreement or sign up for an account "because he intended to use the service for his bankruptcy practice." (Op. 5.) According to the operative Complaint, White initially "learned, by word of mouth," that Square's Agreement would not "allow him to use [Square's] services to accept payments in connection with his business of being a bankruptcy attorney." (ER 140; SAC ¶8.) This purportedly left White in "dismay and frustration," leading him to "form[] the strong, definite and specific intent to have [his] Bankruptcy Law Firm become ... a [Square] subscriber without ... ever once submitting itself to [Square's policy]." (ER 140; SAC ¶¶9-10.) White alleges that he "first" obtained and reviewed the record in another class action lawsuit brought by his counsel, *shierkatz RLLP v. Square, Inc.* (N.D. Cal.) No. 3:15-cv-02202-JST, and then "personally visit[ed] [the] Square Website" (ER 140-141; SAC ¶¶11-12).

White interpreted the Seller Agreement as a "refusal of service to [his] Bankruptcy Law Firm in any situation where [it] might wish to use [Square's] services to facilitate ... White's occupation as a bankruptcy lawyer." (ER 141-142; SAC ¶¶13-14.) According to White, he "elect[ed] not to click the link marked 'Continue' on [the] Square Website (and thereby enter into the Square Seller Agreement)" for two reasons. (*Ibid.*) First, he allegedly believed agreeing to the Agreement would have been "inconsistent with [his] Unruh Law civil rights to be free from occupational discrimination." (ER 141; SAC ¶14.) Second, he contends that based upon his review of the *shierkatz* record, he believed agreeing to the Agreement "would have predictably subjected Bankruptcy Law Firm to a subsequent

discriminatory termination." (*Ibid.*)[2] In White's view, such termination would have "caused [his] Bankruptcy Law Firm to suffer actual injury by virtue of the resulting damage to its professional reputation and commercial credit." (ER 142; SAC ¶14.)

Instead, White brought a putative class action lawsuit in October 2015 against Square in federal District Court, alleging that its Seller Agreement constituted occupation discrimination against bankruptcy attorneys under the Unruh Act. (ER 197-202; Complaint; Op. 5-6.) According to White, he began "continuously visiting the [Square] website beginning on January 1, 2016, and on each calendar day thereafter," by which he claims to have been "refused serviced by [Square] on each such past, present or future calendar day." (ER 142; SAC ¶18.) White also alleges that he "communicat[ed] a formal demand" on Square "that it now immediately and permanently agree to cease and desist from violating Robert White's and Class' Unruh Law civil rights to be free from the occupational discrimination." (ER 143; SAC ¶20.)

II. THE TRIAL COURT PROCEEDINGS AND WHITE'S STANDING ALLEGATIONS

A. The Dismissal

White's initial complaints alleged only that he became aware of Square's prohibited transactions provision by reviewing case filings in

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[2] The *shierkatz* court granted Square's motion to compel arbitration based on the Square Seller Agreement, noting the "liberal federal policy favoring arbitration." (*Shierkatz Rllp v. Square, Inc.* (N.D. Cal., Dec. 17, 2015, No. 15-02202) 2015 WL 9258082, at *4 [citing *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1745].) California likewise has a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.)

shierkatz and then "checking to see that [the provision] remained unchanged." (ER 193, 200; First Amended Complaint ¶9.) On Square's motion, the District Court (the Honorable Jon S. Tigar) dismissed the First Amended Complaint for lack of statutory standing. (ER 151-158.)

White then filed his SAC and alleged, for the first time, that he manifested an intent to subscribe by "personally visiting [the] Square website"; refusing to "enter[] into the Square Seller Agreement"; "continuously visiting" the website; and "communicating a formal demand" on Square. (ER 142-43; SAC ¶¶16-20.) White sought damages, as well as injunctive and declaratory relief. (ER 146-148; SAC ¶¶36-40.) White also sought to represent a class consisting of (i) "all Persons" who "ever learned that they are the subject of [the Seller Agreement's restrictions]," formed the "specific intent to become a [Square] subscriber," and then "attempted to implement that specific intent" by undertaking acts "***short*** of their clicking the link marked 'Continue' on [the] Square Website and thereby entering into [the] Square Seller Agreement"; and (ii) "any Persons" who entered into the Square Seller Agreement "and who have subsequently been terminated ... based on their violation of [the Section's prohibitions]." (ER 143-44; SAC ¶23, original emphasis.) White estimated that "there are several hundred thousand Class members," and that his claims entail "not less than one billion dollars in minimum statutory liability." (ER 144; SAC ¶¶27-28.)

The District Court dismissed the SAC, again for lack of Unruh Act standing. (ER 14-21.) Noting the Court's previous Order determining that White "did not 'allege[] that he attempted to subscribe to Square's services,'" Judge Tigar explained that White's SAC "does not remedy" this standing deficiency. (ER 18.) Judge Tigar explained that "[w]hile the SAC adds additional detail regarding the various actions White undertook," it

"still fails to allege that White 'tender[ed] the purchase price for [Square's] services or products.'" (*Ibid.* [quoting *Surrey*, *supra*, 168 Cal.App.4th at p. 416].) Because "White has not even attempted to obtain services from Square," and because "no ... refusal of service has occurred yet," White's allegations failed to demonstrate standing. (ER 20.)

B. The Motions for Reconsideration and for New Trial

After dismissal of the SAC, White filed a motion for a "new trial," arguing that "new evidence" showed he could not have signed up for Square's services because he did not intend to comply with the prohibited transactions provision. (ER 69.) White submitted a letter from Square's counsel to the plaintiff in the *shierkatz* litigation, which White claimed constituted a "threat of retaliation by Square should White even attempt to click [the 'Continue' tab]." (ER 70.) This purported threat, he argued, left him in a "Catch-22" because it forced him to "deny he practices his legitimate occupation" in order to sign up. (ER 70-71.)

The *shierkatz* plaintiff had previously signed up for Square's service, and was terminated by Square for violating its TOS. (ER 54; *Shierkatz*, *supra*, 2015 WL 9258082 at *1.) In the letter, counsel for Square responded to correspondence in which the *shierkatz* plaintiff expressed an "inten[t] to sign up again to become a subscriber to Square's payment processing services, on the theory that Square's terms of services have supposedly been revised to allow payment processing for bankruptcy legal services." (ER 54.) Square's counsel clarified that "[t]here has been no such revision." (*Ibid.*) The letter cautioned that "[y]our client's signing up for Square's service with the intent to violate the applicable terms of service would be fraudulent." (*Ibid.*)

The District Court denied the motion, rejecting the notion that the letter forced White to do "something illegal" to gain standing—*viz.*, to lie about his intent in signing up for Square. (ER 8.) This argument "mischaracterizes the facts," Judge Tigar explained, because Square was "not 'demanding' anything illegal," and was "not making any demand on White, as the letter addresses the [*shierkatz RLLP* litigation]." (*Ibid.*)

III. THE COURT OF APPEAL DECISION AND THE CERTIFIED QUESTIONS

White appealed, then immediately filed a motion in the Ninth Circuit questioning whether it had Article III jurisdiction and contending he "had not suffered a concrete and particularized injury." (Op. 6.) After briefing and argument, the Ninth Circuit issued a published Opinion holding that White had Article III standing, but certifying to this Court the following questions of California law raised by the appeal:

> Does a plaintiff suffer discriminatory conduct, and thus have statutory standing to bring a claim under the Unruh Act, when the plaintiff visits a business's website with the intent of using its services, encounters terms and conditions that deny the plaintiff full and equal access to its services, and then departs without entering into an agreement with the service provider? Alternatively, does the plaintiff have to engage in some further interaction with the business and its website before the plaintiff will be deemed to have been denied full and equal treatment by the business?

(*Id.* at 3-4.) The Ninth Circuit explained that it needed "guidance" in "applying the rules for statutory standing in the internet context." (*Id.* at 3.) The Circuit found "tension between California appellate courts" on this score, with some cases "indicat[ing] that a person *must* subscribe to a business's services or purchase its products to have standing" (*id.* at 15 [citing *Surrey*, *supra*, 168 Cal.App.4th at p. 420]), and others suggesting it is enough that plaintiffs "present themselves to a business with the intent of

using its products or services," and that "the business actually deny them equal access" (*ibid.*). The Circuit also expressed uncertainty as to "how the cases apply in the absence of brick and mortar to internet-based services." (*Id.* at 16.) It is "not clear," the Circuit explained, "what steps are necessary for plaintiffs to 'present themselves' to an internet-based business or to be denied equal access." (*Ibid.*) Noting that these and similar issues "are likely to arise frequently in the future" (*ibid.*), the Circuit certified the above questions to this Court, which accepted them and docketed this appeal.

ARGUMENT

I. A PLAINTIFF LACKS UNRUH ACT STANDING IF HE MERELY ENCOUNTERS ALLEGEDLY DISCRIMINATORY TOS ON A BUSINESS'S WEBSITE AND HAS NO FURTHER INTERACTION WITH THE BUSINESS

The Questions certified by the Ninth Circuit are interwoven and thus best answered together. The Circuit asks whether a plaintiff who "visits a business's website with the intent of using its services, encounters terms and conditions that [allegedly] deny the plaintiff full and equal access to its services, and then departs without entering into an agreement" has standing to challenge the TOS under the Unruh Act. (Op. 3-4.) It then frames the question, "[a]lternatively," as whether a plaintiff must "engage in some further interaction with the business and its website before the plaintiff will be deemed to have been denied full and equal treatment." (*Id.* at 4.) Because Unruh Act rights are of an "individual nature" (*Koire*, *supra*, 40 Cal.3d at p. 34), a plaintiff's standing turns on whether he "has been the victim of the defendant's discriminatory act" (*Angelucci*, *supra*, 41 Cal.4th at p. 175). The Circuit's questions thus reduce to the issue of *when* a prospective online customer suffers a personal "injury" from the defendant's "discriminatory act." Does someone visiting a website suffer

an injury from discriminatory conduct by merely viewing allegedly discriminatory terms in the website's TOS, or must he have an "interaction" in which the business applies the TOS's allegedly discriminatory terms to him individually?

The plain text of the Unruh Act, its purpose, and the decisions applying the statute all point to the same answer: a plaintiff does not plead an Unruh Act injury by alleging merely that he viewed the defendant's allegedly discriminatory policy while intending to patronize its business. To establish standing, the plaintiff must point to some further interaction in which the defendant discriminated against him individually.

A. Standing Principles and Statutory Text Limit Private Party Standing to Plaintiffs Who Suffer Discrimination While Patronizing the Defendant's Business, or Who Are Individually Prevented by Discrimination from Patronizing It

The general requirements for statutory standing are settled. "[T]he plaintiff must be able to allege injury—that is, some 'invasion of the plaintiff's legally protected interests.'" (*Angelucci, supra*, 41 Cal.4th at p. 175, citation omitted.) The plaintiff must plead facts showing that he is beneficially interested in the controversy, with "some special interest to be served or some particular right to be preserved or protected *over and above the interest held in common with the public at large*." (*Carsten v. Psychology Examining Comm.* (1980) 27 Cal.3d 793, 796, italics added.)

"Standing rules for actions based upon statute may vary according to the intent of the Legislature and the purpose of the enactment." (*Angelucci, supra*, 41 Cal.4th at p. 175.) The Unruh Act was enacted "to 'eradicate' or 'eliminate' arbitrary, invidious discrimination in places of public accommodation." (*Id.* at p. 169.) To that end, the Act created a remedial

scheme that differentiates between public enforcement and private actions. The Attorney General, District Attorney's office, or City Attorney's office may sue on behalf of the public without showing individual "aggrieve[ment]." (*Midpeninsula*, *supra*, 221 Cal.App.3d at p. 1384.) By contrast, private actions require a showing of individual injury from discriminatory conduct. A private action for statutory damages may be asserted by "any person *denied* the rights provided in Section 51," (§ 52, subd. (a), italics added), which enumerates specific classes of people guaranteed "full and equal accommodations" (§ 51, subd. (b)). A private action for injunctive relief may be asserted by "any person *aggrieved* by the conduct" interfering with "the full enjoyment of any of the [statute's] rights." (§ 52, subd. (c), italics added.)

The words of a statute should be given "their 'usual and ordinary meanings'" and should be "construe[d] in context" (*People v. Robles* (2000) 23 Cal.4th 1106, 1111, citation omitted), and the Legislature's language defining a private Unruh Act action connotes a personal harm or injury caused by discriminatory conduct. In the context of a civil rights statute, the word "denied" means "to refuse to grant" or "withhold" rights from someone. (See Webster's Third New Int'l Dict. (1968) 602.) Similarly, the word "aggrieved" means "suffering from an infringement or denial of legal rights." (*Id.* at p. 41.) These words must be read together with the language imposing statutory and actual damages "for each and every offense" (§ 52, subd (a)), and injunctive relief for "conduct of resistance" (*id.*, subd. (c)), which suggest concrete misconduct on a specific, identifiable occasion (see *Boorstein v. CBS Interactive, Inc.*, (2013) 222 Cal.App.4th 456, 469 [holding that because a statute imposed "a statutory penalty 'per violation,'" the kind of injury necessary for standing is limited to a "discrete event"]).

Consistent with this statutory text, this Court has held that Unruh Act allegations must show "that the particular plaintiff suffered actual injury," and that he "was subjected to" the challenged discriminatory policy. (*Angelucci, supra,* 41 Cal.4th at pp. 175-177.) A plaintiff may have standing without "expressly demanding his or her rights and [being] refused"; for example, a plaintiff who unknowingly paid a discriminatory price for a product or service may show that he was "a passive sufferer of discrimination." (*Id.* at p. 169.) But the plaintiff must show that he "suffered actual damage" from the defendant's conduct. (*Id.* at p. 174.)

This Court and the Courts of Appeal have applied these principles in a wide range of contexts over the Unruh Act's fifty-year history, from car washes and bars (see *Koire*, *supra*, 40 Cal.3d at p. 27), to private swimming pools (see *Reycraft*, *supra*, 177 Cal.App.4th at p. 1215), to, more recently, dating websites (see *Surrey*, *supra*, 168 Cal.App.4th at p. 416). The cases show that a plaintiff is victimized for Unruh Act purposes when he patronizes a business and is subject to discrimination, or attempts, on a specific occasion, to patronize the business but is thwarted by discriminatory conduct taken against him personally. If the plaintiff has neither patronized the defendant's business nor been personally prevented by the defendant's discriminatory conduct from patronizing it, the plaintiff cannot show that he suffered any discriminatory injury. An "injury occurs [under the Unruh Act] when the discriminatory policy is *applied* to the plaintiff—that is, at the time the plaintiff patronizes the business establishment." (*Angelucci*, *supra*, 41 Cal.4th at p. 175.)

B. An Unruh Act Plaintiff Lacks Standing to Challenge Internet-Based TOS Unless He Was Individually and Personally Subjected to the Challenged TOS

These general standing rules and Unruh Act principles apply in equal measure to the Internet context. (Cf. Frank H. Easterbrook, *Cyberspace and the Law of the Horse* (1996) 1996 U. Chi. Legal F. 207, 207–08 [cautioning that specialized legal standards focused on particular technologies are often "doomed to be shallow and to miss unifying principles"].) In particular, the Courts' precedents point to three interrelated principles that provide guidance in this context: (1) a plaintiff's knowledge of discriminatory policies is not enough to establish discrimination; (2) the injury cannot be hypothetical or abstract, but must have been actually suffered by the plaintiff, and caused by the defendant, on a particular occasion; and (3) the plaintiff must have personally suffered the injury, and may not rely on potential harm to others from the defendant's discriminatory conduct.

In the context posed by this case and the Circuit's Certified Question, a plaintiff "visits a business's website with the intent of using its services," "encounters" purportedly discriminatory TOS on the website, "and then departs." (Op. 3-4.) That is not enough. A person who views a business's allegedly discriminatory TOS online, without more, is merely aware of them and has not been aggrieved or injured; any asserted injury in this context is abstract and hypothetical, because he has not actually been subjected to the challenged TOS; and his interest as a viewer of the defendant's website is no different from that of the public at large.

Accordingly, there must be some "further interaction" between the plaintiff and defendant (*ibid.*) before the plaintiff will "actually suffer" discriminatory treatment by being "subjected to" the TOS (see *Angelucci*,

supra, 41 Cal.4th at p. 175). Because "there are infinite ways to design a website or smartphone application" (*Meyer v. Uber Techs., Inc.* (2d Cir. 2017) 868 F.3d 66, 75), the Court cannot practicably adopt a "bright-line [standing] rule" covering every internet platform and TOS (cf. POB 49-50). The general principle, however, is that the interaction must be sufficient to have caused discriminatory injury to the plaintiff. When a plaintiff seeks to challenge a website's TOS, he must show that he signed up and was subjected to the TOS; after all, if the plaintiff did not even sign up, then the TOS did not apply to him and could not have inflicted discriminatory injury on him personally. Alternatively, if the plaintiff did not sign up for the defendant's web-based business or otherwise become a patron, he must show that he attempted to patronize the business in some other way and was personally excluded by discrimination. That is similar to the discriminatory injury suffered by plaintiffs in the brick-and-mortar context who "present themselves" to the defendant's business and are personally barred from receiving products or services on nondiscriminatory terms.

1. Mere Knowledge of Discriminatory Policies Is Not Enough for Unruh Act Standing

Courts consistently have emphasized that it is not enough for a plaintiff to learn about a discriminatory policy. Rather, a plaintiff must actually be "subjected to" the discriminatory policy in his interaction with the defendant to be "denied" equal treatment under the Unruh Act. (*Angelucci*, *supra*, 41 Cal.4th at p. 175.) That cannot happen unless the plaintiff "presented himself" (*id.* at p. 171) by patronizing or attempting to patronize the business.

Reycraft v. Lee illustrates the point. There, the mobile home park charged a $10 fee for guests to use the pool. (177 Cal.App.4th at pp. 1215-1216.) The plaintiff did not pay the fee or register as a guest, alleging only

that "she discovered that the pool and restroom facilities at the Park were not compliant [with ADA requirements]." (*Ibid.*) The plaintiff maintained that this was sufficient under the Disabled Persons Act, which parallels and has "significant areas of overlapping application" with the Unruh Act, but the Court of Appeal disagreed. (*Id.* at p. 1227, fn.6.) Noting that the DPA (like the Unruh Act) limits private damages actions to those whose civil rights are "denie[d] or interfer[ed] with," the Court held that standing "requires something more than mere awareness of or a reasonable belief about the existence of a discriminatory condition." (*Id.* at p. 1221.) Because the plaintiff "did not register as a guest or pay the guest fee to use the pool," and, indeed, did not even say "she had any intent to register or to pay the guest fee," she was "unable to show she actually presented herself to the business, as any other customer or guest would do." (*Id.* at pp. 1224-1225.) The plaintiff's allegations were "not specific enough to show an actual denial or interference with access on a particular occasion, as opposed to merely becoming aware of discriminatory conditions in the pool area of the Park." (*Ibid.*; see also *Osborne*, *supra*, 1 Cal.App.5th at p. 1133 ["a plaintiff who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing"].)

In contrast, a plaintiff who has actually experienced discrimination in his enjoyment of products or services has standing. In *Angelucci*, the plaintiffs challenged a club's policy of charging lower admission rates for women. (41 Cal.4th at p. 165.) Because the plaintiffs "patronized the club on several occasions" and paid the allegedly discriminatory fee, they had standing to challenge the policy. (*Ibid.*) This Court reasoned that the plaintiffs "were injured within the meaning of the Act when they presented themselves for admission and were charged the nondiscounted price." (*Id.* at p. 173.)

An Unruh Act plaintiff who is not an actual patron may still have standing, but the case law makes clear that even in such cases, mere knowledge of an allegedly discriminatory policy is not enough to constitute injury; the plaintiff may show that he was prevented from becoming a patron by the defendant's discriminatory conduct. In *Osborne,* for example, the disabled plaintiffs "visited defendant's hotel" with their service dogs, and the defendant refused to offer them a room unless they paid a non-refundable $300 cleaning deposit on top of the $80 room fee. (1 Cal.App.5th at p. 1123.) The Court of Appeal held that the plaintiffs had standing because they presented themselves to the Hotel and "were refused service" except on discriminatory terms. (*Id.* at p. 1134.)

The same principles apply in the e-commerce context. Many Internet-based businesses, including Square, require potential customers to agree to their TOS as a condition of doing online business. A plaintiff who merely "encounter[s]" a business's TOS online is not subjected to the TOS, and cannot suffer any injury from TOS that do not apply to him. (See *Angelucci*, *supra*, 41 Cal.4th at p. 175.) Because "injury occurs when the discriminatory policy is *applied* to the plaintiff—that is, at the time the plaintiff patronizes the business establishment"—a person who merely encounters TOS has not "presented himself" sufficiently to suffer individual discrimination. (Cf. *ibid.*) He is, instead, like the plaintiff in *Reycraft*, who merely discovered the discriminatory policy and cannot "show an actual denial or interference with access on a particular occasion." (177 Cal.App.4th at p. 1225.)

"[S]ome further interaction with the business and its website" (Op. 4) is necessary before an online customer can show an injury from allegedly discriminatory TOS. A plaintiff "presents himself or herself to a business establishment, and is personally discriminated against" by

allegedly discriminatory TOS if he patronizes the business by signing up, subscribing, or making a purchase. (Cf. *Osborne*, *supra*, 1 Cal.App.5th at pp. 1133-1134.) Having become an online patron, the plaintiff can allege that any "discriminatory policy" in the TOS was "applied to [him]" or that he was "subjected to" it. (*Angelucci*, *supra*, 41 Cal.4th at p. 175.) He stands in a similar position to plaintiffs who visit a brick-and-mortar business, transact or attempt to transact business, and actually suffer discrimination.

That a plaintiff may claim to have had the subjective intent to patronize the defendant business is no substitute for actual interaction with it. A plaintiff who merely has the subjective intent to patronize the business, but has not engaged in further interaction with the business, has not given the defendant an occasion to "deny" him equal treatment. (§ 52, subd. (a).)

The difference between mere awareness of allegedly discriminatory TOS and the "further interaction" necessary to establish an Unruh Act injury is reflected in *Surrey*. There, the plaintiff visited an online dating website "with the intent of utilizing its services," but ultimately chose not to "subscribe to or pay for its services" because certain services were free for women. (See 168 Cal.App.4th at p. 417.) The Court of Appeal held that the plaintiff lacked standing, noting that it was "belied by the language of Section 52, subsection (a), which bestows standing to sue only on those whose rights under the Act ... have been denied." (*Id.* at p. 418.) "The mere fact that [the plaintiff] became aware [the company] was offering a discount policy for women subscribers at the time he accessed its website did not constitute a denial of his anti-discrimination rights." (*Ibid.*)

White devotes some 14 pages of his brief to inveighing against language in *Surrey* purporting to adopt a "bright-line rule that a person must tender the purchase price for a business's services or products in order to have [Unruh Act] standing." (168 Cal.App.4th at p. 416.) But White pushes at an open door; Square does not charge a fee to subscribe to its service, so there is no occasion even to consider a payment-based rule here. And because of the "infinite ways to design a website" (*Meyer*, *supra*, 868 F.3d at p. 75), adopting wooden rules for specific online environments makes no sense. The critical part of *Surrey*'s analysis, instead, is its recognition that the plaintiff's mere awareness of a discriminatory policy is inadequate for standing. On *that* point, White's principal authority, *Osborne*, agreed with *Surrey*, and there is no "tension between California appellate courts" (Op. 15): "a plaintiff who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing." (*Osborne*, *supra*, 1 Cal.App.5th at p. 1133.)

2. The Plaintiff Must Suffer Actual Discrimination, Not a Future or Hypothetical Injury

A corollary of the principle that Unruh Act standing requires more than mere awareness of a discrimination policy is that "a plaintiff cannot sue for discrimination in the abstract," but must show he "suffered actual damage" from the challenged policy. (*Angelucci, supra,* 41 Cal.4th at pp. 175, 179.) Because the asserted injury must be "concrete and actual rather than conjectural or hypothetical" (*Surrey*, *supra*, 168 Cal.App.4th at p. 417), an online plaintiff like White may not rely on the mere possibility that the defendant's TOS could be applied to deny him equal treatment; he must establish they actually *were applied* to cause him discriminatory injury in a specific "interaction[]" (Op. 4).

This concrete injury requirement is rooted in statutory text. The Legislature established statutory and actual damages for "each and every *offense*." (§ 52, subd. (a), italics added.) This provides a damages remedy for, but only for, identifiable and discrete acts of discrimination that caused "damage" to the plaintiff. (See *Boorstein*, *supra*, 222 Cal.App.4th at pp. 469-470 [statutory violations result from "a discrete event, such that a court can quantify the number of violations"].) Consistent with the statutory design, courts applying the Act have held that standing requires plaintiffs to show they were "actually denied equal access *on a particular occasion*." (*Reycraft, supra*, 177 Cal.App.4th at p. 1224, italics added [surveying cases]; accord *Angelucci*, *supra*, 41 Cal.4th at p. 165 [noting that the plaintiffs "patronized the [defendant] club on several occasions"].)

For example, in *Orloff v. Hollywood Turf Club* (1952) 110 Cal.App.2d 340, the Court of Appeal, construing a prior version of the Unruh Act, held that a plaintiff lacked standing to sue based upon the defendant's warning that "he would not be admitted to [its] track and, if ... admitted he would be ejected." (*Id.* at p. 342.) Although the plaintiff had previously been ejected, he sought relief only for the days he allegedly did *not* go to the track due to the defendants' "refus[al] to admit him." (*Ibid.*) The Court reasoned that the plaintiff failed to establish an impermissible exclusion because he had not "present[ed] to the defendant a ticket issued by it or tender[ed] to the defendant in lieu thereof the price of a ticket." (*Id.* at p. 344.) The track's threat to exclude him in the future and its deterrent effect was insufficient because at that point "[t]he parties in every sense of the word were legal strangers to one another." (*Id.* at p. 343.)

In contrast, a plaintiff has Unruh Act standing if he was individually subjected to the discriminatory policy and can establish a discriminatory injury "at the time the plaintiff patronize[d] the business establishment."

(*Angelucci, supra*, 41 Cal.4th at p. 175.) Early civil rights cases often centered on restrictions that relegated African-American customers to a segregated or otherwise substandard area within an establishment. (See *Angelucci, supra*, 41 Cal.4th at p. 169 [collecting cases].) Later, in *Koire, supra*, 40 Cal.3d at p. 34, the Court stressed "the actual injury to this plaintiff' when he was charged more than female customers at the "several" car washes and bars he "visited." (*Id.* at p. 27.) The plaintiff, the Court explained, "*was* adversely affected by the price discounts. His female peers were admitted to the bar free, while he had to pay. On the days he visited the car washes, he had to pay more than any woman customer, based solely on his sex." (*Id.* at p. 34.)

A customer may also suffer an injury if he is excluded by the business for discriminatory reasons while *attempting* to patronize the business on a specific occasion. The plaintiffs in *Osborne* were discriminatorily denied service when, on two particular occasions, the defendant hotel expressly refused their requests to rent rooms at the non-discriminatory rate. (1 Cal.App.5th at pp. 1122-1123; see also *Koire, supra*, 40 Cal.3d at p. 27 [noting the plaintiff's allegations that on some visits to car washes, he "asked to be charged the same discount prices as were offered to females," and the "businesses refused his request"].)

In the Ninth Circuit's first Question, the allegedly discriminatory conduct consists solely in posting TOS that anyone can view online. These allegations amount to a claim that the plaintiff *could potentially be* "aggrieved" or "denied [equal] rights" (§ 52, subds. (a), (c)) if he *had* signed up, subscribed, or become a patron in some other way. Such injuries are purely hypothetical, because a plaintiff who did not sign up has not actually been subjected to the allegedly discriminatory TOS. Indeed, such hypothetical injuries are comparable to the allegations of potential future

harm rejected in *Orloff*. The plaintiff there alleged he was entitled to damages for every day he would have attended the race track, "even though he had not personally appeared at the track or purchased a ticket or been ejected," because he was purportedly deterred by the defendant's threat of exclusion. (110 Cal.App.3d at p. 342.) A plaintiff who claims to have been injured by merely viewing TOS terms similarly seeks relief based upon anticipated exclusion on a future occasion, not actual acts of past discrimination. And while White attempts to dismiss *Orloff* as resting on the predecessor statute's text (POB 56), this Court has specifically applied it in construing the Unruh Act, recognizing the force of its general point: the plaintiff must have suffered actual discrimination on a particular occasion. (See *Angelucci*, *supra*, 41 Cal.4th at p. 17 [distinguishing *Orloff* because the "plaintiffs did present themselves for admission and paid the price charged by defendant"]; *Harris*, *supra*, 52 Cal.3d at p. 1163 [invoking *Orloff*].)

To establish a concrete injury, then, a plaintiff who "visits a business's website with the intent of using its services" (Op. 3-4) must show that he was individually subjected to the allegedly discriminatory TOS on a particular occasion. If the plaintiff agrees to the TOS in the course of subscribing to or undertaking a transaction with the defendant's business, then he may be able to plead that the TOS were individually applied to him on that occasion. Alternatively, a plaintiff may be able to establish that he suffered a discriminatory injury in *attempting* to become an online patron by showing that the defendant engaged in discriminatory conduct toward him that thwarted his effort to subscribe.

Depending on the TOS and the circumstances, the nature of the injury may vary, ranging from outright exclusion (cf. *Osborne*) to having services provided in a discriminatory way, such as by discriminatory

pricing (cf. *Angelucci*). But at all events, the plaintiff must be able to show that he was "personally discriminated against" by the defendant's application of the TOS (see *Osborne*, *supra*, 1 Cal.App.5th at p. 1134), and not merely that he faced the *possibility* of being discriminated against if he subscribed to, signed up for, or transacted business with the defendant. Otherwise, a plaintiff could sue based upon just the sort of "abstract" injury, grounded in the *potential* for discrimination, which this Court has rejected. (*Angelucci*, *supra*, 41 Cal.4th at p. 175.)

3. The Plaintiff Must Personally be Aggrieved by the Defendant's Discriminatory Conduct, and May Not Rely on an Injury to the Public or to Other Patrons

A final corollary principle is that the plaintiff must assert an injury *personal* to him, and not discrimination suffered by other people or potentially suffered by the general public. This requirement fits hand-in-glove with the requirement of a concrete injury. Together, they ensure that private Unruh Act lawsuits are limited to people who are "the victim[s] of [a] defendant's discriminatory act" (*ibid.*), and do not become a vehicle for bringing hypothetical challenges on behalf of people "whose civil rights ha[ve] not been personally violated" (*Midpeninsula*, *supra*, 221 Cal.App.3d at p. 1384) or challenges reserved to public enforcement authorities.

To have standing, a plaintiff must assert "some special interest" or a "particular right" that is "over and above the interest held in common with the public." (*Carsten*, *supra*, 27 Cal.3d at p. 796.) In addition, as noted, the Unruh Act draws a clear distinction between the remedies available to private plaintiffs, who must be "aggrieved" or "denied [equal] rights" (§ 52, subd. (c)), and those available to public enforcement officials, who may sue on behalf of the public without showing that a particular plaintiff was "aggrieved." (See *ibid.*; see also *Midpeninsula*, *supra*, 221 Cal.App.3d

at pp. 1384, 1389.) The statutory distinction was no accident, as the Legislature knows how to give the general public the right to sue when it wants. (See *Midpeninsula, supra*, 221 Cal.App.3d at p. 1385 [noting that under a prior version of the Unfair Competition law, injury was not required because the statute gave standing to "the general public" to sue for relief].)

The Courts have accordingly barred private plaintiffs from challenging allegedly discriminatory policies that did not directly affect them. In *Midpeninsula*, the Court held that a nonprofit lacked standing to challenge an allegedly discriminatory rental policy, explaining that the Unruh Act's plain language "strongly suggests that it was intended to provide recourse for those individuals *actually denied* full and equal treatment by a business establishment." (221 Cal.App.3d at p. 1383, italics added.) It rejected the notion that the statute's "aggrieved" language was intended to "confer standing upon an expanded class of plaintiffs whose civil rights had not been personally violated." (*Id.* at p. 1384.) That is why "[t]he courts have acknowledged that a cause of action under the Unruh Act is of an 'individual nature.'" (*Id.* at p. 1383, citation omitted.)

In the context of a challenge to an Internet-based business's TOS, a plaintiff who does nothing more than "visit[] a business's website with the intent of using its services" and "encounter[] [the] terms and conditions" (Op. 3-4) has not suffered an injury that distinguishes him from others who are *potentially* subject to the policy, and accordingly has no interest in the discriminatory policy that is "greater than the interest of the public at large." (*Surrey, supra,* 168 Cal.App.4th at p. 417.) There is no objective difference between a prospective customer who reviews a business's TOS "with the intent of using its services" but then merely "departs" (Op. 3-4) and someone who casually or even accidentally happens upon its TOS

online. In either situation, the plaintiff merely has an interest in avoiding alleged discrimination *if* he actually patronizes the business in the future. That is inadequate, as a matter of law, to distinguish him from the general public: if it were, a whole range of cases, from *Surrey* to *Orloff*, that rejected Unruh Act standing would have deemed the plaintiff injured.

An Unruh Act plaintiff accordingly must be able to show more than the interest White asserts in challenging "discrimination in and of itself." (RJN007.) The plaintiff must show he signed up, subscribed, or engaged the defendant in some other "further interaction" (Op. 3-4) by which he was actually "discriminated against" before his interest will be sufficiently distinct to confer standing (*Osborne*, *supra*, 1 Cal.App.5th at p. 1134). Only through such an objective manifestation of an "intent of using" a defendant's online services (Op. 4) can actual discriminatory injury be distinguished from abstract discrimination that may potentially be visited on the public at large. The difference is comparable to that between a customer who walks into a brick-and-mortar business and is personally denied equal treatment, and a possible customer who reads an advertisement or curious passerby who sees a sign. The former customer would have standing (as in *Osbourne*), but the latter would not (as *Reycraft* and *Surrey* make clear).

Absent some personal harm, the Legislature did not see fit to permit an individual plaintiff to bring suit, whether they seek statutory damages or injunctive relief. Only designated public enforcement officers may bring an action without showing they were actually "aggrieved" or "denied [equal] rights." Nor can the "deterrence policy" invoked by White (POB 35-39) justify rewriting this express scheme. Statutory text "is the best and most reliable indicator of the Legislature's intended purpose," (*Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 157), and the Unruh

Act's language reflects the judgment that deterrence is best served by allowing private plaintiffs to sue only for discrimination they personally suffered.

* * *

While the Court cannot, and need not, resolve all possible Internet standing permutations in order to answer the Ninth Circuit's questions, these standing rules point to a clear answer to the Circuit's first Certified Question, and to clear principles for assessing the many scenarios suggested by its second Question:

- A plaintiff lacks standing under the Unruh Act if he shows only that he "visit[ed] a business's website with the intent of using its services, encounter[ed] terms and conditions that [allegedly] den[ied] the plaintiff full and equal access to its services, and then depart[ed]." (Op. 3-4.) Those allegations, without more, establish only that the plaintiff "became aware" of an allegedly discriminatory policy (*Surrey*, *supra*, 168 Cal.App.4th at p. 418), an injury that is "abstract," has not been suffered on any particular occasion, and does not adequately distinguish the plaintiff's interest from that of the public. (*Angelucci*, *supra*, 41 Cal.4th at p. 175.)

- A plaintiff, then, must show that there was "some further interaction with the business" before he can be said to suffer actual discrimination. (Cf. Op. 4.) In the Internet commerce context, as well in the brick-and-mortar situations, the plaintiff suffers such an injury "at the time the plaintiff patronizes the business establishment" and "the discriminatory policy is *applied* to" him. (*Angelucci*, *supra*, 41 Cal.4th at p. 175, original italics.) While the facts may vary, a plaintiff seeking to meet this standard must generally show that he subscribed to or signed up for the business's services, or undertook an online transaction with the

business, thereby agreeing to its TOS. A plaintiff who takes these actions, or patronizes the business in some other way that "subjected [him] to" the TOS on a particular occasion, may be able to allege that any discriminatory terms "applied to" him as a patron. (See *ibid.*)

- If the plaintiff does not subscribe to, sign up for, or transact business with the defendant, he must be able to show that he attempted to patronize the business, and that the defendant's discriminatory conduct applied to him individually and prevented him from patronizing the defendant's services or products.

C. Under these Principles, White's Allegations Are Inadequate to Establish Standing Under the Unruh Act

Under this framework, White's allegations are insufficient to establish Unruh Act standing despite two opportunities to amend. As Judge Tigar noted, "White has not even attempted to obtain services from Square," and "no such refusal of service has occurred yet." (ER 20.)

White avers only that he heard through "word of mouth" that the TOS would not "allow him to use [Square's] services to accept payments in connection with his business of being a bankruptcy attorney" (ER 140; SAC ¶8); that, having felt "dismay and frustration over what he had first heard," he formed the intent "to attempt to have [his] Bankruptcy Law Firm become ... a [Square] subscriber" (*ibid.*; *id.* ¶10); and that he reviewed the *shierkatz* docket and then "personally visit[ed] [the] Square Website (ER 140-141; *id.* ¶¶12-13). White nowhere alleges, however, that he subscribed to or signed up for Square's service. To the contrary, he avers that he "refus[ed] to acquiesce in [Square's TOS] by clicking the link marked 'Continue' on [the] Square Website." (ER 141; *id.* ¶14.)

These allegations are insufficient to show that White "actually presented himself or herself" to Square by patronizing or attempting to patronize its business, such that he was subjected to its TOS and was "actually denied equal access on a particular occasion." (*Reycraft*, *supra*, 177 Cal.App.4th at p. 1224.) Rather, like the plaintiff in *Surrey*, White "concedes he did not subscribe to [Square's] services," and never entered into the Seller Agreement. (168 Cal.App.4th at p. 420.) White merely "became aware" that Square had the policy he claims is discriminatory, and never "utilized its on-line services." (*Id.* at p. 418.) As White conceded in the Ninth Circuit, he "suffered no tangible, concrete injury" (RJN003), and asserts a purely hypothetical injury: the possibility that he would suffer occupation discrimination *if* he did sign up. That means "his interest in preventing discrimination is arguably no greater than the interest of the public at large." (*Surrey*, *supra*, 168 Cal.App.4th at p. 419.)

Nor has White pled facts showing that Square's discriminatory conduct prevented him from patronizing its business. White alleges that he chose not to subscribe "because doing so would not only have been inconsistent with [his] specific Unruh Civil rights," but also because he allegedly believed "based on the events described in *shierkatz*" that signing up for service "would have predictably subjected [his] Bankruptcy Law Firm to a subsequent discriminatory termination." (ER 141; SAC ¶14.) But these allegations merely underscore the hypothetical nature of the injury White claims. White's assertion that signing up would be "inconsistent" with his rights is nothing more than a claim that he subjectively felt harm from having viewed the TOS. The same could have been said by the plaintiff who felt offended by the pool's lack of disability facilities in *Reycraft*, the plaintiff's offense at the discriminatory pricing

policy in *Surrey*, or any other plaintiff "aware of" a policy discriminating against a group he belonged to.

White's purported concern that he "would have predictably subjected [his firm] to a subsequent discriminatory termination" (ER 141; SAC ¶14) is both irrelevant and unsupported by the TOS. It is irrelevant because White's concern about a possible future termination does not establish actual discrimination any more than the threat of future ejection in *Orloff*. There, as here, the plaintiff's claims rested on anticipated discrimination should he patronize the defendant's establishment in the future. But as the contrasting holdings of *Orloff* and *Koire* show, that injury is too abstract for Unruh Act standing; White can no more recover for each time he *would have* signed up for Square than the *Orloff* plaintiff could seek relief for each time he *could have* attended the track—and that is assuming the TOS's restriction here even implicates the Unruh Act.

Although White suggests that termination would have been a foregone conclusion, nothing on the face of the TOS prevented White from signing up for Square's service, and then either asserting his "personal, specific Unruh Law civil rights" with Square (as he purportedly did with his later "demand") or simply bringing a claim. (ER 141; SAC ¶14.) The Seller Agreement's prohibition applies not to people, but to *transactions*, i.e. "accept[ing] payments in connection with the following business activities," including "(28) bankruptcy attorneys or collection agencies engaged in the collection of debt." (ER 139; SAC ¶6.) To the extent this restriction constitutes unlawful discrimination under the Unruh Act, by signing up White would have been able to allege he was in fact subject to this restriction as a Square subscriber. Nor did White need to "lie about his intended use of the service" in order to sign up or subscribe. (Cf. POB 21.) Even if a merchant would otherwise use the account for such transactions,

he could subscribe, become a patron, and stop short of undertaking the transactions specifically prohibited by the Seller Agreement. This is not a case, then, where the allegedly discriminatory conduct actually barred the plaintiff from signing up. (Cf. *Botosan v. Paul McNally Realty* (9th Cir. 2000) 216 F.3d 827, 835 [finding Unruh Act standing where disabled plaintiff was prevented from becoming a store customer by lack of accessible parking].)

White argues that the letter Square's counsel sent plaintiff's counsel in the *shierkatz* litigation—in a separate lawsuit—somehow precluded him from signing up. But the *shierkatz* plaintiff had previously violated Square's TOS. (ER 54; *Shierkatz Rllp*, *supra*, 2015 WL 9258082 at *1.) Square's response to that plaintiff's attempt to re-subscribe, in the wake of past violations and with the apparent intent to violate the TOS again, does not prevent White from signing up, complying with the TOS's restrictions, and then challenging the TOS by asserting that its restrictions are discriminatory. Indeed, because the *shierkatz* plaintiff *had* signed up and *had* become a patron of Square, the letter underscores that White's claim here is an abstract one.

White alleges that he took the "act of communicating a formal demand to [Square] that it now immediately and permanently agree to cease and desist from violating Robert White's and Class Unruh Law civil rights" following the institution of litigation. (ER 143; SAC ¶20.) These allegations are insufficient alone to plead a discriminatory injury. White has neither pled the content of his demand nor attached the letter to the operative complaint. As noted, a customer who demands, and is then denied, equal treatment from a business may have standing under the Unruh Act because he has suffered an act of discrimination that prevented him from availing itself of the business's goods and services, but White has not

alleged that here. He has not shown that he was actually "denied equal access on a particular occasion." (Cf. *Reycraft*, *supra*, at 177 Cal.App.4th at p. 1224.)

The authorities White features only confirm his failure to plead a discriminatory injury. (POB 43-45.) In *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, an African-American investment advisor accompanied his clients to a bank to help them consummate a financial transaction, but a bank employee stopped the transaction out of racial animus, calling the police and causing his clients to leave. The injury to the investment advisor was palpably individualized and concrete. *In re Cox* (1970) 3 Cal.3d 205 is even further afield from White's allegations, for the plaintiff there had already entered the defendant mall to make a purchase when it ejected him and had him arrested.

White's attempt to rely on the Ninth Circuit's determination of federal Article III standing is equally misplaced. (Cf. POB 30-33.) Article III standing doctrine is rooted in the "case and controversy" clause of the federal constitution, and was developed "to ensure that federal courts do not exceed their authority as it has been traditionally understood." (*Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540, 1547, citations omitted.) A determination of Article III standing does not, and cannot, resolve the separate question of what constitutes an injury from arbitrary discrimination under the Unruh Act. (See *Sturm v. Davlyn Invest., Inc.* (C.D. Cal., Nov. 6, 2013, No. CV 12-07305-DMG-AGRX) 2013 WL 8604760, at *2 ["Standing under Unruh is narrower than Article III."].)

II. WHITE'S UNTESTED DISCRIMINATION THEORY AND HIS OVERWROUGHT ANALOGIES HIGHLIGHT THE NEED FOR CLEAR STANDING PRINCIPLES

It is ironic that White touts the "merits" of his claim (POB 23), for, if anything, they raise a flag of caution. Standing rules serve to ensure that the plaintiff has suffered an injury "'of sufficient magnitude reasonably to assure that all of the relevant facts and issues are adequately presented to the adjudicator.'" (*Osborne*, *supra*, 1 Cal.App.5th at p. 1125, citation omitted.) Here, White advances a theory of occupation discrimination that this Court has never endorsed, on which the Courts of Appeal are divided, and which is not among the core protected classes enumerated in the Unruh Act's text. This underscores why standing rules must require that a plaintiff like White present allegations clearly showing he personally suffered the asserted discriminatory injury. If White's view of standing were adopted, courts would be asked to adjudicate novel, marginal theories of discrimination on the basis of abstract allegations where it is not even clear the plaintiff had been individually victimized by the defendant's conduct.

A. Adjudicating Novel Theories of Discrimination Requires Complex, Multi-Step Inquiries that Should Not be Undertaken in the Abstract

Standing rules need to be clear enough to enable courts to determine if the plaintiff has alleged a statutory injury, and if so, to resolve the dispute. California courts do not sit for "the rendering of advisory opinions." (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 119.) And "judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pac. Legal Found.*, *supra*, 33 Cal.3d at p. 170.)

The nature of White's theory itself shows the risks of relaxing the traditional limits on Unruh Act standing. White's claim of occupation discrimination is not straightforward or conventional; unlike categories such as race or gender, occupation is not a protected class enumerated in the statutory text. While this Court suggested that occupation discrimination might be cognizable in a passing citation to an Attorney General opinion (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 744-745), it has yet to squarely address the issue. In these circumstances, this Court's precedents require a multi-step analysis into whether the plaintiff's asserted class is protected, and whether the challenged restrictions "bear[] a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris*, *supra*, 52 Cal.3d at p. 1165.) This makes it all the more important that White's allegations establish an injury that "frame[s]" the alleged discrimination issues with "sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Pac. Legal Found.*, *supra*, 33 Cal.3d at p. 170.)

In *Harris*, this Court distinguished between the protected classes enumerated in the Unruh Act—including race, gender, and sexual orientation—and other forms of allegedly arbitrary discrimination, such as economic discrimination based upon income. The former are "the subject of large bodies of statutory and constitutional law on both state and federal levels designed to protect classes of persons who have achieved historical recognition as distinct objects of adverse treatment." (52 Cal.3d at p. 1161 fn.9.) While recognizing that the statutory list of protected classes is "'illustrative rather than restrictive'" of discrimination prohibited by the Unruh Act (*id.* at p. 1152, citation omitted), *Harris* reasoned that any extension of the statute to a non-enumerated class must satisfy a "three-part analysis" (see *Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th

824, 841 [applying *Harris*]). First and foremost, a "new claim of discrimination" must be "based on a classification that involves personal characteristics" like the protected classes enumerated in the statutory text. (*Ibid.*) Second, the court must determine "whether a legitimate business interest" justifies the challenged policy. (*Ibid.*) The Unruh Act does not bar a business from drawing "distinctions among its customers" that are not grounded in invidious discrimination, but instead further "the particular business interests of the purveyor in maintaining order, complying with legal requirements, and protecting a business reputation or investment." (*Harris*, *supra*, at p. 1162.) Third, *Harris* requires consideration of the potential "adverse consequences that would likely follow from plaintiffs' proposed interpretation of the Act." (*Id.* at p. 1166; accord *Koebke*, *supra*, 36 Cal.4th at p. 840.)

These complex questions are not suited for adjudication in the abstract. The facts surrounding the discriminatory injury claimed by the defendant and the alleged discriminatory conduct could make all the difference in this inquiry. In some instances, occupation may overlap with personal characteristics, or serve as pretext for them, such that occupational distinctions further invidious discrimination. (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 ["A policy or a classification, in itself permissible, may nevertheless be illegal if it is merely a device employed to accomplish prohibited discrimination."].) In other instances, however, a plaintiff's "occupation" may involve economic relationships and activities that bear directly on credit risk, regulatory concerns, or other "criteria" that implicate "the legitimate interest of business establishments." (See *Harris*, *supra*, 52 Cal.3d at p. 1148.) A business may have legitimate reasons for drawing distinctions among different jobs and any financial, risk, and regulatory

concerns they entail—particularly where, as here, the service is *offered* to merchants and businesses, not individual consumers.

While White insists that the Unruh Act bars discrimination on the basis of occupation, the Courts of Appeal have reached conflicting decisions on that question. In *Roth*, the Court rejected an Unruh Act claim alleging that the defendant discriminated against podiatrists, and in favor of medical doctors, in leasing commercial space. (25 Cal.App.4th at p. 538.) The Court explained that "[t]he election to practice a particular profession represents a professional and, frequently, an economic choice, rather than a personal characteristic of the type enumerated in the act" (*id.* at p. 539), and commercial lessors "have legitimate reasons to designate the purposes for which they wish to let them by limiting their tenants to certain trades or professions or with respect to the type of merchandise sold." (*Ibid.*) Of the two cases White relies upon, one was a pre-*Harris* decision that did not involve a commercial restriction, and had no occasion to address the legitimate business interests later stressed in *Harris*. *Long v. Valentino* centered, instead, on the ACLU's exclusion of a police officer from a public meeting on police practices. ((1989) 216 Cal.App.3d 1287, 1300.) The other case, *Sisemore v. Master Financial Inc.*, did involve a commercial restriction: a bank's policy against extending mortgage loans to certain home day care centers. ((2007) 151 Cal.App.4th 1386.) But its reasoning begs the question of when occupation discrimination may give rise to Unruh Act liability. The *Sisemore* Court concluded that because occupation discrimination had been "identified in a prior appellate decision," it was comparable to other "personal characteristics" protected by the Act. (*Id.* at p. 1407.) But the only decision cited by the Court was *Long*, a pedigree that hardly places occupation on par with the other personal characteristics enumerated in the statute. And even if "an

individual's choice of occupation ... is often a very personal one" (*ibid.*), the *Harris* test would still require the court to weigh that factor against any "legitimate business interest" and any "potential consequences" of recognizing the claim (*Koebke*, *supra*, 36 Cal.4th at p. 841). Indeed, that is how *Sisemore* sought to distinguish *Roth*. (*Sisemore*, *supra*, 151 Cal.App.4th at p. 1408.)

White's claim would require a court to enter this debate and undertake a complex statutory construction and public policy analysis in a situation where the nature and scope of the injury are unclear. As noted above, this analysis would require comparing occupation discrimination to "the Act's enumerated categories and those added by judicial construction," assessing "whether a legitimate business interest" justified the distinction, and weighing the "potential consequences" of allowing the claim. (*Koebke*, *supra*, 36 Cal.4th at p. 841.) It is not apparent, however, that White's allegations establish "occupational discrimination" even on his own terms. White's core theory is that the Seller Agreement's prohibited transactions provision facially discriminates against "bankruptcy attorneys." (POB 8.) But because it focuses on "payments in connection with" specified business activities, the provision on its face permits attorneys and law firms to use Square's payment processing services for other transactions unrelated to bankruptcy practice or debt collection. White seems to acknowledge as much, for he argues that the prohibition "would encompass most of the civil bar in the United States" (POB 26)—not just bankruptcy attorneys.

White's failure to plead anything beyond an abstract injury, without the facts and circumstances needed to give texture to his theory, undercuts the court's ability to balance White's interest in equal "occupational" treatment against Square's business interests in restricting debt-related transactions. The Seller Agreement bars "payments in connection" with

"bankruptcy attorneys or collection agencies engaged in the payment of debt." (ER 139; SAC ¶6.) These transactions raise special regulatory and risk concerns. Square has a legitimate interest in preventing its service from being used for illegal or fraudulent transactions, a risk that is palpable in the bankruptcy context. (E.g., *In re Anastas* (9th Cir. 1996) 94 F.3d 1280, 1283 [applying 11 U.S.C. § 523(a)(2)(A), which makes debts non-dischargeable in bankruptcy if secured through "false pretenses, a false representation, or actual fraud" in credit card transactions]; 11 U.S.C. § 526(a)(4) [barring debt relief agencies from advising an "assisted person" debtor from incurring more debt in contemplation of bankruptcy].) The prohibition also is reasonably related to Square's interest in managing financial risk, which is implicated by transactions involving debt collection and bankruptcy, as well as in Square's interest in complying with its obligations to its banking partners.

These are just the sort of interests "in maintaining order, complying with legal requirements, and protecting a business reputation or investment" that *Harris* recognized. (See 52 Cal.3d at p. 1162.) Yet, with a putative plaintiff who has not pled facts showing how he was personally subjected to the prohibited transaction provision, the courts would be called upon to assess the competing interests involved in the abstract.

B. White's Hypotheticals Are Inapposite and Do Not Justify Loosening the Unruh Act's Standing Requirements

In urging a standing rule focused on subjective injury and subjective deterrence, White seeks to relax Unruh Act standing requirements in suits against online businesses. To that end, White tries to analogize his theory of occupation discrimination to discrimination claims based on the protected classes enumerated in the statutory text. He variously compares the Seller Agreement's bar on specific transactions to "a sign in [a] store

window" that says "Black people are not allowed to come into this store" (POB 53), and, astonishingly, to *the Holocaust*: "Such denigration by association is reminiscent, perhaps, of signs posted in Nazi-era stores: 'Keine Juden oder Hunde erlaubt' ('No Jews or dogs allowed')." (POB 40.) But White's claim is far afield from these hypotheticals, and even core discrimination claims under the Unruh Act would be properly resolved by the traditional rule requiring a plaintiff to show that he suffered discriminatory treatment while patronizing its business, or that he attempted to patronize but was individually thwarted by discrimination.

The historical resonance of the alleged discrimination may bear on the point at which the plaintiff suffers discriminatory injury in his interaction with the defendant's business. (*Angelucci*, *supra*, 41 Cal.4th at p. 169 [describing examples of race discrimination].) But cases like *Reycraft* and *Surrey* make clear that even if the plaintiff claims discrimination on the base of a core, enumerated Unruh Act class, he must still show more than mere awareness to suffer an injury. If a plaintiff were to enter a store, either demand equal treatment or attempt to make a purchase, and be "refused services," he would have standing. (See *Osborne*, *supra*, 1 Cal.App.5th at pp. 1122-1123, 1134; accord *Koire*, *supra*, 40 Cal.3d at p. 27.) But White clearly does not, and his novel theory of occupation discrimination hardly warrants a departure from existing law.

Nor is an expansion of Unruh Act standing justified by White's example of a web-based restriction on a coffee shop website that says "No cops allowed." (POB 46.) In White's hypothetical, the customer can use the website to order coffee drinks, but "never pays a fee to the company that runs the website." (*Ibid.*) The hypothetical police officer might suffer such an injury in a variety of ways, however, in the course of becoming a patron or attempting to become a patron. She "could sign up" for the

service, making the officer a patron subject to the restriction even if the officer does not take the further step of "plac[ing] an order, hoping that no one will notice she's a cop." (Cf. POB 46.) That action would be analogous to the officer's personal attendance at the public meeting in *Long*. (216 Cal.App.3d at pp. 1300-1301.) She might also establish an interest beyond the general public if she contacted the service, engaged them about becoming a customer, and was personally denied equal treatment (like the plaintiffs in *Koire* and *Osborn*). Existing standing rules suffice to ensure that an officer who has actually suffered discriminatory injury would have standing to seek redress.

III. WHITE'S PROPOSED RULE WOULD RADICALLY EXPAND UNRUH ACT STANDING AND MULTIPLY LITIGATION, IN CONTRAVENTION OF THE STATUTORY TEXT AND LEGISLATIVE INTENT

Under White's proposed rule, a plaintiff who merely "visits a business's website with the intent of using its services," "encounters" allegedly discriminatory TOS, and "then departs without entering into an agreement with the service provider" would have standing. (Op. 3-4.) This rule, if adopted, would open a boundless Internet exception to Unruh Act standing, with adverse collateral consequences for the judicial system as well as for Internet businesses.

Applied in the context of Internet commerce, White's proposed standing rule would radically expand the universe of "aggrieved" persons under the Unruh Act to anyone who has visited a website and deems its TOS purportedly discriminatory. White characterizes "[w]ebsites (and related services, like digital 'apps' for mobile devices) [as] today's analogue [for] the shopping mall." (POB 45.) Yet, consumers' access to e-commerce websites and applications is far more convenient and efficient

than a trip to the mall. It is because "Internet sales are paperless and have lower transaction costs" that "the commercial side of the Internet has grown rapidly." (*Sporty's Farm L.L.C. v. Sportsman's Market, Inc.* (2d Cir. 2000) 202 F.3d 489, 493.) And because web-based TOS are so "common in Internet commerce" (*Treiber & Straub, Inc. v. U.P.S., Inc.* (7th Cir. 2007) 474 F.3d 379, 382), consumers may readily "encounter[]" them, and a business's TOS, conversely, may be visited and reviewed thousands of times a day with the click of a button. If any of these plaintiffs could proceed on an Unruh Act suit by alleging they had "the intent of using its services" and "encounter[ed]" allegedly discriminatory terms (Op. 3-4), it would make commonplace lawsuits seeking advisory opinions on behalf of people who did little more than visit the business's website.

Indeed, White's rule could lead not only to individual suits asserting hypothetical injuries, but also to unwieldy class actions that include consumers who undertook no substantial interaction with the defendant. If Unruh Act plaintiffs need not show they were actually subjected to a purportedly discriminatory policy, they could attempt to sue on behalf of other putative plaintiffs who similarly encountered the policy, but did not patronize the business or take the concrete steps to patronize that would make them "victim[s] of the defendant's discriminatory act." (*Angelucci, supra*, 41 Cal.4th at p. 175.) Plaintiffs could seek to certify Unruh Act class actions extending to anyone who alleges they were a prospective customer and "became aware" of a business's discriminatory TOS (*Surrey, supra*, 168 Cal.App.4th at p. 418) or "learn[ed]" about it (*Osborne*, 1 Cal.App.4th at p. 1133). The upshot would be class actions presented to the court that include lead plaintiffs and absent class members who did not actually suffer any personal denial of equal rights.

If there were any doubt about this risk, one need only review White's class action allegations, for he proposes a class that would include:

> [A]ll Persons ... who have ever learned that they are the subject of [Square's prohibited transactions provision] and thereafter formed a specific intent to become a [Square] subscriber and ... by undertaking any direct (but in and of themselves ineffectual) acts that were, are or will be in the future specifically intended to carry out such specific intent ***short*** of their clicking the link marked "Continue" on the Square website.

(ER 144; SAC ¶23.) This class, by its terms, would include anyone who "learned" they fell within Square's prohibited transactions provision and undertook "any direct act," "short of" subscribing, that *subjectively* reflects an intent to subscribe. Because that class is limited to people who *objectively* did nothing more than visit Square's website, its core membership would be people who, like White, suffered no concrete discrimination. And such lawsuits would not be limited to plaintiffs asserting discrimination based on the core protected classes, such as race and gender, enumerated in the Unruh Act. White's proposed rule would invite lawsuits challenging commercial restrictions and practices grounded in legitimate business concerns.

If certified, such class actions asserting hypothetical Unruh Act claims would portend massive liability for defendants, and a huge windfall for plaintiffs like White, despite the absence of any actual customers within the class. This, too, is apparent from White's allegations. White alleges he "continuously visit[ed]" Square's website "on each calendar day," which he understood to constitute "being refused service by [Square] on each such past, present or future calendar day" when he "might wish to use" Square's services. (ER 142; SAC ¶18.) If each "visit" to a website were deemed to constitute an incident of discriminatory injury, a plaintiff could attempt to

stack statutory damages with a $4,000 floor simply by repeatedly clicking a button to "refresh" the business's TOS webpage. That is no doubt how White expects to arrive at "not less than one billion dollars in minimum statutory liability" despite purporting to represent a class that includes people who never became customers or made any concrete attempt to patronize the business. (ER 144; SAC ¶28.)

This result would burden the court system and invite abuse, while distorting the Unruh Act's objectives. Boundless e-commerce classes like the one proposed by White could make "the potential exposure ... so large that the pressure to settle may become irresistible." (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1453.) Even small online businesses could face challenges based on hypothetical discrimination—and novel theories—that would nonetheless threaten their existence and induce "in terrorem" settlements. (See, e.g., *Messner v. Northshore Univ. Health Sys.* (7th Cir. 2012) 669 F.3d 802, 825 [the incentive "to settle a meritless [class action] claim in order to avoid breaking the company" is "magnified" if it includes "'persons who have suffered no injury'"], citation omitted.) In addition to reading the Legislature's discriminatory injury requirement and allocation of private and public remedies out of the Unruh Act, this result would undermine the balance struck by the legislature when it increased the statutory penalty to $4,000 in 2001. As the Attorney General explained, this amount was designed to "ensure that the small business (who is usually the violator) is not put out of business by the commission of one violation." (Assem. Com. on Judiciary, Rep. on Assem. Bill No. 587 (2001-2002 Reg. Sess.) Apr. 3, 2001, p. 5.) Under White's proposed standing rule, however, a plaintiff could unfairly exploit this statutory penalty—without even patronizing a business—by leveraging

even a questionable challenge to a TOS's terms into a "billion dollar[]" lawsuit. (ER 144; SAC ¶28.)

This result would go far beyond deterring discriminatory misconduct and compensating actual victims (POB 35-42); it would threaten to stifle legitimate commercial activity essential to the State's economy. California businesses depend upon e-commerce and are frequently on its cutting edge. Yet, under White's proposed standing rule, these businesses would face potentially crushing liability for drawing non-invidious, commercial distinctions vulnerable, with a jaundiced eye, to novel lawsuits like White's. And "[c]ourts must be cautious not to fashion remedies which overdeter the illegitimate and as a result chill legitimate activities." (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 109 [Mosk, J., concurring and dissenting in part].) Nor can this overdeterrence effect be justified as necessary to "serve the Prime Purposes of the Unruh Act" (POB 35). It would read the Act's discriminatory injury requirement out of the text, enabling plaintiffs to seek recovery even if they were not "personally discriminated against." (*Osborne*, *supra*, 1 Cal.App.5th at p. 1134.) It would collapse the Legislature's textual distinction between private rights of action and public enforcement actions. And it would threaten to obfuscate justiciability principles essential to the courts at a time when "internet-based services [have] become more prevalent" and questions of injury "are likely to arise frequently." (Op. 16).

CONCLUSION

The Court should answer *no* to the Ninth Circuit's first Certified Question, and *yes* to the Ninth Circuit's second Certified Question.

Dated: November 21, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, pursuant to Rule 8.520, subdivision (c), of the California Rules of Court, Respondent's Answer Brief on the Merits is produced using 13-point Roman type and, including footnotes, contains 13,886 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: November 21, 2018

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

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 San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94015.

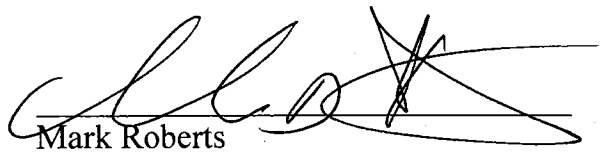
On November 21, 2018, I served true copies of the following document(s) described as **RESPONDENT'S ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on November 21, 2018 at San Francisco, California.



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SERVICE LIST

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