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SUPREME COURT OF TEXAS
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No. 24-0411

IN THE SUPREME COURT OF TEXAS

HOWMET AEROSPACE, INC. F/K/A ALCOA, INC.,

Petitioner,

v.

FRANK BURFORD, ET AL.,

Respondents.

AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., ALLIANCE FOR AUTOMOTIVE INNOVATION, AMERICAN COATINGS ASSOCIATION, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF THE PETITION FOR REVIEW

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (Chamber),[2] Coalition for Litigation Justice, Inc. (Coalition),[3] National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center),[4] Alliance for Automotive Innovation (Auto Innovators),[5] American Coatings

[1] No counsel for a party authored this brief in whole or in part. No party, party's counsel, or other person or entity—other than *amici curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief.

[2] The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases like this one that raise issues of concern to the nation's business community.

[3] The Coalition was formed by insurers in 2000 as a nonprofit association to improve the litigation environment for asbestos and other toxic tort claims. The Coalition files *amicus* briefs in cases that may have a significant impact on the asbestos litigation environment. The Coalition includes Century Indemnity Company; Allianz Reinsurance America, Inc.; Great American Insurance Company; Nationwide Indemnity Company; Resolute Management, Inc., a third-party administrator for numerous insurers; and TIG Insurance Company.

[4] The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

[5] Formed in 2020 through the combination of the Association of Global Automakers and Alliance of Automobile Manufacturers, Auto Innovators is the leading advocacy group for the auto industry, representing 42 automobile manufacturers and value chain partners that together produce nearly all light-duty vehicles sold in the United States.

Association (ACA),[6] and American Property Casualty Insurance Association (APCIA)[7] are organizations that address asbestos causation issues in appellate courts around the country to ensure that asbestos lawsuits remain within the ambit of mainstream and well-accepted science. *Amici*'s members include Texas asbestos defendants or their insurers. Several of the *amici* filed briefs in *Borg-Warner v. Flores*, 232 S.W.3d 765 (Tex. 2007), and *Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332 (Tex. 2014).[8] *Amici* have a substantial interest in ensuring that Texas follows sound science and fair liability rules in asbestos cases.

REASONS FOR GRANTING THE PETITION

For years, Texas asbestos and silica litigation was overrun with thousands of cases filed asserting questionable and even baseless allegations of exposure and disease attributions. Two significant judicial events helped to bring the chaotic

[6] ACA advances the needs of the paint and coatings industry through advocacy and programs that support environmental protection, product stewardship, health, safety, and the advancement of science and technology.

[7] APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent more than 65% of the total U.S. property-casualty insurance market, and more than 75% of the commercial P&C market in the State of Texas.

[8] *See* Amicus Curiae Brief of the Coalition for Litigation Justice, Inc. in Support of Borg-Warner Corporation's Brief on the Merits, *Borg-Warner Corp. v. Flores*, 2006 WL 2851024 (Tex. filed Sept. 2006); Brief of Coalition for Litigation Justice, Inc., Texans for Lawsuit Reform, Chamber of Commerce of the United States of America, American Tort Reform Association, National Association of Manufacturers, NFIB Small Business Legal Center, National Association of Mutual Insurance Companies, Property Casualty Insurers Association of America, and American Insurance Association as Amici Curiae in Support of Respondent, *Bostic v. Georgia-Pacific Corp.*, 2013 WL 4786241 (Tex. filed Aug. 21, 2013).

situation under control: (1) U.S. District Court Judge Janis Graham Jack in Corpus Christi exposed the bogus medical and scientific basis supporting thousands of silicosis claims in federal multi-district litigation,[9] resulting in mass dismissals of nonviable silica claims as well as asbestosis claims; and (2) this Court issued a trio of decisions that reined in speculative causation testimony: *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997), *Flores,* and *Bostic*.[10]

As a result, asbestos litigation in Texas has proceeded for many years under the well-crafted and common-sense causation standards established by this Court. In this environment, asbestos litigation in Texas assumed a much more sensible and manageable equilibrium whereby plaintiffs have the opportunity to prove their cases, but cases based on medical or scientific evidence that is nonexistent or unsupported by proof of substantial-factor causation are dismissed.

The Court of Appeals below overturned a correct summary judgment decision by longtime Texas Asbestos MDL Judge Mark Davidson applying this Court's precedent and, instead, developed its own new causation approach for alleged "sole source" asbestosis cases. The decision threatens to upend the stability

[9] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

[10] Texas also enacted medical criteria to address premature or meritless lawsuits by unimpaired asbestos and silica claimants. *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 90.001–.012.

that has existed for many years in Texas asbestos cases and could return the asbestosis docket to the chaos of the past if it is allowed to stand.[11]

Mrs. Burford incurred a relatively common form of related lung disease characterized by *pulmonary fibrosis.* Like many other instances of that type of disease, her fibrosis has nothing to do with asbestos exposure. Plaintiffs have found a typically inconsequential source of asbestos exposure—laundry washing—to leverage a common lung disease into a lawsuit. If it is this easy to convert a common disease into asbestos litigation, then this case will encourage the filing of many similar lawsuits over routine pulmonary fibrosis that by happenstance coincides with minor asbestos exposures.

Amici urge the Court to grant the Petition, overturn the Court of Appeals' decision, and hold the line established under *Havner, Flores,* and *Bostic* by affirming the trial court's grant of summary judgment to Petitioner.

ARGUMENT AND AUTHORITIES

The Fourteenth Court of Appeals departed from this Court's asbestos jurisprudence and created its own version of asbestosis causation law by asserting a "matter of first impression." Petitioner has ably stated the grounds for accepting

[11] For descriptions of the situation as it existed around 2005, see Texas Civil Justice League J., *Special Report: A Texas Success Story: Asbestos and Silica Lawsuit Reform* (2011) ("Texas was a magnet for asbestos litigation. From 1988 through 2005, more asbestos-related lawsuits were filed in Texas than in any other state.").

the Petition and reversing the decision below. *Amici* file this brief to highlight the lack of scientific credibility in the opinion, coupled with the risk that it will reopen the door to the filing of unfounded asbestosis cases.[12]

I. THE COURT OF APPEALS' DECISION UNDERCUTS REFORMS INTENDED TO ELIMINATE INVALID ASBESTOSIS CASES

This appeal should be viewed in light of the history of asbestos litigation in Texas, particularly asbestosis litigation. In 2005, Texas was in the midst of a litigation crisis due to the filing of an overwhelming number of asbestosis and silicosis cases.[13] Most of the cases involved unimpaired plaintiffs whose diagnoses were based on mass screenings and "findings" of disease by a handful of plaintiff experts.[14] Judge Janis Jack, who was overseeing the federal silica MDL and had a background in nursing, pulled back the curtain on the fraudulent process by which the silicosis plaintiffs were recruited and diagnosed, as set forth in her landmark

[12] *Amici* filed a brief in support of Petitioner in the appeal below, and if the petition is granted, will likewise plan to file a brief in support of reversal.

[13] *See* American Academy of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006) (referencing Aug. 2005 Congressional Budget Office report estimating some 322,000 pending asbestos cases nationally).

[14] *See* Texans for Lawsuit Reform Foundation, *The Story of Asbestos Litigation in Texas & Its National Consequences* 6 (2017) "lawyers…predominately trolled for non-malignancy clients. They actively sought industrial workers, who they screened for lung-tissue scarring that might have been caused by inhaling asbestos fibers. If the lawyers' hired-gun physicians identified any lung-tissue scarring that arguably could have been caused by asbestos inhalation, the worker would be bundled with a large group of others, and a lawsuit would be filed on their behalf against a group of defendants (sometimes 100 defendants or more).").

decision.[15] Judge Jack stated, "the Court is confident…that the 'epidemic' of some 10,000 cases of silicosis 'is largely the result of misdiagnosis.'"[16] "[T]hese diagnoses were driven by neither health nor justice," Judge Jack said, "they were manufactured for money."[17]

The asbestos docket at the time paralleled the silica docket with mass screenings, financial incentives for screening doctors, and rampant misdiagnoses.[18] As Judge Jack acknowledged, "[t]he screening companies were established initially to meet law firm demand for asbestos cases."[19] A commentator explained, "By conducting *Daubert* hearings and court depositions that exposed the prevalence of fraud in silica litigation, Judge Jack exposed the prevalence of fraud in asbestos litigation as well."[20]

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[15] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005). For a discussion of Judge Jack's ruling and the abuses it corrected, *see* Mark A. Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009).

[16] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 632.

[17] *Id*. at 635.

[18] *See* Lester Brickman, *Disparities between Asbestosis and Silicosis Claims Generated by Litigation Screening Companies and Clinical Studies*, 29 Cardozo L. Rev. 513, 524 (2007) (stating Judge Jack's findings applied "with at least equal force to nonmalignant asbestos litigation: the diagnoses are mostly manufactured for money."); *see also* Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 Conn. Ins. L.J. 289 (2006).

[19] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 597.

[20] Elise Gelinas, Comment, *Asbestos Fraud Should Lead to Fairness: Why Congress Should Enact the Fairness in Asbestos Injury Resolution Act*, 69 Md. L. Rev. 162, 162 (2009); *see also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 529 (2007) ("The clearest examples [of fraud and abuse] come from lawyer-sponsored screening

(continued…)

Judge Jack's ruling, this Court's sound asbestos causation decisions in *Flores* and *Bostic*, and statutory criteria requiring minimal evidence of impairment in asbestos cases, worked together to effectively end the rampant abuse of the tort system in Texas silicosis and asbestosis litigations.[21]

Today, the Texas asbestos docket is much more closely aligned with the medical basis for disease attribution. In fact, in the wake of OSHA's effective restrictions on asbestos exposures adopted in the early 1970s and the extremely high doses required to cause asbestosis, the disease has largely disappeared from the medical landscape. There are increasingly fewer workers who actually worked under "dusty trades" conditions.

This case is not part of a mass-tort filing, but it bears close similarities to cases that constituted the crush of unsupported cases some two decades ago. The claim that Mrs. Burford had asbestosis at all is suspect (as Petitioner explains) and almost certainly wrong. In addition, Plaintiffs' halfhearted attempt at a "dose" estimate seems directed at undercutting the causation requirements of *Flores* and

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(continued)

programs that recruit tens of thousands of mostly bogus asbestosis and other non-cancer claims.").

[21] *See* Barbara Rothstein*, Perspectives on Asbestos Litigation: Keynote Address*, 37 Sw. U. L. Rev. 733, 739 (2008) (Director of the Federal Judicial Center: "One of the most important things is I think judges are alert for is fraud, particularly since the silicosis case…and the backward look we now have at the radiology in the asbestos case.").

Bostic to make it easy to file cases with minimal exposure. In reality, Mrs. Burford's take-home exposures would have been too low by orders of magnitude to produce asbestosis. Plaintiffs rely on Mrs. Burford's laundry exposure to turn a routine and fairly common pulmonary fibrosis into an asbestosis case. And they are doing so through circular reasoning: she had "some" asbestos exposure, so her idiopathic pulmonary fibrosis must be asbestosis.

The decision of the Fourteenth Court of Appeals thus creates a significant risk of reigniting the old, discredited asbestosis litigation. The appellate court has crafted a dramatic exception from this Court's asbestos-causation jurisprudence, opening the door to easily pled claims.

II. THE OPINION IGNORES THE REALITIES OF DOSE AND DISEASE

The medical and scientific elements of this case illustrate why the decision poses such a risk to a rational and medically based asbestos docket in Texas.

A. The Low Exposures Involved in This Case Do Not Support an Asbestosis Diagnosis or Greatly Reduced Proof Requirements

Asbestosis has occurred historically in the most heavily exposed populations from several decades ago: asbestos shipyards, asbestos factories, insulation workers, and others exposed to extremely large amounts of free asbestos fibers. From these populations, many studies over the years have consistently shown that

exposures must be in the range of 25 f/cc years to 100 f/cc years to cause asbestosis.[22]

This case instead involves an entirely different scenario—a plaintiff who had no direct occupational exposure to asbestos but alleges she developed the high-dose disease of asbestosis from the comparatively minimal exposure involved in handling her spouse's work clothes. Her husband himself did not have asbestosis.

"Take-home" exposures, as these types of claims are called, not surprisingly occur at a rate that is orders of magnitude lower than occupational exposures.[23] If Mr. Burford had incurred asbestosis, he would be a unicorn among asbestos-exposed populations because his work was not a dusty-trades experience. And considering her husband's own limited exposures, if Mrs. Burford had asbestosis caused by her husband's work, she would be a unicorn among unicorns.

The reality is that the exposures for both Mr. and Mrs. Burford were too low to cause asbestosis, and that Mrs. Burford did not have asbestosis at all. The appellate court got around these significant hurdles by creating an extremely

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[22] Andrew Churg, *Nonneoplastic Disease Caused by Asbestos,* in *Pathology of Occupational Lung Disease* 313-314 (Andrew Churg & Francis H.Y. Green eds., Williams & Wilkins 1998) (1988). The *Flores* court quoted Churg in support of its decision. *See Flores,* 232 S.W.3d at 771.

[23] *See* Jennifer Sahmel, et al., *Evaluation of Take-Home Exposure and Risk Associated with the Handling of Clothing Contaminated with Chrysotile Asbestos*, 34 Risk Analysis 1448 (2014) (study of take-home exposures determined to be *one percent* or less of the workplace simulated exposure); *see also* William Anderson, *The Unwarranted Basis for Today's "Take-Home" Litigation,* 39 Am. J. Trial Advoc. 197 (2015).

generous causation standard for asbestosis cases. The Court should review the decision and reaffirm that the dose and causation elements of *Flores* and *Bostic* apply in all asbestos cases.

B. The Appellate Court's "Sole Source" End Run Around Dose Is Not Warranted or Medically Supported

This Court's *Havner, Flores*, and *Bostic* opinions made clear that dose matters. It matters scientifically, it matters legally, and it matters in *every* case.[24] There is no "sole source" exception to that fundamental medical principle. Yet the appellate court's theory of liability conveys the exact opposite: if plaintiffs assert a single source of exposure, then that exposure is the cause of asbestosis, regardless of the dose. The appellate court said:

> If no other party contributed asbestos fibers to the air that the plaintiff inhaled, then it may reliably and reasonably be concluded that the defendant sufficiently contributed to the aggregate dose of asbestos the plaintiff inhaled.

Under this ruling, the dose attributable to Mrs. Burford's clothes washing is irrelevant; the mere existence of the exposure is deemed sufficient to be causative.

The appellate court's evisceration of this Court's dose requirement is enough by itself to warrant review. Under this ruling, an "any exposure" case is now viable if plaintiffs can simply prevent discovery of other sources of exposure. As several

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[24] Mark A. Behrens & Andrew J. Trask, *The Rule of Science and the Rule of Law*, 49 Sw. U. L. Rev. 436, 438 (2021) ("When the rule of science is lost in the courts, so is the rule of law.").

rulings and analyses have demonstrated, asbestos plaintiffs over the years have at times engaged in significant efforts to avoid litigating alternative causes of asbestos disease.[25] The appellate court's ruling rewards such activity.

The medical reality is that a sole source of asbestos exposure is still not the cause of asbestosis if the dose is too low. In that case, essentially by definition, the disease is not asbestosis at all. Without lung tissue analysis, asbestosis is the correct diagnosis *only if* the exposures fall into the 25 to 100 f/cc range required to call a routine pulmonary fibrosis "asbestosis." That reality is even more pressing in this case because plaintiffs failed to conduct lung tissue analysis of Mrs. Burford, even though they had ample opportunity to do so, and such testing could have proven (or disproven) her case by documenting the actual fiber burden in her lungs. Asbestosis is extremely difficult to diagnose accurately without a lung tissue analysis. The lack of such analysis here opened the door to the improper and

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[25] *In re Garlock Sealing Technologies, LLC,* 504 B.R. 71, 73, 84 (Bankr. W.D.N.C. 2014) (explaining that maker of encapsulated asbestos gaskets and packing was unable to attribute plaintiffs' exposures to higher dose insulation products after those companies declared bankruptcy because "evidence of plaintiffs' exposure to other asbestos products often disappeared" as a result of "the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."); *see also* Mark A. Behrens, *Asbestos Trust Transparency*, 87 Fordham L. Rev. 107, 113-119 (2018) (discussing landmark *Garlock* opinion and other studies documenting suppression of evidence by plaintiffs and their attorneys to prevent solvent defendants from proving that bankrupt entities were the cause of plaintiffs' asbestos diseases).

unscientific circular approach to diagnosis used by the Court of Appeals, magnified by its "sole source" end run around this Court's dose requirement.

III. THE COURT SHOULD REVERSE THE DECISION TO ENSURE CONSISTENCY ACROSS THE TEXAS JUDICIAL CIRCUITS

Allowing the appellate court's decision to remain in place threatens the asbestos-litigation jurisprudence that this Court and the legislature carefully constructed over the last two decades. Texas asbestos litigation, which used to be a hotbed of chaotic, overcrowded dockets and unproven science, is today a model for the country in permitting potentially legitimate cases to proceed while restricting the prosecution of medically unsubstantiated claims. This Court should prevent erosion of Texas's sound asbestos-causation jurisprudence.

The impact of the decision below is magnified because, under the state's specific asbestos-litigation rules, the First and Fourteenth Courts of Appeal are the two courts that hear Judge Davidson's pre-trial rulings. The other appellate courts would presumably honor and apply this Court's strictures in *Flores* (an asbestosis case) and *Bostic* involving the doubling of the dose and medically-proven disease. But those courts would only have such an opportunity if the case went to trial first. Thus, the Fourteenth Court of Appeals, almost by itself, could reinstate medically unsupported asbestosis litigation in Texas by applying its decision below across Judge Davidson's docket.

CONCLUSION AND PRAYER

For these reasons, the Court should grant review, reverse the Court of Appeals, and affirm the trial court's summary judgment for Petitioner.

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Dated: June 13, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement of Tex. R. App. P. 9.4(e) because it has been prepared in conventional typeface no smaller than 14-point for text and 12-point for footnotes. The brief also complies with the word count limitations of Tex. R. App. P. 9.4(i) because it contains 3,296 words, excluding parts exempted by Tex. R. App. P. 9.4(i)(1).

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