IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ROBERT E. WHITE,
Plaintiff and
Petitioner;

v.

SQUARE, INC.,
Defendant and
Respondent.

No. S249248

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

United States District Court
Northern Dist. of California
No. 3:15-cv-04539 JST

For Review Following Request by the U.S. Court of Appeals for the 9th Circuit Pursuant to California Rules of Court, Rule 8.548

ANSWER TO *AMICUS CURIAE* BRIEF OF INTERNET ASSOCIATION

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I. AMICUS FAILS TO ADDRESS THE QUESTIONS POSED BY THE NINTH CIRCUIT.

Amicus answers a question that is not before this Court.

This Court granted review of the following two questions from the Ninth Circuit:

> Does a plaintiff suffer discriminatory conduct, and thus have statutory standing to bring a claim under the Unruh Act, when the plaintiff visits a business's website *with the intent of using its services*, encounters terms and conditions that deny the plaintiff full and equal access to its services, and then departs without entering into an agreement with the service provider?
>
> [¶] Alternatively, does the plaintiff have to engage in some further interaction with the business and its website before the plaintiff will be deemed to have been denied full and equal treatment by the business?
>
> [*White v. Square, Inc.*, 891 F.3d 1174, 1175; emphasis added.]

Nowhere does Amicus Internet Association ("IA") acknowledge *the content* of these Questions. Indeed, Amicus ignores the key fact included in the First Question: "with the

intent of using its services". Our Opening Brief focused on this fact.

Instead, Amicus assumes that this fact is *not* present, and that the issue before this Court is whether a plaintiff has Unruh Act standing when "the plaintiff accessed a website and then became aware of a policy the plaintiff believed was discriminatory." Amicus Brief at p. 7. This misstatement of the issue is repeated throughout the Amicus Brief:

- "Under petitioner's standing rule, a quick click on the policy is all that is needed to file a claim." Amicus Brief at p. 8.
- "The Unruh Act was never designed to . . . confer standing on plaintiffs who did nothing more than read those policies online and dislike them." Amicus Brief at p. 8–9.
- "Petitioner's proposed standing rule would subject such businesses to lawsuits for huge potential damages merely because their policies offend an opportunistic plaintiff who has no actual relationship with that business." Amicus Brief at p. 10.

- "If anyone who merely views the policy online and disagrees with it can have standing to sue for an Unruh Act violation. . . ." Amicus Brief at p. 23.

Amicus contends (at page 9) that a "Yes" answer to the Ninth Circuit's First Question "would unleash a flood of vexatious litigation". Scary stuff—but only because Amicus never mentions the Ninth Circuit's key limitation: that *plaintiff intend to sign up and actually use* the defendant's services. This limitation substantially narrows the number of potential plaintiffs, to include only those people most significantly harmed by the defendant's discriminatory policies.

By addressing the wrong question, Amicus has submitted a brief that does not help this Court answer the right questions—the ones submitted by the Ninth Circuit.[1]

[1] Square's Answer Brief makes the same mistake. We pointed this out in our Reply Brief, which Amicus apparently neglected to read.

II. AMICUS'S ATTACK ON WHITE'S TRIAL COUNSEL IS UNWARRANTED AND IRRELEVANT.

At page 17, Amicus launches an attack on "petitioner White's own trial counsel", citing several suits filed by counsel on behalf of other alleged victims of Unruh Act discrimination by other companies. Those suits will be decided on their merits by other courts, on evidence and argument, so it is not appropriate for either Amicus or for us to consider those merits in briefing to this Court.

Their *relevance* to the present case? Perhaps Amicus merely seeks to undermine Mr. White's arguments by undermining his trial lawyer. Or perhaps Amicus is trying to show a pattern: a wave of suits threatening California's internet industry. But all these suits show is a single attorney aggressively representing a handful of clients—no more. Amicus's inability to cite any other litigation is telling.

At pages 21–22, Amicus parses a letter sent by White's trial counsel to Stripe and PayPal on behalf of a firearms dealer. Amicus quotes some rather colorful language in the letter, but neglects to inform this Court of counsel's *purpose* in sending the

letter—which was *not* to extract money from the companies, but to urge them to *stop discriminating*. The last paragraph states:

> I keep telling you it is very unwise of you not to read the handwriting on the wall and modify the whole approach to telling certain occupational groups to get lost when it comes to access to submerchant accounts. A stitch in time saves nine, so I suggest you anticipate the inevitable in cooperation with my office.
>
> [Amicus Brief at page 29 ("Addendum B")]

Unfortunately, counsel's effort came to naught. The company continues to discriminate, down to this day.

III. AMICUS'S "TRANSPARENCY" ARGUMENT IS MERITLESS.

At page 23, Amicus argues that a "Yes" answer to the Ninth Circuit "would penalize online transparency".

This argument is difficult to follow. If we understand it correctly, it seems to say that allowing standing under the circumstances listed by the Ninth Circuit would discourage an internet company from posting information telling certain potential customers *in advance* that the company plans to withhold services from them because of their race, gender, sexual orientation, occupation, etc.

However, if the company has such a policy, but keeps it secret and does not post it, then the customer who signs up is not bound by it. Is Amicus saying that a company might *later* withhold services from a customer due to race, etc., so it is better that the company admit its discriminatory practices up front, so the potential customer knows who he is dealing with? I suppose we would agree, but it seems be rather strange to answer "No" to the Ninth Circuit in order to accommodate Unruh Act violators who prefer to spring their discriminatory practices on customers *after* they sign up.

IV. OTHER MATTERS

At page 17, Amicus discusses some of the restrictions its members impose on customers. Whether some of these (e.g., barring firearms dealers) are prohibited by the Unruh Act has yet to be determined and will, to some extent, turn on how this Court decides where occupational discrimination fits into the pantheon of protected classes.[2] But the present case is about *standing to sue in an internet context,* not what the Unruh Act prohibits. A negative answer to the Ninth Circuit's First Question *on standing* would effectively immunize any internet business from accountability to a potential customer for discrimination based on grounds that are *indisputably* covered by the Unruh Act: race, gender, sexual preference, and age.

Also on page 17, Amicus notes that its members might "have obligations to third parties, such as banks and credit card networks, that require them to prohibit transactions involving certain type of products or services." This argument is reminiscent of earlier excuses by businesses that their white

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[2] Note that the occupation of bankruptcy lawyer has been expressly recognized by Congress. See 11 U.S.C. § 101(4).

customers insisted that blacks be excluded—excuses that were firmly rejected. See, e.g., *U. S. by Katzenbach v. Gulf-State Theaters, Inc.*, 256 F.Supp. 549, 552 (N.D. Miss. 1966)

In any event, the Unruh Act also forbids such "banks and credit card networks" from requiring Square to discriminate against bankruptcy attorneys.[3] So their lawless behavior provides no justification for Square's own illegal practices.

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[3] See Civil Code § 51.5, which provides in subsection (a):

> (a) No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of any characteristic listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, *or because the person is associated with a person who has, or is perceived to have, any of those characteristics.*
> [Emphasis added.]

CONCLUSION

IA's Amicus Brief is most notable for what it does *not* say.

Our Opening Brief shows, we hope, that California case law supports a "Yes" answer to the Ninth Circuit's First Question.[4] If there is some technical reason why the Court should depart from that law in order to create an "internet exception", one would expect IA's Amicus Brief to present it. The members of IA include Google, Microsoft, Amazon, and Facebook—companies that employ the best computer scientists and engineers in the world.[5] And they are represented in this litigation by a very distinguished lawyer from a very prominent law firm. If *anyone* is qualified to provide this Court with some technical or other reason why internet companies should be allowed to play by a different rule, it is this array of all-stars. But they don't. Therefore, we may rest assured that no such reason exists.

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[4] At page 5, Amicus accuses us of seeking "a change" in standing law—without identifying the "change". See also p. 8 ("sea change"). As explained in our Opening Brief, we seek no change.

[5] At page 5, footnote 2, Amicus lists IA's members. At least one of them—Stripe—engages in the same sort of discrimination that Square does. See https://stripe.com/us/restricted-businesses, and https://help.sumup.com/hc/en-us/articles/115008338707/

The best Amicus can do is essentially this: "We are big. We are important. And there are quite a few of us." Amicus is quite correct in proclaiming their importance to California's economy. But so are other businesses, both past and present. The others include hospitals, factories, retail stores, construction companies, and entertainment centers. Nevertheless, the Legislature has never seen fit to exempt such large, important firms from statutes limiting how they may treat their competitors and customers (via antitrust and unfair competition laws), how they treat their employees (via wage and hour laws, safety laws, and anti-discrimination laws), and how they treat the public generally (via environmental protection laws).

And no such exemption appears in the Unruh Civil Rights Act. The Unruh Act provides, at Civil Code § 51, subsection (a):

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services *in all business*

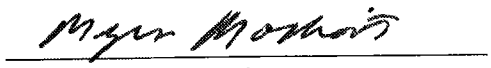
establishments of every kind whatsoever.

[Emphasis added]

Each of Amicus's members is a "business establishment of every kind whatsoever." Amicus does not claim otherwise.

Respectfully submitted,
Moskovitz Appellate Team

Date: February 14, 2019



By: Myron Moskovitz
Attorney for Petitioner

CERTIFICATE OF WORD COUNT

I hereby certify that the attached Answer to Amicus Brief, including footnotes, contains 1,721 words, according to the word count indicator on my Microsoft Word program.

Date: February 14, 2019

Myron Moskovitz
Attorney for Petitioner
Robert E. White

PROOF OF SERVICE

I, the undersigned, certify that I am over the age of eighteen years, and not a party to the action within; that my business address is 90 Crocker Avenue, Piedmont, California 94611; that I served copies of the following documents:

Answer to Amicus Curiae Brief

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Cosmin Barbu