

S249248

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

SUPREME COURT CASE No. S249248

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ROBERT E. WHITE,  
*Plaintiff and Petitioner*

– v. –

SQUARE, INC.,  
*Defendant and Respondent.*

SUPREME COURT  
**FILED**

FEB 13 2019

Jorge Navarrete Clerk

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Deputy

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

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**APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF  
OF THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY  
ATTORNEYS IN SUPPORT OF THE PETITIONER**

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CLERK SUPREME COURT

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**TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE  
OF THE SUPREME COURT OF CALIFORNIA, AND TO THE  
HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF CALIFORNIA:**

Pursuant to California Rule of Court 8.520(f), the National Association of Consumer Bankruptcy Attorneys (the “NACBA”) respectfully requests permission to file the attached amicus brief in support of Petitioner Robert White.

The National Association of Consumer Bankruptcy Attorneys, is a non-profit organization of more than 2,500 consumer bankruptcy attorneys practicing throughout the country. More than 250 of our members are from California.

Among other things, NACBA works to educate the courts, bankruptcy bar, and the community-at-large on the uses and misuses of the consumer bankruptcy process. NACBA advocates for consumer debtors on issues that cannot be addressed adequately by individual member attorneys. NACBA has also filed amicus briefs related to the payment of attorneys fees in bankruptcy. *See Baker Botts v. ASARCO*, 135 S. Ct. 2158 (2015); *America’s Servicing Company v. Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015)(en banc); *Berliner v. Pappalardo*, 674 F.3d 78 (1st Cir. 2012).

NACBA and its membership have substantial and practical experience in bankruptcy law. We also have a deep understanding of the Bankruptcy Code and its relationship state law and its relevance far beyond the bankruptcy courts. NACBA’s brief will aid the Court in properly placing its legal analysis of standing in a real world context.

Pursuant to California Rule of Court 8.520(f)(4), the undersigned counsel have fully authored the brief, with no counsel for a party authoring this brief in whole or part. Likewise, no person other than the amicus curiae, its members, and its counsel made any monetary contribution to the preparation and submission of this brief, with no counsel or party making a monetary contribution to fund the preparation or submission of this brief.

For all of the foregoing reasons, the NACBA respectfully requests that the Court grant the NACBA's application and accept the enclosed brief for filing and consideration.

Dated: February 4, 2019

Respectfully Submitted,

/s/ John C. Colwell

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February 4, 2019

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Consumer Bankruptcy Attorneys is a non-profit organization of more than 2,500 consumer bankruptcy attorneys practicing throughout the country. More than 250 of our members are from California.

NACBA works to educate the courts, bankruptcy bar, and the community-at-large on the uses and misuses of the consumer bankruptcy process. NACBA advocates for consumer debtors on issues that cannot be addressed adequately by individual member attorneys. NACBA also files amicus briefs in systemically important cases to ensure that courts have a full understanding of the relevant bankruptcy law and practice. For example, NACBA has filed amicus briefs in several cases related to related to the payment of attorneys' fees in bankruptcy. *See Baker Botts v. ASARCO*, 135 S. Ct. 2158 (2015); *America's Servicing Company v. Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015)(en banc); *Berliner v. Pappalardo*, 674 F.3d 78 (1st Cir. 2012).

NACBA and its membership have substantial and practical experience in bankruptcy law. We also have a deep understanding of the Bankruptcy Code, its relationship to state law, and its relevance beyond the bankruptcy courts. In a case that centers around overt discrimination against bankruptcy



attorneys, NACBA believes its brief will aid the Court in properly placing its legal analysis of standing in a real world context.

## INTRODUCTION

Our economy is built on billions of debtor-creditor relationships. Bankruptcy is a federal process by which those relationships can be adjusted. It has two main purposes: to relieve debtors of certain financial obligations and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Kokoszka v. Belford*, 417 U.S. 642, 645 (1974). Congress and the courts have established a complex system of statutes, rules, and judicial precedents intended to balance these competing interests.

Various types of debtors—from individual consumers to multinational corporations—turn to bankruptcy in the face of financial distress. The Bankruptcy Code, with its different chapters is designed to accommodate the full spectrum of debtors and their creditors. Because of its reach, bankruptcy is interwoven with and effects, or is affected by, nearly every other branch of jurisprudence including: commercial law, tax law, property law, employment law, family law, and criminal law.

The majority of NACBA’s members identify as “consumer bankruptcy attorneys.” However, many also have secondary or even tertiary areas of practices. Other “bankruptcy attorneys” primarily represent

creditors or other non-debtors involved in bankruptcy proceedings. Many of these bankruptcy attorneys, including the majority of NACBA members, practice in small firm or solo settings. The prevalence and preference of clients to pay for services by credit or debit cards makes payment processing capabilities important to these small practices.

Square, Inc., is a financial service provider that allows individuals and merchants to accept credit cards and off-line debit transactions through its software and hardware. Its seller agreement forbids the use of its services by “bankruptcy attorneys”—a term that is vague and undefined. *See White v. Square*, 891 F.3d 1174, 1175 (9th Cir. 2018). Square claims that the prohibition does not prevent bankruptcy attorneys from using its services to accept payments as the agreement plainly states, but rather attorneys may not “utilize the service to accept payment for their professional services, since their clientele (who are in or near bankruptcy) are at enhanced risk of defaulting on credit extended to them.” *See Defendant-Appellee’s Corrected Brief*, at 8 n.3, Docket No. 38, *White v. Square, Inc.*, No. 16-17137 (9th Cir. June 29, 2017).

Payment processing restrictions, like Square’s, strike at the heart of a small bankruptcy practitioners ability to be paid for services by forcing them into more expensive or less flexible options.

### **A. Do “Bankruptcy Attorneys” Accept Credit Cards?**

The question of whether bankruptcy attorneys accept credit card payments begs the definitional question of who is a “bankruptcy attorney.” Lawyers who spend a majority of their time performing bankruptcy-related work typically identify as “bankruptcy attorneys.” Generally, bankruptcy attorneys specialize in either consumer bankruptcy (Chapter 7 and 13) or commercial bankruptcy (Chapter 11). On the consumer side, most lawyers identify as debtors’ counsel or creditors’ counsel. The reality is more complex. Creditor attorneys, such as Mr. White, may represent financial institutions, small businesses, or individuals, such as landlords, business partners or ex-spouses. They often also represent small business debtors. Conversely, debtors’ counsel may also represent on occasion creditors or third parties in a consumer case. They often will represent consumer creditors. These are individual consumers that become creditors when businesses file for bankruptcy. For example, thousands of wildfire victims are potential creditors in the recently filed PG&E chapter 11. Similarly, former students of Corinthian Colleges became creditors when those entities filed for chapter 11 in May 2015.

Bankruptcy attorneys routinely accept credit card payments from these clients to, among other things, file a proof of claim, review a plan of

reorganization, pursue relief from the automatic stay, or dispute property valuation. Nothing about these clients suggests that these creditors are “in or near bankruptcy” or that they are at “enhanced risk of defaulting on credit extended to them.”

Consumer debtor’s attorneys also accept credit cards payments related to the filing of a bankruptcy, but with a caveat. The Bankruptcy Code restricts bankruptcy attorneys from advising a person who is considering bankruptcy to incur more debt. 11 U.S.C. § 526(a)(4).<sup>1</sup> As a result, debtor’s counsel generally do not accept credit card payments from debtors for payment of pre-petition services or filing fees. Many debtor’s counsel will, however, accept credit card payments from friends or family members for pre-petition services and filing fees. One NACBA member also reported that he recently accepted a credit card payment from the debtor’s employer, who wanted to help the debtor achieve her fresh start. Some debtor’s counsel will accept debit card payments directly from debtors because it is not considered an extension of credit.

Our members also indicate that they will accept credit cards payments from debtors for services related to enforcing the discharge injunction. The

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<sup>1</sup> Attorneys that represent “assisted persons” are statutorily defined as “debt relief agencies,” *see* 11 U.S.C. § 101(3), 12(a), and are heavily regulated by the Bankruptcy Code. *See* 11 U.S.C. §§ 526–528.

culmination of most consumer bankruptcies is a discharge of the debtor from personal liability for certain debts. The discharge injunction prevents creditors from attempting to collect the discharged debt from the debtor. On occasion, creditors disregard the discharge injunction and continue collection activity against the debtor. In this situation, the debtor must retain an attorney to enforce his or her rights. Even though the individual had previously been a debtor in bankruptcy, the bankruptcy attorney may still accept a credit card payment to pay for services rendered in enforcing the discharge injunction.

At times, bankruptcy attorneys may also be called upon to represent third parties, who are neither the debtor or creditor in the bankruptcy case. This most commonly occurs when the third party receives money or property from the debtor prior to bankruptcy. The Bankruptcy Code provides several mechanisms for reversing these transfers depending on when the transfer occurred and the amount of the payment or value of the transferred property. *See* 11 U.S.C. §§ 547 (preference actions), 548 (fraudulent conveyance actions). Bankruptcy attorneys may accept credit card payments from these third parties for bankruptcy-related work.

## **B. Payments for Bankruptcy-Related Advice from Non-Bankruptcy Attorneys**

Not all attorneys that provide bankruptcy-related advice identify as bankruptcy attorneys. The extent of bankruptcy's reach means that nearly every other area of law must include discussion of the consequences of bankruptcy. Take family law for example. It is well known that financial stress frequently contributes to marital breakdown. The bankruptcy of a former spouse can impact the ability to collect certain debts from that former spouse. While debts for child support or alimony may not be discharged in a bankruptcy, obligations under marital property settlements are dischargeable in certain circumstances. *See* 11 U.S.C. §§ 523(a)(5), 523(a)(15), 1328(a). A family law attorney may advise her client on how to best structure a divorce settlement agreement in order to avoid potential negative consequences if her former spouse filed a bankruptcy in the future.

A landlord-tenant attorney might advise his client on the rights and obligations of a landlord when a tenant files for bankruptcy. A property law attorney might advise a couple on how to title property to protect the family home in the event of a future bankruptcy filing. An attorney focusing on retirement planning might advise clients on the best savings vehicles to use in an unpredictable economy or may discuss the extent to which a client

might rely on pension commitments from a financially faltering municipality.

In each of these instances, the non-bankruptcy attorney might accept a credit card payment so long as the clients are not contemplating filing bankruptcy themselves.

### **C. Why Use a Payment Processor Such As Square**

The use of credit and debit cards has become ubiquitous in modern society. The days of accepting only paper checks is fading fast. Trends in noncash payments show that the used of checks continues to decline, while both credit and debit cards show increased use. Federal Reserve Payment Study: 2018 Annual Supplement, available at

<https://www.federalreserve.gov/paymentsystems/fr-payments-study.htm>.

The proliferation of credit card payment processors have increased access to affordable and simple payment processing for those that they serve.

NACBA members primarily practice in small firm or solo settings. Like any other small business, these lawyers are looking for a payment processor that meets their specific needs in terms of flexibility, pricing, etc. This might include, for example, flat rate credit card processing, hardware or software options, integration with accounting software, and timely deposits.

## CONCLUSION

Petitioner's brief and reply brief thoroughly discuss the standing issue presented to the Court. Amicus, the National Association of Bankruptcy Attorneys, agrees with and does not repeat that analysis, but rather writes further in this brief to provide context to the dispute. The National Association of Consumer Bankruptcy Attorneys urges the Court to adopt an inclusive standing requirement

Respectfully submitted,

/s/ John C. Colwell

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**CERTIFICATE OF WORD COUNT**

The undersigned certifies that, pursuant to the word count feature of the word processing program used to prepare this brief, it contains 1,621 words, exclusive of matters that may be omitted under California Rules of Court 8.520(c)(3).

/s/ John C. Colwell

JOHN C. COLWELL (SBN 118532)  
Attorney for Amicus Curiae

February 4, 2019

**PROOF OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Diego, State of California. My business address is 121 Broadway, Ste 533, San Diego, CA 92101. On February 4, 2019 I served the following document(s):

APPLICATION FOR PERMISSION TO FILE AMICUS BRIEF AND PROPOSED BRIEF OF AMICI CURIAE DISABILITY RIGHTS ADVOCATES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, IMPACT FUND, AND NINE ADDITIONAL ORGANIZATIONS IN SUPPORT OF PLAINTIFF AND PETITIONER ROBERT E. WHITE

BY MAIL: I enclosed the document(s) in a sealed envelope or packaged 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 NACBA's processing correspondence for mailing. On the same day that 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.

BY ELECTRONIC TRANSMISSION: I submitted the document(s) using the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on February 4, 2019, at San Diego, California.

/s/ John C. Colwell

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