

No. 19-1341

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In the Supreme Court of the United States

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RICHARD A. VAN AUKEN, TRUSTEE AND  
RICHARD A. VAN AUKEN, BENEFICIARY,  
*Petitioners,*

V.

FLETCHER R. CATRON, ESQ.; PETER F. WIRTH, ESQ.;  
AND KAREN AUBREY, ESQ.,  
*Respondents.*

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**On Petition for a Writ of Certiorari  
to the New Mexico Court of Appeals**

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**MOTION FOR LEAVE TO FILE BRIEF AS  
AMICI CURIAE AND BRIEF FOR CENTER FOR  
ESTATE ADMINISTRATION REFORM, *et al.* IN  
SUPPORT OF PETITIONERS**

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**MOTION FOR LEAVE TO FILE BRIEF AS  
*AMICI CURIAE***

The Center for Estate Administration Reform, the New Mexico Family Guardianship Informal Coalition, Mary Darnell, Terri Black, Elizabeth McKinney Brown, Rio Hamilton, Jorja Armijo-Brasher, and Michael Brasher seek leave to file the accompanying brief as *amici curiae*.

*Amici* include advocacy groups, individuals whose family members have been victimized by predatory guardianships, conservatorships, or attorneys, and two former government officials.

Petitioner consented to the filing of this brief, but respondent Fletcher Caron withheld consent, without providing any reason, by email from counsel dated July 3, 2020. Respondents Peter Wirth and Karen Aubrey, through counsel, declined to take a position on the motion, saying they had been dismissed from the state-court proceedings.

*Amici* seek to provide this Court with information concerning the prevalence of the issue presented by the petition, both in terms of the number of Americans affected and the amount of money at stake. They also seek to explain to the Court the nature of the legal problem presented by the petition.

These matters provide important, and new, perspectives on why the Court should grant the petition. *Amici* therefore seek leave to file their brief.

Respectfully submitted,

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## TABLE OF CONTENTS

	Page
Table of Contents .....	i
Table of Authorities .....	ii
Interests of <i>Amici Curiae</i> .....	1
Summary of Argument .....	2
Argument.....	3
1. The petition presents a recurring and important issue involving hundreds of thousands of Americans and billions of dollars .....	4
2. This Court should grant review to require interpretation and enforcement of the trust agreement .....	8
Conclusion .....	9

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Firestone Tire &amp; Rubber Co. v. Bruch</i> , 489 U.S. 101 (1989).....	8
<b>Other Authorities</b>	
Ariana Campo-Flores & Ashby Jones, <i>Abuse Plagues System of Legal Guardians for Adults</i> , WALL ST. J. (Oct. 30, 2015) .....	5
CENTER FOR ELDERS AND THE COURTS, ADULT GUARDIANSHIP COURT DATA AND ISSUES RESULTS FROM AN ONLINE SURVEY (Mar. 2, 2020) .....	4
Susan Garland, <i>Calls for Court Reform as Legal Guardians Abuse Older Adults</i> , N.Y. TIMES (July 28, 2017) .....	5, 6
Mark Hall, <i>The Greatest Wealth Transfer in History: What's Happening and What Are the Implications</i> , FORBES (Nov. 11, 2019) .....	4
Colleen Heild, <i>New Mexico guardians get a new watchdog</i> , ALBUQUERQUE J. (June 25, 2020) .....	6
David Holmberg, <i>The Scourge of Elder Abuse: Don't Be Afraid to Speak Up</i> , FORBES (Oct. 18, 2019) .....	2

John Pacenti, <i>Jury hits lawyers with \$16.4M for doing senior wrong in guardianship</i> , PALM BEACH POST (Aug. 4, 2017) .....	7
Jess Stonefield, <i>Are Boomers Ready to make the Greatest Wealth Transfer in History?</i> , FORBES (May 21, 2018).....	4
U.S. Attorney's Office, District of New Mexico, <i>Paul Donisthorpe Pleads Guilty to Federal Wire Fraud and Money Laundering Charges Arising Out of Scheme to Embezzle \$4.8 Million from Client Trust Accounts</i> (Nov. 27, 2017) .....	5–6
U.S. Attorney's Office District of New Mexico, <i>Ayudando Guardians' President and Chief Financial Officers Plead Guilty to Conspiracy, Mail Fraud, Identity Theft, and Money Laundering Charges as Part of Multi-Million Dollar Financial Scheme</i> (July 12, 2019) .....	6
Pam Zubeck, <i>How courts and guardians exploit the elderly and their estates and get away with it</i> , COLORADO SPRINGS INDEP. (Jan. 8, 2020) .....	5

## INTERESTS OF *AMICI CURIAE*<sup>1</sup>

*Center for Estate Administration Reform* (CEAR) is a nonprofit foundation that advocates for the rights of vulnerable adults (primarily seniors and adults with disabilities), assists victims of predatory attorneys, and promotes reform in probate and guardianship proceedings.

*New Mexico Family Guardianship Informal Coalition* is an informal coalition of national groups, organizations, and New Mexicans working to build awareness of injustices in the system that governs court-appointed guardians and conservators over incapacitated or otherwise vulnerable persons.

*Mary Darnell, Terri Black, Elizabeth McKinney Brown, and Rio Hamilton* are individuals whose family members were victimized by predatory guardianships, or conservatorships, or attorneys.

*Jorja Armijo-Brasher* is the former director of the Department of Senior Affairs for the City of Albuquerque, New Mexico and served on the New Mexico Adult Guardianship Study Commission.

*Michael Brasher* is a former Albuquerque City Councilor, Bernalillo County Commissioner, and Regent of the University of New Mexico.

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<sup>1</sup>Under Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity—other than *amici curiae* and their counsel—made a monetary contribution intended to fund the preparation and submission of this brief. All parties received 10-days' notice of the filing of this brief.

## SUMMARY OF ARGUMENT

“Elder abuse by opportunistic court guardians is one of those issues in American society that has reached critical mass in recent years, and some statistics indicate that it might soon achieve a dubious parity with child abuse.” David Holmberg, *The Scourge of Elder Abuse: Don’t Be Afraid to Speak Up*, FORBES (Oct. 18, 2019).<sup>2</sup>

The petition in this case arises from this systemic abuse—and presents this Court with an ideal vehicle by which to address it. *Amici* urge this Court to do so.

The problem of predatory estate trafficking is rampant. Court-appointed guardians oversee more than 1.3 million adult Americans and may control more than \$250 billion in assets. The media is filled with stories of fraud and theft by these “guardians.” One state audit found fraud in ten percent of court-appointed guardianships. If that held true across the country, it would mean more than 130,000 instances of fraud against vulnerable Americans involving as much as \$25 billion in assets.

And, as this case demonstrates, the plague of predatory estate trafficking extends well beyond the confines of court-established guardianships to a variety of schemes perpetrated by attorneys. The petition here involves allegations that attorneys conspired with a hospice caregiver to transfer trust assets from a vulnerable elderly person to the caregiver in violation of the trust agreement. Yet, the

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<sup>2</sup><https://www.forbes.com/sites/davidholmberg/2019/10/18/the-scourge-of-elder-abuse-dont-be-afraid-to-speak-up/#2bbf9d19637e>.



state courts would not enforce that trust agreement despite years of litigation.

Even without outright theft, estate assets routinely are drained through protracted and unnecessary state-court proceedings in which end-of-life documents simply are ignored.

To say that this case presents a recurrent and important issue worthy of this Court's discretionary review would be an understatement.

### ARGUMENT

The petition in this case presents an important issue affecting thousands of elderly or otherwise vulnerable Americans: their inability to obtain judicial enforcement of valid, unambiguous estate-planning instruments in the face of predatory guardianships and other estate-trafficking schemes.

Aging Americans are counseled *ad nauseam* to protect themselves by executing instruments like durable powers of attorney, healthcare advance directives, trusts, joint bank accounts, and so on. But these instruments provide cold comfort when courts remain free to thrust them aside. All too often, proceedings involving estates serve no purpose other than to line the pockets of unscrupulous attorneys and professional “guardians” with the savings of the very people they are supposed to protect.

Each day, thousands of American families find themselves trapped in the vortex of guardianship and similar proceedings that are seemingly endless—or whose end all too often coincidentally coincides with the exhaustion of an elderly person's life savings. And

all of this occurs despite the existence of unambiguous end-of-life documents.

*Amici* believe the time has come for this Court to step into the void, grant the petition, and clarify that a court may not simply cast aside trusts, durable powers of attorney, and similar documents in connection with guardianship or similar proceedings.

1. **The petition presents a recurring and important issue involving hundreds of thousands of Americans and billions of dollars.**

We are in the midst of the greatest intergenerational transfer of wealth in human history. Jess Stonefield, *Are Boomers Ready to Make the Greatest Wealth Transfer in History?*, FORBES (May 21, 2018). Over the next two decades, Baby Boomers will transfer more than \$30 trillion in wealth to younger generations. Mark Hall, *The Greatest Wealth Transfer in History: What's Happening and What Are the Implications*, FORBES (Nov. 11, 2019).<sup>3</sup>

Guardianships affect a substantial portion of these transfers. The National Center for State Courts estimates that more than 1.3 million American adults—holding an aggregate \$50 billion in assets—are under the supervision of a court-appointed guardian. CENTER FOR ELDER AND THE COURTS, ADULT GUARDIANSHIP COURT DATA AND ISSUES RESULTS FROM AN ONLINE SURVEY 14 (Mar. 2, 2010).<sup>4</sup>

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<sup>3</sup><https://www.forbes.com/sites/markhall/2019/11/11/the-greatest-wealth-transfer-in-history-whats-happening-and-what-are-the-implications/#e5752314090a>.

<sup>4</sup> [http://aja.ncsc.dni.us/pdfs/GuardianshipSurveyREport\\_FINAL.pdf](http://aja.ncsc.dni.us/pdfs/GuardianshipSurveyREport_FINAL.pdf).

Other sources estimate the amount as being far greater—more than \$250 billion. *See* Arian Campo-Flores & Ashby Jones, *Abuse Plagues System of Legal Guardians for Adults*, WALL ST. J. (Oct. 30, 2015).<sup>5</sup>

And with the aging of the baby boomers, these numbers will increase. Susan B. Garland, *Calls for Court Reform as Legal Guardians Abuse Older Adults*, N.Y. TIMES (July 28, 2017).<sup>6</sup>

Unfortunately, abuse runs rampant. Examples abound. A well-known and popular professional guardian in Florida charged with stealing more than \$500,000 from a 92-year-old man in her care. A Nevada professional guardian sentenced to 16 years in prison for her rampant theft. *See* Pam Zubeck, *How courts and guardians exploit the elderly and their estates and get away with it*, COLORADO SPRINGS INDEP. (Jan. 8, 2020).<sup>7</sup>

In New Mexico, where this case arose, the CEO of a non-profit trust company imprisoned for stealing \$4.8 million in funds under his control—almost all of it from elderly, disabled, and other vulnerable New Mexicans. U.S. Attorney's Office, District of New Mexico, *Paul Donisthorpe Pleads Guilty to Federal Wire Fraud and Money Laundering Charges Arising*

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<sup>5</sup><https://www.wsj.com/articles/abuse-plagues-system-of-legal-guardians-for-adults-1446225524>.

<sup>6</sup><https://www.forbes.com/sites/nextavenue/2018/05/21/are-boomers-ready-to-make-the-greatest-wealth-transfer-in-history/#3b0a5a44677d>.

<sup>7</sup><https://www.csindy.com/coloradosprings/how-courts-and-guardians-exploit-the-elderly-and-their-estates-and-get-away-with-it/Content?oid=21038322>.

*Out of Scheme to Embezzle \$4.8 Million from Client Trust Accounts* (Nov. 27, 2017).<sup>8</sup>

The operators of an Albuquerque guardianship company imprisoned for their roles in a scheme to embezzle more than \$11 million from hundreds of client accounts. U.S. Attorney's Office District of New Mexico, *Ayudando Guardians' President and Chief Financial Officers Plead Guilty to Conspiracy, Mail Fraud, Identity Theft, and Money Laundering Charges as Part of Multi-Million Dollar Financial Scheme* (July 12, 2019).<sup>9</sup>

The New Mexico state auditor performed a random survey of 300 cases with court-appointed guardians or conservators—and found 194 risk factors for fraud, including numerous cases of checks written directly to the guardians and conservators. Colleen Heild, *New Mexico guardians get a new watchdog*, ALBUQUERQUE J. (June 25, 2020).<sup>10</sup>

Similarly, a Texas audit of guardianship cases found fraud in nearly ten percent of all court-imposed guardianships. Garland, *supra*.

These abuses are not limited to guardians; in Florida, a jury returned a \$16.4 million verdict against two attorneys for breaching their fiduciary duties to a person and running up unnecessary fees in a guardianship and trust proceeding. John Pacenti,

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<sup>8</sup><https://www.justice.gov/usao-nm/pr/paul-donisthorpe-pleads-guilty-federal-wire-fraud-and-money-laundering-charges-arising>.

<sup>9</sup><https://www.justice.gov/usao-nm/pr/ayudando-guardians-president-and-chief-financial-officer-plead-guilty-conspiracy-mail>.

<sup>10</sup><https://www.abqjournal.com/1470013/new-mexico-guardians-get-a-new-watchdog.html>.

*Jury hits lawyers with \$16.4M for doing senior wrong in guardianship*, PALM BEACH POST (Aug. 4, 2017).<sup>11</sup>

Consider one family's nightmare.

Delford (Del) Mencarelli executed estate-planning documents to protect himself and his only child, Terri Black. At age 72, Del moved to Las Vegas and rented a place from an old friend, Helen Natko.

Not long afterward, Del began suffering from dementia. Taking advantage of Del's condition, Natko stole \$220,000 from him in just 22 months. Upon discovering the theft, Terri attempted to come to her father's rescue. But Natko held him captive in his home, and challenged Terri's rights in a guardianship proceeding. Natko obtained a court-appointed professional guardian and bogged Terri down in protracted proceedings—in which Natko ultimately prevailed. All of this happened despite Del's unambiguous estate-planning instruments.

Eventually, law enforcement officials indicted Natko for theft and she was convicted. The conviction later was overturned, and the district attorney declined to retry Natko due to her advanced age. By the time the dust settled, Del's family—though “vindicated”—was out more than \$1 million at the hands of a person who prevailed in civil court despite having stolen Del's money.

This is just one of the many similar stories from across the country. The petition presents an issue affecting legions of Americans at the most vulnerable

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<sup>11</sup><https://www.palmbeachpost.com/news/jury-hits-lawyers-with-for-doing-senior-wrong-guardianship/6CnikAZ7x3K9z960lz09BN/>.

time in their lives. *Amici* urge the Court to grant the petition and confront this problem.

**2. This Court should grant review to require interpretation and enforcement of the trust agreement.**

This case involves a hospice caregiver who isolated and then took advantage of a vulnerable and distraught elderly person. The petition alleges that estate-planning attorneys assisted the caregiver in obtaining transfers of trust assets without any notice to the trust beneficiaries, in part by providing a faulty opinion letter.

Probate proceedings are intended to effectuate the decedent's intent. This means enforcing the terms of end-of-life instruments like trust agreements, the same way courts enforce other contracts—by construing and then applying their explicit terms. Yet, according to the petition, the New Mexico courts would not enforce the unambiguous trust terms.

As this Court has noted, the terms of a trust are “determined by the provisions of the instrument as interpreted in light of all the circumstances . . . .” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) (citation omitted). Moreover, “courts construe terms in trust agreements without deferring to either party’s interpretation.” *Ibid.* Whether an act violates the trust agreement depends “on the terms of the trust *as the court may interpret them*, and not as they may be interpreted by the trustee himself or by his attorney.” *Ibid* (citation omitted; emphasis in original).

This Court should grant the petition to clarify the requirement that end-of-life instruments be

interpreted and enforced, like other contracts, in probate and related proceedings.

### CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the petition for a writ of *certiorari*.

Respectfully submitted,

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