CIVIL RIGHTS — STATUTORY STANDING — CALIFORNIA SUPREME COURT HOLDS THAT A TRANSACTION IS NOT REQUIRED TO SUE ONLINE SERVICE PROVIDERS FOR DISCRIMINATION. — *White v. Square, Inc.*, 446 P.3d 276 (Cal. 2019).

Over the past decade, the U.S. Supreme Court's decisions on the Federal Arbitration Act[1] (FAA) have increasingly favored mandatory arbitration clauses.[2] This shift has concerned consumer protection groups, as predispute arbitration clauses deny access to important procedural rights, such as the right to an open forum.[3] Because the Court has rejected direct attempts to disfavor arbitration agreements relative to other contracts, state courts and legislatures have looked to alternative methods of expanding access to judicial forums for consumer protection claims. Recently, in the facially unrelated case of *White v. Square, Inc.*,[4] the California Supreme Court held that plaintiffs have standing to bring claims under the Unruh Civil Rights Act[5] (Unruh Act) against online service providers without entering into an agreement if the plaintiff intends to use the website's services but is deterred by discriminatory terms of service.[6] Although the *White* decision was focused on standing under the Unruh Act, it continued a trend across state courts and legislatures of expanding consumer remedies while evading increasingly pervasive arbitration clauses in businesses' adhesion contracts. Nonetheless, whether *White* will truly expand access to courts for those who have signed arbitration agreements will depend heavily on further legal developments.

Square provides an online service for accepting credit card payments.[7] In 2015, Square's terms of service required prospective users to represent that they would not accept payments in connection with a list of twenty-eight businesses and business activities, including "bankruptcy attorneys or collection agencies engaged in the collection of

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[1] 9 U.S.C. §§ 1–16 (2018).

[2] *See, e.g.*, Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 527–28 (2019) (holding that courts may not refuse to compel arbitration on threshold issues of arbitrability even when the arbitration claim is "wholly groundless," *id.* at 528); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 241 (2013) (Kagan, J., dissenting) (noting that the Court's decision to mandate arbitration "prevents the effective vindication of federal statutory rights"); *see also* Todd D. Rakoff & Jed S. Rakoff, *Arbitration, "Pseudo-Contract," and Objective Theory*, 133 HARV. L. REV. F. 13, 19 (2019) (describing the Supreme Court's enthusiasm for applying the FAA broadly).

[3] *See* Michael A. Satz, *Mandatory Binding Arbitration: Our Legal History Demands Balanced Reform*, 44 IDAHO L. REV. 19, 35–46 (2007) (describing a litany of issues for consumers in arbitration).

[4] 446 P.3d 276 (Cal. 2019).

[5] CAL. CIV. CODE §§ 51–52 (West 2018).

[6] *White*, 446 P.3d at 277.

[7] *Id.* at 278.

debt."[8] Robert White, a bankruptcy attorney, alleged that he visited the site intending to use Square's services.[9] After reading the terms of service, however, he did not click the "Continue" button to create an account, as he believed that he could not sign the agreement without committing fraud.[10]

Instead, White brought a putative class action against Square under California's Unruh Civil Rights Act,[11] which provides that "[a]ll persons . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments."[12] He alleged that Square's policy constituted unlawful occupational discrimination.[13] Relying on *Surrey v. TrueBeginnings, LLC*,[14] the District Court for the Northern District of California explained that "a person must tender the purchase price for a business's services or products in order to have standing to sue it [under the Unruh Act],"[15] and it dismissed the case.[16]

On direct appeal, a panel of the Ninth Circuit certified the statutory standing question to the California Supreme Court.[17] The panel first analyzed the question from the federal perspective, concluding that White's allegations satisfied Article III's standing requirements.[18] It then reviewed California Supreme Court precedent on statutory standing under the Act, finding that the court "[had] not directly addressed a situation where persons present themselves for service at a business establishment, but are deterred by the business's discriminatory policy from using or paying for the business's services or products."[19] Finally, it noted a divide between California appellate courts on this issue.[20] While, as the district court had noted, *Surrey* adopted a bright-line rule for determining statutory standing,[21] other appellate courts have not

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[8] Second Amended Complaint ¶ 6, White v. Square, Inc., No. 15-cv-04539 (N.D. Cal. Sept. 14, 2016).

[9] *White*, 446 P.3d at 278.

[10] *Id.*

[11] *See* White v. Square, Inc., No. 15-cv-04539, 2016 WL 4791748, at *1 (N.D. Cal. Sept. 14, 2016).

[12] CAL. CIV. CODE § 51(b) (West 2018).

[13] *White*, 2016 WL 4791748, at *2. The California Supreme Court ultimately declined to address whether the Unruh Act prohibits occupational discrimination. *White*, 446 P.3d at 284.

[14] 85 Cal. Rptr. 3d 443 (Ct. App. 2008).

[15] *White*, 2016 WL 4791748, at *3 (alteration in original) (quoting *Surrey*, 85 Cal. Rptr. 3d at 444).

[16] *Id.* at *4.

[17] White v. Square, Inc., 891 F.3d 1174, 1175 (9th Cir. 2018); *see also* CAL. RULES OF COURT 8.548(a) ("On request of . . . a United States Court of Appeals . . . the [California] Supreme Court may decide a question of California law . . . .").

[18] *White*, 891 F.3d at 1176–77.

[19] *Id.* at 1178.

[20] *Id.* at 1178–79.

[21] *Id.* (citing Surrey v. TrueBeginnings, LLC, 85 Cal. Rptr. 3d 443 (Ct. App. 2008)).

followed the same approach.[22] Thus, the Ninth Circuit certified this question to the California Supreme Court to resolve the split and clarify how statutory standing rules apply to online businesses.[23]

The California Supreme Court held that entering into an agreement with an online business is not necessary to establish standing under the Unruh Act.[24] Writing for a unanimous court, Justice Liu emphasized that "a person suffers discrimination under the Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services,"[25] and that "visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store."[26] To reach this conclusion, the court noted the broad purposes of the Act and prior cases that had found standing both when plaintiffs requested equal treatment without paying a discriminatory price and when plaintiffs paid a discriminatory price without requesting equal treatment.[27]

While the court agreed with Square that mere awareness alone does not confer standing, it found that White's allegations exceeded mere awareness,[28] as he had alleged that he reviewed Square's terms of service intending to use Square's services for his practice.[29] The court drew a comparison to other plaintiffs, such as those encountering "racially segregated drinking fountains or restroom facilities at an unattended structure"[30] or "a sign reading 'Whites Only' on [a] hiring-office door,"[31] who would be able to bring a claim without formally demanding equal treatment.[32]

Turning to past decisions in the state appellate courts, the court rejected the view of standing espoused in *Surrey*.[33] It noted that *Surrey*'s

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[22] *Id.* at 1179–80 (first citing Reycraft v. Lee, 99 Cal. Rptr. 3d 746, 755–57 (Ct. App. 2009); and then citing Osborne v. Yasmeh, 205 Cal. Rptr. 3d 656, 668–69 (Ct. App. 2016)).

[23] *Id.* at 1175.

[24] *White*, 446 P.3d at 277.

[25] *Id.*

[26] *Id.* at 277–78.

[27] *Id.* at 279–80.

[28] *Id.* at 280–81.

[29] *Id.* at 281.

[30] *Id.* (quoting Angelucci v. Century Supper Club, 158 P.3d 718, 723 (Cal. 2007)).

[31] *Id.* (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365–66 (1977)).

[32] *Id.* This rule is commonly known as the "futile gesture" doctrine. *See Teamsters*, 431 U.S. at 365–66 ("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."); *see also* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 464 & n.260 (1991) (noting that Congress included "futile gesture" language in the Americans with Disabilities Act as a reference to the Court's analysis of the Civil Rights Act of 1964 in *Teamsters*).

[33] *White*, 446 P.3d at 282.

bright-line rule requiring plaintiffs to tender the purchase price conflicted with California Supreme Court cases recognizing situations where plaintiffs would have standing to sue without transacting with a business,[34] such as *Koire v. Metro Car Wash*[35] and *Angelucci v. Century Supper Club*.[36] Thus, the court held that no such requirement existed and disapproved *Surrey*'s contrary view.[37]

The court concluded by rejecting Square's remaining contentions.[38] Although Square argued that White had not been injured, White believed that signing up would lead to injury from the discriminatory policy.[39] While White did not sign up for Square's services, the Unruh Act was intended to deter and remedy harms beyond those that require subjection to the discriminatory terms.[40] The court then noted that even if allowing plaintiffs to sue prior to signing up could lead to abusive litigation, that issue should be left to the legislature.[41] Finally, the court declined to address whether occupational discrimination is covered by the Unruh Act or if White was an adequate representative to support the class action.[42]

While the *White* opinion focused exclusively on the statutory standing issue, the court's decision also has implications in consumer protection more generally, especially in relation to the U.S. Supreme Court's jurisprudence under the Federal Arbitration Act. The Court has allowed many online service providers to evade class action liability. In response, state courts and legislatures have attempted to open other avenues for protecting consumers, with mixed results. Viewed against the predecessor case of *Shierkatz RLLP v. Square, Inc.*,[43] *White* continues this trend of finding new avenues of redress for injured consumers around FAA preemption by highlighting an ambiguity at the intersection of arbitration and class actions. But whether this avenue can provide meaningful redress is dependent on whether consumers not bound by arbitration agreements can effectively vindicate the rights of consumers bound by arbitration agreements.

The U.S. Supreme Court has construed the FAA liberally to support arbitration clauses despite considerable opposition from legal scholars.[44]

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[34] *See id.*
[35] 707 P.2d 195 (Cal. 1985).
[36] 158 P.3d 718 (Cal. 2007).
[37] *White*, 446 P.3d at 282, 284.
[38] *Id.* at 282–83.
[39] *See id.* at 282–83.
[40] *Id.*
[41] *Id.* at 283 (citing *Angelucci*, 158 P.3d at 728–29).
[42] *Id.* at 284.
[43] No. 15-cv-02202, 2015 WL 9258082 (N.D. Cal. Dec. 17, 2015).
[44] *See, e.g.*, David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 367 & n.33 (2018); Judith Resnik, *The Supreme Court, 2010 Term — Comment: Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV.

Compelling arbitration is particularly damaging in the consumer protection context, as it destroys plaintiffs' ability to aggregate harms in a class action, often shielding large companies from liability altogether.[45] And sure enough, the Court's decisions have encouraged a steady increase of standard arbitration clauses in consumer contracts, causing many claims to be forced into arbitration,[46] where businesses have received very favorable outcomes.[47]

There is a trend across state courts[48] and state legislatures[49] of tempering the effects of the Supreme Court's FAA jurisprudence. The Supreme Court has consistently struck down direct challenges to arbitration clauses,[50] but less overt limits on the impact of arbitration have not received the same treatment.[51] For example, in *Iskanian v. CLS*

78, 168 (2011); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 643 (1996) ("[T]he Court has left states almost powerless to regulate unfair binding arbitration provisions.").

[45] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004))).

[46] *See* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 2, at 12, 17 (2015) (noting an increase in arbitration clause use since *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, in form agreements for consumer credit cards and checking accounts).

[47] *See id.* § 1, at 12 (noting that in 2010 and 2011, financial services consumers obtained relief for affirmative claims in only 32 of 341 cases, while companies obtained relief for claims or counterclaims in 227 of 244 cases).

[48] *See, e.g.*, Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005) (holding that certain class action waivers in adhesion contracts prepared by the party with superior bargaining power are unconscionable under California law), *abrogated by Concepcion*, 563 U.S. 333; Extendicare Homes, Inc. v. Whisman, 478 S.W.3d 306, 313 (Ky. 2015) (declining to enforce an arbitration clause signed by an agent "without a clear and convincing manifestation of the principal's intention" to delegate such authority), *overruled by* Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 137 S. Ct. 1421 (2017); *see also* Salvatore U. Bonaccorso, Note, *State Court Resistance to Federal Arbitration Law*, 67 STAN. L. REV. 1145, 1156–65 (2015).

[49] *See, e.g.*, N.Y. C.P.L.R. 7515 (McKinney 2019) (prohibiting mandatory arbitration clauses for resolving discrimination disputes in employment); 2019 Vt. Acts & Resolves 74 (creating a rebuttable presumption of unconscionability for a waiver of a jury trial or class action right in certain contracts). The New York statute's practical effect has already been sharply narrowed by a federal court. *See* Latif v. Morgan Stanley & Co., No. 18-cv-11528, 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019) ("[A]pplication of Section 7515 to invalidate the parties' agreement to arbitrate . . . would be inconsistent with the FAA.").

[50] For example, in 2008, unconscionability claims in arbitration cases were rising and succeeding more frequently, particularly in California federal and state courts. *See* Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 622–24 (2009). Three years later, in *Concepcion*, the Supreme Court sharply limited states' abilities to use unconscionability as a tool against arbitration. *See* 563 U.S. at 352.

[51] *See* McGill v. Citibank, N.A., 393 P.3d 85, 87 (Cal. 2017) (holding that provisions that waive the right to seek a public injunction in any forum are "contrary to California public policy and . . . thus unenforceable under California law"); Santich v. VCG Holding Corp., 443 P.3d 62, 66 & n.2 (Colo. 2019) (declining to change the state's equitable estoppel doctrine even if the traditional rule "may result in piecemeal litigation in which related claims simultaneously proceed in court and arbitration," *id.* at 66 n.2).

Transportation Los Angeles, LLC,[52] the California Supreme Court refused to enforce a representative action[53] waiver when an aggrieved employee brought a statutory action on behalf of the state for alleged labor violations.[54] While the employee had signed an arbitration agreement, the court held that the claim cannot be waived[55] and that such a law is not covered by the FAA because the claim belongs to the state.[56] Some scholars have commented that legislatures can use *Iskanian*'s model and create additional representative actions to allow employers and consumers to bring claims without being forced into arbitration.[57]

A comparison between *White* and a related case, *Shierkatz*, reveals that *White* laid the groundwork for a new strategy to protect consumers who have signed arbitration agreements. *White* and *Shierkatz* effectively litigated the same claim for the same putative class members, but the identities of the lead plaintiffs created differing levels of access to the courtroom. In *Shierkatz*, the plaintiff had agreed to Square's terms of service.[58] The court found that the parties "agreed to arbitrate the threshold issue of arbitrability" and compelled arbitration thereof.[59] Here, White was personal friends with a partner of Shierkatz RLLP,[60] and he discovered the prohibition on debt collection in Square's agreement after reading the court's *Shierkatz* file.[61] But the *White* complaint includes putative class members such as Shierkatz "who have previously agreed to engage in individual binding arbitrations with [Square]."[62] In essence, *White* can be seen as narrowing the effects of the FAA in the discrimination context by implicitly enabling aggrieved classes of plaintiffs to carry their suits further in court by selecting the *right* representative, even if some members of the class are bound by arbitration clauses.

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[52] 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

[53] Representative actions allow plaintiffs to sue on behalf of another party. The statute at issue in *Iskanian* "allow[ed] aggrieved employees . . . to recover civil penalties for Labor Code violations." *Id.* at 146.

[54] *Id.* at 133; *see also* Sakkab v. Luxottica Retail N. Am., Inc., 803 F.3d 425, 427 (9th Cir. 2015) (finding that the *Iskanian* rule is not preempted by the FAA).

[55] *Iskanian*, 327 P.3d at 133.

[56] *Id.* at 151.

[57] *See* Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 FORDHAM L. REV. 2223, 2236–39 (2018) (noting the feasibility and pitfalls of the public-private model and recent state bills under consideration using such a model); Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1159 (2019) (proposing a prohibition on including civil rights–related agreements in employment contracts until after claims arise, with private enforcement on behalf of the state).

[58] Shierkatz RLLP v. Square, Inc., No. 15-cv-02202, 2015 WL 9258082, at *1 (N.D. Cal. Dec. 17, 2015).

[59] *Id.* at *12.

[60] First Amended Complaint for Unruh Law Civil Rights Violations ¶ 8, White v. Square, Inc., No. 15-cv-04539 (N.D. Cal. Sept. 14, 2016).

[61] *Id.* ¶ 9.

[62] *Id.* ¶ 13.

However, it is unclear whether a class containing members bound by arbitration agreements can be certified. At the same time, the broad conception of statutory standing under the Unruh Act would be much less effective as a deterrent if class certification were denied based on the inclusion of class members who have signed arbitration agreements. While the *White* court declined to address the class certification issue,[63] similar classes containing members bound by arbitration agreements have been certified in California federal district court cases against Uber and Toyota.[64] However, in *Berman v. Freedom Financial Network, LLC*,[65] the District Court for the Northern District of California denied class certification, holding that the lead plaintiff was not a typical and adequate representative of the class because, among other reasons, he was not subject to arbitration and thus could not adequately litigate those issues.[66] But the court also suggested potential solutions to the issue, such as adding another class representative to litigate those issues, sub-classing, or, at the very least, presenting a stronger argument for typicality by showing the existence of any other class member who was not subject to the arbitration agreement.[67] In essence, *Berman* represented an exceptional case where the balance between the substantive issues and the effect of arbitration on the class weighed heavily against class certification — a dissimilarly balanced case may yield different results.

Other aggrieved parties may also seek to circumvent forced arbitration provisions by relying on other plaintiffs. For example, consumers may wish to sue an online service provider for deceptive advertising after signing up for its services but be unable to bring the claim in court because they are bound by an arbitration agreement. But competitors also have standing to sue under unfair competition statutes.[68] And California law allows anyone with standing to seek *public* injunctive relief as a remedy.[69] In these cases, an aggrieved consumer may be able to obtain injunctive relief by finding a competitor who is willing to bring

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[63] *See White*, 446 P.3d at 284 (distinguishing statutory standing from adequacy of class representation).

[64] Salas v. Toyota Motor Sales, U.S.A., Inc., No. CV 15-8629, 2019 WL 1940619, at *13–14 (C.D. Cal. Mar. 27, 2019); Ehret v. Uber Techs., Inc., 148 F. Supp. 3d 884, 902–04 (N.D. Cal. 2015).

[65] 400 F. Supp. 3d 964 (N.D. Cal. 2019).

[66] *Id.* at 987–88.

[67] *See id.* at 986–87.

[68] *E.g.*, CAL. BUS. & PROF. CODE § 17204 (West 2017) (allowing suits by anyone "who has suffered injury in fact and has lost money or property as a result of the unfair competition"); *see also* Kwikset Corp. v. Superior Court, 246 P.3d 877, 883 (Cal. 2011) (noting that California's unfair competition law's purpose "is to protect both consumers and competitors" (quoting Kasky v. Nike, Inc., 45 P.3d 243, 249 (Cal. 2002))).

[69] McGill v. Citibank, N.A., 393 P.3d 85, 92 (Cal. 2017). This right cannot be waived, although courts may compel arbitration of the claim. *Id.* at 93–94.

the case and then relying on a favorable judgment to obtain individual damages awards in arbitration.

Furthermore, legislatures can facilitate this model and create leverage for plaintiffs by loosening standing requirements to allow additional parties not subject to arbitration to bring claims on behalf of others bound by arbitration agreements. One proposal that may achieve this result is New York's Bill A679C.[70] The bill provides standing for nonprofit organizations to bring actions on behalf of themselves and injured members of the general public, including in the form of a class action.[71] If the bill is passed in its current form, a consumer who signs up for an online service because of deceptive advertising but is bound by an arbitration clause may be able to indirectly seek recourse in the courts through representation by a nonprofit organization.

Thus, the decision in *White* is in line with a state court trend of keeping courtroom doors open to aggrieved consumers. While the U.S. Supreme Court's recent FAA decisions have starkly limited class action liability for businesses,[72] this case highlights a new strategy for plaintiffs to obtain relief. It remains to be seen whether the Supreme Court will abrogate these state court decisions, explicitly endorse the lines they draw, or maintain its silence on these questions.

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[70] Assem. A679C, 2019–2020 Leg., 242d Reg. Sess. (N.Y. 2019).

[71] *Id.* at 3 ("Any . . . non-profit organization entitled to bring an action under this article may, if the prohibited act or practice has caused damage to others similarly situated, bring an action on behalf of himself or herself and such others . . . . A non-profit organization may bring an action under this section . . . on behalf of those members of the general public who have been injured by reason of any violation of this section . . . .").

[72] *See* Horton, *supra* note 44, at 367 & n.33 (collecting recent FAA cases and scholarly critiques thereof).