No. 18-12619

In the United States Court of Appeals For the Eleventh Circuit

CARMELA DEROY,

Plaintiff-Appellee,

v.

CARNIVAL CORP.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida, Miami Division
(D.C. No. 18-cv-20653-UU)
District Judge: Honorable Ursula Ungaro

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

Elise Sanguinetti
President
American Association for Justice
777 6th Street NW, Suite 200
Washington, DC 20001

Jeffrey R. White
Counsel of Record
American Association for Justice
777 6th Street NW, Suite 200
Washington, DC 20001
Phone: (202) 944-2803
jeffrey.white@justice.org

Attorneys for Amicus Curiae American Association for Justice

Carmela DeRoy v. Carnival Corp., 18-12619

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, amicus curiae hereby provides the following Certificate of Interested Persons and Corporate Disclosure Statement:

The American Association for Justice is a non-profit voluntary national bar association. There is no parent corporation or publicly owned corporation that owns 10% percent or more of this entity's stock.

Counsel certifies that, to his knowledge, the only interested parties in this case omitted from prior-submitted certificates of interested persons are the following:

American Association for Justice (amicus curiae)

Sanguinetti, Elise (counsel for amicus curiae AAJ)

White, Jeffrey R. (counsel for amicus curiae AAJ)

Respectfully submitted this 20th day of December, 2018.

/s/ Jeffrey White

Jeffrey R. White
Attorney for Amicus Curiae
American Association for Justice

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose trial lawyer members primarily represent plaintiffs in personal injury actions, consumer and employee rights cases, and in civil rights litigation. Attorneys representing injured cruise passengers in Florida courts are often AAJ members.

For more than a century, nearly all major cruise carriers allowed passengers the option of filing their claims in state or federal court. In 2002, Carnival incorporated the forum provision at issue in this case, requiring passengers to file claims only in a particular federal district court. Michael D. Eriksen, *U.S. Maritime Public Policy Versus Ad-Hoc Federal Forum Provisions in Cruise Tickets*, 80 Fla. B.J. 21, 21-22 (Dec. 2006).

AAJ is concerned that approval by this Court will invite all major cruise lines to adopt similar provisions. The result will be great injustice to those cruise passengers who have been negligently injured, most particularly Florida residents and others who cannot invoke federal diversity jurisdiction.

This decision will affect a large number of travelers. Florida is the nation's center for cruise activity. In 2016, more than 7 million passengers boarded from one of Florida's five cruise ports – Miami, Everglades, Canaveral, Tampa, and Jacksonville. CLIA, *Global Cruise Industry Contributes $7.97 Billion to Florida's*

Economy (Oct. 4, 2017), https://globenewswire.com/news-release/2017/10/04/1140814/0/en/Global-Cruise-Industry-Contributes-7-97-Billion-to-Florida-s-Economy.html. That was 61 percent of all U.S. port embarkations. *Id.* 2.9 million of those cruise passengers, 25 percent of the total, were Florida residents. *Id.*

Enforcement of the forum selection provision in this case will deprive nondiverse plaintiffs of any option to file their *in personam* claims in either federal or state court. Such plaintiffs will be left with only the option of an *in rem* proceeding on the admiralty side of the federal district court. Such proceedings are cumbersome and expensive for personal injury plaintiffs. Most importantly, forcing litigants to file *in rem* proceedings deprives them of the right to a trial by jury.[1]

STATEMENT OF THE ISSUES

1. Whether Carnival's forum selection provision is invalid and unenforceable when it violates the saving to suitors clause, which preserves the right to seek common-law remedies in state court.

2. Whether Carnival's forum selection provision is invalid and unenforceable in nondiversity cases when it deprives plaintiff of access to a court of competent jurisdiction to decide her claim.

[1] All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part. No person, other than amicus curiae, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

3. Whether Carnival's forum selection provision is invalid and unenforceable when it violates the right to trial by jury.

SUMMARY OF ARGUMENT

Carnival's forum selection requirement, printed on plaintiff's cruise ticket and requiring her to litigate her claim before the United States District Court for the Southern District of Florida, is invalid and unenforceable.

First, the provision violates the saving to suitors clause, which preserves plaintiff's right to seek common-law remedies in state court. Although Congress has vested federal courts with exclusive subject matter jurisdiction over *in rem* proceedings in admiralty, Congress, in the saving clause, preserved the right of plaintiffs to file *in personam* actions in either state or federal court.

Congress intended federal courts to exercise exclusive jurisdiction over claims of particular interest to the federal government, such as prize, piracy, and revenue cases. Congress intended the saving clause to preserve the existing practice in which private maritime disputes, including contract and tort actions, were resolved by state courts. The Supreme Court has consistently adhered to this distinction in procedural terms: Federal courts exercise exclusive subject matter jurisdiction over *in rem* proceedings, but have concurrent jurisdiction with state courts over *in personam* actions seeking common-law remedies.

Thus, the saving clause preserves the historic option of plaintiffs to choose to bring their causes of action in state courts offering common-law remedies, including jury trial. Plaintiff's filing of her claim on the law side of the federal district court cannot be dismissed as mere clever pleading or gamesmanship. Her statutory right to choose her forum is a right that is historically rooted in the concurrent authority of state courts in maritime matters. Because Carnival's forum selection provision deprives her of that right, it is invalid and unenforceable.

Second, Carnival's forum selection provision violates the Shipowner's Limitation of Liability Act, 46 U.S.C § 30509, by depriving non-diverse plaintiffs of access to *any* court of competent jurisdiction. When adjudicating *in personam* maritime tort suits, federal courts do not exercise admiralty jurisdiction or federal question jurisdiction. The general maritime nature of the cause of action may require application of maritime law, but does not provide a ground for federal subject matter jurisdiction. Instead, federal jurisdiction must rest on some separate basis, most often diversity of citizenship. Where a plaintiff's suit does not meet the statutory requirements of diversity of citizenship and jurisdictional amount, it is her right under the saving clause to file her claim in state court.

It is also her right under 46 U.S.C. § 30509, which precludes vessel owners from using contracts or ticket provisions to limit the right of a personal injury claimant to seek trial in a court of competent jurisdiction. Because Carnival's forum

selection provision limits plaintiff to litigation in a single federal court which has no subject matter jurisdiction over her *in personam* claim, the provision is void under the statute.

The fact that plaintiff could have filed her action as an *in rem* proceeding against the vessel itself does not rescue Carnival's provision. Carnival's ticket provision does not require plaintiff to proceed *in rem* with her cause of action. Such *in rem* actions are burdensome for personal injury plaintiffs and do not include the right to a jury trial. Limiting plaintiff to federal *in rem* proceedings would deprive her of the choice of forum that the saving clause was intended to preserve.

Third, Carnival's forum selection provision violates plaintiff's constitutional right to trial by jury. Although the Supreme Court has deemed some forum-selection provisions to be presumptively valid, those decisions addressed geographical forum choices. They did not involve the deprivation of remedies guaranteed by the saving to suitors clause, nor were the litigants in those cases deprived of trial by jury. The Supreme Court did instruct that forum selection clauses must not be enforced if enforcement would violate the strong public policy of the forum.

In this case, enforcement of Carnival's forum selection provision contravenes one of the strongest of public policies: the right to trial by jury. This right is guaranteed by both the federal and Florida constitutions. Significantly, the constitutional protection for the jury right has historic roots in grievances against

England for moving maritime litigation from colonial jury courts to non-jury Vice-Admiralty tribunals. Because the right is fundamental, there is a presumption *against* enforcement of contract provisions purporting to deprive a party of this right.

Although the jury right may be waived by contract, the burden is on the proponent to show that waiver was knowing and voluntary. Courts look to the conspicuousness of the waiver, the parties' bargaining power, the sophistication of the opposing party, and whether the contract was negotiated. Carnival cannot establish that the ticket provision in this case was the result of a knowing and voluntary waiver of plaintiff's constitutional right. Other federal district courts have held such forum selection provisions invalid and unenforceable. This Court should do so here.

ARGUMENT AND CITATIONS OF AUTHORITY

I. CARNIVAL'S FORUM SELECTION PROVISION IS INVALID AND UNENFORCEABLE BECAUSE IT VIOLATES THE SAVING TO SUITORS CLAUSE, WHICH PRESERVES THE RIGHT TO SEEK COMMON-LAW REMEDIES IN STATE COURT.

AAJ addresses this Court regarding the enforceability of the choice-of-forum provision printed on plaintiff's cruise ticket. It requires that any claim against Carnival in connection with the cruise "shall be litigated, if at all, before the United States District Court for the Southern District of Florida." *DeRoy v. Carnival Corp.*, No. 1:18-CV-20653-UU, 2018 WL 2316643 at *1 n.1 (S.D. Fla. May 22, 2018).

The ticket provision also provides that if the federal court lacks subject matter jurisdiction, the passenger may sue Carnival in the state court located in Miami-Dade County. *Id.* On that basis, plaintiff urges enforcement of the provision, asserting that the federal district court lacks jurisdiction over her at-law personal injury claim. Carnival, on the other hand, contends that enforcement of the provision requires plaintiff to file in federal district court and denies that plaintiff has any state court option. Appellant Carnival Corporation's Brief ("Carnival Br.") 8.

AAJ, by contrast, urges this Court to hold the forum provision unenforceable and to affirm the district court's dismissal. AAJ submits that the provision deprives maritime tort plaintiffs of the right to choose to file their claims in state court, a choice that is preserved by the saving to suitors clause in 28 U.S.C. § 1333(a), by the Shipowner's Limitation of Liability Act, 46 U.S.C. § 30509, and by the right to trial by jury guaranteed by the federal and Florida constitutions.

A. Congress Intended Federal Courts to Exercise Exclusive Jurisdiction Only Over Those Admiralty Actions of Great Importance to the National Government, While Allowing State Courts to Adjudicate Private Disputes, Including Maritime Torts.

Plaintiff's filing of her action as an *in personam* action on the law side of the federal district court rather than as an *in rem* proceeding is not an example of mere pleading "tricks" or "games." Carnival Br. 5 & 10. In fact, "the *in rem/in personam* dichotomy has become a sacred tenet of admiralty jurisdiction," William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers,*

and Pirates, 37 Am. J. Legal Hist. 117, 142 (1993), and the right of plaintiffs to file *in personam* actions at law "has clear and deep historical roots." Robert Force, *Understanding the Nonremovability of Maritime Cases: Lessons Learned from "Original Intent,"* 89 Tul. L. Rev. 1019, 1020 (2015). *See, e.g.*, *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 88 (1946) ("It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court.").

As Carnival acknowledges, federal courts are courts of limited jurisdiction and "possess only that power authorized by the Constitution and statute." Carnival Br. 8. The mandatory forum provision printed on Carnival's tickets cannot be enforced if the chosen forum lacks judicial authority.

Pursuant to the constitutional grant of jurisdiction over "all cases of admiralty and maritime Jurisdiction," U.S. Const. art. III, § 2, Congress has defined the scope of the subject matter jurisdiction of lower federal courts:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333(a).[2]

[2] This grant of jurisdiction has remained essentially unchanged from the Judiciary Act of 1789, which provided:

> [T]he district courts shall have, exclusively of the courts of the several States . . . exclusive original cognizance of all civil causes of admiralty

Although what the drafters of the Judiciary Act of 1789 intended in creating the saving to suitors clause "is not entirely clear and has been the subject of some debate," *Lewis v. Lewis & Clark Marine, Inc*., 531 U.S. 438, 444 (2001), it was the "unquestioned aim" of the saving clause to preserve "the historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 371-72 (1959).

Documentary and statistical research into colonial and pre-constitutional admiralty proceedings indicates that the Founders intended to grant exclusive admiralty jurisdiction to federal courts only in those cases of particular importance to the federal government. In colonial times, vice-admiralty courts had exclusive jurisdiction to decide the fate of seized vessels, exercising "prize jurisdiction" conferred by special commission from the High Admiralty Court in England. By contrast, admiralty courts of "instance jurisdiction" decided commercial disputes, including collisions, wages, pilotage, salvage, and similar private actions. Jonathan M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto*, 30 J. Mar. L. & Com. 361, 376

> and maritime jurisdiction . . . within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Ch. 20, § 9, 1 Stat. 76-77. *See Lewis v. Lewis & Clark Marine, Inc*., 531 U.S. 438, 443-44 (2001).

(1999). Those private claims "could be brought either in a court of vice admiralty or in a Colonial court at the option of the plaintiff." Force, *supra*, at 1020. *See also* Gutoff, *supra*, at 378. Such private suits would include negligent injury claims.

After independence and under the Articles of Confederation, state "common law courts had concurrent jurisdiction with courts of admiralty . . . in causes of action against a shipowner in contract or in tort when he could be reached personally." Steven L. Snell, *Courts of Admiralty and the Common Law: Origins of the American Experiment In Concurrent Jurisdiction* 120 (2d ed. 2007). Such *in personam* suits "could be brought in a state common law court or in a state's admiralty court, again at the option of the plaintiff." *Id.*

The Founders who drafted the Judiciary Act of 1789 saw the necessity for "the federal courts' exclusive jurisdiction over the public law cases that really counted: prize cases, criminal prosecutions, and revenue collection cases." Casto, *supra*, at 146.[3] No member of the first Congress even mentioned the adjudication of private maritime claims sounding in tort or contract. *Id.* at 147. Indeed, "they casually dismissed private claims as relatively unimportant disputes that could be safely

[3] It has been observed that the Supreme Court's broad construction of the Commerce Clause has enabled Congress to address such matters directly. *See American Dredging Co. v. Miller*, 510 U.S. 443, 461 (1994) (Stevens, J., concurring in part). *See also* Force, *supra*, at 151 (By the end of the nineteenth century, "[p]rivate [admiralty] claims predominated, and the old paradigm of public litigation had almost faded from sight.").

entrusted to the state courts." *Id.* at 154. Statements of James Madison, Edmund Randolph, and others indicate that the original intent of the saving to suitors clause was that plaintiffs would "file these relatively insignificant cases in a state court." *Id.* at 144.

It is also highly significant for this case that:

> When a plaintiff opts to file a claim in state court under a state's jurisdictional rules or in federal court under diversity jurisdiction, those courts are not exercising "admiralty jurisdiction." The state court is exercising jurisdiction over civil matters such as contract and tort under a general state jurisdictional statute. The federal court is exercising its diversity jurisdiction. It may turn out that the suit stems from an accident on navigable waters . . . and in such cases, the substantive rules of maritime tort or maritime contract will be applied. But this does not make either case one in which a court is exercising its "admiralty jurisdiction."

Force, *supra*, at 1026.

B. The Saving to Suitors Clause Protects the Maritime Plaintiff's Right to Choose to File Her *In Personam* Claim in State Court.

The Supreme Court's construction of the saving to suitors clause reflects this historic distinction, though framed in procedural terms. Casto, *supra*, at 145. Although the Founders did not refer to the federal exclusive admiralty jurisdiction as *in rem*, as distinguished from *in personam* actions, that dichotomy became settled Supreme Court precedent by the second half of the nineteenth century. Casto, *supra*, at 142. The Court explained in *The Moses Taylor* that the "characteristic feature of [the suit *in rem*] is that the vessel or thing proceeded against is itself seized and

impleaded . . . which gives to the title made under its decrees validity against all the world." 71 U.S. 411, 427 (1866). In *The Hine v. Trevor*, the Court made clear that "direct proceeding against the vessel, belonged to the Federal courts alone." 4 Wall. 555, 569 (1866). Exclusive federal admiralty proceedings came to be defined as *in rem*. State courts "may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction." *American Dredging Co. v. Miller*, 510 U.S. 443, 446 (1994) (quoting *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 124 (1924)).

However, the saving to suitors clause also had the "unquestioned aim" of preserving "the concurrent jurisdiction of state courts in admiralty matters" in *in personam* actions, *Romero*, 358 U.S. at 372, including "the historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal." *Id.* at 371. *See also Lewis*, 531 U.S. at 455-56 (reaffirming that the saving to suitors clause protects the claimant's choice of forum and rejecting defendant's idea "making run of the mill personal injury actions involving vessels a matter of exclusive federal jurisdiction").

Thus, far from mere artful pleading, plaintiff's filing of her complaint as an at-law *in personam* action is based on her federal statutory right, which is designed to preserve the concurrent jurisdiction of state courts over such claims. As this Court has explained:

> Under the savings-to-suitors clause, a plaintiff in a maritime case alleging an *in personam* claim has three options: (1) the plaintiff may file suit in federal

> court under admiralty jurisdiction . . .; (2) the plaintiff may file suit in federal court under diversity jurisdiction; or (3) the plaintiff may file suit in state court.

St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc., 561 F.3d 1181, 1187 n.13 (11th Cir. 2009).

Moreover, because one of the important remedies saved to suitors is the right to trial by jury, *Lewis*, 531 U.S. at 454-55, the saving clause preserves the plaintiff's right to file her claim in a tribunal where that remedy is available – either state court or on the "law side" of the federal district court. As this Court has noted, the clause "embodies a presumption in favor of jury trials and common law remedies *in the forum of the claimant's choice*." *Offshore of the Palm Beaches, Inc. v. Lynch*, 741 F.3d 1251, 1258 (11th Cir. 2014) (emphasis added) (quoting *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1037 (11th Cir. 1996).

Because the saving to suitors clause gives plaintiff the right to select either a federal or state forum, "any contractual provision purporting to limit it [must] be deemed void." *Nunez v. Am. Seafoods*, 52 P.3d 720, 723 (Alaska 2002).

II. CARNIVAL'S FORUM SELECTION PROVISION IS INVALID AND UNENFORCEABLE IN NONDIVERSITY CASES BECAUSE IT DEPRIVES PLAINTIFF OF ACCESS TO A COURT OF COMPETENT JURISDICTION TO DECIDE HER CLAIM.

A. Federal Courts Lack Subject Matter Jurisdiction Over *In Personam* Admiralty Actions Lacking Diversity of Citizenship or Other Basis for Federal Jurisdiction.

Plaintiff is a resident of the State of Florida. Consequently, in addition to depriving her of the right to file her *in personam* admiralty suit in state court, enforcement of Carnival's forum selection provision would deprive plaintiff of access to *any* court of competent jurisdiction.

Carnival insists that the district court has jurisdiction over plaintiff's *in personam* claim simply because of its "underlying maritime nature." Carnival Br. at 11. This Court has instructed to the contrary: "[A] federal district court should not accept the removal of a saving clause case solely because of its general maritime nature: the maritime nature simply does not provide a ground for federal jurisdiction." *Armstrong v. Alabama Power Co.*, 667 F.2d 1385, 1388 (11th Cir. 1982).

The two decisions Carnival cites in support of its assertion that the maritime nature of the action can serve as the basis for federal jurisdiction, *see* Carnival Br. 15, actually hold that federal courts can exercise subject matter jurisdiction over maritime tort cases brought by passengers only where there is diversity of citizenship. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625,

628 (1959) (injured cruise passenger had right to choose to file maritime tort action in state court or in federal court based on diversity of citizenship); *Doe v. Celebrity Cruises, Inc*., 394 F.3d 891, 899 (11th Cir. 2004) (court exercised subject matter jurisdiction over tort action against cruise line based on diversity of citizenship).

Contrary to Carnival's view, where there is no diversity of citizenship, federal courts lack subject matter jurisdiction over claims arising under general maritime law.

The Judiciary Act was amended in 1875 to extend federal subject matter jurisdiction to "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States, and Treaties made." Act of Mar. 3, 1875, 18 Stat. 470 (now codified at 28 U.S.C. § 1331). In *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959), the Supreme Court addressed the question of whether an *in personam* action asserting a claim under general maritime law falls within federal question jurisdiction. The Court concluded that it does not.

Franciso Romero was a Spanish crew member who was injured while working aboard The Guadelupe. He filed *in personam* action against the Spanish owner on the law side of the District Court for the Southern District of New York. *Romero*, 358 U.S. at 356. The court dismissed plaintiff's general maritime law claim as lacking diversity of citizenship. *Id*. at 358. The Supreme Court upheld that portion of the judgment, rejecting Romero's contention that maritime claims "brought on

the law side of the lower federal courts" arise "under the Constitution or laws of the United States" for purposes of federal question jurisdiction. *Id.* at 359-60.

The Court found that in amending the Judiciary Act in 1875 to add federal question jurisdiction, Congress did not intend to expand federal admiralty jurisdiction. *Id.* at 367-68. Deeming *in personam* admiralty actions to be federal question cases would undermine the concurrent jurisdiction of state courts, and erase "the historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal." *Id.* at 371. Consequently, lower federal courts have no subject matter jurisdiction over maritime tort cases filed as *in personam* actions, absent diversity or some other basis for subject matter jurisdiction.[4]

Thus, as this Court has stated, in cases where there is no diversity of citizenship, plaintiffs must be permitted to file in state court. It is their "right guaranteed them by the 'savings to suitors' clause." *Murphy v. Florida Keys Elec. Co-op. Ass'n, Inc.*, 329 F.3d 1311, 1319 (11th Cir. 2003).

[4] Carnival argues that this requirement that *in personam* maritime actions be supported by a separate and independent basis for jurisdiction is limited to removal cases. Carnival Br. 17-18. This is plainly incorrect. *Romero* itself was not a removal case; Romero, like plaintiff in this case, filed his action on the law side of the federal district court. *Romero*, 358 U.S. at 356.

B. In Cases Where Diversity Jurisdiction is Absent, Carnival's Forum Provision Also Violates the Shipowner's Limitation Liability Act, 46 U.S.C. § 30509.

Congress enacted the Shipowner's Limitation Liability Act in 1935 to curb the power of shipowners to limit their own liability for negligence. *See* 6 U.S.C. § 183c. The statute, as recodified and renumbered in 2006, provides:

> Provisions limiting liability for personal injury or death
>
> (a) Prohibition.—
> (1) In general.—The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting—
> (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
> (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.
> (2) Voidness.—A provision described in paragraph (1) is void.

46 U.S.C. § 30509. This nonwaiver statute expresses a strong public policy against the use of contract or ticket provisions unilaterally "to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury." *Moore v. Am. Scantic Line, Inc.*, 30 F. Supp. 843, 844 (S.D.N.Y. 1939).

The Supreme Court has discerned from the legislative history that Congress was primarily concerned with combatting the unfairness of carriers imposing mandatory arbitration on passengers. Congress sought to prohibit "passenger-ticket

conditions purporting . . . to remove the issue of liability from the scrutiny of any court by means of a clause providing that 'the question of liability and the measure of damages shall be determined by arbitration.'" *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596 (1991) (quoting S. Rep. No. 2061, 74th Cong., 2d Sess., 6 (1936)). Based on that interpretation, this Court has held that a forum provision that directs litigation to courts in Florida does not violate the statute, so long as it does not leave passengers "without any recourse to judicial process." *Estate of Myhra v. Royal Caribbean Cruises*, 695 F.3d 1233, 1243 (11th Cir. 2012). *See also id.* at 1241 n.26 (stating that the statute, as applied in *Shute*, prohibits a ticket provision that would "foreclose a judicial determination of liability").

In this case, under *Romero* and in the absence of diversity, the federal court for the Southern District of Florida has no subject matter jurisdiction over plaintiff's *in personam* suit. Enforcing the ticket requirement that plaintiff file her claim only in that court is tantamount to prohibiting her from filing in any court of competent jurisdiction. Such a requirement plainly violates § 30509(a)(1) and is therefore void under § 30509(a)(2).

C. Plaintiff Cannot Be Required to Bring Her Personal Injury Action as an *In Rem* Proceeding.

Carnival's final argument appears to be that plaintiff is not deprived of access to a court of competent jurisdiction because instead of filing an at-law *in personam* cause of action, she could have filed an *in rem* proceeding against the vessel itself,

within the exclusive admiralty jurisdiction of the federal court. *See* Carnival Br. 8-10, 15-16.

It is true that a plaintiff's maritime action may also be pursued in an ordinary civil action. *Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd*., 369 U.S. 355, 359 (1962). *See also Seas Shipping Co. Inc. v. Sieracki*, 328 U.S. 85, 88 (1946) (A plaintiff may enforce her rights under the law of admiralty "either by a suit in admiralty or by one on the law side of the court."). In 1966, the admiralty docket was merged with the civil docket for proceedings at law. *See generally*, David W. Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 Mich. L. Rev. 1627 (1976). A plaintiff may specifically designate a civil action as within the exclusive admiralty jurisdiction of the federal district court by so pleading under Fed. R. Civ. P. 9(h).

Invocation of exclusive admiralty jurisdiction by proceeding *in rem* triggers "a host of special rights, duties, rules, and procedures." *Lewis*, 531 U.S. at 446. For example, in *Chan v. Soc'y Expeditions, Inc*., a personal injury action by cruise passengers, plaintiffs were required to comply with Supplemental Admiralty and Maritime Rule C(2), which "requires a plaintiff filing a complaint in actions in rem to state that the vessel 'is within the district or will be during the pendency of the action.'" 123 F.3d 1287, 1294-95 (9th Cir. 1997); *see also Craddock v. M/Y The Golden Rule*, 110 F. Supp. 3d 1267, 1273 (S.D. Fla. 2015) (noting that a maritime

personal injury suit in admiralty must be framed as an action to secure a property right in a maritime lien on the vessel and discussing the pleading requirements to maintain tort proceedings *in rem*).

Such proceedings are relatively rare. Not only does the plaintiff give up the right to a jury trial, but the procedures often prove cumbersome and expensive for injury plaintiffs. *See, e.g.*, *Chan*, 123 F.3d at 1294-96 (noting the difficulties facing plaintiffs in pleading sufficiently to maintain the federal court's *in rem* jurisdiction).

In this case, as the district court pointed out, Carnival's forum selection provision does not expressly require a claimant to contort her personal injury claim into an *in rem* action and cannot be fairly construed to do so. *DeRoy*, 2018 WL 2316643, at *6, n.8.[5] Moreover, to impose such a requirement "would denude the choice of forum and law enshrined in the saving-to-suitors clause." *Id. See also* 14A

[5] It cannot be argued that the forum provision encompasses litigation *in rem*. The vessel – the nominal defendant in an *in rem* action – was not a party to the contract. Nor did the ticket provision make any reference to the vessel or to *in rem* actions. Thus, in *Carbon Black Export, Inc. v. The S.S. Monrosa*, 254 F2d 297 (5th Cir. 1958), where a shipping company included in its form bill of lading a provision requiring any legal action against the vessel owners be filed in the courts of Genoa, Italy, the court of appeals held that the forum selection contract did not include *in rem* proceedings. *Id.* at 299. The Supreme Court, dismissing the writ of certiorari on a separate issue as improvidently granted, indicated approval of the Fifth Circuit's holding that the provision did not apply to *in rem* actions. *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 182 (1959); *cf. Mazda Motors of Am., Inc. v. M/V Cougar Ace*, 565 F.3d 573, 577 (9th Cir. 2009) ("We need not decide whether the forum selection clause, operating alone, applies to this in rem suit," because other contract provisions extended the scope to include actions against the vessel.).

Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3672 (4th ed. 2018) (The saving clause gives an *in personam* plaintiff "the choice of proceeding in an ordinary non-removable civil action in a state or federal court, rather than bringing a libel in admiralty [in rem] in federal court.").

To require plaintiff to pursue redress for wrongful injury *only* as an *in rem* claim in admiralty would violate the saving to suitors clause. Most importantly, it would deprive plaintiff of her right to trial by jury, which is one of the remedies saved to suitors.

III. CARNIVAL'S FORUM SELECTION PROVISION IS INVALID AND UNENFORCEABLE BECAUSE IT VIOLATES THE RIGHT TO TRIAL BY JURY.

The Supreme Court has deemed certain forum-selection provisions to be presumptively valid and enforceable. The Court in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), upheld a provision in a negotiated international towage contract between sophisticated American and German corporations that disputes be litigated in English courts, recognizing the expanded international commercial relationships of our time. *Estate of Myhra*, 695 F.3d at 1240. Nevertheless, the Court specifically instructed that a maritime contractual choice-of-forum clause "should be held unenforceable if [it] contravene[s] a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision." *Bremen*, 407 U.S. at 15.

In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), where a passenger brought suit for injuries she sustained in a fall aboard a cruise ship, the Court refined its *Bremen* analysis and upheld Carnival's ticket provision, which at that time required that any lawsuit be filed in either state or federal court in Florida. *Id.* at 593-94. However, as this Court observed, *Bremen's* declaration that forum selection clauses are unenforceable if they contravene strong public policy "remains alive and well in the wake of *Shute*." *Estate of Myhra*, 695 F.3d at 1241.

In this case, enforcement of Carnival's forum selection provision contravenes one of the strongest public policies: the right to trial by jury. The Seventh Amendment guarantees the right to a jury trial in civil actions at common law. U.S. Const. amend. VII. Florida's Constitution commands: "The right of trial by jury shall be secure to all and remain inviolate." Fla. Const., art. I, § 22. *See also Fox v. City of Pompano Beach*, 984 So.2d 664, 668 (Fla. 4th DCA 2008) ("The right to a trial by jury is a fundamental right under both the United States and Florida constitutions."). Requiring plaintiff to pursue her claim in an *in rem* proceeding would preclude her right to choose a jury trial. *Baughan v. Royal Caribbean Cruises, Ltd.*, 944 F. Supp. 2d 1216, 1218 (S.D. Fla. 2013); Fed. R. Civ. P. 38(e).

The right to choose a jury trial is clearly guaranteed by the saving clause. As the Supreme Court has made clear, "[t]rial by jury is an obvious, but not exclusive, example of the remedies available to suitors." *Lewis*, 531 U.S. at 454-55. *Bremen*

and *Shute* addressed geographical forum selections. Neither involved the saving to suitors clause and its preservation of the "historic option of a maritime suitor pursuing a common-law remedy to select his forum, state or federal." *Romero*, 358 U.S. at 371. For that reason, the presumption favoring forum selection contracts does not apply where enforcement would deprive the claimant of her right to a jury trial. Indeed, this Court has enunciated a presumption *against* enforcement of such a provision. *See Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1063 (11th Cir.1996) ("[T]he 'saving to suitors' clause of § 1333(1) embodies a presumption in favor of jury trials and other common law remedies in the forum of the damage claimant's choice.").

A primary grievance of the American colonists, ultimately leading to the American Revolution, was the continuing effort by England to avoid jury adjudications of maritime disputes by moving cases from colonial courts, where local juries sat, to Vice-Admiralty courts, which were non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, The Vice-Admiralty Courts and the American Revolution 209-11 (1960); Roscoe Pound, The Development of Constitutional Guarantees of Liberty 69-72 (1957); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 654 (1973). The colonists complained bitterly of this infringement of their right through the Stamp Act Congress, the Continental Congress, and, finally, in the

Declaration of Independence ("For depriving us in many cases, of the benefits of Trial by Jury"). Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993).

The right to trial by jury is "is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 580-81 (1990) (quoting *Parsons v. Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433 (1830)). It is true that "[a] party may validly waive its Seventh Amendment right to a jury trial so long as the waiver is knowing and voluntary." *Bakrac, Inc. v. Villager Franchise Sys., Inc.*, 164 F. App'x 820, 823 (11th Cir. 2006) (citing *Brookhart v. Janis*, 384 U.S. 1, 4-5 (1966)). However, "because the right to a jury trial is fundamental, 'courts must indulge every reasonable presumption against waiver.'" *Burns v. C. Lawther*, 53 F.3d 1237, 1240 (11th Cir. 1995) (quoting *LaMarca v. Turner*, 995 F.2d 1526, 1544 (11th Cir. 1993)).

In assessing whether a waiver is knowing and voluntary, this Court has instructed courts to consider (1) conspicuousness of the waiver provision, (2) the parties' relative bargaining power, (3) the sophistication of the party challenging the waiver, and (4) whether the terms of the contract were negotiable. *Bakrac*, 164 F. App'x at 823-24. There can be no doubt that Carnival cannot carry its burden of

establishing that plaintiff in this case knowingly and voluntarily waived her right to jury trial.

On that basis, federal district courts have held cruise ticket provisions that expressly require plaintiffs to pursue claims in federal court without an opportunity to choose a jury trial to be invalid and unenforceable. *See, e.g.*, *Ginsberg v. Silversea Cruises, Inc.*, No. 03-62141-CIV, 2004 WL 3656827, at *1-2 (S.D. Fla. Mar. 18, 2004) (cruise ticket requirement that all disputes be tried in federal court "without jury" is an unenforceable waiver of Seventh Amendment right); *Sullivan v. Ajax Navigation Corp. and Celebrity Cruises, Inc*., 881 F. Supp. 906, 910-11 (S.D.N.Y. 1995) (cruise ticket provision requiring that suits be "instituted in the United States District Court for the Southern District of New York as an admiralty or maritime action without demand for a jury trial" invalid); *McDonough v. Celebrity Cruise, Inc*, No. 98 CIV.1517(RWS), 2000 WL 341115, at *1 (S.D.N.Y. Mar. 30, 2000) (similar).

AAJ urges this Court to hold that Carnival's forum selection ticket provision is invalid and unenforceable because it violates the saving to suitors clause, 28 U.S.C. § 1333(a); the Shipowner's Limitation Liability Act, 46 U.S.C. § 30509; and the right to trial by jury guaranteed by the federal and Florida constitutions.

CONCLUSION

For the foregoing reasons this Court should affirm the judgment of the court below.

Respectfully submitted,

/s/ Jeffrey White

Jeffrey White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th St., NW, Ste. 250
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Attorney for Amicus Curiae
American Association for Justice

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6,201 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 styles requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

Date: December 20, 2018

/s/ Jeffrey White

Jeffrey White
Attorney for Amicus Curiae
American Association for Justice

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. I also certify that the foregoing document is being served on this day on all counsel of record via transmission of the Notice of Electronic Filing generated by CM/ECF. All participants in this case are registered CM/ECF users.

/s/ Jeffrey White
Jeffrey White
Attorney for Amicus Curiae
American Association for Justice