IN THE SUPREME COURT
OF THE STATE OF GEORGIA

SUNTRUST BANK, *Petitioner*,	)	
v.	)	Court of Appeals No. A18A1519
JEFF BICKERSTAFF, JR. *Respondent*.	)	

<u>*AMICUS CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER SUNTRUST BANK</u>

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS

American Tort Reform Association (ATRA), founded in 1986, is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. Among its other activities, ATRA closely monitors civil litigation developments in courts across the country. Where courts systematically apply laws and court procedures in an unbalanced and unfair manner, ATRA publicly reports those findings through its Judicial Hellholes® program.

ATRA, however, is not a passive observer and commentator. For more than two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important civil justice issues, including cases that raise concerns that businesses will be subjected to unnecessary expense and delay in resolving disputes and that contractual terms will not be enforced.

Amicus Curiae American Tort Reform Association submits the following brief in support of SunTrust Bank's Petition for a Writ of *Certiorari*.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *BANK SOUTH* BECAUSE GEORGIA CITIZENS SHOULD HAVE THE FREEDOM TO CHOOSE GEORGIA JUDGES TO DECIDE DISPUTES.

This Court should re-examine the enforceability of pre-litigation jury trial waivers and overturn the ill-considered ruling in *Bank South, N.A. v. Howard*, 264 Ga. 339 (1994). Parties agree to jury trial waiver provisions for good reason: bench trials provide an efficient, cost-effective, and procedurally sound method of resolving disputes that may arise from many contractual relationships. *Bank South* held pre-litigation jury waiver provisions invalid without taking into account parties' freedom to contract as they choose, which warrants substantial deference. Contractual provisions should be declared unenforceable only when they directly run afoul of Constitutional or statutory enactments. The *Bank South* holding reached an improper conclusion that abridged the liberty of Georgia citizens to contract and has created the absurd result of favoring arbitrators over Georgia judges.

A. Parties Increasingly Choose Bench Trials Due to Their Benefits over Other Dispute-Resolution Methods.

Pre-litigation jury-waiver provisions have gained wide acceptance across the country in a range of contractual settings, despite *Bank South* rendering them invalid in Georgia. Jury waivers now often appear in commercial lease

agreements.[1] The vast majority of current corporate merger and acquisition transactions also include jury-trial waivers.[2] In present practice, employers are increasingly advised to incorporate jury waiver provisions in employment contracts.[3] Financing and lending agreements frequently contain jury-trial

[1] *See, e.g.*, *Ex parte AIG Baker Orange Beach Long Wharf, L.L.C.*, 49 So.3d 1198 (Ala. 2010) (retail lease agreement); *In re The Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004) (commercial lease agreement); *Gelco Corp. v. Campanile Motor Service, Inc*., 677 So.2d 952 (Fla. Dist. Ct. App. 1996) (commercial lease agreement).

[2] *See, e.g.*, *Tracinda v. DaimlerChrysler AG*, 502 F.3d 212 (3d Cir. 2007) (merger of Daimler–Benz AG and Chrysler Corporation). Notably, ABA studies of merger and acquisition transactions involving private companies show an expanding proportion of such contracts containing jury-trial waiver provisions from 2006 to 2017. The most recent data revealed that the parties chose to include jury trial waivers in 88% of these agreements. American Bar Ass'n. M&A Market Trends Subcommittee, *Private Target M&A Deal Points Study*, 114 (Dec. 2017), https://www.tagonline.org/files/2.-2017-ABA-MandA-Deal-Points-Study-Private-Target.pdf.

[3] *See* Chad Schultz, *The Jury's Still Out–Way Out: Subtracting the Jury From the Equation Decreases Uncertainty in Employment Cases*, 50 Soc. for Human Resource Mag., Jan. 2005, at 97 (encouraging employers to use contractual jury-trial waivers rather than arbitration provisions); Michael H. LeRoy, *Jury Revival or Jury Reviled? When Employers Are Compelled to Waive Jury Trials*, 7 U. Pa. J. Lab. & Emp. L. 767, 788 (2005) (noting that lawyers have begun "recently [to] advis[e] employers to use these [jury] waivers instead of arbitration."); Samuel Eistrecher & Rene M. Johnson, *Contractual Jury Trial Waivers in Federal Employment Litigation*, N.Y.L.J., May 2, 2003, at 3 ("practitioners are increasingly considering contractual jury trial waivers").

waivers.[4] And, as with the present dispute, deposit agreements often contain a jury-trial waiver.

Parties choose to include jury waivers in contractual agreements because trials to the court may offer significant advantages over both jury trials and arbitration. Compared to jury trials, bench trials are less costly and less time-consuming. According to a Department of Justice study of civil trials, "[j]ury trials lasted 4.3 days on average compared to 1.9 days for bench trials," and cases decided by juries took an average of 5 months longer to reach resolution.[5] Another study that focused specifically on contract-based lawsuits found even more pronounced differences in trial duration and time to disposition.[6] Jury trials simply

---

[4] *Parsons v. Associated Banc-Corp.*, 893 N.W.2d 212 (Wis. 2017) (construction financing agreement); *Wachovia Bank, N.A. v. Blackburn*, 755 S.E.2d 437 (S.C. 2014) (mortgage contract); *Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771 (Tenn. Ct. App. 2010) (truck promissory note and security agreement). *See also* Jarod S. Gonzalez, *A Tale of Two Waivers: Waiver of the Jury Waiver Defense Under the Federal Rules of Civil Procedure*, 87 Neb. L. Rev. 675, 676 (2009) ("The insertion of these clauses into leasing and lending agreements by financial institutions has been going on for many years.")

[5] Thomas H. Cohen & Steven K. Smith, U.S. Department of Justice, *Civil Trial Cases & Verdicts in Large Counties, 2001*, Bureau of Justice Statistics Bulletin 8, 3 (April 2004), https://www.bjs.gov/content/pub/pdf/ctcvlc01.pdf.

[6] "In 2005 the median length of jury trials for contract cases was 3 days; the median length of bench trials was 1 day. The median overall case processing time—from the filing of the case until final disposition—was about 23 months for jury trials and 17 months for bench trials." Donald J. Farole, U.S. Department of Justice, *Contract Bench and Jury Trials in State Courts, 2005*, Bureau of Justice

require extra undertakings—such as *voir dire*, motions *in limine*, sidebars and jury-instruction preparation—that lengthen the proceedings.[7] Additionally, judges have extensive legal training. In cases dealing with complex or lengthy contracts, this training gives judges an advantage in understanding and fairly resolving disputes.[8]

Arbitration as a concept differs considerably from either bench or jury trials. As private proceedings, arbitrations progress without the restrictions of procedural requirements employed in the court system. For example, discovery in arbitration focuses tightly on the core issues of the case,[9] and arbitrators are not limited by the evidentiary rules.[10] The outcome declared by the arbitrator is generally binding on the parties; barring exceptional circumstances, the arbitrator's determination brings

---

Statistics Bulletin 7 (September 2009), https://bjs.gov/content/pub/pdf/cbajtsc05.pdf.

[7] *See* Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 57-58 (2001).

[8] Kimberly A. Stout, *No Prelitigation Contractual Waiver of Jury Trial: Bank South, N.A. v. Howard, A Step Backward for Georgia*, 12 Ga. St. U. L. Rev. 929, 945 (1996) ("[A] jury may not reach a fair result in a trial when the case involves complex issues that the jurors do not fully understand. Judges are in a better position than the average juror to handle the complexity of the evidence presented in some trials.").

[9] *See* Joseph S. Burns, *Predispute Arbitration Agreements in Ohio: An Employer's Guide to Creating an Enforceable Agreement*, 28 U. Dayton L. Rev. 351, 379 n. 158 (2003) (AAA rules state that an arbitrator shall have the authority to order discovery in a manner "consistent with the expedited nature of arbitration.").

[10] *Shelton v. The Ritz Carlton Hotel Co., LLC*, 550 F. Supp. 2d 74, 82 (D.D.C. 2008).

immediate finality to the dispute.[11] With fewer constraints, arbitrations may reach disposition expeditiously.

Each of these methods for resolving conflicts—bench trial, jury trial, and arbitration—carry advantages and disadvantages when viewed from the perspective of the litigants. Further, the pluses and minuses associated with each will differ with the nature and magnitude of the dispute. Eliminating one of the options otherwise available undermines the parties' ability to select the dispute-resolution procedure that is collectively agreed to be best suited for the situation.

When contracting parties include jury-waiver provisions in agreements, nearly all other courts find them enforceable. Among Georgia's five bordering States, South Carolina, Alabama, Tennessee and Florida all enforce pre-litigation jury waivers.[12] Many other States also recognize the validity of contractual provisions to waive jury trials.[13] Federal courts, including federal courts sitting in

---

[11] *See Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 287 Ga. 408, 411 (2010) (courts must "give extraordinary deference to the arbitration process and awards[.]" (internal quotations omitted)).

[12] *Blackburn*, 755 S.E.2d at 443; *Ex parte AIG*, 49 So.3d at 1201-03; *Gelco Corp.*, 677 So.2d at 952-53; *Poole*, 337 S.W.3d at 781.

[13] In addition to those States noted previously, jurisdictions that have held that parties may agree to waive their right to trial by jury in future disputes include Connecticut, Idaho, Missouri, Nevada, New Jersey, New York, Rhode Island, Texas, Utah, Virginia, Wisconsin and the District of Columbia. *See L & R Realty v. Connecticut Nat. Bank*, 715 A.2d 748 (Conn. 1998); *Watkins Co., LLC v. Storms*, 272 P.3d 503 (Idaho 2012); *Malan Realty Investors, Inc. v. Harris*, 953 S.W.2d

Georgia, also enforce pre-litigation jury waivers.[14] The *Bank South* conclusion that pre-dispute waivers of the right to jury trial should not be enforced has become a distinctly minority viewpoint among courts that have considered the issue.

---

624 (Mo. 1997); *Lowe Enters. Residential Partners, L.P. v. Eighth Jud. Dist. Cour*t, 40 P.3d 405 (Nev. 2002); *Inv'rs Sav. Bank v. Waldo Jersey City, LLC*, 12 A.3d 264, 271 (N.J. App. Div. 2011); *Barclays Bank of New York, N.A. v. Heady Elec. Co.*, 571 N.Y.S.2d 650 (1991); *Rhode Island Depositors Econ. Prot. Corp. v. Coffey and Martinelli, Ltd.*, 821 A.2d 222 (R.I. 2003); *In re The Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004); *Camco Constr. Inc. v. Utah Baseball Acad. Inc.*, 424 P.3d 1154 (Utah Ct. App. 2018); *Azalea Drive-in Theatre, Inc. v. Sargoy*, 214 S.E.2d 131 (Va. 1975); *Parsons v. Associated Banc-Corp.*, 893 N.W.2d 212 (Wis. 2017); *Pers. Travel, Inc. v. Canal Square Assocs.*, 804 A.2d 1108 (D.C. 2002). The Arkansas Supreme Court found pre-dispute jury waiver agreements unenforceable, but the Arkansas legislature immediately enacted a statute authorizing contractual jury-trial waivers in loan agreements. *Compare Tilley v. Malvern Nat. Bank*, 532 S.W.3d 570 (Ark. 2017), *with* Ark. Code R. § 16-30-104 (2018). In North Carolina, on the other hand, the legislature enacted an explicit prohibition declaring that "[a]ny provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable." N.C. Gen. Stat. § 22B-10 (2017). Apart from Georgia's *Bank South* ruling and the North Carolina statutory prohibition, California appears to be the only state which finds all pre-dispute jury waiver provisions to be unenforceable. *See Grafton Partners LP v. Superior Court*, 116 P.3d 479 (Cal. 2005).

[14] *See Georgia Power Co. v. Westinghouse Elec. Co. LLC*, No. CV112-167, 2013 WL 12204328 (S.D. Ga. Sept. 30, 2013), at *9 ("[T]his Court will enforce the bargained-for waiver provision and strike Plaintiffs' jury demand."). *See also, e.g., Bakrac, Inc. v. Villager Franchise Sys., Inc.*, 164 F. App'x 820, 824 (11th Cir. 2006) ("Bakrac knowingly and voluntarily waived his right to a jury trial."); *Tracinda*, 502 F.3d at 222; *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832 (4th Cir. 1986); *K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755 (6th Cir. 1985).

Georgia's refusal to enforce contractual jury-waiver provisions deprives parties of the potential advantages of using bench trials as a dispute-resolution method. With selection of a trial to the court eliminated as an option, parties must either default to the more expensive and less efficient jury-trial process or leave the court system and proceed with arbitration.[15] The Texas Supreme Court aptly described how rejecting jury-waiver agreements does not benefit either the contracting parties or the interests of the justice system:

> [I]f parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. … [With a bench trial t]he parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

In re The Prudential Ins. Co. of America, 148 S.W.3d 124, 133 (Tex. 2004). *See also Tracinda v. DaimlerChrysler AG*, 502 F.3d 212, 223 (3d Cir. 2007) ("[S]ubmission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury[.]"). *Bank*

[15] Georgia courts uphold agreements to resolve dispute through arbitration. *See, e.g., Brown v. RAC Acceptance E., LLC*, 303 Ga. 172, 175 (2018); *Wise v. Tidal Const. Co., Inc.*, 261 Ga. App. 670 (2003).

South's rigid rejection of all pre-dispute jury waivers does a disservice to parties entering contracts governed by Georgia law.

B. *Bank South* Failed to Consider the Importance of Freedom of Contract.

The Court should reconsider the *Bank South* holding because it overlooked Georgia's deep-rooted recognition of the right of all parties to enter into contracts of their choosing. As a result, the *Bank South* holding denies Georgia citizens the advantages afforded by their preferred dispute-resolution mechanism.

1. Freedom of Contract Requires Substantial Deference.

Georgia courts have declared that contracts "shall be held sacred" and their enforcement is "paramount public policy" in the absence of very specific circumstances. *See Cash v. Street & Trail, Inc.*, 136 Ga. App. 462, 465 (1975) (quoting *Mutual Life Ins. Co. v. Durden*, 8 Ga. App. 797, 800 (1911)).[16] "[A]ll persons are free to contract on any terms regarding a subject matter in which they have an interest," and can expect those contracts to be enforced by the courts "unless prohibited by statute or public policy." *Quillen v. Quillen*, 265 Ga. 779,

[16] *See also Nat'l Cas. Co. v. Ga. Sch. Bds. Ass'n-Risk Mgmt. Fund*, 304 Ga. 224, 2018) (describing freedom of contract as "the paramount public policy of this State"); *Baltimore & Oh. Sw. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900) (freedom of contract is a "sacred" right and it is "paramount" that courts take care "not lightly to interfere with [it].").

751 (1995) (emphasis added). *Bank South* violates these fundamental principles because no statute or public policy prohibits a pre-suit choice of a bench trial.

A presumption of contractual validity applies: in considering whether a particular contract or contractual provision might run afoul of prohibitions, "the courts must exercise extreme caution in declaring a contract void as against public policy and should do so only in cases free from doubt." *Emory Univ. v. Porubiansky*, 248 Ga. 391, 393 (1981) (emphasis added). *See also Cotton States Mut. Ins. Co. v. Neese*, 254 Ga. 335, 338 (1985) (explaining that "a contract or a provision thereof may be found by a court to be unenforceable as a matter of public policy . . . only in cases free from doubt" (quotations omitted)); *RSN Properties, Inc. v. Engineering Consulting Services, Ltd.*, 301 Ga. App. 52, 54 (2009). Specific indications of prohibition must exist before a court can legitimately declare a contract void or decline to enforce a contractual provision:

> A contract cannot be said to be contrary to public policy unless the General Assembly has declared it to be so, or unless the consideration of the contract is contrary to good morals and contrary to law, or unless the contract is entered into for the purpose of effecting an illegal or immoral agreement or doing something which is in violation of law.

Dept. of Transp. v. Brooks, 254 Ga. 303, 312 (1985) (quoting *Camp v. Aetna Ins. Co.*, 170 Ga. 46, 50 (1930)) (emphasis added). Unless established public policy

unquestionably demonstrates the impropriety of an agreement, courts should hold the parties to the terms of the contract.[17]

2. Freedom of Contract Was Tossed Aside Without a Finding That a Statute or Public Policy Was Violated.

In holding pre-litigation jury trial waivers invalid, the *Bank South* decision ignored freedom of contract as a core value that should receive primary consideration. Contrary to this Court's directives about the limited circumstances in which the liberty to contract must give way, *Bank South* dismissed contractual jury-waiver provisions in an opinion that runs just four paragraphs and includes no conclusion that these provisions violate any public policy. Indeed, such a determination would be impossible: the Georgia General Assembly has never declared pre-dispute jury-waiver provisions contrary to public policy, despite the available model of North Carolina's prohibition statute.[18] *Bank South* also failed to acknowledge that the valid liberty to contract in Georgia includes the power to waive rights, including constitutional rights.[19]

---

[17] *See Edwards v. Grapefields, Inc*., 267 Ga. App. 399, 404 (2004) (reversing trial court's invalidating of contract "because the alleged violation of public policy in this case is not 'free from doubt.'").

[18] *See* N.C. Gen. Stat. § 22B-10, *supra* note 13.

[19] *See Bryan v. MBC Partners*, L.P. 256 Ga. App. 549, 552 (2000) ("Bryan 'was at liberty to waive a constitutional as well as a legal right[.]'" (quoting *Humphries v. McWhorter & Brightwell*, 25 Ga. 37, 39 (1858)). *See also Quillen*, 265 Ga. at 782 ("[P]arties are free to contract for self-executing changes" in rights and obligations granted by court order); *McGregor v. Bd. of Regents of the Univ. Sys. of Ga*., 249

Rather than consider the import of freedom of contract in assessing the validity of pre-dispute jury-waiver provisions, *Bank South* declared such contractual terms unenforceable simply because it could not identify a previously-enacted method for invoking such jury waivers. *Id*. at 340 ("We conclude, therefore, that pre-litigation contractual waivers of jury trial are not provided for by our Constitution or Code and are not to be enforced in cases tried under the laws of Georgia."). This conclusion is predicated on "mere speculation" about public policy that courts are forbidden to use to invalidate contractual provisions. *See Duffett v. E & W Properties, Inc*., 208 Ga. App. 484, 486 (1993).[20] Subsequent to *Bank South*, other courts have rejected the concept that the mere absence of an explicit procedural mechanism is a sufficient basis for finding pre-dispute jury waivers invalid. *See*, *e.g*., *Parsons v. Associated Banc-Corp*., 893 N.W.2d 212, 218-21 (Wis. 2017); *Poole v. Union Planters Bank, N.A.*, 337 S.W.3d 771, 781-82 (Tenn. Ct. App. 2010).

Ga. App. 612, 613 (2001) ("[C]ontracting parties are free to waive numerous and substantial rights.").

[20] In fact, if the General Assembly had contractual pre-litigation jury waivers in mind when it enacted O.C.G.A. § 9-11-39(a), and intended that statute to prohibit the practice, that statute itself likely would run afoul of the constitutional prohibition against "laws impairing the obligation of contract[.]" Georgia Constitution, Article 1, §1, para. X.

When courts properly consider and give weight to the freedom of parties to enter into binding contracts, pre-dispute jury-waiver provisions are determined to be valid and enforceable. For example, the Nevada Supreme Court declared:

> [I]n accordance with Nevada's public policy favoring the enforceability of contracts, … contractual jury trial waivers are presumptively valid unless the challenging party can demonstrate that the waiver was not entered into knowingly, voluntarily or intentionally.

*Lowe Enters. Residential Partners, L.P. v. Eighth Jud. Dist. Cour*t, 40 P.3d 405 (Nev. 2002).[21] *Bank South* failed to include freedom-of-contract principles in its analysis, and that failure resulted in the unwarranted ruling that jury-waiver

---

[21] *See also Poole*, 337 S.W.3d at 780:

> It is the opinion of this Court—consistent with the majority view—that Tennessee litigants are free to waive the constitutional right to a civil jury trial by prior written contractual agreement. Our holding finds support in the principles governing the interpretation and enforcement of contracts in Tennessee. The Tennessee Supreme Court has explained that the right to contract or "freedom of contract" has historically ensured that parties to an agreement have the right and power to construct their own bargains. Parties are free to bargain for and agree upon such terms as they see fit, even if the bargained-for agreement may seem undesirable to outside observers. Courts should, therefore, generally enforce the terms of a bargained-for agreement unless they violate public policy. The same principles apply to contractual jury waivers.

(quotations and citations omitted).

provisions are invalid. That erroneous determination imposes costs on parties entering into contracts in Georgia and precludes them from receiving the benefits available from resolving disputes with bench trials rather than arbitration or jury trials. This Court now has the opportunity to remedy the error of *Bank South*.

CONCLUSION

This Court should grant certiorari and reconsider the holding in *Bank South, N.A. v. Howard*, 264 Ga. 339 (1994).

This 15th day of May, 2019.

Respectfully submitted,

/s/ Michael R. Boorman, Esq.
Michael R. Boorman, Esq.
Georgia Bar No. 067798
HUFF, POWELL & BAILEY, LLC
999 Peachtree Street, N.E., Ste. 950
Atlanta, Georgia 30309
Telephone: (404) 892-4022
Facsimile: (404) 892-4033
mboorman@huffpowellbailey.com

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **AMICUS BRIEF**, before filing, upon all counsel of record by placing a true copy of same in the U.S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Eugene Scalia
Thomas H. Dupree Jr.
Allison K. Turbiville
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue NW
Washington, DC 20036

Richard H. Sinkfield
Michael L. Eber
Katherine L. D'Ambrosio
ROGERS & HARDIN LLP
2700 International Tower
229 Peachtree Street NE
Atlanta, Georgia 30303

William N. Withrow, Jr.
Misha Tseytlin
Jaime L. Theriot
Lindsey B. Mann
TROUTMAN SANDERS LLP
600 Peachtree Street NE, Suite 3000
Atlanta, Georgia 30308

Michael B. Terry
Steven J. Rosenwasser
Jason J. Carter
BONDURANT MIXSON & ELMORE LLP
1201 West Peachtree Street NW
Suite 3900
Atlanta, GA 30309

C. Ronald Ellington
135 Beaver Trail
Athens, GA 30605

J. Benjamin Finley
MaryBeth V. Gibson
THE FINLEY FIRM, P.C.
Piedmont Center
3535 Piedmont Road
Building 14, Suite 230
Atlanta, GA 30305

This 15th day of May, 2019

/s/*Michael R. Boorman*
Michael R. Boorman, Esq.
Georgia Bar No. 067798

Counsel for *Amicus Curiae*

HUFF POWELL BAILEY, LLC
999 Peachtree Street, N.E.
Suite 950
Atlanta, Georgia 30309
Telephone: (404) 892-4022
Email: mboorman@huffpowellbailey.com