

No. 26-1264

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHAEL PAUKER,
Plaintiff-Appellant,

v.

HEART CONSCIOUSNESS CHURCH, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:25-cv-02852-CRB
Hon. Charles Breyer, U.S. District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	v
INTRODUCTION.....	1
JURISDICTIONAL STATEMENT	6
STATEMENT OF ISSUES PRESENTED	7
STATUTORY AND CONSTITUTIONAL AUTHORITIES	9
STATEMENT OF THE CASE.....	9
A. Mikey Pauker is a Jewish musician for whom Israel is intrinsic to his religious and racial identity.....	9
B. Pauker’s commitment to Zionism is a common feature of Jewish identity.....	10
C. In the late fall of 2024, Pauker secures the opportunity to play a Hanukkah concert at Harbin Hot Springs, with the ability to sell related merchandise there	12
D. Shortly before Pauker is to perform, Harbin cancels his concert due to customer complaints about his Zionism and Harbin’s related concerns	13
E. Harbin hosts non-Jewish, anti-Zionist performers who engage in supposedly disfavored online discussion of the Israeli-Palestinian conflict	16
F. Pauker sues Harbin for discrimination, but the district court finds Harbin cannot be liable for bowing to customer complaints, rejecting a Jew it initially hired, or where it did not expressly forbid merchandise sales	17
SUMMARY OF THE ARGUMENT	22
STANDARD OF REVIEW.....	25
ARGUMENT	27

I.	PAUKER PLAUSIBLY ALLEGED THAT, AS A ZIONIST JEW, HE IS PROTECTED UNDER ANTI-DISCRIMINATION LAW BECAUSE OF RACE, RELIGION, AND NATIONAL ORIGIN...	27
A.	Pauker plausibly alleged his Zionism is a sincere and integral part of his race, religion, and national origin.....	27
B.	The law protects Pauker’s overlap of Jewish race, religion, national origin, and ties to Israel.....	29
C.	The law also recognizes that Zionism can serve as a proxy for Pauker’s Jewish identity.....	35
II.	PAUKER PLAUSIBLY ALLEGED HARBIN UNLAWFULLY DISCRIMINATED AGAINST HIM AS A ZIONIST JEW	37
A.	Under applicable anti-discrimination law and pleading rules, Pauker need only plausibly allege facts permitting a reasonable inference of discriminatory motive.....	37
B.	Harbin’s direct reliance on Pauker’s pro-Israel Facebook post in cancelling him alone shows discriminatory motive	39
C.	Harbin’s reliance on biased community complaints further supports a plausible inference of intent	41
D.	Harbin’s comparably favorable treatment of non-Jewish, anti-Zionist performers additionally supports a showing of discriminatory intent.....	47
III.	PAUKER OTHERWISE STATED A TITLE II CLAIM	49
A.	Title II’s plain-text prohibition of discrimination against “all persons” in the “full and equal enjoyment” of “any place of public accommodation” controls	49
B.	As the district court found, Pauker plausibly alleged Harbin is a covered “place of public accommodation”	50

C.	Pauker plausibly alleged Title II covers the performance privilege Harbin offered him.....	50
D.	As described above, Pauker plausibly alleged Harbin denied him the performance privilege because of his race, religion, and national origin	55
IV.	PAUKER OTHERWISE STATED AN UNRUH ACT CLAIM.....	57
A.	The Unruh Act broadly guarantees “all persons” the right to “full and equal” treatment by “business establishments of every kind whatsoever”	57
B.	Pauker amply alleged that Harbin is a covered “business establishment of [any] kind whatsoever”	58
C.	Pauker amply alleged that his performing and selling of merchandise were covered privileges at Harbin	58
D.	As with Title II, Pauker plausibly alleged protected status under the Unruh Act as a Zionist Jew	60
E.	Pauker plausibly alleged that Harbin intentionally discriminated against him	62
V.	PAUKER OTHERWISE STATED A SECTION 1981 CLAIM.....	63
A.	Section 1981 applies to Harbin’s termination of Pauker’s performance contract	63
B.	Section 1981 applies to Harbin’s interference with Pauker’s proposed merchandise contracts	64
C.	Pauker plausibly alleged under Section 1981 that racial discrimination caused his contractual deprivations	65
VI.	PAUKER OTHERWISE STATED A SECTION 1982 CLAIM.....	66
	CONCLUSION	69
	STATEMENT OF RELATED CASES	

CERTIFICATE OF COMPLIANCE

ADDENDUM

42 U.S.C. § 1981(a).....	A-1
42 U.S.C. § 1981(b).....	A-1
42 U.S.C. § 1982	A-2
42 U.S.C. § 2000a(a).....	A-3
42 U.S.C. § 2000a(b).....	A-3
42 U.S.C. § 12182(a).....	A-5
Cal. Civ. Code § 51(b)	A-6
Cal. Civ. Code § 51(e)(5).....	A-6
Cal. Civ. Code § 52(a)	A-7

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144 (1970).....	42
<i>Akiyama v. U.S. Judo Inc.</i> , 181 F. Supp. 2d 1179 (W.D. Wash. 2002).....	55
<i>Ariz. Students’ Ass’n v. Ariz. Bd. of Regents</i> , 824 F.3d 858 (9th Cir. 2016).....	25
<i>ASARCO, L.L.C. v. Union Pac. R.R. Co.</i> , 765 F.3d 999 (9th Cir. 2014).....	18
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	25, 34
<i>Ave. 6E Invs., LLC v. City of Yuma</i> , 818 F.3d 493 (9th Cir. 2016).....	35
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	25
<i>Bloch v. Frischholz</i> , 587 F.3d 771 (7th Cir. 2009).....	30
<i>Bolden-Hardge v. Off. of Cal. State Controller</i> , 63 F.4th 1215 (9th Cir. 2023)	3, 27, 28
<i>Bostock v. Clayton Cty.</i> , 590 U.S. 644 (2020).....	43, 49
<i>Bray v. Alexandria Women’s Health Clinic</i> , 506 U.S. 263 (1993).....	35
<i>Buchanan v. Warley</i> , 245 U.S. 60 (1917).....	42

<i>Burks v. Poppy Constr. Co.</i> , 370 P.2d 313 (Cal. 1962).....	57
<i>Callahan v. Woods</i> , 658 F.2d 679 (9th Cir. 1981).....	22, 28
<i>Coghlan v. Am. Seafoods Co.</i> , 413 F.3d 1090 (9th Cir. 2005).....	37
<i>Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media</i> , 589 U.S. 327 (2020).....	65, 67
<i>Conn. Nat’l Bank v. Germain</i> , 503 U.S. 249 (1992).....	49
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982).....	40
<i>In re Cox</i> , 474 P.2d 992 (Cal. 1970).....	61
<i>Daniel v. Paul</i> , 395 U.S. 298 (1969).....	50, 53, 54
<i>Detwiler v. Mid-Columbia Med. Ctr.</i> , 156 F.4th 886 (9th Cir. 2025)	29
<i>Diaz v. Am. Tel. & Tel.</i> , 752 F.2d 1356 (9th Cir. 1985).....	40
<i>Domino’s Pizza, Inc. v. McDonald</i> , 546 U.S. 470 (2006).....	64
<i>Earl v. Nielsen Media Rsch., Inc.</i> , 658 F.3d 1108 (9th Cir. 2011).....	38, 47
<i>Evans v. Laurel Links, Inc.</i> , 261 F. Supp. 474 (E.D. Va. 1966)	54
<i>Fernandez v. Wynn Oil Co.</i> , 653 F.2d 1273 (9th Cir. 1981).....	43

<i>Frankel v. Regents of Univ. of Cal.</i> , 744 F. Supp. 3d 1015 (C.D. Cal. 2024)	29
<i>Galdamez v. Potter</i> , 415 F.3d 1015 (9th Cir. 2005)	36
<i>Gerdorn v. Cont'l Airlines, Inc.</i> , 692 F.2d 602 (9th Cir. 1982)	43
<i>Gilligan v. Jamco Dev. Corp.</i> , 108 F.3d 246 (9th Cir. 1997)	25
<i>Godwin v. Hunt Wesson, Inc.</i> , 150 F.3d 1217 (9th Cir. 1998)	38, 39
<i>Goodman v. Lukens Steel Co.</i> , 482 U.S. 656 (1987)	42–43
<i>Guides, Ltd. v. Yarmouth Grp. Prop. Mgmt., Inc.</i> , 295 F.3d 1065 (10th Cir. 2002)	66–67
<i>Guz v. Bechtel Nat'l, Inc.</i> , 8 P.3d 1089 (Cal. 2000)	62
<i>Hardie v. NCAA</i> , 876 F.3d 312 (9th Cir. 2017)	20, 53–54
<i>Harmston v. City & Cnty. of San Francisco</i> , 627 F.3d 1273 (9th Cir. 2010)	61
<i>Hartmann v. Cal. Dep't of Corr. & Rehab.</i> , 707 F.3d 1114 (9th Cir. 2013)	25, 34
<i>Hoko v. Transit Am. Servs.</i> , No. 14-CV-01327, 2014 WL 3963033 (N.D. Cal. Aug. 13, 2014)	38, 48
<i>Hurd v. Hodge</i> , 334 U.S. 24 (1948)	68–69
<i>Imagineering, Inc. v. Kiewit Pac. Co.</i> , 976 F.2d 1303 (9th Cir. 1992)	64

<i>Impala African Safaris, L.L.C. v. Dall. Safari Club, Inc.</i> , No. 3:13-CV-2175-G, 2014 WL 4555659 (N.D. Tex. Sept. 9, 2014).....	55
<i>Isbister v. Boys’ Club of Santa Cruz, Inc.</i> , 707 P.2d 212 (Cal. 1985).....	57, 58
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 409 (1968).....	6, 66, 68–69
<i>Karasek v. Regents of Univ. of Cal.</i> , 956 F.3d 1093 (9th Cir. 2020).....	9, 27
<i>Katzenbach v. McClung</i> , 379 U.S. 294 (1964).....	42
<i>Koebke v. Bernardo Heights Country Club</i> , 115 P.3d 1212 (Cal. 2005).....	61
<i>Koire v. Metro Car Wash</i> , 707 P.2d 195 (Cal. 1985).....	57–58, 59, 60, 63
<i>Lam v. Univ. of Haw.</i> , 40 F.3d 1551 (9th Cir. 1994).....	29
<i>LeBlanc-Sternberg v. Fletcher</i> , 781 F. Supp. 261 (S.D.N.Y. 1991).....	29
<i>Liapes v. Facebook, Inc.</i> , 313 Cal. Rptr. 3d 330 (Cal. Ct. App. 2023).....	62–63
<i>Long v. Cnty. of Los Angeles</i> , 442 F.3d 1178 (9th Cir. 2006).....	7
<i>Lopez v. Smith</i> , 203 F.3d 1122 (9th Cir. 2000).....	26
<i>Marina Point, Ltd. v. Wolfson</i> , 640 P.2d 115 (Cal. 1982).....	63
<i>Martin v. PGA Tour, Inc.</i> , 204 F.3d 994 (9th Cir. 2000).....	5, 51, 52, 53

<i>McCalden v. Cal. Libr. Ass’n</i> , 955 F.2d 1214 (9th Cir. 1990)	61
<i>McGinest v. GTE Serv. Corp.</i> , 360 F.3d 1103 (9th Cir. 2004)	37, 39
<i>Menkowitz v. Pottstown Mem. Med. Ctr.</i> , 154 F.3d 113 (3d Cir. 1998)	52
<i>Miller v. Gammie</i> , 335 F.3d 889 (9th Cir. 2003)	54
<i>Molski v. M.J. Cable, Inc.</i> , 481 F.3d 724 (9th Cir. 2007)	52–53
<i>O’Connor v. Vill. Green Owners Ass’n</i> , 662 P.2d 427 (Cal. 1983)	58
<i>Opara v. Yellen</i> , 57 F.4th 709 (9th Cir. 2023)	39
<i>Pac. Shores Props., LLC v. City of Newport Beach</i> , 730 F.3d 1142 (9th Cir. 2013)	35
<i>Painter’s Mill Grille, LLC v. Brown</i> , 716 F.3d 342 (4th Cir. 2013)	64
<i>Palmore v. Sidoti</i> , 466 U.S. 429 (1984)	42
<i>Payne v. Anaheim Mem’l Med. Ctr., Inc.</i> , 30 Cal. Rptr. 3d 230 (Cal. Ct. App. 2005)	5, 59, 60
<i>Perry v. Woodward</i> , 199 F.3d 1126 (10th Cir. 1999)	40
<i>PGA Tour, Inc. v. Martin</i> , 532 U.S. 661 (2001)	5, 24, 51, 53, 54, 55
<i>Phiffer v. Proud Parrot Motor Hotel, Inc.</i> , 648 F.2d 548 (9th Cir. 1980)	67, 68

<i>Polich v. Burlington N., Inc.</i> , 942 F.2d 1467 (9th Cir. 1991).....	26
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	5, 23, 40
<i>Runyon v. McCrary</i> , 427 U.S. 160 (1976).....	63, 64
<i>Schmitt v. Kaiser Found. Health Plan of Wash.</i> , 965 F.3d 945 (9th Cir. 2020).....	36
<i>Shaare Tefila Congregation v. Cobb</i> , 481 U.S. 615 (1987).....	3, 22, 30, 66
<i>Sheppard v. David Evans & Assocs.</i> , 694 F.3d 1045 (9th Cir. 2012).....	46
<i>Sinai v. New Eng. Tel. & Tel. Co.</i> , 3 F.3d 471 (1st Cir. 1993)	3, 23, 31, 32
<i>Sischo-Nownejad v. Merced Community College District</i> , 934 F.2d 1104 (9th Cir. 1991).....	37–38, 40
<i>St. Francis Coll. v. Al-Khazraji</i> , 481 U.S. 604 (1987).....	30, 32
<i>Starr v. Baca</i> , 652 F.3d 1202 (9th Cir. 2011).....	25
<i>Sturgill v. Am. Red Cross</i> , 114 F.4th 803 (6th Cir. 2024)	22
<i>Sumrall v. Ali</i> , 793 F. Supp. 3d 199 (D.D.C. 2025)	3, 33, 34
<i>Suttles v. Hollywood Turf Club</i> , 114 P.2d 27 (Cal. Ct. App. 1941)	60
<i>Swierkiewicz v. Sorema</i> , 534 U.S. 506 (2002).....	25–26, 27

<i>T.E. v. Pine Bush Cent. Sch. Dist.</i> , 58 F. Supp. 3d 332 (S.D.N.Y. 2014).....	29
<i>Tamosaitis v. URS Inc.</i> , 781 F.3d 468 (9th Cir. 2015).....	4, 43, 56
<i>Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.</i> , 450 U.S. 707 (1981).....	28
<i>United States v. Johnson</i> , 680 F.3d 1140 (9th Cir. 2012).....	49
<i>Warfield v. Peninsula Golf & Country Club</i> , 896 P.2d 776 (Cal. 1995).....	58–59
<i>Washington v. Garrett</i> , 10 F.3d 1421 (9th Cir. 1993).....	48
<i>White v. Square, Inc.</i> , 446 P.3d 276 (Cal. 2019).....	57
Statutes	
28 U.S.C. § 1291	7
28 U.S.C. § 1331	6
28 U.S.C. § 1367	6
42 U.S.C. § 1981	2, 17, 63–64
42 U.S.C. § 1982	2, 17, 66, 67, 68
42 U.S.C. § 2000a(a)	2, 49, 50, 53
42 U.S.C. § 12182(a)	52
Cal. Civ. Code § 51	17, 18, 58
Cal. Civ. Code § 51(b)	2, 57, 60
Cal. Civ. Code § 51(e)(5)	60
Cal. Civ. Code § 52(a)	63

Rules

Fed. R. Civ. P. 8(a).....	26
Fed. R. Civ. P. 8(a)(2)	26
Fed. R. Civ. P. 12(b)(6)	18, 25
Fed. R. Civ. P. 15(a).....	26
Fed. R. Civ. P. 58.....	7

Other Authorities

Federal Bureau of Investigation, Most Wanted: <i>Shaare Tefila Synagogue Vandalism</i> (Feb. 9, 2026), www.fbi.gov/wanted/seeking-info/shaare-tefila-synagogue-vandalism.....	31
Fung, Brian, <i>Meta Will Now Remove Some Posts Attacking ‘Zionists’ as a Form of Hate Speech</i> , CNN (July 9, 2024), https://www.cnn.com/2024/07/09/tech/meta-posts-zionists-hate-speech/index.html	36
Hamedy, Saba, <i>Twitch Changes Its Hateful Content Policy to Include ‘Zionist’ as Potential Slur Following Criticism</i> , NBC News (Nov. 15, 2024), https://www.nbcnews.com/tech/twitch-changes-hateful-content-policy-zionist-termrcna180406	36
<i>Hate Speech</i> , CNN (July 9, 2024), https://www.cnn.com/2024/07/09/tech/meta-posts-zionists-hate-speech/index.html	36
International Holocaust Remembrance Alliance, <i>Working Definition of Antisemitism</i> (May 26, 2016), https://holocaustremembrance.com/resources/working-definition-antisemitism	45

<i>Potential Slur Following Criticism</i> , NBC News (Nov. 15, 2024), https://www.nbcnews.com/tech/twitch-changes-hateful-content-policy-zionist-term-rcna180406	13, 36
Scalia, Antonin, <i>The Rule of Law as a Law of Rules</i> , 56 U. Chi. L. Rev. 1175 (1989)	54
@StopAntisemitism, X (Feb. 10, 2026), https://x.com/StopAntisemitism/status/2021371933795700831	31
<i>TANAKH: The Holy Scriptures</i> (Jewish Publication Society 1985).....	10–11, 12, 28

INTRODUCTION

This appeal presents a narrow yet vital question: whether a Jewish musician, who is a Zionist as an interconnected matter of religion, race, and national origin, can allege that a venue from which he secured a performance opportunity violated anti-discrimination law when it later revoked that opportunity due to intervening community complaints over his “Zionist views” and its own related concerns. The answer is “yes.”

Mikey Pauker plays Jewish devotional music and is training to be a rabbi and cantor. Like many Jews, Pauker’s Zionism—that is, his support for Israel and concern for its people—is integral to his Jewish identity and a manifestation of that shared religious belief and racial tradition that the Jewish people have an inseparable and sacred bond to Israel as a self-determined ancestral homeland promised by God.

In late 2024, Pauker was set to perform a Hanukkah concert at Harbin Hot Springs (“Harbin”)—a rustic retreat venue offering various forms of recreation and entertainment. Within days of accepting his pitch to perform through a functionally open tryout process, however, Harbin canceled the concert due to community complaints over Pauker’s “Zionist views” and its review of an “I stand with Israel” post Pauker had made

to Facebook in the wake of the October 7th attacks—the worst atrocity committed against Jews since the Holocaust. Harbin also indicated it wanted to avoid the “politics and divisiveness” of the Israeli-Palestinian conflict. This despite the orthogonality of that conflict to the concert; Harbin hosting non-Jewish, anti-Zionist performers who engage the topic; and Pauker having no plans to raise the matter.

Pauker thereafter sued Harbin for violations of: (1) Title II of the Civil Rights Act of 1964’s protection against the denial of the “full and equal enjoyment” of “any place of public accommodation” on account of a person’s race, religion, or national origin, 42 U.S.C. § 2000a(a); (2) the California Unruh Act’s analogous protections against discrimination by “all business establishments of every kind whatsoever,” Cal. Civ. Code § 51(b); and (3) the Civil Rights Act of 1866’s prohibition of race discrimination in contracts and property sales, 42 U.S.C. §§ 1981, 1982.

Notably, the district court accepted that Pauker sufficiently pled a nexus between his “Zionist views,” support for Israel, and his Jewish religious beliefs and racial identity. ER-102. Rightly so; the Supreme Court has recognized Jewish ethnicity and ancestry—including religious aspects—as a protected racial class. *Shaare Tefila Congregation v. Cobb*,

481 U.S. 615, 617–18 (1987). And courts avoid “second-guessing the reasonableness” of a plaintiff’s religious beliefs. *Bolden-Hardge v. Off. of Cal. State Controller*, 63 F.4th 1215, 1223 (9th Cir. 2023). The district court, moreover, observed Pauker had pled the anti-Zionist campaign to cancel his concert was motivated by “anti-Jewish animus.” ER-103. Again, rightly so; the law recognizes that anti-Israel animus can support an inference of unlawful anti-Jewish discrimination. *Sinai v. New Eng. Tel. & Tel. Co.*, 3 F.3d 471, 473–75 (1st Cir. 1993); *Sumrall v. Ali*, 793 F. Supp. 3d 199, 208–10 (D.D.C. 2025).

Unfortunately, however, the lower court dismissed Pauker’s claims, because, in its view: (1) Harbin acted only in response to customer animus and therefore cannot be liable for discrimination; (2) it is implausible Harbin discriminated against Pauker as a Jew because it had previously booked him to play a Jewish-oriented concert; (3) only patrons, and not performers, can protest the denial of “full and equal enjoyment” of a place of public accommodation; and (4) Pauker did not allege for his contract or property-sale claims that Harbin wholly denied him the ability to sell concert merchandise. But the district court is wrong on all counts.

For starters, the district court’s finding that Harbin permissibly and only catered to customer animus is wrong on the law and facts. As to the law, the court ignored well-established authority that a business cannot cave to discriminatory customer preference. *See Tamosaitis v. URS Inc.*, 781 F.3d 468, 482–83 (9th Cir. 2015) (explaining that the Ninth Circuit has “long held that a customer’s discriminatory preference does not justify” discriminatory treatment and rejecting distinction between acting on one’s own animus and acting to placate a customer).

As to the facts, the lower court overlooked Pauker’s pleading that Harbin “referenced Plaintiff’s October 7 [Facebook] post as a factor in [its] decision” to cancel the concert. ER-83. In other words, the alleged animus was not limited to customers but included Harbin directly. The court also downplayed the pled comparators outside Pauker’s protected class whose performances were allowed—including those who denied the Holocaust, expressed other anti-Jewish views, or commented on the war in Gaza despite Harbin’s supposed neutrality rule. ER-87–90.

Regarding the district court’s conclusion that Harbin could not have discriminated against Pauker because it previously agreed to book him, the law forbids taking adverse action based on stereotype or distinctions

within a protected class. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–52 (1989) (explaining reliance on stereotypes can constitute illegal discrimination). In short, Harbin cannot discriminate against Pauker as a Zionist Jew in concluding that, unlike celebrating Hanukkah, embracing Zionism contradicts its subjective vision of an acceptable Jew.

As for the lower court’s categorical refusal to apply federal or state public-accommodation law to encompass performers, precedent from the Supreme Court, this Court, and the California Court of Appeal shows these laws extend not only to patrons of entertainment establishments but also performers—even when participation is selective or pursued professionally. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677–80 (2001) (holding that competing in PGA tournaments was a covered privilege offered at golf courses and recognizing that Title II protects participants as well as spectators or listeners); *Martin v. PGA Tour, Inc.*, 204 F.3d 994, 999 (9th Cir. 2000) (treating tournament golfers as protected users of public-accommodation facilities and rejecting a categorical line between recreational and economic use); *Payne v. Anaheim Mem’l Med. Ctr., Inc.*, 30 Cal. Rptr. 3d 230, 242–45 (Cal. Ct. App. 2005) (applying Unruh Act to physician’s hospital privileges).

Finally, as to the lower court's finding that Pauker failed to plead for purposes of his contracting and property-sales claims that Harbin wholly denied him the ability to sell merchandise, Pauker indeed pled "he would not have been permitted to make such sales as a non-performing guest at Harbin." ER-95. Regardless, eliminating even one opportunity to engage in property sales while others might remain violates Sections 1981 and 1982. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 417–20 (1968).

This Court should reverse and remand for the case to proceed, or alternatively allow Pauker to cure any pleading defect by amendment.

JURISDICTIONAL STATEMENT

The district court had original jurisdiction under 28 U.S.C. § 1331 over Pauker's federal claims (Title II of the Civil Rights Act of 1964, and Sections 1981 and 1982 of the 1866 Civil Rights Act), and supplemental jurisdiction over his California Unruh Act claim under 28 U.S.C. § 1367.

As for appellate jurisdiction, the district court granted Harbin's motion to dismiss and entered an order in its favor on February 3, 2026. ER-8. Pauker filed a timely notice of appeal on February 26, 2026, and dismissed his claims against the remaining defendants on April 29, 2026. ER-210, 220. And although the district court has not entered a formal

final judgment, this Court has jurisdiction under 28 U.S.C. § 1291. *See Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1184 n.3 (9th Cir. 2006) (“A mechanical application of Rule 58 is not required when the parties and the judge all have indicated that they treat a district court entry as a final, separate judgment.”); *see also* Dkt. Entry No. 12.1 (ordering appeal to proceed after Pauker’s voluntary dismissal of the other defendants).

STATEMENT OF ISSUES PRESENTED

1. Whether, as the district court found, Pauker plausibly alleged that his Zionism is a protected aspect of or proxy for his Jewish faith or race under Title II, Sections 1981 and 1982, and/or the Unruh Act.¹

2. Whether Pauker plausibly alleged that Harbin’s cancellation of his concert, based on its consideration of his public support for Israel and/or related customer complaints about his “Zionist views” (which the district court recognized as allegations of direct anti-Jewish animus), is an act for which Harbin can in any event be held liable as a defendant under Title II, Sections 1981 and 1982, and/or the Unruh Act.

¹ Although the district court did not reach the issue, Pauker further pled—and continues to assert on appeal—that his Zionism is also a protected aspect of his Jewish national-origin identity. *See, e.g.*, ER-78, 80, 82, 90.

3. Whether Pauker plausibly alleged that Harbin could be liable for illegal discrimination for cancelling his concert based on his being a Zionist Jew even though it had booked him knowing he was a Jew who celebrates Hanukkah.

4. Whether Pauker plausibly alleged a reasonable inference of discrimination on the basis of his status as a Jew and/or Zionist Jew where Harbin canceled his concert on a suggested ground of avoiding performers who publicly comment on the Israeli-Palestinian conflict but hosted non-Jewish, anti-Zionist performers who make such commentary.

5. Whether, as the district court found, Pauker plausibly alleged that Harbin was a covered place of public accommodation under Title II—and, by extension, a business establishment under the Unruh Act.

6. Whether Pauker plausibly alleged that Harbin denied him “full and equal enjoyment” of “a place of public accommodation” or “any business establishment” under Title II and the Unruh Act, respectively, by revoking his opportunity to perform—whether that opportunity was one Pauker secured through an open tryout process or otherwise.

7. Whether Pauker plausibly alleged that Harbin violated Sections 1981 and 1982 in terminating his performance contract and

attendant sales opportunity, with the further understanding that guests cannot sell merchandise and Pauker had an outlet to sell removed.

STATUTORY AND CONSTITUTIONAL AUTHORITIES

All relevant statutory and constitutional authorities are set out in the Addendum to this brief.

STATEMENT OF THE CASE²

A. Mikey Pauker is a Jewish musician for whom Israel is intrinsic to his religious and racial identity.

Michael (Mikey) Pauker is an ethnic and religious Jew who expresses his faith and heritage as a Jewish devotional musician. ER-77–78. Seeking to deepen his knowledge and exercise of Judaism, Pauker is also presently training to be a rabbi and cantor. *Id.*

As a matter of his Jewish religious beliefs, race, and national origin, Pauker sees his connection to Israel, the ancestral Jewish homeland, as essential. ER-78–80. To that end, Pauker’s belief in and bond to Jewish self-determination in that homeland—an established and well-known

² This Court accepts as true and construes in the light most favorable to the plaintiff all well-pled factual allegations in the complaint. *Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1104 (9th Cir. 2020). Accordingly, the bulk of the facts described herein, which are taken from the operative complaint (ER 76–98), must be accepted as true.

tenet of Jewish identity known as Zionism and presently embodied in the State of Israel—is integral to what makes him a Jew. ER-79–80.

B. Pauker’s commitment to Zionism is a common feature of Jewish identity.

Pauker is far from alone in his commitment to Zionism, as the Jewish connection to the land of Israel is as old as the Jewish people themselves. ER-78–80. Indeed, Jews derive their name, identity, and ancestral roots from the Kingdom of Judea, where the Jewish people originated and Israel now exists. ER-79.

After all, the foundation of the Jewish religion is the Abrahamic Covenant in which God promised Abraham and his descendants a home in the land today known as Israel. ER-78–80; *see also Genesis* 12:7 (God appeared to Abram and said “I will assign this [land of Canaan] to your offspring”).³ This divine promise is so central to Jewish identity that whenever Jews were historically expelled from Israel, the Hebrew Bible recorded the Jewish people’s longing for their homeland. *See, e.g., Deuteronomy* 30:1–5 (God promising to “bring you to the land that your fathers possessed”); *Isaiah* 11:11–12 (prophesying God will “assemble the

³ All quotations from the Hebrew Bible are from *TANAKH: The Holy Scriptures* (Jewish Publication Society 1985) (New JPS Translation).

banished of Israel” and “gather the dispersed Judah”); *Jeremiah* 29:14 (God declaring “I will bring you back to the place from which I have exiled you”); *Psalms* 126 (asking God to “restore[] the fortunes of Zion”).

This Jewish bond to the ancestral homeland, which has endured for thousands of years, manifests in religious and secular ways. ER-79–80. For religious Jews like Pauker, more than half of the Torah’s 613 laws are tied to the land of Israel, while Maimonides’s Thirteen Principles of Jewish Faith describe belief in and hope for return to a Jewish homeland. *Id.* From a secular view, even though a small minority of American Jews keep kosher, more than eighty percent “say caring about Israel is an important or essential part of what being Jewish means to them.” ER-37. In short, the connection to Israel is just as central to Jewish racial identity as it is to Jewish religious identity.⁴

Today, Zionism captures an abiding and ancient longing for the homeland ordained by God and a belief that self-determination is essential for the survival of the Jewish people. ER-78–80. As the

⁴ If amendment were necessary, Pauker would add that even those who have infamously persecuted Jews have not discriminated between the religious and secular Jew.

complaint quotes *Encyclopedia Britannica*, Zionism “is in many ways a continuation of the ancient attachment of the Jews and of the Jewish religion to the historical region of Palestine.” ER-79. Indeed, the term Zionism itself draws on passages from the Hebrew Bible that refer to this promised homeland of “Zion.” See *Isaiah* 33:20 (declaring “Zion” shall be a “city of assembly” and “a secure homestead, a tent not to be transported, whose pegs shall never be pulled up, and none of whose ropes shall break”); *Isaiah* 35:10 (prophesying “the ransomed of the Lord shall return, and come with shouting to Zion”); *Psalms* 137 (“By the rivers of Babylon, there we sat, sat and wept, as we thought of Zion.”).

C. In the late fall of 2024, Pauker secures the opportunity to play a Hanukkah concert at Harbin Hot Springs, with the ability to sell related merchandise there.

Harbin Hot Springs, which is owned and operated by Defendant Heart Consciousness Church, Inc., is a retreat center in Middletown, California that provides lodging to transient guests, allowing individuals to book a stay for a “Day or Extended Visits, Camping and Lodging.” ER-77. Harbin also serves as a place of entertainment and exhibition, hosting a wide variety of communal activities such as concerts, dances, yoga, and moon ceremonies for guests to partake in and enjoy. ER-77–78.

In November 2024, Pauker emailed Harbin to propose a Hanukkah concert. ER-81. Per industry custom, any musician can pitch Harbin to perform. *Id.* Functionally, Harbin maintains a tryout system open to the public to secure a concert spot. *Id.* On receiving Pauker's email, Harbin accepted his bid and the parties signed a contract. *Id.*

As part of the Hanukkah concert experience, and as he has done at past Harbin performances, Pauker also planned to sell concert-related merchandise there. *Id.* In accordance with industry standard and custom, Harbin affords performers the opportunity to sell merchandise as part of their appearance at the venue. *Id.* And Pauker could not have otherwise sold merchandise absent his scheduled performance. *Id.*⁵

D. Shortly before Pauker is to perform, Harbin cancels his concert due to customer complaints about his Zionism and Harbin's related concerns.

On October 7, 2023, as militants invaded Israel to commit the worst atrocity against Jews since the Holocaust, Pauker publicly posted to Facebook an image of two Israeli soldiers in an open-hatched tank

⁵ If amendment were necessary, Pauker would add that the performance contract he secured from Harbin expressly afforded him the right to sell merchandise related to his event and solicit donations, and included a three-night stay in its facility.

flying a large Israeli flag with the words “I stand with Israel” imposed on the image. ER-80 (with cite). The use of military to protect Jews in Israel is core to the Judaism of Pauker, who meant to express solidarity with Jews being murdered, raped, and terrorized, and not to comment on any future war. *Id.* When Pauker posted, the killings were ongoing and Israel was in a defensive posture. *Id.* And while Israel has since engaged in offensive military action in Gaza, Pauker advocates for peace and urges compassion about civilian casualties. *Id.*

Shortly before the December 2024 concert was to occur, however, a then-anonymous Facebook user falsely commented on Harbin’s page that Pauker plays “genocide music” and urged readers to “[a]sk Harbin not to support genocide and cancel him!” ER-81. The user similarly replied to a public Facebook photo of Pauker engaged in a Jewish ritual, further falsely claiming Pauker played “[d]evotional terrorist music.” *Id.*

The next morning, Harbin emailed Pauker to cancel his concert. ER-81–82. Harbin first cited “unforeseen events,” including severe “negative feedback” and a need to avoid association with “politics and divisiveness” or violence in the Israeli-Palestinian conflict. ER-82. Harbin later explained, however, that its cancellation was due to

“community complaints” about Pauker’s “Zionist views” and “Zionism.” ER-82–84. Harbin, moreover, independently “referenced Plaintiff’s October 7 [Facebook] post as a factor in [its] decision.” ER-83.

Harbin gave no performance reason for cancelling Pauker, which again, centered on Hanukkah, not the Israeli-Palestinian conflict—of which Pauker had no plans of discussing. ER-82. Nor did Harbin cite any concern about security threats arising from his concert. ER-84. And although Pauker assured Harbin he “does not condone violence,” Harbin refused to relent yet offered him only the option of visiting as a guest. *Id.*

Twenty-three minutes after Harbin wrote Pauker to cancel his concert, the Facebook user who falsely commented the day before about Pauker’s supposed “genocide music,” emailed him the following:

Winner winner canceled dinner! Keep your psychotic Zionist genocidal shit out of our peaceful communities!!! I am watching you and will have canceled anywhere you go. Maybe you should just get the fuck out of here and go to ‘Israel.’ You are so proud of your ‘country’ and its genocidal war crimes why not go take part in them coward!!!

ER-83.

E. Harbin hosts non-Jewish, anti-Zionist performers who engage in supposedly disfavored online discussion of the Israeli-Palestinian conflict.

Despite its purported desire to avoid being associated with “politics and divisiveness” in the Israeli-Palestinian conflict as a ground for cancelling Pauker’s performance due to his public commentary, Harbin hosts non-Jewish performers that otherwise lack Pauker’s sincerely held religious belief of Zionism and discuss the conflict publicly—including, at times, with deeply antisemitic undertones anathema to the Zionist aspect of Pauker’s Jewish identity. ER-82, 85–90.

Roughly a week before her performance at Harbin, one of these performers made a social-media post that “den[ied] the Holocaust,” quoted Hamas’s architect of the October 7th attacks, and warned “Jews will move on from Gaza to conquer the rest of the world.” ER-87. Eleven days after October 7th, she accused Israel of being a terrorist state and posted a video maligning its supporters. ER-87–88.

Another non-Jewish performer regularly waded into the Israeli-Palestinian conflict online. ER-89–90. And while it is otherwise industry standard for venues like Harbin to vet performer social media, Harbin

knew of this performer's commentary in any event where Pauker told Harbin about it before one of that performer's events. *Id.*

F. Pauker sues Harbin for discrimination, but the district court finds Harbin cannot be liable for bowing to customer complaints, rejecting a Jew it initially hired, or where it did not expressly forbid merchandise sales.

Pauker sued Harbin, alleging illegal religious, race, and national-origin discrimination under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, and California's Unruh Civil Rights Act, Cal. Civ. Code § 51; as well as race discrimination under the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1982. ER-90–97.

The district court dismissed Pauker's First Amended Complaint with leave to amend, and his Second Amended Complaint without. ER-8, 107.⁶ In so ruling, however, the court made four determinations in Pauker's favor. First, it accepted on the pleadings that Pauker's Zionism is sufficiently linked to his Jewish race and religion to make out a discrimination claim on those protected statuses. ER 7, 102. Second, the

⁶ The First Amended Complaint was filed two days after the original only to fix a few procedural items with no material changes to the operative facts and legal claims. *See* ER 168–90 (First Amended Complaint), ER 214 (Docket). We cite the order on the First Amended Complaint to the extent it helps capture the court's reasoning more fully.

court observed that, as alleged, the community campaign against Pauker’s Zionism exhibited “anti-Jewish animus.” ER-103. Third, the court found Pauker adequately pled that Harbin was a “place of public accommodation” under Title II—which means it is also covered by the Unruh Act, which applies to “all business establishments of every kind whatsoever.” ER-104; Cal. Civ. Code § 51. Fourth, the court rejected as beyond a pleading challenge any defense Harbin might have under the First Amendment. ER-106–107.⁷

In the end, though, the district court ruled against Pauker on all claims, and in so doing, made five other findings. First, it found Pauker failed to plead actionable discrimination on Harbin’s part because, in its view, Harbin cannot be liable for cancelling him based on community complaints rather than its own animus, and, the court added, Pauker did not “allege that Harbin took issue with his purported Zionist views.” ER-5–6, 102–03. The court cited no authority for its legal analysis. Nor did it discuss the plausibility of direct animus by Harbin in either Pauker’s

⁷ See *ASARCO, L.L.C. v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (“Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint.”).

allegation that it “referenced Plaintiff’s October 7 post as a factor in [its] decision” or Harbin’s further combined concern over “divisiveness” and Pauker’s “Zionist views” in cancelling. ER-82–83.⁸

Second, the district court found Harbin cannot be liable for discrimination based on Pauker’s Jewish identity where it initially “hired a Jewish musician to perform at a Jewish festival.” ER-5. The court again cited no law for its reasoning. Nor did it address whether Pauker plausibly alleged that, although Harbin knew he was Jewish when it booked him, it did not know the fact, nature, or community impact of his concomitant Zionism until that was later brought to the fore. *See* ER-82–83 (describing intervening complaints and Facebook consideration). The court discounted as speculative Pauker’s argument that one type of Jew—*e.g.*, a Zionist—might be treated adversely compared to another. ER-6. This despite Harbin’s above-noted aversion to Pauker’s Zionism.

⁸ Although the court also referenced a concern by Harbin about “potential violence,” Pauker’s pleading spoke only of Harbin’s desire to avoid being “associated with” violence in Gaza, not that Harbin was concerned with violence at the concert. ER-82; *see also* ER-84 (alleging Pauker had no indication “Harbin was concerned [his] concert would invite violence”).

Third, the district court rejected—in what it called an “argument of disparate impact”—Pauker’s comparator allegations to others who publicly commented on the Israeli-Palestinian conflict but were not canceled.⁹ Specifically, the court found Pauker failed to “allege that Harbin was aware of the social media posts of its performers;” rejected as speculative Harbin was aware of that commentary based on industry standard; and said Harbin “was at most prioritizing speech on the opposite side of the Israel-Palestine conflict, not on account of Pauker being Jewish.” ER-7–8. The court cited no authority that decisionmaker awareness is needed on the pleadings nor addressed that Pauker told Harbin of at least one other performer’s social-media posts. ER-90. The court also did not examine whether its finding on the pleadings that Zionism can be a proxy for Pauker’s Judaism might save his comparator

⁹ Respectfully, the district court mistakenly labeled Pauker’s claim as one of “disparate impact.” That theory “bars practices that generate disproportionately adverse consequences, even when the organizer’s motivations appear neutral.” *Hardie v. NCAA*, 876 F.3d 312, 327 (9th Cir. 2017) (Faber, J., concurring). Yet Pauker invokes comparator evidence to support the separate theory of disparate treatment that requires “a deliberately discriminatory intent,” *id.*—in this case, Harbin’s alleged “double standard” in applying its purported policy prohibiting performers from commenting on the Israeli-Palestinian conflict. ER-85.

argument, as Harbin plausibly preferred those lacking this protected trait given their hostility to Israel.

Fourth, the district court further dismissed Pauker's Title II and Unruh Act claims by finding he was not denied "full and equal enjoyment" of the venue where, in its view, the public had no right to perform at Harbin and Pauker could visit. ER-104–06. And although the court had also dismissed in a previous iteration of Pauker's complaint his public-accommodation claims because he had briefed but not pled that "anyone can pitch Harbin" to perform, the court omitted that reason in dismissing those claims in the operative complaint—where Pauker added allegations about a public tryout process. ER-8, 81, 106.

Finally, the lower court dismissed Pauker's Section 1982 claim for the further reason he failed to plead that Harbin wholly forbade him from selling goods on site after cancelling his concert. ER-8. The court did not address Pauker's pleadings that "those visiting Harbin merely as guests are not permitted to set up shop" or he "could not have sold merchandise absent his scheduled performance." ER-78, 81.

This appeal follows.

SUMMARY OF THE ARGUMENT

Because Pauker alleged Harbin canceled his concert on account of his religious, racial, and national-origin connection to Israel as a Jew, he stated claims under Title II, the Unruh Act, and Sections 1981 and 1982.

First, as required by his claims, Pauker plausibly alleged he was a member of a protected religious, racial, and/or national-origin group as a Jewish Zionist. As the Supreme Court has held, Jewish identity should be viewed holistically and expansively in recognizing Jews—as such and as connected to Jewish ancestry, ethnicity, and religion—as a protected race under federal law. *See Shaare Tefila*, 481 U.S. at 617–18 (so holding under Section 1982). And the laws at issue here cover all aspects of what one might call Jewish ethno- or racio-religious belief, observance, and practice—without concern for their reasonableness and even where they may overlap with secular concerns. *See Callahan v. Woods*, 658 F.2d 679, 684 (9th Cir. 1981) (observing that “a coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one”); *Sturgill v. Am. Red Cross*, 114 F.4th 803, 810 (6th Cir. 2024) (“[T]hat there may be both religious and secular reasons for an act does not elevate the latter over the former.”). This includes Zionism, an

integral component of Pauker’s Judaism and proxy for Jewish identity. Indeed, courts have found that anti-Israel animus creates an inference of anti-Jewish discrimination. *Sinai*, 3 F.3d at 474. The district court thus rightly accepted that Pauker’s connection to Israel and Zionism as a Jew is sufficient for membership in a protected class.

Second, and as also required across his claims, Pauker plausibly alleged Harbin illegally discriminated against him by (1) acting on direct animus towards his October 7th Facebook post and/or the purported “divisiveness” of his “Zionist views;” (2) capitulating to customer bigotry; and/or (3) differentially treating Pauker by embracing non-Jewish, anti-Zionist performers despite Harbin’s purported policy of neutrality. Indeed, any one of these alone suffices to yield an inference of discrimination. And, in any event, that Harbin booked Pauker knowing he was a Jew does not preclude it from being liable for cancelling his concert based on its further consideration of his being a Zionist Jew. *See Price Waterhouse*, 490 U.S. at 250–52 (forbidding discrimination based on stereotype or intra-class distinctions).

Third, Pauker plausibly alleged for his Title II and Unruh Act claims that Harbin denied him “full and equal enjoyment” of a public

accommodation or business establishment. The district court dismissed those claims on the ground that Pauker could visit Harbin even if he could not perform. But places of public accommodation cannot avoid liability by offering one privilege while denying another, and the statutes have been applied to performers as well as spectators. *Martin*, 532 U.S. at 677–81. And though the district court did not address the matter in dismissing the operative complaint, Pauker in any event alleged the denial of “full and equal enjoyment” as a performer given that the public had the chance to “vie” for that opportunity. *Id.* at 677.

Fourth, Pauker stated Section 1981 and 1982 claims by further alleging that Harbin’s cancellation interfered with his right to perform and sell merchandise. The lower court dismissed Pauker’s Section 1982 claim for the particular reason that Pauker had not alleged denial of the sales right, but it failed to address allegations Pauker could not have sold merchandise at Harbin absent his performance. ER-8, 78, 81.

Fifth and finally, were this Court to conclude that the complaint is defective in alleging any of Pauker’s claims, it should at least reverse and remand to permit him the chance to cure any defect on amendment.

STANDARD OF REVIEW

This Court reviews de novo a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011). In conducting de novo review, this Court "accept[s] the complaint's well-pleaded factual allegations as true, and construe[s] all inferences in the plaintiff's favor." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir. 2016).

Dismissal for failure to state a claim is disfavored. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Instead, a dismissal is affirmed "only where the complaint lacks a cognizable legal theory or sufficient facts to support [one]." *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013) (internal quotation marks omitted). That is, the court ascertains if the plaintiff alleges "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A plaintiff is not required to allege facts establishing a prima facie case of discrimination at the pleading stage. As the Supreme Court clarified in *Swierkiewicz v. Sorema*, the prima facie case is "an

evidentiary standard, not a pleading requirement.” 534 U.S. 506, 510 (2002). Rather, “[t]he liberal notice pleading of Rule 8(a) is the starting point,” which provides that a complaint “must include only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Id.* at 512, 514 (quoting Fed. R. Civ. P. 8(a)(2)).

Finally, this Court reviews a district court’s decision to deny leave to amend for abuse of discretion. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). Notably, however, “[d]ismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment.” *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991). After all, Rule 15(a) provides “a trial court shall grant leave to amend freely when justice so requires, [and t]he Supreme Court has stated that this mandate is to be heeded.” *Lopez*, 203 F.3d at 1130 (internal quotation marks omitted).

* * *

ARGUMENT

I. PAUKER PLAUSIBLY ALLEGED THAT, AS A ZIONIST JEW, HE IS PROTECTED UNDER ANTI-DISCRIMINATION LAW BECAUSE OF RACE, RELIGION, AND NATIONAL ORIGIN.

A. Pauker plausibly alleged his Zionism is a sincere and integral part of his race, religion, and national origin.

As the lower court concluded, it must be assumed on the pleadings that Pauker is “right” in “alleging that his Zionist beliefs are inextricably tied to his racial and religious identity” and “insisting that Zionism is a proxy for Judaism or Jewish racial identity.” ER-99, 102; *see also* ER-7. After all, courts accept as true all well-pleaded allegations of fact in a complaint, construed in the light most favorable to the non-movant. *Karasek*, 956 F.3d at 1104. And as the district court also noted, in the religion context in particular “courts are ‘cautioned against second-guessing the reasonableness of an individual’s assertion that a requirement burdens her religious beliefs.’” ER-102 (quoting *Bolden-Hardge*, 63 F.4th at 1223). Instead, they confirm only whether the belief is an “honest conviction.” *Bolden-Hardge*, 63 F.4th at 1223.

Pauker more than plausibly alleged that his Zionism is “an honest conviction” by pleading it as a “core element” of his being a Jew. *Id.*; ER-80. Like many Jews, this bond to Israel is an integral and inseparable

part of his racial, religious, and national-origin identity. ER-78–80, ER-33; *see also* ER-37. Pauker’s connection to Israel is grounded in God’s promise of an ancestral homeland. *Id.*; *Deuteronomy* 30:1–5 (God promising to “bring you to the land that your fathers possessed”); *Jeremiah* 29:14 (God declaring “I will bring you back to the place from which I have exiled you”). Moreover, Pauker’s bond to Israel emanates from the Twelfth Principle of the Jewish Faith. ER-79–80.

Whether Pauker’s religious Zionism might overlap with secular concerns—including this ancient mandate also extending unto Pauker’s embrace of a modern-day foreign people, government, and military—is of no moment. *See Callahan*, 658 F.2d at 684 (observing that “a coincidence of religious and secular claims in no way extinguishes the weight appropriately accorded the religious one”). Notably, the Supreme Court and this Court have honored religious objections to forms of military and government support, respectively. *See Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 713–16 (1981) (respecting religious objection to producing military armaments); *Bolden-Hardge*, 63 F.4th at 1222–24 (respecting religious concern that a “faith and allegiance” employment oath would violate beliefs against pledging “primary allegiance” to

secular government). That approach in turn honors a faith that requires support for a government or military. On the pleadings, courts ask only if the belief is “religious, rather than purely secular.” *Detwiler v. Mid-Columbia Med. Ctr.*, 156 F.4th 886, 895 (9th Cir. 2025). Thus, “religious beliefs concerning the Jewish state of Israel” receive protection. *Frankel v. Regents of Univ. of Cal.*, 744 F. Supp. 3d 1015, 1028 (C.D. Cal. 2024).

B. The law protects Pauker’s overlap of Jewish race, religion, national origin, and ties to Israel.

Courts need not force overlapping forms of discrimination into separate boxes. “[W]here two bases for discrimination exist [that] cannot be neatly reduced to distinct components,” courts may treat them together. *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994). This respect for overlap can be particularly apt for Jewish claimants. Indeed, “[b]ecause Jewish culture, ancestry, and ethnic identity are intricately bound up with Judaic religious beliefs,” Jewish racial and religious discrimination cannot be “easily distinguished.” *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261, 267 (S.D.N.Y. 1991); *see also T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 354–55 (S.D.N.Y. 2014) (protecting Jewish ancestry under race and national-origin provisions of Title VI).

This approach is well grounded in Supreme Court authority. In *Shaare Tefila*, the Court considered whether vandalizing a synagogue—by definition, an attack on Jewish religious practice—sounded in the Civil Rights Act of 1866’s protections against race discrimination. The Court answered in the affirmative, noting “Jews . . . were among the peoples then considered to be distinct races and hence within the protection of the statute.” 481 U.S. at 617–18. In so holding, the Supreme Court properly viewed Jewish identity holistically, understanding the Jewish race is not limited to physiognomy but includes “ancestry” and “ethnic characteristics.” *Id.* at 617 (quoting *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987)).

As Jews are an ethnoreligious racial group, discrimination aimed at their religious institutions and practices equally targets their race per *Shaare Tefila*—an understanding upon which, for example, the Seventh Circuit relied in advancing a race-discrimination claim against a homeowners’ association that targeted Jewish tenants for placing religious ornaments on their exterior doorframe. *Bloch v. Frischholz*, 587 F.3d 771, 775 n.5, 785–87 (7th Cir. 2009). The same logic applies when a

Jewish plaintiff, pleading Zionism as a matter of faith and ancestral tradition, is burdened on that basis.¹⁰

As the First Circuit counseled in *Sinai*, discriminating against Jews in relation to their connection to Israel creates an inference of anti-Jewish discrimination. 3 F.3d at 471. There, a Jewish Israeli alleged an employer rejected him because of his “Jewish/Hebrew race” and Israeli origin. *Id.* at 473. During interviews, the decisionmaker said “Israel doesn’t count” in dismissing the plaintiff’s experience there and reacted with apparent facial disgust to his Israeli origin. *Id.* A jury found race discrimination, and on that basis, the court in turn found national-origin discrimination. *Id.* On appeal, the employer disputed that the two are

¹⁰ If amendment were necessary, Pauker would add that recent vandalism at Shaare Tefila itself—the synagogue attacked in the eponymous case—shows the overlaps in Jewish identity, especially the connection to Israel. In February 2026, vandals defaced its stone entrance sign and banner “we support Israel in its struggle for peace and security” with a swastika and the acronym “AZAB” (which means “All Zionists Are Bastards”). FBI, Most Wanted: *Shaare Tefila Synagogue Vandalism* (Feb. 9, 2026), www.fbi.gov/wanted/seeking-info/shaare-tefila-synagogue-vandalism; @StopAntisemitism, X (Feb. 10, 2026), <https://x.com/StopAntisemitism/status/2021371933795700831>. The banner was also spraypainted with the word “genocide.” *Id.* This mirrors sentiments to which Harbin capitulated in cancelling Pauker’s concert. See, e.g., ER-81 (describing comment on Harbin’s Facebook page that Pauker plays “genocide music”).

“inextricably intertwined” and, correspondingly, challenged whether there was “evidence to support a finding of discrimination on the basis of . . . race, as opposed to . . . national origin.” *Id.* at 473–74.

Recognizing the anti-Jewish nature of anti-Israel prejudice, the First Circuit rejected the employer’s attempted distinction as follows:

Although appellant claims that these events do not establish race discrimination, the jury could find that Israel is one of those countries in which the populace is composed primarily of a particular race. As Justice Brennan stated of race and national origin discrimination, often “the two are identical as a factual matter: one was born in the nation whose primary stock is one’s own ethnic group.” *Saint Francis College*, 481 U.S. at 614, 107 S. Ct. at 2028 (Brennan, J., concurring). That Israel is a Jewish state, albeit not composed exclusively of Jews, is well established. Furthermore, it is undisputed that appellee is of Hebrew/Jewish descent, the stock primarily associated with Israel. The jury thus could have determined that [the employer], through [its interviewer], discriminated against appellee on the basis of his Hebrew/Jewish race by disparaging Israel.

Id. at 474. Ultimately, the court held “[t]he jury was entitled to find that appellee’s race led to his failure to gain employment” in a case where the evidence centered on instances of anti-Israel animus. *Id.*

Pauker alleges an even stronger link. In explaining its reasons for cancelling Pauker’s concert, Harbin expressly identified his Zionism. ER-80–83. That would be akin to the *Sinai* employer saying, “we will not hire

you because of your connection to Israel.” What’s more, Pauker also alleged ancestry tracing back to ancient Israel. ER-78. And an involved community member validated this perspective of Jews as a national-origin group tied to Israel by telling him to “just get the fuck out of here and go [back] to ‘Israel,’” even though Pauker was born here. ER-78, 83.

Recent cases reinforce the inference that Jewish identity includes an ethnic association with Israel, including in the context of October 7th, the War in Gaza, and ensuing fallout in the United States. In *Sumrall v. Ali*, for example, pro- and anti-Israel protesters squared off on the Gaza War at the U.S. Capitol, where, as characterized by the court, the plaintiff “proudly displayed her Jewish heritage . . . by tying an Israeli flag around her neck.” 793 F. Supp. 3d at 201. The defendant then allegedly “approached her from behind and yanked it, choking her.” *Id.* Against the defendant’s argument that “the Israeli flag represents the state of Israel rather than the Jewish race, so her action is merely anti-Israel, not antisemitic,” the court found in applying the preliminary injunction standard that “it is much more likely” the defendant “was intentionally attacking a Jewish person wearing a Jewish flag as a symbol of her racial heritage,” rendering the attack unmistakable anti-

Jewish discrimination. *Id.* at 209. Adopting plaintiff’s counsel’s argument, the court noted “if yanking on a flag emblazoned with the Star of David tied around a Jewish person’s neck at a pro-Israel protest is not discrimination, I don’t know what is.” *Id.* (citations and quotations omitted). Driving this point, the court independently reasoned that the attack was as “racially motivated” as the most infamous racial slur. *Id.*

Importantly, the court made this finding in issuing a preliminary injunction, “an extraordinary remedy granted sparingly” with the commensurately heavy burden of establishing a likelihood of success on the merits—including those of the plaintiff’s theory relating anti-Israel animus to anti-Jewish discrimination. *Id.* at 204, 207–10. Here, the burdens are reversed; a defendant must demonstrate “the complaint lacks a cognizable legal theory,” *Hartmann*, 707 F.3d at 1122, and a plaintiff need only plead plausibility, *Iqbal*, 556 U.S. at 678. Pauker too used the Israeli flag to express his Jewish identity and solidarity with Jews. At minimum, therefore, Harbin’s admitted reliance on Pauker’s post with that same flag as a factor in its decision plausibly supports a finding of discrimination on its face and in light of *Sumrall*.

C. The law also recognizes that Zionism can serve as a proxy for Pauker’s Jewish identity.

As described above, targeting Pauker as a Zionist constitutes discriminating against him as a Jew. Such anti-Zionist discrimination separately constitutes proxy discrimination: the use of “seemingly neutral criteria that are so closely associated with the disfavored group that discrimination on the basis of such criteria is, constructively, facial discrimination against the disfavored group.” *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). As the Supreme Court put it, “[a] tax on wearing yarmulkes is a tax on Jews.” *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993). Pauker alleged that Zionism has distinctly Jewish roots tracing back to antiquity, is embraced by the majority of Jews in some form, and marks his own Jewish identity. ER-37, 78–80. That allegation amply supports a proxy theory at this stage.

The use of “Zionist” as an anti-Jewish slur supports the same inference. The attacks on Shaare Tefila so illustrate. Indeed, this Court recognizes “‘code words’ may demonstrate discriminatory intent.” *Ave. 6E Invs., LLC v. City of Yuma*, 818 F.3d 493, 505 (9th Cir. 2016) (quoting

Galdamez v. Potter, 415 F.3d 1015, 1024 n.6 (9th Cir. 2005)). Here, the alleged code word also names the very identity Harbin targeted.¹¹

The proxy theory prevails even if some Zionists are not Jewish, “since overdiscrimination is prohibited . . . [and] [d]iscriminatory laws, policies, or actions will often have negative effects (whether intended or not) on individuals who do not belong to the disfavored group.” *Schmitt v. Kaiser Found. Health Plan of Wash.*, 965 F.3d 945, 958 (9th Cir. 2020) (internal quotation marks omitted). In *Schmitt*, this Court held that excluding hearing-loss treatment in insurance coverage could support an inference of disability discrimination, though some affected lacked a disability. *Id.* at 949. The same principle applies here. Non-Jews may be Zionists, but that overlap does not defeat Pauker’s claim.¹²

¹¹ If amendment were necessary, Pauker would that add Meta and Twitch may treat attacks on “Zionists” as antisemitic hate speech. See Brian Fung, *Meta Will Now Remove Some Posts Attacking ‘Zionists’ as a Form of Hate Speech*, CNN (July 9, 2024), <https://www.cnn.com/2024/07/09/tech/meta-posts-zionists-hate-speech/index.html>; Saba Hamedy, *Twitch Changes Its Hateful Content Policy to Include ‘Zionist’ as Potential Slur Following Criticism*, NBC News (Nov. 15, 2024), <https://www.nbcnews.com/tech/twitch-changes-hateful-content-policy-zionist-termrcna180406>.

¹² Moreover, whatever affinity non-Jews have towards Zionism cannot be grounded in Jewish religious belief or racial tradition like Pauker’s.

Taken together, Pauker's allegations more than plausibly place him within the legally protected Jewish racial, religious, and national-origin classes. His Zionism is a sincere religious belief, and it also reflects his ancestry and ethnic tradition. At minimum, Pauker's complaint permits an inference that targeting his Zionism targeted his Jewish identity.

II. PAUKER PLAUSIBLY ALLEGED HARBIN UNLAWFULLY DISCRIMINATED AGAINST HIM AS A ZIONIST JEW.

A. Under applicable anti-discrimination law and pleading rules, Pauker need only plausibly allege facts permitting a reasonable inference of discriminatory motive.

At this stage, Pauker need not prove discriminatory motive. He must merely allege facts that permit a reasonable inference of it. *See Swierkiewicz*, 534 U.S. at 510 (stressing that the prima facie case is “an evidentiary standard, not a pleading requirement”); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1124 (9th Cir. 2004) (stressing plaintiff's low burden to establish discriminatory intent even at summary judgment).

Direct evidence links a protected trait to the challenged decision without inference. *Coghlán v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005). And the mere allusion to or mention of protected traits by a decisionmaker in the course of an adverse action is enough. In *Sischo-Nownejad v. Merced Community College District*, for example, this Court

held phrases like “[t]here she is with her little group of women” and “you women’s libbers” to be direct evidence of gender discrimination when they “were made by [the plaintiff’s] superiors at the same time that they were subjecting her to less favorable working conditions.” 934 F.2d 1104, 1108, 1112 (9th Cir. 1991) (superseded by statute on other grounds). As the mention of a protected trait in circumstances surrounding an adverse action constitutes direct evidence, all the more so when the decisionmaker links the two—as this Court held in the promotion-denial case of *Godwin v. Hunt Wesson, Inc.*, where a decisionmaker told a third party that another decisionmaker “did not want to deal with another female.” 150 F.3d 1217, 1221 (9th Cir. 1998) (quotation marks omitted).

Circumstantial allegations can also show discriminatory intent. And better treatment of a materially similar person outside the class can suffice. *Earl v. Nielsen Media Rsch., Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011). Indeed, “[c]ourts in the Ninth Circuit have repeatedly held that plaintiffs who demonstrate that even only one other similarly situated employee outside of plaintiff’s protected class was treated more favorably sufficiently state a claim for disparate treatment.” *Hoko v. Transit Am. Servs.*, No. 14-CV-01327, 2014 WL 3963033, at *7 (N.D. Cal. Aug. 13,

2014). Even at the proof stage, a plaintiff's burden here is "minimal."
Opara v. Yellen, 57 F.4th 709, 722 (9th Cir. 2023) (citation omitted).

B. Harbin's direct reliance on Pauker's pro-Israel Facebook post in cancelling him alone shows discriminatory motive.

Harbin itself tied the cancellation to Pauker's protected identity. Indeed, it said his October 7th post "was a factor" in its decision. ER-83. That post stated "I stand with Israel" and displayed the Israeli flag, and Pauker alleged it expressed his faith and Jewish identity. ER-80, 82. Harbin also referred to complaints about his "Zionist views." ER-82–83. Separately or together, these allegations directly connect his protected Zionism to the cancellation. No "talismanic expressions" are required. *McGinest*, 360 F.3d at 1117. Pauker thus amply pled direct evidence that Harbin unlawfully discriminated against him due to its own animus.

Harbin's words are even more explicit than those this Court deemed sufficient in *Godwin* and *Sischo-Nownejad*. Unlike in *Godwin*, where the defendant communicated to a third party, 150 F.3d at 1221, Harbin expressed its sentiment directly to Pauker, overdetermining this matter as a direct-evidence case. The same holds in comparison to *Sischo-Nownejad*, where the direct evidence of gender discrimination involved sarcastic comments about the women's liberation political movement,

934 F.2d at 1108, rather than Harbin’s acknowledgment that its consideration of a protected trait indeed caused the adverse action.

What’s more, Harbin’s earlier booking does not defeat the inference. After all, the complaint alleges Harbin acted only after reviewing Pauker’s online post and complaints about his “Zionist views.” ER-82–83. Favorable treatment of some Jews does not license bias against another Jew. Even if Harbin had determined a Jew who embraces Hanukkah is suitable to perform, “Congress never intended to give [one] license to discriminate against some . . . because he favorably treats other members of the . . . group.” *Diaz v. Am. Tel. & Tel.*, 752 F.2d 1356, 1360 (9th Cir. 1985) (quoting *Connecticut v. Teal*, 457 U.S. 440, 455 (1982)).

Harbin could not accept a Jewish Hanukkah performer yet cancel him once it learned he was also a Zionist. Its drawing a line between acceptable and unacceptable Jewish belief indeed supports a finding of discriminatory motive. *See Price Waterhouse*, 490 U.S. at 235–37 (inferring discriminatory motive from “impermissibly cabined view of the proper behavior of women”). It would be unlawful for a business to take comparative adverse action against “a woman it negatively perceives as a ‘feminist.’” *Perry v. Woodward*, 199 F.3d 1126, 1137 (10th Cir. 1999).

So too a business may not target a Jew for being a Zionist. Add Harbin's suggested concern about "divisiveness" arising from his "Zionist views" and the matter is all the more determined. ER-82–83.

Thus, Harbin's own explanation more than plausibly indicates that Pauker's Jewish Zionism caused the cancellation. Harbin cited Pauker's religious belief and racial tradition of Zionism and its consideration of his Facebook post professing such. This alone warrants reversal when it comes to Pauker's pleading of discriminatory intent.

C. Harbin's reliance on biased community complaints further supports a plausible inference of intent.

Harbin also said it canceled Pauker "due to community complaints about [Pauker's] 'Zionist views.'" ER-83. This is unlawful even if it were Harbin's only reason—which, as just described in discussing its liability based on its direct reliance on Pauker's Facebook post alone, it was not.

The Supreme Court has long held that anti-discrimination law forbids caving to community bigotry in taking adverse action against protected groups. As it observed a century ago in striking down a segregated-housing ordinance that was purportedly and shamefully designed to "promote the public peace by preventing race conflicts," although "there exists a serious and difficult problem arising from a

feeling of race hostility which the law is powerless to control . . . its solution cannot be promoted by depriving citizens of their . . . rights and privileges.” *Buchanan v. Warley*, 245 U.S. 60, 80–81 (1917). As the Court later put it, even where “[p]rivate biases may be outside the reach of the law, . . . the law”—and, by extension, the courts—“cannot, directly or indirectly, give them effect.” *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

In its landmark *Adickes* decision, for example, in weighing a business’s refusal to serve a white teacher accompanied by black students “pursuant to a ‘custom of the community to segregate the races in public eating places,’” the Court found “a violation of [Title II] of the 1964 Act” against the business’s argument it “refused service only because [it] was fearful of a riot in the store by customers angered at seeing a ‘mixed group’ of whites and blacks eating together,” with a large crowd gathering outside. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 n.5, 154 n.10 (1970). In *Katzenbach v. McClung*, the Court famously rejected that potential business loss could justify catering to customer bias. 379 U.S. 294, 297 (1964). And in *Goodman v. Lukens Steel Co.*, the Court held a union liable for race discrimination under Section 1981 when it acted adversely towards minorities “in deference to the perceived desires of its

white membership . . . regardless of whether . . . its leaders were favorably disposed toward minorities.” 482 U.S. 656, 669 (1987) (superseded by statute on other grounds).

This Court likewise rejects reliance on discriminatory customer preference. In *Fernandez v. Wynn Oil Co.*, for example, the Court forbade a company from basing a woman’s promotion decision upon how that company expected its clients to react. 653 F.2d 1273, 1276–77 (9th Cir. 1981). A year later, it held “it would be totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether . . . discrimination was valid.” *Gerdorn v. Cont’l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (citation omitted). And in *Tamosaitis*, the Court found “no meaningful distinction” between a defendant’s own animus and action taken to placate a customer’s animus. 781 F.3d at 482.

Ultimately, a “defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged [adverse] decision,” such as community animus. *Bostock v. Clayton Cty.*, 590 U.S. 644, 656 (2020). “So long as the plaintiff’s [protected trait] was one but-for cause of that decision, that is enough to trigger the law.” *Id.* Here, Pauker’s Jewish identity was the but-for cause of his cancellation.

“[A] but-for test directs us to change one thing at a time and see if the outcome changes . . . [i]f it does, we have found a but-for cause.” *Id.* (emphasis omitted). Eliminate Pauker’s Jewish identity, his sincere religious belief and racial tradition of Zionism also evaporate, as do his attendant public professions, the ensuing community complaints, and ultimately his cancellation. Pauker’s Jewish Zionism thus “play[ed] a necessary and undisguisable role” in the cancellation. *Id.* at 652.

Indeed, Harbin attributing Pauker’s cancellation to community complaints over his Zionism is direct evidence of discrimination. And while Harbin’s mention of Pauker’s “Zionist views” in summarizing the community complaints is alone adequate for a direct-evidence finding in his favor, the lower court’s observation that these complaints, as alleged, involved “direct anti-Jewish animus” (ER-103), is also well supported—with at least one such complaint posted to Harbin’s Facebook page accusing Pauker of “genocide music” and urging readers to “[a]sk Harbin not to support genocide and cancel him!” ER-81.¹³ Pauker’s music is

¹³ Pauker hopes it goes without saying, but he does not play “genocide music,” is a peace activist, and has spoken only sympathetically about civilian casualties in Gaza. ER-81.

Jewish music and an expression of that religion and heritage. ER-77, 82. His Hanukkah concert, in particular, was a Jewish celebration, and Pauker had no plans to discuss the Israeli-Palestinian conflict. ER-82.

Antisemitism manifests in various forms, and it may be subtle. But claims that a Jewish person is responsible for purported wrongdoing committed by a single Jewish person or group merely on the basis of their Jewish heritage and culture, or their public professions of such on the day of the worst massacre of Jews since the Holocaust, is antisemitism. ER-83. That accusation invokes a familiar trope which has led to centuries of Jewish persecution: Jews conspire to harm humanity.¹⁴ The complaint alleges critics assigned Pauker responsibility for conduct by others because he identified with Jews after October 7th. As pled, such allegations support a showing of anti-Jewish motive.

Other allegations reinforce that inference and warrant discovery. One involved patron described a photo of Pauker performing a Jewish ritual, without reference to the current Israeli government or any war,

¹⁴ Int'l Holocaust Remembrance All., Working Definition of Antisemitism (May 26, 2016), <https://holocaustremembrance.com/resources/working-definition-antisemitism>.

as Pauker engaging in “[d]evotional terrorist music.” ER-81. And Harbin referred to multiple complaints and canceled Pauker the next day. ER-81–83. In fact, less than thirty minutes after Harbin called Pauker to tell him they were cancelling his performance, a community member emailed Pauker “Keep your psychotic Zionist genocidal shit out of our peaceful communities!!!” and “Maybe you should just get the fuck out of here and go to ‘Israel.’ You are so proud of your ‘country’ and its genocidal war crimes why not go take part in them coward!!!” ER-82–83. Harbin’s plausible responsiveness to such sentiments further indicates liability. *See Sheppard v. David Evans & Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012) (stressing immediate timing in permitting inference of causation).

Harbin’s admitted consideration of community complaints against Pauker’s “Zionist views”—either in isolation or in light of false and inflammatory accusations like “genocide music”—more than plausibly crossed the line into further direct evidence of discrimination.

D. Harbin’s comparably favorable treatment of non-Jewish, anti-Zionist performers additionally supports a showing of discriminatory intent.

Comparator allegations need only permit an inference that Harbin treated materially similar people outside Pauker’s class better. *Earl*, 658 F.3d at 1114. The complaint amply does so.

As pled, Harbin hosted multiple non-Jewish artists who publicly took positions on what Harbin viewed as the political and divisive Israeli-Palestinian conflict, a suggested ground on which Pauker was canceled. ER-85–90. One even denied the Holocaust, claimed “Zionists want to govern the world,” and warned that Jews would conquer other countries. ER-87–89. Another accused Israel of genocide, and Pauker told Harbin about that statement. ER-89–90. Yet Harbin canceled only Pauker.

The district court viewed the comparison as pro-Israel versus pro-Palestinian speech. ER-8. But Harbin represented to Pauker that its actual concern was maintaining neutrality and avoiding divisiveness, and the pled comparator performers engaged in the same supposedly disqualifying conduct as Pauker of publicly commenting on the Israeli-Palestinian conflict without cancellation. ER-82, 85–90. At minimum, the mismatch between Harbin’s stated rule and its treatment of others shows

pretext. *See Washington v. Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993) (observing “different justifications for an [adverse] action would give rise to a genuine issue of fact with respect to pretext since they suggest the possibility that neither of the official reasons was the true reason”).

The comparison is plausible even under the district court’s frame. Pauker alleged protected status as a Zionist Jew. ER-7, 78–80. The anti-Zionist performers plausibly fall outside that class. Pauker’s complaint thus identifies better-treated comparators on the court’s own terms.

The district court cast doubt on Pauker’s allegation that Harbin knew about the social media of other performers as a matter of “industry standard,” reasoning that if Harbin followed that standard it would have known about Pauker’s October 7th post when it booked him. ER-7. But Harbin’s knowledge presents a factual issue, not a pleading defect. The complaint alleges an industry practice of reviewing performers’ social media. ER-89–90. It also identifies one performer whose posts Harbin knew about because Pauker supplied them. *Id.* One comparator suffices. *Hoko*, 2014 WL 3963033, at *7. Further, as noted, Harbin could have seen Pauker’s post before it booked him yet started to care only after

subsequent, vociferous, and intertwined complaints about his “Zionist views.” Discovery is at least warranted.

III. PAUKER OTHERWISE STATED A TITLE II CLAIM.

A. Title II’s plain-text prohibition of discrimination against “all persons” in the “full and equal enjoyment” of “any place of public accommodation” controls.

Title II guarantees “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000a(a).

In construing statutes, this Court “begins with the plain language[;] [i]f the plain meaning of the statute is unambiguous, that meaning is controlling.” *United States v. Johnson*, 680 F.3d 1140, 1144 (9th Cir. 2012) (citations omitted). In such circumstances, “this first canon” of construction “is also the last: judicial inquiry is complete.” *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (internal quotation marks omitted). Further, “[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law[.]” *Bostock*, 590 U.S. at 653.

B. As the district court found, Pauker plausibly alleged Harbin is a covered “place of public accommodation.”

A “place of public accommodation” includes any facility that “provides lodging to transient guests,” as well as a “theater, concert hall, . . . or other place of exhibition or entertainment.” 42 U.S.C. § 2000a(b). Those categories receive a liberal construction. *Daniel v. Paul*, 395 U.S. 298, 307–08 (1969).

Here, Pauker alleged Harbin lodges transient guests and hosts concerts. ER-77–78. And he further alleged it operates as a place of entertainment. *Id.* The district court thus rightly accepted the “lodging” allegation as “enough at this stage for [Harbin] to be a public accommodation.” ER-104. Combined with its status as a concert venue and place of entertainment, and the matter is amply alleged.

C. Pauker plausibly alleged Title II covers the performance privilege Harbin offered him.

Title II protects the full and equal enjoyment of a covered place’s “services,” “facilities,” and “privileges.” 42 U.S.C. § 2000a(a). And Pauker alleged Harbin offered concert-hosting “services,” “facilities,” and “privileges.” ER-77, 81. By the statute’s plain text, therefore, Harbin could not deny Pauker access thereto on a discriminatory ground. *See*

Martin, 532 U.S. at 677 (applying a similar “plain terms” analysis in finding the applicability of public-accommodations law to the PGA Tour). What’s more, because Harbin affords the opportunity to perform through a functionally “open tryout,” that opportunity is in any event a covered privilege Harbin could not discriminatorily revoke. ER-81.

As a global matter, a covered privilege offered by a place of public accommodation need not be open to everyone. In this Court’s decision in *Martin*, which was thereafter affirmed by the Supreme Court, this Court indeed held that “the fact that users of a facility are highly selected does not mean that the facility cannot be a public accommodation” or that related law does not apply. 204 F.3d at 998, 1002. As this Court noted, elite universities are subject to public-accommodation law despite selective admissions. *Id.* at 998. And although this global principle should render superfluous any further analysis where it applies, the Supreme Court’s ensuing affirmance further makes clear that Title II’s coverage of a privilege is all the more ensured where the facility at issue has afforded members of the public the opportunity to “vie” for it. 532 U.S. at 677.

Martin applied Title III of the ADA, whose public-accommodation text parallels Title II.¹⁵ In defending a suit by a disabled golfer, the PGA argued Title III protections did not reach those in tournament areas reserved for elite golfers. *Martin*, 204 F.3d at 997. This Court, however, disagreed since the PGA indeed offered those facilities and privileges to competitors and related personnel. *Id.* By offering them to at least some members of the public, the PGA could not deny others on a discriminatory basis. In so holding, this Court relied on authority that a discriminatory denial of hospital staff privileges largely unavailable to the general public may entail an unlawful denial of public accommodations. *Id.* at 998 (discussing *Menkowitz v. Pottstown Mem. Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998)). This Court, moreover, saw no “justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living.” *Id.* at 999; *see also Molski v. M.J. Cable, Inc.*, 481

¹⁵ The ADA reads: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a).

F.3d 724, 733 (9th Cir. 2007) (“One need not be a client or customer of a public accommodation to feel the sting of its discrimination.”).

In affirming, the Supreme Court came to the same conclusion. The golf courses were public accommodations; the PGA operated them; and playing in tours was among the offered “privileges.” *Martin*, 532 U.S. at 677. What’s more, the Court held, the protection of public-accommodation law is especially applicable where the entity provided a privilege for which “individuals from the general public . . . vie.” *Id.*

The foregoing analysis squarely fits Harbin’s concert venue and the performance opportunity it afforded Pauker and then revoked—whether based on Title II’s plain-text coverage of Harbin’s “services,” “facilities,” or “privileges,” or that the performance opportunity is secured through a process that he alleged “functions as an open tryout.” ER-77, 81; 42 U.S.C. § 2000a(a); *Martin*, 532 U.S. at 677; *Martin*, 204 F.3d at 997.

Nor did Harbin cure the alleged discrimination by allowing Pauker to visit as a guest. A venue may offer separate privileges to observe and to participate. *Daniel*, 395 U.S. at 306; *see also Hardie v. NCAA*, 876 F.3d 312, 317 n.4 (9th Cir. 2017) (assuming without deciding “that coaching in NCAA-certified athletic tournaments constitutes a ‘privilege’ of a place of

public accommodation” because “Title II protects from discrimination ‘spectators,’ ‘listeners,’ and ‘those where entertainment takes the form of direct participation in some sport or activity’”) (quoting *Daniel*, 395 U.S. at 306). In *Evans v. Laurel Links, Inc.*, 261 F. Supp. 474, 477 (E.D. Va. 1966), for example, the district court found that Title II protected black golfers excluded from tournaments even though the course otherwise served them at its lunch counter. The Supreme Court in *Martin* deemed *Evans* persuasive. 532 U.S. at 681. Pauker likewise rightly challenges the denial of a performance privilege, regardless any other access.

Martin’s Title III holding guides this Title II claim, as the Supreme Court itself said its conclusion was consistent with Title II and relied on Title II cases. 532 U.S. at 681. This Court, moreover, recognizes “lower courts as being bound not only by the holdings of higher courts’ decisions but also by their ‘mode of analysis.’” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)). Both this Court’s and the Supreme Court’s “mode of analysis” in *Martin* centered on principles and reasoning applicable to public-accommodations law, including Title II,

thus rendering *Martin* binding as applied to Harbin’s selectively offered performance privilege.

Lower courts have indeed similarly applied *Martin* to Title II. *See Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1183–84 (W.D. Wash. 2002) (“*Martin* compels the conclusion that the event organizers may not discriminate against potential competitors” in judo tournament); *Impala African Safaris, L.L.C. v. Dall. Safari Club, Inc.*, No. 3:13-CV-2175-G, 2014 WL 4555659, at *6 (N.D. Tex. Sept. 9, 2014) (adopting magistrate recommendation to deny motion to dismiss Title II claim, which observed in the context of a trade-show convention that “[b]ased on [*Martin*], Title II . . . protects not only the attendees, but also the exhibitors”).

D. As described above, Pauker plausibly alleged Harbin denied him the performance privilege because of his race, religion, and national origin.

As detailed above in Argument Sections I and II, Pauker adequately pled the final element of a Title II claim concerning Harbin’s liability for discrimination based on his membership in a protected class.

As the district court recognized on the pleadings, Pauker is “right” in “alleging that his Zionist beliefs are inextricably tied to his racial and religious identity” and in “insisting that Zionism is a proxy for Judaism

or Jewish racial identity.” ER-99, 102. That conclusion accords with well-established precedent that protects Jewish identity on racial, religious, and national-origin grounds, and attendant inferences of discrimination from the disparagement of Israel. *See supra* pp. 27–37 (Section I).

Furthermore, Pauker pled Harbin expressly “referenced [his] October 7 post as a factor in [its] decision” and attributed the cancellation to complaints about his “Zionist views.” ER-83. Those allegations, independently or collectively, plausibly and directly connect Pauker’s protected identity to Harbin’s cancellation of his concert. *See supra* pp. 39–46 (Sections II.B and II.C). Nor does Harbin’s reliance on community complaints break the link. *See supra* pp. 41–46 (Section II.C). After all, this Court recognizes “no meaningful distinction” between a defendant acting from its own prohibited animus and acting to placate a customer’s. *Tamosaitis*, 781 F.3d at 482. Pauker’s allegations that Harbin favored similarly situated performers outside his protected class provide additional circumstantial support. *See supra* pp. 47–49 (Section II.D).

Taken as true, these allegations more than plausibly allege that Harbin denied Pauker the performance privilege on the ground of his membership in a protected class under Title II.

IV. PAUKER OTHERWISE STATED AN UNRUH ACT CLAIM.

A. The Unruh Act broadly guarantees “all persons” the right to “full and equal” treatment by “business establishments of every kind whatsoever.”

California’s Unruh Civil Rights Act provides “[a]ll persons” the right to “full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever” without discrimination based on, *inter alia*, religion, race, ancestry, or national origin. Cal. Civ. Code § 51(b).

Notably, the state legislature framed the Unruh Act to be as broad, if not broader, than other public-accommodation laws. The California Supreme Court thus called the Act a “bulwark against arbitrary discrimination” and, among other things, construes its reference to business establishments in the broadest sense reasonably possible. *Isbister v. Boys’ Club of Santa Cruz, Inc.*, 707 P.2d 212, 214 (Cal. 1985); *Burks v. Poppy Constr. Co.*, 370 P.2d 313, 316 (Cal. 1962). Indeed, California courts apply the Act liberally to deter business discrimination. *White v. Square, Inc.*, 446 P.3d 276, 279 (Cal. 2019).

Accordingly, the Unruh Act requires “equal treatment of patrons in all aspects of the business,” and therefore applies to discrimination in a given accommodation, advantage, facility, privilege even when a plaintiff

may access another aspect of the business. *Koire v. Metro Car Wash*, 707 P.2d 195, 197–98 (Cal. 1985) (surveying cases).

To state an Unruh Act claim, a plaintiff must allege that (1) a “business establishment;” (2) intentionally denied him “full and equal accommodations, facilities, privileges, or services;” (3) in light of a protected characteristic. Cal. Civ. Code § 51.

B. Pauker amply alleged that Harbin is a covered “business establishment of [any] kind whatsoever.”

To ensure the Unruh Act’s coverage of “all business establishments of every kind whatsoever,” courts apply the Act to entities that engage in “customary business functions” like hiring, charging fees, or maintaining premises. *O’Connor v. Vill. Green Owners Ass’n*, 662 P.2d 427, 431 (Cal. 1983). It also applies to nonprofit recreational organizations and places of public amusement. *Isbister*, 707 P.2d at 215–17. Cutting to the point, Pauker’s pleading that Harbin lodges guests, books performers, and hosts concerts easily meets this broad standard. ER-77–78.

C. Pauker amply alleged that his performing and selling of merchandise were covered privileges at Harbin.

The Unruh Act protects both generally available and selectively offered privileges. *See Warfield v. Peninsula Golf & Country Club*, 896

P.2d 776, 798 (Cal. 1995) (applying Act to private country club’s discriminatory member policies); *Koire*, 707 P.2d at 197–98 (emphasizing the Act protects equal treatment “in all aspects of the business”); *Payne*, 30 Cal. Rptr. 3d at 245 (stressing the Act “is not restricted to those business or public facilities which offer their wares or services to everyone”). In *Payne*, therefore, the Court of Appeal applied the Unruh Act to a physician’s hospital admitting privileges—even though the hospital did not offer them to everyone. 30 Cal. Rptr. 3d at 242–45. A hospital could reasonably limit access to licensed physicians, the court explained, but could not further restrict that group based on race. *Id.*

Accordingly, Pauker’s performance opportunity is covered by the Unruh Act no matter how performers at Harbin are chosen. At minimum, once Harbin afforded Pauker the opportunity to perform and sell related merchandise, those became protected privileges of Harbin’s business and Harbin could not discriminate against him in revoking them. ER-81.

Harbin’s invitation that Pauker could still visit as a guest did not supply equal treatment. Once again, California courts reject a rule under which equal access to one aspect of a business licenses discrimination in another; rather, the Act protects equal treatment “in all aspects of the

business.” *Koire*, 707 P.2d at 197–98; *see also Payne*, 30 Cal. Rptr. 3d at 245 (applying Act generally and particularly). In *Suttles v. Hollywood Turf Club*, the Court of Appeal found unlawful discrimination under the Unruh Act’s (narrower) predecessor statute where patrons of a certain race could enter a racetrack but not its club seating area. 114 P.2d 27, 29 (Cal. Ct. App. 1941). Similarly here: Pauker appropriately challenges the denial of distinct privileges—in both the opportunity to perform and sell—even if he was otherwise allowed access as a guest. ER-36, 81, 95.

D. As with Title II, Pauker plausibly alleged protected status under the Unruh Act as a Zionist Jew.

Pauker sufficiently pled the Unruh Act protected him as a Zionist Jew. For starters, the Act expressly protects “race,” “ancestry,” “national origin,” and “religion,” and it further defines “religion” to include “all aspects of religious belief, observance, and practice.” Cal. Civ. Code § 51(b), (e)(5). Here, Pauker alleged that Zionism is inseparable from his Jewish race, religion, ancestry, and national origin. ER-78–80. And the district court accepted Pauker’s pleading that his Zionism is sufficiently connected to his Jewish race and religion and can serve as a proxy for those identities. ER-99, 102; *see supra* pp. 27–37 (Section I). Pauker thus plausibly alleged coverage under the Act’s express terms.

Furthermore, even if Pauker had not demonstrated coverage under the Unruh Act’s express terms—he did—it covers him in any event given the approach taken by California courts in interpreting those terms as “illustrative, rather than restrictive.” *In re Cox*, 474 P.2d 992, 995 (Cal. 1970); *see also id.* at 1000 (applying Act to protect those “who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union”). Indeed, the Act applies to unenumerated traits fundamental to identity, belief, or self-definition. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1219–21 (Cal. 2005). Showing its breadth, even Holocaust deniers have been recognized as protected by the Unruh Act. *McCalden v. Cal. Libr. Ass’n*, 955 F.2d 1214, 1221 (9th Cir. 1990) (superseded by rule on other grounds as stated in *Harmston v. City & Cnty. of San Francisco*, 627 F.3d 1273, 1279–80 (9th Cir. 2010)).

Pauker described Israel as his ancestral homeland and Zionism as core to his Jewish identity. ER-78–80. These allegations amply fit within the Unruh Act’s expansive protections.

E. Pauker plausibly alleged that Harbin intentionally discriminated against him.

As described above in Argument Section II, Pauker plausibly alleged direct and circumstantial evidence that Harbin discriminated against him based on the relevant protected characteristics. *See supra* pp. 39–49 (Sections II.B–D); *see also Guz v. Bechtel Nat’l, Inc.*, 8 P.3d 1089, 1113 (Cal. 2000) (noting that, given the similarities between state and federal employment-discrimination laws, California courts look to federal precedent in applying state law). Harbin cited its consideration of Pauker’s Zionist pro-Israel Facebook post as “a factor” in cancelling his concert (ER-83); attributed the cancellation to complaints about his “Zionist views” (ER-82–83)—which the district court recognized as a pleading of “direct anti-Jewish animus” (ER-103); and hosted performers outside Pauker’s protected class who publicly addressed the Israeli-Palestinian conflict despite Harbin’s asserted neutrality rule (ER-85–90).

Like Title II, Harbin cannot escape responsibility under the Unruh Act by attributing its decision to the discriminatory preferences of others. *See Liapes v. Facebook, Inc.*, 313 Cal. Rptr. 3d 330, 341–42 (Cal. Ct. App. 2023) (accepting claim against defendant for implementing advertisers’

discriminatory preferences). What’s more, the Act applies to a defendant who “aids” in the complained-of discrimination. Cal. Civ. Code § 52(a).

Nor can Harbin’s supposed interest in avoiding “politics and divisiveness” excuse it. Indeed, the California Supreme Court has made clear a business can be liable under the Unruh Act even where it says adopting customer preferences is in its “rational self-interest” in creating an “environment” they prefer. *Marina Point, Ltd. v. Wolfson*, 640 P.2d 115, 117, 127 n.9 (Cal. 1982); *see also Koire*, 707 P.2d at 199 (citing *Marina* in rejecting under Unruh Act a car wash’s gender-based discount despite its supposed rational self-interest).

Pauker’s Unruh Act claim survives.

V. PAUKER OTHERWISE STATED A SECTION 1981 CLAIM.

A. Section 1981 applies to Harbin’s termination of Pauker’s performance contract.

Section 1981(a) guarantees “all persons . . . shall have the same right . . . to make and enforce contracts” regardless of race. 42 U.S.C. § 1981(a); *see also Runyon v. McCrary*, 427 U.S. 160, 170 (1976) (stressing statute’s broad protection). And Section 1981(b) clarifies that the statute covers not only the “termination of contracts,” but also “the enjoyment of all benefits, privileges, terms, and conditions of the contractual

relationship.” 42 U.S.C. § 1981(b). The statute thus provides relief when racial discrimination blocks a proposed contractual relationship or impairs an existing one, so long as the plaintiff has or would have rights thereunder. *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006).

Here, Pauker alleges he contracted with Harbin to perform and Harbin discriminatorily terminated that contract. ER-81–84. Because Section 1981 expressly covers “termination of contracts,” Pauker has a claim arising from Harbin’s cancellation of the performance.

B. Section 1981 applies to Harbin’s interference with Pauker’s proposed merchandise contracts.

As noted, Section 1981 protects a “would-be contractor” as well as a party to an existing contract. *Domino’s Pizza*, 546 U.S. at 476; *see also Runyon*, 427 U.S. at 172 (same). As this Court has observed, moreover, “courts have not imposed a privity of contract type requirement that would otherwise protect third parties from section 1981 liability.” *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1313 (9th Cir. 1992). Section 1981 can therefore provide relief when a defendant “discriminatorily uses its authority to preclude an individual from securing a contract with a third party.” *Painter’s Mill Grille, LLC v. Brown*, 716 F.3d 342, 351 (4th Cir. 2013) (citation and emphasis omitted).

Here, Pauker alleges Harbin’s cancellation of his concert also deprived him of prospective contracts to sell merchandise to concertgoers. *See* ER-95 (alleging Harbin “deprived [Pauker] of the ability to contract with [Harbin patrons] as he was unable to sell his merchandise [there]”). Indeed, Pauker’s complaint identifies concrete proposed transactions that Harbin interfered with, by alleging that performers customarily sell event-related merchandise at Harbin; he planned to sell such merchandise at this concert, as he had during prior Harbin performances; and ordinary guests could not “set up shop” or make those sales. ER-78, 81, 95. By cancelling his concert, Harbin also foreclosed Pauker’s access to customary third-party contracts under Section 1981.

C. Pauker plausibly alleged under Section 1981 that racial discrimination caused his contractual deprivations.

A Section 1981 plaintiff must plausibly allege that race was a but-for cause of the contractual injury. *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. 327, 333–34, 341 (2020). As detailed above in Argument Sections I and II, Pauker amply did so. *See supra* pp. 27–37 (Section I) and pp. 39–49 (Sections II.B–D).

Pauker alleged, the district court accepted, and established law confirms a nexus between his Zionism and Jewish racial identity. *See* ER-

78–80 (pleading); ER99, 102 (court ruling); *Shaare Tefila*, 481 U.S. at 617–18 (applying Section 1982 to Jews); *supra* pp. 27–37 (Section I). And again, Harbin justified itself by reliance on Pauker’s pro-Israel post and complaints about his “Zionist views” that were further alleged to exhibit “direct anti-Jewish animus” (ER-82–83, 103); and it hosted performers outside the class who addressed the Israeli-Palestinian conflict despite Harbin’s supposed neutrality rule (ER-85–90). *See also supra* pp. 39–49 (Sections II.B–D). All of this supports a finding of race discrimination, and when coupled with the above-described contractual deprivations of a performance and merchandise sales, a viable Section 1981 claim.

VI. PAUKER OTHERWISE STATED A SECTION 1982 CLAIM.

Section 1982 of the Civil Rights Act of 1866 prohibits racial discrimination in the sale of property. 42 U.S.C. § 1982 (“All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to purchase . . . [or] sell . . . real and personal property”). Notably, the statute reaches interference with property sales. *Jones*, 392 U.S. at 421–22. It also covers a contracted right to sell merchandise at a venue. *See Guides, Ltd. v. Yarmouth Grp. Prop.*

Mgmt., Inc., 295 F.3d 1065, 1073 (10th Cir. 2002) (affirming denial of judgment to defendant on vendor’s claim to leased retail space).

Echoing Section 1981, a plaintiff states a claim under Section 1982 where he plausibly alleges: (1) he is a member of a protected racial class; (2) he sought to buy or sell personal property; (3) the defendant interfered with that right; and (4) facts or circumstances that defendant acted because of plaintiff’s race. *See Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552 (9th Cir. 1980) (outlining claim in real-property context); *Comcast*, 589 U.S. at 336 (explaining Sections 1981 and 1982 are construed similarly and 1982 requires conduct “because of” race).

Pauker’s complaint plausibly alleges each point. The protected-status and causation allegations are the same as described above. *See supra* pp. 27–37 (Section I) and pp. 39–49 (Sections II.B–D). Pauker alleged Zionism forms part of his Jewish race. ER-78–80. He also alleged Harbin canceled him because of his Zionist post and related complaints. ER-83. And the cancellation removed his outlet for merchandise sales. ER-95. These facts plausibly link racial bias to the interference.

The complaint also alleges the underlying sales right. For although the lower court reasoned in rejecting his Section 1982 claim that Pauker

failed to allege an express merchandise discussion or physical bar from selling (ER-8, 105), Pauker indeed alleged that guests may not “set up shop” and that he “could not have sold merchandise absent his scheduled performance” and could sell merchandise only as a performer. ER-78, 81, 95.¹⁶ At this stage, these facts more than plausibly allege interference with a sales opportunity. *See Phiffer*, 648 F.2d at 552 (recognizing the rejection of a property-sale opportunity as basis for Section 1982 claim).¹⁷

Finally, even on the lower court’s mistaken terms, Pauker stated a Section 1982 claim. The statute affords Pauker “the same right” as others to sell property without regard to his race. 42 U.S.C. § 1982. By depriving him of the opportunity to sell merchandise as an incident to his concert, Pauker did not have the “same right” as the non-Jewish performers he identified. “To suggest otherwise . . . ‘is to reject the plain meaning of language.’” *Jones*, 392 U.S. at 418–19 (quoting *Hurd v. Hodge*, 334 U.S.

¹⁶ These considerations apply with equal force to Pauker’s Section 1981 sales-deprivation claim.

¹⁷ Once again, if amendment were necessary, Pauker would add that the performance contract he secured with Harbin expressly afforded him the right to sell merchandise related to his event.

24, 34 (1948), and stressing statute's far broader reach than only conduct wholly disabling minorities from engaging in property transactions).

CONCLUSION

This Court should reverse the district court's dismissal and allow Pauker's civil-rights claims to proceed as plausibly alleged under Title II, the Unruh Act, and Sections 1981 and 1982. In the alternative, it should reverse and remand with leave to amend any claim it finds lacking.

Date: August 14, 2026

Respectfully submitted,

STANFORD LAW SCHOOL
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**STATEMENT OF RELATED CASES
PURSUANT TO CIRCUIT RULE 28-2.6**

The undersigned attorney states the following: I am unaware of any related cases currently pending in this Court.

Dated: August 14, 2026

/s/ Matthew Mainen

Matthew Mainen

Attorney for Appellant

Michael Pauker

CERTIFICATE OF COMPLIANCE

The foregoing **Appellant's Opening Brief** complies with the type-volume limitation of Cir. R. 32-1, because it contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief contains a total of 13,975 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), and was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word. Finally, the electronic brief was subject to a virus scan and no virus was detected prior to its submission.

Dated: August 14, 2026

/s/ Matthew Mainen

Matthew Mainen

Attorney for Appellant

Michael Pauker

ADDENDUM

INDEX TO ADDENDUM

PERTINENT FEDERAL AND STATE STATUTORY AUTHORITIES

42 U.S.C. § 1981(a)	A-1
42 U.S.C. § 1981(b)	A-1
42 U.S.C. § 1982	A-2
42 U.S.C. § 2000a(a)	A-3
42 U.S.C. § 2000a(b)	A-3
42 U.S.C. § 12182(a)	A-5
Cal. Civ. Code § 51(b)	A-6
Cal. Civ. Code § 51(e)(5)	A-6
Cal. Civ. Code § 52(a)	A-7

42 U.S.C. § 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

* * * *

42 U.S.C. § 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 2000a. Prohibition against discrimination or segregation in places of public accommodation

(a) Equal access

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

* * * *

42 U.S.C. § 12182. Prohibition of discrimination by public accommodations

(a) General rule

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

* * * *

**Cal. Civ. Code § 51. Unruh Civil Rights Act; equal rights;
business establishments; violations of federal Americans with
Disabilities Act**

* * * *

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

* * * *

(e) For purposes of this section:

* * * *

(5) “Religion” includes all aspects of religious belief, observance, and practice.

* * * *

**Cal. Civ. Code § 52. Denial of civil rights or discrimination;
damages; civil action by persons aggrieved; intervention;
unlawful practice complaint; waiver of rights by contract**

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

* * * *

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I electronically filed the foregoing document, **Appellant's Opening Brief**, with the United States Court of Appeals for the Ninth Circuit, using the ACMS system. I further certify that all parties, through their counsel of record, are registered as ACMS filers and that they will be simultaneously served via Notice of Docketing Activity (NDA).

Dated: August 14, 2026

/s/ Matthew Mainen

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