No. 18-1951

In the United States Court of Appeals For the Third Circuit

IN RE: AC&S, INC., ET AL.,

Debtors.

On appeal from the United States District Court for the District of Delaware, Case No. 1:16–cv–1078, which affirmed orders of the United States Bankruptcy Court for the District of Delaware, Case Nos. 00–3837, 00–4471, 01–1139, 01–2094, 01– 2471, 02–10429, 02–12687, 03–10495, 04–11300.

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCATION FOR JUSTICE IN SUPPORT OF APPELLEES AND AFFIRMANCE

Elise Sanguinetti
President
American Association for Justice
777 6th St. NW, Suite 200
Washington, DC 20001
(202) 965-3500

Robert S. Peck
Center for Constitutional Litigation
455 Massachusetts Ave. NW, Suite 152
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

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

Counsel for Amicus Curiae American Association for Justice

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Local Appellate Rule 26.1, amicus curiae hereby provides the following disclosure statement:

The American Association for Justice (AAJ) has no parent company. No publicly held company owns 10% or more of its stock or has as a financial interest in the outcome of the proceeding. Neither AAJ nor its counsel represent a debtor or trustee in the underlying bankruptcy proceeding.

Respectfully submitted this 28th day of September, 2018.

/s/ Jeffrey White

Jeffrey R. White
Attorney for Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a national voluntary bar association founded in 1946 to safeguard the right of all Americans to seek legal recourse for wrongful injury, strengthen the civil-justice system, and protect access to the courts. AAJ is the world's largest trial bar association, with members in the United States, Canada, and abroad. Throughout its 70-year history, AAJ has served as a leading advocate of the right to access to the courts for legal redress for wrongful injury. Many AAJ members represent victims of asbestos exposure before the trusts set up to compensate them and before the courts.[1]

SUMMARY OF ARGUMENT

Honeywell International Inc. and Ford Motor Company couch their appeal on a specious claim that victims of deadly and disabling asbestos-based diseases regularly engage in "rampant fraud and abuse" with filings that assert one thing when applying for compensation from the asbestos trusts and something different in litigation with non-bankrupt defendants, even though any differences may be mandated by law or process.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

Quoting extensively from self-serving statements made by members of their industries, their defense counsel, and their political supporters at congressional hearings advocating for a bill repeatedly introduced but never enacted, the companies provide this Court with a gravely distorted view of asbestos litigation that falsely portrays it as a bonanza for the many people whose lives were taken or devastated by asbestos exposure. Despite the picture of "double dipping" that Honeywell and Ford paint to advance an openly political agenda that does nothing to provide this Court with guidance on the legal questions presented, reality is quite different, as the District Court explained.

The outlandish assertions, which serve as the basis for this appeal,[2] deserve a response – and the Court deserves a clearer idea than the Opening Brief provides of the high hurdles and limited compensation available to asbestos claimants who play by the rules imposed on them.

Asbestos plaintiffs have suffered real harm and are typically undercompensated by a system that usually pays miniscule amounts for the horrific injuries they have suffered. Adequate means already exist, through discovery and the maturity of this litigation and the experience all parties have with it, to prevent the type of fraud and abuse that Honeywell and Ford claim. Moreover, the

[2] *See* Honeywell-Ford Opening Br. [hereinafter, "Opening Br."] 1 ("This appeal concerns the public's interest in fraud and abuse that pervades the asbestos claims systems.").

information the two companies seek has little value for the purposes they claim unless used in skewed and out-of-context fashion that ignores application of the apportionment regimes employed in these cases.

Honeywell and Ford are wrong to assert that 11 U.S.C. § 107 displaced, rather than codified, the common law. Instead, Section 107 must be read against the common law background that existed beforehand. Under both the statutory language and the traditional application of the common law, the decisions of the bankruptcy and district courts are well-founded and abundantly within their discretion.

Finally, Honeywell and Ford have doubly waived their First Amendment argument. Not only did they fail to raise it in adequate fashion in the bankruptcy court by merely mentioning it in passing in a footnote, but they also fail to explain what extraordinary circumstances justify its consideration in this Court by ignoring the District Court's finding of waiver. That new waiver should control. Yet, even if this Court were to reach the merits, the First Amendment provides no additional reason to open access to the records the companies seek, as it provides no independent basis for access to information not otherwise available to the public.

ARGUMENT

I. USE OF ASBESTOS HAD DEVASTATING CONSEQUENCES TO WORKERS AND THEIR FAMILIES FOR WHICH AVAILABLE COMPENSATION IS LIMITED.

A. Plaintiffs Have Suffered Real Injuries that Require Real Compensation.

Once touted as a miracle fiber for its flame-retardant and insulating properties and used ubiquitously in as varied a set of products as adhesives, insulation, roofing shingles, ceiling and floor tiles, paper products, and automobile clutch, brake and transmission parts, asbestos is now simply described by the government as a "health hazard." U.S. Dep't of Labor, OSHA, *Safety and Health Topics: Asbestos, Overview, available at* https://www.osha.gov/SLTC/asbestos (last visited Sept. 13, 2018).

Exposure to asbestos can convey mesothelioma, a fatal form of cancer that almost never occurs from any other cause, see Anita Bernstein, *Asbestos Achievements*, 37 Sw. U. L. Rev. 691, 703 (2008), and is not dose-related or cumulative. Jane Stapleton, *Two Causal Fictions at the Heart of U.S. Asbestos Doctrine*, 122 L.Q. Rev. 189, 189-90 (2006). Asbestos can also cause other sometimes fatal but always devastating cancers, a variety of non-malignant respiratory diseases, as well as lung scarring. Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 Conn. Ins. L.J. 255, 256-57 (2006).

The resulting cancers – the legally cognizable injuries from exposure – appear only after long latency periods have passed, sometimes as long as 40 years. *Norfolk*

& W. Ry. Co. v. Ayers, 538 U.S. 135, 168 (2003) (Kennedy, J., concurring in part, dissenting in part). The "cancers inflict excruciating pain and distress-pain more severe than that associated with asbestosis, distress more harrowing than the fear of developing a future illness." *Id.* For example, mesothelioma causes "agonizing, unremitting pain in the lungs, which spreads throughout the thoracic cavity as tumors expand and metastasize," with increasing severity over time and "with death the only prospect for relief." *Id.*

Despite the severity of these injuries, when claimants seek compensation from the asbestos trusts, they often receive only "pennies on the dollar." Stephen J. Carroll et al., *Asbestos Litigation*, RAND Inst. for Civil Justice, 102 (2005), *available at* http://www.rand.org/pubs/monographs/MG162. The payment percentages are formally adopted by the trusts to preserve funds for future claimants and are revised periodically to reflect claiming projections. A federal study found the percentage can be as low as 1.1 percent of the scheduled compensation, just a tenth of a cent more than a single penny on the dollar. Government Accounting Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts*, 21 (Sept. 2011).

Despite that small proportionate compensation, and regardless of apportionment regime of the state in which the case is brought, solvent co-defendants are credited as if the trusts paid full compensation. Apportionment results

in consistent under-compensation of claimants with liable parties obtaining a windfall.

It is little wonder, then, that counsel properly seeks compensation for the claimant from other liable parties. After all, attorneys have an ethical obligation to pursue their clients' interests zealously within the law and the standards of professional conduct. *See Nix v. Whiteside*, 475 U.S. 157, 168 (1986). *See also, e.g.*, Delaware Lawyers' Rules of Professional Conduct 1.3, comment 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

Multiple defendants logically bear responsibility. Asbestos exposures often take place over the course of a long career with exposures occurring again and again at different worksites. Some workers handled asbestos as it came out of its packaging, some worked on asbestos removal when identifying the manufacturer may not have been obvious, and still others suffered from airborne fibers of unknown origin. Some may have worked in all three capacities. In any event, attempting to recall product names some 40 years later that had no significance to them at the time of exposure asks a great deal of a worker – and the inability to convincingly identify brand and dosage often forms the complete defense a company undertakes.

In the same congressional hearings that Honeywell and Ford proffer to support their allegations of fraud, a lawyer for asbestos claimants cogently explained why

defendants' arguments that they pay more than their share of liability because of the bankruptcy trusts "betrays a hopeless lack of awareness about how asbestos cases are actually litigated." Furthering Asbestos Claim Transparency (FACT) Act of 2012, Hearing on H.R. Rep. 112-120, at 59 (May 10, 2012) (testimony of Charles S. Siegel). Mr. Siegel explained:

> there is no "fair share" for a defendant in asbestos litigation; there is only what percentage of causal responsibility is assigned by a jury in a particular case and each case, of course, turns on its facts. Moreover, the fact that other parties may share responsibility for causing an injury is not a ground for avoiding liability. …
>
> Defendants routinely and vigorously assert their rights to place other responsible parties on the verdict form that is filled out by jury, including bankrupt entities. The critics of state courts' handling of asbestos cases are apparently unaware that defendants in civil lawsuits can conduct discovery to vindicate these rights. Such discovery includes … [m]aterials submitted by plaintiffs to bankruptcy trusts. …
>
> Nor do plaintiffs in states with joint and several liability obtain a "double recovery" when they are compensated both in the tort system and from the trusts. Under the "one satisfaction" rule, a plaintiff is entitled to only one recovery for a particular injury. Thus, after a verdict is entered, the non-settling defendants are entitled to discover the amount of settlements after the verdict is entered, and will be given a set-off equal to the settlements – including any settlements with trusts. Further, if the plaintiff does not obtain a settlement from the defendant's co-tortfeasor, the defendant can seek contribution directly from that co-tortfeasor or the asbestos trust that has assumed its responsibilities.

Id. at 59-61.

Mr. Siegel's point was reiterated three years later by Elihu Inselbuch, a lawyer who has been involved with the asbestos bankruptcy trusts from their inception:

> Each trust only pays its respective defendant's share of the harm caused to a victim, meaning that there is absolutely no opportunity to double dip because each trust and each settling defendant in the tort system only pays for their portion of the harm caused. No one defendant or trust pays for the harm caused by another trust or defendant.

Furthering Asbestos Claim Transparency (FACT) Act of 2015, Hearing on H.R. Rep. 114-7, at 11 (Feb. 4, 2015) (testimony of Elhiu Inselbuch).

Defendants, both through the tall tales they have told Congress and state legislatures and through information routinely available to them in litigation, have access to everything they need for both their litigation and political purposes. There is no reason for this Court to upset the entirely appropriate ruling from the court below.

B. The Value of Trust Claim Information is Highly Limited, While Defendants Have Significant Access to Better Information.

Additional realities of asbestos litigation also demonstrate the absurdity of the asserted need that Honeywell and Ford claim. First, as the District Court, quoting the bankruptcy court below, explained, the records they seek "are attorney statements of authority to represent multiple clients" and do not represent current claims made or future claims that might be made. *In re Motions Seeking Access to 2019 Statements*, 585 B.R. 733, 742 (D. Del. 2018) (citation omitted). Thus, the documents do not provide information about claiming, let alone, claims that conflict with one another.

Second, in cases brought by a worker's estate, there is no plaintiff to attempt the task of recollection. Instead, both plaintiff and defense counsel must reconstruct the likely exposures from work history, expert testimony, other documentary evidence, and witnesses such as co-workers because the injured party is no longer available. These methods of constructing an evidentiary record remain available and are frequently employed, even when the worker is still alive. That is why one defense firm has published a primer that advises defendants that "every case requires expert evidence." *See* Hermes Netburn, *Asbestos Litigation: A Defense Primer for Motor Vehicle Manufacturers*, http://www.hermesnetburn.com/E40D62/assets/files/News/Asbestos%20Litigation-A%20Defense%20Primer%20for%20Motor%20Vehicle%20Manufacturers.pdf.

At this mature point in the litigation, both sides know the likely exposures based on a claimant's work history. Even industry consultants concede that this is true. *See* Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2013 Overview of Trust Assets, Compensation & Governance*, 12:11 Mealey's Asbestos Bankr. Rep. 2, 12 (Jun. 2013).

In fact, the trusts publish their settlement grids, making it easy to determine likely settlement amounts based on job assignment and location. *See* Mark Davidson, et al., *Asbestos Bankruptcy Trusts and their Impact on the Tort System*, 7 J.L. Econ. & Pol'y 281, 289 (2010). Thus, regardless of whether a plaintiff ever files

a claim with a trust and regardless of any amount that a trust may pay in settlement, defendants are in a position to deflect some of their liability on trusts when the case is in a several-liability jurisdiction. All they need to do is have an expert testify about likely other exposures based on work history, which provides defendants with the means to assure that they are not assessed excess liability – and perhaps even the means to diminish what appropriately should be assessed against them – regardless of whether claims, which themselves are inadmissible, are made or not. The filing of claims simply has limited significance on the ultimate apportionment of damages.

It is true that different law firms, plaintiff and defense, use different methodologies and different experts to develop that evidence and often will come to different conclusions about exposure because of those differences. Yet, those methodological or tactical decisions do not change the calculus about opening these records for plenary non-litigation use.

As RAND observed, even when undisclosed claims occur,

> Failure to disclose trust claims is not necessarily intentional. In some cases, trust claims are filed by a referring (or intake) law firm but the discovery responses coordinated by the litigating firm. The litigating firm might be unaware of whether the referring firm has filed claims.

Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, RAND Institute for Civil Justice, 69 n.27 (2011), *available at* https://www.rand.org/pubs/monographs/MG1104.html. When that occurs, it is not the product of fraud, and legislated solutions will not correct those occasional errors.

It is also true that different causation regimes are applied to different cases, requiring counsel to make certain strategic decisions on where to expend litigation resources first or at all, leading counsel to forego certain trusts or order claims applications in a certain way.

Many asbestos exposures occurred in shipyards, where maritime law has much stricter causation requirements than do cases tried under ordinary tort. *See, e.g.*, *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005) (requiring "product [be] a *substantial* factor in causing the injury he suffered." (emphasis added)). As a result, one might qualify for compensation from a bankruptcy trust, even if the bankrupt party's liability would be insufficient to affect the liability of solvent parties. These differences mean that the fact that a claim was filed with a trust may have no bearing on the extent of the liability of a solvent maritime-case defendant. The maritime case also must be distinguished from tort cases, which use a more familiar causation standard. *See, e.g.*, *Tragarz v. Keene Corp.*, 980 F.2d 411, 417 (7th Cir. 1992).

In addition, some exposures are so *de minimis* that they are not part of a calculation of contributing causes. The Restatement (Second) of Torts § 431 cmt. a, for example, instructs that a "but-for" cause that is trivial should be ignored for apportionment purposes. Thus, a shipyard worker who later worked for a short time

as an auto mechanic need only focus on the shipyard exposure. Doing so is not fraudulent.

The distinction between trusts, tort cases, and maritime cases also matters with respect to the apportionment regime in place. Under joint and several liability, payment by a trust that utilizes a different standard to qualify for payment does not have significant meaning for a solvent defendant's total liability – and may be equally irrelevant in a several jurisdiction. Thus, while defendants assert that they might pay more than they would have if a bankrupt party's liability is fully developed, their apportionment is still likely less than their fair share under the law given the limited compensation available from the trusts. Thus, beyond the facts of this case, where the information in dispute tells nothing about actual claiming and compensation, claiming documents provide little basis for reducing a defendant's liability.

Claimants must overcome significant obstacles to obtain compensation in court. The notion, propagated in the Honeywell and Ford brief, that they and other defendants are easy pickings for double-dipping asbestos victims simply does not match reality and should not push this Court's analysis of the legal principles in the direction of exposing claimants' lives to the companies' politically opportunist aims.

II. HONEYWELL AND FORD MISSTATE THE APPLICABILITY OF THE COMMON LAW IN INTERPRETING STATUTES.

The parties have extensively briefed the proper construction of 11 U.S.C. § 107. Amicus AAJ will not reiterate that discussion. Instead, AAJ offers several unassailable principles that Honeywell and Ford neglect in asserting that common-law principles were entirely displaced by Section 107 or that access and uninhibited use of the records in question is consistent with applicable common-law principles.

A. Statutes are Interpreted in Light of the Common Law.

Appellants tell this Court that Congress displaced the common-law framework for making judicial records available to non-parties by enacting Section 107. Opening Br. 15. Yet, that simplistic assertion, unsupported by the legislative record, fails to come to grips with standards for interpreting statutes. Congress "is understood to legislate against a background of common-law … principles." *Astoria Fed. Sav. & Loan Ass'n. v. Solimino*, 501 U.S. 104, 108 (1991). For that reason, canons of statutory construction teach that the text "should be interpreted consistently with the common law [because doing so] helps us interpret a statute that clearly covers a field formerly governed by the common law." *Samantar v. Yousuf*, 560 U.S. 305, 320 (2010) (footnote omitted). Thus, "when a statute covers an issue previously governed by the common law, we interpret the statute with the presumption that Congress intended to retain the substance of the common law." *Id*. at 320 n.13. Only "when a statutory purpose to the contrary is evident" is the

common law eschewed for the new statutory paradigm. *Id*. (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

Here, Section 107(a) codifies the public's common-law right of access to judicial records, rather than establishes a "statutory purpose to the contrary." *See In re Gitto Glob. Corp.*, 422 F.3d 1, 6 (1st Cir. 2005); *In re Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994);[3] *In re Rivera*, 524 B.R. 438, 442 (Bankr. D.P.R. 2015). *See also In re Motions*, 585 B.R. at 746. Nothing in Congress's purpose or language seeks to displace the common law. When Congress codifies the common law, the common law informs construction of the statute. *Evans v. United States*, 504 U.S. 255, 259-60 (1992). On the other hand, when displacement is intended, Congress manifests that intention in unmistakable terms. *See Norfolk Redevelopment and Hous. Auth. v. Chesapeake and Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) ("the common law ... ought not be deemed repealed, unless the language of the statute be clear and explicit for this purpose") (citation omitted). Contrary to what Honeywell and Ford have argued, the statute does not divest courts from common-law considerations. Instead, as confirmed by amendments added in 2005, the statute enhanced court authority to protect the privacy of individuals in these records. *See*

[3] Honeywell and Ford misread these decisions to assert that "[e]very court of appeals" has determined that Section 107 displaces the common law right of access. Instead, these decisions recognize codification of the right of access, which can only be construed to reference the preexisting common law. There simply was nothing else for Congress to codify.

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), Pub. L. No. 109-8, §§ 231-34, 110 Stat. 23. The material amendment specifically authorized courts to protect *any* "information" in a paper that contains personal information. 11 U.S.C. § 107(c)(1). Certainly, nothing in Section 107 diminished a court's supervisory authority over its own records and files. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

The District Court understood these principles and applied them faithfully, reading the statute to effectuate its purpose, consistent with the common-law background of the right of access. Because Honeywell and Ford sought plenary and unrestricted access to records and files containing personal information that a court is obliged to protect, there was no error in upholding the bankruptcy court's well-crafted order.

B. Both the Common Law and Statute Invest the Court with Discretion to Limit Access to Proper Purposes.

Honeywell and Ford alternatively argue that common-law principles favor their position, not the holding staked out by the District Court. Opening Br. 30-34. They are wrong. Moreover, public access to judicially controlled records under the common law serves not as a check on litigants, but to create transparency in the judicial process to serve objectives of trustworthiness in that process and curb judicial abuses. *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988).

The Supreme Court's 1978 description of the applicable common law still governs:

> It is difficult to distill from the relatively few judicial decisions a comprehensive definition of what is referred to as the common-law right of access or to identify all the factors to be weighed in determining whether access is appropriate. The few cases that have recognized such a right do agree that the decision as to access is one *best left to the sound discretion of the trial court*, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.

Nixon, 435 U.S. at 598-99 (footnote omitted) (emphasis added).

This principle of judicial discretion was codified in Section 107(c). It permits a bankruptcy court broad freedom to protect individuals' information that might create any type of unlawful injury. The language is consistent with the expectation all litigants have, and that caselaw mandates, that weigh their privacy interests against the public interest in exercising their supervisory authority over records within their control. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-36 (1984). Courts protect "confidentiality to prevent the infliction of unnecessary or serious pain on parties who the court reasonably finds are entitled to such protection." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994).

Here, the District Court found no abuse of discretion in the bankruptcy court's exercise of that discretion, particularly because Appellants failed to provide any alternative means to provide that protection. No error was committed.

Experience with discovery reflects the animating common-law understandings that were correctly applied here. With respect to discovery, courts retain authority to place restrictions on disclosure and the use of the materials discovered. As a fundamental concept, the purpose of discovery is to assure "[m]utual knowledge of all the relevant facts gathered by both parties" and its existence serves as a mechanism "essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Still, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Id*.

In its current iteration, the Federal Rules of Civil Procedure establish that the scope of discovery is limited to information:

> relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). The rule leaves no room for forcing disclosure for purposes unrelated to the claims or defense at issue in the specific proceeding for which it was sought. It further mandates that a "court must limit" any proposed discovery "outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C)(iii).

Thus, under the terms of Rule 26, the compulsory process that discovery utilizes is decidedly not available to obtain otherwise relevant information for purposes that have no bearing on issues in the case. *See also Oppenheimer Fund,*

Inc. v. Sanders, 437 U.S. 340, 352 (1978). Thus, the Supreme Court has explained that "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied." *Id*. at 352 n.17. To make the point even more emphatically, the Court held that, "[i]n deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information." *Id*.

As in *Oppenheimer Fund*, Honeywell and Ford "do not seek this information for any bearing that it might have on issues in the case[s]" before the bankruptcy court. *Id*. at 352. The District Court's order, therefore, should not be reversed to permit further uses of the information obtained by the parties because the Bankruptcy Court's denial of their request "satisf[ied the court's] Rule 26 obligation to ensure that the scope of discovery is limited to issues actually relevant to the litigation." *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 995-96 (D.C. Cir. 2014). On the other hand, permitting a non-party's access to the information for any purpose, including the lobbying purposes Honeywell and Ford specifically stated, would have abused the court's authority to assure that discovery is limited to its proper scope when the materials were first deposited with the court.

While discovery does not govern disclosure here, the principles applied reflect common law understandings about public access to records deposited with a court and should inform the question before this Court.

III. HONEYWELL AND FORD HAVE DOUBLY WAIVED THEIR FIRST AMENDMENT ARGUMENT.

A. Honeywell and Ford Waived their First Amendment Argument by Not Preserving It in the Bankruptcy Court and Waived It Again Before this Court by Not Addressing the District Court's Finding of Waiver.

The District Court held that Honeywell and Ford waived their First Amendment claim for access and use of the 2019 documents by limiting the claim to a passing reference in a footnote. *In re Motions*, 585 B.R. at 760. The Court was indisputably correct because an argument can only be preserved when supported by "the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." Fed. R. App. P. 28(a)(8)(A). Failure to do so in this Court consistently results in a refusal to consider those arguments. *See Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 145 (3d Cir. 2017).

Remarkably, Honeywell and Ford make the same error again before this Court. In their Opening Brief, Honeywell and Ford fail to address the District Court's ruling of waiver and instead proceed directly to the merits of the First Amendment. By failing to explain why waiver should not be applied and failing to argue against waiver, the two companies have waived that dubious ground for reversal. This double waiver should not be overlooked, as no exceptional circumstances exist to revitalize it. *Cf. In re Diet Drugs Prod. Liab. Litig.*, 706 F.3d 217, 226 (3d Cir. 2013) (arguments waived "are not susceptible to review in this Court absent exceptional circumstances.") (citation omitted).

Without an argument that the District Court erred in finding waiver or an appeal that exceptional circumstances excuse it, there is no assignment of error for this Court to examine. Moreover, Honeywell and Ford cannot use their reply brief to address it. As this Court held earlier this year, "[r]aising an issue in a reply brief is too late, for '[a]s a general matter, an appellant waives an argument in support of reversal if it is not raised in the opening brief.'" *Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018) (quoting *In re: Asbestos Prod. Liab. Litig. (No. VI)*, 873 F.3d 232, 237 (3d Cir. 2017)). *Cf. Lewis v. Def. Ass'n of Philadelphia*, 712 F. App'x 210, 213 (3d Cir. 2017) ("We do not review, however, arguments that are not raised on appeal; those arguments are waived."). A reply brief is simply too late to preserve an issue for this Court's review. *Id*. (citing *Kost v. Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993).

B. In Any Event, Honeywell's and Ford's First Amendment Argument Is Meritless.

It is axiomatic that "the right to inspect and copy judicial records is not absolute." *Nixon*, 435 U.S. at 598. Rather than be a self-executing First Amendment right, such as mounting a soapbox and lecturing passersby about some worldly issue, see *U. S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 (1981), the access Honeywell and Ford seek requires the intervention and cooperation of a judicial body that "has supervisory power over its own records and files." *Nixon*, 435 U.S. at 598. Access is properly denied where court files might

become a vehicle for improper purposes, such as its use "to gratify private spite or promote public scandal," *id.* (citing *In re Caswell*, 18 R.I. 835, 836, 29 A. 259 (1893)), or "to serve as reservoirs of libelous statements for press consumption, *id.* (citing *Park v. Detroit Free Press Co.*, 72 Mich. 560, 568, 40 N.W. 731, 734-735 (1888), "or as sources of business information that might harm a litigant's competitive standing." *Id.* The Bankruptcy Code adopts similar standards. *See* 11 U.S.C. § 107(b).

The First Amendment protects the public's right to speak freely, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), their right to associate with others in pursuit of a variety of political, social, economic, educational, religious, and cultural ends, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), and their right to petition for a redress of grievances. *Sure–Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984). In a narrow range of instances, it provides a right of access for First Amendment purposes, such as where there is a traditional or designated public forum. *See Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985). There is, however, no First Amendment right of access to non-public court records.

Not even the press, which enjoys specific First Amendment protection, has a constitutional right of access to "information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972). As this Court observed in another

context, what Honeywell and Ford seek does not "concern[] expressive conduct or speech at all," but "access to information." *PG Pub. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013). And, "First Amendment right of access to information is qualified and subject to limitations." *Id*. at 98. The Supreme Court held that the "right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

In holding that there was no First Amendment right of access to the voting process, this Court rejected an argument, like the one Honeywell and Ford make here, that the restriction constituted a prior restraint. Even if "restricting access to information may work a prior restraint on speech," as this Court said, there is nothing in the Constitution or judicial decisions that imposes an affirmative duty to make available sources of information not available to members of the public generally. *Aichele*, 705 F.3d at 101 (quoting *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974)).

As in *Aichele*, this case "does not implicate the 'kind of classic prior restraint that requires exacting First Amendment scrutiny.'" *Id.* (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-34 (1984)). *See also United States v. Cianfrani*, 573 F.2d 835, 861 (3d Cir. 1978) (holding that there was "[n]o prior restraint ... involved" where the court imposed restrictions on information adduced at a pre-trial suppression hearing). Instead, *Aichele* held that the analysis "turns on the question of whether the source of information (here, access to the polling place) should be

'available to members of the public generally.'" 705 F.3d at 102. The upshot is that the First Amendment provides no independent grounds for access to the documents Honeywell and Ford seek that override the inadequacies of their statutory and common-law arguments.

Instead, courts have a "responsibility to exercise an informed discretion as to release of the [documents], with a sensitive appreciation of the circumstances that led to their production." *Nixon*, 435 U.S. at 603 (referring to the tapes of presidential wrongdoing that had been played in open court). Despite widespread public knowledge and reporting of their content, the Supreme Court held that the tapes were not susceptible to "copying upon demand," which could create "a danger that the court could become a partner in the use of the subpoenaed material 'to gratify private spite or promote public scandal,' with no corresponding assurance of public benefit." *Id*. (internal citation omitted).

In sum, Honeywell and Ford failed to preserve their First Amendment argument and failed to demonstrate any error in the District Court's determination of waiver. Still, the First Amendment provides them no life raft, even if they had diligently pursued that argument.

CONCLUSION

For the foregoing reasons, the decision of the District Court to uphold limits on the use of discovered material should be affirmed.

Dated: September 28, 2018

/s/ Jeffrey White
Jeffrey White
Counsel of Record
AMERICAN ASSOCIATION FOR JUSTICE
777 6th St. NW, Suite 200
Washington, DC 20001
(202) 944-2839
jeffrey.white@justice.org

Attorney for Amicus Curiae
American Association for Justice

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit and remain a member in good standing of the Bar of this Court.

Date: September 28, 2018

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

CERTIFICATE OF COMPLIANCE

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 5,580 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 style 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.

I further certify pursuant to L.A.R.31.1(c) that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court,

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Date: September 28, 2018

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 2018, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Third 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