

Nos. 07-3837/09-2796/09-3001/09-3018 (consol.)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRUCE G. HOWELL, Plaintiff-Appellant, v. No. 07-3837 MOTOROLA, INC., et al., Defendants-Appellees.	Appeals from the U.S. District Court for the Northern District of Illinois (No. 1:03-cv-05044) Hon. Rebecca R. Pallmeyer
STEPHEN LINGIS, et al., Plaintiffs-Appellants, v. No. 09-2796 RICK DORAZIL, et al., Defendants-Appellees.	
GARY SPANO, et al., Plaintiffs-Appellees, v. No. 09-3001 BOEING CO., et al., Defendants-Appellants.	Appeal from the U.S. District Court for the Southern District of Illinois (No. 3:06-cv-00743) Hon. David R. Herndon
PAT BEESLEY, et al., Plaintiffs-Appellees, v. No. 09-3018 INTERNATIONAL PAPER CO., et al., Defendants-Appellants.	Appeal from the U.S. District Court for the Southern District of Illinois (No. 3:06-cv-00703) Hon. David R. Herndon

**BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLEES IN NOS. 07-
3837 AND 09-2796 AND OF APPELLANTS IN NOS. 09-3001 AND 09-3018**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 07-3837 (lead case)

Short Caption: Howell v. Motorola, Inc.

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INTEREST OF THE *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America (“Chamber”) is the world’s largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of three million professional organizations of every size, in every industry sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts (although membership in the Chamber is neither necessary nor sufficient to obtain the Chamber’s *amicus* support). To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation’s business community. The Chamber has filed *amicus* briefs in thousands of cases, including *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020 (2008), a case at the heart of these consolidated appeals. The Chamber’s briefs have been described as “helpful”² and “influential”³ by courts and commentators.

Most of the Chamber’s business members have established and continue to maintain employee benefit plans regulated by the Employee Retirement

¹ Pursuant to Federal Rule of Appellate Procedure 29, this brief is filed with the consent of all parties in each of the consolidated cases.

² See, e.g., *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 n.8 (R.I. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007).

³ David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1026 (2009); see also *id.* (quoting Supreme Court practitioner Carter Phillips: “The briefs filed by the Chamber in that Court and in the lower courts are uniformly excellent. They explain precisely why the issue is important to business interests. Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the [Chamber]”).

Income Security Act (“ERISA”), 29 U.S.C. §§ 1001 *et seq.* These companies have a vital interest in ensuring that ERISA class actions be limited to *similarly situated* plan participants who meet their burden of satisfying the requirements of Fed. R. Civ. P. 23. Otherwise, the costs of ERISA plan administration will increase unduly and may force the Chamber’s members to reduce or decline to expand benefits.

INTRODUCTION AND SUMMARY OF ARGUMENT

These consolidated cases present a range of questions, but they share a common issue: how the Supreme Court’s decision in *LaRue* affects class certification in suits by defined contribution plan participants.⁴ *LaRue* recognized that defined contribution plans, such as the 401(k) plans that have recently become ubiquitous, differ markedly from the defined benefit plans that prevailed for decades. Whereas all participants share common interests in a defined benefit plan, the same cannot be said for a defined contribution plan, which is an amalgam of many—often tens of thousands of—separately managed individual accounts.

The distinction recognized and applied in *LaRue* affects class certification in two ways. First, because defined contribution plan participants manage their own accounts in light of their individual goals, they often have competing interests that preclude satisfaction of the typicality and adequacy requirements of Fed. R. Civ. P. 23(a). Second, because a defined contribution plan

⁴ This brief is limited to the class certification issues raised in the consolidated appeals. *Amicus* takes no position on the merits of the underlying cases.

participant may seek relief based on circumstances particular to her individual account, the rights of one plan participant often do not resolve the rights of others, as required by Fed. R. Civ. P. 23(b)(1)(B). As demonstrated below, the class certifications being challenged in this appeal should be reversed in light of *LaRue*.

ARGUMENT

I. Defined Contribution Plans Confer Different Legal Rights Than Defined Benefit Plans.

Retirement plans come in a variety of formats, and the differences compel different legal rules. Commentators long have recognized that “the crucial distinction [among retirement plans] is between defined contribution and defined benefit plans.” Daniel Fischel & John H. Langbein, *ERISA’s Fundamental Contradiction: The Exclusive Benefit Rule*, 55 U. CHI. L. REV. 1105, 1112 (1988). In the past decade, the Supreme Court has twice addressed that distinction and how it affects the legal rights of participants.

In *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999), the Court addressed surplus assets that result from better-than-expected investment performance. The Court held that although defined contribution plan participants are entitled to any surplus, defined benefit plan participants are not. In *LaRue*, the Court again distinguished between defined benefit plans and defined contribution plans, this time in the context of how plan participants may challenge the conduct of fiduciaries. The Court held that whereas defined benefit plan participants may sue only on behalf of the entire

plan to seek plan-wide relief, defined contribution plan participants may seek recovery for their individual accounts.

Until the rise of 401(k) plans in the mid-1980s, defined benefit plans dominated the retirement landscape. *LaRue*, 128 S. Ct. at 1025. A defined benefit plan “consists of a general pool of assets rather than individual dedicated accounts.” *Hughes Aircraft*, 525 U.S. at 439. A defined benefit plan participant has “no right to the assets of the plan,” *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988), but only to “a guaranteed stream of payments,” *Johnson v. Ga.-Pac. Corp.*, 19 F.3d 1184, 1186 (7th Cir. 1994). Defined benefit plans are often likened to annuities, in which retirees are entitled to fixed benefits that are typically computed as a function of salary and term of service. *Montgomery v. United States*, 18 F.3d 500, 501 (7th Cir. 1994); ALICIA H. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 214 (1982). Employees have no say in how the assets are invested and can do neither better nor worse than the promised benefit. This arrangement protects plan participants from investment risk: “if plan assets diminish below appropriate funding levels, it is the plan sponsor’s duty to increase pension contributions.” Peter T. Scott, *A National Retirement Income Policy*, 44 TAX NOTES 913, 919 (1989).

Defined contribution plans operate very differently. As the name suggests, in such plans the employer and/or the employee make predetermined contributions. Those contributions are deposited into “individual dedicated accounts,” *Hughes Aircraft*, 525 U.S. at 439, which

represent a participant's personal "pool of assets," *Johnson*, 19 F.3d at 1186. The investment risk is borne by the plan participant. In a standard 401(k) plan, the participant invests her pool of assets in one or more of a number of investment funds selected by the plan sponsor or investment fiduciary. The success or failure of her investments governs her ultimate retirement proceeds, and thus defined contribution plans "do not provide specific dollar benefits at retirement." Scott, *supra*, at 919. In this respect, a defined contribution plan "resembles a bank, brokerage, or mutual fund account. The participant's pension will be based on whatever happens to be in this account when he or she retires." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 46 (3d ed. 2000); accord *Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan*, 188 F.3d 895, 904 (7th Cir. 1999).

Because defined benefit plans were the prevailing format when ERISA was enacted, "ERISA is centered on [defined benefit] plans." LANGBEIN & WOLK, *supra*, at 46. Likewise, the Supreme Court's earliest ERISA cases focused on defined benefit plans. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985), the Court held that an individual plan participant who files suit under ERISA §§ 409 and 502(a)(2) to seek damages for a breach of fiduciary duty does so for "the plan as a whole." That approach made eminent sense in the defined benefit context. Because no defined benefit plan participant has a claim on any particular assets, her interests run only to "the common interest * * * in the financial integrity of the plan." *Id.* Hence, all

claims based on an alleged harm to that common interest must be adjudicated together.

However, the principles underlying *Russell* do not fit defined contribution plans, where participants have individual accounts that they control to effectuate their individual interests. The Supreme Court recognized this disconnect in *LaRue*. Justice Stevens—who also penned the opinion for the Court in *Russell*—explained for the Court in *LaRue* that “*Russell*’s emphasis on protecting the ‘entire plan’ from fiduciary misconduct reflects the former landscape of employee benefit plans. That landscape has changed.” 128 S. Ct. at 1025. Accordingly, the “references to the ‘entire plan’ in *Russell*, which accurately reflect the operation of § 409 in the defined benefit context, are beside the point in the defined contribution context.” *Id.* Because defined contribution plan participants have individual accounts, “fiduciary misconduct need not threaten the solvency of the entire plan” but instead can be “tied to particular individual accounts.” *Id.* Thus, in the defined contribution context, §§ 409 and 502(a)(2) combine to authorize an individual who has sustained damages to his individual account to pursue individual relief. *Id.* Although that relief will nominally be paid to the plan because of the trust structure, the plan then must credit the recovery to the participant’s individual account, underscoring the individual nature of the recovery.

II. Under *LaRue*, The Individualized Claims Of Defined Contribution Plan Participants Pose Significant Obstacles To Fiduciary Breach Class Actions.

Although the rulings under review were decided both before and after *LaRue*, they share a common flaw—a failure to recognize fundamental differences between defined benefit and defined contribution plans. Each court operated from the premise that 401(k) plan participants share identical interests—solely by virtue of the fact that they participate in the same plan. However, this premise is inconsistent with the nature of defined contribution plans, in which plan participants make individualized decisions about how to invest their personal assets.

LaRue specifically held that participants in defined contribution plans may pursue claims that do not seek to benefit the entire plan but only their individual accounts. In other words, claims by defined contribution plan participants are not shared but rather individual in nature:

The negative implication of th[e] [*LaRue*] holding is clear: One defined contribution plan participant has no pecuniary interest in the accounts of another. If a defined contribution plan participant sues for a breach of fiduciary duty, his financial recovery must be entirely, and only, to his own accounts.

Bendaoud v. Hodgson, 578 F. Supp. 2d 257, 266 (D. Mass. 2008). The individual character of such claims means that defined contribution plan participants often will have divergent interests, a conclusion with obvious implications for the propriety of class certification. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (a certified class must be “sufficiently cohesive to warrant adjudication by representation”).

Indeed, the interests of defined contribution plan participants are frequently at odds. For some, their individual account is their sole source of retirement funds, mandating a conservative and relatively predictable investment approach. See, *e.g.*, *Steinman v. Hicks*, 352 F.3d 1101, 1104 (7th Cir. 2003) (“Most people are assumed to be risk averse when it comes to investing for retirement because they will have limited alternative sources of income once they stop working.”). For others, a 401(k) plan is merely a supplement to other savings, allowing them to take greater investment risks. See, *e.g.*, *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 409 (7th Cir. 2006) (noting that in a diversified portfolio, “the risks of the various components of such a portfolio tend to cancel out”). These particularized strategies may be defeated if *any* plan participant may advance her personal interests on behalf of the entire plan.

In considering whether to certify a class, district courts must find that all Rule 23(a) requirements are satisfied and that one of the class formats in Rule 23(b) is appropriate. *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008). The individual nature of defined contribution accounts affects the class certification analysis under both subsections (a) and (b). *First*, courts must ensure that no intra-class conflicts preclude satisfaction of the typicality and adequacy requirements of Rule 23(a). *Second*, courts must evaluate whether the individual nature of the requested relief precludes certification of a mandatory class under Rule 23(b)(1)(B). Both inquiries mandate reversal of the rulings below in light of *LaRue*.

A. A class of defined contribution plan participants cannot be certified if intra-class conflicts exist.

When defined contribution plan participants have conflicting interests, class certification is inappropriate. “[A] putative representative cannot adequately protect the class if the representative’s interests are antagonistic to or in conflict with the objectives of those being represented.” 7A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1768 (3d ed. 2005); accord ALBA CONTE ET AL., 7 NEWBERG ON CLASS ACTIONS § 22.34 (4th ed. 2002). As this Court has explained, the typicality and adequacy requirements of Rule 23 cannot be satisfied when the putative class contains “members whose interests [are] in conflict with the rest of the class.” *Baranski v. Vaccariello*, 896 F.2d 1095, 1098 (7th Cir. 1990); accord *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993) (“a class is not fairly and adequately represented if class members have antagonistic or conflicting claims”); *Sec’y of Labor v. Fitzsimmons*, 805 F.2d 682, 697 (7th Cir. 1986) (en banc). Accordingly, courts must “ensure that there is no inconsistency between the named parties and the class they represent.” *Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002).

In the proceedings below, the courts dispensed with this critical analysis, based on their mistaken views that, because ERISA provides for suits on behalf of the plan, *any* breach of fiduciary duty claim is suitable for class treatment.

In *Spano v. Boeing Co.*, the court found the typicality requirement satisfied “principally because [plaintiffs] seek relief on behalf of the Plan under section 502(a)(2) of ERISA for alleged fiduciary violations as to the Plan.” App.

A96. The court likewise found the named plaintiffs to be adequate representatives because they “seek relief that would affect the Plan as a whole, and because any monetary relief would go to the Plan.” *Id.* at A99. In *Howell v. Motorola, Inc.*, the court certified a class over typicality and adequacy objections because “Plaintiffs emphasize their role in bringing this action on behalf of the Plan as a whole.” R.256, at 10. See also *Beesley v. Int’l Paper Co.*, Short App. 12 (typicality requirement satisfied because “Plaintiffs have alleged that Defendants have breached their fiduciary duties against the Plans as a whole and every participant in the Plans”); *id.* at 16 (adequacy requirement satisfied because “this is an action on behalf of the Plan, not for individual relief”).

The reasoning of these courts is irreconcilable with the *LaRue* holding that defined contribution plan participants have individual interests and may pursue individual relief. Prior to the Supreme Court’s opinion in *LaRue*, some courts had taken the position that the nature of claims under ERISA § 502(a)(2) meant that class members’ claims were “necessarily typical of those of the rest of the class,” such that class members were “each bringing the exact same suit.” *Lively v. Dynegy, Inc.*, 2007 WL 685861, at *10 (S.D. Ill. Mar. 2, 2007) (quoting *In re Enron Corp. Sec., Derivative & “ERISA” Litig.*, 2006 WL 1662596, at *11 (S.D. Tex. June 7, 2006)).⁵ However, the example of *LaRue*

⁵ Indeed, the Secretary of Labor advanced that position in an *amicus* brief submitted to this Court in *Lively*, which settled before disposition. Brief of the Secretary of Labor, Elaine L. Chao, as *Amicus Curiae* in Support of Plaintiffs-Appellees at 18, *Lively v. Dynegy, Inc.*, No. 07-2073 (7th Cir. dismissed Oct. 7, 2008).

disproves that supposed rule. *LaRue* arose from a uniquely individual claim brought by a single plaintiff—that his individual account within a defined contribution plan had been depleted because the plan fiduciaries failed to execute his investment directions. 128 S. Ct. at 1022-23. If it were true that a class member’s claims were “necessarily typical” of other plan participants simply because they relate to an ERISA-qualified plan, then *LaRue*’s personal claim could have been certified as to all plan participants. The possibility of such an absurd result underscores the importance of evaluating the typicality of a claim.

Personal investment preferences often make a participant’s claim atypical; she may have purchased an equity when its value was at its highest, chosen a mutual fund without reviewing the prospectus materials, or preferred a fund that engages in frequent trading. The fact that a putative class representative purports to proceed on behalf of the entire plan cannot obscure the individual nature of the claim and the potential for nonrepresentative suits.

The fundamental flaw of the decisions granting class certification was their failure to engage in a serious evaluation of whether intra-class conflicts rendered the named plaintiffs’ claims atypical and unrepresentative. The Supreme Court, however, has mandated a “rigorous analysis” of the Rule 23(a) prerequisites before a class can be certified. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); accord *Amchem*, 521 U.S. at 615, 623 n.18 (requiring a “close look” at the predominance of class issues and the superiority of the class

mechanism under Rule 23(b)(3), inquiries that are “similar to the [typicality] requirement of Rule 23(a)(3)”.

When courts take a “close look” at the nature of the interests of defined contribution plan participants, the “rigorous analysis” will often reveal insurmountable impediments to class certification. For example, a district court evaluating a sibling case of *Beesley* and *Spano* declined to certify a class to challenge a fund that allegedly facilitated day trading because “[t]he typicality requirement of Rule 23(a)(3) cannot be satisfied where both day traders and participants who may have been disadvantaged by day traders’ actions are class members.” *Abbott v. Lockheed Martin Corp.*, 2009 WL 969713, at *8 (S.D. Ill. Apr. 3, 2009), *petitions for interlocutory appeal filed*, Nos. 09-8019, 09-8022 (7th Cir. Apr. 17, 2009).⁶ The district courts in these consolidated cases failed to engage in the scrutiny that would have identified antagonistic interests between class members.

The possibility of multibillion-dollar class actions led by claimants with pecuniary interests at odds with those of the participants they purport to represent is of particular concern to the Chamber’s members. Retirement plans often contain enormous assets, and demands for class-wide relief can reach billions of dollars. Certification of such enormous classes “can propel the stakes of a case into the stratosphere” and “put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the

⁶ By order of this Court dated August 19, 2009, the petitions in *Abbott* are being held in abeyance pending the disposition of these consolidated cases.

merits is slight.” *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). Judicial concern about such “blackmail settlements” is “legitimate.” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). That concern jumps to the fore in ERISA cases, where the proposed class generally includes both current and retired employees, making potential liabilities truly stratospheric.

Allowing individual claimants to raise billion-dollar claims based on their personal investment preferences raises a severe risk of strike suits, forcing companies either to accede to the demands of the litigious minority or to curtail retirement benefits in light of the expected litigation costs. See *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) (“Litigation cannot compel an employer to make plans more attractive. . . . It is possible, though, for litigation about pension plans to make everyone worse off.”). These harms can reasonably be avoided simply by requiring a legitimate showing that putative class claims actually represent the interests and legal concerns of the entire class. The courts below erred by dispensing with that analysis.

B. The individual nature of defined contribution plans makes a mandatory class under Rule 23(b)(1)(B) inappropriate.

Both the *Spano* and *Beesley* courts certified a class under Rule 23(b)(1)(B); the *Howell* court certified a class under Rule 23(b)(1) without specifying the subparagraph. Rule 23(b)(1)(B) allows for certification of a class where

prosecuting separate actions by or against individual class members would create a risk of *** adjudications with respect to individual class members

that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.

In *Beesley*, the court deemed certification under Rule 23(b)(1)(B) appropriate “[b]ecause Plaintiffs bring their claims on behalf of the Plans.” Short App. 18. Likewise, in *Spano*, the court reasoned that “[b]ecause Plaintiffs bring their claims on behalf of the Plan, adjudications of the representative Plaintiffs’ suit would, as a practical matter, be dispositive of the interests of the other participants [sic] claims on behalf of the Plan.” App. A101. See also *Howell*, R.256, at 8 n.2 (accepting plaintiffs’ contention that “claims for breach of fiduciary duty are routinely certified under Rule 23(b)(1)”).

These rulings conflict with *LaRue*, which squarely rejected the idea that defined contribution plan participants *must* seek relief on behalf of the “entire plan.” 128 S. Ct. at 1025. Given the *LaRue* holding, the courts below should not have assumed that *every* defined contribution action against fiduciaries is appropriate for class treatment simply because the claim relates to an ERISA-qualified plan.

Rule 23(b)(1)(B) is generally an inappropriate mechanism for resolving claims raised by defined contribution plan participants. As the Rule 23 Advisory Committee noted, Rule 23(b)(1)(B) was designed for common funds, where one claimant’s gain is another’s loss. A class certified under this provision is mandatory, such that class members are entitled neither to notice nor to the right to opt out. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n.13 (1999). Because absent class members have due process rights, classes

certified under Rule 23(b)(1)(B) must “stay close to the historical model” of “limited fund actions,” *id.* at 842, barring actions under that provision “for money damages,” *Jefferson v. Ingersoll Int’l, Inc.*, 195 F.3d 894, 897 (7th Cir. 1999).

As a practical matter, breach of fiduciary duty actions by defined contribution plan participants are actions for money damages. The named plaintiffs allege that their individual accounts have been damaged and seek recompense for their losses. They have no legal or practical interest in the accounts of their coworkers, and damages relief to one plan participant has no impact on the accounts of others. The plaintiffs do not seek damages from a common fund, and their claims do not presuppose an identity of interests among plan participants. To the contrary, plan participants make investment decisions based on their own individual needs, and their accounts therefore serve widely varying purposes. For some it is the primary source of retirement savings, counseling highly conservative risk management, while for others it merely supplements other investments and thus allows for more risk. Thus, a “prudent” investment for some would be “imprudent” for others. Likewise, plan participants make their investment decisions based on different sources of information. Particularly in the case of claims alleging misrepresentation, there can be no single understanding of how plan participants construed plan communications and whether they misunderstood the contents. In these circumstances, the type of claims at issue in these cases are effectively

individualized claims for damages that do not fit within the Rule 23(b)(1)(B) framework.

Moreover, allowing suits by classes comprising such divergent participants invites an avalanche of vexatious litigation. Different and adverse plan participants could each file concurrent class actions—all “on behalf of the Plan”—under multiple legal theories, giving rise to dozens of bites at the apple and exerting enormous settlement pressure on defendants regardless of the substantive merits of the claims. Especially given the size of large company retirement plans, which can have 100,000 participants or more, the courts should give effect to *LaRue* and bar Rule 23(b)(1)(B) class actions where an alleged breach of fiduciary duties had disparate effects on the individual accounts of defined contribution plan participants.

CONCLUSION

The decisions below granting class certification should be vacated or reversed.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on November 2, 2009, I caused two copies of the foregoing Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* to be served by UPS overnight delivery, and a digital version to be served by e-mail, on the following:

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The undersigned attorney hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(c), that the foregoing Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* contains 4029 words, excluding those sections excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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