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VIA ELECTRONIC FILING

Blake A. Hawthorne
Clerk, Supreme Court of Texas
201 West 14th Street, Room 104
Austin, Texas 78701

Re: No. 12-0957, *In re Ford Motor Company*

Dear Mr. Hawthorne:

The Chamber of Commerce of the United States of America respectfully submits this letter brief as *amicus curiae* in support of the petition for rehearing in the above-referenced case.[1]

The Chamber is the world's largest business organization, representing 300,000 direct members and indirectly representing the interests of more than 3 million companies and professional organizations of every size, in every industry, from every region of the country.

Key to the Texas economy remaining the strongest in the Nation is the predictability of the State's legal system—particularly the protection the Texas Legislature has afforded against unnecessary litigation risk and expense. *See*, *e.g.*, U.S. Chamber Institute for Legal Reform, *Ranking the States Lawsuit Climate*

[1] 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 of submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. TEX. R. APP. P. 11.

2010, at 2 (noting that "two-thirds" of in-house counsel "report that the litigation environment in a state is likely to impact important business decisions at their companies, for instance, where to locate or do business").

It is no accident that Texas is home to the second-largest number of Fortune 500 companies in the Nation, or that Texas is adding more jobs a month than any other state. *See National Conference of State Legislators: State Unemployment Rates*, July 2014, http://www.ncsl.org/research/labor-and-employment/state-unemployment-update.aspx (last visited Sept. 2, 2014). The Chamber and its members have a strong interest in Texas's "fair, efficient, and predictable civil justice system," *Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 51 (Tex. 2008) (citation and internal quotation marks omitted), and respectfully suggest that interest would be served by rehearing this case to respect, reaffirm, and judicially enforce the limits the Texas Legislature placed on litigation in Texas courts.

In particular, if permitted to stand, the majority decision would allow the manipulation of venue rules in a manner that threatens this State's ability to continue to attract and to foster business. The Chamber therefore respectfully suggests that rehearing is warranted to ensure a construction of the State's *forum non conveniens* statute that does not inadvertently invite the very litigation gamesmanship that the Texas Legislature has consistently sought to prevent.

BACKGROUND

Texas is one of at least 23 states that have codified the doctrine of *forum non conveniens*.[2] In codifying the doctrine, the Texas Legislature cabined the

[2] Alabama, ALA. CODE § 6-5-430 (2005); Arkansas, ARK. CODE ANN. § 16-4-101 D. (1999); California, CAL. CIV. PROC. CODE § 410.30 (2004); Colorado, COLO. REV. STAT. ANN. § 13-20-1004 (West 2005); Florida, FLA. STAT. § 47.122, FLA. R. CIV. P. 1.061; Georgia, GA. CODE ANN. § 9-10-31.1 (2007); Indiana, IND. R. TRIAL P. 4.4 (C)-(E); Louisiana, LA. C.C.P. ART. 123; Maryland, MD. CODE. ANN., Cts. & Jud. Proc. § 6–104(a) (2006); Massachusetts, MASS. GEN. LAWS CH. 223A, § 5 (West 2000); Mississippi, MISS. CODE ANN. § 11-11-3(4) (1972); Minnesota, MINN STAT. ANN. § 60B.04 (West 1994); Montana, MONT. CODE ANN. § 25-2-201 (West 2012); Nebraska, NEB. REV. STAT. § 25-538 (1995); Nevada, NEV. REV. STAT. ANN. § 13.050 (West 2013); New York, NY CLS CPLR R 327(a) (McKinney 2001); North Carolina, N.C. GEN. STAT. § 1-75.12 (2007); North Dakota, N.D.R. CIV. P. 4(b)(5); Oklahoma, 12 OKLA. STAT. TIT. 12, §§ 140.3 & 1701.05 (1993); Pennsylvania, 42 PA. CONS. STAT. ANN. § 5322(e)

discretion of courts to apply the traditional *forum non conveniens* factors by carving out a Texas-resident exception to the doctrine in cases involving wrongful death or personal injury. TEX. CIV. PRAC. & REM. CODE § 71.051(e) & (i).

As the rehearing motion explains, however, the Texas Legislature became concerned about Texas courts being flooded with out-of-state actions and, in 1997, narrowed the Texas-resident exception further by expressly excluding counterclaimants, cross-claimants, and third-party plaintiffs from the scope of the exception. *See* Rehearing Motion 16 (citing TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2)).

By further narrowing the exception's application, the Legislature acted consistently with the existing statutory text, which already included other express limitations to the Texas-resident exception, such as limiting its application to "properly joined" plaintiffs. TEX. CIV. PRAC. & REM. CODE § 71.051(e). As explained further below, the Texas Legislature has carefully circumscribed the scope of the exception by limiting it to certain types of cases, to certain types of parties, and to certain types of plaintiffs, TEX. CIV. PRAC. & REM. CODE § 71.051(e) & (h)—all to avoid the manipulation of Texas's procedural rules to flood Texas courts with cases that properly belong elsewhere.

ARGUMENT

I. The Court should rehear this case because it involves a matter of exceeding importance to businesses in Texas and across the Nation—the proper construction of Texas's *forum non conveniens* statute.

As the majority opinion correctly notes, "when interpreting a statute, we look to the language passed by the Legislature and signed by the Governor—not to our own lights." *In re Ford Motor Co.*, --- S.W.3d ----, 2014 WL 2994622, at *7 (Tex. July 3, 2014). This Court's consistent adherence to that rule of statutory construction is important as a cornerstone not only of separation of powers, but also of the predictability that is in turn a vital component of economic prosperity. *See, e.g.*, *Frank's Casing*, 246 S.W.3d at 51; *Hertz Corp. v. Friend*, 559 U.S. 77,

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(West 1981); West Virginia, W. VA. CODE § 56-1-1a (Lexis Nexis 2007); Wisconsin, WIS. STAT. § 801.63 (West 1994).

94 (2010) (observing that "[p]redictability is valuable to corporations making business and investment decisions").

Predictability is especially important for businesses because, without it, they cannot effectively plan for the future—and thus cannot grow and expand. In addition, when legal systems are predictable, litigation costs go down—and economic growth goes up. For example, according to economist Dr. Ray Perryman, 8.5 percent of Texas's economic growth is attributable to lawsuit reforms. J. Nixon, *The Purpose, History & Five Year Effect of Recent Lawsuit Reform in Texas*, THE ADVOCATE, Fall 2008, at 20. However it is quantified, the link between predictable legal rules and economic growth is undeniable.

Consistent, proper application of the *forum non conveniens* doctrine is an important component of the predictability essential to economic growth. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Litigating in the Field of Dreams: Asbestos Cases in Madison County* (2013), at 18 (citing the lack of any "attempt to apply *forum non conveniens* rules on a consistent and universal basis" as a driver for "a kind of litigation perpetual motion machine"). The proper construction of Texas's *forum non conveniens* statute is thus of exceeding importance to businesses in Texas and across the Nation—and rehearing of this Court's deeply divided decision construing the Texas-resident exception to apply in this case is warranted. Otherwise, as the rehearing motion explains (at 11-15), this Court risks inviting manipulation of the venue rules in an effort to circumvent the *forum non conveniens* statute—a result the Legislature could not have intended.

II. Rehearing is warranted because the Texas Legislature did not intend to make Texas an outlier by inviting manipulation of Texas venue rules and allowing intervenors to control the choice of forum

If permitted to stand, the majority decision will make Texas the only state in the Nation that allows intervenors to control the choice of forum. Although the Texas Legislature could have effected such a sea change in the law if it wanted—though one wonders why it would, given the obvious invitation to manipulation and gamesmanship such a legal regime would invite—the better view of the text, structure, and purpose of Texas's *forum non conveniens* statute (including the Texas-resident exception) is that the Legislature did no such thing. Indeed, the statute's history reveals that a key purpose of the reform was to *combat*, not

incentivize, blatant forum shopping, such as that of the litigants in this case. *See Owens Corning v. Carter*, 997 S.W.2d 560, 565-66 (Tex. 1999). Rehearing is necessary to ensure the statute is applied as written and to avoid the serious threat of manipulation and gamesmanship invited, however inadvertently, by the majority's construction of the statute.

The Legislature's desire to avoid that result finds expression in the text of the statute itself. The statute itself is very narrow—limited to cases involving personal injury or wrongful death. TEX. CIV. PRAC. & REM. CODE § 71.051(i). All other cases are governed by the common law. *Quixtar Inc. v. Signature Mgmt. Team, LLC*, 315 S.W.3d 28, 31-32 (Tex. 2010). It is further limited by an express exclusion of cross-claimants, counterclaimants, and third-party plaintiffs from the Texas-resident exception. TEX. CIV. PRAC. & REM. CODE § 71.051(h)(2). As the majority opinion correctly recognizes, that limitation ensures "claims brought by non-resident plaintiffs on matters otherwise unrelated to Texas" are not "cemented in Texas fora." *In re Ford Motor Co.*, 2014 WL 2994622, at *6.

Underscoring the textual limitations in the statute's definition of "plaintiff," Subsection (e) of the statute requires that the Texas-resident exception only applies in cases involving both in-state and out-of-state plaintiffs if the in-state plaintiffs have been "*properly joined*" in the action. TEX. CIV. PRAC. & REM. CODE § 71.051(e) (providing that "the court may not stay or dismiss the action under Subsection (b) if the plaintiffs who are legal residents of this state are *properly joined* in the action and the action arose out of a single occurrence") (emphasis added).

Intervenors, however, cannot be "properly joined" in any action, because they are not "joined" at all—they choose to intervene. "Joinder" and "intervention" are distinct concepts—as the venue provisions of the Texas Civil Practice & Remedies Code reflect by describing named, joined, and intervening plaintiffs separately. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(a) ("In a suit in which there is more than one plaintiff, whether the plaintiffs are included by joinder, by intervention, because the lawsuit was begun by more than one plaintiff, or otherwise, each plaintiff must . . . establish proper venue."). The Texas Legislature thus appreciates the difference between joined plaintiffs and intervening plaintiffs. And it expressly limited the application of the Texas-

resident exception to the former.[3] The Legislature's limitation of the exception to "properly joined" plaintiffs serves precisely the same purpose as the other statutory limitations designed to curb forum shopping.[4]

Rehearing should be granted to ensure fidelity to the text, structure, and purpose of the statute, and to avoid the serious concerns about manipulations and gamesmanship raised, however inadvertently, by the majority decision.

Sincerely,

/s/ Allyson N. Ho

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[3] This Court has likewise recognized the difference between joinder and intervention, treating the two means of case participation as distinct from one another. *In re Union Carbide Corp.*, 273 S.W.3d 152, 155-56 (2008).

[4] The language of (h)(2) referencing "a *party* seeking recovery" need not be interpreted to encompass intervenors. The Texas legislature, for instance, has previously drawn distinctions between the two groups. *See, e.g.*, TEX. R. CIV. P. § 76a(7) & (8) (referring to either a "party or intervenor"). An exclusive interpretation is thus appropriate here because of the "properly joined" instruction in Subsection (e).

CERTIFICATE OF SERVICE

I certify that on the 2nd day of September, 2014, a true and correct copy of the foregoing document was delivered via electronic filing or email and certified mail, return receipt requested to all known counsel of record and interested parties.

/s/ Allyson N. Ho
Allyson N. Ho