Case No. A24A1246

IN THE COURT OF APPEALS

STATE OF GEORGIA

JOHN TAYLOR,
Appellant,

v.

ARGOS USA, et al.,
Appellee.

BRIEF OF AMICUS CURIAE GEORGIA LEGAL FOUNDATION

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STATEMENT OF INTEREST

On behalf of the Georgia Legal Foundation ("GLF"), this Amicus Curiae brief is submitted in connection with the above-captioned case. Your Amicus is aligned with Appellant's interest.

The Georgia Legal Foundation is a 501(c)(3) organization that provides legal assistance to injured workers involved in the litigation of significant workers' compensation cases.

STANDARD OF REVIEW

Amicus adopts the Standard of Review cited by the Appellant.

STATEMENT OF FACTS

Amicus adopts Appellant's Statement of Facts.

ARGUMENT AND CITATION OF AUTHORITY

Preface

In early 2020, the entire world was upended by a global pandemic caused by the rapid spread and deadly consequences of the novel coronavirus then known as COVID 19. The widespread nature of business and government closures, mandatory lockdowns, restrictions on hospital visitation, and other unprecedented disruptions and in some cases cessation of normal life in America are well known to this Honorable Court, to the parties, and to the general public. In response to this global health emergency, courts across the state were shut down to avoid negative health consequences to court employees and the public, and the Supreme Court of Georgia instituted a statewide stay of proceedings and extension of statutes of limitations. Measures were taken nationwide to require social distancing and masking, and eventually vaccinations were mandated or strongly encouraged in several sectors. Shelter-in-place orders were issued in most states, including Georgia, and businesses were shut down or severely restricted in their operations.

The risks to elderly and infirm Americans were also well known. The state tracked both COVID transmissions and deaths, both statewide and at the county level, in order to keep Georgians apprised of the dangers of this novel and, at the time, deadly disease. Throughout April of 2020, between 17 and 42 people were dying per day in the State of Georgia from COVID 19.[1] There was no vaccine available at the time. After a statewide shelter-in-place order, Governor Brian Kemp was just beginning to reopen businesses, stating in a press release on April 20, 2020:

> The entities that I am reopening are not reopening for 'business as usual.' Each of these entities will be subject to specific restrictions, including adherence to Minimum Basic Operations, social distancing, and regular sanitation. Minimum Basic Operations includes, but is not limited to, screening workers for fever and respiratory illness, enhancing workplace sanitation, wearing masks and gloves if appropriate, separating workspaces by at least six feet, teleworking where at all possible, and implementing staggered shifts.[2]

1 *See, e.g.*, https://www.nytimes.com/interactive/2021/us/georgia-covid-cases.html
2 https://gov.georgia.gov/press-releases/2020-04-20/gov-kemp-updates-georgians-covid-19

Governor Kemp went on to say "[t]he shelter in place order is still active and will expire at 11:59 PM on April 30 for most Georgians," and "[w]e urge everyone to continue to follow CDC and DPH guidance by sheltering in place as often as you can."[3] Notably, given the facts of this case, he added "[f]or medically fragile and elderly Georgians, make plans to shelter in place at least through May 13 – the date Georgia's Public Health Emergency expires."[4] On April 30, 2020, Governor Kemp removed the shelter-in-place order for most Georgians, but said

> To protect vulnerable populations, I will sign an order today **requiring** medically fragile and elderly Georgians to continue to shelter in place through June 12, 2020. In addition, I will order long-term care facilities – including nursing homes, personal care homes, assisted living facilities, and similar community living homes – to utilize enhanced infection control protocols, ensure safer living conditions, and protect residents and staff from coronavirus exposure.[5]

On June 11, 2020, Governor Kemp removed the shelter-in-place order for most elderly Georgians, but with significant limitations that are relevant to this case:

> **Sheltering in Place:** Effective immediately, residents and visitors of Georgia who are sixty-five years of age or older are no longer required to shelter in place unless they meet any of the following categories:
>
> - Those persons who live in a nursing home or long-term care facility, including inpatient hospice, assisted living communities, personal care homes, intermediate care homes, community living arrangements, and community integration homes

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[3] *Id.*
[4] *Id.*
[5] https://gov.georgia.gov/press-releases/2020-04-30/gov-kemp-extends-protections-vulnerable-georgians-releases-guidance (emphasis added).

- Those persons who have chronic lung disease
- Those persons who have moderate to severe asthma
- Those persons who have severe heart disease
- Those persons who are immunocompromised
- Those persons, of any age, with class III or severe obesity
- Those persons diagnosed with the following underlying medical conditions: **diabetes**, liver disease, and persons with chronic kidney disease undergoing dialysis[6]

As this Honorable Court is aware from the statement of facts proffered by the Appellant, and from the record, the employee in this case (a 33 year employee of the employer at the time of his termination) was over the age of 65 at the time the job was offered, and has diabetes. Because of his age and disease, even after June 11, 2020 (well after he was terminated by the employer), he was under a shelter-in-place order from the Governor of this State.

In this case, the justification for the employee's refusal to accept a proffered job was precisely that, in April of 2020, at the very outset of the pandemic when little was known about the disease, he was offered work in the employer's plant, and as a high risk and elderly citizen, he was concerned that his health would not be adequately protected. Through counsel, he asked the employer to provide information about its COVID 19 safety protocol, which the employer refused to provide other than to say, through its own counsel, they were "taking all necessary precautions." Based on this refusal, the employee elected not to endanger his life

[6] https://gov.georgia.gov/press-releases/2020-06-11/gov-kemp-signs-new-covid-19-executive-order (emphasis added).

and health by returning to a job where his health and safety could not be reasonably assured, at a time when the Governor had ordered him to stay at home as much as possible in order to protect him and other similarly situated Georgians from COVID 19.

O.C.G.A. § 34-9-240(a) states that "[i]f an injured employee refuses employment procured for him or her and suitable to his or her capacity, such employee shall not be entitled to any compensation, except benefits pursuant to Code Section 34-9-263, at any time during the continuance of such refusal unless in the opinion of the board such refusal was justified." The caselaw regarding return to work under the Georgia Workers' Compensation Act indicates that "the employee's refusal to accept employment must relate, in some manner, to his physical capacity or his ability to perform the job in order for his refusal to be justified..."[7] The meaning of this statutory and precedential authority is at issue in this case.

Georgia Legal Foundation would show this Honorable Court that O.C.G.A. § 34-9-240(a) has two distinct prongs, which the reviewing Courts have never formally conflated, but which the Appellate Division of the State Board of Workers' Compensation in this case appears to have conflated. The Administrative Law Judge's ("ALJ's") Award was well within the statutory framework and the

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7 City of Adel v. Wise, 401 S.E.2d 522, 261 Ga. 53 (Ga. 1991).

precedents set by this Court and the Georgia Supreme Court. The Award of the Appellate Division needlessly restricts that framework, adding a new requirement that the refusal must relate to the work injury specifically in order to be justified. The Appellate Division held:

> We cannot agree that the Employee was justified in refusing to return to work irrespective of any light-duty job offer, **for reasons unrelated to the light-duty work restrictions imposed or the nature of his compensable injury**. The preponderance of competent, credible evidence shows that the Employee's individual health and safety concerns during the pandemic were **personal to the Employee and unrelated to his compensable work injury**.[8]

The caselaw does not support such a requirement, nor does the plain language of the statute. The requirement in the caselaw that a refusal, in order to be justified, must in some way relate to the employee's physical capacity or ability to perform the job, ought not be construed as eradicating the second prong of the statutory test, but rather as a specific limitation upon that test, and one which has been met in this case. The employee's refusal to return to work at the height of a global pandemic when he was at great risk of contracting a deadly disease and under a shelter-in-place order, and when the employer had refused to give reasonable assurances of its own safety protocols in response to that disease, is well within the precedents of this Court and the Georgia Supreme Court. The caselaw imposes no requirement that in order to relate to the employee's ability to do the job, the refusal must relate to the work

[8] Award of Appellate Division at 5-6 (emphasis added).

injury and not be personal to the employee. The Appellate Division impermissibly rendered the justification prong meaningless by reading it as a re-statement of the suitability prong and tying it to the work injury where the relevant precedents do not.

Georgia Legal Foundation would further show this Honorable Court that the relevant precedents on WC-240 return to work offers indicate that in order for the suspension to remain valid, the job offer has to remain open. That was not done in this case, and thus the Appellate Division erred in finding that the employee was not entitled to income benefits once the job was no longer available.

Finally, Georgia Legal Foundation would show that the requirement that the employee perform a so-called Maloney job search was inappropriate under the facts of this case, since the employer's termination of the employee ended the availability of any light duty job at the employer's election rather than the employee's election, and thus ended the availability of suitable light duty work. Maloney is inapplicable under such circumstances.

In support of these arguments, Georgia Legal Foundation offers the following arguments.

I. There is no requirement in the caselaw that the employee's refusal to return to work be "related" to the work injury or impersonal to the employee:

In holding that income benefits were not payable in this case because "the Employee's individual health and safety concerns during the pandemic were personal to the Employee and unrelated to his compensable work injury," the Board added a requirement to the justification prong that is foreign to the caselaw from this Honorable Court and the Georgia Supreme Court, and in fact contradicts established law. In City of Adel v. Wise,[9] the Supreme Court of Georgia said "we conclude that the employee's refusal to accept employment must relate, in some manner, to his physical capacity **or** his ability to perform the job in order for his refusal to be justified within the meaning of OCGA § 34-9-240."[10] The Court went on to discuss several ways in which an employee's refusal might be considered justified in light of the employee's "ability to perform the job." As one example, the Court said "an employee who has been charged with a crime and incarcerated pending adjudication of guilt would be justified in refusing proffered employment because his incarceration deprives him of the capacity to perform the work proffered."[11] It should go without saying that being incarcerated after being charged with a crime is personal to the employee and does not relate to the work injury in any way. Other examples were given by the Wise Court: "it is not unreasonable for a nurse to refuse a typing job which she is physically capable of performing, but lacks the skills to perform," and "a refusal to accept work which requires relocation from one's home,

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9 401 S.E.2d 522, 261 Ga. 53 (Ga. 1991).

10 Id. at 55 (Ga. 1991) (emphasis added).

11 Id. at 55-56 (citations omitted).

and is therefore life-disrupting . . . [is not] unreasonable."[12] Again, neither of these situations relates to the work injury, and both are personal to the employee. The Wise Court reasoned that in order to be justified, an employee's refusal of proffered work is justified "must relate to the physical capacity of the employee to perform the job; the employee's ability or skill to perform the job; or factors such as geographic relocation or travel conditions which would disrupt the employee's life." [13] Obviously, only the first of these could possibly (though would not necessarily) relate to the work injury. There is no requirement in the law that the refusal relate to the work injury, and notably, neither the employer and insurer nor the Appellate Division cited to one below.

Georgia Legal Foundation would suggest that there are few things that "would disrupt the employee's life" more than a pandemic disease that could end his life, and which rendered him subject to governmental restrictions that restricted his ability to move about freely in society. The employee's inability to do the job in this case, while he was in danger of severe illness or death through no fault of his own, and under a shelter-in-place order from the Governor of this State, is far more analogous to the several examples cited by the Wise Court than any of the examples

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12 Id. at 56.

13 Id.

in the caselaw where employees refuse to attempt light duty work for reasons that relate more to convenience or personal choice than ability or necessity.

As one example of the former, the Wal-Mart v. Harris case dealt with an employee who was offered light duty work at her pre-injury wage or higher, and chose instead to take a lower paying sitter job, asking the employer to pay temporary partial disability. That Court held:

> Wal-Mart contends that inasmuch as it offered suitable work to Harris when she became capable of it and has never withdrawn that offer, Harris's continued and unjustified rejection disqualifies her for any income benefits as of that date. Wal-Mart argues that it is inconsistent with the statutory intent of OCGA § 34-9-240(a) to allow an employee to refuse an employer's offer of full-time suitable work at a pre-injury wage, accept a part-time position with another employer instead, and require the employer to subsidize the income difference by payment of partial disability benefits. That is so.[14]

It is obvious that the Court's concern in the Wal-Mart case is not that the refusal was unrelated to the work injury, but rather that the refusal was a personal choice made by the employee to earn less money and ask Wal-Mart to pick up the slack.

This case is also not analogous to the situation where an employee, having accepted a light duty offer and worked light duty for a time, becomes disabled for reasons unrelated to the job. The cases involving this issue dealt with the 15-day provision of O.C.G.A. §34-9-240(b)(1) and the subsequent issue of whether a

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[14] Wal-Mart Stores, Inc. v. Harris, 506 S.E.2d 908, 234 Ga.App. 401 (Ga. App. 1998)

change of condition has been established (where the employee works past the 15 days) or not established (where the employee does not). Thus, if a change of condition has been established by an actual return to work past 15 days, the employer has established that the job is suitable and absent a refusal, the justification prong is immaterial. The only question is whether the subsequent disability relates to the work injury.

In Freeman v. Southwire, this Court held that "the statutory test focuses on the time that the lighter-duty employment is offered, not on a time down the road when the employee may develop an additional disability arising out of circumstances unrelated to employment."[15] In other words, the concern of the Freeman Court was not that a refusal to attempt light duty employment was unreasonable, but that ***having already accepted light duty employment and continued in that employment for some time***, the employee contracted a disease that was unrelated to her job at all and sought to use that disease as justification for ceasing work and receiving income benefits. The Court did not set forth a blanket rule that the refusal to attempt light duty work must always relate to the employment or work injury, but only that having offered a suitable job that the employee accepted and continued working, the employer will not be held responsible for the employee's nonjob-related disability

15 Freeman v. Southwire Co., 269 Ga.App. 692, 605 S.E.2d 95 (Ga. App. 2004)

after-the-fact. Thus, the question in Freeman was not whether the refusal must relate to the work injury, because there was no refusal. The question was whether the employee's change in economic condition from "able to work" to "no longer able to work" related to the work injury. Freeman does not apply to this case.

Notably, this Court took the opposite approach in Technical Coll. Sys. of Ga. v. McGruder.[16] In that case, where an employee stopped working within 15 days for reasons utterly unrelated to the work injury, the Court nonetheless held that the employer could not defend the suitability of the job because it did not immediately reinstate income benefits as required by law. The Court reasoned:

> By refusing to immediately reinstate McGruder's TTD benefits when she stopped her light-duty work, as required by OCGA § 34–9–240 and Rule 240, ATC simply placed itself back in the same position it was in prior to offering the light-duty position, which is that it was paying benefits to McGruder and was required to do so until proving that a change in condition for the better has occurred and/or proving that a subsequent intervening non-work related injury is the cause of McGruder's continuing disability.[17]

As with the Freeman case, the Court's decision was based on the 15-day provision of O.C.G.A. §34-9-240(b) and Board Rule 240, and not on whether the refusal to continue the job was related to the work injury or not. These cases thus have no application where, as here, the employee never attempted the job and the refusal was reasonable under the law. Thus, the only times this Court has tied the refusal to the

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16 326 Ga.App. 469, 756 S.E.2d 702 (Ga. App. 2014).

17 Id. at 705.

work injury are those cases where the 15-day provision is at issue, and thus the question of whether a change of condition was established is in question. If it has, then the employee has the burden of proving a change of condition for the worse. If it has not, then the employer has the burden of demonstrating that a change of condition for the better has occurred. Neither situation presents itself here.

In other cases dealing specifically with the refusal to attempt a proffered job, this Court has held that "personal choice" circumstances render a refusal unreasonable and unjustified. These include where the employee enters the country illegally and because of that is unable to obtain a license to drive,[18] where a claimant's testimony about the disruption to his life and economic inability to accept the job were not supported by the evidence in the record,[19] and where an undocumented worker claimed he was unable to accept employment despite the fact that he was undocumented when he began the job.[20] However, in at least one case this Court held that an employee's refusal to accept a job was not unreasonable because "it did not provide 'a reasonable opportunity for advancement and growth

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18 Martines v. Worley & Sons Const., 628 S.E.2d 113, 278 Ga. App. 26 (Ga. App. 2006).

19 Brasher v. U.S. Xpress Enters., Inc., 328 Ga.App. 20, 761 S.E.2d 448 (Ga. App. 2014).

20 Earth First Grading v. Gutierrez, 270 Ga.App. 328, 606 S.E.2d 332 (Ga. App. 2004).

and a correlation with the [claimant's] interests and aptitudes.'..." [21] The jurisprudence of reviewing courts in this State seems to revolve around whether a refusal is truly unrelated to the offered job (not the work injury) and whether it amounts to a personal choice on the part of the employee versus an actual inability to accept or do the job. All of this is irrespective of the work injury itself, as the caselaw makes clear. The undersigned has found no case that suggests that a refusal must be based on the work injury itself in order to be justified, and there are ample cases that demonstrate that it need not be related to the work injury.

No such personal choice or purely personal issue is present in the instant case. The COVID 19 Pandemic was an unprecedented and highly dangerous disruption of American life, and one that caused the governing authorities of this state to shut down the government and businesses for a significant period of time. That period of time coincided with the return-to-work offer in this case, and with the employee's refusal to attempt that job without adequate assurances that his health and safety would be safeguarded. The employee in this case was subject to a shelter-in-place order that persisted past the date of his termination on May 21, 2020, as shown above. The undersigned has found no relevant authority, and again, the employer and insurer notably do not cite to any below, that would suggest a requirement that

21 Clark v. Georgia Kraft Co., 345 S.E.2d 61, 178 Ga.App. 884 (Ga. App. 1986)

the refusal directly relate to the work injury and not be "personal" to the employee. As noted above, the relevant reported cases give several examples of situations "personal" to the employee and unrelated to the work injury which would justify a refusal to attempt a proffered light duty job such as incarceration or lack of skill. In crafting such a requirement, the Board went well beyond the statutory language and the precedents of this Court and the Georgia Supreme Court. For this reason, the Appellate Division's Award must be reversed, and the ALJ's Award should be reinstated.

II. A return to work offer under O.C.G.A. § 34-9-240 is only valid for as long as the offer remains open to the employee:

The employee in this case was offered a light duty job during the pandemic, and absent assurances that his health and safety would be protected, he refused to attempt it. Even if this refusal was unreasonable (which your Amicus rejects), nonetheless the employer's basis for suspension of benefits ended when the employer withdrew the job offer and refused to keep it open. Thus, the basis for the suspension ended when the job was no longer available, even if the employee's refusal was unjustified. This would have been, at the latest, his termination on May 21, 2020, as the ALJ specifically found in her Award.[22]

[22] ALJ Award at 8.

"When an employer procures a light job which an injured employee can perform and the employee refuses the job, (OCGA § 34-9-240) ... requires that compensation be suspended only 'during the continuance of such refusal.' The refusal does not forever ban receipt of future compensation should the availability of suitable light work cease."[23] This rule has consistently been upheld by our courts, including by this Honorable Court in Wal-Mart Stores, Inc. v. Harris, cited above.[24]

In this case, the Board failed to render any finding of fact on the issue of the continued availability of light duty work, and ignored the ALJ's finding on this specific point, which was based on the evidence in the record, and which cited to the Universal Ceramics case directly. The ALJ held:

> After the employer terminated the employee on May 21, 2020, there was no longer a light duty job available for him to refuse, and the employee was entitled to the payment of temporary total disability benefits. Additionally, the employer/insurer never offered the employee a light duty job at any time after his termination, not even after the employee's deposition was taken in November of 2020, and the employee told representatives of the employer/insurer that he would be willing to return to a light duty job with the employer.[25]

The Board thus glossed past both the relevant caselaw on this point and the record evidence, to reach a decision that is supported by neither. Because the relevant caselaw requires the employer to maintain availability of the light duty job to support

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23 Universal Ceramics, Inc. v. Watson, 339 S.E.2d 304, 177 Ga.App. 345, 347-348 (Ga. App. 1985).

24 506 S.E.2d 908, 234 Ga.App. 401 (Ga. App. 1998)

25 ALJ Award at 8; (Tr. 76).

a suspension of income benefits, and because the record evidence compels the conclusion that it did not maintain such availability, the Appellate Division's Award should be reversed.

III. Maloney v. Gordon County Farms is inapplicable to the facts of this case:

The Board, having already committed two errors by (1) adding to the precedents of this Court and the Georgia Supreme Court in requiring an employee's refusal to attempt light duty work to relate "to the work injury," and (2) ignoring the precedent of this Court and record evidence in failing to render a finding that the job remained available, went on to commit a third error. The third error was to impose a Maloney burden on the employee in this case. In Maloney v. Gordon County Farms, the Supreme Court of Georgia held:

> In order to receive workers' compensation benefits based on a change in condition, a claimant must establish by a preponderance of the evidence that he or she suffered a loss of earning power as a result of a compensable work-related injury; continues to suffer physical limitations attributable to that injury; and has made a diligent, but unsuccessful effort to secure suitable employment following termination.[26]

Maloney is plainly aimed at the circumstance where an employee has already returned to work and is terminated for cause or in a general layoff or for other reasons

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26 Maloney v. Gordon County Farms, 265 Ga. 825, 462 S.E.2d 606, 608-609 (Ga. 1995)

unrelated to the work injury, as part of the normal course of the employer's business. It requires a showing by the employee that his continued economic disability is related to the work injury, since his termination is not based on the work injury itself, but on other things that are irrelevant to the work injury. However, that case is not congruent with the facts of the instant case, where the employer terminates the employee precisely because he did not attempt the offered job, regardless of whether the refusal was reasonable or unreasonable, and without any such determination being made.

For the reasons stated above, the employee's refusal to attempt the proffered job was not unreasonable. At least arguably, the same errors that led the Appellate Division to reverse the ALJ in this case, if properly decided, would compel a decision that the termination was related to the work injury, in that the employer fired the employee in this case for refusing to attempt light duty work designed to suspend his income benefits, rather than in a general layoff or for cause or for other business related reasons. This is best shown by the fact that the termination came immediately upon the employee's refusal to attempt the job, not while the employee was working, and certainly not after the State Board had decided whether the refusal to attempt the job was reasonable or unreasonable.

However, this Court need not reach that issue specifically. The employee offered, at his deposition, to return to work at the light duty job once the worst of the pandemic was over, something the ALJ acknowledged and expressly rendered findings of fact on, and the Appellate Division again conveniently ignored.[27] Thus, the employer could easily have allowed the employee to return to work at the proffered light duty job after the pandemic concerns had waned, and chose not to, terminating the 33 year employee instead. This is too convenient by half. His termination for justifiably refusing to attempt the job and the employer's refusal to keep the job available are the reasons for the employee's economic disability, not a termination unrelated to the work injury that occurred while the employee was working for the employer, such as a layoff or for-cause termination. If an employer can simply terminate an employee for not attempting a proffered job, and by doing so trigger a Maloney burden on the part of the employee, then the reasonableness or unreasonableness of the refusal is rendered moot, as is the requirement that the employer keep the job available. This is not the law, nor should it be. Maloney is not a workaround for a proper job offer, and does not undo the requirement that the employer maintain the job's availability in order to maintain its suspension of benefits. Maloney is thus inapplicable to the facts of this case, and the Appellate Division Award should be reversed and the ALJ Award reinstated.

[27] ALJ Award at 8; (Tr.76). See, generally, Appellate Division Award.

CONCLUSION

The Appellate Division of the State Board of Workers' Compensation erred by adding to the precedents of this Court and the Supreme Court of Georgia a requirement that the employee's refusal must not be "personal" to him and must be related to the work injury. The Appellate Division further erred in failing to render findings of fact on the issue of whether the job remained available, and ignoring the relevant caselaw on that point. Finally, the Appellate Division erred in applying a Maloney burden to the employee in this case when the relevant issue is whether the employee's refusal to attempt the proffered job was justified, and whether that job remains available. Because of these errors, the Award of the Appellate Division should be reversed, and the Award of the ALJ reinstated in full.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the parties, by and through their respective counsel of record, a true and complete copy of the foregoing Brief of Amicus Curiae Georgia Legal Foundation, via electronic mail and USPS First Class Mail addressed as follows:

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This 30th day of April, 2024.

GEORGIA LEGAL FOUNDATION, INC.

/s/ J. David Garner
By: J. David Garner
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