AMERICAN ASSOCIATION FOR JUSTICE®
The Association for Trial Lawyers

January 30, 2025

Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Proposed Amendments to FRAP 29 Brief of an Amicus Curiae

Dear Members of the Committee on Rules of Practice and Procedure:

The American Association for Justice ("AAJ") submits this comment regarding the proposed amendments to FRAP 29 (Brief of an Amicus Curiae) by the Advisory Committee on Appellate Rules ("Appellate Committee"). AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury and wrongful death actions, employment rights cases, consumer cases, class actions, and other civil actions, and regularly represent clients in multidistrict litigation proceedings, both in leadership and non-leadership positions. As a matter of policy, AAJ supports making it easy for both the public and courts to determine the true identities and interests of amici curiae. However, AAJ has several concerns with the proposed amendments, as described in this Comment, and urges the Appellate Committee to revise and redraft parts of the rule text.

I. AAJ Regularly Files Amicus Briefs in the Federal Courts.

AAJ maintains a robust amicus curiae program, through which the association files briefs in state and federal appellate courts to promote and defend foundational access-to-justice principles, including the Seventh Amendment right to trial by jury in civil cases. AAJ files amicus briefs in myriad practice areas and case types, including product liability claims, class actions and MDLs, child sex abuse cases, civil rights violations, securities fraud actions, and personal injury claims. Although AAJ commonly files independently, the association joins state-based and national organizations as co-amici in nearly half of all briefs filed each year.

Between January 1, 2023, and December 31, 2024, AAJ filed 47 amicus curiae briefs nationwide, of which 45% were filed in federal circuit courts of appeals. Those briefs addressed a wide variety of complex legal questions facing federal litigants and jurists, including issues related to class certification requirements, state sovereign immunity,

federal preemption, Section 230 immunity, mass arbitration, securities fraud, and the effective vindication of statutory rights. While most of these briefs were filed during the merits stage of each case, AAJ does file amicus briefs in support of or opposition to petitions for rehearing en banc under certain circumstances.

II. The Filing of Amicus Briefs Should Not Be Discouraged or Dissuaded by the Courts.

The Committee Note correctly states that most parties follow "a norm of granting consent to anyone who asks." Indeed, this has been AAJ's experience in 99% of amicus filings over the last two years. However, the Committee Note continues that "As a result, the consent requirement fails to serve as a useful filter." In AAJ's opinion, a proposed rule on disclosure has veered into an exercise of the appellate courts inappropriately and prematurely evaluating the content of amicus briefs. In most other matters, AAJ would be hard pressed to find that its position aligns with that of the Washington Legal Foundation (WLF). Yet on these proposed amendments, AAJ's position supports the comment filed by WLF:

> [T]here is no need to decrease the number of amicus briefs in the courts of appeals. Judges have efficient processes for filtering amicus briefs and disregard briefs that they or their clerks find unhelpful. In other words, judges do not—and need not—give each amicus brief equal consideration.[1]

Importantly, the Supreme Court has taken the *opposite* approach, authorizing the filing of all briefs and eliminating the consent requirement. AAJ believes that this approach is preferable for all federal courts of appeals and does not implicate sufficiently significant recusal concerns in the vast majority of merits-stage cases. Indeed, the act of filing an amicus curiae brief does not in and of itself demand that the brief be read or given equal attention or weight by the court. The fundamental role of the court as final arbiter is not supplanted by the filing of an amicus brief. Likewise, the parties' mutual consent to such a filing is a courtesy and does not usurp the court's authority to determine what is and is not relevant to the resolution of a given case. If the appellate rule were to echo the Supreme Court's approach by signaling to the public *all amici* are welcome to file, the federal judiciary would avoid the appearance of playing favorites early on—a possible outcome of requiring the courts to provide permission, especially when combined with the new text on "Purpose" (discussed below), which suggests that the court should actively disfavor briefs that are redundant.[2]

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[1] Washington Legal Foundation, Comment Letter on Proposed Rule 29 on Amicus Briefs, at 2 (Aug. 19, 2024), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0004 [hereinafter WLF Comment].

[2] In this scenario, the court may then be left with a less substantive or fulsome brief by granting permission to the first party who requested leave to file an amicus brief on a particular issue when subsequent amici may be better equipped or knowledgeable on the same issue or may represent different but important interests not otherwise brought to the court's attention. The other option, which seems completely unworkable, would require the court to wait until right before the time for filing briefs expires, and then grant permission only to those briefs it wants on the docket. This, however, would be extremely burdensome, requiring courts to thoroughly review requests and forcing amici, who may not ultimately be permitted to file, to spend time and resources on brief preparation in case the court accepts their brief.

In an age when information is more readily available and accessible to parties and the public, it seems like a strange choice to place the burden of granting leave on the already overburdened appellate courts when the existing system of consent-based filings not only functions well, but also encourages litigants *to cooperate* with each other, saving the parties and the public significant time and money.

A. The stated justification for the rule is unfounded and not borne out by the proposed amendments.

The purported justification for the rule is to increase efficiency by avoiding unhelpful or unnecessary amicus briefs. However, the proposed rule would have the opposite effect, forcing the court to read all briefs and assess the relevance or redundancy of their content to determine whether to grant leave to file.[3] This approach is exceedingly time-consuming and inefficient for the courts and the public alike. In many cases, requiring amici to file motions for leave of court will result in burdensome and expensive motion practice for parties and amici. It would be more efficient to allow all briefs to be filed and only read what is helpful or of interest to the court, rather than wasting judicial time and resources determining whether an amicus brief is sufficiently relevant to a case before the court may fully be ready to make that determination. Indeed, this is the basis for the change to the Supreme Court rules, which permit the filing of briefs without consent.[4]

The other stated justification—to avoid conflicts and recusals—does not address an existing problem in merits-stage cases. The current rule clearly states that "a court of appeals may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification."[5] If concerns remain regarding disqualification of judges during en banc proceedings, then AAJ encourages the Committee and affected jurisdictions to consider whether there is another way to address disqualification without limiting existing options or increasing the work for both parties and the court.[6]

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[3] The Committee Note states, "Under the amendment, all nongovernmental parties must file a motion, eliminating uncertainty and providing a filter on the filing of unhelpful briefs." Thus, the Appellate Committee intends for the court to read or at least minimally review briefs to determine whether the brief would be helpful to the court.

[4] The Supreme Court Clerk's commentary to the proposed amendments explains the purpose of this revision: "While the consent requirement may have served a useful gatekeeping function in the past, it no longer does so, and compliance with the rule imposes unnecessary burdens upon litigants and the Court." Proposed Rules of the Supreme Court of the United States: Redline/Strikeout Version, at 9 (Mar. 2022), https://www.supremecourt.gov/filingandrules/2021_Proposed_Rules_Changes-March_2022-redline_strikeout_version.pdf.

[5] The proposed amendment seems to make this even clearer by placing the prohibition against disqualifying briefs in a separate sentence: "The court may prohibit the filing of or may strike an amicus brief that would result in a judge's disqualification."

[6] For example, the WLF suggests that a timing provision be added to the consent requirement to eliminate the problem of parties not responding to amici. WLF Comment, *supra*, at 4. The WLF also proposes that consent be presumed unless a party opposes the request within two business days. *Id.* AAJ suggests that such a timing rule could also be limited to en banc proceedings, which seem to be the motivation behind the proposed amendment on consent.

One option that may warrant consideration is to add language specifically on recusal to the Rule, similar to D.C. Cir. R. 29(b).[7] While AAJ agrees with the U.S. Chamber of Commerce Litigation Center—an organization that AAJ routinely disagrees with on the merits of legal issues—that the current Rule 29 is adequate for striking briefs that would result in a judge's disqualification, the language could be tightened to address concerns raised by appellate courts without eliminating party consent. The comment submitted by the California Academy of Appellate Lawyers specifically addresses the recusal issue.[8]

B. Party consent is a feature, not a bug, of the current federal rule that encourages cooperation and professional courtesy between litigants.

Only rarely does AAJ fail to obtain consent to file from the parties. (A recent example is detailed in section D below.) AAJ believes that the simplest way to solve this problem is to remove consent altogether, similar to the rule established by the Supreme Court. However, if the Appellate Rules Committee should decide that it would prefer to retain a consent provision for the federal appellate courts, then AAJ strongly recommends that filing by consent of the parties remains an option for amici.

Due to the time, expense, and expertise necessary to prepare an amicus brief, the committee should assume, and FRAP 29 should operate from a perspective of, positive intent rather than fearing a few bad actors. This is especially true where there is no evidence that the consent provision is an issue for litigants or courts and no guarantee that any brief—let alone the brief of an actor or entity trying to conceal their true identity—would be considered persuasive by a court.

C. The statement of purpose is unnecessary and unworkable.

In addition to eliminating consent by the parties, the rule adds *two* sentences regarding "Purpose" to section (a)(2), an unnecessary addition to a rule amendment regarding "the procedure for filing amicus briefs, including to the disclosure requirements."[9] Both sentences are unfortunate and unnecessary content restrictions to the rule.

> An amicus curiae brief that brings to the court's attention relevant matter not already mentioned by the parties may help the court. An amicus brief that

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[7] *See* D.C. Cir. R. 29(b) ("Leave to participate as amicus will not be granted and an amicus brief will not be accepted if the participation of amicus would result in the recusal of a member of the panel that has been assigned to the case.").

[8] "[T]he court should simply end the internal practice of asking clerks not to assign cases to a judge based on the filing of an amicus brief in the case. Judges could review assigned cases when they receive them, including any amicus briefs, and then either strike the amicus brief or not. This process would be virtually identical to asking each member of the assigned panel to review a pending motion for leave, except that no motion would be necessary." California Academy of Appellate Lawyers, Comment Letter on Proposed Rule 29 on Amicus Briefs, at 3 (Jan. 27, 2025), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0027.

[9] See the first sentence of the Committee Note summarizing the justification for the amendment. The amendment to (a)(2) adding the "Purpose" to the Rule 29 is not addressed in the Committee Note until "Subdivision (a)" of the Committee Note.

> does not serve this purpose—or that is redundant with another amicus brief—is disfavored.

While both sentences are objectionable, the second sentence is especially concerning. On a practical level, do the appellate courts really want to police briefs for redundancy when a motion is made to file? How would a court, or perhaps the clerk in some circuits, even be aware that a brief is redundant before the actual filing? What if a brief is somewhat redundant and somewhat unique? And if the court were to take this direction, it would certainly not be time well spent.

On a substantive level, it may be helpful for a court to consider that parties who do not normally share the same legal perspective have a similar viewpoint on key legal or constitutional issues. It may, for example, be helpful to know when libertarian-leaning or conservative organizations share commonality with more progressive organizations.[10] A coalition of so-called "strange bedfellows" briefs may help the court assess the breadth and depth of thinking from important segments of the legal community or the general public. AAJ again finds itself agreeing with the U.S. Chamber Litigation Center:

> Focusing on redundancy will deprive courts of a diverse range of perspectives, despite the Supreme Court's recognition that amicus briefs from 'organizations span[ning] the ideological spectrum' may itself be highly relevant to a court's resolution of the issues before it.[11]

Moreover, amicus briefs can often reinforce or reframe information provided by the parties. This may be particularly helpful in cases where the parties' brief is disorganized or fails to make the cogent arguments expected at the highest levels of appellate practice. Briefs that reinforce a party's merits brief can be particularly helpful in appeals involving litigants with limited resources. In fact, the D.C. Circuit specifically references these briefs in their local rule.[12]

D. Removing the consent provision, coupled with adding "purpose" sentences, will lead to increased motion practice.

If consent must always be obtained from the court—and the purpose of the brief is to avoid redundancy—then the court may receive motions opposing the filing of the brief. AAJ experienced this firsthand in a recent appeal before the Eleventh Circuit involving an ERISA

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[10] *See* Brief for the American Association for Justice, The Cato Institute, The Due Process Institute, Law Enforcement Action Partnership, Reason Foundation, and the R Street Institute as Amici Curiae Supporting Petitioner, *Torres v. Madrid*, 592 U.S. 306 (No. 19-292), 2020 WL 635299, https://www.justice.org/resources/research/torres-v-madrid.

[11] U.S. Chamber of Commerce Litigation Center, Comment Letter on Proposed Rule 29 on Amicus Briefs, at 11 (Dec. 19, 2024), https://www.regulations.gov/comment/USC-RULES-AP-2024-0001-0018.

[12] D.C. Cir. R. 29(a) ("The brief must avoid repetition of facts or legal arguments made in the principal (appellant/petitioner or appellee/respondent) brief and *focus on points not made or adequately elaborated upon* in the principal brief, although relevant to the issues before this court.") (emphasis added).

issue about whether to uphold an "effective vindication" clause over defendant's arbitration agreement. After defense counsel withheld consent to AAJ's amicus brief filing, we filed a motion for leave of court, detailing the association's identity and the purpose of the brief—to provide a broader perspective on the common law of contracts than that found in the parties' briefs, and specifically the broader history and impact of the effective vindication doctrine in the common law of contracts predating the Federal Arbitration Act. Defense counsel responded by filing an opposition to the motion, arguing that AAJ should be denied leave because, in their opinion, our filing would add "nothing new" to the briefing. Indeed, the brief went so far as to list all the authorities AAJ and the Plaintiffs-Appellees mutually relied upon in an attempt to demonstrate the duplicative nature of the amicus brief. Surely the courts would not be aided if the federal rules prohibited amici and parties from citing the same case law. The defense opposition also claimed that FRAP 29 prohibited AAJ from filing an amicus brief in the case because plaintiff counsel were dues-paying members of the association. AAJ filed a reply rebutting those arguments and citing this Committee's 2010 Advisory Note explicitly excluding general membership dues from those funds intended to fund the preparation or submission of an amicus brief. The court granted AAJ's motion three weeks later.

As this example demonstrates, baseless arguments can be proffered in opposition to amicus briefs and debated through costly and time-consuming motion practice. Neither defense argument against AAJ's motion for leave held water, yet the court was burdened with wading through numerous filings to determine whether FRAP 29 permitted the filing. This example could be the harbinger of things to come if the rule amendment essentially always defaults to the court to obtain leave to file a brief. Does the court really want to read briefs for redundancy? Or would it not be better to accept all briefs, as is the practice of the Supreme Court? The latter would avoid motions practice and the need to read briefs except those of interest to the court. This process also prevents any appearance of favoritism by the court, removing the court from potentially accepting some briefs but not others.

Proposed (a)(2) as rewritten:

> **(2) Purpose: When Permitted.** An amicus curiae brief that brings to the court's attention relevant matter may help the court. [The brief [[must]] [[should]] focus on relevant points not made or adequately elaborated upon in the principal brief.][13] The United States or its officer or agency or a state may file an amicus brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only with ~~by~~ leave of court or if the brief states that all parties have consented to its filing~~, but a court of appeals~~. "The court may prohibit the filing of or may strike an amicus brief that would result in judge's disqualification or recusal."

Proposed (a)(3)(B) would then be modified as follows:

[13] AAJ believes a simple statement of "Purpose" sentence is sufficient. This second bracketed sentence is an option to consider should the Appellate Committee believe that additional direction is warranted. It is based on the D.C. Cir. Rule 29(b), discussed *supra*.

> **(B)** the reason ~~why an amicus~~ the brief is helpful ~~desirable~~ and why the matters asserted are relevant to the disposition of the case.

Due to both its recent experience in the Eleventh Circuit and its overall participation in the rules amendment process where uniformity is valued and preferred, AAJ urges the Appellate Committee to carefully consider the comments and testimony provided. Indeed, it is authored by organizations who frequently and vociferously disagree on the merits yet completely agree about preserving filing by consent. It would be a mistake to address this commonality by eliminating consent in the federal rule but allowing Circuits to restore the provision incrementally through local rule. An opt-in by local rule would ensure inconsistency, creating additional hardship for smaller organizations and entities who file amicus briefs infrequently in the federal courts.

E. Conciseness matters when it comes to disclosures.

AAJ generally supports the broader disclosure requirements of (a)(4)(D) to ensure that the court and the public can assess the helpfulness of an amicus brief. To that end, AAJ recommends some small minor word modifications, tightening both the proposed text and the accompanying Committee Note, which are meant to help the court and the public decipher amici with "anodyne or potentially misleading names."[14] First, AAJ recommends shortening the following in (a)(4)(D): ". . . together with an explanation of how the brief and the perspective of the amicus will help the court."

Second, by using the conjunctive "and," the rule seems to suggest two disclosures: (1) how the brief will help the court; and (2) how the perspective of the amicus will help the court. These seem redundant, so if the Appellate Committee believes there is a difference, it needs to be clarified. Otherwise, AAJ recommends keeping "the perspective of the amicus" because that wording focuses more closely on disclosing the true identity of the person or entity submitting the brief.

Proposed (a)(4)(D) would be modified as follows:

> **(D)** a concise ~~statement~~ description of the identity, history, experience, and interests of the amicus curiae, ~~its interest in the case and the source of its authority to file~~ together with an explanation of how the perspective of the amicus will help the court;

III. Financial Disclosures for Amici Should Be Reasonable and Fair.

The origins of the proposed rule were additional disclosures for amici, which seems like a reasonable goal, and AAJ is supportive of courts and the public knowing the identity of

[14] In addition to the American Association for Justice, the word "justice" appears fairly frequently in the names of amici, including other consumer friendly groups such as Public Justice and the Alliance for Justice. For the unfamiliar, AAJ has to explain why Lawyers for Civil Justice (LCJ) does not represent the interests of AAJ members and indeed, most often takes a position at odds with the interests of AAJ members.

amici. As drafted, the proposed amendments provide different disclosure requirements for the relationship between a party and amicus than that of a nonparty and amicus, with justification provided in the Committee Note:

> [T]here is an additional interest in disclosing the relationship between a party and an amicus: the court's interest in evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus.

While the justification for the different treatment seems imminently reasonable, AAJ questions whether the proposed rule text is fairly constructed in practice, as the disclosure burden on nonparties seems more arduous.

Subdivision (b)(4) requires disclosure of whether a party, its counsel, or any combination of parties or counsel either has contributed or pledged to contribute 25% or more of the revenue of an amicus. In contrast, the rule for non-parties is set at $100 if a contribution is specifically earmarked for a brief. This seems like a far more stringent disclosure rule for non-parties, who are less likely to influence a party than a party or its counsel contributing to an amicus.

This is best illustrated by making a cost comparison. To prepare this comment, AAJ spoke to regular filers of amicus briefs who represent plaintiffs, regardless of whether the plaintiff is the appellant or appellee for the appeal, to get a realistic price range for brief preparation. Respondents noted that the range is between $25,000 and $150,000, with the average cost of an amicus brief standing at around $50,000. Costs for brief preparation for the corporate defense bar are often even greater.

Take for instance an amicus brief at the inexpensive end of the scale, costing $25,000. Under the (b)(4) proposed rule, an amicus would disclose any contribution made by a party or its counsel who funded the brief at $6,250 or more, but a substantial contribution of $5,000 would not have to be disclosed. Thus, the brief could easily be funded by five people contributing $5,000 each and avoid disclosure entirely, even if three of the five contributors were parties to the litigation. Alternatively, if a non-party recruited people to contribute specifically to an earmarked brief, they could solicit 250 donors at $100 each to reach $25,000. Perhaps a few donors would contribute more to an issue of utmost importance.

A more realistic example would set the cost of the brief at $50,000. With that higher total amount, a contribution of $12,500 or more made by a party or its counsel would have to be disclosed (but a contribution of 20% or $10,000, which is still a substantial amount, would not be disclosed). Under these circumstances, it's very likely that "passing the hat" would include a higher ask of the most generous donors, but would result in numerous donors exceeding the $100 threshold for disclosure, disproportionately impacting smaller organizations without a wealthy donor base, yet still failing to address the issue of amici manufactured for the sole purpose of supporting a party in the case.

One way to solve the discrepancy would be to raise the threshold for nonparties to $1000, which seems to more fairly align the disclosures, particularly for nonprofits and others with fewer resources.

IV. Conclusion.

AAJ supports making it easier for the courts and the public to determine the true identity of amici and to assist the courts and the public understand who has authored the brief and their relationship to the parties. We urge the Appellate Committee to consider the elimination of permission to file by motion of the court, which, of course, does not mean that any brief needs to be read. If that seems like a step too far, AAJ strongly urges that language eliminating parties' permission to file be restored. Requiring the court to be the sole source of permission will lead to motion practice and is an unnecessary waste of time and resources for both courts and amici. Additionally, AAJ strongly urges modifications to the "Purpose" section of the rule. It is impossible for an amicus to know ahead of filing whether or not its brief is redundant with another brief. It can also be helpful for briefs to augment and supplement arguments made by the parties. Finally, AAJ encourages the Appellate Committee to consider a reasonable disclosure amount for nonparties.

Please direct any questions regarding these comments to Susan Steinman, Senior Director for Policy & Senior Counsel, at susan.steinman@justice.org.

Respectfully submitted,

Lori Andrus
President
American Association for Justice

ATTACHMENT 1

No. 24-11192

In the United States Court of Appeals for the Eleventh Circuit

EBONI WILLIAMS, *et al.*,

Plaintiffs-Appellees,

v.

GERALD SHAPIRO, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:23-cv-03236-VMC (Hon. Victoria Marie Calvert)

MOTION OF AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(415) 986-1400
lori.andrus@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the American Association for Justice certifies that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Respectfully submitted this 4th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1-1, 26.1-2, 28-1(b), and 29-2, undersigned counsel for *amicus curiae* gives notice of the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

A360 Holdings LLC (Appellant)

A360 Profit Sharing Plan (Appellee)

American Association for Justice (Amicus Curiae)

Argent Financial Group, Inc. (100% owner of Argent Trust Company)

Argent Trust Company (Appellant)

Bailey III, Harry B. (Counsel for Appellees)

Berman Fink Van Horn P.C. (Counsel for Appellants)

Brinkley, Scott (Appellant)

Calvert, Honorable Victoria M. (United States District Court Judge)

Dearing, Lea C. (Counsel for Appellants)

Dunn Harrington LLC (Counsel for Appellees)

Edelman, Marc R. (Counsel for Appellees)

Engstrom, Carl (Counsel for Appellees)

Engstrom Lee (Counsel for Appellees)

Fink, Benjamin (Counsel for Appellants)

Foley & Lardner (Counsel for Appellants)

Harrington III, Robert Earl (Counsel for Appellees)

Herring, Shadrin (Appellee)

Hill, Brandon J. (Counsel for Appellees)

Holland & Knight LLP (Counsel for Appellant Argent Trust Company)

House, Bryan B. (Counsel for Appellants)

JonesGranger (Counsel for Appellees)

Kovelesky, Tina, (Appellee)

Lee, Jennifer Kim (Counsel for Appellees)

McCarthy, Chelsea Ashbrook (Counsel for Appellant Argent Trust Company)

Origin Bancorp, Inc. (Publicly traded company that owns more than 10% of common stock of Argent Financial Group Inc.)

Ridley, Eileen R. (Counsel for Appellants)

Morgan & Morga (Counsel for Appellees)

Shapiro, Gerald (Appellant)

Shoemaker, Paula Mays (Appellee)

Thomson, Mark E. (Counsel for Appellees)

Wenzel Fenton Cabassa, P.A. (Counsel for Appellees)

Williams, Eboni (Appellee)

White, Jeffrey R. (Counsel for Amicus Curiae)

Wozniak, Todd D. (Counsel for Appellant Argent Trust Company)

To the best of the undersigned counsel's knowledge, no other persons, association of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

Respectfully submitted this 4th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Federal Rule of Appellate Procedure 29 and Eleventh Circuit Local Rule 29-1, proposed *amicus curiae* the American Association for Justice respectfully moves this Court for leave to file the accompanying Brief of *Amicus Curiae* in Support of Plaintiffs-Appellees. Defendants-Appellants have withheld their consent to the filing of this brief. In support of its Motion, AAJ states as follows:

1. The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including ERISA actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

2. AAJ members represent many Americans seeking to vindicate the rights that Congress has enacted for their benefit, not only in ERISA, the statutory cause of action involved in this case, but in many other federal statutes. AAJ is concerned that adoption of appellants' radical proposal—that powerful corporations should be able to use private contracts to erase the rights created by Congress—will

undermine the ability of our elected representatives to advance the public good.

3. A central question in this appeal is whether the Supreme Court's "effective vindication" doctrine, which invalidates any arbitration provision that operates as a "prospective waiver of a party's right to pursue statutory remedies," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), precludes enforcement of the arbitration provision in this case. Defendants contend that the doctrine is narrow and not controlling. AAJ agrees with Plaintiffs' defense of the district court's application of the doctrine to Defendants' ERISA retirement plan. However, AAJ presents a much broader perspective to this Court.

4. The effective vindication doctrine is rooted in a settled principle of the common law of contracts. Long before the enactment of the Federal Arbitration Act, courts widely and broadly held that waivers of statutory protections enacted for the public good and waivers of legislatively created causes of action are invalid and void as against public policy. This principle precludes enforcement of Defendants' arbitration agreement, as it would preclude any other contract to waive plan participants' ERISA cause of action.

5. AAJ believes that this added perspective will assist the Court in addressing an important issue raised by the parties in this case.

For the foregoing reasons, AAJ respectfully requests that this Court grant this Motion and accept the attached *amicus curiae* brief for consideration in this case.

Dated: October 4, 2024

Respectfully submitted,

/s/ *Jeffrey R. White*

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae
American Association for Justice

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LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(415) 986-1400
lori.andrus@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
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Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1-1, 26.1-2, 28-1(b), and 29-2, undersigned counsel for *amicus curiae* gives notice of the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

A360 Holdings LLC (Appellant)

A360 Profit Sharing Plan (Appellee)

American Association for Justice (Amicus Curiae)

Argent Financial Group, Inc. (100% owner of Argent Trust Company)

Argent Trust Company (Appellant)

Bailey III, Harry B. (Counsel for Appellees)

Berman Fink Van Horn P.C. (Counsel for Appellants)

Brinkley, Scott (Appellant)

Calvert, Honorable Victoria M. (United States District Court Judge)

Dearing, Lea C. (Counsel for Appellants)

Dunn Harrington LLC (Counsel for Appellees)

Edelman, Marc R. (Counsel for Appellees)

Engstrom, Carl (Counsel for Appellees)

Engstrom Lee (Counsel for Appellees)

Fink, Benjamin (Counsel for Appellants)

Foley & Lardner (Counsel for Appellants)

Harrington III, Robert Earl (Counsel for Appellees)

Herring, Shadrin (Appellee)

Hill, Brandon J. (Counsel for Appellees)

Holland & Knight LLP (Counsel for Appellant Argent Trust Company)

House, Bryan B. (Counsel for Appellants)

JonesGranger (Counsel for Appellees)

Kovelesky, Tina, (Appellee)

Lee, Jennifer Kim (Counsel for Appellees)

McCarthy, Chelsea Ashbrook (Counsel for Appellant Argent Trust Company)

Origin Bancorp, Inc. (Publicly traded company that owns more than 10% of common stock of Argent Financial Group Inc.)

Ridley, Eileen R. (Counsel for Appellants)

Morgan & Morga (Counsel for Appellees)

Shapiro, Gerald (Appellant)

Shoemaker, Paula Mays (Appellee)

Thomson, Mark E. (Counsel for Appellees)

Wenzel Fenton Cabassa, P.A. (Counsel for Appellees)

Williams, Eboni (Appellee)

White, Jeffrey R. (Counsel for Amicus Curiae)

Wozniak, Todd D. (Counsel for Appellant Argent Trust Company)

To the best of the undersigned counsel's knowledge, no other persons, association of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

Respectfully submitted this 4th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Other Authorities

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including ERISA actions. Throughout its 78-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ addresses this Court with respect to an issue of crucial concern to all Americans for whom Congress has enacted statutory rights along with civil enforcement means to protect those rights—not only in ERISA, but also in many other consumer protection and worker protection laws. Those protections ring hollow if millions of American workers and their families have no forum to effectively vindicate their statutory rights. AAJ urges this Court to reject the notion that companies should be free to use their dominant position to privately contract their way out of the accountability Congress has legislated for the public good.

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[1] No counsel for any party authored this brief in whole or in part. Apart from the *amicus curiae*, no person, party, or party's counsel contributed money intended to fund the brief's preparation and submission.

SUMMARY OF ARGUMENT

1. The validity and enforceability of contract waivers of statutory rights is an issue of great importance far beyond the ERISA plan in this case. Many workers and consumers depend upon the rights Congress has legislated for their protection. Those rights ring hollow if companies and individuals are allowed to privately contract their way out of accountability. AAJ urges this Court to reject the notion that the Federal Arbitration Act (FAA) requires enforcement of such waivers, which have long been viewed as invalid as a matter of general contract law.

The A360 retirement plan in this case expressly prohibits participants from exercising their right under ERISA § 502(a)(2) to bring a representative suit on behalf of the plan to recover losses to the plan due to breach of fiduciary duty. This prospective waiver flatly violates the Supreme Court's rule against arbitration provisions that prevent parties from effectively vindicating their statutory rights. Individual actions for losses limited to individual accounts do not permit participants to effectively vindicate their right to sue for plan-wide relief on behalf of the plan.

Defendants' arguments that the effective vindication doctrine does not apply to the A360 retirement plan are not persuasive. First, Defendants attempt to characterize the right to bring a representative suit as procedural in the same manner that the right to bring class actions or collective actions is procedural, and therefore waivable. The Supreme Court has squarely addressed this fallacious argument. As

the Court has stated, class and collective action procedures allow plaintiffs to aggregate their substantive law claims; eliminating those procedural mechanisms does not alter the claims' substantive merits. Precluding representative actions, by contrast, eliminates the litigant's substantive right entirely. Additionally, class action waivers are enforced under the FAA because the formal protections needed to protect absent claimants undermine the simplicity and informality of arbitration. Representative suits do not present those obstacles, and so the FAA does not require enforcement of waivers of representative suits.

Second, the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates., Inc*., 552 U.S. 248 (2008), did not eliminate an ERISA plan participant's right to bring a representative lawsuit on the plan's behalf for plan-wide relief. *LaRue* held that § 502(a)(2) permits suits for the loss of value of plan assets in individual accounts for participants in defined contribution plans. The Court made clear that this remedy is *in addition to*, not instead of, suits seeking plan-wide relief.

In short, the effective vindication doctrine is directly applicable to the A360 Plan in this case, which is consequently invalid and unenforceable.

2. The effective vindication doctrine is firmly grounded in the long-recognized principle of general contract law that waivers of statutory protections enacted for the public good are void and unenforceable. Congress enacted the FAA as an "equal treatment rule" to make agreements to arbitrate as enforceable as any other contract,

but not more so; Section 2 authorizes courts to reject arbitration agreements on grounds that would render "any contract" unenforceable. 9 U.S.C. § 2.

One such common-law defense that long predates the FAA is that private contracts will not be enforced to undermine statutory rights the legislature has enacted for the public good. For example, this general contract defense was applicable in connection with "exemption acts" that protected certain property from attachment or seizure due to debt default. Lenders and sellers responded by requiring borrowers and installment buyers to waive those statutory protections.

Courts in many states held such contractual waivers invalid and unenforceable on public policy grounds. As those common-law judges explained, enforcing such waivers would allow private parties with dominant bargaining power to render legislation enacted for the public good ineffective. The Supreme Court's effective vindication doctrine is rooted in this contract-law tradition.

3. Contract waivers of the right to bring a statute-created cause of action have long been deemed invalid and unenforceable, particularly in employer-employee contracts. The tremendous rise in on-the-job deaths and injuries that accompanied the Industrial Revolution gave rise to the development of tort law negligence doctrines. Employers—most notably railroads—persuaded the common-law courts to adopt an "unholy trinity" of defenses: the fellow-servant rule, comparative negligence, and assumption of the risk. To counter these defenses, most state

legislatures enacted Employers' Liability statutes establishing a cause of action for wrongful death or injury to workers due to negligence, including that of a fellow employee. In response, many employers inserted into their employment contracts a waiver of the statutory right to bring an Employers' Liability lawsuit.

Courts around the country invariably held those waivers—including waivers of statutory rights to bring representative lawsuits, such as actions for wrongful death caused by a fellow employee—void and unenforceable as against public policy. The courts' reasoning that public policy must not be outdone by private agreements is as compelling today as it was prior to the FAA's enactment.

ERISA now protects 153 million workers, retirees, and dependents whose financial future depends upon the effectiveness of the civil enforcement scheme Congress put in place. This Court should not allow companies and individuals who control retirement plans to write their own immunity into plan documents.

ARGUMENT

I. THE FAA PRESERVES PLAINTIFFS' RIGHT TO EFFECTIVELY VINDICATE THEIR FEDERAL STATUTORY RIGHTS, INCLUDING THE RIGHT TO RECOVER PLAN LOSSES DUE TO BREACH OF FIDUCIARY DUTY.

A. The Waiver Provisions Inserted into the ERISA Plan Deprive Participants and Beneficiaries of the Statutory Rights Congress Enacted for Their Protection.

Plaintiffs in this case, participants in the A360, Inc. Employee Stock Ownership Plan ("Plan"), allege that the Plan's fiduciaries arranged the sale of the

Plan's A360 stock below its fair market value, resulting in profits for themselves and losses to the Plan and its beneficiaries. *Williams v. Shapiro*, No. 1:23-cv-03236-VMC, 2024 WL 1208297, at *13 (N.D. Ga. Mar. 20, 2024) [hereinafter "Dist. Ct. Op."]. They brought suit under ERISA §§ 502(a)(2) and 409(a), seeking, inter alia, to recover those losses on behalf of the Plan. Defendants moved to compel arbitration based on the Third Amendment to the plan document (adopted on the day the Plan was terminated), which requires that claims not only be arbitrated, but also "brought solely in the Claimant's individual capacity and not in a representative capacity or on a class, collective, or group basis." *Id.* at *8.

The district court denied Defendants' motion, holding the arbitration and waiver provision "invalid under the effective vindication doctrine." *Id.* at *35. Because the provision by its terms was not severable, the court denied enforcement of the arbitration agreement in its entirety. *Id.* at *36. The application of that doctrine is central to Defendants' appeal to this Court.

The Employee Retirement Income Security Act (ERISA) of 1974, Pub. L. 93-406, Title I, § 502, 88 Stat. 891 (codified as amended at 29 U.S.C. § 1132) provides retirement plan participants broad remedies for breach of fiduciary duty. Under ERISA § 502(a)(2), a participant may sue "for appropriate relief under § 409," *id.*, which, in turn, makes fiduciaries "personally liable to make good to [the] plan *any* losses to the plan." ERISA § 409, 88 Stat. at 886 (codified as amended at 29 U.S.C.

§ 1109). Importantly, "actions for breach of fiduciary duty" are "brought in a representative capacity on behalf of the plan as a whole." *See Mass. Mut. Life. Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985).

The Plan, however, expressly bars plaintiffs from bringing such a representative suit action for reimbursement to the plan of plan-wide losses. The district court correctly held that this attempt to waive Plaintiffs' statutory rights violated the "effective vindication" doctrine.

For much of the twentieth century, the prevailing view held that agreements to arbitrate federal statutory claims were not enforceable under the FAA. *See, e.g.*, *Wilko v. Swan*, 346 U.S. 427 (1953). In 1985, the Court changed its view, explaining that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," but merely "submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court cautioned that the FAA permits enforcement of arbitration agreements only "so long as the prospective litigant *effectively may vindicate its statutory cause of action* in the arbitral forum." *Id.* at 637 (emphasis added). In that way, "the statute will continue to serve both its remedial and deterrent function." *Id.* If the arbitration agreement "operated . . . as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against

public policy." *Id.* at 637 n.19.

This Court can affirm on that basis alone. The Supreme Court has made clear that its effective vindication doctrine "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights." *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013). *See also Hudson v. P.I.P. Inc.*, 793 F. App'x 935, 938 (11th Cir. 2019). That is precisely what the Third Amendment to the Plan does in this case.

B. The Right to Bring a Representative Action on Behalf of the Plan Is Not Procedural or Waivable.

Defendants contend that the effective vindication doctrine does not apply to their waiver provision because Plaintiffs' § 502(a)(2) right to bring a representative lawsuit is not substantive, but merely procedural. Brief of Defendants-Appellants ("Defs.' Br.") 5, 21. This is plainly wrong.

Representative causes of action are defined by substantive law. *E.g.*, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 227 (1986) (holding that state substantive law applied to wrongful death on the high seas action); *City of Cambridge Ret. Sys. v. Ersek*, 921 F.3d 912, 918 (10th Cir. 2019) (holding that the sufficiency of shareholders' derivative action complaint "depends upon the substantive law of the state"). *See also Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 657 (2022) (referring to representative suits as "part of the basic architecture of much of substantive law"). The representative suit authorized by Congress in ERISA is

likewise substantive and serves both a "remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637.

Defendants argue instead that representative actions belong in the same basket as class actions or collective actions. Defendants insist that Plaintiffs are "seeking to have a class action certified, but that is a procedural right that can be waived." Defs.' Br. 27 (citing *Italian Colors*, 570 U.S. at 234–35); *see also id.* at 24 (referring to the Plan provision as a "class waiver" or waiver of "collective action"); *id.* at 42 ("Defendants urge this Court to find that Plaintiffs do not have a nonwaivable, statutory right to seek monetary relief on behalf of absent Plan participants or their Plan accounts.").

At the outset, it should be clear that Plaintiffs' class action claims are permissible, but not because the *class action* waiver is invalid; They are permissible because the ban on *representative* suits is invalid and by its terms nonseverable, rendering the entire arbitration procedure "null and void." Dist. Ct. Op. at *9–10. Defendants are unhappy with a litigation problem of their own making.

More to the point, the right to bring a representative action simply does not belong in the same basket as a right to pursue claims on a class action or collective action basis. The Court in *American Express Co. v. Italian Colors Restaurant* made clear that the right to class certification by meeting the requirements of Federal Rule Civil Procedure 23 is procedural because the rule does not vest claimants with any

substantive right. 570 U.S. at 236. Class actions are simply procedural mechanisms for aggregating a multitude of persons with similar substantive claims in a single civil action, and an individual could obtain the same relief even if the class action procedure were unavailable. *Id.* at 236–37. The waiver in this case, by contrast, prohibits representative actions as well as individual suits seeking plan-wide relief, making that substantive remedy unavailable entirely.

Additionally, as the Court made clear, representative suits are not like class actions or collective actions because they do not interfere with the FAA's informality. Class action waivers are enforceable because arbitration on a class or collective basis would transform the "individualized and informal . . . arbitration process" into the "litigation it was meant to displace." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 508–09 (2018). *See also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011) (stating that parties may agree to arbitrate using class action procedures, but that "is not arbitration as envisioned by the FAA").

The Court explained that the aggregation of a multitude of individual claims, with the procedural formalities necessary to protect the rights of the numerous absent plaintiffs who will be bound by the outcome, "interfere[s] with a fundamental attribute of arbitration." *Epic Sys.*, 584 U.S. at 508. In the Court's view, requiring an arbitration to comply with class action procedures would threaten to mire the process in a "procedural morass." *Concepcion*, 563 U.S. at 348; *Italian Colors*, 570 U.S. at

238. Because they are multi-party, collective proceedings share those same risks. *Epic Sys.*, 584 U.S. at 508.

By contrast, representative actions pose none of these problems. The Court addressed precisely this issue in *Viking River Cruises, Inc. v. Moriana*. There, the plaintiff sued her former employer under the Private Attorney General Act (PAGA), alleging that her final wages violated provisions of the California Labor Code. 596 U.S. at 653. The employer moved to compel arbitration under her employment agreement, which provided that the parties "could not bring any dispute as a class, collective, or representative action under PAGA." *Id.* at 639.

Justice Alito, writing for the majority, noted that California courts viewed PAGA actions as a "type of *qui tam* action," *id.* at 644, that is, a "representative action" in which the employee-plaintiff sues as an "agent or proxy" of the State. Unlike the class-action plaintiff, who "represents a multitude of absent individuals," the PAGA plaintiff "represents a single principal." *Id.* at 655. As a result of this structural difference, representative "PAGA suits exhibit virtually none of the procedural characteristics of class actions," designed to protect absent class members. *Id.* Instead, it is the type of one-on-one representative action that is "part of the basic architecture of much of substantive law," like shareholder-derivative

suits and wrongful-death actions. *Id.* at 657.[2] The Court concluded that the FAA does not "mandate the enforcement of waivers of representative capacity." *Id.*[3]

Plaintiff's ERISA action in this case is likewise a representative action by a single claimant on behalf of a single party, the Plan. The FAA does not require a court to enforce a purported waiver of Plaintiff's right to bring that suit.

C. ERISA Does Not Bar a Plan Participant from Bringing a Representative Suit on Behalf of the Plan to Redress the Plan's Losses.

Defendants also contend that the effective vindication doctrine is inapplicable because, following the Court's decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), an ERISA participant no longer has a right to bring a representative suit on behalf of the plan as a whole. Rather, "a participant suing to remedy the harm caused by a fiduciary breach can pursue the ERISA § 502(a)(2) claim on behalf of her individual plan account *only*." Defs.' Br. 27 (emphasis added).

It is plainly not so. The right to bring a representative action seeking plan-

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[2] The Court also noted, relevant to this case, that "although the statute gives other affected employees a future interest in the penalties awarded in an action, that interest does not make those employees 'parties' in any of the senses in which absent class members are." *Id.*

[3] Plaintiff also sought penalties under PAGA based on violations of the Labor Code involving other employees. The Court stated that such joinder of multiple claims *was* similar to class action procedure, and the FAA required enforcement of waivers of such PAGA actions. Because California law did not permit separating the representative from non-individual claims, the state's broad ban on waivers of PAGA actions could not stand. *Id.* at 662–63.

wide relief remains a substantive right under ERISA §§ 502(a)(2) and 409(a). The *LaRue* Court held that a plaintiff seeking to recover losses to their own account due to a breach of fiduciary duty is cognizable under § 502(a)(2), separate from and *in addition to* the remedy of plan-wide relief previously recognized by the Court in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985).

In *Russell*, the plaintiff was a participant in a defined benefit plan. *Id.* at 148. She alleged that the fiduciary improperly processed her claim for disability benefits, causing a significant delay in her receipt of the promised benefit amount, and consequential damages. *Id.* at 137–38. Justice Stevens, writing for the Court, held that § 502(a)(2) provides "remedies that would protect the entire plan, rather than with the rights of an individual beneficiary." *Id.* at 142. Recovery of Russell's consequential damages would not "inure to the benefit of the plan as a whole." *Id.* at 140.

By the time the Court decided *LaRue*, the "landscape ha[d] changed." 552 U.S. at 254. Mr. LaRue was a participant in a defined contribution plan. He had an individual account, and his benefit was determined by the value of the stocks in that account. *Id.* at 250–51. He alleged the fiduciary's failure to carry out his investment directions caused his account to lose value. The Court, again through Justice Stevens, held that § 502(a)(2) "authorize[s] recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.* at 256.

Nowhere did the Court suggest that a plan participant could no longer sue to recover losses to the "entire plan." *Id.* at 254. Rather, the *LaRue* Court *expanded* its view of the remedies available under § 502(a)(2) to include losses to a small portion of the plan assets in a single account, as well as losses to the plan as a whole. *Id.* at 253. The Court made clear that either remedy could be pursued in a representative lawsuit. *Id.* at 256 (Whether a fiduciary breach diminishes plan assets payable to all participants and beneficiaries, or only to persons tied to particular individual accounts, it creates the kind of harms that concerned the draftsmen of § 409.").

Plainly, the contractual waiver at issue is invalid and unenforceable because it prevents participants and beneficiaries from effectively vindicating their explicit ERISA right to bring a representative lawsuit to recover losses to the entire A360 Plan.

II. THE COMMON LAW OF CONTRACTS HAS LONG RECOGNIZED THAT CONTRACTUAL WAIVERS OF STATUTORY PROTECTIONS ENACTED FOR THE PUBLIC GOOD ARE VOID AND UNENFORCEABLE.

Defendants largely discount or ignore entirely the plain meaning of the Supreme Court's pronouncement that if an arbitration provision operated "as a prospective waiver of a party's right to pursue statutory remedies," it would be invalid and unenforceable under the FAA. *Mitsubishi*, 473 U.S. at 637 n.19. Defendants instead vigorously insist that "liberal federal policy favor[s] arbitration agreements," Defs.' Br. 15, 29–30, and the arbitration agreement—including the

waiver of the right to bring representative suits—must be "enforced as written." *Id.* at 15, 19, 21.

These general statements cannot bear the weight Defendants would have them support in this case. Congress did not mandate arbitration at all costs. Congress enacted the FAA to make agreements to arbitrate disputes "as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). *See also Epic Sys.*, 584 U.S. at 507 ("[Section 2 of the FAA] establishes a sort of 'equal-treatment' rule for arbitration contracts"); *Kindred Nursing Ctrs. L. P.* v. *Clark*, 581 U.S. 246, 251 (2017) (same). The FAA enforces agreements "to settle by arbitration"; it must not be gamed to shut the doors of both the courthouse and the arbitral forum to legitimate claimants. Defendants seek precisely that outcome in this case. 9 U.S.C. § 2.

The district court correctly ruled that Defendants' contractual waiver of the right to bring a representative lawsuit is invalid and unenforceable under the Supreme Court's "effective vindication" doctrine. Dist. Ct. Op. at *35.

The Supreme Court did not invent this doctrine out of whole cloth. As the authorities relied upon by the Court suggest, the doctrine is firmly rooted in the long-settled principle of contract law that, as a matter of "public policy," courts will not enforce contracts that waive statutory legal rights. *See Mitsubishi*, 473 U.S. at 637 n.19 (citing *Redel's Inc. v. Gen. Elec. Co.*, 498 F.2d 95, 99 (5th Cir. 1974) (holding

that inserting a liability waiver in franchise agreement "to bar private antitrust actions arising from subsequent violations is clearly against public policy"); *Gaines v. Carrollton Tobacco Bd. of Trade, Inc.*, 386 F.2d 757, 759 (6th Cir. 1967) (holding that an agreement "to waive [treble damages for] future violations of the antitrust laws, would be invalid on public policy grounds"); and *Fox Midwest Theatres v. Means*, 221 F.2d 173, 180 (8th Cir. 1955) (holding that a contract provision "to absolve one party from liability for future violations of the anti-trust statutes against another would to that extent be void as against public policy")).

Finally, the *Mitsubishi* Court's footnote cites to 15 *Williston on Contracts* § 1750A (3d ed. 1972). Professor Williston there summarized the common-law principle that a contract provision that has the effect of conferring complete immunity on one party will be held void if the agreement is (1) violative of a statute, (2) contrary to a substantial public interest, or (3) gained through inequality of bargaining power. *Id.* This anti-waiver principle of the common law of contracts has a long history. Congress 'legislate[s] against a background of common-law adjudicatory principles.'" *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)), and "Congress is presumed to be knowledgeable about existing case law pertinent to any legislation it enacts." *United States v. Bryant*, 996 F.3d 1243, 1259 (11th Cir. 2021) (quoting *United States v. Phillips*, 19 F.3d 1565, 1581 (11th Cir. 1994)). In

this instance, contract law prior to the FAA recognized as a general principle that contract waivers of rights conferred by statute are void and unenforceable.

The mid-nineteenth century to early- twentieth century could be called the "freedom of contract era." The dominant view postulated that all risk, whether of economic loss, personal injury, or even death, could be managed by the marketplace and reflected in the contractually agreed price of goods or labor. Ryan Martins, Shannon Price, & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 Cardozo L. Rev. 1265, 1269–75 (2020). *See also* Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 163 (1953) (stating that the "period intervening between the beginning in America of the railway epoch and the final enactment of the Federal Employers' Liability Act in 1908, saw the rise and fall of *laissez faire*"). Nevertheless, contract law did not give free license for abusive practices seeking private profit at the expense of public good.

For example, the California legislature commanded in 1872 that "a law established for a public reason cannot be contravened by a private agreement." Cal. Civ. Code § 3513 (West). Under this anti-waiver rule, the California Supreme Court explained, "there can be no effectual waiver by the parties of any restriction established by law for the benefit of the public." *Grannis v. Super. Ct. of S.F.*, 146 Cal. 245, 253 (1905). *See* Myriam Gilles & Gary Friedman, *Unwaivable: Public*

Enforcement Claims and Mandatory Arbitration, 89 Fordham L. Rev. 451 (2020) (tracing the nineteenth-century origins of California's anti-waiver laws).

Legislatures around the country enacted legislation during this period to protect vulnerable individuals from the consequences of unfair contracts or simple misfortune, and courts around the country invalidated contract provisions purporting to waive the protections of those enactments. One example involved "exemption acts," statutes that exempted certain property (such as household goods) from seizure or attachment for non-payment of debts. Lenders and vendors responded by inserting into loan agreements and installment sales agreements provisions in which the borrower/buyer purportedly waived these statutory protections. Courts in many states held such contractual waivers void as against public policy. *E.g.*, *Recht v. Kelly*, 82 Ill. 147, 148 (1876) (citing cases). As the Supreme Court of Florida declared:

> In view of the recognized policy of the States in enacting exemption laws and of the practically universal concurrence of the authorities on the identical question, our conclusion is that the "waiver" of the benefit and protection of the exemption laws contained in this note is not valid to defeat a claim of exemption.

Carter's Adm'rs v. Carter, 20 Fla. 558, 570–71 (1884).

Similarly, the Supreme Court of Tennessee, surveying the decisions from other jurisdictions, concluded that "the main current of judicial enunciation is against the validity of such contracts." *Mills v. Bennett*, 30 S.W. 748, 749 (Tenn. 1895). Such a private contract "contravenes a sound public policy, and, if enforced,

abrogates the exemption statutes." *Id.* The New York Court of Appeals agreed, holding waivers of the statutory exemptions invalid as "inconsistent with the public policy which the legislative act manifested." *Crowe v. Liquid Carbonic Co*., 102 N.E. 573, 575 (1913). Courts reasoned, pragmatically, that judicial enforcement of such provisions would invite creditors to insert them into every contract, with the result that "the exemption law of the state would be virtually obsolete." *Moxley v. Ragan*, 73 Ky. 156, 158 (1874).

The Supreme Court's "effective vindication" doctrine is firmly rooted in the broader common-law rule that waivers of statutory protections enacted in the public interest are void. That general principle, which stands as a defense to the enforcement of "any contract," renders the A360 Plan waiver of Plaintiffs' right to bring a representative action seeking plan-wide relief unenforceable. 9 U.S.C. § 2.

III. CONTRACTUAL WAIVERS OF THE RIGHT TO BRING A STATUTORY CAUSE OF ACTION HAVE HISTORICALLY BEEN HELD TO BE VOID AND UNENFORCEABLE, PARTICULARLY IN EMPLOYMENT CONTRACTS.

An even closer analog to the present case involves the general principle that courts will refuse to enforce provisions—particularly in employment contracts—that purport to show one party has waived the right to assert a statutory cause of action that the legislature has put in place to protect such parties. Such overreaching "agreements" have long been widely condemned as void and unenforceable—in contracts having nothing to do with arbitration and long before the FAA—as a matter

of public policy.

From 1870 to 1910, industrialization transformed the United States into "the world's premier economic power," bringing progress and higher living standards to Americans nationwide. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1748 (1981). But the "dark and bitter" underside to this story is told in the sudden increase of workers who were killed and injured by huge machines lacking basic safety protections. *See generally* Griffith, *supra*, at 163. "In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001).

Much of the struggle for accountability for on-the-job accidents–and, therefore, greater workplace safety—involved railroad workers. During this period, railroads dominated all facets of the American economy, and the perils faced by railroad workers were excessive, even by the norms of the time. The rates of death and serious injury to railroad workers were "astronomical," accounting for an estimated sixty-four percent of all occupational fatalities. Walter Licht, *Working for the Railroad: The Organization of Work in the Nineteenth Century* 124–29 (1983). In 1890, one railroad worker in every three hundred was killed on the job. Among

freight railroad brakemen, one in every hundred died in work accidents *each year*. Witt, *supra*, at 694–95. *See also* Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 Harv. J. on Legis. 79, 81 (1992) ("The injury rate among railroad employees in the late nineteenth century was horrific—the average life expectancy of a switchman was seven years, and a brakeman's chance of dying from natural causes was less than one in five.").

Workers and their families could bring personal injury lawsuits, but the railroads and their well-paid legal departments also dominated the development of tort law. As one scholar summarized, the "principal thrust of late nineteenth century doctrines was to restrict, rather than to expand, the compensatory function of the law of torts." G. Edward White, *Tort Law in America: An Intellectual History* 61 (1980).

The most effective defenses that the railroads' lawyers persuaded the common-law courts to adopt were the "unholy trinity" of contributory negligence, the fellow-servant doctrine, and assumption of the risk. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 80, at 569 (5th ed. 1984). *See* Lawrence M. Friedman, *A History of American Law* 412–14 (1973) (tracing the history of these doctrines). As a result, at a time when the number of workers killed and injured on the job was scandalously high and rising, "a large proportion of industrial accidents went uncompensated." *Haman v. Allied Concrete Prod., Inc.*, 495 P.2d 531, 534 (Alaska 1972) (citing Arthur Larson, *Law of Workmen's Compensation* § 4.50, at

28–30 (1968)). The broad application of the "unholy triangle" of defenses "approached the position that corporate enterprise would be flatly immune from actions sounding in tort." Friedman, *supra*, at 417.

Lawyers representing injured workers attempted to counter these defenses, but labor's advocates had greater success in statehouses than in courthouses. "Beginning with the Act of the Georgia legislature of 1855 abrogating the fellow-servant defense for railway companies, numerous and other similar Acts cutting down defenses of the employer were enacted in some 25 States prior to enactment of any Workmen's Compensation Acts." *Kamanu v. E.E. Black, Ltd.*, 41 Haw. 442, 451–52 (1956); *see also Haman*, 495 P.2d at 533–34.[4]

While their statutory text varied from state to state, the purpose and effect of these Employers' Liability statutes was to bestow upon employees (in some instances only railroad workers; in others, workers more generally) a right to sue their employers for personal injuries or deaths caused by co-employees. Some statutes also provided a negligence cause of action that limited or eliminated the common-law defenses of contributory negligence and assumption of the risk. *See generally* Wex S. Malone, *American Fatal Accident Statutes-Part I: The Legislative*

[4] The House Committee on the Judiciary, in connection with its consideration of the proposed Federal Employers' Liability Act, issued a report reviewing the elements of the various state Employers' Liability statutes and reprinting the text of the relevant laws of forty-one states. *See* Liability of Employers, H. Rep. No. 1386, 60th Cong., 1st Sess. 30–72 (1908).

Birth Pains, 4 Duke L.J. 673, 710–18 (1965).

The Supreme Court upheld the constitutionality of such legislation, holding in *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888), that the Kansas statute—which imposed liability on railroads for injury caused by a fellow employee—did not amount to a "taking" under the Fourteenth Amendment because the company had no property interest in the enforcement of such prospective waivers. *Id*. at 208.

Employers and their legal departments responded with "widespread attempts . . . to contract themselves out of the liabilities the acts were intended to impose." *Duncan v. Thompson*, 315 U.S. 1, 6 (1942). They did so by inserting into their employment contracts provisions whereby the worker "agreed" to waive the right to bring an injury lawsuit based on the negligence of a fellow servant. And the states, in turn, "adopted measures invalidating agreements [that] attempted to exempt employers from liability." *Id.*

Invariably, courts around the country held such prospective waivers of workers' statutory right to sue void and unenforceable. As one commentator noted at the time, both the "modern view" and the "weight of authority" in the United States hold that "Contracts to waive the protection afforded by Employers' Liability Statutes against negligence of fellow-servants . . . are held to be against public policy." *Master and Servant — Duty of Master to Provide Safe Appliances — Contracts Limiting Liability*, 18 Harv. L. Rev. 316, 317 (1905).

A leading decision by the Ohio Supreme Court is typical in its reasoning and temperament:

> [I]t only remains for us to inquire whether railroad companies may ignore or contravene [public] policy by private compact with their employes [sic], stipulating that they shall not be held to a liability for the negligence of their servants which public policy demands should attach to them. The answer is obvious. Such liability . . . has its reason and foundation in a public necessity and policy which should not be asked to yield or surrender to more private interests and agreements.

Lake Shore & M.S.R. Co. v. Spangler, 8 N.E. 467, 469–70 (Ohio 1886). Similarly, in *Mumford v. Chicago, R.I. & P.R. Co.*, 104 N.W. 1135, 1137–38 (Iowa 1905), the Supreme Court of Iowa refused on public policy grounds to enforce a waiver of the right to bring an Employers' Liability cause of action for job injuries caused by the negligence of a coworker. To allow prospective waiver of the statute's protections would render the legislature "so seriously crippled that it is well–nigh impotent." *Id.* at 1138. The Iowa court rejected defendant's reliance on "freedom of contract" and on the then-recent decision in *Lochner v. New York*, 198 U.S. 45 (1905):

> [L]iberty under law [is] not absolute license. It is freedom frequently restrained by law for the common good. Surely a corporation, . . . may be compelled to respond in damages for the negligence of its employees, notwithstanding any contract it may make or attempt to make relieving itself from such responsibility or restricting its liability therefor.

Id.

Significantly for this case, some states creating a representative cause of action for the wrongful death of worker incorporated the general contract anti-waiver

principle into the legislation itself. For example, the California Assembly provided in 1885:

> When death . . . results from an injury to an employee . . . the personal representative of such employee shall have a right of action therefor against such employer, and may recover damages in respect thereof for and on behalf and for the benefit of the [survivors]. . . . Any contract or agreement, express or implied, made by any such employee to waive the benefits of this section, or any part thereof, shall be null and void."

Cal. Civ. Code § 1970 (West). *See also Hancock v. Norfolk & W. Ry. Co.*, 32 S.E. 679, 680 (N.C. 1899), upholding the validity North Carolina's statutory cause of action for the death of a railroad employee due to the negligence of a coworker, including the provision that "any contract or agreement, express or implied, made by any such employee, to waive the benefit of that law shall be void." *Id*. at 680.

When Congress enacted the Federal Employers' Liability Act (FELA) of 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. § 51 *et seq.*), it included both a statutory cause of action for injured railroad workers and an expansive version of the common-law anti-waiver rule: "Any contract, . . . the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." 45 U.S.C. § 55.

Ultimately, the states placed the right to compensation for job-related deaths and injuries entirely beyond the reach of contractual waivers by the universal adoption of workers' compensation statutes. Martins et al., *supra*, at 1276. The Supreme Court's effective vindication doctrine, which condemns prospective

waivers of the right to bring causes of action established by Congress, is a reaffirmation of this historical and well-settled ground for invalidating "any contract." 9 U.S.C. § 2.

CONCLUSION

Congress enacted ERISA to put an end to the draining of workers' retirement savings due to mismanagement and malfeasance. Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, *in* Special Comm. on Aging, U.S. Senate, 98th Cong., 2d Sess., *The Employee Retirement Income Security Act of 1974: The First Decade* 8 (Comm. Print 1984). Currently ERISA plans "cover 153 million workers, retirees, and dependents who participate in private sector pension and welfare plans that hold an estimated $12.8 trillion in assets." Emp. Benefits Sec. Admin., U.S. Dep't of Labor, *EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries* (Oct. 14, 2022), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.

The financial future for millions of workers and their families depends on the effectiveness of ERISA's "comprehensive civil enforcement scheme." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 42 (1987). Defendants ask this Court to allow companies and individuals who control their employees' retirement plans to write their own immunity into plan documents. This Court should not allow private contracting parties to undo the safeguards and protections that Congress has put in

place for the public good.

For the foregoing reasons, AAJ urges this Court to affirm the judgment below.

Dated: October 4, 2024

Respectfully submitted,

/s/ *Jeffrey R. White*

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae
American Association for Justice

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5) because this brief contains 6,492 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Times New Roman type style.

CERTIFICATE OF SERVICE

I, hereby certify that on this day, October 4, 2024, a true and correct copy of the foregoing document was filed with the Clerk of Court and electronically served on counsel of record for all parties using the CM/ECF system of the United States Court of Appeals for the Eleventh Circuit. All participants in this case are registered CM/ECF users.

Date: October 4, 2024

/s/ *Jeffrey R. White*
JEFFREY R. WHITE

ATTACHMENT 2

No. 24-11192

In the United States Court of Appeals for the Eleventh Circuit

EBONI WILLIAMS, *et al.*,

Plaintiffs-Appellees,

v.

ARGENT TRUST COMPANY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:23-cv-03236-VMC

DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION OF AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Todd D. Wozniak
HOLLAND & KNIGHT LLP
1180 West Peachtree Street NW, Suite 1800
Atlanta, GA 30309
404-817-8431
todd.wozniak@hklaw.com

Chelsea Ashbrook McCarthy
HOLLAND & KNIGHT LLP
150 N. Riverside Plaza, Suite 2700

Chicago, IL 60606
chelsea.mccarthy@hklaw.com

Counsel for Defendant-Appellant Argent Trust Company

Bryan B. House
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, Wisconsin 53202
Telephone: 414-297-5554
bhouse@foley.com

Eileen R. Ridley
FOLEY & LARDNER LLP
555 California St., 17th Floor
San Francisco, California 94104
Telephone: 415-438-6469
eridley@foley.com

Counsel for Defendants-Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure and Rules 26.1-1 and 26.1-2 of the Rules of the United States Court of Appeals for the Eleventh Circuit, undersigned counsel for Appellants give notice of the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal:

A360 Holdings LLC, Appellant

A360 Profit Sharing Plan, Appellee

Argent Financial Group, Inc., 100% owner of Argent Trust Company

Argent Trust Company, Appellant

Bailey III, Harry B., Counsel for Appellees

Berman Fink Van Horn P.C., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Brinkley, Scott, Appellant

Calvert, Honorable Judge Victoria M., United States District Court Judge

Dearing, Lea C., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Dunn Harrington LLC, Counsel for Appellees

Edelman, Marc R., Counsel for Appellees

Engstrom, Carl, Counsel for Appellees

Engstrom Lee, Counsel for Appellees

Fink, Benjamin, Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Foley & Lardner, Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Harrington III, Robert Earl, Counsel for Appellees

Herring, Shadrin, Appellee

Hill, Brandon J., Counsel for Appellees

Holland & Knight LLP, Counsel for Appellant Argent Trust Company

House, Bryan B., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

JonesGranger, Counsel for Appellees

Kovelesky, Tina, Appellee

Lee, Jennifer Kim, Counsel for Appellees

McCarthy, Chelsea Ashbrook, Counsel for Appellant Argent Trust Company

Origin Bancorp, Inc., publicly-traded company, owns more than 10% of common stock of Argent Financial Group Inc.

Ridley, Eileen R., Counsel for Appellants Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC

Morgan & Morgan, Counsel for Appellees

Shapiro, Gerald, Appellant

Shoemaker, Paula Mays, Appellee

Thomson, Mark E., Counsel for Appellees

Wenzel Fenton Cabassa, P.A., Counsel for Appellees

Williams, Eboni, Appellee

Wozniak, Todd D., Counsel for Appellant Argent Trust Company

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3, Appellants make the following disclosures:

Argent Trust Company is a private Tennessee Corporation wholly owned by Argent Financial Group, Inc. No public company is an owner of 10% or more of the stock of Argent Trust Company.

A360 Holdings LLC is a private limited liability company. No public company is an owner of 10% or more of the stock of A360 Holdings LLC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Defendants-Appellants Argent Trust Company, Gerald Shapiro, Scott Brinkley, and A360 Holdings LLC respectfully submit this response in opposition to the Motion of American Association for Justice ("AAJ") for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees. ECF No. 32-1.

A motion for leave to file an *amicus* brief is required to state "(1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b). Specifying a movant's interest allows the Court to evaluate whether it is appropriate to accept the brief—such as "when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997).

The AAJ's brief raises two issues related to the AAJ's interest in the present appeal that warrant the Court denying its leave to file an *amicus* brief. First, the AAJ fails to show it has "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide" because the AAJ's *amicus* brief simply regurgitates arguments already made by Plaintiff-Appellees and

the Department of Labor (the "DOL"). Second, counsel for Plaintiffs-Appellees are members of AAJ who pay membership dues, meaning Plaintiffs-Appellees partially funded AAJ's purported third-party *amicus* brief.

ARGUMENT AND ANALYSIS

AAJ's motion for leave to file its *amicus curiae* brief should be denied. AAJ's brief neither adds to the arguments already before this Court nor is AAJ impartial in its relationship to Plaintiffs-Appellees.

I. AAJ's *Amicus* Brief Adds Nothing New.

AAJ does not assert new arguments or additional perspective whereby it contributes something not already before the Court, as it must to satisfy Rule 29(b). The thrust of AAJ's *amicus* brief is the same argument made by both Plaintiffs-Appellees and the Department of Labor who has already filed an *amicus* brief: that the "effective vindication doctrine is directly applicable to the A360 Plan, which is consequently invalid and unenforceable" and that waivers of statutory rights are void and unenforceable. (*Compare* ECF No. 32-2 ("AAJ *Amicus* Brief") at 2-5 *with* ECF No. 26 ("Plaintiffs-Appellees Brief") at 12-14.) This is simply a rehashing of Plaintiffs-Appellees' arguments. AAJ also relies on the same legal authorities of Plaintiffs-Appellees and the DOL, demonstrating that the *amicus* brief is "essentially duplicating" Plaintiffs-Appellees and the DOL's brief. *See Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003) (noting that a judge will

deny permission to file an amicus brief that essentially duplicates a party's brief). For example, AAJ relies on the following authorities also relied upon by Plaintiffs-Appellees and the DOL: *Am. Exp. Co. v. Italian Colors Rest.*, *AT&T Mobility LLC v. Concepcion*, *Epic Sys. Corp. v. Lewis*, *Hudson v. P.I.P., Inc.*, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, *Mass Mut. Life Ins. Co. v. Russell*, *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.*, and *Viking River Cruises, Inc. v. Moriana*. This overlap in authorities demonstrates the true nature of AAJ's duplicative brief, which merely rehashes Plaintiffs-Appellees' arguments and improperly gives Plaintiffs-Appellees more pages to put ink to paper. *See Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) ("[A]micus briefs are often used as a means of evading the page limitations on a party's briefs.") (citation omitted).

A multitude of reasons exist to deny a duplicative *amicus* brief: "judges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process." *Id.* (citation omitted). Given that AAJ's *Amicus* brief does not advance the matters before this Court and that the DOL has

already filed an *amicus* brief addressing the same issues the AAJ seeks to address, AAJ's motion for leave should be denied.

II. Counsel For Plaintiffs-Appellees At Least Partially Funded AAJ's *Amicus* Brief.

Additionally, pursuant to Fed. R. App. P. 29(a)(2), AAJ's brief must include a statement that "indicates whether . . . a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief . . . ." AAJ's statement is found in footnote 1 of its *Amicus* brief: "No counsel for any party authored this brief in whole or in part. Apart from the *amicus curiae*, no person, party, or party's counsel contributed money intended to fund the brief's preparation and submission."

Yet, Plaintiffs-Appellees' counsel Engstrom Lee and Morgan & Morgan are both dues paying members of AAJ, a self-described "plaintiff trial bar." (*See* Decl. of Chelsea Ashbrook McCarthy at Exs. 1– 2; ECF No. 32-1 at ¶ 1.) The amici fail to mention that both law firms pay membership dues to the AAJ. Under these circumstances, the *amicus* brief is tainted by the financial interests of counsel for Plaintiffs-Appellees. *See Glassroth*, 347 F.3d at 919 (finding that an amicus brief should not be underwritten by a party and discouraging work done by parties in connection with supporting amicus briefs).

CONCLUSION

For all these reasons, this Court should deny AAJ's motion for leave.

October 14, 2024

Respectfully submitted,

ARGENT TRUST COMPANY

By: */s/ Chelsea Ashbrook McCarthy*

Chelsea Ashbrook McCarthy
HOLLAND & KNIGHT LLP
150 N. Riverside Plaza Suite 2700
Chicago, Illinois 60606
Telephone: 312-715-5768
chelsea.mccarthy@hklaw.com

Todd D. Wozniak
HOLLAND & KNIGHT LLP
Regions Plaza
1180 West Peachtree Street NW
Suite 1800
Atlanta, GA 30309
Telephone: 404-817-8500
todd.wozniak@hklaw.com
Georgia Bar No. 777275

GERALD SHAPIRO, SCOTT BRINKLEY, A360 HOLDINGS LLC

By: */s/ Bryan B. House*

Bryan B. House
FOLEY & LARDNER LLP
777 East Wisconsin Ave.
Milwaukee, Wisconsin 53202
Telephone: 414-297-5554
bhouse@foley.com

Eileen R. Ridley
FOLEY & LARDNER LLP
555 California St., 17th Floor
San Francisco, California 94104
Telephone: 415-438-6469
eridley@foley.com

CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this reply brief contains 943 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This reply brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type requirements of Fed R. App. P. 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2302 with a 14-point font named Times New Roman.

/s/ Chelsea Ashbrook McCarthy
Chelsea Ashbrook McCarthy

Counsel for Defendant-Appellant
Argent Trust Company

CERTIFICATE OF SERVICE

This is to certify that the foregoing document has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on October 14, 2024 on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Chelsea Ashbrook McCarthy
Chelsea Ashbrook McCarthy

Counsel for Defendant-Appellant
Argent Trust Company

No. 24-11192

In the United States Court of Appeals
for the Eleventh Circuit

EBONI WILLIAMS, *et al.*,

Plaintiffs-Appellees,

v.

ARGENT TRUST COMPANY, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:23-cv-03236-VMC

DECLARATION OF CHELSEA ASHBROOK MCCARTHY IN SUPPORT OF DEFENDANTS' OPPOSITION TO MOTION OF AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

I, Chelsea Ashbrook McCarthy, pursuant to 28 U.S.C. § 1746, hereby declare under penalty of perjury under the laws of the United States of America that the following is true and correct and based upon my personal knowledge, and if called and sworn as a witness at trial or any other hearing before this Court, I would and could competently testify as set forth herein:

1. I am counsel for Defendant-Appellant Argent Trust Company.

2. On October 14, 2024, I located Exhibits 1 and 2 on the website of the American Association for Justice ("AAJ") showing that Morgan & Morgan and Carl Engstrom are both members of the AAJ.

3. The AAJ website states that members of the organization pay dues which cover 12 months of membership. https://www.justice.org/membership (last visited Oct. 14, 2024).

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

Executed on October 14, 2024 in Chicago, Illinois.

/s/ Chelsea Ashbrook McCarthy
Chelsea Ashbrook McCarthy

Exhibit 1

AMERICAN ASSOCIATION FOR JUSTICE
The Association for Trial Lawyers

FIND A MEMBER - SEARCH RESULTS

Listings 1 - 25 of 40
Return to Main Search

Refine by...

Dan Morgan, Matt Morgan, Ultima Morgan, John Morgan, and Mike Morgan

Morgan & Morgan
Mike Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
P: (407)420-1414 • F: (407)425-8171
W: http://www.forthepeople.com

AAJ LEADERS FORUM®
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Read more info...

Robert F. Wilkins Esq.
Morgan & Morgan
4450 Old Canton Rd., Ste. 200
Jackson, MS 39211
P: (601)503-1654 • F: (601)503-1607
E: rocky@forthepeople.com
W: http://www.forthepeople.com
Admitted to the bar in 1999

AAJ LEADERS FORUM®
BENEFACTOR

Areas of Practice:
Motor Vehicle; Personal Injury; Premises Liability; Prod

Read more info...

C. Todd Alley Esq.
Morgan & Morgan
201 N. Franklin St. 7th Fl.
Tampa, FL 33602-5157
Phone: (813)223-5505
Fax: (813)224-0373
E-mail: talley@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 1981

Antonio Arzola
Morgan & Morgan
201 N. Franklin St.
Tampa, FL 33602
Phone: (813)229-4027
E-mail: ararzola@forthepeople.com
Admitted to the bar in 2022

Patrick A. Barthle II
Morgan & Morgan
201 N. Franklin St., 7th Fl.
Tampa, FL 33602
Phone: (813)229-4023
Fax: (813)222-4708
E-mail: PBarthle@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2012

James Garrett Biggart II
Morgan & Morgan
4401 Belle Oaks Dr., Ste. 300
North Charleston, SC 29405
Phone: (850)445-3036
Fax: (850)270-9006
E-mail: JBiggart@ForThePeople.com
Admitted to the bar in 1994

Bernie Brannan
Morgan & Morgan
216 Summit Blvd., Ste. 300
Birmingham, AL 35223
E-mail: jbrannan@forthepeople.com
Admitted to the bar in 2010

Francesca Kester Burne
Morgan & Morgan
201 N. Franklin St., 7th Fl.
Tampa, FL 33602
Phone: (813)223-5505
E-mail: fkester@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2017

Kevin Butler
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (321)662-2367
E-mail: kbutler@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2015

Preston P. Cahill
Morgan & Morgan
333 W. Vine St., Ste. 1200
Lexington, KY 40507
Phone: (859)899-8791
Fax: (859)899-8812
E-mail: pcahill@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2018

Amira Cheikh-Khalil
Morgan & Morgan
820 Main Ln., Apt. 1145
Orlando, FL 32801
Phone: (407)840-5582
Fax: (407)425-8171
E-mail: amira@forthepeople.com

Web Page: https://www.forthepeople.com/
Admitted to the bar in 2024

Alexander M. Clem
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (407)420-1414
Fax: (407)245-3333
Toll-Free: (800)454-6825
E-mail: aclem@forthepeople.com
Web Page: http://www.forthepeople.com
Admitted to the bar in 1991

Jack T. Cook
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (407)420-6926
Fax: (407)425-8171
E-mail: jcook@forthepeople.com
Web Page: http://www.forthepeople.com
Admitted to the bar in 2011

Andrew Parker Felix Esq.
Morgan & Morgan
20 N. Orange Ave., Ste. 1600
Orlando, FL 32801
Phone: (407)420-1414
Fax: (407)425-8171
E-mail: andrew@forthepeople.com
Web Page: http://www.forthepeople.com
Admitted to the bar in 2003

Erby Fischer
Morgan & Morgan
216 Summit Blvd., Ste. 300
Birmingham, AL 35243
Phone: (205)423-8504
Fax: (205)423-8510
E-mail: efischer@forthepeople.com
Admitted to the bar in 1996

Conor Flynn
Morgan & Morgan
525 NE 4th St.
Gainesville, FL 32601
Phone: (207)710-6323
Fax: (407)425-8171
E-mail: conor.flynn@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2018

J. Matthew French
Morgan & Morgan
200 N. Broadway, Ste. 720
Saint Louis, MO 63102
Phone: (314)955-1032
Fax: (407)425-8171
E-mail: mfrench@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2022

Michael Murphy Gallagher
Morgan & Morgan
5106 Crawford St. Unit A
Houston, TX 77004-5894
Phone: (689)219-2333
E-mail: michaelgallagher@forthepeople.com
Admitted to the bar in 2003

Mark R. Hanson
Morgan & Morgan
1700 Palm Beach Lakes Blvd., Ste. 500
West Palm Beach, FL 33401
Phone: (561)764-2236
Fax: (561)799-5763
Toll-Free: (866)522-6842
E-mail: mark.hanson@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 1986

Robert L. Hendrix
Morgan & Morgan
408 12th St.

Columbus, GA 31901
Phone: (706) 478-1951
Fax: (706) 478-1953
E-mail: RHendrix@ForThePeople.com
Web Page: http://Stottlemyerhendrix.com
Admitted to the bar in 2003

Thomas Joseph Jerla Jr.
Morgan & Morgan
8151 Peters Rd., Ste. 4000
Plantation, FL 33324
Phone: (786)236-7508
E-mail: tjerlajr@forthepeople.com
Admitted to the bar in 2002

Steven J. Jones
Morgan & Morgan
2355 E. Camelback Rd., Ste. 335
Phoenix, AZ 85020
Phone: (716)471-1204
E-mail: steven.jones@forthepeople.com
Web Page: http://www.forthepeople.com/
Admitted to the bar in 2014

Abdul Hameed Khan-Tareen
Morgan & Morgan
1901 Pennsylvania Ave. NW, Ste. 300
Washington, DC 20006
Phone: (202)772-0562
E-mail: akhantareen@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2019

William Lewis
Morgan & Morgan
1700 Palm Beach Lakes Blvd., Ste. 500
West Palm Beach, FL 33401
Phone: (561)227-5859
E-mail: wlewis@forthepeople.com
Admitted to the bar in 2009

Fan Li
Morgan & Morgan
20 N. Orange Ave. Ste. 1600
Orlando, FL 32801
Phone: (407)418-1056
Fax: (954)523-4803
E-mail: fan.li@forthepeople.com
Web Page: https://www.forthepeople.com/
Admitted to the bar in 2015

Listings 1 - 25 of 40

AAJ'S VISION IS JUSTICE FOR ALL.

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777 6th Street, NW, Suite 200, Washington, DC 20001
800.424.2725 202.965.3500

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Exhibit 2

AMERICAN ASSOCIATION FOR JUSTICE
The Association for Trial Lawyers

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Carl Engstrom
Engstrom Lee LLC
323 Washington Ave N., Ste. 200
Minneapolis, MN 55401-1118
Phone: (612)699-4703
E-mail: cengstrom@engstromlee.com
Admitted to the bar in 2014

Listings 1 - 1 of 1

AAJ'S VISION IS JUSTICE FOR ALL.

ATTACHMENT 3

No. 24-11192

In the United States Court of Appeals for the Eleventh Circuit

EBONI WILLIAMS, *et al.*,

Plaintiffs-Appellees,

v.

GERALD SHAPIRO, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia
No. 1:23-cv-03236-VMC (Hon. Victoria Marie Calvert)

REPLY OF AMERICAN ASSOCIATION FOR JUSTICE TO DEFENDANTS-APPELLANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

LORI ANDRUS
President
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(415) 986-1400
lori.andrus@justice.org

JEFFREY R. WHITE
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the American Association for Justice certifies that it is a non-profit organization. It has no parent corporation or publicly owned corporation that owns 10% or more of its stock.

Respectfully submitted this 18th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rules 26.1-1, 26.1-2, 28-1(b), and 29-2, undersigned counsel for *amicus curiae* gives notice of the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

A360 Holdings LLC (Appellant)

A360 Profit Sharing Plan (Appellee)

American Association for Justice (Amicus Curiae)

Argent Financial Group, Inc. (100% owner of Argent Trust Company)

Argent Trust Company (Appellant)

Bailey III, Harry B. (Counsel for Appellees)

Berman Fink Van Horn P.C. (Counsel for Appellants)

Brinkley, Scott (Appellant)

Calvert, Honorable Victoria M. (United States District Court Judge)

Dearing, Lea C. (Counsel for Appellants)

Dunn Harrington LLC (Counsel for Appellees)

Edelman, Marc R. (Counsel for Appellees)

Engstrom, Carl (Counsel for Appellees)

Engstrom Lee (Counsel for Appellees)

Fink, Benjamin (Counsel for Appellants)

Foley & Lardner (Counsel for Appellants)

Harrington III, Robert Earl (Counsel for Appellees)

Herring, Shadrin (Appellee)

Hill, Brandon J. (Counsel for Appellees)

Holland & Knight LLP (Counsel for Appellant Argent Trust Company)

House, Bryan B. (Counsel for Appellants)

JonesGranger (Counsel for Appellees)

Kovelesky, Tina, (Appellee)

Lee, Jennifer Kim (Counsel for Appellees)

McCarthy, Chelsea Ashbrook (Counsel for Appellant Argent Trust Company)

Origin Bancorp, Inc. (Publicly traded company that owns more than 10% of common stock of Argent Financial Group Inc.)

Ridley, Eileen R. (Counsel for Appellants)

Morgan & Morgan (Counsel for Appellees)

Shapiro, Gerald (Appellant)

Shoemaker, Paula Mays (Appellee)

Thomson, Mark E. (Counsel for Appellees)

Wenzel Fenton Cabassa, P.A. (Counsel for Appellees)

Williams, Eboni (Appellee)

White, Jeffrey R. (Counsel for Amicus Curiae)

Wozniak, Todd D. (Counsel for Appellant Argent Trust Company)

To the best of the undersigned counsel's knowledge, no other persons, association of persons, firms, partnerships, or corporations have an interest in the outcome of this case or appeal.

Respectfully submitted this 18th day of October 2024.

/s/ Jeffrey R. White

JEFFREY R. WHITE
Counsel for Amicus Curiae

The American Association for Justice ("AAJ") respectfully submits this Reply to Defendants-Appellants' Opposition to AAJ's Motion for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees.

ARGUMENT

I. AAJ'S PROPOSED BRIEF PRESENTS A UNIQUE PERSPECTIVE AND ADDITIONAL ARGUMENTS THAT ARE RELEVANT TO THE DISPOSITION OF THIS CASE.

Defendants assert, first, that "AAJ does not assert new arguments or additional perspective whereby it contributes something not already before the Court, as it must to satisfy [Federal Rule of Appellate Procedure] 29(b)." Defendants-Appellants' Opposition to Motion of American Association for Justice for Leave fo File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees ("Defs.' Opp.") at 2.

Rule 29(b) imposes no such litmus test. Rather, a motion for leave to file an *amicus* brief must state "(1) the movant's interest; and (2) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(b).

Moreover, the content of AAJ's proposed brief clearly refutes Defendants' objection. AAJ members are trial attorneys who represent workers, consumers, and small businesses seeking to secure their rights under various federal statutes. They bring to this Court a far broader perspective on the Supreme Court's "effective vindication" doctrine than that of the parties, who are focused exclusively on the

application of that doctrine to ERISA actions. As AAJ explains in Part I, the statutory rights of numerous workers and consumers under laws enacted by Congress for their protection "will ring hollow" if Defendants are permitted to use their considerable leverage to extract contractual waivers from ERISA participants and beneficiaries. Brief for American Association for Justice as Amicus Curiae Supporting Plaintiffs-Appellees ("AAJ Br.") at 5.

In addition, Parts II and III of AAJ's brief outlines in detail the foundation of the "effective vindication" doctrine in the common law of contracts, long before Congress enacted the Federal Arbitration Act. AAJ Br. at 14–25. Neither party delves into these common-law origins.

Defendants instead urge this Court to impose additional and very restrictive conditions on acceptable amicus briefs as suggested in an in-chambers opinion by a single judge in another circuit. Defs.' Opp. at 1 (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J.)). Other courts have rejected such a view as both unwise and ineffective. *See Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132–33 (3d Cir. 2002) (Alito, J.). This Court should adhere to the "predominant practice in the courts of appeals," which is "to grant motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29's criteria as broadly interpreted." *Id.* at 133.

II. MEMBERSHIP OF PLAINTIFFS' COUNSEL IN AAJ DOES NOT VIOLATE RULE 29.

Defendants' second ground for objection is wholly meritless. Defendants complain that one or more of the attorneys representing Plaintiffs-Appellees in this action are dues-paying members of AAJ. As such, Defendants assert that "the *amicus* brief is tainted by the financial interests of counsel." Defs.' Opp. at 4. Defendants' sole authority, incongruously, is *Glassroth v. Moore*, 347 F.3d 916 (11th Cir. 2003), which stated that *amicus* briefs "should not be underwritten" by a *party*. *Id.* at 919. Quite obviously, an AAJ member's annual dues payment, while supporting all of AAJ's activities, is not "money that was *intended to fund preparing or submitting the brief*." Fed. R. App. P. 29(a)(2) (emphasis added).

Rule 29 itself puts to rest any question as to whether membership dues could be encompassed by the rule by requiring disclosure of any "person—*other than* the amicus curiae, *its members*, or its counsel—contributed money that was intended to fund preparing or submitting the brief." Fed. R. App. P. 29(a)(4)(E)(iii) (emphasis added). Moreover, to erase any possible, lingering notion that membership dues create a troubling financial interest, the 2010 Advisory Committee Note states:

> [The rule] requires amicus briefs to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel contributed money with the intention of funding the preparation or submission of the brief. A party's or counsel's *payment of general membership dues to an amicus* need not be disclosed."

Fed. R. App. P. 29 advisory committee's note to 2010 amendments (emphasis added). Indeed, the Advisory Committee cited *Glassroth v. Moore* in the following paragraph to underscore the purpose of the disclosure requirement "to deter counsel from using an amicus brief to circumvent page limits." *Id.* As AAJ has attested that counsel for Plaintiffs-Appellants has neither authored the proposed *amicus* brief in whole or in part, nor contributed any money intended to fund the brief, *see* AAJ Br. at 1 n.1, the Court's opinion in *Glassroth* is inapplicable in this case and the brief is permissible under both Federal Rule of Appellate Procedure 29 and Eleventh Circuit Local Rule 29-1.

CONCLUSION

For these reasons, this Court should grant AAJ's Motion Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees.

Dated: October 18, 2024

Respectfully submitted,

/s/ *Jeffrey R. White*

Jeffrey R. White
AMERICAN ASSOCIATION FOR JUSTICE
777 6th Street, NW #200
Washington, DC 20001
(202) 617-5620
jeffrey.white@justice.org

Counsel for Proposed Amicus Curiae
American Association for Justice

ATTACHMENT 4

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-11192

EBONI WILLIAMS,
DEBBIE SHOEMAKER,
PAULA MAYS,
TINA KOVELESKY,
SHADRIN HERRING,
as representatives of a class of similarly
situated persons, and on behalf of the
A360, Inc. Profit Sharing Plan f.k.a.
A360, Inc. Employee Stock Ownership Plan,

Plaintiffs-Appellees,

versus

GERALD SHAPIRO,
SCOTT BRINKLEY,
ARGENT TRUST ARGENT TRUST COMPANY,
A360 HOLDINGS LLC,

Defendants-Appellants,

JAMIE ZELVIN, et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:23-cv-03236-VMC

ORDER:

The "Motion of American Association for Justice for Leave to File Brief as *Amicus Curiae* in Support of Plaintiffs-Appellees" is GRANTED.

/s/ Nancy G. Abudu
UNITED STATES CIRCUIT JUDGE