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SUPREME COURT OF TEXAS
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No. 17-0019

In the Supreme Court of Texas

IN RE MAHINDRA, USA INC.

MAHINDRA USA, INC.,

Relator,

KMW, LTD.,

Defendant,

v.

JASON ALAN COOPER, INDIVIDUALLY, AS ADMINISTRATOR OF THE ESTATE OF VENICE ALAN COOPER, AND AS NEXT FRIEND OF FAITH COOPER, AND CHRISTOPHER CODY COOPER,

Real Parties In Interest.

On Petition for Writ of Mandamus to the 152nd Civil District Court of Harris County, Texas, No. 2016-40032

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

Allyson N. Ho
State Bar No. 24033667
allyson.ho@morganlewis.com
Justin R. Chapa
State Bar No. 24074019
justin.chapa@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
Tel.: 214.466.4000
Fax: 214.466.4001

COUNSEL FOR *AMICUS CURIAE*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and business associations, representing directly more than 300,000 members and indirectly the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. As part of its advocacy efforts, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. Because of its growing population and favorable business climate, Texas has emerged as one of the largest economies in the world. Crucial to that success—and of great importance to the many Chamber members that call Texas home and to the myriad companies that do business in the State—is the fairness, efficiency, and predictability of the State's legal system, particularly the protection the Legislature has afforded against unnecessary risk and expense. The Chamber previously has defended those interests before this Court, including in *In re Ford Motor Co.*, 442 S.W.3d 265 (Tex.

2014)—the case that prompted the Legislature to amend the *forum non conveniens* statute with the provisions at issue here.

Those interests are once again under threat. The trial court's decision disregards the clear language and intent of the amended statute by allowing a case with only a tangential connection to Texas to nonetheless remain in Texas courts when traditional *forum non conveniens* principles—and common sense—would hold that it is "more properly heard in" Mississippi. Tex. Civ. Prac. & Rem. Code § 71.051(b). That outcome sows confusion among the business community and risks the type of venue manipulation that the Legislature sought to prevent.

The Chamber therefore files this brief in support of Relator Mahindra USA, Inc. ("Mahindra") and respectfully urges the Court to grant the petition.[1]

[1] Pursuant to Texas Rule of Appellate Procedure 11, the Chamber certifies that no counsel for a party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

"Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). It thus was no surprise that a 2015 Chamber-sponsored study revealed that 75 percent of survey respondents considered "a state's litigation environment" important to "business decisions at their companies, such as where to locate or do business." U.S. Chamber Institute for Legal Reform, *Ranking the States: A Survey on the Fairness and Reasonableness of State Liability Systems*, at 3 (Sept. 2015). Businesses like to operate in places where courts can be counted on to treat litigants reasonably and apply the law fairly. *See id.* at 13. This includes the expectation that states will "hav[e] and enforc[e] meaningful venue requirements." *Id.* at 5.

This case concerns whether Texas courts will enforce a venue requirement that the Legislature adopted by statute: the *forum non conveniens* provision in section 71.051(e) of the Texas Civil Practice and Remedies Code. This Court, among others, has questioned whether *forum non conveniens* can be applied in a predictable manner given that the doctrine depends on a trial court's discretion and a multi-factor test.

See Exxon Corp. v. Choo, 881 S.W.2d 301, 305–06 (Tex. 1994) (citing *American Dredging Co. v. Miller*, 510 U.S. 443, 454–55 (1994)). But that academic debate is not implicated where, as here, the Legislature has statutorily instructed courts to apply *forum non conveniens* in a specific manner. In such circumstances, courts must "look to the language passed by the Legislature and signed by the Governor—not to [their] own lights." *In re Ford*, 442 S.W.3d at 274.

In the context of the *forum non conveniens* statute, fidelity to the post-amendment language of the statute should result in a predictable outcome: that the Texas-resident exception will no longer exclude cases from the ambit of *forum non conveniens* simply because a plaintiff happens to reside in Texas, regardless of the capacity in which the plaintiff has brought suit. "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," *In re Smith Barney, Inc.*, 975 S.W.2d 593, 598 (Tex. 1998), whether brought by Texas residents or residents of other states. As detailed below, consistent with its historical treatment of the *forum non conveniens* statute, the Legislature unmistakably intended for the 2015 amendments to

alleviate that burden with respect to cases brought by a certain class of derivative or representative litigants.

ARGUMENT

I. The *Forum Non Conveniens* Statute's Legislative History Reflects Clear Intent to Apply the Doctrine In Cases Like This One.

The 2015 amendments to the Texas *forum non conveniens* statute embody the most recent expression of the Legislature's longstanding concern that Texas not serve as "'the world's forum of final resort.'" *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 680 (Tex. 1990) (Hightower, J., concurring). After this Court held in *Alfaro* that the Legislature had "statutorily abolished" *forum non conveniens* in wrongful-death and personal-injury cases, *id.* at 679 (maj. op.), the Legislature codified the doctrine in 1993, *see* S.B. 2, 73rd Leg. (Tex. 1993) (codified at Tex. Civ. Prac. & Rem. Code § 71.051 (1993)).

The Texas-resident exception appeared in the *forum non conveniens* statute at its inception, but even then, it had limits. As originally enacted, the Texas-resident exception applied only to "a claimant" who was "properly joined" to an action for wrongful death or personal injury. *See* Tex. Civ. Prac. & Rem. Code § 71.051(f)(1) (1993); S.B. 2, 73rd Leg., 1993 Tex. Sess. Law Serv. Ch.4, § 1, sec. 71.051(f)(1).

The Legislature tucked further restrictions into the definition of "claimant." Although the term of art once "includ[ed] a plaintiff, a counterclaimant, cross-claimant, or third-party plaintiff," it did not extend to "a person who [was] assigned a cause of action for personal injury, or who accept[ed] an appointment as a personal representative in a wrongful death action, in bad faith," to avoid application of *forum non conveniens*. *Id.* § 71.051(j)(2) (1993); *see also* S.B. 2, 73rd Leg., 1993 Tex. Sess. Law Serv. Ch. 4, § 1, sec. 71.051(j)(2).

These limits proved insufficient to assuage the Legislature's concern that Texas courts were being flooded with essentially out-of-state cases, and in 1997 it again took action to prevent the Texas-resident exception from being used to manipulate venue. *Owens Corning v. Carter*, 997 S.W.2d 560, 565–66 (Tex. 1999). In passing Senate Bill 220, the 75th Legislature intended to "eliminate[] certain exemptions to forum non conveniens," H.R. Rep., C.S.S.B. 220, 75th Leg. (May 20, 1997) ("Purpose"), one of which was the Texas-resident exception's inclusion of a "counterclaimant, cross-claimant, or third-party plaintiff" within the definition of a "claimant," *id.* § 1(h) ("Section by Section Analysis"), which the Legislature replaced with the term

"plaintiff," Tex. Civ. Prac. & Rem. Code § 71.051(h)(2) (1997); *see also* S.B. 220, 75th Leg., 1997 Tex. Sess. Law Serv. Ch. 424, § 1, sec. 71.051(h)(2). Since 1997, the definition of "plaintiff" has expressly foreclosed "a counterclaimant, cross-claimant, or third-party plaintiff" from accessing the Texas-resident exception. *Compare* Tex. Civ. Prac. & Rem. Code § 71.051(h)(2) (1997) *with id.* § 71.051(h)(2)(A) (2017).

Yet litigants continued to exploit the Texas-resident exception to bring claims in Texas courts that belonged elsewhere, in part because of a quirk in how the statute accounted for derivative parties. From the beginning, the *forum non conveniens* statute considered as a "claimant," and then a "plaintiff," both an injured person or decedent *and* the person formally bringing a claim for wrongful death or personal injury on behalf of "that other person." *See id.* § 71.051(j)(2) (1993); *id.* § 71.051(h)(2) (2005) ("In a cause of action in which a party seeks recovery of damages for personal injury to or the wrongful death of another person, 'plaintiff' includes both that other person and the party seeking such recovery.").

At the same time, however, the statute excluded a "third-party plaintiff" from the definition of "plaintiff," *id.* § 71.051(h)(2) (2005), and

derivative parties like wrongful-death beneficiaries could be viewed as somewhat akin to third-party plaintiffs because their "right . . . to maintain a wrongful death action is entirely derivative of the decedent's right to have sued for his own injuries immediately prior to his death." *Russell v. Ingersoll-Rand Co.*, 841 S.W.2d 343, 347 (Tex. 1992). That right exists only as a function of statute and is available only to "the deceased's surviving spouse, children, and parents." *Shepherd v. Ledford*, 962 S.W.2d 28, 31 (Tex. 1998) (citing Tex. Civ. Prac. & Rem. Code § 71.004(a)). Wrongful-death beneficiaries otherwise would lack standing to assert product-liability claims, for example, because they would not have suffered the "concrete and particularized" injury allegedly sustained by the decedent's use of a defective product.

The Court addressed this potential ambiguity in *In re Ford* and concluded that "wrongful-death beneficiaries are not third-party plaintiffs," but rather "distinct plaintiffs whose own residency can satisfy the Texas-resident exception." 442 S.W.3d at 280. This holding stemmed in part from the Court's reading of the language of the then-extant version of the *forum non conveniens* statute. In rejecting Ford's argument that "the derivative beneficiary rule require[d] [the Court] to

treat the wrongful-death beneficiaries as third-party plaintiffs," *id.* at 278–79, the Court acknowledged that "beneficiaries' claims are in a sense derivative," but concluded that they are nonetheless "entitled to their own independent recovery that does not benefit the estate," *id.* at 279. This fact, the Court reasoned, dovetailed with the "statutory definition of 'plaintiff,'" which then "'include[d] both' the decedent and other parties suing to recover damages for the decedent's wrongful death." *Id.* at 280. This statutory fiction created multiple, "distinct plaintiffs" and "allow[ed] [beneficiaries] to rely on their Texas residency" to keep a wrongful-death case in Texas court even if it otherwise lacked a nexus to Texas. *Id.*

Although the interpretation adopted in *In re Ford* endeavored to follow the statutory text, its upshot was to virtually bar defendants from asserting *forum non conveniens* against any wrongful-death plaintiff who happened to be a Texas resident. The Court confirmed as much when it next addressed the Texas-resident exception, in *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565 (Tex. 2015). There, the Court summarized the exception's post-*In re Ford* scope as unfettered: "When the Texas-resident exception outlined in

subsection 71.051(e) applies, a case may not be dismissed on forum-non-conveniens grounds *no matter how tenuous its connection to Texas*." *Id.* at 569 (emphasis added).

The Legislature swiftly disavowed that it intended any such result. Companion bills to amend the *forum non conveniens* statute were introduced in the Texas House and Senate on February 20 and March 13, 2015, respectively, and received final legislative approval on May 22, 2015, after two public hearings. The law went into effect immediately upon receiving Governor Abbott's signature on June 16, 2015.

Legislative and public support for the measure was overwhelming. House Bill 1692, the lead bill, passed the House by a vote of 132-5-1 and the Senate by a vote of 27-4. *See* Texas House Journal, 84th Leg., at 2975 (May 11, 2015); Texas Senate Journal, 84th Leg., at 1913 (May 22, 2015). At a public hearing before the House Judiciary and Civil Jurisprudence Committee, nearly three dozen witnesses spoke or registered support for the bill—including representatives from the business community—but only four witnesses spoke or registered against the bill. *See* House Research Organization, Bill Digest, H.B.

1692, at 1 (May 8, 2015). Things went no differently at the hearing before the Senate State Affairs Committee. *See* S. State Affairs Comm. Rep., Witness List, H.B. 1692, 84th Leg. (May 18, 2015).

The business community strongly supported House Bill 1692 in large part because, as the legislative history evinces, it unequivocally was intended to correct the statutory language that gave rise to the holdings in *In re Ford*. The House Committee Report stated the "Background and Purpose" of House Bill 1692 in two sentences: "Recent court cases involving an unintended use of forum non conveniens have highlighted problematic loopholes created by broad statutory definitions of certain terms. C.S.H.B. 1692 seeks to address these loopholes." H.R. Judiciary & Civil Jurisprudence Comm. Rep., Bill Analysis, 84th Leg. Echoing traditional *forum non conveniens* principles, the "Fiscal Note" that accompanied the as-introduced version of House Bill 1692 interpreted the legislation to "provide that a plaintiff's choice of a forum in Texas would be given substantial deference if the plaintiff was a legal resident of Texas *and the litigation had a significant connection to Texas*." Legislative Budget Board, Fiscal Note, H.B. 1692, 84th Leg. (Apr. 3, 2015) (emphasis added).

The "Author's/Sponsor's Statement of Intent" provided to the Senate State Affairs Committee elaborated on the loopholes referenced in the House Committee Report, identifying as problematic that Texas, contrary to the practice in "[m]ost jurisdictions," used residency alone as the basis to maintain a lawsuit in Texas, rather than "one of many factors in a balancing test." S. State Affairs Comm. Rep., Senate Research Center, Bill Analysis, 84th Leg. (May 14, 2015). "Additionally," the Statement of Intent explained that "the Texas definition of legal resident [was] so broad as to allow resident intervenors or derivative plaintiffs to bring a case from non-residents into the state." *Id.* The Senate Committee Report succinctly described the overarching goal of the legislation as "to preserve Texas courts for Texas residents by requiring non-residents to establish that claims arising in another state or country have a significant connection to Texas." *Id.*

Mahindra's briefing explains how the plain text of the statute operates to preclude application of the Texas-resident exception here, and its interpretation comports with that of legal commentators who

follow developments in Texas *forum non conveniens* law. As one group of commentators put it:

> Unlike the prior version of the statute, the residency of a single Texas plaintiff cannot anchor an entire multiparty case in Texas; instead, the statute now provides for consideration of each plaintiff's claims separately, allowing dismissal or stay of nonresident plaintiffs' claims. Nor can a legal Texas resident who is a wrongful death beneficiary, personal representative, or next friend keep a case in Texas if the real party in interest is not—or if a decedent was not—a legal Texas resident.

Amanda Sotak, et al., *Civil Procedure: Pre-Trial & Trial*, 2 SMU Annual Texas Survey 71, 79 (2016) (footnotes omitted). As the legislative history of the 2015 amendments and the evolution of the *forum non conveniens* statute demonstrate, that is precisely what the Legislature intended.

II. This Case Implicates Important Public Policy Considerations Relevant to Businesses in Texas and Across the Nation.

In amending the Texas-resident exception as it did, the Legislature responded to a development in the law that frustrated its "'continuing effort to attain a fair, efficient, and predictable civil justice system.'" *See Excess Underwriters at Lloyd's, London v. Frank's Casing Crew & Rental Tools, Inc.*, 246 S.W.3d 42, 51 (Tex. 2008) (citation omitted). Each of those interests—and thus the business and litigation environment in Texas—will be impaired if courts can decline to enforce the 2015 amendments as written and under circumstances foreseen by the Legislature. The proper construction of Texas's *forum non conveniens* statute is thus of exceeding importance to businesses in Texas and across the Nation.

As an initial matter, the consistent adherence to rules of statutory construction is 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.*, *id.*; *Hertz Corp.*, 559 U.S. at 94. If legal rules are not reliably enforced, businesses cannot effectively plan for the future and must incur greater compliance and legal expenses—inhibiting their operations and driving up costs for consumers. Predictable legal

systems, on the other hand, provide a foundation for strong economic growth. *See, e.g.*, J. Nixon, *The Purpose, History & Five Year Effect of Recent Lawsuit Reform in Texas*, The Advocate, Fall 2008, at 20 (citing study that found Texas's economy grew by 8.5 percent in a five-year period following certain lawsuit reforms). And proper application of the *forum non conveniens* doctrine is an important component of predictability. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Litigating in the Field of Dreams: Asbestos Cases in Madison County*, at 18 (2013) (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"). Businesses expect to be hailed into Texas courts only in cases where Texas has some "dog in [the] fight." *See In re Perelli Tire, L.L.C.*, 247 S.W.3d 670, 681 (Tex. 2007) (Willett, J., concurring).

The approach endorsed by the trial court here also inevitably leads to inefficient and unfair litigation for both businesses and Texans. From a fairness perspective, the existence of a Texas connection—or even multiple connections to Texas—does not mean that a case is "more properly heard in" Texas than "in a forum outside this state." Tex. Civ.

Prac. & Rem. Code § 71.051(a). *Forum non conveniens* "comes into play when there are sufficient contacts between the defendant and the forum state to confer personal jurisdiction upon the trial court, but the case itself has no significant connection to the forum." *In re Perelli*, 247 S.W.3d at 675–76 (maj. op.). The trial court's interpretation conflates personal jurisdiction with convenience to the parties; that Mahindra is headquartered in Texas and may be amenable to general jurisdiction in Texas says nothing about whether Mahindra and other parties can fairly litigate Plaintiffs' claims in a Texas court—and as Mahindra points out, it cannot. *See, e.g.*, Mahindra's Merits Br. at 10 (noting that the vast majority of witnesses reside outside the subpoena power of a Texas court). Whether resident in Texas or not, businesses should not be forced to litigate fundamentally foreign disputes in Texas courts based simply on the fortuity of a derivative plaintiff's residence in Texas and of a business's unrelated connection to the State.

And the number of individuals with significant personal connections to another state—potential future derivative plaintiffs—will only increase. Nearly five million people moved to Texas from another state between 2005 and 2013. Alexa Ura and Jolie McCollough,

Texas Drawing Millions Moving from Other States, Texas Tribune (Apr. 20, 2016), *available at https://www.texastribune.org/2016/04/20/texas-top-destination-domestic-migrants/* (last visited August 21, 2017). Even if some of those moving to Texas leave behind no relatives who could at some point become the subject of a personal-injury or wrongful-death action, a substantial number of new Texans will arrive from areas where they lived near close family. "Most adults," one study has found, "do not venture far from their hometowns." Quoctrung Bui & Claire Cain Miller, *The Typical American Lives Only 18 Miles from Mom*, N.Y. Times (Dec. 23, 2015), *available at www.nytimes.com/interactive/2015/12/24/upshot/24up-family.html* (last visited August 21, 2017).

It would be "fundamentally unfair to burden" the courts, businesses, and Texas residents with the obligation to host, litigate, and fund personal-injury and wrongful-death cases involving out-of-state decedents whose only connection to Texas is a spouse, child, or parent who adopts Texas as his or her home. *Cf. In re Smith Barney*, 975 S.W.2d at 598. The interpretation relied on by the trial court, however, would permit that outcome even as the Texas Legislature would foreclose it.

* * *

The court below "failed to adhere to guiding principles" in the text of the amended *forum non conveniens* statute, making mandamus relief appropriate. *In re Perelli*, 247 S.W.3d at 676. Moreover, it reached a result plainly at odds with the Legislature's intent and with the interests of predictability, fairness, and efficiency central to Texas's business and litigation environment. The Chamber respectfully requests that the Court grant the petition to ensure that courts follow the text and purpose of the *forum non conveniens* statute and to protect Texas's "'fair, efficient, and predictable civil justice system.'" *Frank's Casing Crew*, 246 S.W.3d at 51 (citation omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of mandamus should be granted, and Respondent should be directed to withdraw his Order dated August 12, 2016, and to enter an order dismissing Plaintiffs' claims on the basis of *forum non conveniens*.

Respectfully submitted,

/s/ Allyson N. Ho

Allyson N. Ho
Texas Bar No. 24033667
allyson.ho@morganlewis.com
Justin R. Chapa
Texas Bar No. 24074019
justin.chapa@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
1717 Main Street, Suite 3200
Dallas, Texas 75201
Tel.: 214.466.4000
Fax: 214.466.4001

COUNSEL FOR *AMICUS CURIAE*

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* was prepared using Microsoft Word 2010, which indicated that the total word count (exclusive of those items listed in rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, as amended) is 3,401 words.

/s/ Allyson N. Ho
Allyson N. Ho

CERTIFICATE OF SERVICE

I certify that on the 22nd day of August, 2017, 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.

COUNSEL FOR DEFENDANT-RELATOR MAHINDRA USA, INC.

Edwin S. Gault, Jr.
State Bar No. 24049863
win.gault@formanwatkins.com
Sharon M. Garner
State Bar No. 24057862
sharon.garner@formanwatkins.com
T. Peyton Smith
Admitted Pro Hac Vice
peyton.smith@formatwatkins.com

FORMAN WATKINS & KRUTZ LLP
4900 Woodway Drive, Suite 940
Houston, Texas 77056

COUNSEL FOR DEFENDANT KMW, INC.

Nicholas E. Zito
State Bar No. 22279500
nez@ramey-chandler.com
RAMEY, CHANDLER, QUINN & ZITO, P.C.
750 Bering Drive, Suite 600
Houston, Texas 77057

COUNSEL FOR REAL PARTIES IN INTEREST

Anthony G. Buzbee
State Bar No. 24001820
tbuzbee@txattorneys.com
Andrew Dao
State Bar No. 24082895
adao@txattorneys.com
THE BUZBEE LAW FIRM
JP Morgan Chase Tower
600 Travis Street, Suite 7300
Houston, Texas 77002
Austin, Texas 78701

Joseph M. Gourrier
State Bar No. 24007258
joseph@gourrierlaw.com
THE GOURRIER LAW FIRM, PLLC
530 Lovett Boulevard, Suite B
Houston, Texas 77006

RESPONDENT

Hon. Robert Schaffer
District Judge
152nd Civil District Court
Harris County Civil Courthouse
201 Caroline Street, 11th Floor
Houston, Texas 77002

/s/ Allyson N. Ho
Allyson N. Ho