SUPREME COURT COPY

No. S249248

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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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 TO AMICUS CURIAE BRIEFS

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INTRODUCTION

White's primary *amici curiae*, a group led by Disability Rights Advocates ("Amici"),[1] do not dispute that California law denies Unruh Act standing to plaintiffs, such as White, who are aware of an allegedly discriminatory policy but have not personally suffered discrimination by the defendant on a particular occasion. Instead, Amici argue that such plaintiffs *should* have standing, but rather than trying to ground their arguments in the text of the Unruh Act and California precedents, Amici urge this Court to cast all of that aside and adopt the "futile gesture" doctrine from federal statutes such as Title VII of the Civil Rights Act of 1964, the Fair Housing Act ("FHA"), and the Americans with Disabilities Act ("ADA"). Under that standing standard, Amici argue, a plaintiff who alleges he visited a business's website and viewed the terms of service ("TOS") at issue would have Unruh Act standing on the theory that those terms "deterred" him from becoming a customer. The mere act of viewing online TOS with the intent to patronize a business, without more, would give the plaintiff standing to seek $4,000 in minimum statutory damages per violation—and potentially to represent a class of others who neither signed up with the business nor were actually subjected to its TOS.

Like White's proposed sweeping standing rule, Amici's deterrence theory of standing is nontextual, flouting the Unruh Act's statutory language and structure. Like White's proposed rule, it would defeat the Legislature's considered decision to limit Unruh Act standing to plaintiffs

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[1] The Amici group includes Disability Rights Advocates; Disability Rights Education & Defense Fund; Impact Fund; Civil Rights Education and Enforcement Center; Disability Rights California; Disability Rights Legal Center; Law Foundation of Silicon Valley; Legal Aid at Work; Legal Services for Prisoners with Children; National Federation of the Blind; National Federation of the Blind of California; Public Justice P.C.

who are actually "aggrieved" and "denied" equal rights. (Civ. Code, § 52, subds. (a), (c).) And like White's proposed rule, it would invite sweeping class actions against any online business, however big or small, that elected to post terms, conditions, and restrictions online, since the mere act of viewing them would suffice for standing.

Amici's proposed deterrence theory should be rejected. At its core, the theory seeks to displace, in blunderbuss fashion, the California Legislature's carefully crafted scheme of civil rights protections with federal standards. The Legislature knows how to draft a broad, prophylactic standing rule when it wants to, as it did when allowing Disabled Persons Act ("DPA") plaintiffs to bring injunctions actions if they are "aggrieved *or potentially aggrieved.*" (Civ. Code, § 55, italics added.) The Legislature also knows how to draw on federal civil rights and antidiscrimination provisions when it wants to, as reflected in Civil Code section 51, subdivision (f)'s incorporation of ADA standards. (*Id.*, § 51, subd. (f).) Yet, the Legislature did neither of those things in the Unruh Act provisions at issue here, Sections 52(a) and (c), despite having repeatedly amended the statute. Instead, it has maintained, for decades, the requirement that plaintiffs show they "actually suffer[ed] the discriminatory conduct," and were "the victim of the defendant's discriminatory act," in order to bring suit. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175-177 (*Angelucci*).) That requirement has been consistently applied by this Court and the Courts of Appeal, without the sort of reflexive reliance on federal sources that Amici urge.

Indeed, far from importing federal civil rights standards, this Court explained in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142 (*Harris*) that the Unruh Act's broad scope makes it fundamentally distinct from statutes like Title VII or its California counterpart, the Fair Employment and Housing Act ("FEHA"). That broad scope places critical

weight on the Unruh Act standing requirements. Whereas the Unruh Act broadly "'aims to eliminate arbitrary discrimination in the provision of *all* business services to all persons,'" Title VII and FEHA are narrowly tailored statutes focused on eliminating "'discrimination solely in employment and housing as to enumerated classes of persons.'" (*Id.* at p. 1174, citation omitted.) *Harris* declined to graft onto the Unruh Act the disparate impact liability standards from the latter statutes, lest it "'expose businesses to new liability and potential court regulation of their day-to-day practices in a manner never intended by the Legislature.'" (*Ibid.*, citation omitted.)

Here, overturning the traditional requirements for Unruh Act standing would have the same effect. Because the Unruh Act is not limited to specifically enumerated categories of protected classes, adopting the overly broad notion of standing urged by White and his Amici would open the door to class actions that, like White's, challenge non-invidious restrictions posted by any business with an online presence, from publicly traded companies to local shops. And because such class actions would carry the risk of substantial statutory damages, businesses operating in California would face massive liability even if the putative plaintiffs, like White, were not actually or personally subjected to discrimination. Indeed, as the Internet Association has pointed out, its members have already been threatened with class actions challenging their policies regarding issues far afield of traditional civil rights concerns, from restrictions on sales of firearms and drug paraphernalia to White's claim concerning bankruptcy-related transactions.

Amici justify abandoning decades of Unruh Act jurisprudence on the grounds that California has somehow failed to "match" federal civil rights protections, and that the Court should play catch up by overlaying federal standing standards onto California's scheme. This argument is both irrelevant and wrong. It is irrelevant because the Legislature has carefully

balanced the remedies available under the Unruh Act, and courts are not free to reweigh that balance to suit Amici's policy objectives. It is wrong because California's civil rights protections already match, and in many ways exceed, those in the federal system. The Unruh Act is not an isolated statute; it is a part of a larger scheme of civil rights statutes, including the FEHA and the DPA, that are direct counterparts to the federal statutes Amici rely upon. Those statutes already provide relief, in circumstances similar to their federal counterparts, for plaintiffs deterred from applying for employment or going to a public accommodation that violates disability accessibility standards. (See *post*, at pp. 28-32.) Thus, relaxing traditional Unruh Act standing requirements would not fill the gaps that Amici posit between federal and state civil rights protections, despite multiplying litigation and potential liabilities far beyond what California law contemplates.

Amici maintain that their deterrence theory is justified by the need for effective enforcement of the Unruh Act (Amici Br. at p. 21), but this argument—which also sounds in lawmaking rather than statutory construction—is meritless. Amici point to no evidence that the Unruh Act has been under-enforced over the last sixty years under traditional standing rules. Nor is there evidence that those rules are unduly rigid and warrant revision in the Internet era. Amici warn that applying current standing rules to online commerce would result in an inflexible requirement that users agree to defendants' TOS in order to have standing. That concern is imagined. As Square explained in its principal brief (pp. 25-38), Unruh Act precedents teach that a potential plaintiff may have standing in the absence of an agreement if he pleads some other interaction with the defendant in which he personally suffered discrimination. This is not a case, however, where the defendant is alleged to have engaged in discriminatory conduct that thwarted the plaintiff's attempts to sign up or that otherwise personally

subjected the plaintiff to discrimination. White could readily have signed up for Square's service and thereby become a patron with standing, but he chose not to, and has acknowledged that he suffered no discriminatory injury. (*Id.* at pp. 38-42.)

Finally, the brief filed by the National Association of Consumer Bankruptcy Attorneys ("NACBA") serves only to underscore the need for clear and meaningful standing requirements. In pointing out that bankruptcy attorneys often engage in other areas of practice, NACBA's brief confirms that bankruptcy law practice is not the kind of "personal characteristic" that the Unruh Act aims to protect. And, in describing the circumstances in which bankruptcy attorneys receive credit card payments, NACBA's brief lends support to Square's position that it has legitimate business interests in restricting such transactions. Were the Court to adopt the expansive, nontextual standing rules proposed by White and his amici, it would invite plaintiffs to bring novel discrimination claims like White's in situations where the plaintiff pleads no actual injury. That would draw courts perilously close to adjudicating the hypothetical disputes, and issuing the advisory opinions, that standing rules are meant to avoid. (See *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119.)

ARGUMENT

I. The Court Should Not Rewrite the Unruh Act's Standing Requirements to Import the Federal "Futile Gesture" Doctrine from the ADA, FHA, and Title VII

A. Amici's Proposed Standing Rule Contravenes the Text of the Unruh Act and Decades of California Case Law

Under the Unruh Act's text and decades of California case law, a plaintiff cannot plead injury and seek statutory penalties merely by alleging that he became aware of an allegedly discriminatory policy while having an intent to patronize the defendant's business. As this Court has explained,

the allegations must show "that the particular plaintiff suffered actual injury," and that he "was subjected to" the challenged discriminatory policy. (*Angelucci, supra*, 41 Cal.4th at pp. 175-177.) In the context of online commerce, this bedrock principle provides the answer to the Ninth Circuit's Questions (see CA9 Opinion 3-4): a plaintiff cannot establish the requisite injury, and thus lacks Unruh Act standing, by alleging merely that he "visit[ed] a business's website" and "encounter[ed]" allegedly discriminatory TOS (Question 1); to have standing the plaintiff must allege facts showing "further interaction" that personally subjects him to the discriminatory policy (Question 2).

Given the infinitely varied ways consumers and businesses interact online, it would be neither practical nor desirable to fix a rigid, one-size-fits-all rule for standing to bring suits challenging online TOS. In most circumstances, however, such interactions require allegations showing that the plaintiff either patronized the defendant's website, or that he attempted to do so but was thwarted in an interaction in which the defendant personally subjected him to discrimination. A plaintiff who has merely viewed the defendant's online TOS with the intent to subscribe has not suffered injury, because he has not been personally "subjected" to discriminatory conduct (*Angelucci, supra*, 41 Cal.4th at pp. 175-177); has not suffered an injury that is "concrete and actual rather than conjectural and hypothetical," (*Surrey v. TrueBeginnings, LLC* (2008) 168 Cal.App.4th 414, 417 (*Surrey*)); and asserts interests in the alleged discrimination that are no "greater than the interest of the public at large," (*ibid.*). Under settled California law, that is simply not enough for Unruh Act Standing.

Amici do not dispute that White lacks standing under current California law. Instead, they urge this Court to abandon the Unruh Act standing jurisprudence that California courts have developed over decades, and replace it with the federal "futile gesture" doctrine developed under

federal statutes such as Title VII of the Civil Rights Act of 1964, the FHA, and Title III of the ADA. (See Amici Br. at p. 33 [criticizing California "appellate courts' often narrow interpretation of [Unruh Act] standing over the past twenty years"].) Under this doctrine, Amici argue, a plaintiff like White who has merely viewed a website with a purported intent to sign up, but who has not signed up or engaged in any interaction in which the defendant subjected him personally to discrimination, would still have standing—on the grounds that he was "deterred" from becoming an actual patron. (*Id.* at pp. 22-23.) This, despite the fact that White has already acknowledged he has "suffered no tangible, concrete injury" from Square's allegedly discriminatory TOS. (Square's Motion and Request for Judicial Notice, RJN003.)

It is important to note, as an initial matter, that even White has not urged the wholesale displacement of traditional Unruh Act standing principles by federal law. Because White did not advance this argument in his principal briefs, and because "'an amicus curiae accepts a case as he or she finds it'" (*Rental Housing Owners Assn. of Southern Alameda County., Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 95, fn. 13, citation omitted), the amici's effort to substitute federal antidiscrimination standards for the California Legislature's carefully crafted scheme is procedurally improper.

In any event, Amici's argument should be rejected on the merits. The standing rule Square urges is merely what California law already requires; it comports with the text and purpose of the Unruh Act, and carries forward decades of California precedents. In contrast, Amici's proposal to permit standing based on deterrence would radically, and needlessly, change Unruh Act standing; instead of limiting the statute to plaintiffs who personally suffered discrimination on a particular occasion, it

would permit plaintiffs to bring suit based on *potential* discrimination in hypothetical future interactions with the defendant.

1. The Text of the Unruh Act Does Not Support Deterrence-Based Standing

"As in any case of statutory interpretation, [the Court's] task is to determine afresh the intent of the Legislature by construing in context the language of the statute." (*Harris*, *supra*, 52 Cal.3d at p. 1159.) The text of the Unruh Act plainly requires potential plaintiffs to allege that they have been personally subjected to discrimination. Civil Code section 51 guarantees "full and equal accommodations." As a remedy, Section 52, subdivision (a) authorizes actions "for each and every offense for the *actual damages* [with a $4,000 statutory minimum]... *suffered* by any person *denied* the rights provided in Section 51 ...." (Italics added.) Section 52, subdivision (c) further authorizes injunctive actions by "any person *aggrieved* by [] conduct" interfering with "the full enjoyment of any of the rights described in this section." (Italics added.) The statutory text thus makes clear that, to have standing to sue, a plaintiff must have been "*actually* denied full and equal treatment by a business establishment" on a particular occasion. (See *Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1383-1384 (*Midpeninsula*), italics added.) Mere awareness of the policy coupled with intent to sign up for the service, without further interaction with the defendant and actual injury from that interaction, is not enough. (See *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1133 (*Osborne*) ["a plaintiff who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing"].)

Amici do not even try to ground their theory of standing in the Unruh Act's text, offering no analysis of the statutory language or any explanation of how their theory comports with the legislative intent as

reflected therein. (Cf. *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152 ["Ordinarily, the words of the statute provide the most reliable indication of legislative intent."].) Nor could they, for there is nothing in Section 52's text indicating legislative intent to confer standing on plaintiffs who are aware of, and subjectively deterred by, alleged discriminatory practices, but who have not been personally or "actually denied equal access on a particular occasion." (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1224 (*Reycraft*).) As the Court of Appeal noted in construing similar language in the DPA's provision for damages actions, this text "does not include any express language that could be construed to include deterrence claims." (*Id.* at p. 1226 [construing section 54.3 of the DPA, which like Section 52 provides actions for "actual damages" "suffered by any person denied any of the rights"].)

Because the Unruh Act's text is clear, the Court must give effect to its clear meaning and force. (See *Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818 ["If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls."].) If the California Legislature had intended to permit Unruh Act plaintiffs to sue based on potential discrimination, or an interest in deterring future discrimination, it could have drawn on the same prophylactic language it used in other antidiscrimination statutes. In related statutes addressing disability rights, the Legislature used language expressly permitting standing for such plaintiffs. For example, in the DPA, the Legislature authorized injunctive actions by "[a]ny person who is aggrieved or *potentially aggrieved*" by a violation. (Civ. Code, § 55, italics added.) This disjunctive language, together with the language reaching "potential" violations, is markedly different from the injunction provision of Section 52, subdivision (c), which grants standing only to persons who are actually "aggrieved." The word "potentially" connotes discriminatory injuries that could result from "a

violation" *in the future*—not just past or current violations. (See, e.g., *Rash v. Ministry Co.* (Or. 2001) 20 P.3d 197, 201-202 [explaining that "[t]he addition of the word 'potentially'" to the phrase "'all matters ... potentially arising out of claims'" "means that a [settlement agreement] resolves all matters that, in the future, could arise out of a claim, not merely the matters currently known to arise out of a claim"].)

The Court of Appeal in *Reycraft* made this very point in contrasting the DPA's broad standing provision for injunction actions with its narrower standing provision for damages actions. As noted, Section 54.3 of the DPA mirrors the Unruh Act's standing provisions in limiting standing for damages actions to those who "suffered" "actual damages" and were actually "denied" DPA rights. (See Civ. Code, § 54.3.) *Reycraft* reasoned that because Section 55 of the DPA allows plaintiffs who were "potentially aggrieved," in addition to "aggrieved" plaintiffs, to seek injunctive relief, "the statutes as written were intended to provide two distinct remedies." (177 Cal.App.4th at pp. 1226-1227.) That "potential" language is also conspicuously absent from the Unruh Act's general standing provisions.

By extending statutory standing to disability rights plaintiffs who are "potentially aggrieved," the Legislature demonstrated that it "kn[ew] how to phrase an enactment when it want[ed] to adopt a broadly permissive standard [for discrimination standing]." (Cf. *People v. Slaughter* (1984) 35 Cal.3d 629, 650.) Its decision to limit Unruh Act standing to those who already "suffered" or were "aggrieved by" a discriminatory injury (Civ. Code, §§ 52, subds. (a), (c)) must therefore be taken as considered and intentional, particularly given how active the Legislature has been in revising the statute and enacting related antidiscrimination laws. The

Unruh Act alone has been amended 21 times.[2] Adopting the Amici's argument would eviscerate the distinction the Legislature made between granting standing to those who were "potentially aggrieved" under the DPA's injunction provisions, and limiting standing to those who were actually "aggrieved" or "denied [equal] rights" under the Unruh Act. (See *Reycraft*, *supra*, 177 Cal.App.4th at pp. 1225-1227 [holding that Section 54.3 under the DPA does not permit damages claims by plaintiffs who allege merely "awareness of or a reasonable belief about unequal access," because unlike injunction claims under Section 55, Section 54.3's text does not authorize damages claims by persons who are merely "potentially aggrieved"]; cf. *Midpeninsula*, *supra*, 221 Cal.App.3d at p. 1384 [rejecting argument that the term "'aggrieved'" in Section 52 "confer[ed] standing upon an expanded class of plaintiffs whose civil rights had not been personally violated"].)

The text of Section 52 also contrasts starkly with Civil Code section 55.56. That statute addresses disability claims alleging "violations of one or more construction-related accessibility standards" under the Unruh Act and the DPA, and expressly permits the kind of deterrence standing urged by Amici for those claims. Section 55.56 provides that a plaintiff could establish standing by showing that "he or she was deterred from accessing a

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[2] (See Historical and Statutory Notes, 6 West's Ann. Civ. Code (2007 ed.) foll. § 51, pp. 486-488 [describing amendments to the Unruh Act in 1961, 1974, 1987, 1992, 1998, 2000, and 2005]; Historical and Statutory Notes, 6 West's Ann. Civ. Code (2019 supp.) foll. § 51, pp. 157-158 [describing amendments in 2011 and 2015]; Historical and Statutory Notes, 6 West's Ann. Civ. Code (2007 ed.), foll. § 52, pp. 577-579 [describing additional amendments, not already listed in the Historical and Statutory Notes to Section 51, to the Unruh Act in 1976, 1978, 1981, 1986, 1989, 1991, 1994, 1999, 2000, 2001, and 2005]; Historical and Statutory Notes, 6 West's Ann. Civ. Code (2019 supp.) foll. § 52, p. 251 [describing additional amendment to the Unruh Act in 2014].)

place of public accommodation on a particular occasion," *i.e.*, if he "had actual knowledge of a violation" and would have actually accessed the site on a particular occasion but was deterred from doing so. (Civ. Code, § 55.56, subds. (b), (d).)[3] But this relaxed standing standard applies only to claims that come within the ambit of the "construction related accessibility claim[s]" governed by section 55.56, subdivision (a). By contrast, no language authorizing deterrence-based standing appears in the Unruh Act for the numerous other types of claims that could be brought under it. This textual distinction makes sense, because laws focused on disability access, unlike other anti-discrimination statutes, require public accommodations places to take *affirmative* steps to make their businesses accessible to the disabled, so that even *potential* harms may warrant redress. (Cf., e.g., *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 814 [disability statutes "require that public entities eliminate impediments to disabled access to public facilities"].) Amici's construction would defeat the Legislature's carefully-drawn remedial scheme and, again, eviscerate its distinction between construction-related disability access claims and Unruh Act actions in general, including unconventional claims such as those brought by White.

2. Amici's Standing Theory Does Not Comport With Decades of California Jurisprudence, From Both this Court and the Courts of Appeal

Rather than trying to grapple with the statute as written, Amici simply rely on the general principle that the Unruh Act should be liberally construed to effectuate its purpose. (Amici Br. at p. 30.) But the long line of Unruh Act standing authorities already reflects that canon. Even

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[3] Section 55.56 applies only to litigation filed after January 1, 2009, so it did not apply to *Reycraft* itself, which arose from events that took place in 2004. (177 Cal.App.4th at p. 1226 fn. 5.)

liberally construing the Unruh Act's standing provisions, the courts have consistently held that the Act requires plaintiffs to allege that they have personally been victimized by discrimination on a particular occasion. (See, e.g., *Angelucci*, *supra*, 41 Cal.4th at p. 167 ["the Act must be construed liberally in order to carry out its purpose"]; *Osborne*, *supra*, 1 Cal.App.5th at p. 1125 [similar]; *Surrey*, *supra*, 168 Cal.App.4th at p. 418 [similar].)

Amici criticize the Courts of Appeal's interpretation of Unruh Act standing as unduly "narrow" (Amici Br. at p. 33), but make little effort to engage with the reasoning and analysis in the case law. What is more, in focusing on Court of Appeal precedents, Amici wholly ignore this Court's decision in *Angelucci*, which admonished that "'a plaintiff cannot sue for discrimination in the abstract, but must actually suffer the discriminatory conduct'" (41 Cal.4th at p. 174, citation omitted), and in *Koire v. Metro Car Wash*, which emphasized "the actual injury to this plaintiff" in upholding his standing to sue ((1985) 40 Cal.3d 24, 27 (*Koire*)). Amici also ignore the consistent way in which the Courts of Appeal have applied these principles, over a wide range of situations they have faced. (Compare, e.g., *Reycraft*, *supra*, 177 Cal.App.4th at p. 1225 [private swimming pools], with *Surrey*, *supra*, 168 Cal.App.4th at p. 417 [dating website].)

These principles have governed Unruh Act standing for decades. Even before the Unruh Act's enactment in 1959, the Courts of Appeal had already construed its predecessor statute (including Sections 51 and 52) as requiring a plaintiff to prove that he had been personally subjected to discrimination on a particular occasion, not just that he believed he would potentially be subject to discrimination should he interact with the challenged business. (See *Orloff v. Hollywood Turf Club* (1952) 110 Cal.App.2d 340 (*Orloff*).) In *Orloff*, the plaintiff had previously been

ejected from a racetrack and told that he would not be admitted again. (*Id.* at p. 342.) He then filed suit to recover damages for every day on which the track was open during the three years preceding the complaint, even though he did not show up at the track on any of those days. (*Ibid.*) The court held that the plaintiff lacked standing to sue for the days he did not present himself at the track, because on those occasions "[t]he parties in every sense of the word were legal strangers to one another." (*Id.* at p. 343-344.) *Orloff* applied predecessor statutes to the 1959 Unruh Act that prohibited businesses from "den[ying] to any citizen" equal rights (former Civ. Code, § 52, added by Stats. 1905, ch. 413, § 2, p. 553, amended by Stats. 1919, ch. 210, § 2, pp. 309-310, subsequently amended by Stats. 1959, ch. 1866, § 2, p. 4424), which similarly connoted actual "failure [to provide equal accommodations] or discrimination." (*Orloff, supra*, 110 Cal.App.2d at p. 342).

After the Unruh Act's passage, both this Court and the Court of Appeal construed the revised version of Section 52 to continue requiring plaintiffs to demonstrate that they have been personally subjected to discrimination on a specific, identifiable occasion. (See *Angelucci, supra*, 41 Cal.4th at p. 171.) In *Angelucci*, this Court explained that "injury occurs when the discriminatory policy is applied to the plaintiff—that is, at the time the plaintiff patronizes the business establishment." (*Angelucci*, at p. 175.) The Court invoked *Orloff* and distinguished it from the situation in *Angelucci* where plaintiffs did present themselves at the defendant's establishment, paid discriminatory fees, and had standing to sue. (*Id.* at p. 171; see also *Harris*, at p. 1163 [discussing *Orloff*].) In *Surrey*, the Court of Appeal also cited *Orloff* (among other cases) and explained that "the cases interpreting the Unruh Act have consistently held that an individual plaintiff has standing to bring claims thereunder only if he or she *has been the victim of the defendant's discriminatory act*." (168 Cal.App.4th at p.

419.) Other decisions consistently confirmed that a plaintiff must personally experience discrimination in order to have standing. (*Midpeninsula*, *supra*, 221 Cal.App.3d at p. 1384 [no Unruh Act standing for plaintiff "whose civil rights had not been personally violated"]; *Osborne*, *supra*, 1 Cal.App.5th at p. 1133 [a plaintiff "who only learns about the defendant's allegedly discriminatory conduct, but has not personally experienced it, cannot establish standing"].)

That the Legislature never altered this standing rule, which dates back to the Unruh Act's predecessor statute, to incorporate deterrence standing further confirms the congruence between case law and legislative intent. "It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.) This principle carries particular force here in light of the close attention the Legislature has given to the Unruh Act, having amended the statute 21 times since 1959. (See *ante*, at p. 17, fn. 2.) If the Legislature thought the standing principles applied by the courts were, at any point over the last several decades, too stringent, it could readily have amended the statute. And it would have needed to look no further than the DPA's injunction provision for a model of how to expand Unruh Act standing. But the Legislature did not, and for good reason; it would have rendered the Act's already-broad scope unwieldy and limitless. (See *post*, at pp. 25-27.)

Against the great weight of California jurisprudence, Amici rely on a federal district court decision, *Arnold v. United Artists Theater Circuit* (N.D.Cal. 1994) 866 F.Supp. 433, which concerned disability access claims brought under both the DPA and the Unruh Act. *Arnold* concluded on policy grounds that the disabled plaintiffs allegedly deterred from visiting

movie theaters had standing because holding otherwise would "reduce the incentives for compliance with the disability access requirements of these laws." (*Id.* at p. 439.) As *Reycraft* explained, *Arnold* is unpersuasive because the Legislature could have established deterrence-based standing, but had not, at that point, chosen to do so. (*Reycraft*, *supra*, 177 Cal.App.4th at pp. 1226-1227.) And when the Legislature later *did* address the policy concerns expressed by *Arnold*, it did so expressly in the narrow context of construction-related disability access claims, without expanding Unruh Act standing more generally. (See Civ. Code, § 55.56, subds. (a), (b) [granting standing for a plaintiff deterred from accessing a place of public accommodation on a particular occasion, but only for "construction-related accessibility claim[s]"].)

3. Traditional Unruh Act Standing Principles Do Not Rigidly Require a Plaintiff to Become a Patron In Order to Have Standing

Amici warn that "[l]imiting actionable discrimination to that occurring after a formal agreement between the parties would significantly limit the reach of the Unruh Act," because some users may not be able to enter into an agreement with an online business. (Amici Br. at pp. 22-23.) That is a strawman argument. As Square's principal brief has made clear, Square does not seek adoption of a special rule for online commerce that would require all plaintiffs to enter into formal user agreements with websites in order to have standing. (Answer Br. at pp. 32-34, 38.) Rather, the traditional principles of Unruh Act standing should apply equally to online transactions. Just as in the brick-and-mortar context, the existence of standing will depend on the circumstances surrounding the plaintiff's online (or offline) interaction with the defendant. And just as in the brick-and-mortar context, where a customer patronizing a brick-and-mortar business can personally suffer discrimination without purchasing the

service or product at issue (see, e.g., *Osborne*, *supra*, 1 Cal.App.5th at p. 1133; *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936), an Internet user, depending on the circumstances, may personally suffer discrimination even if he did not enter into a formal TOS agreement with an online business.

As we have explained (Answer Br. at pp. 32-34), a prospective patron at a brick-and-mortar business may personally suffer discriminatory injury, even without actually completing a transaction, if the defendant applies a discriminatory policy and thwarts her from becoming a patron on equal terms. That may occur, for example, if the prospective customer makes a demand for equal treatment to the business and is refused; then she would have been personally "'denied ... equal treatment'" and thereby suffered "actual damage." (*Angelucci*, *supra*, 41 Cal.4th at pp. 174-175, quoting *Midpeninsula*, *supra*, 221 Cal.App.3d at p. 1383.) In *Osborne*, the disabled plaintiffs, who were traveling with service dogs, offered to pay the standard room rate at a hotel, but the hotel refused and demanded that they pay an additional cleaning deposit not required of other guests. (1 Cal.App.5th at p. 1123.) The plaintiffs had standing because they presented themselves at the hotel and were personally denied equal treatment, even though they did not end up patronizing the hotel. (*Id.* at p. 1134.)

Similarly, while the specific circumstances may differ, a user who attempted to patronize an Internet business but was personally thwarted from doing so by the defendant's discriminatory conduct could potentially have Unruh Act standing. In that event, he would have been personally subjected to the allegedly discriminatory policy or conduct, and not just a potential injury. (Answer Br. at pp. 32-34, 38.) This could occur, for example, if a plaintiff made a demand for equal treatment to the defendant that was then denied. (*Id.* at pp. 41, 49; see also *Osborne*, *supra*, 1 Cal.App.5th at pp. 1122-1123, 1134; *Koire*, *supra*, 40 Cal.3d at p. 27.)

Amici offer no reason to think that effective enforcement of the Unruh Act has been frustrated over the last sixty years by the statute's standing requirement. This case provides no occasion to change those principles, as White could easily have signed up for Square's services. The challenged restriction in Square's TOS would not have stopped him from signing up, because it applies to *transactions*, not people. (ER 139; SAC ¶6 [prohibition on "accept[ing] payments in connection with" certain business activities, including "(28) bankruptcy attorneys or collection agencies engaged in the collection of debt"].) Nor did White adequately plead facts showing any other interaction with Square in which he personally suffered discrimination, in contrast to the plaintiffs in cases like *Osborne* and *Koire*. White's acknowledged lack of discriminatory injury hardly justifies creating a new general standing rule that the Legislature itself never adopted, and which would overturn decades of California jurisprudence.

B. The Federal Statutes Cited By Amici Provide No Basis to Displace Long-standing California Law

With no textual basis or precedent to stand on, Amici are left contending that Unruh Act standing should be radically expanded in order to "match federal civil rights protections," citing federal civil rights statutes such as Title VII, the FHA, and the ADA. (Amici Br. at p. 24.) But as a California statute, the Unruh Act must be interpreted on its own terms, not to reflexively follow inapposite federal statutes. Had the California Legislature sought to incorporate federal antidiscrimination standards, it could easily have done so, as reflected in the Unruh Act's incorporation of ADA standards. (See Civ. Code, § 51, subd. (f) [making a violation of individual rights under the ADA also a violation of the Unruh Act]; *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 672 [explaining that claims based on section 51, subdivision (f), unlike other Unruh Act claims, do not require a showing of intentional discrimination].) But the

Legislature has adhered to its standing requirements in Sections 51 and 52 of the Unruh Act, and that decision is just part of an interwoven scheme of remedies available under the State's civil rights laws. The Legislature's choices about how to balance and structure civil rights remedies in California ought to be respected, rather than overridden with standards judicially imported from a different civil rights scheme.

1. The Unruh Act Is Fundamentally Different From the Federal Statutes Amici Cite, and Expanding Standing As Amici Suggest Would Multiply Litigation While Distorting the Unruh Act's Purpose

The "interpretation of a federal statute's standing requirements does not determine the scope of standing provided by a California statute." (*Midpeninsula, supra*, 221 Cal.App.3d at p. 1385.) "Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted." (*Ibid.*) Indeed, as this Court has recognized, the Unruh Act is fundamentally different from other anti-discrimination statutes like Title VII and the FHA. (*Harris, supra*, 52 Cal.3d at p. 1174.)

In *Harris*, the plaintiffs argued that disparate impact claims should be recognized under the Unruh Act because federal courts had permitted such claims under Title VII and Title VIII (the FHA). (52 Cal.3d at p. 1171.) This Court disagreed:

> 'We note that the general antidiscriminatory objectives of the Unruh Act are much broader than the specific antidiscrimination principles underlying titles VII and VIII. Those two federal laws, with their state FEHA counterparts, aim to eliminate discrimination solely in employment and housing as to enumerated classes of persons. They represent areas of special concern to Congress and the Legislature. It might well be more appropriate to single out those two areas for special attention. The Unruh Act, however, aims to eliminate arbitrary discrimination in the provision

> of *all* business services to all persons. Adoption of the disparate impact theory to cases under the Unruh Act would expose businesses to new liability and potential court regulation of their day-to-day practices in a manner never intended by the Legislature. This we decline to do.'

(*Id.* at p. 1174, citation omitted; accord *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1424-1426 [construing FEHA standing as broader than Unruh Act standing].) In other words, because the Unruh Act is far broader in scope and aim than the more narrowly tailored employment and housing statutes the *Harris* plaintiffs invoked, grafting liability standards from those statutes onto the Unruh Act would lead to expanded liability beyond what the Legislature intended.

This reasoning applies equally to Unruh Act standing. Unlike the federal civil rights statutes Amici rely upon, the Unruh Act is not limited to discrete protected categories like race, sex, religion, or disability, nor to specific contexts like employment actions, but rather prohibits "all arbitrary discrimination by a business enterprise," (*In re Cox* (1970) 3 Cal.3d 205, 212). The breadth of the statute permits plaintiffs to develop novel theories of how business practices may constitute "arbitrary discrimination" that are untethered to statutorily enumerated categories of unlawful discrimination, and to test them in court, while seeking minimum statutory damages of $4,000 per violation, (Civ. Code, § 52, subd. (a)). The lawsuit in *Harris* illustrates this risk, for it rested on putative claims for "economic discrimination" based upon the alleged effect of neutral financial requirements. (52 Cal.3d at p. 1148.)

The scope of potential liability exposure is heightened in the Internet context. As the Internet Association has pointed out, online businesses have already been subjected to Unruh Act claims that challenge their policies restricting items that range from firearms to "bongs, pornography, and lottery tickets." (Amicus Curiae Br. of Internet Association, at pp. 18-

19; *id.* at p. 18 [describing Unruh Act claim challenging policies on "drug paraphernalia, adult entertainment, and gambling"].) White himself is pursuing a novel claim of anti-bankruptcy-lawyer discrimination, and seeks "not less than one billion dollars in minimum statutory liability." (ER 144; SAC ¶28.) Under White's and Amici's theory, anyone who merely viewed a website with an alleged intent to subscribe, despite the absence of any interaction with the defendant that subjected them personally to discrimination, would have standing to pursue $4,000 in statutory damages per violation for anything they consider to be "arbitrary discrimination." This is so even if the plaintiff, like White, admittedly "suffered no tangible, concrete injury." (RJN003.)

This raises the specter of class actions against online companies threatening enormous liability even where the alleged theory of discrimination is marginal or, at best, novel. Because this is less of a concern for more targeted antidiscrimination laws like Title VII or the FEHA, it makes no sense to judicially expand Unruh Act standing to "match" those federal statutes. If deterrence sufficed to create Unruh Act standing, plaintiffs could seek to recover on behalf of putative class members who had merely visited a defendant's online TOS even if the restriction was "based on the rational economic interest of the [business]" and was afield of the "personal characteristics" traditionally protected by the Act. (*Harris*, *supra*, 52 Cal.3d at pp. 1161, 1164.) By inviting broad-based class actions against businesses with any online presence, whether they be publicly traded corporations or local, family-owned businesses, Amici's proposed standing rule would only serve to "expose businesses to new liability" in a manner the Legislature never intended. (Cf. *id.* at p. 1174.)

2. Amici's Misplaced Policy Concerns Cannot Justify Second-Guessing California's Carefully Balanced Civil Rights Scheme

The driving assumption underlying Amici's reliance on federal civil rights laws is that the Unruh Act is somehow inadequate, or that California has somehow fallen behind in its civil rights protections. Of course, courts have no general power to rewrite statutes to advance an underlying policy. Time and again, this Court has explained that "'[w]hatever may be thought of the wisdom, expediency, and policy of the act,' we have no power to rewrite the statute to make it conform to the presumed intention that is not expressed." (*County of Santa Clara v. Perry* (1998) 18 Cal.4th 436, 446, citations omitted.) And even if that power were at hand, there would be no need to use it here. California has already matched, and in some ways exceeded, federal civil rights protections, including with respect to permitting deterrence-based standing in certain specific contexts.

The Unruh Act is part of a much larger system of civil rights protections in California. It is complemented by, and overlaps with, statutes, particularly the FEHA and the DPA, that are specifically designed to address particular forms of discrimination. Like the federal statutes Amici cite (e.g., Title VII, the ADA, and the FHA), the FEHA and California's disability laws provide remedies for particular kinds of discrimination claims, including employment and housing discrimination on the basis of categories such as race or sex or religion, and failure to provide equal access to persons with disabilities. And as discussed below, those statutes similarly recognize claims by plaintiffs deterred by allegedly discriminatory conduct in those specific contexts, so it is not necessary for California to import the federal "futile gesture" doctrine into the Unruh Act generally in order to match federal civil rights protections.

In trying to show that California has somehow failed to match federal civil rights laws, Amici feature the U.S. Supreme Court's decision in *International Brotherhood of Teamsters v. United States* (1977) 431 U.S. 324, which held that a person who did not apply for employment may nonetheless pursue a Title VII claim by showing that "he was deterred from applying for the job by the employer's discriminatory practices," (*id.* at p. 368). But California's own FEHA already allows such deterrence-based employment discrimination claims. (See Cal. Code Regs. tit. 2, § 11008, subd. (a) [for purposes of employment discrimination claims, defining an "Applicant" to include "an individual who can prove that he or she has been deterred from applying for a job by an employer's or other covered entity's alleged discriminatory practice"]; *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 383 [citing the then-current version of this regulation, and holding that deterred job applicants stated claims under FEHA].)

Amici also cite federal case law applying the FHA in the housing discrimination context. (Amici Br. at p. 25 [citing *Pinchback v. Armistead Homes Corp.* (4th Cir. 1990) 907 F.2d 1447].) While we have found no California precedent specifically addressing the futile gesture doctrine for housing discrimination claims under California's FEHA, its statutory standing provision closely parallels that of the FHA, and permits standing for plaintiffs who have not actually suffered discriminatory injury. (Compare Gov. Code, § 12927, subd. (g) [defining "aggrieved person" to include "any person who claims to have been injured by a discriminatory housing practice or believes that the person *will be injured* by a discriminatory housing practice that is about to occur," italics added] with 42 U.S.C.A. § 3602(i) [defining an "[a]ggrieved person" under the FHA to include "any person who ... claims to have been injured by a discriminatory housing practice; or ... believes that such person will be injured by a discriminatory housing practice that is about to occur"].)

With respect to disability claims, Amici point out that the U.S. Congress expressly incorporated the "futile gesture" doctrine into the ADA's statutory text, thereby granting standing to plaintiffs who were deterred from accessing the challenged accommodations. (42 U.S.C. § 12188(a)(1) ["Nothing in this section shall require a person with a disability to engage in a futile gesture if such person has actual notice that a person or organization ... does not intend to comply with its provisions"]; see also *Pickern v. Holiday Quality Foods Inc.* (9th Cir. 2002) 293 F.3d 1133, 1136-1137.) As discussed above, the California Legislature has also expressly authorized deterrence-based disability claims for plaintiffs who did not actually access the challenged public facility or public accommodation, in Civil Code sections 55 and 55.56. (See Civ. Code, § 55 [injunctive relief for "any person who is aggrieved or *potentially aggrieved*," italics added]; *id.* § 55.56, subd. (b) [providing damages for construction-related accessibility claims by plaintiffs "deterred ... on a particular occasion"].) Moreover, as noted above, the Legislature has expressly incorporated the ADA's liability standards. (See Civ. Code, § 51, subd. (f).)

In many respects, California statutes provide even stronger protections than their federal counterparts. For example, FEHA encompasses far more protected classes than its federal counterparts. (Compare Gov. Code, § 12921, subd. (a) [barring employment discrimination based on "race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status"] with 42 U.S.C. § 2000e-2 [limiting Title VII to discrimination claims based on an

"individual's race, color, religion, sex, or national origin"].)[4] As for disability access, the DPA provides a treble damages remedy with a statutory minimum recovery, while Title III of the ADA provides no damages remedy, and only injunctive relief, for disability discrimination in public accommodations. (Compare *Reycraft*, *supra*, 177 Cal.App.4th at p. 1218 ["'Damages are not recoverable under Title III of the ADA—only injunctive relief is available for violations of Title III,'" quoting *Wander v. Kaus* (9th Cir. 2002) 304 F.3d 856, 858], with Civ. Code, § 54.3 [authorizing damages under the DPA "up to ... three times the amount of actual damages, but in no case less than one thousand dollars"] and *id.*, § 55.56 [permitting statutory damages for deterred plaintiffs for "construction-related accessibility claim[s]"].)

Amici are mistaken, then, both in suggesting that the courts are free to rewrite the Unruh Act to implement their preferred remedial scheme and in their assumption that California has somehow fallen short of federal civil rights protections. In addition to California's specific statutory counterparts to Title VII, the FHA, and the ADA, the Unruh Act further provides a breadth of additional protection that has no parallel in the federal system. Its closest potential analogue is Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a et seq., which prohibits discrimination in places of public accommodation, but that federal statute covers only a very limited set of protected categories, and affords no damages remedy, let alone one with a statutory minimum. (See 42 U.S.C. § 2000a [prohibiting discrimination on

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[4] Also compare Gov. Code, § 12921, subd. (b) [barring housing discrimination based on "race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, genetic information, or any other basis prohibited by Section 51 of the Civil Code"] with 42 U.S.C.A. § 3604 [limiting FHA claims to those based on "race, color, religion, sex, familial status, or national origin"].

the basis of "race, color, religion, or national origin"]; *Pickern*, *supra*, 293 F.3d at p. 1136 ["Title II allows injunctive relief only"].) When viewed in the context of an overall scheme that includes many other civil rights protections, the Unruh Act's breadth and scope only underscores the need for caution when it comes to making changes to standing rules that will inevitably lead to increased litigation and risk exposure for businesses.

C. This Case Is Not an Appropriate Vehicle to Address Amici's Policy Concerns Regarding Access for Marginalized Communities

Finally, Amici argue that the importance of ensuring equal access for marginalized communities militates in favor of expanding Unruh Act standing. (Amici Br. at pp. 35-42.) Those are important policy considerations to be sure, but they are not implicated by the facts of this case, which involves only alleged discrimination against a non-marginalized group—bankruptcy attorneys. In any event, the Legislature is the proper body to make policy judgments concerning any need to revise standing requirements for the Unruh Act. (Cf. *Munson*, *supra*, 46 Cal.4th at p. 677 ["we are bound to interpret the Unruh Civil Rights Act in accordance with the legislative intent as we can best discern it, regardless of any policy views we may hold"].) To the extent the policy concerns raised by Amici are appropriate for judicial resolution, they can be addressed in a future case that actually implicates facts pertaining to those concerns.

First, Amici argue that a deterrence-based standing rule is needed to ensure equal access to online services for people with disabilities, because conventional digital content may pose barriers for blind community members, people with hearing impairments, and people with manual dexterity disabilities. (Amici Br. at pp. 37-40.) But those policy considerations are not presented by White's allegations at all, particularly given that disability access presents considerations and standards distinct

from other types of Unruh Act claims. (Cf. e.g., *Munson*, *supra*, 46 Cal.4th at pp. 669-670 [holding that, unlike other types of discrimination claims under the Unruh Act, disability access claims do not require intentional discrimination].)

To the extent that Amici suggest that disability access online presents novel problems that warrant changes to traditional standing rules, such concerns are more appropriately addressed by the Legislature rather than by ad hoc adjudication in a case that does not even present a disability claim. After all, the Legislature is better-placed to devise systematic rules and balance competing policy imperatives, just as it has done with respect to construction-related accessibility claims. (See Civ. Code, § 55.56 [recognizing deterrence-based standing for construction-related accessibility claim (§ 55.56, subd. (b)) as part of a statutory scheme that also provides, among other things, reduced damages if the defendant promptly corrected violations, § 55.56, subd. (g), and a presumption against causation for certain technical violations, § 55.56, subd. (e)].)

Second, Amici emphasize that marginalized communities are underserved by financial institutions, and argue that "[p]ermitting online businesses to restrict protected communities' options for safe, affordable, and convenient banking options through discriminatory terms of service ... could be financially devastating." (Amici Br. at p. 40.) Amici do not identify any such terms of service, nor explain how traditional Unruh Act standing rules would be inadequate to effectuate the statute's purpose in this context. For example, Amici offer no reason to think members of financially underserved communities would be unable to sign up with Square or other online companies to the extent they sought to challenge their online TOS. Essentially, Amici is asking this Court to consider, in the abstract, policy concerns about unspecified other categories of potential

plaintiffs whose ability to seek redress for unspecified discrimination may or may not be impacted by current standing rules.

Here, White is not a member of any marginalized community. White himself acknowledged to the Ninth Circuit that he "continued to do business as he had before being deterred [by Square's terms of service]," and that he "cannot point to any loss of business or similar injury that resulted from his inability to use Square services." (RJN003.) Indeed, the brief from NACBA suggests that its members already have access to a variety of payment services that they use in their practices, including credit cards and debit cards. (NACBA Br. at pp. 4-5.) Nor is there anything that prevented White from signing up with Square or otherwise interacting with Square in ways that would give him standing to challenge Square's TOS. All he alleges is an awareness of Square's terms of service and an intent to sign up with Square. He has no standing under traditional Unruh Act principles, and his claim presents no occasion to depart from them.

II. NACBA'S BRIEF CONFIRMS THE NEED FOR ROBUST STANDING STANDARDS

NACBA filed a separate amicus brief that contains no legal analysis of Unruh Act standing, and instead provides a general description of consumer bankruptcy attorneys and the circumstances in which they may accept credit and debit card payments. If anything, the brief highlights that White's theory of occupational discrimination is a marginal one at best, and that the Court should adhere to the Unruh Act's traditional standing requirements so that the courts are not burdened with adjudicating novel claims from plaintiffs who seek to take advantage of minimum statutory damages despite having suffered no injury.

As Square discussed in its principal brief, this Court's precedents require a three-part analysis first set forth in *Harris* to determine whether the Unruh Act should be extended to cover a protected class not

enumerated in the statutory text. (Answer Br. at pp. 44-45.) The analysis must consider (1) whether "a new claim of discrimination" is "based on a classification that involves personal characteristics"; (2) whether a challenged policy is justified by a "legitimate business interest"; and (3) the "potential consequences" of allowing the plaintiff's claim to proceed. (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 824, 840-841 (*Koebke*).)

NACBA's brief illustrates well why White's novel theory—arbitrary discrimination against bankruptcy lawyers—should not be resolved on the basis of a hypothetical injury. It explains that many "consumer bankruptcy attorneys" "have secondary or even tertiary areas of practices," while attorneys who don't identify as such may still provide bankruptcy-related advice as part of a practice focused on family law, property law, or estate planning. (NACBA Br. at pp. 2-3, 7-8.) This underscores that the practice of bankruptcy law does not constitute a "personal characteristic." (See *Koebke*, *supra*, 36 Cal.4th at pp. 841-843 [finding that "personal characteristics" such as "'geographical origin, physical attributes, and personal beliefs [citation omitted]'" are the "common element" of protected categories under the Unruh Act].) Further, NACBA's description of the circumstances in which bankruptcy attorneys accept credit card payments echoes the points Square made about its business interest in restricting debt-related transactions. (Cf. Answer Br. at p. 48.) As NACBA noted, bankruptcy attorneys accept credit card payments from debtors who have already declared bankruptcy (NACBA Br. at pp. 5-6 [describing credit card payments for post-bankruptcy discharge injunctions]); such persons are highly likely to be credit risks. NACBA also noted that credit card payments from persons contemplating bankruptcy may run afoul of the Bankruptcy Code's prohibition on advising such persons to incur more debt (*id.* at p. 5 [discussing 11 U.S.C. § 526(a)(4)].) Square has a legitimate

interest in preventing its service from being used for such risky transactions, and to comply with its obligations to its banking partners that restrict such transactions.[5]

White may argue that his novel claim would somehow satisfy the *Harris* test, but if his suit were to proceed, the court would be undertaking that analysis in the abstract, for a plaintiff who has not even been subjected to the allegedly discriminatory terms of service and who admittedly suffered no injury. That would hamstring the court's ability to apply the *Harris* factors and determine whether the right sounds in the Unruh Act. And it could not but invite other plaintiffs to pursue similarly novel claims without having suffered any concrete injury.

* * *

This Court should adhere to traditional Unruh Act standing requirements, and re-affirm that they are not met by a plaintiff who alleges mere awareness of a discriminatory practice and an intent to sign up for a defendant's service, without any interaction with the defendant in which he was personally subjected to discrimination on a particular occasion.

CONCLUSION

The Court should answer *no* to the Ninth Circuit's First Certified Question, and *yes* to the Ninth Circuit's Second Certified Question.

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[5] There are payment processors that focus on providing high risk merchant accounts or similar payment processing services for higher risk transactions. (See, e.g., https://www.merchantmaverick.com/highrisk-merchant.)

Dated: April 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, pursuant to Rule 8.520, subdivision (c), of the California Rules of Court, Respondent's Answer to Amicus Curiae Briefs is produced using 13-point Roman type and, including footnotes, contains 9,105 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: April 15, 2019

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

CERTIFICATE OF SERVICE

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 560 Mission Street, 27th Floor, San Francisco, CA 94105.

On April 15, 2019, I served true copies of the following document(s) described as

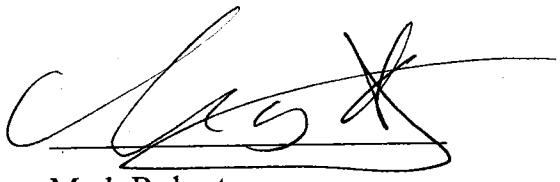
RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 15, 2019, at San Francisco, California.



Mark Roberts

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Case No. S249248
U.S. Court of Appeals for the 9th Circuit 16-17137

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