No. S249248

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT E. WHITE,

Plaintiff and Petitioner

v.

SQUARE, INC.,

Defendant and Respondent.

On Certification from the U.S. Court of Appeals for the Ninth Circuit
No. 16-17137

U.S. District Court for the Northern District of California
No. 3:15-cv-04539 JST

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Plaintiff Robert E. White ("White") candidly admitted in the Ninth Circuit that "he suffered no tangible, concrete injury" from the terms of service that he challenges on the basis of "occupational discrimination." (Square's Motion and Request for Judicial Notice, RJN003.) That concession only makes sense, for it is undisputed that White never signed up for the payment card processing services offered by Defendant/Respondent Square, Inc. ("Square"), and never attempted to process a transaction through that service. To the contrary, White acknowledged that he merely visited Square's website and reviewed its terms of service, "elect[ing] not to" agree to those terms. (CA9 Excerpts of Record ("ER") 141; Second Amended Complaint ("SAC") ¶14.) The upshot is that White was never a patron or customer of Square, and was never actually subjected to the terms that he claims "discriminate" against him as a bankruptcy lawyer. (*Ibid.*) Despite this admitted lack of any concrete injury, White insists the Unruh Civil Rights Act permits him not only to sue Square for "occupational discrimination" (*ibid.*), but also to represent a class of plaintiffs who similarly were never subjected to Square's terms of service. Indeed, because these claims rest on the notion that merely *viewing* Square's terms online constitutes discrimination, White maintains the class is entitled to statutory penalties, in $4,000 increments, for thousands of purported violations—"not less than *one billion in minimum statutory liability*." (ER 144; SAC ¶28, italics added.)

If these allegations sufficed for standing, they would portend sweeping Unruh Act class actions, challenging online terms of service accessible by millions of people on the basis of hypothetical discriminatory injuries. But that is not the law. This Court made clear in *Angelucci v. Century Supper Club* that "a plaintiff cannot sue for discrimination in the

abstract, but must actually suffer the discriminatory conduct." ((2007) 41 Cal.4th 160, 175.) A discriminatory injury, this Court explained, "occurs when the discriminatory policy is *applied* to the plaintiff—that is, at the time the plaintiff patronizes the business establishment." (*Ibid.*) Here, White contends that "the intangible injury he suffered would be *the inherent harm of discrimination in and of itself,*" and that it is enough he "was *deterred* from signing up with Square when he learned of the prohibition." (RJN002-003, RJN007, italics added.) That is precisely the sort of abstract injury this Court has rejected, for White's claim is grounded in the notion that he *would have* suffered discrimination *if* he had actually signed up for Square's service. On White's theory, it was his awareness and review of the terms "in and of itself" that "deterred him" from subscribing. (*Ibid.*) Yet, those allegations show, at most, that White may potentially face the alleged discrimination, not that he "actually suffer[ed] the [alleged] discrimination." (Cf. *Angelucci*, *supra*, 41 Cal.4th at p. 175.)

The deficiencies in White's allegations and theory of discriminatory injury confirm that his answers to the Ninth Circuit's Certified Questions are flatly wrong, and risk drawing the courts into uncharted standing territory. Blackletter principles of standing, the text of the Unruh Act, and decades of precedent applying the statute all make clear that the answer to the first Question is *no*: a plaintiff lacks "statutory standing to bring a claim under the Unruh Act" if the plaintiff alleges only that he "visit[ed] a business's website with the intent of using its services, encounter[ed] terms and conditions that [purportedly] deny the plaintiff full and equal access to its services, and then depart[ed] without entering into an agreement with the service provider." (CA9 Opinion ("Op.") 3-4.) That is because the Act limits private plaintiff standing in damages actions to "any person *denied* [equal] rights," and in injunction actions to "any person *aggrieved* by the

conduct" interfering with public accommodations rights. (Civ. Code § 52, subds. (a), (c), italics added.) This language requires that the plaintiff show he was "actually denied full and equal treatment by a business establishment," and that he personally was a "victim[]" of discrimination. (*Angelucci*, *supra*, 41 Cal.4th at p. 175.)

A plaintiff who alleges that he subjectively intended to patronize a business, but merely "encounter[ed]" its terms of service ("TOS") online (Op. 4) has not shown he was actually and personally "aggrieved" or "denied [equal] rights" by the TOS. It follows that the answer to the Circuit's second, related Certified Question is *yes*: to state a cognizable Unruh Act injury, the plaintiff must show "some further interaction with the business or its website" (*ibid.*) that actually subjected him to the TOS's allegedly discriminatory policy. Although the facts will vary, a plaintiff will generally meet that standard by showing that he patronized the defendant's business by subscribing to, or signing up for, its service, or by engaging in some other transaction making the TOS applicable to him. Failing that, the plaintiff must show that the defendant applied its discriminatory policy on a particular occasion to prevent him *personally* from becoming a patron in the first place.

While e-commerce has revolutionized the marketplace and made the Internet a common medium for businesses and consumers, this Court need not, and should not, devise special standing rules for Unruh Act claims arising from e-commerce. The wide variation in website and application design would make particularized e-commerce rules unworkable. And the general rule requiring a plaintiff to show the defendant individually discriminated against him as a patron availing himself of goods and services, or in preventing him from becoming a patron, is firmly grounded

in principles developed in longstanding brick-and-mortar cases. In particular, the cases reflect three principles defining an Unruh Act injury:

First, a plaintiff "who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing." (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1133.) Rather, the plaintiff must show he "present[ed] himself or herself to a business establishment, and [was] personally discriminated against." (*Id.* at pp. 1133-1134.) In other words, the plaintiff must show not only that he was aware of the defendant's discriminatory policy, but also that the business applied the policy to him personally as a patron or to bar him from becoming a patron.

Second, an Unruh Act plaintiff may not rest on a hypothetical or potential injury, but must establish concrete discrimination on a particular occasion. Courts consistently have recognized that the plaintiff must demonstrate a discriminatory injury that is "concrete and actual rather than conjectural or hypothetical." (*Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 417.) The plaintiff must show more than the possibility that he might suffer discrimination in future transactions with the defendant; he must show that he was "actually denied equal access on a particular occasion." (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1224.) Nor is it enough that a plaintiff subjectively sought to patronize the business and was "deterred" by the mere existence of the policy. (RJN002.) The Unruh Act requires an actual act of discrimination, not an anticipated one, and there would be no practical way of distinguishing injured plaintiffs from uninjured people who visited the website if subjective deterrence alone were enough.

This leads to a third key principle: consistent with general standing rules, the plaintiff must point to an injury personal to him, distinct from the generalized interests of third parties or the general public. The plaintiff's claim must rest on a "special interest that is greater than the interest of the public at large." (*Surrey*, *supra*, 168 Cal.App.4th at p. 417.) Because the Unruh Act's right to equal accommodations is "individual [in] nature," (*Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 34), it neither permits plaintiffs to assert injuries suffered by others, nor provides a judicial remedy for "plaintiffs whose civil rights ha[ve] not been personally violated" (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1384).

These principles collectively refute White's contention that it is enough for a plaintiff to "encounter" TOS online while "visit[ing] a business's website with the intent of using its services." (Opening Brief ("POB") 20 [quoting Op. 3-4].) Such a showing establishes, at most, that the plaintiff "learned about" the TOS (*Osborne*, *supra*, 1 Cal.App.5th at p. 1133), an alleged harm that is "abstract" and falls short of being actually "subjected to" the challenged terms (*Angelucci*, *supra*, 41 Cal.4th at p. 175). Any "injury" flowing from viewing the TOS does not establish a "personal" injury sufficiently distinct from the interests of the general public or third parties to support standing (*Osborne*, *supra*, 1 Cal.App.5th at p. 1134).

The "further" interaction giving rise to a discriminatory injury in this situation will depend on the circumstances, and Square agrees that a "bright-line" rule is neither necessary nor practicable here. (Cf. POB 48-62.) But a plaintiff who, in contrast to White, alleges facts showing he subscribed to or signed up for the defendant's business, or engaged in an online transaction with it, will generally establish that any discriminatory

policy in the TOS was "applied to [him]" at the time he "patronize[d] the business." (Cf. *Angelucci*, *supra*, 41 Cal.4th at p. 175.) The same is true of a plaintiff who, while not a patron or customer, alleges facts showing he attempted to patronize the business, but was "personally discriminated against" when the defendant applied its policy to thwart him. (Cf. *Osborne*, *supra*, 1 Cal.App.5th at pp. 1133-1134.)

While White touts the "merits" of his claim as a factor supporting standing (POB 24), his allegations and theory of discrimination underscore the importance of requiring that Internet-based claims, like brick-and-mortar claims, be backed by a showing of concrete efforts to patronize and concrete discrimination. This is not a case where the plaintiff has asserted discrimination on the basis of a class expressly protected by the Unruh Act (such as race, gender, or sexual orientation) or recognized by this Court's precedents. Rather, White asserts that Square's Seller Agreement effects "occupational discrimination" against him and other "bankruptcy attorneys" (POB 8), a novel claim that would require the courts to assess whether a person's occupation as a bankruptcy attorney is comparable to the "personal characteristics" garnering the Act's protection, and the extent to which it implicates a business's legitimate interests "in maintaining order, complying with legal requirements, and protecting a business reputation or investment." (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1162.) That is a complex and fact-bound issue, which is why, contrary to White's suggestion, the courts have reached different results on occupation discrimination claims. Yet, White would have the courts adjudicate the theory on allegations that do not establish a discriminatory injury—and, indeed, do not clearly establish "occupational discrimination" *at all*. That result runs headlong into this Court's standing precedents, which apply the justiciability requirements like standing to

ensure "that the issues [presented] will be framed with sufficient definiteness to enable the court to ... dispos[e] of the controversy." (*Pac. Legal Found. v. Cal. Coastal Comm'n* (1982) 33 Cal.3d 158, 170.)

If all this were not enough, White's proposed subjective awareness and deterrence rule would fundamentally distort both the Unruh Act and standing law. It would flout the Legislature's decision to limit private actions to people "aggrieved" or "denied [equal] rights," and upset its carefully-drawn remedial scheme. That scheme allows only the Attorney General, District Attorneys, and City Attorneys to bring enforcement suits to redress the "inherent harm of discrimination in and of itself" that lies at the core of White's claim. (RJN007.) It would require courts not only to adjudicate hypothetical disputes presented by individual plaintiffs, but also to confront broad-based class actions that seek upwards of "billion[s]" in penalties (ER 144; SAC ¶28) on behalf of class members who suffered no concrete discriminatory injury. The effect of White's rule would be to create a special e-commerce rule of Unruh Act standing, inviting individual and class action suits brought on behalf of people who never were patrons of the defendant's business, and whose attempt to patronize it consists of mere web-browsing activities that could just as well be taken by the general public. This Court should reject it.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Square is based in San Francisco. (ER 138; SAC ¶2; Op. 4.) It provides Internet-based services that, among other things, allow merchants (referred to as "sellers") to process card payments without opening up a merchant account directly with Visa, Master Card, or other payment card companies. (ER 138; SAC ¶5.) Using Square's proprietary

card readers and software applications, sellers can convert their smart phones, tablets, and computers into payment card processors, submitting charges, receiving payments, and transmitting receipts to customers, all electronically. The service has gained enormous popularity, and sellers that use Square now number in the millions.

To use Square's service, a seller must sign up for an account and agree to Square's Terms of Service and Seller Agreement, among other written agreements.[1] A seller may sign up by visiting Square's website and agreeing to Square's Terms of Service. (See Op. 4-5.) Square does not charge a subscription or admission fee to sign up for its managed payment services; rather, it charges a flat fee and/or fixed percentage for each payment card transaction. (*Ibid.*)

The Seller Agreement imposes certain restrictions on the use of Square's payment processing service. Among other things, it bars sellers from "accept[ing] payments in connection with the following businesses or business activities," and lists a variety of prohibited business transactions. (ER 139; SAC ¶6.) These range from "(6) infomercial sales" and "(11) rebate based businesses" to "(14) betting ...," "(22) sales of [] firearms," and "(27) escort services." (*Ibid.*) At issue here is Square's restriction on using its service in connection with payments to "(28) bankruptcy attorneys or collection agencies engaged in the collection of debt." (*Ibid.*)

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[1] While there have been changes to Square's website since the time White filed suit, Square here adheres to White's operative allegations in the SAC. Square accordingly refers to the relevant agreement as the "Seller Agreement," which was its title at the time White filed suit and the title used in the SAC (ER 138; SAC ¶5); that agreement is now known as "Payment Terms."

Plaintiff Robert White alleges he is a bankruptcy attorney who sought to use Square's service but "refused" to agree to its Seller Agreement or sign up for an account "because he intended to use the service for his bankruptcy practice." (Op. 5.) According to the operative Complaint, White initially "learned, by word of mouth," that Square's Agreement would not "allow him to use [Square's] services to accept payments in connection with his business of being a bankruptcy attorney." (ER 140; SAC ¶8.) This purportedly left White in "dismay and frustration," leading him to "form[] the strong, definite and specific intent to have [his] Bankruptcy Law Firm become ... a [Square] subscriber without ... ever once submitting itself to [Square's policy]." (ER 140; SAC ¶¶9-10.) White alleges that he "first" obtained and reviewed the record in another class action lawsuit brought by his counsel, *shierkatz RLLP v. Square, Inc.* (N.D. Cal.) No. 3:15-cv-02202-JST, and then "personally visit[ed] [the] Square Website" (ER 140-141; SAC ¶¶11-12).

White interpreted the Seller Agreement as a "refusal of service to [his] Bankruptcy Law Firm in any situation where [it] might wish to use [Square's] services to facilitate ... White's occupation as a bankruptcy lawyer." (ER 141-142; SAC ¶¶13-14.) According to White, he "elect[ed] not to click the link marked 'Continue' on [the] Square Website (and thereby enter into the Square Seller Agreement)" for two reasons. (*Ibid.*) First, he allegedly believed agreeing to the Agreement would have been "inconsistent with [his] Unruh Law civil rights to be free from occupational discrimination." (ER 141; SAC ¶14.) Second, he contends that based upon his review of the *shierkatz* record, he believed agreeing to the Agreement "would have predictably subjected Bankruptcy Law Firm to a subsequent

discriminatory termination." (*Ibid.*)[2] In White's view, such termination would have "caused [his] Bankruptcy Law Firm to suffer actual injury by virtue of the resulting damage to its professional reputation and commercial credit." (ER 142; SAC ¶14.)

Instead, White brought a putative class action lawsuit in October 2015 against Square in federal District Court, alleging that its Seller Agreement constituted occupation discrimination against bankruptcy attorneys under the Unruh Act. (ER 197-202; Complaint; Op. 5-6.) According to White, he began "continuously visiting the [Square] website beginning on January 1, 2016, and on each calendar day thereafter," by which he claims to have been "refused serviced by [Square] on each such past, present or future calendar day." (ER 142; SAC ¶18.) White also alleges that he "communicat[ed] 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." (ER 143; SAC ¶20.)

II. THE TRIAL COURT PROCEEDINGS AND WHITE'S STANDING ALLEGATIONS

A. The Dismissal

White's initial complaints alleged only that he became aware of Square's prohibited transactions provision by reviewing case filings in

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[2] The *shierkatz* court granted Square's motion to compel arbitration based on the Square Seller Agreement, noting the "liberal federal policy favoring arbitration." (*Shierkatz Rllp v. Square, Inc.* (N.D. Cal., Dec. 17, 2015, No. 15-02202) 2015 WL 9258082, at *4 [citing *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1745].) California likewise has a "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.)

shierkatz and then "checking to see that [the provision] remained unchanged." (ER 193, 200; First Amended Complaint ¶9.) On Square's motion, the District Court (the Honorable Jon S. Tigar) dismissed the First Amended Complaint for lack of statutory standing. (ER 151-158.)

White then filed his SAC and alleged, for the first time, that he manifested an intent to subscribe by "personally visiting [the] Square website"; refusing to "enter[] into the Square Seller Agreement"; "continuously visiting" the website; and "communicating a formal demand" on Square. (ER 142-43; SAC ¶¶16-20.) White sought damages, as well as injunctive and declaratory relief. (ER 146-148; SAC ¶¶36-40.) White also sought to represent a class consisting of (i) "all Persons" who "ever learned that they are the subject of [the Seller Agreement's restrictions]," formed the "specific intent to become a [Square] subscriber," and then "attempted to implement that specific intent" by undertaking acts "***short*** of their clicking the link marked 'Continue' on [the] Square Website and thereby entering into [the] Square Seller Agreement"; and (ii) "any Persons" who entered into the Square Seller Agreement "and who have subsequently been terminated ... based on their violation of [the Section's prohibitions]." (ER 143-44; SAC ¶23, original emphasis.) White estimated that "there are several hundred thousand Class members," and that his claims entail "not less than one billion dollars in minimum statutory liability." (ER 144; SAC ¶¶27-28.)

The District Court dismissed the SAC, again for lack of Unruh Act standing. (ER 14-21.) Noting the Court's previous Order determining that White "did not 'allege[] that he attempted to subscribe to Square's services,'" Judge Tigar explained that White's SAC "does not remedy" this standing deficiency. (ER 18.) Judge Tigar explained that "[w]hile the SAC adds additional detail regarding the various actions White undertook," it

"still fails to allege that White 'tender[ed] the purchase price for [Square's] services or products.'" (*Ibid.* [quoting *Surrey*, *supra*, 168 Cal.App.4th at p. 416].) Because "White has not even attempted to obtain services from Square," and because "no ... refusal of service has occurred yet," White's allegations failed to demonstrate standing. (ER 20.)

B. The Motions for Reconsideration and for New Trial

After dismissal of the SAC, White filed a motion for a "new trial," arguing that "new evidence" showed he could not have signed up for Square's services because he did not intend to comply with the prohibited transactions provision. (ER 69.) White submitted a letter from Square's counsel to the plaintiff in the *shierkatz* litigation, which White claimed constituted a "threat of retaliation by Square should White even attempt to click [the 'Continue' tab]." (ER 70.) This purported threat, he argued, left him in a "Catch-22" because it forced him to "deny he practices his legitimate occupation" in order to sign up. (ER 70-71.)

The *shierkatz* plaintiff had previously signed up for Square's service, and was terminated by Square for violating its TOS. (ER 54; *Shierkatz*, *supra*, 2015 WL 9258082 at *1.) In the letter, counsel for Square responded to correspondence in which the *shierkatz* plaintiff expressed an "inten[t] to sign up again to become a subscriber to Square's payment processing services, on the theory that Square's terms of services have supposedly been revised to allow payment processing for bankruptcy legal services." (ER 54.) Square's counsel clarified that "[t]here has been no such revision." (*Ibid.*) The letter cautioned that "[y]our client's signing up for Square's service with the intent to violate the applicable terms of service would be fraudulent." (*Ibid.*)

The District Court denied the motion, rejecting the notion that the letter forced White to do "something illegal" to gain standing—*viz.*, to lie about his intent in signing up for Square. (ER 8.) This argument "mischaracterizes the facts," Judge Tigar explained, because Square was "not 'demanding' anything illegal," and was "not making any demand on White, as the letter addresses the [*shierkatz RLLP* litigation]." (*Ibid.*)

III. THE COURT OF APPEAL DECISION AND THE CERTIFIED QUESTIONS

White appealed, then immediately filed a motion in the Ninth Circuit questioning whether it had Article III jurisdiction and contending he "had not suffered a concrete and particularized injury." (Op. 6.) After briefing and argument, the Ninth Circuit issued a published Opinion holding that White had Article III standing, but certifying to this Court the following questions of California law raised by the appeal:

> 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?

(*Id.* at 3-4.) The Ninth Circuit explained that it needed "guidance" in "applying the rules for statutory standing in the internet context." (*Id.* at 3.) The Circuit found "tension between California appellate courts" on this score, with some cases "indicat[ing] that a person *must* subscribe to a business's services or purchase its products to have standing" (*id.* at 15 [citing *Surrey*, *supra*, 168 Cal.App.4th at p. 420]), and others suggesting it is enough that plaintiffs "present themselves to a business with the intent of

using its products or services," and that "the business actually deny them equal access" (*ibid.*). The Circuit also expressed uncertainty as to "how the cases apply in the absence of brick and mortar to internet-based services." (*Id.* at 16.) It is "not clear," the Circuit explained, "what steps are necessary for plaintiffs to 'present themselves' to an internet-based business or to be denied equal access." (*Ibid.*) Noting that these and similar issues "are likely to arise frequently in the future" (*ibid.*), the Circuit certified the above questions to this Court, which accepted them and docketed this appeal.

ARGUMENT

I. A PLAINTIFF LACKS UNRUH ACT STANDING IF HE MERELY ENCOUNTERS ALLEGEDLY DISCRIMINATORY TOS ON A BUSINESS'S WEBSITE AND HAS NO FURTHER INTERACTION WITH THE BUSINESS

The Questions certified by the Ninth Circuit are interwoven and thus best answered together. The Circuit asks whether a plaintiff who "visits a business's website with the intent of using its services, encounters terms and conditions that [allegedly] deny the plaintiff full and equal access to its services, and then departs without entering into an agreement" has standing to challenge the TOS under the Unruh Act. (Op. 3-4.) It then frames the question, "[a]lternatively," as whether a plaintiff must "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." (*Id.* at 4.) Because Unruh Act rights are of an "individual nature" (*Koire*, *supra*, 40 Cal.3d at p. 34), a plaintiff's standing turns on whether he "has been the victim of the defendant's discriminatory act" (*Angelucci*, *supra*, 41 Cal.4th at p. 175). The Circuit's questions thus reduce to the issue of *when* a prospective online customer suffers a personal "injury" from the defendant's "discriminatory act." Does someone visiting a website suffer