IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROBERT E. WHITE, Plaintiff and Petitioner; v. SQUARE, INC., Defendant and Respondent.	No. S249248 U.S. Court of Appeals for the 9th Circuit No. 16-17137 United States District Court Northern Dist. of California No. 3:15-cv-04539 JST

For Review Following Request by the U.S. Court of Appeals for the 9th Circuit Pursuant to California Rules of Court, Rule 8.548

REPLY BRIEF ON THE MERITS

*Myron Moskovitz, SBN 36476
Christopher Hu, SBN 293052
MOSKOVITZ APPELLATE TEAM
90 Crocker Avenue
Oakland, CA 94611
(510) 384-0354
myronmoskovitz@gmail.com

William McGrane, SBN 57761
MCGRANE PC
4 Embarcadero Center, 14th Fl.
San Francisco, CA 94111

Michael J. Hassen, SBN 124823
REALLAW, APC
1981 N. Broadway, Suite 280
Walnut Creek, CA 94596

Attorneys for Petitioner

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INTRODUCTION

In its Answer Brief, Square disclaims any intent to propose standing requirements for internet lawsuits that differ from standing requirements for bricks-and-mortar lawsuits. Yet that is exactly what Square proposes.

Square insists that a plaintiff who intends to sign up for an internet business's services but refuses to do so because of discriminatory terms lacks standing. But as we shall explain in this Reply, established California law does not support Square's position.

Square claims that absent a stringent standing requirement, the sky will fall on internet businesses. Square asserts that, if this Court answers "Yes" to the Ninth Circuit's first question, this would "open a boundless Internet exception to Unruh Act standing."

Just the opposite. Our courts have determined that "[s]tanding under the Unruh Act is broad." *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1127. This broad standing rule supports the Act's broad ban on arbitrary discrimination "in *all* business establishments *of every kind whatsoever*." Civ. Code, § 51, subd. (b), emphasis added. Accepting Square's position

would open a "boundless Internet exception" to Unruh Act coverage, effectively immunizing unscrupulous internet operators from any meaningful accountability for discriminatory conduct.

I. THE ISSUE BEFORE THIS COURT

This Court accepted a precise question from the Ninth Circuit: under a specific set of facts, does a plaintiff have standing to bring suit for a violation of the Unruh Civil Rights Act? Our Opening Brief proposed an answer to that question, and only that question, before turning to the Ninth Circuit's second certified question.

Square's Answer Brief,[1] however, blurs the question. Square begins by combining the Ninth Circuit's two certified questions. Square then *changes* the facts assumed in the Ninth Circuit's first question—and addresses factual settings *not posed* by the Ninth Circuit. See AB 21.

Therefore, before proceeding further, we need to clarify what is—and what is not—at issue before this Court.

There are many *possible* ways that a plaintiff *might* claim standing to sue an internet company for an Unruh Act violation. For instance:

[1] We cite to Square's Answer Brief as "AB."

1. He somehow learned that the company discriminated, but never visited the company's website because he had no interest in signing up for the company's services.
2. He intended to sign up for the company's services, but was deterred from visiting the website—because a friend told him that the company would impose discriminatory terms on him.
3. He visited the website, but had no intent to sign up for the company's services.
4. He visited the website, specifically intending to sign up for services, but decided not to when he discovered that the company discriminated against a protected class to which he did not belong.
5. He visited the website, specifically intending to sign up for services, but decided not to when he encountered discriminatory terms and conditions that would have denied *him* full and equal access to the company's services.
6. He entered into a contractual relationship with the defendant, and then decided to challenge the discriminatory practice.

The Ninth Circuit's first question asks this Court whether #5 is sufficient, and its second question asks whether #6 (or some other type of "further interaction") is required. The Ninth Circuit did not ask whether #1, #2, #3, or #4 might be enough. And yet Square devotes much of its brief to shooting down variations on those straw men. A few examples:

- Page 8: White's "claims rest on the notion that merely *viewing* Square's terms online constitutes discrimination."
- Page 12: "Any 'injury' flowing from *viewing* the TOS [terms of service] does not establish a 'personal' injury sufficiently distinct from the interests of the general public or third parties to support standing." Italics added, citation omitted.
- Page 14: Allowing standing here would confer standing on "mere web-browsing . . ."
- Pages 21–22: Characterizing the Ninth Circuit's question as "Does someone visiting a website suffer an injury from discriminatory conduct by *merely viewing* allegedly discriminatory terms in the website's TOS . . . .?" Italics added.

- Page 26: "Mere Knowledge of Discriminatory Policies Is Not Enough for Unruh Act Standing." Emphasis omitted.
- Page 29: "[M]ere awareness" is not enough.
- Page 30, quoting *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1133: "[M]ere awareness" is not enough. Nor is it enough that the plaintiff " 'only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it . . . .' "
- Page 37: The facts in the Ninth Circuit's question "establish only that the plaintiff 'became aware' of an allegedly discriminatory policy . . . ."

None of these presentations of the issue include the key facts that distinguish the plaintiff in the Ninth Circuit's question from the general public: but for the discriminatory terms, this plaintiff visited the website and *intended* to sign up for the company's services (although at other points in its brief, Square does acknowledge these facts). Indeed, at pages 26–27, Square relies on *Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, even though in *Reycraft*, the court expressly found that the plaintiff *failed to show that she had any intent* to use the defendant's services. *Id*. at pp. 1224–1225.

There is no need for this Court to decide whether a plaintiff in scenarios #1, #2, #3, or #4 has Unruh Act standing. So, to be clear, we shall continue this brief on the assumption that the main issue before this Court includes *all* facts—and *only* those facts—posed by the Ninth Circuit's first question:

> Does a plaintiff suffer discriminatory conduct, and thus have statutory standing to bring a claim under the Unruh Act, when the plaintiff visits a business's website with the intent of using its services, encounters terms and conditions that deny the plaintiff full and equal access to its services, and then departs without entering into an agreement with the service provider?

II. PLANTIFF'S INJURIES ARE SUFFICIENT TO CONFER STANDING

A. Plaintiff's Economic and Non-Economic Injuries.

Square asserts that, in the factual situation assumed by the Ninth Circuit's first question, the plaintiff suffers no recognizable injury, and could suffer no such injury unless and until the plaintiff actually enters into a contractual relationship with the defendant, or defendant somehow "prevents" plaintiff from entering into a contractual relationship.

However, our Opening Brief, at pages 39–40, discusses the *economic* injuries suffered by the plaintiff bankruptcy attorney who declines to sign a discriminatory agreement. He may lose clients who want to use a credit card to pay for a complete consultation—including bankruptcy advice.

We also discussed the plaintiff's *non-economic* injuries: the humiliation that a plaintiff might suffer from such discriminatory treatment and the legislative purpose to provide minimum compensation in part to remedy this type of humiliation. See Opening Brief at 40–42; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33–34.

Square's Answer Brief tries to cast these injuries as "abstract and hypothetical." AB 25. They are not. They are real. Recall that the Ninth Circuit's question assumes the plaintiff had the *intent* to sign up for defendant's services, and encountered terms and conditions that denied *him* full and equal access.

Square's argument on this point relies heavily on *Orloff v. Hollywood Turf Club* (1952) 110 Cal.App.2d 340. But as Square acknowledges, see AB 33, *Orloff* interpreted an older antidiscrimination statute. Unlike the modern Unruh Act, the statute at issue in *Orloff expressly required* the purchase of a ticket or tender of the purchase price. See Opening Brief at 55–57. *Orloff* has no continuing validity under the Unruh Act.[2]

Please note that the Ninth Circuit's question is not limited to discrimination against bankruptcy attorneys or to any other specific group. The question applies to *any* discrimination barred

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[2] Square notes that this Court has previously cited *Orloff*. As far as we can tell, however, this Court has never been called upon to disapprove *Orloff* in the manner we are proposing here. In *Angelucci*, 41 Cal.4th 160, at p. 171, this Court distinguished *Orloff* on another ground, because Mr. Angelucci *had* tendered the purchase price. In *Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1147, 1163, this Court cited *Orloff* as an early example of the legitimate business interest defense, not as establishing any principle of standing.

by the Unruh Act. A gay person who intends to sign up with some internet business will be humiliated by a website that confronts him with: "Persons signing up for this service may not use it to assist any sale to gay people." This humiliation should constitute an injury sufficient to confer standing on that person—with or without any additional showing of economic injury.

B. Plaintiff Need Not Sign a Contract in Order to Have Standing.

Throughout its Answer Brief, Square pounds a steady theme: California law does not give an Unruh Act victim standing unless he first "patronize[s] the defendant's business," AB 10, by entering into a contractual relationship with the discriminator that subjects him to the discriminator's terms of service.[3]

But no language in the Act so states. There is no reason to make the presence or absence of a contract the dividing line. The right to be free from arbitrary discrimination is based on principles of equality and is protected by statute; it does not derive from contract. In fact, courts have allowed Unruh Act claims to proceed where the parties had never entered into any

[3] Or is "prevented from becoming a patron by discriminatory conduct." AB 28. This second possibility is discussed *infra*.

contract. See, e.g., *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 940–942 (plaintiff was not a customer of the bank); *Stone v. Board of Directors* (1941) 47 Cal.App.2d 749, 754 (no indication that plaintiffs had ever paid to enter public pool).[4]

In *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, this Court indicated that an African-American person would have standing to challenge a practice of "racially segregated drinking fountains or restroom facilities at an unattended structure." *Id.* at p. 170. This Court never suggested that the plaintiff *must sign a contract* with the fountain or restroom operator in order to have standing to challenge the discriminatory treatment.

C. "Prevention" of Patronage.

Square appears to argue that, to establish standing, a plaintiff who does not sign a contract must be "prevented" from becoming a patron. Such a requirement would be at odds with both case law and common sense. In *Angelucci*, *supra,* this Court

[4] As discussed at length in *Osborne*, *supra*, 1 Cal.App.5th at pp. 1128–1133, there are also several cases in which the plaintiff apparently entered into a contract with the defendant by making a purchase, but the court's opinion did not treat that purchase as crucial (or even important) to standing. See, e.g., *In re Cox* (1970) 3 Cal.3d 205.

indicated that an African-American person would have standing to challenge a practice of "racially segregated drinking fountains or restroom facilities at an unattended structure" 41 Cal.4th at p. 170—even though no one physically barred the person from going to the fountain or restroom.[5] That observation accords with the Unruh Act's guarantee of "full and equal accommodations." Civ. Code, § 51, subd. (b).[6] Making an accommodation available to all, subject to discriminatory terms for some, violates the requirement of "equal treatment of patrons in all aspects of the business." *Koire*, *supra*, 40 Cal.3d at p. 29.

Even if some sort of "prevention" were required, hasn't Square's website effectively "prevent[ed] [White] *personally* from becoming a patron," AB 10, by telling him, in effect, "We don't want your kind"? Does it further the purposes of the Unruh Act to require this person to endure even more humiliation (and

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[5] As we explained on page 43 of our Opening Brief, a website like Square's is "unattended" in the same sense as the segregated drinking fountain described in *Angelucci*.

[6] We have cited *Angelucci*'s hypothetical several times because our research shows it to be the fact situation closest to that posed in the Ninth Circuit's first question.

expense) by signing up, engaging in the forbidden conduct, and then facing either termination or a lawsuit?

D. There Is No "Personal Discrimination" Requirement.

At pages 25, 34–38, and 42, Square argues that a plaintiff has no standing unless the discriminatory practice is aimed at him "personally" and "individually"—rather than at the group to which the plaintiff belongs. Square presents no authority for this notion. As discussed above, *Angelucci* discussed the formerly-common practice of placing signs ("Whites Only" and "Colored Only") on public facilities. 41 Cal.4th at p. 170. These signs were addressed to groups, not to particular individuals. This Court did not limit its statement in *Angelucci* to situations where a plaintiff was "personally" or "individually" told that "*You* may not drink at this fountain because you are black." There is no reason to impose a similar limitation here.

Likewise, because the Ninth Circuit's first question assumes a scenario in which the plaintiff "encounters terms and conditions that deny *the plaintiff* full and equal access," *White v. Square*, 891 F.3d 1174, 1175, italics added, there is no need to decide whether a plaintiff has standing to challenge a

discriminatory policy that would restrict only *someone else's* access. Mr. White is not, for example, challenging Square's ban on "adult entertainment oriented products" or "occult materials." ER 139 (SAC ¶ 6). Nor is this a case in which, say, a sex worker or a Satanist is challenging Square's ban on "bankruptcy attorneys." *Ibid.* Mr. White is challenging a provision of Square's terms and conditions that applies to him personally, as a member of the targeted group.

E. The Text of the Unruh Act Does Not Support Square's Proposed Requirements.

At pages 9–10 of its Answer Brief, Square points to the text of the Unruh Act, which refers to "any person denied" full and equal accommodations and "any person aggrieved by [defendant's] conduct." Civ. Code, § 52, subds. (a) & (c).

Square places particular emphasis on the latter provision, arguing that subsection (c)'s reference to public enforcement by district attorneys and the like suggests that the plaintiff in the Ninth Circuit's first question is not "aggrieved" by the website owner's discriminatory conduct. See AB 14, 23, 34, 36. But "aggrieved" does not define itself. The statutory language suggests that a private plaintiff seeking injunctive relief must

have done *something* to set himself apart from the general public, but does not explain *what* is required. The word has been defined by our courts in the cases we've discussed, in light of the two policies the Legislature meant to further: to deter unlawful discrimination and to compensate its victims.[7]

At page 11 of its Answer Brief, Square argues that there is "no practical way of distinguishing injured plaintiffs from uninjured people who visited the website if subjective deterrence alone were enough." Not so. A plaintiff's intent to use the defendant's services is provable by means that are usually used to show intent, such as a declaration in which the plaintiff states under penalty of perjury his intent to use the service, why he wants it, and the like.

[7] At page 10, Square also cites cases saying that "aggrieved" means "actually denied full and equal treatment" and being a "victim" of discrimination. These vague words are similarly unhelpful in answering the precise question at issue here.

III. ARTICLE III

At pages 29–33 of our Opening Brief, we noted that the Ninth Circuit ruled that White has standing to bring suit under Article III of the U.S. Constitution, because he satisfied a test for standing that is framed in nearly the same terms as California's test for Unruh Act standing.[8] If he has standing under Article III, he must therefore also have standing under the Unruh Act.

At page 42 of its Answer Brief, Square brushes this off, relying on a single unpublished trial court decision that addresses an aspect of standing that is not at issue in this case. See *Sturm v. Davlyn Investments, Inc.* (N.D.Cal. Nov. 6, 2013) No. CV 12-07305-DMG, 2013 WL 8604760. As *Sturm*'s citations demonstrate, some cases have held that companions of persons with disabilities, and organizations that advocate for fair housing, might have Article III standing yet lack standing under the Unruh Act. See *Sturm*, 2013 WL 8604760, at *2 (citing

[8] At AB 8 and in its Request for Judicial Notice, Square asks the Court to note that White's counsel argued in the Ninth Circuit that White lacked Article III standing. Those arguments are now irrelevant, in light of the Ninth Circuit's holding (which is now law of the case) that White has Article III standing. (It is equally irrelevant that Square pursued in the federal courts a claim that Square has now abandoned: the fact that White did not tender any purchase price.)

Arnold v. United Artists Theater Circuit (N.D.Cal.1994) 158 F.R.D. 439, 458 and *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1386). The defendants in those cases did not discriminate against those companions and organizations. Mr. White, by contrast, is suing based on an infringement of *his own* right to be free from arbitrary occupational discrimination. See *Jackson*, *supra*, 30 Cal.App.4th at pp. 940–942 (black companion of bank customer had Unruh Act standing to sue bank for racial discrimination *targeting the companion*).

We do not suggest that a plaintiff with Article III standing will *always* have Unruh Act standing. The *sources* of these two standing rules are different, and there might be some situations where the tests for standing will diverge. But in the present case, the Ninth Circuit expressly invoked the Article III rule that "discrimination itself . . . can cause serious non-economic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group." 891 F.3d at p. 1177. This echoes this Court's justification for standing under the Unruh Act, in *Koire*, *supra*. This is not surprising, because to have standing under the Unruh Act, the plaintiff " 'must have a

special interest that is greater than the interest of the public at large and that is concrete and actual rather than conjectural and hypothetical.' " *Osborne*, *supra*, 1 Cal.App.5th at p. 1127. To have standing under Article III, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540, 1548. Thus, the elements of the two tests are virtually identical, expressed in virtually the same words. Square's Answer Brief fails to discuss this.

IV. OCCUPATIONAL DISCRIMINATION

A. Standing to Challenge Occupational Discrimination Is Not Subject to More Restrictive Requirements.

Square appears to argue that occupational discrimination should be treated as a second-class sort of evil, with a higher standing barrier, because it is not expressly listed in the Unruh Act—as race, religion, gender, and sexual orientation are.

No authority supports this notion. Once a court holds that a certain group is protected under the Unruh Act's catch-all ban on "arbitrary" discrimination, a member of that group is entitled to equal treatment by the courts.

There are no special standing requirements for different groups of victims under the Unruh Act. This Court has applied the Unruh Act to groups not expressly mentioned in the statute, including hippies, see *In re Cox* (1970) 3 Cal.3d 205,[9] and families with children, see *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, but has never suggested that they have less protection or higher standing requirements.

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[9] The petitioner in *Cox* was a "youth" who was accosted by mall security while talking with a friend "who wore long hair and dressed in an unconventional manner." 3 Cal.3d at p. 210.

At pages 43–44 of its Answer Brief, however, Square calls occupational discrimination a "novel, marginal theory" that has never been endorsed by this Court. The Court has, however, said in dicta that the Unruh Act does bar occupational discrimination. In *Marina Point, supra,*30 Cal.3d 721, the Court stated:

> Whether the exclusionary policy rests on the alleged undesirable propensities of those of a particular race, nationality, *occupation*, political affiliation, or age, in this context the Unruh Act protects individuals from such arbitrary discrimination.
> [*Id.* at p. 726, italics added.]

And California Court of Appeal cases hold that the Unruh Act forbids businesses from arbitrarily discriminating against customers because of their occupations. See, e.g., *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1405–1406; *Long v. Valentino* (1989) 216 Cal.App.3d 1287, 1300.

It seems odd to call a doctrine "novel" or "marginal" when it has been recognized by several California appellate courts for more than a quarter century. And the Ninth Circuit apparently had no doubt that established California law bars occupational

discrimination, because that court saw no need to include any inquiry about this in its questions to this Court.

In any event, whether occupational discrimination is barred by the Unruh Act is not directly relevant to the issue now before this Court, because the Ninth Circuit's questions do not specify any particular type of discrimination. The questions cover *all* types of arbitrary discrimination, including racial, religious, gender, and others. The Ninth Circuit assumed, as do we, that standing analysis does not vary according to the type of discrimination involved.

B. Depriving Specific Occupations of Certain Services Violates the Unruh Act.

At page 47, Square asserts that, because Square does not wholly bar bankruptcy attorneys from signing up with Square, it was free to bar bankruptcy attorneys from some Square services.

But the Unruh Act guarantees "full and equal accommodations." Civ. Code, § 51, subd. (b). Would the Unruh Act permit a bus company to allow blacks to ride but require them to sit in the back of the bus?

And note that in *Osborne, supra,* 1 Cal.App.5th 1118, defendant hotel did not bar a disabled person from renting a

room, but imposed a discriminatory cleaning fee on such persons. The court held that the person had standing under the Unruh Act.

C. Square Has No "Legitimate Business Interests" in Discriminating Against Bankruptcy Lawyers.

At page 45, Square notes cases allowing occupational discrimination where such discrimination was justified by a defendant's "legitimate business interests." But this has no effect on a plaintiff's standing to bring the suit. We are aware of no authority holding that the possibility that a defendant might raise an affirmative defense in his answer negates a plaintiff's standing to file a complaint.

At page 48, Square suggests that it might have such a "legitimate business interest" here, because allowing a lawyer to receive credit card payment for bankruptcy work would "raise special regulatory and risk concerns." If this were true in a particular case—including this one—Square would be free to allege such concerns in its answer and try to prove them at trial. But this possibility is no reason to deny a plaintiff standing.

In any event, Square's concerns are quite overinclusive. They provide no basis for a blanket exemption of occupational

discrimination from Unruh Act protection. It is difficult to conceive any legitimate business reason for Square's practice of restricting service to *every* attorney in the United States whose practice encompasses *some* aspect of bankruptcy law—whether he is advising creditors or debtors, whether his advice involves personal finances or corporate restructuring, and even if the client has absolutely no solvency or liquidity problems.

In *Marina Point v. Wolfson*, *supra*, this Court rejected the defendant's attempt to justify discrimination against *all* members of a group with evidence that would justify exclusion of *some* members of that group:

> The landlord's blanket exclusion of all families with minor children is not permissible under the Unruh Act even if children "as a class" are "noisier, rowdier, more mischievous and more boisterous" than adults.
> [30 Cal.3d at p. 736.]

* * * *

> [T]he Unruh Act does not permit a business enterprise to exclude an *entire class* of individuals on the basis of a generalized prediction that the class "as a whole" is more likely to commit misconduct than

some other class of the public.

[*Id.* at p. 739.]

Square also claims an interest in "preventing its service from being used for illegal or fraudulent transactions, a risk that is palpable in the bankruptcy context." AB 48. But it cannot be assumed that all—or even most—clients seeking bankruptcy advice will use it for "illegal or fraudulent transactions." It seems unlikely that the Framers of our Constitution would have expressly authorized Congress to provide bankruptcy protection if they thought it would be commonly used to defraud. See U.S. Constitution, Art. I, § 8(4). Note that Square's bar applies to attorneys who perform bankruptcy work *for creditors*, not merely for debtors. There is no reason to assume that creditors of bankrupt debtors have any particular propensity to commit fraud. Here again, Square's overinclusive discrimination violates the principles established in *Marina Point*, *supra*.

Square also claims an "interest in managing financial risk." AB 48. Square fails to explain how this interest is served by prohibiting *all* lawyers from accepting credit card payments to help clients with bankruptcy problems. In any event, if a client misuses a credit card or fails to make his credit card payments,

the card company will cancel the card, and the lawyer will not be able to accept it for payment.

Finally, Square claims an "interest in complying with its obligations to its banking partners." AB 48. If this means that credit card companies *required* Square to include the discriminatory term in its terms of service, this could never constitute a "legitimate" business interest. Could Square justify a *racial* exclusion because a "banking partner" required it?

Square's inability to come up with of any plausible "legitimate business interest" for its policy of discriminating against bankruptcy lawyers demonstrates what is at stake in the present proceeding: a "No" answer to the Ninth Circuit's first question would enable Square and similar website operators to build a wall of standing around indefensible discriminatory practices.

V. A "YES" WILL NOT OPEN THE FLOODGATES

At AB 10, Square says that "this Court need not, and should not, devise special standing rules for Unruh Act claims arising from e-commerce." We agree. To answer the Ninth Circuit's questions, there is no need to create new legal doctrines. The principles our courts have already adopted regarding the twin purposes of the Unruh Act—deterrence and compensation—are adequate to resolve standing issues arising under the internet. The Legislature has not created any internet exceptions.

And yet, Square goes on to argue that answering "Yes" to the Ninth Circuit's first question would "open a boundless Internet exception to Unruh Act standing," AB 50, and would "radically expand Unruh Act standing and multiply litigation," AB 50, emphasis and capitalization omitted. See also AB 8, where Square argues that "If these allegations sufficed for standing, they would portend sweeping Unruh Act class actions, challenging online terms of service accessible by millions of people on the basis of hypothetical discriminatory injuries."

No, the sky would not fall. Suppose an African-American person approaches a bricks-and-mortar furniture store, intending to buy a bed, and sees a sign in the window that says, "We sell on credit. (Black people must pay cash.)" The person declines to enter the store. Does that person have standing? Yes, for the reasons we have already explained. And if this person instead goes to the store's website with exactly the same intent, faces exactly the same restriction, and declines to agree to the discriminatory term (a scenario encompassed by the Ninth Circuit's first question), there is no reason why the result should differ. Square would require this plaintiff to enter the bricks-and-mortar store, enter into a contractual relationship with the owner, and then endure the further humiliation of denial of credit—or to sign up on the defendant's website and face the same rebuff when she later asks for credit. Neither the deterrent nor the compensatory purposes of the Unruh Act would be served by such requirements. Indeed, both would be undermined.

Square contends (at page 51 of its Answer Brief) that a "Yes" answer to the Ninth Circuit's question would lead to "unwieldy class actions that include consumers who undertook no substantial interaction with the defendant." But the defendant

would be free to argue that the class should include only persons who meet the same standing requirement our courts impose on the named plaintiff, including an intention to sign up for the company's services. As we explained at pages 47–48 of the Opening Brief, meeting that standing requirement is no small feat.[10] And the defendant would be free to argue that each claimant should recover only a single $4,000 statutory minimum, even if he visited the website more than once.

In any event, Square fails to show that what Square did commonly occurs on the internet. What is "novel" here is not White's claim, but Square's facially discriminatory treatment of potential patrons who have done nothing wrong, nothing illegal, and nothing disreputable. Mr. White is engaged in a lawful and honorable occupation, heavily regulated by the state, helping clients employ a legal procedure expressly endorsed by the Framers of our Constitution. There might be other technology

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[10] If some persons are excluded from the class because they have had *too little* engagement with defendant, others will be excluded because they had *too much*. A defendant whose terms of service include an arbitration agreement could move to compel arbitration against any named plaintiff who signed the agreement, and could seek to exclude from the class any persons who are subject to arbitration.

companies that facially discriminate against protected classes in the same manner as Square, but we hope they are few and far between.[11]

In cases where the statutory text and purpose favors plaintiff, this Court has not hesitated to reject the same type of "floodgates" argument that Square is advancing here. See, e.g., *Estate of Duke* (2015) 61 Cal.4th 871, 892–893 (quoting *Buss v. Superior Court* (1997) 16 Cal.4th 35, 58 and *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171).

A "Yes" answer will not spell the end of Silicon Valley; it merely will subject internet-based businesses to the same restrictions on unlawful discrimination that bricks-and-mortar businesses have faced for decades. If Square and other technology companies believe they need a special Unruh Act

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[11] Some of Square's competitors (Intuit, Stripe, and SumUp) also discriminate against bankruptcy lawyers. See https://quickbooks.intuit.com/payments/legal/TOC102017/acceptable-use/, https://stripe.com/us/restricted-businesses, and https://help.sumup.com/hc/en-us/articles/115008338707/ PayPal provides similar credit card services. See https://www.paypal.com/us/brc/article/how-paypal-works-for-sellers. But PayPal does not discriminate against bankruptcy attorneys. See https://www.paypal.com/us/webapps/mpp/ua/acceptableuse-full

standing rule for the internet, they are free to ask the Legislature to enact one.

Square fails to consider the effect of a "No" answer to the Ninth Circuit's first question. If the answer is "No," then to acquire standing, Plaintiffs would need to sign up for services provided on a discriminatory basis, and then, to challenge that practice, hire a lawyer to arbitrate each claim on an individual basis only.[12] How many people are likely to endure this effort? The answer is suggested by the fact that Square has been continuously discriminating against bankruptcy attorneys for years—and continues to do so, down to the present. Unless this suit is allowed to proceed, it seems likely that Square will continue its practice into the future, indefinitely.

While there is no cause to adopt special, new standing principles for internet cases, our courts should be alert to how modern technology now provides businesses with new opportunities to evade accountability for unlawful discrimination. As Square notes (at page 26 of its Answer Brief), "there are infinite ways to design a website." Adopting Square's new

[12] Square, like many sophisticated businesses, requires prospective customers to sign arbitration agreements that contain class waivers. See AB 17, fn. 2.

requirements could enable clever engineers to create ways that effectively immunize internet businesses from accountability for discriminatory practices.

VI. THE SECOND QUESTION

The Ninth Circuit's second question asks, if this Court answers the first question "No," whether some "further interaction" is necessary to establish standing.

At page 64–65 of our Opening Brief, we contend that if "further interaction" is required, sending a letter to the defendant expressly demanding equal treatment for this plaintiff should constitute sufficient "further interaction." We noted that this in fact occurred in the present case.

At page 14 of our Opening Brief, we summarized the allegations of the SAC regarding a letter sent by White's counsel to Square demanding the Square "cease and desist" its discriminatory treatment of White. At page 41 of its Answer Brief, Square concedes that "a customer who demands, and is then denied, equal treatment from a business may have standing under the Unruh Act because he has suffered from an act of discrimination that prevented him from availing itself of the business's goods and services . . . ." See also AB 50 (observing that hypothetical plaintiff may have standing if she "contacted

the service, engaged them about becoming a customer, and was personally denied equal treatment").

Square, however, asserts that this rule does not apply on these facts because "White has neither pled the content of his demand nor attached the letter to the operative complaint." AB 41. This is not true. While the letter was not attached, its content was clearly alleged. The Second Amended Complaint alleges that White had his attorney serve "a formal demand on [Square] that it now immediately and permanently agree to cease and desist from violating Robert White's and Class' Unruh Law civil rights to be free from the occupational discrimination they have suffered by virtue of [Square's] having previously and continuously refused to allow Robert White and Class to use [Square's] services to accept payments in connection with their engaging in their lawful occupations." ER 143 (SAC ¶ 20). Square ignored the demand. ER 143 (SAC ¶ 21). Even under Square's restrictive approach to standing, these allegations are enough.

We also contend, at pages 63–64 of the Opening Brief, that Square's letter to another bankruptcy attorney in a related case shows that Mr. White would have had to lie in order to sign up

for Square's services. Square portrays this letter as being specific to that other bankruptcy attorney. See AB 41. But the letter itself indicates otherwise: it states, regarding "payment processing for bankruptcy legal services," that "Square's terms of service **continue to require subscribers to agree that they will not use the service to process payments because of the economic risk associated with those transactions**." ER 54, emphasis in original. It then warns that "signing up for Square's service with the intent to violate the applicable terms of service"—that is, the intent to use Square for bankruptcy-related legal services—"would be fraudulent." ER 54. Once Mr. White became aware of this letter, and in light of his undisputed intent to use Square for his bankruptcy practice, he reasonably could have believed that merely signing up for Square would have subjected him to a fraud lawsuit or professional discipline.

CONCLUSION

This Court should answer the Ninth Circuit's first question "Yes." If this Court reaches the Ninth Circuit's second question, it should answer that what Mr. White did here is sufficient "further interaction" to establish standing.

Respectfully submitted,
Moskovitz Appellate Team

Date: January 3, 2019

By: Myron Moskovitz
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

I hereby certify that the attached Reply Brief, including footnotes, contains 5,877 words, according to the word count indicator on my Microsoft Word program.

Date: January 3, 2019

Myron Moskovitz
Attorney for Petitioner
Robert E. White

PROOF OF SERVICE

I, the undersigned, certify that I am over the age of eighteen years, and not a party to the action within; that my business address is 90 Crocker Avenue, Piedmont, California 94611; that I served copies of the following documents:

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Munger Tolles & Olson LLP
350 S Grand Avenue
Los Angeles, CA 90071

Colleen Bal
Wilson Sonsini Goodrich and Rosati PC
One Market Plaza, Spear Twr, Suite 3300
San Francisco, CA 94105

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

Date: January 3, 2019

Cosmin Barbu