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

OPENING BRIEF ON THE MERITS

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INTRODUCTION

Square, Inc. hosts a website that invites businesses to open "sub-merchant" accounts that allow them to become "Square Sellers," i.e., to process their customers' credit card payments through Square, which acts as "merchant of record" with various banks. This enables small business owners to accept credit cards without signing up with the banks, and to use their cell phones to accept customers' charge cards.

Robert White, an attorney with an active bankruptcy practice, alleged in his Second Amended Complaint that he visited the Square website, intending to open a Square account for his business. However, by reading the Square website's "terms of service," White saw that Square would allow him to become a Square "seller" only if he first truthfully "confirmed" that "you will not accept payments in connection with the following businesses or business activities: . . . bankruptcy attorneys." Because White could not truthfully "confirm" this, he did not agree to the Square website's terms of service. And because Square's website made no provision for the user to pay Square any money when opening an account, White did not tender any money to Square.

White later took additional steps. White returned to Square's website on a daily basis, but each time he encountered the same barriers. White also instructed his counsel to formally demand that Square cease its discrimination against bankruptcy attorneys. And White discovered that Square had asserted that any attempt to sign up for a Square account "with the intent to violate the applicable terms of service would be fraudulent." Excerpts of Record ("ER") 54.

A federal district court judge ruled that, under California law, these allegations were insufficient—because White's refusal to agree to Square's terms and tender money to Square deprived him of standing to sue Square for arbitrary occupational discrimination, under California's Unruh Civil Rights Act.

The Ninth Circuit then certified to this Court two questions that are based on the facts White alleged in his complaint, regarding how California law treats Unruh Act standing.

STATEMENT OF THE CASE

The Operative Complaint.

On October 1, 2015, Plaintiff Robert White filed a complaint in federal district court against Defendant Square, Inc. ER 197.

Shortly thereafter, White filed a First Amended Complaint ("FAC"). ER 190. The district court granted Square's motion to dismiss the FAC, while allowing White leave to amend. ER 151.

White then filed a Second Amended Complaint ("SAC"), which is the operative complaint for the current appeal. ER 137. The SAC alleged the following.

Square provides an online service that permits businesses without a credit card merchant account to accept payments from their customers who use Visa, Mastercard, Discover, or American Express credit cards. The SAC alleges "See https://squareup.com (Square Website) for a fuller description of the nature of what a Square Account (as same is defined by the Square Seller Agreement) consists of." ER 138 (SAC ¶ 5).[1]

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[1] See https://web.archive.org/web/20151202050718/https://squareup.com for an archived version of Square's website as it appeared in

Square's website is open to the public, and any member of the public may use that website to sign up for a Square account—so long as that person agrees to the terms of the Square Seller Agreement. *See* ER 138 (SAC ¶ 5).

That Agreement includes Section 6, the so-called "Bad List." Section 6 provides that "By creating a Square Account, you . . . confirm that you will not accept payments in connection with the following businesses or business activities:" ER 139 (SAC ¶ 6). Then appears a list of 28 businesses, such as (1) selling illegal goods, (21) selling "adult entertainment oriented products or services," (22) selling firearms and ammunition, (25) "occult

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December 2015. (Square's current website is substantially the same in all respects that are relevant to this appeal, with only minor wording changes.) At that time, the website read, in part:

> Accept every way your customers want to pay.
> Take chip cards, NFC payments, and magstripe cards on the go or at your counter. . . .
>
> Tools for every type of business.
> From a register in your pocket to reports for all your locations, we have services for sellers of all types and sizes.

materials," and (26) selling "hate or harmful products." ER 139 (SAC ¶ 6).[2]

The 28th excluded business is "(28) bankruptcy attorneys or collection agencies engaged in the collection of debt." ER 139 (SAC ¶ 6).

Plaintiff White is an attorney whose practice includes bankruptcy work (representing creditors in federal bankruptcy proceedings). ER 138 (SAC ¶ 1). Square requires each person who opens a Square account to "confirm"—at the moment he or

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[2] Someone wishing to set up a Square account in December 2015 would see this Bad List when she:

Visited squareup.com (see https://web.archive.org/web/20151202050718/squareup.com for an archived version of the webpage as it appeared in December 2015).

Clicked on "Get Started,"

Saw "By continuing, I agree to Square's Seller Agreement and E-Sign Consent," and then clicked on "Seller Agreement." (See https://web.archive.org/web/20151202050849/https://squareup.com/signup for an archived version of Square's signup webpage as it appeared in December 2015.)

Saw "6.a. Your Square Account." (See https://web.archive.org/web/20151202051444/https://squareup.com/legal/ua for an archived version of Square's Seller Agreement webpage as it appeared in December 2015.)

she clicks on the "Continue" button that opens the account—that he or she will not accept credit card payments for work as a bankruptcy attorney. At that moment, Square's website does not provide for Square's receiving any payment from the user. Square makes money from the user *later*, by charging users a portion of each credit card payment it processes[3] or a monthly fee charged at the end of the month.[4]

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[3] See https://web.archive.org/web/20151202050916/https://squareup.com/pricing for an archived version of Square's pricing webpage as it appeared in December 2015:

> 2.75% Per swipe, sale with Online Store, or paid Square Invoice
>
> Pay one price for every swipe, sale with Online Store, and paid invoice.
>
> Accept Visa, MasterCard, Discover, and American Express all at the same rate.
>
> Get deposits in your bank account in one to two business days.
>
> . . .
>
> 3.5% + 15¢
>
> Per manually entered transaction
>
> Pay one price for every keyed-in transaction.

The SAC included a series of allegations regarding White's interaction with Square's website.[5] White formed the "strong, definite and specific intent" to become a Square subscriber. ER 140 (SAC ¶ 10). White then personally visited Square's website and reviewed the Refusal of Service List (the Bad List). ER 140–141 (SAC ¶ 12). White construed the Bad List as prohibiting him from using Square's services to facilitate his practice as a bankruptcy lawyer. ER 141 (SAC ¶ 13). White then declined to press "Continue," because doing so "would have predictably subjected [White] to a subsequent discriminatory

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> Accept Visa, MasterCard, Discover, and American Express all at the same rate.

[4] See https://squareup.com/help/us/en/article/5252-manage-your-subscriptions-and-payment-method:

> Square will charge your credit or debit card on the first of the month. This method of payment is best if you want to separate your subscription service expenses from your transaction fees. Your subscription fees will appear on your credit or debit card statement, while transaction fees will appear in your deposit details report.

[5] We focus here on the factual allegations the Ninth Circuit chose to incorporate into its first certified question, as well as additional allegations we believe are relevant to the second certified question. The Ninth Circuit provided its own summary of the SAC's allegations, at *White v. Square, Inc.* (9th Cir. 2018) 891 F.3d 1174, 1175–1176.

termination" by Square, resulting in damage to his professional reputation and commercial credit. ER 141–142 (SAC ¶ 14).

At that point, White retained legal counsel to investigate and file a lawsuit against Square. ER 142 (SAC ¶¶ 15–17). White returned to Square's website on a daily basis. ER 142 (SAC ¶ 18).

White then 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). The letter produced no results. ER 143 (SAC ¶ 21). White alleged that Square's practice of excluding White and other people engaged in legal occupations violates California's Unruh Civil Rights Act (California Civil Code sections 51 and 52), which forbids California businesses from engaging in arbitrary discrimination based on occupation. *See* ER 139–140 (SAC ¶ 7); ER 148 (SAC ¶ 40).

White sought declaratory and injunctive relief, as well as statutory minimum damages of $4,000 per violation (provided by the Unruh Act) for a nationwide class of "several hundred thousand Class members." ER 145–148; ER 144 (SAC ¶¶24, 27).[6]

The District Court Dismisses the Complaint.

Square moved to dismiss the SAC. ER 126. White opposed the motion. ER 104. Square filed a reply. ER 91.

The district court held no hearing on the motion. ER 90.

The court granted the motion, holding that the SAC did not allege facts sufficient to show standing under the Unruh Act. ER 14. The SAC "fails to allege that White 'tender[ed] the purchase price for [Square's] services or products,' " which the court deemed necessary to establish standing under *Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414. ER 18 (p. 5:26–28).

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[6] The American Bar Association estimates that 1,338,678 attorneys are presently practicing law in the United States. See ABA National Lawyer Population Survey, https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_by_State_2018.authcheckdam.pdf.

White then requested leave to file a motion for reconsideration. ER 82. Without holding a hearing, the district court denied the motion. ER 12.

The Judgment.

On September 26, 2016, the district court entered judgment dismissing the action with prejudice. ER 10–11.

White Moves for a New Trial.

White then filed a motion for new trial. ER 69. The motion was based on new evidence: a recent letter from Square's counsel to White's counsel in a related case against Square stating that "Your client's signing up for Square's service with the intent to violate the applicable terms of service would be fraudulent." ER 54. Square filed an opposition. ER 35. White filed a reply. ER 32.

The district court denied the motion, holding that the evidence was not "newly discovered," because "Square's terms of service—which form the basis of the letter—have been in White's possession since the start of the litigation. . . ." ER 7 (p. 5:20–27). Also, the letter would not have changed the outcome anyway,

because the letter "falls well short of demonstrating White's required 'tender [of] the purchase price for a business's services or products in order to have standing to sue' [quoting *Surrey*]." ER 8 (p. 6:8–16).

White Moves for Reconsideration of Denial of Motion for New Trial.

White filed a motion for reconsideration, ER 28, claiming that a "material difference in law," ER 29 (p. 1:10), had occurred: the recent publication of a California Court of Appeal decision in *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118. In *Osborne*, the court held that there is in fact no bright-line requirement to tender the purchase price in order to have standing in *all* Unruh Act cases. *Id*. at pp. 1128–1133.

The Court denied the motion, finding that *Osborne* applied only to discrimination based on disability. ER 2.

White Files Notice of Appeal.

On November 21, 2016, White filed notice of appeal from the judgment. ER 22–23.

Ninth Circuit Certifies Questions to California Supreme Court.

The U.S. Court of Appeals for the Ninth Circuit held that White meets Article III standing requirements based on the allegations in the SAC. *White v. Square, Inc.* (9th Cir. 2018) 891 F.3d 1174, 1176–1177.

However, the Ninth Circuit requested this Court's assistance because there is "tension between California appellate courts" regarding statutory standing under the Unruh Act, and it "is not clear how the cases apply in the absence of brick and mortar to internet-based services." *White*, *supra*, 891 F.3d at p. 1181.

The Ninth Circuit certified the following questions to this Court:

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

[¶] Alternatively, does the plaintiff have to engage in some further interaction with the business and its website before the plaintiff will be deemed to have been denied full and equal treatment by the business?

[*White v. Square, Inc.*, *supra*, 891 F.3d at p. 1175.]

This Court granted review of the certified questions.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's *first* question assumes the following three facts:

- "the plaintiff visits a business's website with the intent of using its services,"
- the plaintiff then "encounters terms and conditions that deny the plaintiff full and equal access to its services," and
- the plaintiff "then departs without entering into an agreement with the service provider."

Under California's "broad" definition of Unruh Act standing, such a plaintiff has standing, because California cases grant Unruh Act standing to any person who has " 'a special interest that is greater than the interest of the public at large and that is concrete and actual rather than conjectural or hypothetical.' " *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1127. This plaintiff's "intent of using its services" demonstrates his "special interest that is greater than the interest of the public at large." And his act of "visiting the business's website" and encountering discriminatory terms and conditions shows an

interest that "is concrete and actual rather than conjectural or hypothetical."

Allowing standing here serves the two major purposes of the Unruh Act. It would *deter* businesses from imposing discriminatory treatment on customers. And it would *compensate* a "bankruptcy attorney" for both the economic damages caused by loss of services, and the non-economic damages caused by the humiliation inflicted by the disparagement of his profession.

If this Court answers "No" to the first question and therefore reaches the Ninth Circuit's second question, we propose that this Court answer that question as follows:

The "further interaction" that is required to establish standing in the internet context should be decided on a case-by-case basis, depending on the services offered by the business and the nature of the alleged discrimination. But no further interaction should be required if the website requires a potential customer—in order to sign an agreement with the business—either to lie about his intended use of the service, or to surrender his right to non-discriminatory access to services provided to other customers. And a plaintiff should have standing if he sends a demand letter giving the business notice of an ongoing Unruh

Act violation, and the business nevertheless fails to remedy the violation.

ARGUMENT

I. SQUARE ENGAGED IN OCCUPATIONAL DISCRIMINATION BARRED BY THE UNRUH CIVIL RIGHTS ACT.

On the merits, it would seem that Square has no defense to Mr. White's claim that Square's discriminatory treatment violates the Unruh Act.

California 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. Here, it is undisputed that Square flatly refuses to allow use of its services for Mr. White's work as a "bankruptcy attorney." ER 139 (SAC at p. 2:19).

Square cannot evade liability by arguing that Mr. White is free to sign up for Square so long as he does not use it to process payments from his bankruptcy clients. The Unruh Act guarantees the right to "full and equal" public accommodations. Civ. Code, § 51, subd. (b). The statute "evidences concern not only with access to business establishments, but with equal

treatment of patrons *in all aspects* of the business." *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 29, italics added.

Finally, even assuming that California law permits a business to defend against claims for occupational discrimination by showing a "legitimate business interest" for doing so,[7] it is difficult to conceive of any legitimate interest a business might have in denying full and equal use of its service to every member of the civil bar in the United States whose practice encompasses some aspect of bankruptcy. See Argument Section II, *infra*.

Thus, it appears that Square's only hope of defeating Mr. White's claim is to *keep it from being heard* on the merits—by asserting that neither he nor any other lawyer whose practice includes some bankruptcy law and who goes to Square's website and refuses to agree to Square's exclusionary practice has standing to make this claim.

If this Court sets the standing barrier too high, it would effectively immunize discriminatory practices by Square and other internet-based businesses.

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[7] Compare *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162, with *Sisemore, supra*, 151 Cal.App.4th at p. 1407.

II. THE SCOPE OF SQUARE'S DISCRIMINATORY TREATMENT.

The *scope* of Square's exclusion is broad.

Square's use of the term "bankruptcy attorneys" in its ban would appear to exclude only the small percentage of attorneys whose practice focuses on bankruptcy cases.

Nevertheless, during this litigation, Square has taken the position that Square does not bar such bankruptcy specialists from signing up for its services, but Square bars *all* attorneys from using its services for payment from clients for any type of bankruptcy work. See page 8, footnote 3 of Square's answering brief in the Ninth Circuit.

Under *this* definition of Square's exclusion, the number of affected attorneys expands exponentially. Almost every general practice attorney has occasion to counsel clients about bankruptcy law and practice. Attorneys with business clients often advise their clients that bankruptcy might allow them to restructure their debt. Real property attorneys occasionally advise clients on how a bankruptcy filing might affect efforts to foreclose on liens or deeds of trust. Family law attorneys sometimes advise clients regarding the use of bankruptcy courts

to discharge debts. Apparently, Square's own trial counsel[8] and appellate counsel[9] do some bankruptcy work, so they too would face Square's discrimination if they wanted to use Square's services. And so would White's trial counsel.[10] The number of attorneys affected by Square's discriminatory treatment would encompass most of the civil bar in the United States—a large portion of the 1,338,678 attorneys that the American Bar Association estimates are actively practicing law in the country.

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[8] See https://www.wsgr.com/WSGR/Display.aspx?SectionName=practice/restructuring.htm.

[9] Square's appellate law firm claims that "Clients in need of experienced restructuring advice turn to the attorneys at Munger, Tolles & Olson. Our firm is frequently called upon for practical and sophisticated counsel in complex bankruptcy proceedings nationwide and is adept at handling the challenges facing companies and their key constituents in distressed financial situations." See https://www.mto.com/practices-industries/practices/financial-restructuring.

[10] See http://www.mcgranepc.com/bio-william_mcgrane.html.

III. THE CONTEXT: STANDING UNDER THE UNRUH ACT AND ARTICLE III.

A. "Standing Under the Unruh Act Is Broad."

The Ninth Circuit's questions should be reviewed in light of California's general approach to issues arising under the Unruh Civil Right Act.

Under California law, "[t]he [Unruh] Act is to be given a liberal construction with a view to effectuating its purposes." *Koire*, *supra*, 40 Cal.3d at p. 28; see also *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 666, 673.

The Unruh Act opens with a statement of purpose that reads like a modern, secular take on the Declaration of Independence: "All persons within the jurisdiction of this state are free and equal." Civ. Code, § 51, subd. (b). In recognition of these fundamental principles of liberty and equality, all persons "are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." *Ibid.*

The Act's enforcement provisions are meant to ensure this vision becomes a reality. The Legislature understood that private actors may "fall into discriminatory practices" when left

to their own devices. *Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 167 (discussing legislative purpose). The Act is therefore an "active measure" and a "bulwark," intended to "create and preserve a nondiscriminatory environment in California business establishments by 'banishing' and 'eradicating' arbitrary, invidious discrimination by such establishments." *Ibid.*

This liberal construction has produced a liberal *standing* rule: "Standing under the Unruh Act is broad." *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1127. The *Osborne* court continued:

> Standing under the Unruh Act is broad. When "any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in this section . . . any person aggrieved by the conduct may bring a civil action . . . ." ([Civ. Code,] § 52, subd. (c).) As the Supreme Court stated, "[A]n individual plaintiff has standing under the [Unruh] Act if he or she has been the victim of the defendant's discriminatory act." (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175, ... "The focus of the standing inquiry is on the plaintiff, not on the issues he or she seeks to have determined; he or she 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 or hypothetical." ([*Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414] at p. 418.)
> [*Ibid.*]

B. Standing Under Article III Is Equally Broad.

It would be ironic if White had standing under Article III but no standing under the Unruh Act—because the test under each is virtually the same.

In the Ninth Circuit, both parties raised serious questions about White's standing under Article III of the U.S. Constitution to sue in federal court. Yet the Ninth Circuit held that White's allegations did give him standing under Article III:

> We conclude that White meets the constitutional standing requirements. White alleged that he sought to use Square's services, but was unable to do so because of its discriminatory policy against bankruptcy attorneys. Because "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," *Heckler v. Mathews*, 465 U.S. 728, 739–40, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984), and "state law can create interests that support

> standing in federal courts," *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001), White's allegations satisfy Article III's requirements for a concrete and particularized injury. Therefore we must address White's alternative argument, on which we seek the California Supreme Court's direction. [*White v. Square, Inc.* (9th Cir. 2018) 891 F.3d 1174, 1177.]

Under the facts assumed in the Ninth Circuit's first certified question, the test for standing under Article III is no more stringent than California's test for Unruh Act standing. Therefore, the Ninth Circuit's finding that White has Article III standing means that he also has Unruh Act standing.

Standing to sue under a California statute "may vary according to the intent of the Legislature and the purpose of the enactment." *Angelucci*, *supra*, 41 Cal.4th at p. 175. There is thus no *automatic* relationship between Article III standing and standing under a state statute. But California courts have interpreted the language and purpose of the Unruh Act to create

a statutory standing rule in language that is *strikingly similar* to Article III's injury-in-fact requirement.[11]

An Unruh Act plaintiff "must be able to allege injury—that is, some 'invasion of the plaintiff's legally protected interests.' " *Angelucci*, *supra*, 41 Cal.4th at p. 175 (quoting Witkin). In other words, 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 (quoting *Surrey*, *supra*, 168 Cal.App.4th at p. 418).

Article III standing requires the same thing, and the rule on Article III standing is expressed in almost exactly the same words. To establish an injury in fact, "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)

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[11] Article III standing also requires causation and redressability. There appears to be no dispute in this case that the alleged injury, if established, would be "fairly traceable to the challenged conduct of the defendant" and "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540, 1547.

136 S.Ct. 1540, 1548. The language of the two tests is nearly identical.

Given the remedial purposes of the Unruh Act, it makes sense that California courts have construed Unruh Act standing to mirror the requirements of Article III. Among other things, this allows the Unruh Act to work in concert with federal civil rights statutes. In the disability rights context, for example, many Unruh Act claims are filed in federal court alongside claims under the Americans with Disabilities Act. Because the Unruh Act and related state statutes "are meant to work in harmony with the ADA," *National Federation of the Blind v. Uber Technologies, Inc.* (N.D.Cal. 2015) 103 F.Supp.3d 1073, 1082, courts have held that plaintiffs who establish Article III standing and standing under the ADA necessarily have standing under the Unruh Act as well. See, e.g., *ibid.*; *Rios v. New York & Company, Inc.* (C.D.Cal. Nov. 16, 2017) No. 2:17-cv-04676-ODW(AGRx), 2017 WL 5564530, at *4.

Imagine a plaintiff with disabilities who visits a business's website with the intent of using its services, encounters terms and conditions that deny her full and equal access based on her disability, and then leaves before signing an agreement with the

service provider. Such a plaintiff clearly would have Article III and ADA standing. See *National Federation of the Blind*, *supra*, 103 F.Supp.3d at pp. 1080–1081. There is no legitimate reason to grant this plaintiff standing to pursue ADA claims in federal court, but deny her standing to pursue Unruh Act claims in either federal or state court.

In its certification order, the Ninth Circuit held that a plaintiff has Article III standing if he "sought to use [a business's] services, but was unable to do so because of its discriminatory policy . . . ." *White v. Square, Inc.*, *supra*, 891 F.3d at pp. 1176–1177. A plaintiff in this scenario necessarily has standing under Unruh Act's nearly identical standing test.[12]

[12] There may be other settings, not implicated by these certified questions or the facts of Mr. White's case, where standing under the Unruh Act is narrower than Article III standing. See *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385–1386. But in many other respects, the Legislature has expanded the Unruh Act to provide broader protection (and thus a broader range of potential plaintiffs) than under federal law. For example, the definition of "disability" under the Unruh Act is more expansive than the federal law definition. See, e.g., *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1027.

IV. THE ANSWER TO QUESTION #1 SHOULD BE: "YES."

The Ninth Circuit's first question is as follows:

> 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?

This question assumes the following three facts:

- "the plaintiff visits a business's website with the intent of using its services,"
- the plaintiff then "encounters terms and conditions that deny the plaintiff full and equal access to its services," and
- the plaintiff "then departs without entering into an agreement with the service provider."

The answer to this question should be "Yes."

A. A "Yes" Will Serve the Prime Purposes of the Unruh Act.

Allowing standing here will serve to *deter* Square and other internet operators from applying discriminatory policies to their potential customers, and it will *compensate* those potential customers for the humiliation they suffer.

1. A "Yes" Will *Deter* Discriminatory Conduct.

Most people who suffer the humiliation and loss of service inflicted by Square will not want to endure the time and expense of litigation to enforce their rights under the Unruh Act. This reality underlies why the law allows victims of indignities that cause little or no economic harm to sue for statutory minimum damages and injunctive relief, and to join together through class actions.

a. Legislative History Shows the Need for Deterrence.

The Unruh Act's legislative history underscores the importance of deterrence.

In 2001, the Legislature increased from $1,000 to $4,000 the minimum statutory damages for an Unruh Act violation. The purpose of this amendment was "to increase deterrence against

civil rights violations profitable to businesses but causing relatively little individual damage, such as gender discounts forbidden by section 51.6." *Munson, supra*, 46 Cal.4th at p. 674, fn. 9 (citing legislature history); see also Stats. 2001, ch. 261, § 1.

The Attorney General sponsored the 2001 amendments, and the Attorney General's arguments in favor of the bill apparently swayed the Legislature—because those arguments are the only ones reflected in the legislative history. The Senate committee analysis explained that "[a]ccording to the Attorney General, since very few individuals are likely to file complaints and pursue prosecution, many businesses simply dismiss the prospect of an occasional penalty as an 'absorbable cost of doing business,' and continue to undertake discriminatory promotions that, even with the occasional $1,000 penalty, will garner them thousands of dollars in sales because customers are unaware of the law." Sen. Com. on Judiciary, Analysis of Assem. Bill No. 587 (2001–2002 Reg. Sess.) as amended Mar. 26, 2001, p. 7.

Echoing that deterrence theme, the Assembly committee analysis notes that "[t]he AG believes that since the typical $1,000 damage award is unlikely to have a significant deterrence effect on the discriminatory practices of a large company, that

minimum amount should be increased to at least $4,000." Assem. Com. on Judiciary, Analysis of Assem. Bill No. 587 (2001–2002 Reg. Sess.) as amended Mar. 26, 2001, p. 5.

b. Case Law Shows the Need for Deterrence.

Under the Unruh Act, "any person denied the rights provided in [Civil Code] Section 51" may file a suit for damages, and "any person aggrieved by the conduct" may sue for injunctive relief. Civ. Code, § 52, subd. (a); *id.*, § 52, subd. (c).[13]

In *Angelucci*, *supra*, a night club charged male customers an entry fee higher than that charged to female customers. Plaintiffs (male customers) paid the higher fee, but did not *affirmatively request* nondiscriminatory treatment before filing suit. The defendant argued that this failure deprived plaintiffs of standing. This Court rejected that argument. 41 Cal.4th at p. 164.

The Court held that this statutory language must be interpreted in light of the Unruh Act's purpose: "to 'eradicate' or

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[13] White seeks both damages and injunctive relief. ER 144–148. The Ninth Circuit's question asks about "statutory standing" generally, without distinguishing between standing to pursue any particular remedy. That approach is consistent with California cases suggesting that statutory standing requirements under the Unruh Act do not vary based on the remedy sought. See *Midpeninsula*, *supra*, 221 Cal.App.3d at p. 1384.

'eliminate' arbitrary, invidious discrimination in places of public accommodation." 41 Cal.4th at p. 169. *Angelucci* understood that if the bar for standing is set too high, the Unruh Act will not deter discriminatory conduct, and the Act's purpose will be thwarted. *Angelucci* observed that absent effective enforcement mechanisms, many businesses will "*revert* to discrimination." 41 Cal.4th at p. 169, italics added; see also *id.* at p. 167 (without the Unruh Act, "businesses might fall into discriminatory practices"). This Court understood that discrimination is not a relic of the past, limited to a few people with hateful beliefs. Whether motivated by profit, bias, or mere convenience, discrimination will return unless the Unruh Act remains an effective deterrent.

Just as important, *Angelucci* recognized that the statutory standing requirement must be calibrated to encourage private enforcement of the law. If standing were limited to those few customers "knowledgeable and assertive enough" to demand nondiscriminatory treatment at the moment they visit the business, *Angelucci*, *supra*, 41 Cal.4th at p. 169, businesses would largely be free to discriminate, safe in the knowledge that they could placate potential plaintiffs on a one-off basis. *Angelucci* understood this result would be intolerable.

Likewise, in the internet context, a standing rule that requires the plaintiff to undertake "further interaction" with the business beyond the steps set forth in the Ninth Circuit's first certified question would shrink the pool of potential plaintiffs to such an extent that internet-based businesses would face little threat of private enforcement—and thus little deterrence.[14] Few potential plaintiffs will go to the lengths that Mr. White did.

2. A "Yes" Will *Compensate* Victims of Discrimination.

An Unruh Act violation might inflict two types of damages: economic and non-economic.

In this case, the *economic* damages caused by Square's denial of service would occur *after* the decision to accept or reject Square's terms and conditions. According to Square's position in the current litigation, a "bankruptcy attorney" is allowed to agree to Square's terms and conditions, but thereafter will not be allowed to accept credit cards from clients for bankruptcy advice

[14] To the extent Square seeks a rule under which a plaintiff must *enter into an agreement* with an internet-based business in order to establish standing, the business would have yet another tool to reduce deterrence: it could use a contract of adhesion to limit whether, or on what terms, the prospective user may file a lawsuit to enforce the Unruh Act.

or representation. This may inflict economic damages on White, as some clients might decline to retain him, and he might incur other expenses in arranging for other ways to receive payment.

The *non-economic* damages would consist of the humiliation White might suffer when he views the Bad List and realizes that a major American corporation treats his bankruptcy practice as dishonorable—lumping him together with purveyors of "escort services," "any illegal activity or goods," "drug paraphernalia," "hate or harmful products," "occult materials," and "cigarette, tobacco or vaporizer sales."[15] ER 139 (SAC ¶ 6).[16]

This Court has recognized that arbitrary discrimination is "*per se* injurious." *Koire*, *supra*, 40 Cal.3d at p. 33.[17] *Koire*

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[15] Such denigration by association is reminiscent, perhaps, of signs posted in Nazi-era stores: "Keine Juden oder Hunde erlaubt" ("No Jews or dogs allowed").

[16] By declining to sign Square's agreement, White would spare himself the *further* humiliation he might suffer later—when he would have tell his client that her credit card is acceptable for all of White's services, except bankruptcy. This would require White to send a message to his client that both White and the client are engaged in something disreputable.

[17] *Koire* addressed "arbitrary sex discrimination," 40 Cal.3d at p. 33, but its holding applies to all discrimination prohibited by the Unruh Act. See, e.g., *Engel v. Worthington* (1997) 60 Cal.App.4th 628, 636 (explaining, in the context of discrimination against gays, that *Koire* "acknowledged the amount of recovery

discussed the harm caused by car washes and a bar that discriminated based on gender. Defendants had argued that gender-based price discounts "do no injury to either men or women," *id.* at p. 33, but this Court rejected that argument. The male plaintiff suffered "actual injury" because he was adversely affected by price discounts available only to women. *Id.* at p. 34. But that economic injury was not the only harm: "In addition to the economic impact, the price differentials made him *feel that he was being treated unfairly*." *Ibid.*, italics added.

Koire recognized that the Unruh Act provides for recovery of statutory minimum damages "*regardless* of the plaintiff's actual damages." *Koire*, *supra*, 40 Cal.3d at p. 33; see also Civ. Code, § 52, subd. (a). Because many discriminatory practices cause relatively little in the way of measurable economic injury, the $4,000 statutory minimum compensates the plaintiff for *all* the harm he or she suffered, which necessarily goes beyond economic harm.

Denying standing to a plaintiff in Mr. White's position would leave potential customers without a remedy for the

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for actual damages is insignificant because discrimination by businesses is, *per se*, injurious").

humiliation they suffer when they seek to use an internet-based service, only to be told that their occupation (or their race, or their sexual orientation) is not worthy enough to qualify for defendant's services.[18]

B. California Cases Support a "Yes."

No California case has dealt with facts exactly like those presented in the Ninth Circuit's first question—partly because most of those cases predated the recent use of websites as vehicles for business interactions with consumers.

Nevertheless, several cases involved analogous facts, and include holdings or dicta that would grant Unruh Act standing here.

In *Angelucci, supra*, 41 Cal.4th 160, this Court alluded to the most similar situation, indicating that an African-American person would have standing to challenge a practice of "racially segregated drinking fountains or restroom facilities at an

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[18] The Ninth Circuit noted regarding Article III standing: "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." *White v. Square, Inc.*, *supra*, 891 F.3d at p. 1177 (citing *Heckler v. Mathews* (1984) 465 U.S. 728, 739–40).

unattended structure." *Id.* at p. 170. It would seem that such a practice would inflict no *economic* loss on the plaintiff, nor even any *inconvenience* if the "colored" fountain or restroom is physically equivalent to the "white" one. In the Court's example, the only injury is humiliation.

In the present case, Mr. White faced an occupationally segregated policy at a similarly "unattended" website. White was not totally barred from using Square's services, but neither would be the African-American in this Court's example—as she would be free to use the "colored" drinking fountain or restroom. Moreover, because there was no attendant physically barring his admission, it is conceivable that Mr. White, like the African-American in the *Angelucci* example, could have used the services prohibited to him and simply hoped no one would notice. But nothing in California law suggests a plaintiff must break the defendant's rules before filing suit, thereby risking racist violence (as in the *Angelucci* example) or an accusation of fraud (as in Mr. White's case).

In *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, the court held that an African-American investment advisor who encountered discriminatory conduct while accompanying his

clients to their bank had standing under the Unruh Act. *Jackson* rejected defendant's argument that plaintiff lacked standing "because he was not himself seeking the services of the bank as a customer." *Id.* at p. 940. Instead, plaintiff had standing as someone "pursuing an accommodation, advantage or privilege of the bank . . . when he accompanied his clients to the bank to aid them in transacting their business . . . ." *Id.* at p. 942.

As *Jackson* explained, a bank "accommodates the public in many ways peripheral to its main function of providing banking services," and a person who is denied full and equal access to those accommodations has standing to sue, even if he is not a customer. 30 Cal.App.4th at p. 941. Just as the plaintiff in *Jackson* did not need to be a customer of the bank, nor should a person "pursuing" the accommodation offered by an internet-based business, see *id.* at p. 942, be required to sign an agreement with the defendant or pay a fee before challenging its discriminatory terms and conditions.

Jackson's pragmatic approach to the Unruh Act echoes *In re Cox* (1970) 3 Cal.3d 205. *Cox* involved a "would-be customer" who was excluded from a suburban shopping mall and then arrested. *Id.* at p. 216. This Court held that the Unruh Act

"forbids a business establishment generally open to the public from arbitrarily excluding a *prospective* customer." *Id.* at p. 217, italics added.[19] In explaining its holding, this Court discussed the role that shopping centers played in postwar American life, as "the modern analogue of the town center," and one which "perform[ed] an important public function" as a "source of food, clothing and other commodities." *Id.* at pp. 217–218.

Websites (and related services, like digital "apps" for mobile devices) are today's analogue of the shopping mall. *Cox*'s analysis, and its reference to "prospective" customers, suggests that a plaintiff like Mr. White—who seeks to use an internet-based service, but is denied full and equal access to that service based on the website's terms and conditions—has standing to challenge the website's discriminatory practices.

Consider a hypothetical (based on a recent incident in Oakland). A company creates a website that allows customers to pre-order coffee drinks over the internet. The drink is made to order at one of several participating coffee shops, and the

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[19] The petitioner in *Cox* purchased a soft drink in the course of being hassled by security. 3 Cal.3d at p. 210. But as noted in *Osborne*, *supra*, 1 Cal.App.5th at p. 1131, "the Supreme Court gave no indication that [Mr. Cox's] rights under the Unruh Act attached as a result of that purchase."

customer pays for the drink upon visiting the coffee shop and picking it up. The customer never pays a fee to the company that runs the website; the website is free to use, and participating coffee shops pay the website to be linked to the service, because it drives business to their stores. The website decides that it will not serve law enforcement officers, in violation of the Unruh Act. See *Long v. Valentino*, *supra*, 216 Cal.App.3d 1287. A coffee-loving police officer would like to use this service, but upon visiting the website, she encounters a stern warning: "We need the support of the actual community to keep our streets safe, not police. No cops allowed." The officer is indignant and would like to challenge the policy by filing suit under the Unruh Act. California cases suggest she has already done enough to establish statutory standing. In theory, she *could* sign up and even place an order, hoping that no one will notice she's a cop; but the scenario described in *Angelucci* suggests that is not necessary. She's not yet a customer of the website, but *Cox* and *Jackson* indicate that doesn't matter either—she is a "prospective customer" and someone "pursuing an accommodation."

An Unruh Act plaintiff must demonstrate a "special interest that is greater than the interest of the public at large

and that is concrete and actual rather than conjectural or hypothetical." *Osborne*, *supra*, 1 Cal.App.5th at p. 1127, citations omitted. But under the scenario presented in the Ninth Circuit's first certified question, the requisite "special interest" exists.

Under this scenario, plaintiff actually *visits* the business's website, as opposed to simply hearing or reading about it. As such, he has "presented himself for service or access," *Angelucci*, *supra*, 41 Cal.4th at p. 170, in the only manner possible on the internet. Plaintiff also has the *intent* of using the business's services. And plaintiff *encounters terms and conditions* that deny him full and equal access to its services. This scenario therefore excludes potential plaintiffs who do not read the terms and conditions. Cf. Ayres & Schwartz, *The No-Reading Problem in Consumer Contract Law* (2014) 66 Stan. L.Rev. 545, 547–548 (summarizing empirical studies showing that the vast majority of consumers do not read internet-based terms and conditions). And it also excludes plaintiffs who do not allege that the terms and conditions *themselves* deny full and equal access. A plaintiff who clears each of these hurdles "has been the victim of the

defendant's discriminatory act," *Angelucci*, at p. 175, and thus has done enough to establish standing.[20]

C. *Surrey's* Bright-Line Rule Does Not Apply Here.

There is only one published California opinion addressing standing in the internet context: *Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, where the Court of Appeal purported to adopt "a bright-line rule that a person must tender the purchase price for a business's services or products in order to have standing to sue it for alleged discriminatory practices relating thereto." *Id*. at p. 416.

In accepting Square's argument that Mr. White has no standing, the federal district court relied on *Surrey's* "bright-line rule." ER 18. Square then relied heavily on *Surrey* in the Ninth Circuit. And the Ninth Circuit's certification order identified

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[20] We do not mean to suggest that a plaintiff can never establish standing unless each of these facts exist. For example, there are other settings, not contemplated by the Ninth Circuit's first certified question, where a plaintiff will have Unruh Act standing if he is deterred from visiting the business's website or reading its terms and conditions based on his independent knowledge of the business's discriminatory practices. See *Botosan v. Paul McNally Realty* (9th Cir. 2000) 216 F.3d 827, 835; *National Federation of the Blind, supra*, 103 F.Supp.3d at pp. 1081–1082; *Arnold v. United Artists Theatre Circuit, Inc.* (N.D.Cal. 1994) 866 F.Supp. 433, 439.

Surrey as the key case supporting Square's narrow conception of standing. See *White v. Square, Inc.*, *supra*, 891 F.3d at pp. 1179–1181.

Surrey's "bright-line rule" involves price discrimination. As there was no price discrimination in the present case, that rule has no application here. In any event, the rule was wrong and should be disapproved.

1. *Surrey's* "Bright-Line Rule" Applies Only to Price Discrimination Cases.

Surrey has no application in cases where the plaintiff does not allege price discrimination—such as the present case, and the scenario described in the Ninth Circuit's first certified question, which is based on the present case.

The district court assumed that *Surrey* established a bright-line rule that applies to *every* claim under the Unruh Act. But California appellate courts—including the California Supreme Court—have found standing in many situations where the plaintiff did *not* tender a purchase price. *Surrey* did not mention those situations and did not purport to disavow or overrule them, because *Surrey* was solely about price discrimination.

For example, in *Angelucci*, *supra*, 41 Cal.4th 160, the California Supreme Court presented two situations where the lower court's holding would have erroneously denied plaintiff standing:

> The Court of Appeal's interpretation also would leave without redress those persons who discover only *after the fact* that they have suffered discrimination in violation of the Act. For example, an African–American family seeking to purchase a home may not realize that the real estate agency they employed has discriminated against them on the basis of race by failing to disclose to them eligible homes in a White-majority neighborhood until after the agency has concluded its services. At that point a demand for equal treatment and a refusal on the part of the agency would be pointless. Also denied redress under the foregoing interpretation would be persons discriminated against on an occasion when there was no one present to receive and answer a demand for equal treatment (for example, persons encountering, as they did in past decades, racially segregated drinking fountains or restroom facilities at an unattended structure).
>
> [*Id*. at p. 170.]

In neither of these examples did plaintiff tender a purchase price. But *Surrey* did not say that the Supreme Court wrongly failed to apply *Surrey's* new bright-line rule to these examples.

In *Surrey*, plaintiff challenged defendant's practice of charging men for using defendant's online dating service, while allowing women to use the service for free. The court framed the issue as follows:

> The *critical issue* in this appeal is whether someone who presents him or herself to a business with the intent of purchasing its services or products, but becomes aware of that business's practice of *charging different amounts* for such services or products based on gender and thereafter does not purchase those services or products, is aggrieved by that practice so as to have standing to sue for violations of the Unruh Civil Rights Act. . . .
> [168 Cal.App.4th at p. 416, italics added.]

The court *immediately* followed this presentation of the "critical issue" with this answer:

> In a case of first impression in California, we answer *this question* in the negative and adopt a bright-line rule that a person must tender the purchase price for a business's services or products in order to have standing to sue it for alleged

discriminatory practices relating thereto.

[*Ibid.*, emphasis added.]

"[T]his question" was a narrow one, involving price *discrimination*—and *only* price discrimination.

But there was no price discrimination in the present case, nor will there be in many internet cases. Square did not discriminate among users by charging them different prices. Square simply excluded certain people entirely.

Surrey did not purport to apply its bright-line test to a situation where the defendant gave the plaintiff *no opportunity* to tender the purchase price, because the defendant had excluded the plaintiff *before* that could happen. But that is what happened here. Square does not request or collect a "purchase price" from users at the time they click "Continue" to set up a Square account. Square provides no way for the user to tender a purchase price at that time. Instead, Square charges its users *later,* when it takes a portion of a charge card payment from a user's customer, or a monthly fee.[21]

[21] See footnotes 3 and 4, *supra*.

Thus, Square *does not permit* its user to "tender the purchase price" at the moment Square tells bankruptcy attorneys that they are not welcome to use Square's services. Square has chosen a business model that does not fit the factual assumption on which *Surrey* based its bright-line rule.

The same is true of other internet-based services, many of which do not charge users any up-front fees. These services may, for instance, charge a periodic subscription fee, take a cut of transactions made using the service, or generate revenue by selling advertising rather than charging users.

Suppose Defendant puts a sign in its store window: "Black people are not allowed to come into this store." Plaintiff is black and would like to enter the store, peruse the merchandise, and perhaps make a purchase. By forbidding Plaintiff from entering the store, however, Defendant has made it impossible for Plaintiff to tender a purchase price. Neither *Surrey* nor the Legislature could have intended to bar that plaintiff's Unruh Act claim for lack of standing.

Square has put a similar sign on its website: "No Bankruptcy Attorneys Allowed." *Surrey* does not deprive Mr. White of standing to pursue his Unruh Act claim.

Surrey's bright-line rule applies, if at all, only "when the price itself gives rise to the alleged discrimination." *Rios v. New York & Company, Inc.* (C.D.Cal. Nov. 16, 2017) 2017 WL 5564530, at *4 (applying California law, and reconciling *Surrey* and *Osborne*). There is no such allegation in this case, or in the scenario described in the Ninth Circuit's first certified question.

2. *Surrey's* "Bright-Line Rule" Should Be Disapproved.

Surrey's "bright-line rule" is not just inapplicable—it is wrong. The bright-line rule has no foundation in the text or purposes of the Unruh Act. *Surrey* improperly read into the Unruh Act a tender requirement that was based on a now-defunct precursor to the Act. This Court should disapprove *Surrey*'s doctrinal wrong turn, and should make it clear that the case does not help answer the Ninth Circuit's questions.

Surrey relied on four cases to justify its "bright-line rule." 168 Cal.App.4th at pp. 418–420. One of those cases is irrelevant, and the other three reveal *Surrey*'s analytical error.[22]

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[22] *Surrey* also cited a fifth case, *Hales v. Ojai Valley Inn & Country Club* (1977) 73 Cal.App.3d 25, as an example of a case where the plaintiff *did* have standing. *Hales* reversed an order dismissing the plaintiff's complaint, but did not address standing. *Id.* at p. 28.

Midpeninsula Citizens for Fair Housing v. Westwood Investors (1990) 221 Cal.App.3d 1377 did not involve the standing of an individual plaintiff. Instead, it addressed whether a nonprofit organization that focused on combating housing discrimination had standing to sue a landlord under the Unruh Act. *Id.* at p. 1380. *Midpeninsula* held that the organization lacked standing because the organization itself was not a "person aggrieved" within the meaning of the Unruh Act. *Id.* at pp. 1385–1386. *Midpeninsula* has nothing to say about whether an individual plaintiff must tender a purchase price to be considered a "victim" of discrimination.

The other three cases on which *Surrey* relied either applied former Civil Code sections *53 and 54* (which were narrowly drafted *precursors* to the Unruh Act, which is at Civil Code sections 51 and 52) or themselves relied on cases applying those older statutes.

Former section 53 made it unlawful for a " 'place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, *who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket*, and who demands admission to such place.' "

Suttles v. Hollywood Turf Club (1941) 45 Cal.App.2d 283, 285, italics added (quoting former Civ. Code, § 53). And former section 54 created remedies for " '[a]ny person who is refused admission' " in violation of section 53. Klein, *The California Equal Rights Statues in Practice* (1958) 10 Stan. L.Rev. 253, 255 (quoting former Civ. Code, § 54). As the statutory text shows, the Legislature wrote stringent standing requirements into these statutes, and the statutes applied exclusively to *ticketed* events.

These express, now-obsolete statutory requirements explain the early cases on which *Surrey* relied. In *Orloff v. Hollywood Turf Club* (1952) 110 Cal.App.2d 340, the plaintiff argued he had standing to sue racetracks based on instances in which he did *not* buy a ticket because he'd been told by the racetracks that he needn't bother—they'd refuse him admission or kick him out anyway. *Id.* at p. 341. The plaintiff lacked standing because, as the Court of Appeal observed, former Civil Code section 53 and 54 expressly provide for liability only in the event of "refusal by a racing course to admit a person 21 years of age or over *presenting a ticket, or the price thereof*." *Orloff*, at p. 343, italics added; see also Klein, *supra*, 10 Stan. L.Rev. at

p. 263 (citing *Orloff* as an example of a court interpreting section 53 "literally").

Likewise, *Weaver v. Pasadena Tournament of Roses* (1948) 32 Cal.2d 833, involved admission to a ticketed event under former Civil Code sections 53 and 54. This Court affirmed the denial of class certification because there was no evidence the members of the putative class met the specific criteria set forth in those statutes, including whether, as to each class member, "*he* tendered the price of the ticket." *Weaver*, at p. 838.

When the Legislature enacted the Unruh Act, it *repealed* former sections 53 and 54. Stats. 1959, ch. 1866, p. 4424, § 3.[23] At the same time, the Legislature expanded section 51, the general anti-discrimination statute, to cover "all business establishments." See *Cox*, *supra*, 3 Cal.3d at p. 214, fn. 8. And it amended former Civil Code section 52 to allow suit by "any person denied the rights provided in Section 51." Stats. 1959, ch. 1866, p. 4424, § 2.

[23] Civil Code sections 53 and 54 now feature unrelated anti-discrimination provisions.

Today, neither section 51 nor section 52 includes *any* requirement that a plaintiff purchase a ticket or pay a price in order to have standing to challenge discriminatory treatment.

Surrey relied on one additional case, *Bartlett v. Hawaiian Village, Inc.* (1978) 87 Cal.App.3d 435. *Bartlett* was decided after enactment of the Unruh Act, but it relied heavily on the reasoning of *Weaver*, a pre–Unruh Act case that applied the statutes that had included the ticket-purchase price requirement. The plaintiffs in *Bartlett* sought to challenge discrimination at a gay bathhouse. The Court of Appeal affirmed denial of class certification because, among other things, there were factual differences within the putative class as to whether each class member "presented himself . . . demanded admittance . . . tendered the admission fee," and was ejected or refused admission. *Id.* at p. 438, fn. 6. *Bartlett* stated that "similar considerations" were at play in *Weaver*, and then quoted at length from *Weaver*—without explaining why the express statutory requirements of former sections 53 and 54, which no longer exist, should apply under the Unruh Act. *Bartlett*, at pp. 438–439.

Contrary to *Bartlett*'s assumption, those long-defunct statutory requirements, including the tender requirement, *do not*

apply under the current Unruh Act. There is no basis for them in the modern statutory text. Instead, the "bright-line rule" announced in *Surrey* conflicts with the Legislature's decision to grant standing to any person whose rights are "denied," and to "any person aggrieved" by the discriminatory conduct. Civ. Code, § 52, subds. (a), (c). And *Surrey*'s bright-line rule cannot be squared with the Legislature's decision to repeal former sections 53 and 54 in favor of broader substantive rights.

Surrey took a wrong turn, and its "bright-line rule" should now be disapproved by this Court.[24]

Indeed, *Surrey's* "bright-line rule" *was* effectively disapproved by a recent Court of Appeal decision. *Osborne v. Yasmeh*, *supra*, 1 Cal.App.5th at p. 1128, found standing even though the plaintiff had not tendered the purchase price—and it reviewed the long history of cases showing that standing "has not historically turned on whether a plaintiff has paid a fee." In *Osborne*, plaintiff was a paraplegic who used a service dog. *Id.* at p. 1121. He went to defendant's hotel, but defendant refused to rent him a room unless he paid a room fee of $80 and—because of

[24] This is not to suggest that tendering a purchase price can never be *sufficient* to establish standing. Our point is that *Surrey* had no basis to make tender a *requirement*.

the dog—a nonrefundable cleaning fee of $300. Plaintiff tendered neither and left. *Ibid*.

Defendant argued that *Surrey's* bright-line rule deprived plaintiff of standing to sue under the Unruh Act, because plaintiff had failed to tender the purchase price. The court held that "We think this argument takes *Surrey*'s bright-line rule too far and contradicts California's established antidiscrimination case law." 1 Cal.App.5th at p. 1128.

The court then discussed a series of California cases where either (1) the court found standing, but would not have found standing if *Surrey*'s bright-line requirement had applied, or (2) the court suggested in dicta that tender of a purchase price was not required. These include Supreme Court cases, such as *In re Cox*, *supra*, 3 Cal.3d 205 and *Koire*, *supra,* 40 Cal.3d 24. And they include several Court of Appeal cases, such as *Hutson v. Owl Drug Co.* (1926) 79 Cal.App. 390, *Evans v. Fong Poy* (1941) 42 Cal.App.2d 320, and *Stone v. Board of Directors* (1941) 47 Cal.App.2d 749.

The *Osborne* court purported to agree with the reasoning of *Surrey*—but nevertheless concluded that "the articulated bright-line rule in *Surrey* is not appropriate on the facts before us."

1 Cal.App.5th at p. 1133. The court explained:

> Neither the language of the Unruh Civil Rights Act nor its history support application of this bright-line rule here. The history of the Unruh Civil Rights Act and the cases interpreting it make clear that when a person presents himself or herself to a business establishment, and is personally discriminated against based on one of the characteristics articulated in section 51, he or she has suffered a discriminatory act and therefore has standing under the Unruh Civil Rights Act. . . .
>
> This holding comports with the history and intention of the Unruh Civil Rights Act. The cases discussing discrimination under sections 51 and 52 do not focus on whether patrons who were personally discriminated against have alleged or proved that they paid a fee or were subject to unfair pricing before bringing a lawsuit. Indeed, much of the legal history surrounding sections 51 and 52 involve plaintiffs who [like plaintiffs here] were *refused services, thereby making a purchase impossible*. To hold that plaintiffs here lacked standing would contradict both the language and the intent of the

Unruh Civil Rights Act.

[*Id.* at pp. 1133-1134, italics added.][25]

In the present case too, plaintiff was "refused services, thereby making a purchase impossible." And here too, to hold that a plaintiff in Mr. White's position "lacked standing would contradict both the language and the intent of the Unruh Act."

[25] *Osborne* did purport to "agree with the result" in *Surrey*. *Osborne*, 1 Cal.App.5th at p. 1121. We take no position on whether that *result* was proper, and there is no need for this Court to do so in order to answer the Ninth Circuit's questions. Our quarrel is with *Surrey*'s "bright-line rule."

V. WHITE'S "FURTHER INTERACTION" ESTABLISHED HIS STANDING.

The Ninth Circuit's *second* question is as follows:

> Alternatively, does the plaintiff have to engage in some further interaction with the business and its website before the plaintiff will be deemed to have been denied full and equal treatment by the business?

If this Court answers "No" to the first question, it will have an opportunity to decide what "further interaction," if any, is required to establish standing under the Unruh Act.

Such "further interaction" should be case-specific, depending on the services offered by the business and the nature of the alleged discrimination.

A. No "Further Interaction" Should Be Required Where the Website Requires the Prospective Customer to Either Lie or to Surrender His Right to Non-Discriminatory Treatment.

No further interaction should be required if the website requires the plaintiff—in order to sign an agreement with the business—either to lie about his intended use of the service, or to surrender his right to non-discriminatory access to services provided to other customers. That is exactly what Square

required of Mr. White. Confirming the plain language of the terms and conditions, Square's counsel warned that it would be "fraudulent" for a bankruptcy attorney to sign up for Square intending to use the service for "bankruptcy legal services." ER 54.

We are aware of no California case that deals with this type of barrier. If a business is allowed to erect such a barrier in order to deprive plaintiffs of standing to challenge discriminatory treatment, that is exactly what they will do. Allowing this would defeat the very purposes of the Unruh Act: to deter unlawful discrimination and to compensate consumers who are injured by it.

B. A Plaintiff's Demand that a Business Cease Its Discriminatory Practice Is Sufficient "Further Interaction."

Unlike other California statutes creating a private right of action, the Unruh Act does not require a formal demand letter prior to initiating litigation. See *Angelucci*, *supra*, 41 Cal.4th at p. 168 (discussing, e.g., pre-suit requirements under the Consumers Legal Remedies Act). Indeed, in *Angelucci*, this Court squarely rejected the argument that standing exists only once

defendant "refuses an express demand for equal treatment." *Id.* at p. 169.

Though an express demand is not *necessary* under the Unruh Act, it nevertheless should be *sufficient* to establish standing, at least in a case like this one—where plaintiff has already visited the website and encountered discriminatory terms and conditions, and plaintiff is challenging an ongoing policy or practice of discrimination. See ER 143 (SAC ¶ 20). At that point, what else can plaintiff do?

CONCLUSION

Square's discriminatory practice bars hundreds of thousands of lawyers across the country from using its services in bankruptcy cases. This is exactly the type of arbitrary occupational discrimination by companies headquartered in California (as Square is) that the Unruh Act was designed to prevent.

Answering "No" to the Ninth Circuit's first question would enable clever website operators to erect barriers to Unruh Act challenges that effectively immunize any discrimination they choose to inflict—whether based on occupation, race, religion, gender, sexual orientation, or other arbitrary classification.

This Court's analysis may begin and end by applying the long-established California rule for Unruh Act standing. A plaintiff who engages in the three facts stated in the Ninth Circuit's first question has " 'a special interest that is greater than the interest of the public at large,' " *Osborne*, *supra*, 1 Cal.App.5th at p. 1127, because he is a bankruptcy attorney who has a specific need and desire to use Square's service. And his interest is " 'concrete and actual rather than conjectural or hypothetical,' " *ibid.*, because he has logged on to Square's

website and followed each of Square's instructions for opening an account—up to the point that Square requires him either to lie about his intended use of Square's services or submit to Square's discriminatory treatment.

In sum, this Court should answer "Yes" to the first question, and return the case to the Ninth Circuit for further disposition of this case.[26]

Respectfully submitted,
Moskovitz Appellate Team

Date: August 24, 2018

Myra Moskovitz

By: Myron Moskovitz
Attorney for Petitioner

[26] Most likely, the Ninth Circuit will send the case back to the district court for trial on the allegations of the SAC.

CERTIFICATE OF WORD COUNT

I hereby certify that the attached Appellant's Opening Brief, including footnotes, contains 10,859 words, according to the word count indicator on my Microsoft Word program.

Date: August 24, 2018

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:

OPENING BRIEF ON THE MERITS

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

Date: August 24, 2018

C. Barbu

Cosmin Barbu