

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

SUPREME COURT  
**FILED**

AUG 24 2018

ROBERT E. WHITE,  
Plaintiff and  
Petitioner;

v.

SQUARE, INC.,  
Defendant and  
Respondent.

No. S249248

Jorge Navarrete Clerk

Deputy

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).<sup>1</sup>

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<sup>1</sup> 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).<sup>2</sup>

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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<sup>2</sup> 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<sup>3</sup> or a monthly fee charged at the end of the month.<sup>4</sup>

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<sup>3</sup> 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.<sup>5</sup> 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.

<sup>4</sup> 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.

<sup>5</sup> 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).<sup>6</sup>

### **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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<sup>6</sup> 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](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,<sup>7</sup> 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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<sup>7</sup> 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<sup>8</sup> and appellate counsel<sup>9</sup> 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.<sup>10</sup> 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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<sup>8</sup> See <https://www.wsggr.com/WSGR/Display.aspx?SectionName=practice/restructuring.htm>.

<sup>9</sup> 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>.

<sup>10</sup> See [http://www.mcgranepc.com/bio-william\\_mcgrane.html](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