



## Update from Washington

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# Supreme Court wrapped up a busy and controversial term

## AAJ FILED AMICUS CURIAE BRIEFS ON ARBITRATION, CONSENT JURISDICTION, PRIVATE RIGHT OF ACTION FOR FNHRA VIOLATIONS AND SECTION 230 IMMUNITY

Following the congressional July recess, AAJ is working hard for you and your clients. We remain committed to protecting civil justice and lobbying in Congress in support of as many of our members' practice areas as possible.

AAJ continues the fight to end forced arbitration, eliminate qualified immunity, and protect clients' rights on many other issues. We're on the front line of issues that directly affect your practice such as Medicare Secondary Payer and access to electronic medical records.

Additionally, AAJ monitors over 1,000 bills each year so that we are prepared and can fight any attempt to preempt your state tort law remedies. And we are also working to introduce proactive legislation to repair damage done by tort reform proponents at the federal level.

Whether you're a single event case lawyer or a mass tort lawyer, AAJ is fighting for you and your clients. Here are some recent highlights.

### **National Defense Authorization Act: AAJ successfully resists bad amendments**

The National Defense Authorization Act (NDAA) passed the House of Representatives narrowly on July 14. Thanks to AAJ's strong advocacy, several amendments harmful to your practices and your clients' rights were not included in the final package.

In the Senate, the NDAA is on the floor starting the week of July 17. An amendment was filed by Senator Sullivan on the Camp Lejeune Justice Act attorney fee issue. AAJ will strongly advocate against its inclusion in the Senate version of the NDAA.

### **Federal Aviation Administration (FAA) Reauthorization**

The Federal Aviation Administration (FAA) Reauthorization Act passed the House floor on July 20. AAJ monitored the process for any bad amendments, such as an amendment that would give broker-shippers immunity or an amendment that would exempt information from later discovery requests, but none of these problematic amendments were filed to the FAA.

In the Senate, the Commerce Committee has not yet marked up their bill due to issues with pilot flight training requirements and other outstanding issues that need to be resolved with the majority and the minority. AAJ will monitor this process for any anti-civil justice provisions as well.

### **Recent Supreme court decisions**

The Supreme Court wrapped up a busy and controversial term, issuing three important decisions in cases in which AAJ filed amicus briefs. AAJ amicus curiae briefs are available at [www.justice.org/amicusbriefs](http://www.justice.org/amicusbriefs).

#### **Consent jurisdiction constitutional under due process clause**

In a 5-4 opinion authored by Justice Neil Gorsuch, the U.S. Supreme Court held that consent, whether by an individual or a corporation, remains a valid basis for the exercise of personal jurisdiction in *Mallory v. Norfolk S. Rwy. Co.*, No. 21-1168, 2023 WL 4187749 (June 27, 2023). Justices Thomas and Sotomayor joined the majority opinion, which tracked many of the arguments AAJ made in its amicus brief. AAJ member Ashley C. Keller of Keller Postman LLC in Chicago, Illinois, is counsel of record for Robert Mallory and presented oral argument before the Supreme Court on

November 8, 2022. AAJ members Daniel C. Levin, Laurence S. Berman, and Luke T. Pepper of Levin Sedan & Berman in Philadelphia represented Mallory before the Pennsylvania Supreme Court.

#### **Trial courts must stay litigation during appeals of arbitration denials**

In a 5-4 opinion authored by Justice Brett Kavanaugh, the U.S. Supreme Court reversed the Ninth Circuit Court of Appeals and held that a district court must stay all proceedings in a case when a party appeals the denial of its motion to compel arbitration in *Coinbase v. Bielski*, No. 22-105, 2023 WL 4138983 (June 23, 2023). An appeal of denial of a motion to compel arbitration, the Court stated, encompasses the entire case filed in the trial court. Therefore, Coinbase was entitled to an automatic stay of all proceedings, including discovery and other pretrial matters. Justice Ketanji Brown Jackson, joined by Justices Sotomayor, Kagan, and Thomas (in part) strongly dissented, arguing that the majority "invents a new stay rule perpetually favoring one class of litigants-defendants seeking arbitration."

AAJ's amicus brief in the Supreme Court was authored by Jennifer Bennet, Deepak Gupta, Matthew Wessler, and Alisa Tiwari of Gupta Wessler PLLC. Professor Richard H. Frankel of the Drexel University School of Law, Philadelphia, PA, prepared the AAJ amicus brief in the Ninth Circuit. Bielski was originally represented by sole practitioner Matthew D. Carlson of Orchard Park, NY. A team of attorneys from Tycko & Zavareei, LLP, led by Hassan Zavareei, represented him at the Supreme Court.

#### **Private right of action under § 1983 for FNHRA violations upheld**

In a 7-2 opinion authored by Justice Ketanji Brown Jackson, the U.S. Supreme Court affirmed a Seventh Circuit Court of Appeals judgment and held that the Federal Nursing Home Reform Act (FNHRA) unambiguously creates enforceable rights under 42 U.S.C. § 1983, opening the door for nursing home residents to bring private actions against county-owned nursing homes and their agents for violations of the act. (*Health and Hosp. Corp. of Marion County, et al. v. Talevski* (June 8, 2023) 143 S.Ct. 1444.)

AAJ joined the Pennsylvania Association for Justice (PAJ) amicus brief emphasizing the impact an adverse decision would have on the rights of residents of county-owned nursing homes to seek the remedy intended by Congress when it passed the FNHRA. AAJ member Robert F. Daley (Robert Peirce & Associates, P.C.) authored the brief.

#### **Court sidesteps section 230 immunity question**

In a three-page per curiam opinion, a unanimous Supreme Court vacated the Ninth Circuit's decision in *Gonzalez v. Google LLC* (May 18, 2023) 143 S.Ct. 1191, which held that all but the plaintiffs' revenue-sharing claims were barred under Section 230, for reconsidering in light of its concurrent decision in *Twitter, Inc. v. Taamneh*, 143 S. Ct. 1206 (May 18, 2023) (holding that plaintiffs' allegations that defendants aided and abetted ISIS in its terrorist attack on a nightclub in Istanbul failed to state a claim under the Antiterrorism Act (18 U.S.C. § 2333(d)(2))). The Court declined to weigh in on the issue of section 230 immunity. AAJ had urged the Court to adopt a narrow basis for immunity that keeps the courthouse doors open to victims of illegal online speech recommended by internet service providers.