NO. 07-0195

IN THE SUPREME COURT OF TEXAS

IN RE GENERAL ELECTRIC COMPANY, *ET AL.*

Relators,

THE HONORABLE MARK DAVIDSON, 11TH JUDICIAL DISTRICT, HARRIS COUNTY, TEXAS,

Respondent.

AMICI CURIAE BRIEF OF THE TEXAS CIVIL JUSTICE LEAGUE, COALITION FOR LITIGATION JUSTICE, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN TORT REFORM ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN INSURANCE ASSOCIATION, AMERICAN CHEMISTRY COUNCIL, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, IN SUPPORT OF RELATORS' PETITION FOR WRIT OF MANDAMUS

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The Texas Civil Justice League, Coalition for Litigation Justice, Inc., National Federation of Independent Business Legal Foundation, Chamber of Commerce of the United States of America, National Association of Manufacturers, American Tort Reform Association, Property Casualty Insurers Association of America, American Insurance Association, American Chemistry Council, and National Association of Mutual Insurance Companies — collectively "*amici*" — ask this Court to grant Relators' petition and issue

a writ of mandamus ordering the district court to vacate its November 3, 2006 order and dismiss the case without prejudice to the Plaintiffs refiling in Maine.[1]

STATEMENT OF INTEREST

As organizations that represent Texas companies and their insurers, *amici* have a significant interest in the fair and effective administration of justice. Thus, we have a significant interest in ensuring that Texas courts follow the letter and spirit of the legislature's policy decision to promote the doctrine of *forum non conveniens.*

As explained below, allowing cases to proceed in a forum that has little connection to one party or another is a distortion of the civil justice system. At a minimum, it encourages forum shopping. Moreover, when such cases are allowed to proceed unchecked, the inevitable effect is the swelling of the dockets of courts that are perceived as favorable to plaintiffs. When court dockets become overburdened by such cases, the ability of the court to deliver justice is severely compromised. This Court's reaffirmation of the vitality of the *forum non conveniens* doctrine, as described below, will allow Texas courts to mete out justice, fairly and with due deliberation, in cases properly brought before them.

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[1] Pursuant to Texas Rule of Appellate Procedure 11, counsel state that this brief was paid for entirely by the above-referenced *amici* organizations.

* * *

Established in 1986, the Texas Civil Justice League (TCJL) is the state's first legal reform coalition, established to promote fairness and stability in the Texas civil justice system. TCJL members include individuals, health care providers, defense law firms, professional and trade associations, cities, counties, chambers of commerce, school districts, and businesses of all sizes. TCJL has actively supported efforts to curb forum-shopping abuse in Texas. In addition, TCJL files *amicus curiae* briefs in the Texas courts on issues that impact its members.

The Coalition for Litigation Justice, Inc. (Coalition) is a nonprofit association formed by insurers to address and improve the asbestos litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the asbestos litigation environment.

The National Federation of Independent Business Legal Foundation (NFIB), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business.

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[2] The Coalition for Litigation Justice includes ACE-USA companies, Chubb & Son, a division of Federal Insurance Company, CNA service mark companies, Fireman's Fund Insurance Company, Liberty Mutual Insurance Group, and the Great American Insurance Company.

NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The Chamber of Commerce of the United States of America (U.S. Chamber) is the world's largest business federation. The U.S. Chamber represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the U.S. Chamber has filed more than 1,000 *amicus curiae* briefs in state and federal courts.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

Founded in 1986, the American Tort Reform Association (ATRA) is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil

litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The Property Casualty Insurers Association of America (PCI) is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. In light of its involvement in Texas, the PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The American Insurance Association (AIA), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative

developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The American Chemistry Council (ACC) represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

Founded in 1895, National Association of Mutual Insurance Companies (NAMIC) is a full-service, national trade association with more than 1,400 member companies that underwrite more than forty percent of the property/casualty insurance premium in the United States. NAMIC members account for forty-seven percent of the homeowners market, thirty-nine percent of the automobile market, thirty-nine percent of the workers' compensation market, and thirty-four percent of the commercial property and liability market. NAMIC benefits its member companies through public policy development, advocacy, and member services.

STATEMENT OF FACTS

Amici adopt Relators' Statement of Facts. In a nutshell, Relators' petition should be granted because there is no connection between Texas and the Plaintiffs or their claims.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici support relators' position. *Amici* offer this brief not to repeat relators' arguments, but to underscore the legislative intent behind the Texas *forum non conveniens* statute and to highlight how the trial court's application of the statute defeats that intent and the spirit of the law.

The Texas Legislature first enacted the *forum non conveniens* statute in 1993. The Legislature was responding to a 1990 decision by this Court that had effectively abolished the doctrine in Texas. Since 1993, the Legislature has repeatedly amended the statute to expand its scope and to limit the trial courts' discretion to disregard the statute. Thus, there is no serious question about the spirit and intent of the statute. It represents the Legislature's repeated attempts (1) to limit the burden on Texas courts and citizens and (2) to limit the trial court's discretion to hear non-Texas disputes.

This mandamus petition impacts both legislative goals. First, this lawsuit is an extreme example of a claim that should not burden Texas courts and juries. The basic facts are undisputed. All the "acts or omissions" at issue arose outside of Texas. *See* TEX. CIV. PRAC. & REM. CODE § 71.051(b)(5) (Vernon Supp. 2006). The Legislature's intent was unmistakably to bar non-Texas lawsuits like this one from Texas courts.

Second, the trial court interpreted the statute as creating broad *discretion* to keep non-Texas cases like this one in Texas courts. That discretion is contrary to the statute's plain language. Specifically, the amendments *twice* replaced permissive language with mandatory language. The resulting statute (1) directs the trial court to make a fact

finding about the "interest of justice" and the "convenience of the parties," (2) mandates exactly what factors the trial court must consider, and (3) requires the Court to decline jurisdiction depending on its finding. In short, the trial courts' role is to make an objective finding of fact, not to exercise discretion about the best way to achieve "justice" as the court sees fit.

Finally, in reaching its decision, the trial court not only cited to the nature of Plaintiffs' situation, it also maligned the federal asbestos MDL as a "black hole." *Amici* have significant experience and insight into the federal MDL. In short, the "black hole" stereotype is wrong and misleading. That Court has effectively resolved a phenomenal number of cases and remanded many others for trial. Moreover, that MDL has historically operated with a preference for malignancy cases. Both legally and factually, there is no basis to conclude that the federal MDL court is inadequate.

ARGUMENT

I. Texas Public Policy is to Limit the Burden of External Disputes on Texas Courts and Texas Juries

In 1990, this Court held that the Texas Legislature had abolished the doctrine of *forum non conveniens* in personal injury cases back in 1913. *See Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 677-79 (Tex. 1990). Justice Hightower, in joining the *Alfaro* majority, recognized that this decision made Texas "the world's forum of final resort" and encouraged the Texas Legislature to clarify its intentions. *Id.* at 680 (Hightower, J., concurring). In 1993, the Texas Legislature passed—and has since repeatedly

amended—the *forum non conveniens* statute, sending a clear message that Texas courts should not hear external disputes. *See* TEX. CIV. PRAC. & REM. CODE § 71.051 (Vernon 1997 & Supp. 2006).

Amici respectfully suggest that this case presents an opportunity for this Court to acknowledge the clear legislative intent and provide direction for intermediate courts and trial courts to enforce that intent.

A. The Texas Legislature Enacted the Statute in Response to a Decision by the Texas Courts to Hear All Non-Texas Injury Cases

"The primary rule in statutory interpretation is that a court must give effect to legislative intent." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). To determine legislative intent, Texas courts must consider the problems created by the prior state of the law, *i.e.*, the "evil" to be remedied. *See* TEX. GOV'T CODE § 312.005 (Vernon 2005) (directing Texas courts to determine legislative intent by considering "the old law, the evil, and the remedy."). In this case, the history behind the enactment of the *forum non conveniens* statute vividly demonstrates that the Texas Legislature intended to create a powerful and practical tool to exclude external disputes.

In the case of *forum non conveniens*, the problem was clear: Texas courts repeatedly refused to bar external disputes. Indeed, Texas had achieved widespread notoriety for this position. As the United States Supreme Court recognized even before the *Alfaro* decision, Texas had become the "world's forum of last resort":

> [Texas] courts may not apply the same, or indeed, any *forum non conveniens* analysis to petitioner's case. Rather, as the

> Court of Appeals noted, it is possible that 'Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere else.'"

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 145 (1988). Justice Peeples bemoaned the problems created by not having access to *forum non conveniens* in a securities case: "if it remains the law in Texas, we will be not only the courthouse for the world but the laughingstock of the legal world as well." *'21' Int'l Holdings, Inc. v. Westinghouse Elec. Corp.*, 856 S.W.2d 479, 486 (Tex. App.—San Antonio 1993, no writ) (Peeples, J., concurring).[3]

Like the U.S. Supreme Court, the former Chief Justice of this Court recognized that Texas had served as the courthouse to the world long before the *Alfaro* decision. *See Alfaro*, 786 S.W.2d at 690 ("As the existence or not of forum non conveniens has long been an open question in Texas, our courts have traditionally attracted a number of actions originating in foreign jurisdictions.") (Phillips, C.J., dissenting).

The *Alfaro* majority, however, took the problem to an entirely different level by eliminating *forum non conveniens* in personal injury cases. *See Sarieddine v. Moussa*, 820 S.W.2d 837, 840 (Tex. App.—Dallas 1991, writ denied) ("The court in *Alfaro* ruled that Section 71.031 of the Civil Practice and Remedies Code abolished forum non conveniens in cases involving personal injury and wrongful death.").

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[3] This Court later vindicated Justice Peeples' insight when it disapproved of the holding in *21 Int'l Holdings. In re Smith Barney, Inc.*, 975 S.W.2d 593, 597 (Tex. 1998).

Against this backdrop, there can be no question that the Texas Legislature intended the original 1993 version of the *forum non conveniens* statute to be a powerful and practical tool that would allow Texas courts to ensure that non-Texas disputes would not burden Texas courts and Texas juries. *See* Carl Christopher Scherz, *Section 71.051 of the Texas Civil Practice and Remedies Code—the Texas Legislature's Answer to Alfaro: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 Baylor L. Rev. 99, 139 (1994) ("Texas courts may no longer be held hostage by anyone and everyone that has been injured or killed in the world.").

Indeed, five years later, this Court recognized that the Texas Legislature had broadly endorsed *forum non conveniens* by enacting Section 71.051. *See In re Smith Barney, Inc.*, 975 S.W.2d 593, 597-98 (Tex. 1998). In *Smith Barney*, this Court was faced with the application of *forum non conveniens* to a case that was governed by pre-existing Supreme Court precedent, not by the newly enacted Section 71.051. *Id.* at 595-96.

Nevertheless, on the strength of Section 71.051, this Court overturned its own precedent and applied *forum non conveniens* to this different area of the law. *Id.* at 597-98. In doing so, this Court explicitly recognized that the public policy behind *forum non conveniens* was to protect the Texas public from the burdens of hearing non-Texas cases. *Id.* at 598 ("It is fundamentally unfair to burden the people of Texas with the cost of providing courts to hear cases that have no significant connection with the State.").

B. The Amendments to the *Forum Non Conveniens* Statute Strengthened the Protection of Texas Courts and Texas Juries

Since 1993, the Texas Legislature has amended the *forum non conveniens* statute four times, in 1995, 1997, 2003 and 2005. There is no mistaking the trajectory of these changes: the Legislature has systematically expanded the availability of *forum non conveniens* and limited the discretion of the trial courts to disregard the doctrine.

According to commentators, the original 1993 statute was the product of compromise legislation between two factions—one supported by the plaintiffs' bar and the other supported by job growth advocates. Scherz, *supra*, at 109 n.48. Not surprisingly, the 1993 statute operated much like the traditional *forum non conveniens* doctrine. *Cf. Alfaro*, 786 S.W.2d at 695-96 (describing the common law guidelines that Justice Gonzalez would have adopted for the application of *forum non conveniens*) (Gonzalez, J., dissenting). Most importantly, 1993 statute used *permissive* language to describe a trial court's obligation to invoke the doctrine—even in the separate provision relating to non-U.S. residents:

> With respect to a claimant who is not a legal resident of the United States, if a court of this state, on written motion of a party, finds that in the interest of justice an action to which this section applies would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the action in whole or in part on any conditions that may be just.

TEX. CIV. PRAC. & REM. CODE §71.051(a) (Vernon 1997) (emphasis added).

The 1993 statute had other noteworthy aspects. For example, to assert the doctrine against a legal resident of the United States, the defendant had to prove the "factors" by a preponderance of the evidence. *Id.* at §71.051(b). The statute also created several explicit exceptions, making some lawsuits completely immune from *forum non conveniens*—including asbestos lawsuits. *Id.* at § 71.051(f)(5).

The amendments to the statute, however, fundamentally altered how *forum non conveniens* operates in Texas. The process began in earnest in 1997. This Court has previously evaluated the legislative intent of the 1997 amendments:

> In early 1997, the Legislature concluded that Texas law was too amenable to claims arising out of state and claims brought by foreign plaintiffs, and determined that this amenability crowded Texas courts with claims having little or no connection to Texas, at the expense of Texas residents.

Owens Corning v. Carter, 997 S.W.2d 560, 565-66 (Tex. 1999).

Specifically, in 1997, the Legislature repealed language that required the movant to prove (by a preponderance of the evidence) that the alternative court was "a more appropriate forum." Acts 1997, 75th Leg., ch. 424, § 1 (modifying TEX. CIV. PRAC. & REM. CODE § 71.051(b)(1)). The resulting statute now merely directs the trial court to consider whether "an alternative forum exists in which the claim or action may be tried." TEX. CIV. PRAC. & REM. CODE § 71.051(b)(1) (Vernon Supp. 2006). The Legislature also extended by 180 days the right to invoke *forum non conveniens*, and it *eliminated* the exceptions to *forum non conveniens* for asbestos litigation and other lawsuits. Acts 1997, 75th Leg., ch. 424, § 1.

In 2003, House Bill 4 passed. Acts 2003, 78th Leg., ch. 204, § 3.04. That amendment added *mandatory* language to the statute for the first time—so the current statute now *requires* dismissal:

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action.

TEX. CIV. PRAC. & REM. CODE § 71.051(b) (Vernon Supp. 2006) (emphasis added).

House Bill 4 also eliminated the heavy burden of proof on defendants. Acts 2003, 78th Leg., ch. 204, §§ 3.04. Instead of requiring that the defendants prove the factors by a preponderance of the evidence, the Legislature allowed the trial court leeway to "consider" those factors:

> In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court may consider whether ....

Id. (emphasis added). Superficially, this change gave trial courts broad factfinding power. But the statute nevertheless *required* a court to invoke *forum non conveniens* whenever the facts justified it. *Id.* ("the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens ....") (emphasis added). In context, there is no question that the Legislature intended to *expand* the use of *forum non conveniens* by replacing the heavy burden of proof on defendants with a factfinding obligation on the courts.

In 2005, the Legislature acted one final time to constrain this broad factfinding power. Acts 2005, 79th Leg., ch. 248, § 1. Thus, the statute now instructs the trial courts that they "shall consider" the enumerated factors in determining the "interest of justice" and the "convenience of the parties":

> If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action. In determining whether to grant a motion to stay or dismiss an action under the doctrine of forum non conveniens, the court shall consider whether ....

TEX. CIV. PRAC. & REM. CODE § 71.051(b) (Vernon Supp. 2006). If it was not clear before, the Legislature made it clear now: the trial court's job is to make an objective factfinding, not to determine the best means of serving the interests of "justice" as each trial court might determine that to be.

The Texas Legislature has left little room for doubt about the spirit of this law. Over the course of 14 years, the Texas Legislature has declared its intent to exclude out-of-state disputes from Texas courts. It has made every effort to close every loophole that might have allowed maverick courts to create exceptions to this policy. If the "primary rule" in statutory interpretation is to effectuate legislative intent, *Casteel*, 22 S.W.3d at 383, a Texas jury should not hear plaintiffs' claims in this case.

C. This Court Should Vindicate the Legislative Intent in this Case

The trial court's decision in this case is a test of whether there is a way to enforce this legislative intent. Using the strongest terms, the District Court admitted that this case has no ties to Texas:

> There is absolutely no connection between the State of Texas and any element of negligence, causation or damages. It is apparently undisputed that the Plaintiff spent his entire life, was exposed to asbestos, was diagnosed with mesothelioma and, in all probability will die in the state of Maine.... Based on these facts, I have struggled with any way any attorney could argue with a straight face that the case belongs in Texas.

App. Tab D to Petition for Writ of Mandamus at 1. This passage, of course, describes exactly the type of case that the Texas Legislature intended to exclude from Texas courts.

Moreover, precisely because of these extreme facts, the District Court's error is based on a misreading of the statute—the trial court committed an error of law in applying the statute to these facts. In particular, following the court's blunt assessment of the lack of a connection to Texas, the trial court purported to find discretion in the plain language of the statute:

> Then I reread the language of the new statute. Section 71.051(b) states:
>
> If a court of this state, on written motion of a party, finds that *in the interest of justice* and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside of this state, the court shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall dismiss the claim or action ...

Id. (italics added by trial court).

In other words, the amended statute allegedly gave the trial court discretion to determine the best way to serve "the interest of justice." *Cf. Id.* ("... the language of the statute was amended to significantly broaden the discretion of Texas trial courts.") (emphasis added).

This is a misreading of the statute and its amendments. As this Court has already recognized, the amended *forum non conveniens* statute is *mandatory*. *Coca-Cola Co. v. Harmar Bottling Co.*, --- S.W.3d ---, 2006 WL 2997436, *10 (Tex. 2006) ("A Texas statute governing wrongful death, survival, and personal injury actions requires courts, on a proper written motion, to 'decline to exercise jurisdiction under the doctrine of forum non conveniens' ....") (emphasis added).

In 2003 and again in 2005, the Texas Legislature replaced discretionary language with mandatory language in the statute. The word "shall" now appears three times in the current statute. TEX. CIV. PRAC. & REM. CODE § 71.051(b) (Vernon Supp. 2006).

Ultimately, the trial court's specific mistake was in confusing its factfinding job with a grant of discretion. The statute directs the trial court to make a finding about "the interest of justice" and "the convenience of the parties." *Id.* The trial court interpreted this command as an invitation for the trial court to use its discretion about how to best serve the "interest of justice." Instead, the Legislature intended this language to require the trial court to undertake an objective factfinding inquiry, based strictly on the six enumerated factors. *Id.* The results of that objective factfinding then have mandatory repercussions. *Id.*

This Court has the power to correct the trial court's misreading of the statute. Even in a mandamus petition, this Court should give no deference to the lower court's interpretation of the law:

> A trial court has no 'discretion' in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.

Walker v. Packer, 827 S.W.2d 833, 840 (Tex. 1992).

Significantly, the trial court does not appear to have made any true factfindings in reaching its decision. As mentioned above, the key facts are undisputed. Nor did the trial court appear to have formally received evidence about the status of the federal MDL court:

> This isn't just what I have been able to find out from conferring with federal judges around the nation—this is what the Judge D. Brock Hornby, Chief Judge of the Federal Courts of the District of Main, wrote in *In re Maine Asbestos Cases*, 44 F.Supp.2d 368 (D. Me. 1999).

App. Tab D to Petition for Writ of Mandamus at 2. Instead, the trial court incorrectly applied the law to the facts. The trial court found discretion in the statute's command to make a narrow factfinding. This Court should hold that the trial court abused its discretion by interpreting the amended Section 71.051 to give the trial court this power. *See Walker*, 827 S.W.2d at 840.

II. The Rationale for the Texas Legislature's Decision was Fundamentally Sound

The Legislature's justification for mandating the use of *forum non conveniens* was entirely sound. One of the basic presuppositions of *forum non conveniens*—and, indeed, of the American justice system generally—is that parties will normally be inclined to file in the forum with the closest connection to the claims. When plaintiffs instead choose to bring their actions in great numbers in some out-of-the-way forum, something is amiss.

That is precisely what seems to have happened in Texas with asbestos lawsuits. Texas has historically been a magnet for asbestos cases from around the country. *See* George S. Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. Tex. L. Rev. 981, 986 (2003) (reporting, "Some Texas businesses estimate that out-of-state claims make up seventy-five percent or more of their total asbestos claims in the state.") (citations omitted); *see also* House Research Organization, *Asbestos Litigation: An Inactive Docket Proposal* (Apr. 2, 2004) (Texas accounted for "more than 60 percent of filings between 1998 and 2000."); Stephen J. Carroll *et al.*, *Asbestos Litigation* 62 (RAND Inst. For Civil Justice 2005), *available at* http://www.rand.org/publications/MG/MG162 (study of asbestos filings through 2000 found that from 1988 to 2000 Texas led the nation in asbestos filings).[4]

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[4] *See generally* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002); Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. Tex. L. Rev. 945 (2003).

Many of the premises of our legal system were initially established with the premise that plaintiffs will generally file their claims in their local courts. For example, the existence of federal diversity jurisdiction testifies to the concern that local biases will sometimes favor local residents. Nevertheless, by and large, this approach serves the traditional ends of justice: courts of a particular locale have a special interest in serving the needs of their residents. The tendency of plaintiffs to bring suit in their home forum presumably distributes the burden of lawsuits equally, in accordance with the population.

When a phenomena like the Texas asbestos litigation occurs—that is, when plaintiffs flock to a particular jurisdiction—it is presumably because those plaintiffs perceive that they will receive favorable treatment in the way the laws are administered in those jurisdictions. This search for favorable treatment is fundamentally inconsistent with the American justice system. The fair administration of justice, without regard to whether one is a plaintiff or defendant, is supposed to be the singular objective of all courts.

In addition to the inherent problem of allowing the perception of unfairness to exist, the perception has the tendency to create the reality. As the docket increases, a court's ability to administer the docket decreases. One common response is the adoption of short cuts: summary judgment will routinely be denied; cases will be set for trial on short notice; the court will turn a deaf ear to complaints about overbroad discovery. Where there is no other way to move the docket, the court may employ various procedural devices that promote efficiency over fairness. *See* Victor E. Schwartz & Leah

Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 Miss. L.J. 531 (2001).[5]

In addition to these problems, courts have traditionally recognized the more obvious disadvantages of opening local courts to external disputes. The flooding of a local court docket with out-of-state filings will potentially overwhelm the resources of the local judiciary and the local populace. Except perhaps in a few jurisdictions that are regional commercial centers, local judicial resources are closely tied to addressing the needs of the resident population. Growing dockets adversely impact the courts' ability to dispense fair and timely justice to local residents.

The dissenting opinions in *Alfaro* emphasized this concern in the face of the majority's decision to completely eliminate *forum non conveniens* in 1990. *Alfaro*, 786 S.W.2d at 690 ("'Bhopal'-type litigation, with little or no connection to Texas will add to our already crowded dockets, forcing our residents to wait in the corridors of our courthouses while foreign causes of action are tried.") (Gonzalez, J., dissenting); *see also*

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[5] In the case of asbestos litigation, Texas has responded to the explosion of asbestos lawsuits with the creation of an asbestos MDL. Nevertheless, many of the same concerns resonate in that context as the MDL court itself grapples with mechanisms to control the volume of cases.

Owens Corning, 997 S.W.2d at 582 ("The [1997 Texas] Legislature reasonably believed ... that Texas residents were being denied access to their own courts because of a backlog of cases the Legislature reasonably believed should be litigated elsewhere.").

The dissenting justices in *Alfaro* also cited to the traditional objection that it is unfair to force Texas juries to sit through non-local disputes. *Alfaro*, 786 S.W.2d at 708 ("Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.") (Hecht, J., dissenting) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-509 (1947)); *Id.* at 698-99 ("Public interest concerns focus [] a court's attention on such factors such as ... the burden of jury duty upon communities which have no relation to the litigation.") (citations omitted) (Cook, J., dissenting).

Finally, the justices emphasized the concerns about the use of Texas taxes to pay to adjudicate these external disputes. *Id.* at 707 ("Do Texas taxpayers want to pay extra for judges and clerks and courthouses and personnel to handle foreign litigation?") (Hecht, J., dissenting).

By passing the *forum non conveniens* statute, the Texas Legislature provided a mechanism for addressing and correcting these concerns. This was not merely a legitimate policy decision by the Legislature, it was the right one. *Amici* strongly encourage this Court to vindicate that choice by providing clear guidelines on how to apply the *forum non conveniens* statute.

III. The Federal Asbestos MDL is an Adequate Forum

The trial court justified its holding on one basis: it concluded that the federal MDL would prevent Plaintiff from trying this case before his death. App. Tab D to Petition for Writ of Mandamus at 2 ("Apparently, the judge will not give the plaintiff an opportunity to have his case heard before his death. The judge will attempt to get the case to settle."). Indeed, the trial court characterized the federal MDL as a "black hole." *Id.*

The trial court's conclusion was not a traditional factfinding that would normally be subject to deference in a mandamus proceeding. Instead, to justify this conclusion, the trial court first cited his informal contacts with federal judges. *Id.* This would seem to be inappropriate on its face. Second, the trial court cited the opinion in *In re Maine Asbestos Cases*, 44 F. Supp. 2d 368, 374 n.2 (D. Me. 1999). *Id.* In effect, the trial court held that the federal MDL was inadequate as a matter of law. The trial court's holding is plain wrong—both as a matter of fact and as a matter of law.

A. The Federal MDL Has an Impressive Track Record

The federal MDL has done a remarkable job. Before the creation of the MDL, both federal and state courts faced "an asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997). The courts were overwhelmed with asbestos lawsuits:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long;

> the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Id. (citing the Report of The Judicial Conference Ad Hoc Committee on Asbestos Litig. at 2-3 (Mar. 1991)).

In response to the crisis, the Judicial Panel on Multidistrict Litigation created the federal asbestos MDL in 1991. *In re Asbestos Prods. Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1991). As the Panel noted at the time, nearly two new asbestos cases were being filed in federal court for each such action that was terminated. *Id.* at 419.

Shortly after taking control of the MDL, the late Judge Charles Weiner instituted procedures to gain control of the docket. *In re Asbestos Prods. Liab. Litig.*, 1996 WL 539589, *1 (E.D. Pa. Sept. 16, 1996). The parties developed a settlement model that resolved the cases in the New England area. *Id.* Other settlements followed, and some included a method for both resolving the present cases and handling future cases. *Id.* This approach became a model for cases outside the MDL: "This settlement process is now in use in every jurisdiction across the country and almost every plaintiffs [sic] attorney has an agreement with one or more of the defendants." *Id.* Finally, Judge Weiner prioritized the cases so that those involving malignancies and other serious diseases were addressed first. *Id.*

As a result of Judge Weiner's efforts, the tide began to turn. In 1996, for the first time, the number of cases resolved exceeded the number of new cases filed. *Id.* at *2. In

1997 and 1998, Judge Weiner was closing 10,000 cases a year. *In re Patenaude*, 210 F.3d 135, 140 (3d Cir. 2000). Even at the time of the 2000 *Patenaude* opinion, approximately 1,000 actions or claims had been remanded back to their original federal courts. *Id.* at 140 & 141-42. By September 2006, nearly 75,000 of the 110,000 cases in the MDL were resolved. *See* Judicial Panel on Multidistrict Litig., *Statistical Analysis of Multidistrict Litigation 2006,* at 11 (Summary by Docket of Multidistrict Litigation Pending as of Sept. 30, 2006, or Closed Since Oct. 1, 2005), *available at* http://www.jpml.uscourts.gov/Statistics/statistics.html.

Thus, the MDL resolved almost seventy percent of the staggering number of asbestos cases in the federal asbestos MDL. Many of these cases involved multiple plaintiffs. Moreover, as a result of Judge Weiner's prioritization of the cases, few of the remaining cases involve malignancies. *In re Asbestos Prods. Liab. Litig.*, 1996 WL 539589, *1.

B. The Published Cases Do Not Call the Federal MDL into Question But Instead Vindicate Its Performance

Despite this track record, the trial court cited to the *Maine Asbestos* opinion as allegedly proving that the federal MDL is inadequate. The *Maine Asbestos* opinion, however, makes its comments only in passing, in a footnote. *Maine Asbestos*, 44 F. Supp.2d at 374 n.2. In fact, the Court cites no statistics or, indeed, any authority whatsoever for its conclusions. *Id.*

Moreover, the *Maine Asbestos* Court's comments were based on the MDL's early preoccupation with achieving a global settlement:

> "If [these asbestos cases] remain in federal court, they will encounter significant delay upon their transfer through the Panel on Multidistrict Litigation to the Eastern District of Pennsylvania where no asbestos trials or discovery takes place in deference to global settlement efforts."

Id. (emphasis added). As the Third Circuit explained in its opinion in *Patenaude* just a year after the *Maine Asbestos* opinion, the global settlement efforts "fell apart." *Patenaude*, 210 F.3d at 138.

In *Patenaude* itself, multiple asbestos plaintiffs implicitly asserted that the federal MDL was an inadequate forum. After failing to convince the MDL court and the JPML Panel to remand their claims to their original courts for trial, they filed a petition for writ of mandamus. *Patenaude*, 210 F.3d at 138. The mandamus petition specifically involved malignancy cases. *Id.*

Nevertheless, the Third Circuit rejected the mandamus petition, in large part because the MDL Court was appropriately handling its cases consistent with its legislative mandate:

> the statute imposes two limitations on the kinds of proceedings that the transferee court may conduct: they must be (1) coordinated or consolidated and (2) pretrial.... The plaintiffs acknowledge that individual settlement negotiations and discovery continue in MDL 875 and the docket sheets show a pattern of settlements continuing through 1999.

Id. at 142.

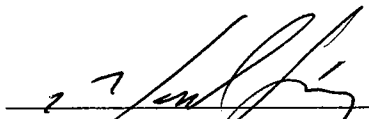
In making its holding, the Third Circuit highlighted the MDL court's explicit favoritism toward malignancy cases: "the sick and dying, their widows and survivors should have their claims addressed first." *Id.* at 139 (citing *Carlough v. Amchem*, No. 93-215 (E.D. Pa. Apr. 15, 1993) (Mem. Op.)); *see also Id.* at 140 ("The MDL court's Administrative Order No. 3 ... establishes that in attempting to resolve cases through negotiation, cases of mesothelioma and lung cancer with asbestosis will be 'address[ed] ... on a priority basis.'") (citations omitted). Indeed, while the MDL resisted most motions to remand, the MDL made exceptions when "the claimant was seriously ill or dying and all avenues of settlement were exhausted." *Id.* at 139-40 (citing *Carlough*).

Ultimately, then, the published cases—just like the available statistics—demonstrate that the federal asbestos MDL is a fair and balanced forum. That is especially true for malignancy cases. This Court should thus have no hesitation to allow the federal court with perhaps the most asbestos experience of any court in the world to handle this case if that is indeed what would happen.

CONCLUSION

For these reasons, *amici* respectfully urge the Court to grant the requested mandamus relief to vindicate the legislative intent behind the Texas *forum non conveniens* statute and to further Texas' stated public policy of excluding out-of-state disputes from Texas courts.

Respectfully submitted,



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At the request of the Supreme Court of Texas, I also certify that a pdf copy of the foregoing was sent electronically to the Clerk's office (scebriefs@courts.state.tx.us). The ebrief complies with the following requests of the Court:

1. Information for ebrief being submitted:
   a. Case Style: *Austin Richards and Gwendolyn Richards v. CBS Corporation, f/k/a Viacom, Inc., successor by merger to CBS Corporation, f/k/a Westinghouse Electric Corporation*
   b. Case Number: 07-0195
   c. Type of Brief: *Amici Curiae* Brief
   d. The Word Processing Software and Version Use to prepare the ebrief: Microsoft Office Word 2003.
2. The email attachment contains only an electronic copy of the original document which was filed in the Texas Supreme Court Clerk's office and does not contain any document or portion thereof that is not included in the original filing.
3. The ebrief is free of viruses or any other files that would be disruptive to the Court's computer system. The following software was used to ensure the filing is virus-free: McAfee VirusScan Enterprise Version 8.0.0.
4. I understand that the ebrief will be posted on the Court's web site.

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