S249248

IN THE SUPREME COURT 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 Pursuant to California Rules of Court, Rule 8.548
No. 16-17137

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

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND PROPOSED BRIEF OF AMICI CURIAE DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, IMPACT FUND, AND NINE ADDITIONAL ORGANIZATIONS IN SUPPORT OF PLAINTIFF AND PETITIONER ROBERT E. WHITE

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APPLICATION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.520(f), proposed amici curiae Disability Rights Advocates, Disability Rights Education & Defense Fund, Impact Fund, Civil Rights Education and Enforcement Center, Disability Rights California, Disability Rights Legal Center, Law Foundation of Silicon Valley, Legal Aid at Work, Legal Services for Prisoners with Children, National Federation of the Blind, National Federation of the Blind of California, and Public Justice, P.C. (collectively, "Amici") respectfully request permission to file the attached amicus brief in support of plaintiff and petitioner Robert E. White.

Amici are non-profit legal services and advocacy organizations that represent vulnerable communities of workers and consumers protected by the Unruh Civil Rights Act. Amici can provide focused assistance to this Court in understanding the implications of the certified questions for enforcement of civil rights protections by these communities in the Internet age.

In accordance with California Rules of Court, Rule 8.250(f)(4), no party or counsel for the party, other than counsel for Amici, have authored the proposed brief in whole or in part or funded the preparation of the brief.

INTEREST OF PROPOSED AMICI

Amicus **Disability Rights Advocates (DRA)** is a non-profit, public interest law firm that specializes in high impact civil rights litigation and other advocacy on behalf of people with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, and housing. DRA's clients, staff, and board of directors include people with various types of disabilities. With offices in New York City and Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities nationwide.

Amicus **Disability Rights Education & Defense Fund (DREDF)**, based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF pursues its mission through education, advocacy and law reform efforts. For over three decades, DREDF has received funding from the California Legal Services Trust Fund Program as a Support Center providing consultation, information, training and representation services to legal services offices throughout the state as to disability civil rights law issues. DREDF is nationally recognized for its expertise in the interpretation of federal and California disability civil rights laws, including the Unruh Act. DREDF has participated as *amicus* and *amici* counsel in numerous cases addressing the scope of California civil rights

mandates. DREDF served as party counsel in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, assisting this Court in understanding the breadth of California's broad and independent laws and their interactions with federal authority.

Amicus **Impact Fund** is a nonprofit foundation that provides funding, training, and co-counsel to public interest litigators across the country. The Impact Fund is a California Legal Services Trust Fund Support Center that assists legal services projects throughout the State of California. The organization has served as class counsel in a number of major civil rights class actions, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws. The organization has submitted amicus briefs in numerous cases before this Court.

Amicus **Civil Rights Education and Enforcement Center (CREEC)** is a national nonprofit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of disability. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that individuals with disabilities have access to all advantages, privileges, and benefits offered by businesses and places of public accommodation, including access to the benefits provided by websites. In today's society, websites provide an invaluable method of communication, shopping, and information gathering, and thus it is essential that websites be equally accessible to

people with disabilities. CREEC has represented deaf and hard of hearing people in lawsuits seeking to ensure that they have access to websites. CREEC strongly supports the arguments set forth in this amicus brief.

Amicus **Disability Rights California (DRC)**, a non-profit legal advocacy organization established in 1978, is California's Protection & Advocacy system mandated under federal law to advance and defend the civil rights of people with all types of disabilities statewide. DRC works in partnership with people with disabilities to achieve a society that values all people and supports their rights to dignity, equality of opportunity, choice, and quality of life. DRC is well-versed in the access barriers that prevent people with disabilities from being integrated into the mainstream of society. Last year, DRC provided critical legal assistance on more than 25,000 matters to individuals with disabilities, many of whom requested assistance to overcome accessibility barriers due to inaccessible websites, places of public accommodation, and public services within their communities, despite longstanding federal and state accessibility requirements.

Amicus **Disability Rights Legal Center (DRLC)** is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle with ignorance, prejudice, insensitivity, and lack of legal protections in their endeavors to achieve fundamental dignity and respect. DRLC assists people with disabilities in obtaining the benefits, protections, and equal

opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, the Individuals with Disabilities Education Act, the Unruh Civil Rights Act, and other state and federal laws. DRLC's mission is to champion the rights of people with disabilities through education, advocacy and litigation. DRLC is generally acknowledged to be a leading disability public interest organization. DRLC also participates in various amici curie efforts in a number of cases affecting the rights of people with disabilities.

Amicus **Law Foundation of Silicon Valley** is a nonprofit corporation based in San José, California focused on advancing the rights of under-represented individuals and families in Santa Clara County through legal services, strategic advocacy, and educational outreach. The Law Foundation of Silicon Valley serves more than 10,000 low-income individuals and families each year. Part of the Law Foundation's mission includes protecting the civil rights of individuals and groups in Santa Clara County who are underrepresented in the civil justice system through class action and impact litigation, including claims based on violations of the Unruh Act.

Amicus **Legal Aid at Work (LAAW)** is a non-profit public interest law firm whose mission is to protect, preserve, and advance the rights of individuals and families from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the

LGBT community, and the working poor. LAAW has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs (see, e.g., *National Railroad Passenger Corp. v. Morgan* (2002) 536 U.S. 101; *U.S. Airways, Inc. v. Barnett* (2002) 535 U.S. 391; *California Federal Savings & Loan Ass'n v. Guerra* (1987) 479 U.S. 272 [counsel for real party in interest]), as well as in an amicus curiae capacity (see, e.g., *United States v. Virginia* (1996) 518 U.S. 515; *Harris v. Forklift Systems* (1993) 510 U.S. 17; *International Union, UAW v. Johnson Controls* (1991) 499 U.S. 187; *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228; *Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57). LAAW's interest in preserving the protections of this country's antidiscrimination laws is longstanding.

Amicus **Legal Services for Prisoners with Children (LSPC)**, based in Oakland, California, is a non-profit organization that serves as a Support Center for Qualified Legal Services Providers. LSPC advocates for policy reforms and conducts strategic litigation to advance the constitutional and human rights of currently and formerly incarcerated people. LSPC also houses All Of Us Or None, a national organizing group led by and for currently and formerly incarcerated people. People with physical and cognitive disabilities make up a disproportionately large portion of the people who are currently or formerly incarcerated. This is due to the social stigmatization, lack of resources, and over-policing that disabled people experience, especially if they are also poor and or people of color. LSPC

strives to advance the rights of all who have been incarcerated, ensuring that all are freed from detention and then have a chance at successful reentry in our ever-modernizing world. LSPC has submitted amicus briefs in numerous cases before this Court.

Amicus **National Federation of the Blind (NFB)**, the oldest and largest national organization of blind persons, is a non-profit corporation headquartered in Baltimore, Maryland. It has affiliates in all 50 states, Washington, D.C., and Puerto Rico. NFB and its affiliates are recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The ultimate purpose of NFB is the complete integration of the blind into society on a basis of equality. This objective includes the removal of legal, economic, and social discrimination. As part of its mission and to achieve these goals, NFB has worked actively to ensure that the blind have an equal opportunity to access the Internet and other emerging technology.

Amicus **National Federation of the Blind of California (NFB of California)** is the California affiliate of the National Federation of the Blind. With about 400 members, the NFB of California works to ensure that blind Californians can participate fully and equally in modern society, which includes access to the Internet. In pursuit of this mission, NFB-CA has brought claims under California civil rights laws in state and federal courts,

including in *National Federation of the Blind of California v. Uber Technologies* (N.D.Cal. 2015) 103 F.Supp.3d 1073, which resulted in a federal decision offering persuasive reasoning as to the expansive nature of standing under California civil rights laws.

Amicus **Public Justice, P.C.** is a national public interest law firm that specializes in precedent-setting, socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. Public Justice has appeared before this Court in a number of recent cases involving individuals' access to the civil justice system, including *Noel v. Thrifty Payless, Inc.*, review granted Feb. 28, 2018, S246490, and *T.H. v. Novartis* (2017) 4 Cal.5th 145. Public Justice has a strong interest in ensuring that those harmed by discriminatory conduct are able to seek justice under California's civil rights laws, regardless of whether the discrimination occurs in a physical place of business or on one of the mobile and online platforms that are playing an increasingly prominent role in all aspects of modern life.

BRIEF OF AMICI CURIAE

INTRODUCTION AND SUMMARY OF ARGUMENT

The changing technological landscape raises important questions for the future of civil rights in California, such as those certified to this Court by the Court of Appeals for the Ninth Circuit:

> 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?

(*White v. Square, Inc.* (9th Cir. 2018) 891 F.3d 1174, 1175.)

In his Opening Brief, Petitioner White sets forth multiple reasons why a formal agreement between a user and service provider should not be required to establish statutory standing under the Unruh Civil Rights Act ("Unruh Act" or "Act") (Civ. Code, § 51), including the need to deter companies from implementing discriminatory policies and compensate potential customers for the discrimination they experience. (Petitioner's Opening Brief on the Merits at pp. 34-42.) Amici – nonprofit legal services and advocacy organizations dedicated to serving vulnerable groups protected by the Unruh Act – write separately to explain the unique significance of the certified questions to marginalized communities in California and the importance of

maintaining effective mechanisms for enforcement of civil rights laws.

Amici respectfully urge the Court to respond "Yes" to the first certified question and "No" to the second for two reasons. First, the Unruh Act is clear in its commitment to equal opportunity and access for all Californians. A narrow interpretation of standing and harm is at odds with the language and history of the statute. Notably, California has not yet matched the federal standard of the "futile gesture" doctrine, which is intended to address discriminatory barriers that deter further engagement. The "futile gesture" doctrine should be adopted by California courts to ensure that those protected by the Act can continue to enforce their rights in the Internet age.

Second, equal access to online businesses is critical as technology becomes ever more integral to the nation's culture and economy. Evolving technology holds great promise for communities that may have difficulty accessing brick-and-mortar establishments, including low-income families, people of color, and people with disabilities. The Unruh Act's promise of full and equal access must be enforced in the online marketplace or these groups will find themselves without recourse when discriminatory exclusion is virtual.

This Court has previously read California's civil rights laws broadly to fulfill their remedial purpose. The questions presently before the Court provide an opportunity to affirm that California's civil rights laws will be read in the context of an ever-

evolving business environment with the continued purpose of providing equal opportunity and access for all.

ARGUMENT

I. THE UNRUH ACT PROHIBITS MYRIAD FORMS OF DISCRIMINATION AND CALIFORNIANS SHOULD BE EMPOWERED TO ENFORCE THE FULL REACH OF THE STATUTE.

This Court is asked to determine at what point an individual may bring a claim under the Unruh Act – specifically, whether a plaintiff can be discriminated against and have standing before they enter into an agreement with an online business. The answer to this question must be "Yes" to effectuate the Act's broad anti-discrimination mandate.

A. The Unruh Act Prohibits A Wide Range of Discriminatory Conduct and "Is to Be Given A Liberal Construction," Which Requires a Robust View of Standing.

The Act requires "all business establishments of every kind whatsoever" to provide all people within the state of California "full and equal accommodations, advantages, facilities, privileges, or services." (Civ. Code, § 51, subd. (b).) This Court has held, "The Act is to be given a liberal construction with a view to effectuating its purposes." (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28.) Limiting actionable discrimination to that occurring after a formal agreement between the parties would significantly limit the reach of the Unruh Act and the ability of courts to address facial discrimination online.

The Act's promise of "full and equal" treatment can be violated in innumerable insidious ways before an agreement is reached or a transaction takes place. The discrimination itself can prevent a potential customer, client, or employee from ever entering into an agreement. For example, a person who uses a wheelchair is denied full and equal access to a restaurant with steps at its entry before that person ever enters the front door of the restaurant, much less completes an order. In the Internet context, users with disabilities similarly may not be able to enter into an agreement online because a website is inaccessible.

Requiring a formal agreement between the user and the business will leave users without recourse to challenge even blatant facial discrimination under the Unruh Act, as long as it is online and experienced before the user enters into any agreement with the business. Online companies will try to immunize themselves from legal challenge by placing barriers at the virtual entrance to their businesses. Those who wish to limit the demographics of their audience will be incentivized to do so early and deter unwanted potential users from engaging with the business and gaining the ability to challenge perceived discrimination.

B. The "Futile Gesture" Doctrine Would Assist Enforcement of the Unruh Act.

Federal courts have addressed unequal access that prevents a transaction or other formal engagement through the "futile gesture" doctrine, which has been part of the federal enforcement structure for over forty years. The state legislature

and courts often look to at least match federal civil rights protections,[1] but California has yet to adopt this doctrine under the Unruh Act. Doing so now would allow Californians to enforce the full breadth of the statute's protections.

The U.S. Supreme Court first applied the "futile gesture" doctrine in the employment discrimination context under Title VII of the Civil Rights Act of 1964. In *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, the Court explained:

> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices. . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

(*Id.* at pp. 365-366.) Federal circuit courts followed suit and have applied the doctrine in cases arising under Title VII and other workplace statutes. (See, e.g., *Fischer v. Forestwood Co., Inc.* (10th Cir. 2008) 525 F.3d 972, 985 [job seeker need not submit job application to challenge religious discrimination in hiring under Title VII]; *Breneisen v. Motorola, Inc.* (7th Cir. 2008) 512 F.3d

[1] See, e.g., *Konig v. Fair Employment & Housing Com.* (2002) 28 Cal.4th 743, 749-750 [noting California legislative intent that the Fair Employment and Housing Act (FEHA) be at least as protective as the federal Fair Housing Amendments Act of 1988]; *Isbister v. Boys Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 79-80 [looking to Title II of the federal Civil Rights Act of 1964 to interpret language in the Unruh Act].

972, 980 [recognizing claim for retaliatory denial of workplace entitlement because of Family Medical Leave Act absence without actual request]; *Gutowsky v. County of Placer* (9th Cir. 1997) 108 F.3d 256, 260–261 [reversing summary judgment for employer on claim of wrongful denial of employment under Section 1983 where plaintiff had not submitted application]; *United States v. Gregory* (4th Cir. 1989) 871 F.2d 1239, 1242 ["The Supreme Court has recognized that when an employer's discriminatory policy is known, subjecting oneself to the humiliation of explicit and certain rejection is not required to make out a case of discrimination."].)

Federal courts also have applied the "futile gesture" doctrine to enforce laws beyond employment. For example, the Fourth Circuit concluded that an applicant for housing had been injured by a housing cooperative's policy of not accepting black applicants, even though the plaintiff had not submitted an application and instead learned of the discriminatory policy from her real estate agent. (*Pinchback v. Armistead Homes Corp.* (4th Cir. 1990) 907 F.2d 1447, 1449, 1452.) The court wrote:

> The burden of humiliation occasioned by discrimination is heavy. When one has felt it as Pinchback did here, we cannot require the victim to press on meaninglessly. . . . The victims who were reliably informed of Armistead's policy would not be limited to those who approached Armistead and were rebuffed. Pinchback, who was unwilling to engage in the futile gesture of submitting an offer for the property, is nonetheless a victim of discrimination.

(*Id.* at p. 1452. See also *Bach v. Pataki* (2d Cir. 2005) 408 F.3d 75, 82–83, overruled on other grounds by *McDonald v. Chicago*

(2010) 561 U.S. 742 [gun owner need not submit futile firearm application to challenge licensing law under the Second Amendment and the Privileges and Immunities Clause]; *Sammon v. New Jersey Bd. of Medical Examiners* (3d Cir. 1995) 66 F.3d 639, 643 [prospective midwives had standing to challenge discriminatory licensing statute under Section 1983 without submitting futile applications].)

The Americans with Disabilities Act (ADA) explicitly incorporates the "futile gesture" doctrine to "avoid unreasonable burdens on ADA plaintiffs." (42 U.S.C. § 12188(a)(1) ["Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization . . . does not intend to comply with its provisions."]; see *Pickern v. Holiday Quality Foods Inc.* (9th Cir. 2002) 293 F.3d 1133, 1136-1137 [discussing legislative history].) Courts have interpreted the statutory language to mean "if a plaintiff can show either that he was deterred from visiting the accommodation on specific past occasions when he otherwise would have visited it because of the known barriers there, . . . he has established an injury in fact. . . ." (*Doran v. 7–Eleven, Inc.* (9th Cir. 2008) 524 F.3d 1034, 1041, fn. 4. See also *Pickern*, *supra*, 293 F.3d at pp. 1136-1137 ["[O]nce a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury."].) This provision is a recognition of the unique dilemma

faced by persons with disabilities in achieving full access to what others take for granted.

Just a few years ago, a federal court in California concluded that a blind plaintiff had standing to sue Uber where the plaintiff knew that Uber drivers had turned away blind customers accompanied by guide dogs but had never attempted to use the service. (*National Federation of the Blind of California v. Uber Technologies, Inc.* (N.D.Cal. 2015) 103 F.Supp.3d 1073, 1080-1081.) Noting that "the factual scenario presented here is different" than cases where *physical* barriers prevented access, the court nonetheless found the plaintiff had standing because the "ADA directs this Court to relax its standard for injury in fact in order to discourage both piecemeal litigation and futile attempts at access." (*Id.* at p. 1081.) The district court's refusal to require plaintiffs to pursue "futile attempts at access" represents an inclusive standing analysis that both guarantees civil rights protections and acknowledges the reality of how individuals interact with Internet-based services like Uber.

Amici have been unable to identify any state court decisions addressing the availability of the "futile gesture" standard under the Unruh Act, but at least two federal courts have done so. (*Botosan v. Paul McNally Realty* (9th Cir. 2000) 216 F.3d 827, 835 [holding that plaintiff was entitled to statutory minimum damages under the Unruh Act after he was deterred from patronizing a business that did not provide handicapped parking]; *Arnold v. United Artists Theatre Circuit, Inc.* (N.D.Cal.

1994) 866 F.Supp. 433, 439 [concluding that the Unruh Act "extend[s] to claims based on incidents of deterrence.")

One California appellate court considered and rejected "futile gesture" standing in a claim for money damages under Section 54.3 of the California Disabled Persons Act. (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1225-1227.) The *Reycraft* court interpreted statutory language creating liability for "[a]ny person . . . who denies or interferes with admittance to or enjoyment of the public facilities . . . or otherwise interferes with the rights of an individual with a disability" (Civ. Code, § 54.3) to require a plaintiff to "actually present himself" and be "denied equal access on a particular occasion." (*Reycraft*, *supra*, at p. 1224.) However, after analyzing the same language, the *Arnold* court earlier reached the opposite outcome. (*Arnold*, *supra*, 855 F.Supp. at p. 439 ["The Court therefore holds that where a plaintiff can prove that violations of applicable California disability access standards deterred her on a particular occasion from attempting to attend a place of public accommodation, that plaintiff states a claim . . . for damages[] under § 54.3. . . ."].) Further, *Reycraft* has limited applicability here, as the language at issue in Section 54.3 of the Disabled Persons Act is distinct from the broad, inclusive language of the Unruh Act. (See Civ. Code, § 51, subd. (b).)

The certified questions provide an opportunity for this Court to ensure proper enforcement of its civil rights laws and

affirm California's commitment to civil rights protections through adoption of the "futile gesture" doctrine.

C. The Supreme Court Has Previously Been Called On to Protect the Broad Remedial Mandate of California's Civil Rights Laws, and It Should Do So Again.

In certifying questions to this Court, the Ninth Circuit referenced three appellate interpretations of standing under state civil rights laws: *Surrey v. TrueBeginnings LLC* (2008) 168 Cal.App.4th 414; *Reycraft*, *supra*, 177 Cal.App.4th 1211; and *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118. (See *White, supra*, 891 F.3d at pp. 1180-1182.) Petitioner White discusses these decisions at length. (See, e.g., Petitioner's Opening Brief on the Merits at pp. 27-29, 48-62.) However, this Court's analysis is not limited to the outcomes reached by these appellate courts, none of which extend as broadly as federal recognition of deterred action as a basis for recovery.

Recognizing the harm of deterred action is consistent with California's long history at the forefront of civil rights protections. In the late 1800s, the U.S. Supreme Court invalidated federal post-Civil War legislation prohibiting racial discrimination in public accommodations.[2] California picked up

[2] See *Civil Rights Cases* (1883) 109 U.S. 3, in which the high court struck down the Civil Rights Act of 1875. (43 Cong. Ch. 114, 18 Stat. 335-337, enacted Mar. 1, 1875.) The court construed the Thirteenth and Fourteen Amendments as narrowly focused on the abolition of slavery and a small measure of protection from discriminatory governmental action. (*Civil Rights Cases*, *supra*, 109 U.S. at p. 23.) Expansive federal protections would not return until the civil rights era of the 1960s.

the civil rights mantle abandoned by the federal government and, in 1897, passed its first public accommodations statute, the Dibble Civil Rights Act.[3] Over the next sixty years, this Court issued expansive public accommodations decisions, acknowledging its application to unenumerated diversity characteristics and scenarios.[4]

In 1959, the state commitment to public accommodations access was recodified in the Unruh Act, directly rebuking the appellate court decision in *Reed v. Hollywood Professional School* (1959) 169 Cal.App.2d Supp. 887. In *Reed*, the court held that public accommodations protections did not extend to private schools because they were not specifically enumerated nor were they sufficiently similar to entities that were. (*Id.* at pp. 889-890.) Later that same year, the Legislature enacted the Unruh Civil Rights Act and made clear that it applied to "all businesses of every kind whatsoever." (Civ. Code, § 51, subd. (b) added by Stats. 1959, ch. 1866.)

Applying the Unruh Act, this Court continued its tradition of liberal construction to rid California's public spaces of

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[3] See Stats. 1897, ch. 108. The statute's author, Henry Clay Dibble, was notable for his career as an early civil rights lawyer and legislator. (See McClain, *California Carpetbagger: The Career of Henry Dibble* (2010) 28 Quinnipiac L.Rev. 885.)

[4] See, e.g., *Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 113-114 [identifying the importance of adequate remedies to ensure appropriate public access to privately operated accommodations]; *Stoumen v. Reilly* (1951) 37 Cal.2d 713, 717 [California Board of Equalization cannot suspend an establishment's liquor license on the grounds that "many of [its] patrons were homosexuals"].

discrimination.[5] Together, the Court and the Legislature added enumerated diversity characteristics,[6] confirmed coverage of unenumerated scenarios,[7] and endorsed expansive judicial interpretations of the Act.[8] On multiple occasions, this has required the Court to correct appellate narrowing of the Act.[9]

A prime example of the Court's periodic intervention is the Unruh Act's protection of Californians with disabilities.

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[5] See, e.g., *Isbister*, *supra*, 40 Cal.3d at pp. 75-76 ["The Act is this state's bulwark against arbitrary discrimination in places of public accommodation," reflecting the "Legislature's desire to banish such practices from California's community life"]; *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 468 [the Act's language "leaves no doubt that the term 'business establishments' was used in the broadest sense reasonably possible."].

[6] See, e.g., Stats. 2015, ch. 282, § 1 [adding "citizenship, primary language, or immigration status" to the list of characteristics protected by the Unruh Act]; Stats. 2005, ch. 420, § 3 [adding "marital status" and "sexual orientation"]; Stats. 1974, ch. 1193, § 1 [adding "sex"]; Stats. 1961, ch. 1187, § 1 [specifying protection for "all persons" rather than "all citizens"].

[7] See, e.g., *Isbister*, *supra*, 40 Cal.3d at p. 76 [Act covers private charitable organization that operates community recreation facility]; *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796 [condominium owners' association covered]; *Burks, supra*, 57 Cal.2d at p. 469 [real estate developers covered].

[8] For example, the Civil Rights Act of 2005 expressly endorsed *Marina Point, Ltd v. Wolfson* (1982) 30 Cal.3d 721, 740 [holding children to be a protected class, even though unenumerated] and *O'Connor*, *supra*, 33 Cal.3d at p. 796 [holding condominium owners' associations to be covered by Unruh Act, even though unenumerated]. (See Stats 2005, ch. 420, § 1, subd. (d).)

[9] See, e.g., *Warfield v. Peninsula Golf & Country Club* (1995) 10 Cal.4th 594, 630 [reversing lower courts' narrow ruling that private golf club was not covered by the Unruh Act]; *O'Connor*, *supra*, 33 Cal.3d at pp. 796-797 [reversing lower court ruling that condominium owners' association not covered]; *Burks*, *supra*, 57 Cal.2d at pp. 467, 468-469, 476 [reversing lower court ruling that real estate developers not covered].

Disability was first added to the Unruh Act's enumerated list of protected diversity characteristics in 1987. (See Stats. 1987, ch. 159, § 1 [adding "blindness or other physical disability"].) In 1992, the Legislature expanded the definition to include mental disabilities, in addition to physical and sensory disabilities. (See Stats. 1992, ch. 913, § 3 [deleting the word "physical" as a modifier of "disability"].) This 1992 legislation also incorporated the federal Americans with Disabilities Act as a minimum level of protection, retaining California law where it provided greater advantages.[10]

California Courts of Appeal failed to honor the legislative expansion of the Act. As federal courts moved to narrow the federal definition of "disability,"[11] several California Courts of Appeal moved in tandem, reaching restrictive interpretations of the state law definition.[12] Ultimately, this Court intervened to

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[10] Stats. 1992, ch. 913, § 1 ["It is the intent of the Legislature in enacting this act to strengthen California law in areas where it is weaker than the [ADA] and to retain California law when it provides more protection for individuals with disabilities than the [ADA]."]. See also Civ. Code, § 51, subd. (f) ["A violation of the right of any individual under the [ADA] shall also constitute a violation of this section."].

[11] See, e.g., *Sutton v. United Airlines* (1999) 527 U.S. 471, 475 [holding severe vision impairment did not qualify as disability within the meaning of the ADA]; *Murphy v. United Parcel Service, Inc.* (1999) 527 U.S. 516 [holding significantly high blood pressure did not qualify as disability within the meaning of the ADA]. The ADA Amendments Act of 2008 superseded these cases, restoring Congress's expansive federal definition of "disability." (See Pub.L. No. 110-325 (Sept. 25, 2008) 122 Stat. 3553.)

[12] See, e.g., *Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1039-1040 [inability to see color red not a "disability"]; *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th

disapprove these decisions.[13] The Legislature also moved to clarify the breadth and independence of California state law. (See Gov. Code, § 12926.1.[14])

This history reveals striking parallels between the late-twentieth century narrowing of the definition of "disability," described above, and the appellate courts' often narrow interpretation of standing over the past twenty years, described in the Ninth Circuit's opinion in the present appeal. (See *White*, *supra*, 891 F.3d at pp. 1178-1180.) In the former instance, inappropriately narrow interpretations by appellate courts prompted intervention by this Court and the Legislature to restore the wide sweep of state law. The Court faces this scenario again.

614, 628-629 [evidence of "only minor limitations" insufficient]; *Muller v. Automobile Club of So. Cal.* (1998) 61 Cal.App.4th 431, 442 ["Legislature intended to conform California's employment statutes to the ADA"]; *Pensinger v. Bowsmith, Inc.* (1998) 60 Cal.App.4th 709, 721 [suggesting that the federal "substantial limitation test" applies to proving physical disability under state law]; *Gosvener v. Coastal Corp.* (1996) 51 Cal.App.4th 805, 813 [California law incorporates the ADA's definition of disability].

[13] See *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019. *Colmenares* confirmed the broad scope of state law, invalidated the state appellate decisions cited *supra* at fn. 12, and disapproved of a narrowing federal analysis of disability. (*Id.* at pp. 1027, 1031, fn. 6.)

[14] Because FEHA establishes definitions that are cross-referenced by other state laws, FEHA provisions like this enactment are applicable to the Unruh Act. A comparable amendment was added to Government Code, Section 11135 a year later. (See Stats. 2001, ch. 708, § 1.)

D. Square, Inc.'s Objections to an Inclusive Standing Analysis Fail.

Respondent Square, Inc. ("Square"), asserts that a standard that recognizes deterred action as a basis for harm would lead to (1) "individual suits asserting hypothetical injuries" and (2) "unwieldy class actions that include consumers who undertook no substantial interaction with the defendant." (Respondent's Answer Brief on the Merits at p. 51.)

To the contrary, the U.S. Supreme Court described the burden of showing discrimination deterred one from acting as "not always easy." (*Int'l Brotherhood of Teamsters*, *supra*, 431 U.S. at p. 368.) In *Pinchback*, the Fourth Circuit affirmed the district court's application of the "futile gesture" doctrine in the housing context because it was "amply supported by the record." (*Pinchback*, *supra*, 907 F.2d at p. 1452.) The record included evidence that Pinchback belonged to a protected group, the housing cooperative maintained a discriminatory housing policy, Pinchback intended to apply for a housing lease, and she decided not to apply after she learned of the discriminatory policy. (*Id.* at pp. 1449-1450.) The court concluded, "We do not share [the housing cooperative's] concern about frivolous litigation in light of the careful treatment the district court has given the futile gesture doctrine as a basis for recovery." (*Ibid.*)

In addition, the "futile gesture" doctrine was born out of group action. In *International Brotherhood of Teamsters*, *supra*, 431 U.S. at pp. 328-329, the federal government brought suit on behalf of a large group of employees, alleging that the employer

had engaged in a pattern and practice of employment discrimination and that the employee union had agreed to create and maintain a discriminatory seniority system. After finding the defendants liable, *id.* at p. 362, the Supreme Court then considered deterred action as part of the process of identifying which employees were entitled to relief. (*Id.* at pp. 367-368.)

In reaching its final determination, the *Teamsters* Court wrote:

> The denial of Title VII relief on the ground that the claimant had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups.

(*Id.* at p. 367.) The Unruh Act should also be read to prohibit discrimination that deters further action.

II. EQUAL ACCESS TO ONLINE PUBLIC ACCMODATIONS IS VITAL TO MARGINALIZED COMMUNITIES.

Technology is now ubiquitous in the public marketplace. Many brick-and-mortar businesses provide additional services to their customers through a website or app, such as store locators, price checks, additional offers, coupons or discounts, and wayfinding in the store. Some businesses are beginning to facilitate in-person transactions through mobile phone or tablet apps.[15] Access to online spaces is thus important to customers,

[15] See D'Innocenzio, *For retailers the smartphone is future of store experience*, Associated Press (Dec. 12, 2018) <https://apnews.com/4949636dcced43f89912dfc2d71b54bb> [as of Jan. 31, 2019].

even when businesses have a physical presence. In addition, increasing numbers of businesses operate exclusively online, such that customers must use technology to access their goods or services. These online-only businesses offer retail products as well as critical services, including online legal assistance and telemedicine.[16]

Evolving technological developments have unique implications for marginalized and vulnerable communities. The early days of the Internet created a well-documented "digital divide," referring to the lack of access that lower-income households have to various kinds of cutting-edge communication and information technologies.[17] While this divide persists, newer data show that historically disadvantaged groups have made significant progress in closing the gap.[18] According to 2018 Pew

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[16] See, e.g., LegalZoom <https://www.legalzoom.com> [as of Jan. 31, 2019]; American Telemedicine Association <https://www.americantelemed.org/about/about-ata> [as of Jan. 31, 2019]; Talkspace <https://www.talkspace.com> [as of Jan. 31, 2019].

[17] See U.S. Department of Commerce, National Telecommunications and Information Administration, *Falling Through the Net: A Survey of the "Have Nots" in Rural and Urban America* (July 1995) <https://www.ntia.doc.gov/ntiahome/fallingthru.html> [as of Jan. 31, 2019].

[18] See Redl, *New Data Show Substantial Gains and Evolution in Internet Use* (Jun. 6, 2018) National Telecommunications and Information Administration <https://www.ntia.doc.gov/blog/2018/new-data-show-substantial-gains-and-evolution-internet-use> [as of Jan. 31, 2019]; Perrin, *Digital gap between rural and nonrural America persists* (May 19, 2017) Pew Research Center <http://www.pewresearch.org/fact-tank/2017/05/19/ digital-gap-between-rural-and-nonrural-america-persists/> [as of Jan. 31, 2019].

Research Center data, about 77 percent of Americans now own a smartphone.[19] About 20 percent of Americans rely exclusively on smartphones for Internet access, including younger adults, people of color, and low-income Americans at disproportionately high rates.[20]

Technological advances continue to create new opportunities for engagement. Ensuring equal access to online public accommodations *today* is critical. As traditional services, including banking and advertising, go online, the protections of the Unruh Act must do so as well.

A. New Technologies Offer Unprecedented Integration Opportunities for People with Disabilities—But Only If They Are Accessible.

Millions of Americans with disabilities use the Internet.[21] People with a wide range of disabilities benefit from automated services, electronic access, and an online world that is available

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[19] See Pew Research Center, *Mobile Fact Sheet* (Feb. 5, 2018) at "Mobile phone ownership over time" <http://www.pewinternet.org/fact-sheet/mobile/> [as of Jan. 31, 2019].

[20] *Id.* at "Who is smartphone dependent."

[21] Out of over 250 million adult Americans, 89 percent use the Internet and 27 percent have a disability. (United States Census Bureau, *Quick Facts* <https://www.census.gov/quickfacts/fact/table/US/PST045218> [as of Jan. 31, 2019]; Pew Research Center, *Internet/Broadband Fact Sheet* (Feb. 5, 2018) at "Internet use over time" <http://www.pewinternet.org/fact-sheet/internet-broadband/> [as of Jan. 31, 2019].); Taylor, *Americans With Disabilities: 2014* (November 2018) United States Census Bureau at p. 2 <https://www.census.gov/content/dam/Census/library/publications/2018/demo/p70-152.pdf> [as of Jan. 31, 2019].)

24/7 to overcome the systemic transportation, communication, architectural, and other barriers that pervade our society.[22] For example, people with disabilities that limit their travel or other functions to certain times of day can access services online and on their own schedule. With screen reader technology, people who are blind or have low vision can access a vast world of electronic information and avoid alternative methods of communication, such as telephone or in-person assistance that may reduce accuracy, availability, privacy, and independence.[23] People who are deaf or hard of hearing can interact visually, rather than aurally.[24]

However, new technologies can also create new barriers to entry unless electronic and information technology—and the protocols by which they are used—are designed with awareness

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[22] See Web Accessibility in Mind (WebAim), *Introduction to Web Accessibility* at "Conclusion" <https://webaim.org/intro> [as of Jan. 31, 2019] ["The web offers many opportunities to people with disabilities that are unavailable through any other medium. It offers independence and freedom."].

[23] See American Foundation for the Blind, *Screen Readers*, <http://www.afb.org/prodBrowseCatResults.aspx?CatID=49> [as of Jan. 31, 2019] ["Screen readers are software programs that allow blind or visually impaired users to read the text that is displayed on the computer screen with a speech synthesizer or braille display."].

[24] See National Association of the Deaf, *What is Captioning?* <https://www.nad.org/resources/technology/captioning-for-access/what-is-captioning> [as of Jan. 31, 2019] ["Captioning is the process of converting the audio content of a television broadcast, webcast, film, video, CD-ROM, DVD, live event, or other productions into text and displaying the text on a screen, monitor, or other visual display system."].

of disability access needs.[25] Blind community members who rely on screen-reader software cannot avail themselves of websites, apps, self-service kiosks, and other electronic information that are not compatible with this software.[26] Lack of captioning for video clips creates barriers for people with hearing impairments.[27] People with manual dexterity disabilities may be timed out of "CAPTCHA" challenge response tests (which aim to verify that the user is "not a robot") or locked out of accounts due to keying errors or failure to input data quickly enough.[28]

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[25] See *Introduction to Web Accessibility*, *supra,* at "Conclusion" ["[I]f a website is not created with web accessibility in mind, it may exclude a segment of the population that stands to gain the most from the internet."].

[26] See, e.g., Babu et al., *Understanding Blind Users' Web Accessibility and Usability Problems* (Sept. 2010) 2 AIS Transactions on Human-Computer Interaction, Issue 3, at pp. 73, 89-90 <https://aisel.aisnet.org/cgi/viewcontent.cgi?article=1014&context=thci> [as of Jan. 31, 2019] [identifying accessibility issues with websites]; Babu, *Can Blind People Use Social Media Effectively? A Qualitative Field Study of Facebook Usability* (2014) 2 American J. of Information Systems, No. 2, at p. 33, 39 <https://pdfs.semanticscholar.org/4929/43f4e392a497100f3592639a2261b9ddcc2f.pdf> [as of Jan. 31, 2019] [identifying accessibility issues with social media]; Ahmed et al., *Addressing Physical Safety, Security, and Privacy for People with Visual Impairments* (2016) Symposium on Usable Privacy and Security at pp. 5-6 <https://www.cs.indiana.edu/~kapadia/papers/VIP-SOUPS.pdf> [as of Jan. 31, 2019] [describing the safety and security concerns of study participants with visual impairments].

[27] See National Association of the Deaf, *Captioning on the Internet* <https://www.nad.org/resources/technology/internet-access-and-broadband/captioning-on-the-internet> [as of Jan. 31, 2019] ["The NAD strongly advocates for captioning of all audio and audiovisual information and material, regardless of distribution method."].

[28] See World Wide Web Consortium, *Inaccessibility of CAPTCHA: Alternatives to Visual Turning Tests on the Web* (Jul. 3, 2018) at "4. Conclusion" <https://www.w3.org/TR/turingtest> [as of Jan. 3, 2019] ["The evolution of CAPTCHA techniques has demonstrated

Any of these accessibility barriers could deter users with disabilities from using the services of an online business before they are able to enter into a formal agreement. A restrictive standing analysis could prohibit them from challenging this inaccessibility or other discrimination experienced along the way.

B. Internet-Based Financial Services Companies Are Critical to Marginalized Communities, Who Must Be Able to Enforce Equal Access.

Websites and digital interfaces also create opportunities for communities in need of easily accessible and affordable financial and banking services, including those explicitly protected from discrimination under the Unruh Act. Permitting online businesses to restrict protected communities' options for safe, affordable, and convenient banking options through discriminatory terms of service, lack of accessibility, failure to provide adequate language options, or other measures could be financially devastating.

Lael Brainard, a member of the U.S. Federal Reserve System Board of Governors, recently observed, "The Federal Reserve, and other federal banking agencies, view access to technology as increasingly essential to households and small businesses in underserved low- and moderate-income communities."[29] Members of these communities are substantially

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that traditional solutions such as text-based characters contained in images are not only challenging for people with disabilities, but also insecure."].

[29] See Brainard, *FinTech and the Search for Full Stack Financial Inclusion* (Oct. 17, 2018) at p. 17 <https://www.federal reserve.gov/newsevents/speech/files/brainard20181017a.pdf> [as of Jan. 31, 2019].

more likely to be "unbanked," meaning "no one in the household ha[s] a checking or savings account," or "underbanked," meaning "the household ha[s] an account at an insured institution but also obtained financial products or services outside of the banking system."[30] A recent survey by the Federal Deposit Insurance Corporation (FDIC) showed that about 25 percent of U.S. households fell into these categories in 2017, and that "[c]onsistent with previous surveys, . . . unbanked and underbanked rates were higher among lower-income households, less-educated households, younger households, black and Hispanic households, working-age disabled households, and households with volatile income."[31] An earlier FDIC study also identified higher rates of unbanked and underbanked households among immigrant families.[32]

Unbanked and underbanked families must turn to "alternative financial services" to access funds, including "money orders, check cashing, international remittances, payday loans, refund anticipation loans, rent-to-own services, pawn shop loans,

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[30] Federal Deposit Insurance Corporation, *2017 FDIC National Survey of Unbanked and Underbanked Households* (Oct. 2018) at p. 1 <https://www.fdic.gov/householdsurvey/2017/2017report.pdf> [as of Jan. 31, 2019].

[31] *Id.* at p. 3.

[32] See Northwood & Rhine, *Use of Bank and Nonbank Financial Services: Financial Decision Making by Immigrants and Native Born* (Aug. 10, 2016) FDIC Division of Depositor and Consumer Protection Research Working Paper Series 2016-03 at p. 3 <https://www.fdic.gov/news/conferences/consumersymposium/2016/documents/northwood_paper.pdf> [as of Jan. 31, 2019].

or auto title loans."[33] These services require families to incur high fees and leave them vulnerable to unfair practices.[34]

Online financial institutions create possibilities for safer, more convenient, and less expensive financial services. Brainard observed, "[N]ew technological building blocks increasingly can be used to build more full-stack approaches to financial inclusion."[35] But she also emphasized, "Financial literacy and consumer protections are critically important regardless of whether financial services are delivered through traditional means or smartphone apps."[36]

C. New Technologies Enable Businesses to Determine Who Sees Their Advertising, Which is Vulnerable to Abuse.

Companies now have access to an unprecedented level of detail regarding Internet users' browsing histories. They use this information to target search results and advertising at certain

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[33] Federal Deposit Insurance Corporation, *2017 FDIC National Survey of Unbanked and Underbanked Households*, *supra*, at p. 1.

[34] See AARP Public Policy Institute, *The Alternative Financial Services Industry* (August 2001) at pp. 5-8 <https://assets.aarp.org/rgcenter/consume/ib51_finance.pdf> [as of Jan. 31, 2019]; Pew Health Group, *Slipping Behind: Low-Income Los Angeles Households Drift Further from the Financial Mainstream* (October 2011) at p. 22 <https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/safe_banking_opportunities_project/slipping20behindpdf.pdf> [as of Jan. 31, 2019] [finding the fees associated with alternative financial services consumed 6.0% of an average household's income, while the cost of the same services at a bank consumed only 0.5%].

[35] See Brainard, *supra*, at p. 11.

[36] *Id.* at p. 17.

users based on inferences they have made about their users, including interests, race/ethnicity, gender, religion, ZIP code, and other characteristics.[37] This targeted advertising allows companies, in many cases, to direct information to the users to whom it is most salient. However, it is also vulnerable to abuse. Advertisers can stop or limit specified groups from seeing products, available housing, and employment opportunities, including in blatant violation of civil rights laws.

A recent study demonstrated that women were less likely than men to receive advertising through Google for high-paying jobs.[38] Facebook ad preferences can allow landlords to prevent groups from seeing housing ads based on characteristics such as likely membership in a racial or ethnic group, religion, or ZIP

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[37] Hitlin & Rainie, *Facebook Algorithms and Personal Data* (January 16, 2019) Pew Research Center <http://www.pew internet.org/2019/01/16/facebook-algorithms-and-personal-data> [as of Jan. 31, 2019] [describing Facebook ad preferences, which allow advertisers to target groups based on categories including demographics and political leanings]; see also Federal Trade Commission, *Big Data: A Tool for Inclusion or Exclusion*? (January 2016) at pp. 3-5 <https://www.ftc.gov/ system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> [as of Jan. 31, 2019]; Cyphers, *A Guided Tour of the Data Facebook Uses to Target Ads* (January 24, 2019) Electronic Frontier Foundation <https://www.eff.org/deeplinks/2019/01/guided-tour-data-facebook-uses-target-ads> [as of Jan. 31, 2019].

[38] Datta et al., *Automated Experiments on Ad Privacy Settings: A Tale of Opacity, Choice, and Discrimination* (2015) Proceedings on Privacy Enhancing Technologies 92 at p. 102 <http://www.andrew.cmu.edu/user/danupam/dtd-pets15.pdf> [as of Jan. 31, 2019] [identifying "a statistically significant difference in the ads for male and female agents that simulated an interest in jobs in May, 2014"].

code.[39] Similarly, major employers have been accused of using these Facebook advertising features to exclude older workers from seeing ads for job opportunities.[40]

These examples expose the danger of narrowing the Court's focus to formal agreements or transactions as the basis for harm under the Unruh Act. Internet users can experience discrimination online before ever entering into an agreement or transaction with a business. A restrictive interpretation of standing would deny them recourse to challenge harmful and unlawful discrimination.

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[39] Angwin et al., *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, ProPublica (Nov. 21, 2017) <https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin> [as of Jan. 31, 2019] [purchasers of housing ads permitted to exclude African Americans, Spanish speakers, and others]. See also Angwin & Parris, *Facebook Lets Advertisers Exclude Users by Race*, ProPublica (October 28, 2016) <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race> [as of Jan. 31, 2019]; Bagli, *Facebook Vowed to End Discriminatory Housing Ads. Suit Says It Didn't.*, N.Y. Times (March 27, 2018) <https://www.nytimes.com/2018/03/27/nyregion/facebook-housing-ads-discrimination-lawsuit.html> [as of Jan. 31, 2019].

[40] Angwin et al., *Facebook Job Ads Raise Concerns About Age Discrimination*, N.Y. Times (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/business/facebook-job-ads.html> [as of Jan. 31, 2019]; see *Bradley v. T-Mobile US, Inc.* (N.D.Cal. 2017, No. 5:17-cv-07232-BLF).

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court adopt an inclusive standing requirement that provides for effective civil rights enforcement in the Internet age.

Dated: February 1, 2019

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 8,120 words, exclusive of matters that may be omitted under California Rules of Court 8.520(c)(3).

Dated: February 1, 2019

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PROOF OF SERVICE

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 Alameda, State of California. My business address is 125 University Ave, Suite 102, Berkeley, CA 94710.

On February 1, 2019 I served the following document(s):

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND PROPOSED BRIEF OF AMICI CURIAE DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, IMPACT FUND, AND NINE ADDITIONAL ORGANIZATIONS IN SUPPORT OF PLAINTIFF AND PETITIONER ROBERT E. WHITE

BY MAIL: I enclosed the document(s) in a sealed envelope or packaged addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Impact Fund's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC TRANSMISSION: I submitted the document(s) using the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on February 1, 2019, at Berkeley, California.

/s/ Katharine Vidt
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