No. 07-0040

IN THE SUPREME COURT OF TEXAS

IN RE GLOBAL SANTE FE CORPORATION

ORIGINAL PROCEEDING FROM THE
295TH JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS
NO. 2005-767732

AMICI CURIAE BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND TEXAS CIVIL JUSTICE LEAGUE ON MOTION FOR REHEARING IN SUPPORT OF NEITHER PARTY

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Tex. R. App. P. 11(b), (c), *Amici Curiae* certify that the following is a complete list of the persons or entities on whose behalf this brief is filed and the person or entities paying for preparation of this brief.

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STATEMENT OF INTEREST

As organizations that represent Texas companies, *amici* have a significant interest in the fair and effective administration of justice. *Amici*'s members play a significant role in the Texas economy, with headquarters and facilities in the state, through hundreds of thousands of employees and pensioners that are Texas residents, and through taxes paid to Texas. Accordingly, *amici* have a significant interest in ensuring that a decision by this Court with respect to the application of the federal Jones Act to Chapter 90 makes clear that the decision is not intended to reflect on other litigation that is ongoing and may ultimately reach this Court with respect to the retroactive application of Chapter 90 to cases under Texas law alleging exposure to silica or asbestos.[1]

* * *

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.

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[1] Likewise, the Court's opinion on the scope of preemption under the federal Jones Act should have no bearing on other potential constitutional challenges based on Texas law, such as the "open courts" provision.

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.

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's 5,000 Texas 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. In addition, TCJL files *amicus curiae* briefs in the Texas courts on issues that impact its members.

ISSUE PRESENTED

Whether the Court's December 5, 2008 opinion finding that Chapter 90's requirement that silica claimants show a minimum level of impairment is substantive for purposes of the Jones Act and therefore preempted in such cases reflects upon the constitutionality of the minimum impairment requirement of the Act as applied to pending silica claims under Texas law.

SUMMARY OF THE ARGUMENT

On December 5, 2008, this Court ruled that Chapter 90's requirement that silica claimants show a minimum level of impairment is substantive for purposes of the Jones Act, a federal maritime statute, and therefore preempted in such suits. *Amici* believe that the opinion may unintentionally send a much broader message to lower courts deciding personal-injury actions alleging injuries from silica and asbestos exposure. The decision presents the potential for a trial court to misapply this Court's holding on federal preemption to support a finding that the minimum level of impairment required under Chapter 90 is substantive in a manner that constitutionally does not permit the statute's application to pending claims.

The Court's narrow ruling on the Jones Act should not be read in a manner that would nullify the core of the silica and asbestos criteria reform law. For that reason, *amici* urge the Court to clarify that its analysis and findings with respect to substantive law does not apply outside the context of the Jones Act and should not be construed to

reflect on the distinct state constitutional analysis required to determine whether a statute may be applied retroactively to claims under Texas law.

INTRODUCTION AND BACKGROUND

In 2005, the Texas Legislature enacted reforms to ensure silica and asbestos claims are backed by reliable scientific evidence and prioritize the claims of those who are truly sick in an ever shrinking pool of financial resources. *See* Act of May 16, 2005, 79th Leg., R.S., ch. 97, § 12, 2005 Tex. Gen. Laws 169, 182 (codified at Tex. Civ. Prac. & Rem. Code §§ 90.001-90.012). Three of these provisions are at issue in this litigation. The first requires silica claimants to serve a detailed expert report prepared by a qualified physician verifying that the claimant suffers from one or more silica-related diseases. *Id.* § 90.004(a)(3). The second provides for a single multi-district litigation (MDL) court that generally decides all pretrial matters. *Id.* § 90.004(b)(3). The third requires that a silica claimant show a minimum level of physical impairment before he or she can proceed with a claim. *Id.* § 90.004(b)(2). The statute requires "at least a Class 2 or higher impairment" as defined by American Medical Association guidelines. *Id.*

On December 5, 2008, the Court ruled on whether these provisions are applicable in cases arising under the Jones Act, a federal maritime statute. *In re Global Sante Fe Corp.*, No. 07-0040, -- S.W.3d --, 2008 WL 5105257 (Tex. Dec. 5, 2008). The deciding factor in such an analysis is whether the requirement is substantive or procedural for Jones Act purposes. In this "reverse-*Erie*" analysis, if the state law is substantive, it is preempted. *See Engle v. Davenport*, 271 U.S. 33, 39 (1926). If the state law is

procedural, then it continues to apply to the Jones Act claim. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994). The Court has recognized that drawing the substantive/procedural distinction is difficult. "It is done differently in different contexts, and in all contexts it is difficult to do." *Global Sante Fe*, 2008 WL 5105257, at *5 n. 54.

Applying this difficult substantive/procedural framework, this Court found that the expert report and MDL provisions are matters of state procedural law and therefore apply in Jones Act cases. *See id.* at *6-*7. The Court also ruled, however, that the Jones Act does not require any minimum level of physical impairment and, therefore, this provision of state law is preempted. *Global Sante Fe*, 2008 WL 5105257, at *7. This final point was conceded by the defendant and decided by the court in a short, concluding paragraph. *See id.*

Real Party in Interest John B. Lopez filed a Motion for Rehearing on January 21, 2009, requesting that the Court reconsider its holding that the expert report and MDL provisions applied in Jones Act cases. If the Court is inclined to entertain rehearing of these matters, the Court need not invite full hearing and briefing; rather, the Court may simply withdraw the current opinion and re-release the opinion clarifying the scope of its decision in one small, but significant, respect. *Amici* are concerned that the Court's finding that the minimum-impairment provision constitutes "substantive state law" rather than state procedural law, even while in the context of a preemption analysis under the Jones Act, might be misapplied by lower courts in an entirely different context: whether,

under the Texas Constitution, the minimum-impairment requirement may be constitutionally applied to pending asbestos and silica claims under Texas law.

ARGUMENT

I. THE COURT SHOULD CLARIFY THAT ITS HOLDING IS LIMITED TO THE JONES ACT AND DOES NOT ADDRESS THE CONSTITUTIONALITY OF THE MINIMUM IMPAIRMENT REQUIREMENT OF CHAPTER 90 AS APPLIED TO PENDING STATE LAW CLAIMS.

The Court should clarify that its holding in *Global Sante Fe* is limited to determining when the Jones Act preempts requirements of Chapter 90 and does not address whether the minimum impairment requirement is substantive for the purposes of state constitutional law. *Amici* suggest that such a clarification is warranted for four reasons.

First, the Court's decision was clearly confined to silica claims under the Jones Act. As the relevant paragraph states:

> The Jones Act imposes no requirement for a minimal threshold of physical injury, nor any limitation that only lung diseases that have progress to a specified level of physical impairment are covered. GSF concedes that Chapter 90 cannot impose a requirement that the plaintiff suffer from a minimal level of physical impairment before he can obtain relief on his Jones Act claim. Accordingly, section 90.002(b)(2), providing that claimants alleging silicosis must have sustained "at least Class 2 or higher impairment" cannot be applied to Jones Act claims. We further conclude that Chapter 90 must not be interpreted to impose a higher standard of proof of causation than the federal standard applicable to Jones Act cases.

Id. at *7 (footnotes omitted). As the quoted text above shows, the Court repeatedly stated that its decision was based on the incongruence between the federal Jones Act and state

law. The Court also carefully noted that its decision with respect to the Jones Act should not be read to apply to Chapter 90's separate minimum-impairment criteria applicable to asbestos claims. *See id.* at *7, n.78.

Second, the defendant conceded the point at issue, and the Court reached its decision with respect to the nature of the minimum impairment requirement after only very brief analysis. *See id.* at *7.[2] A decision on a constitutional issue that may effectively nullify the intent of the legislature and broadly impact perhaps tens of thousands of silica and asbestos claims brought under state law should be reached only after a thorough review. Moreover, the Court should provide due deference to the legislature, a co-equal branch of government charged with making the laws, by applying a presumption in favor of constitutionality. *See Texas Pub. Bldg. Auth. v. Mattox*, 686 S.W.2d 924, 927 (Tex. 1985); *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968).

Third, there is a difference between an analysis of what is substantive law for purposes of a "reverse-*Erie* doctrine" to decide preemption under the Jones Act and what is substantive law for the purposes of the Texas Constitution as to the permissibility of the retroactivity of state law. Indeed, "[t]he line between 'substance' and 'procedure' shifts as the legal context changes. 'Each implies different variables depending upon the

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[2] There are strong arguments that the minimum impairment requirement is indeed procedural, rather than substantive. It is interwoven with ensuring a reliable medical diagnosis, which the Court views as procedural in nature, *see id.* at *6, and effectively prioritizes the court's docket while preserving the plaintiffs' substantive rights.

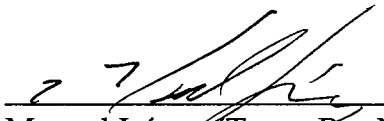
particular problem for which it is used.'" *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (citation omitted). This Court did not consider whether 90.004(b)(2) impairs vested rights. Moreover, the Court did not consider the level of physical impairment required under the Texas common law. Rather, the Court considered only whether the Jones Act, which provides a relaxed standard of causation, required this standard of proof. *See Global Santa Fe Corp.*, 2008 WL 5105257, at *7 n.79 (citing *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406 (Tex. 1998)).

Finally, the constitutionality of applying Chapter 90's minimum impairment provision to pending silica claims is currently being fully briefed at the trial court level. *In re Texas State Silica Prods. Liab. Litig.*, Master Docket No. 2004-70000, Cause No. 2005-80837, *Ballard v. Am. Optical Corp.* (295th Jud. Dist. Ct., Harris County) and Cause No. 2005-77740, *Weitzel v. 3M* (295th Jud. Dist. Ct., Harris County). A clarification from this Court that its decision in *Global Santa Fe* should not be read to extend beyond preemption under the Jones Act would ensure that the lower court's constitutional considerations are not colored by an overbroad application of this Court's opinion here.

CONCLUSION

For these reasons, *amici* respectfully request that this Court clarify that its December 5, 2008 decision is limited to determining when the Jones Act preempts requirements of Chapter 90 and does not address whether the minimum impairment requirement is substantive for the purposes of state constitutional law.

Respectfully submitted,



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Dated: February 3, 2009

CERTIFICATE OF SERVICE AND EBRIEF CERTIFICATE OF COMPLIANCE

I certify that I served a copy of the foregoing *Amici Curiae* Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the U.S. Postal Service this 3rd day of February, 2009, addressed as follows:

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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: *In re Global Sante Fe Corporation*
   b. Case Number: 07-0040
   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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