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No. 07-40058

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN RE VOLKSWAGEN AG AND VOLKSWAGEN OF AMERICA, INC., PETITIONERS

Original Proceeding from the United States District Court for the Eastern District of Texas, Marshall Division

BRIEF OF CIVIL PROCEDURE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Professor Lonny S. Hoffman
George Butler Research
Professor of Law
UNIVERSITY OF HOUSTON LAW CENTER
100 Law Center
Houston, Texas 77204-6060
Telephone: (713) 743-5206
Facsimile: (713) 743-2238
COUNSEL OF RECORD

Professor Debra Lyn Bassett
Professor of Law and Judge Frank M. Johnson, Jr., Scholar
University of Alabama School of Law
Box 870382
101 Paul Bryant Drive East, Room 319
Tuscaloosa, AL 35487
Telephone: (205) 348-9715
Facsimile: (205) 348-1112

Professor Robert C. Casad
John H. and John M. Kane
Professor of Law Emeritus
The University of Kansas
School of Law
1535 W. 15th Street
Lawrence, KS 66045
Telephone: (785) 864-9218

Professor Kevin Clermont
James and Mark Flanagan
Professor of Law
Cornell Law School
204 Myron Taylor Hall
Ithaca, NY 14853-4901
Telephone: (607) 255-5189
Facsimile: (607) 255-7193

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101 Paul Bryant Drive East, Room 319
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1535 W. 15th Street
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Professor Kevin Clermont
James and Mark Flanagan
Professor of Law
Cornell Law School
204 Myron Taylor Hall
Ithaca, NY 14853-4901
Telephone: (607) 255-5189
Facsimile: (607) 255-7193

Professor William Dorsaneo
Dedman School of Law
Southern Methodist University
P. O. Box 750116
Dallas, Texas 75275
Telephone: (214) 768-2626
Facsimile: (214) 768-3142

Professor Christopher M. Fairman
The Ohio State University, Moritz
College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Telephone (614) 292-2422

Professor Jared Gonzalez
Texas Tech University School of Law
1802 Hartford Avenue
Lubbock, TX 79409
Telephone: (806) 742-3990
Facsimile: (806) 742-1629

Professor Rachel M. Janutis
Capital University Law School
303 E. Broad Street
Columbus, Ohio 43215
Telephone: (614) 236-6543
Facsimile: 614-236-6956

Professor Georgene Vairo
Professor and William M. Rains Fellow
Loyola Law School Los Angeles
19 Albany St.
Los Angeles, CA 90015-1211
Telephone: (213) 736-8170
Facsimile: (213) 380-3769

Professor Theodore Eisenberg
Henry Allen Mark Professor of Law
Cornell Law School
104 Myron Taylor Hall
Ithaca, NY 14853-4901
Telephone: (607) 255-6477
Facsimile: (607) 255-7193

Professor Paul George
Texas Wesleyan University
School of Law
1515 Commerce Street
Fort Worth, TX 76102
Phone: (817) 212-4120
Facsimile: (817) 212-3965

Professor Laura Hines
The University of Kansas
School of Law
1535 W. 15th Street
Lawrence, KS 66045
Telephone: (785) 864-9265

Professor Elizabeth Gregory Thornburg
Dedman School of Law
Southern Methodist University
P. O. Box 750116
Dallas, Texas 75275
Telephone: (214) 768-2613
Facsimile: (214) 768-3142

Professor Robert A. Weninger
J. Hadley Edgar Professor of Law, 1974
Texas Tech University School of Law
1802 Hartford Avenue
Lubbock, Texas 79409-0004
Telephone: (806) 742-3990 x272
Facsimile: (806) 742-1629

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Statement of Interest of *Amici Curiae*

This *amici curiae* brief in support of Respondents is jointly filed by the previously-listed law professors, all of whom teach and write about civil procedural law. Because of our scholarly work in the area, *amici* have a strong and continuing interest in the law's development. Counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. *Amici* file this brief in their personal capacities as scholars. Law school information is presented for identification purposes only, and indicates an endorsement of the views expressed in this brief only by the individuals listed. Pursuant to FED. R. APP. P. 29(a), all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Sixty years ago, Congress gave federal judges the power to transfer a case but it did not say that they had to use it. In granting Volkwagen's petition for mandamus relief, the Panel wrongly concludes that the district court was required to transfer this action to the Northern District of Texas. Part of its error was to misread the historical significance of Congress's passage of 28 U.S.C. §1404 in 1948. Its consideration of history was limited to the doctrinally defensible, but unremarkable observation that in §1404 Congress meant to vest federal district courts with greater discretion to transfer a case than they previously possessed to dismiss it on common law *forum non conveniens* grounds.

A more complete, perspicacious view of history leaves little doubt, however, that Congress had a very specific animating purpose in mind in authorizing transfers under §1404: namely, to make clear that courts were not required to adjudicate a case solely because it had been filed in a congressionally authorized venue. Nothing in the relevant history suggests, however, that Congress thought transfer would be mandatory under §1404, as the Panel erroneously concludes, when another venue is "clearly" or "substantially" more convenient, and certainly not when the other forum is only somewhat more convenient.

Furthermore, as experience demonstrates, Congress's choice to vest federal district courts with wide discretion was eminently sound as a defendant's request

to transfer venue may often have little to do with convenience. It is entirely appropriate for Congress to treat district judges as the primary decision-makers in making the fact-bound determination whether it truly is for the convenience of parties and witnesses and in the interests of justice to grant a defendant's motion to transfer. The Panel's opinion, by contrast, unwisely invites appellate courts to second-guess district court transfer determinations. If uncorrected, the Panel's decision threatens to lead other courts to similarly employ a flawed analysis, both as to the standard a district court should use in deciding a §1404 transfer motion and the standard that appellate panels should employ thereafter in evaluating whether a district court abused its discretion in not transferring a case. *Amici* urge this *en banc* Court to deny Volkswagen's Petition for Mandamus Review.

ARGUMENT

I. The Panel's Emphasis on Differences Between *Forum Non Conveniens* Dismissals and Transfers Under §1404 is Narrow and Incomplete.

In concluding that the district court abused its discretion by giving the plaintiff's choice of forum an "elevated status" and concluding that transfer is not warranted unless the defendant shows the balance of factors "substantially" weighs in favor of transfer, the Panel thought it was correcting a historical misunderstanding that led courts, including the district court in this case, to an erroneous doctrinal treatment of §1404 transfers. Specifically, it was central to the Panel's determination that in using the "substantially weights in favor of transfer

standard" the district court had confused the stricter common law *forum non conveniens* doctrine as it was articulated before 1948 with the transfer standard under §1404 after 1948. *In re Volkswagen II*, 506 F.3d 376, 381 (5th Cir. 2007). This confusion resulted, the Panel thought, from earlier precedents that had treated the plaintiff's choice of forum with considerable respect. *Id.* at 383 (*citing, inter alia, Rodriguez v. Pam Am. Life Ins. Co.*, 311 F.2d 429, 434 (5th Cir. 1962) ("a plaintiff's choice of forum is 'highly esteemed'")). But these early precedents, the Panel maintained, were based on *forum non conveniens* cases, not §1404 cases, or on vestiges of *forum non conveniens* cases that had inappropriately crept into §1404 jurisprudence. *Id.*

Citing, *inter alia*, the Supreme Court's decision in *Norwood v. Kirkpatrick*, 349 U.S. 29 (1955), the Panel noted that in passing §1404 Congress dropped the "heavy burden on defendants to show dismissal only in favor of a substantially more convenient forum." *Id.* at 381. With this limited understanding of the history surrounding §1404's enactment, the Panel then jumped to its most critical conclusion:

> When the transferee forum is no more convenient than the chosen forum, the plaintiff's choice should not be disturbed. When the transferee forum is clearly more convenient, a transfer should be ordered.

Id. at 384.

The Panel's opinion is not only novel and problematic insofar as it indicates transfer is mandatory when the transferee forum is "clearly" more convenient. Additionally, while the Panel does not directly address whether transfer might also be mandatory if the transferee forum is only somewhat more convenient, its opinion certainly may be read to suggest this judgment as well insofar as it holds that the extent of deference owed to a plaintiff's choice of forum is no different than the burden that a moving party must meet in seeking a §1404 transfer. *Id.*

After *Norwood*, there's nothing remarkable in the observation that in §1404 Congress meant to vest district courts with greater discretion to grant transfer than courts possess by virtue of the common law *forum non conveniens* power to dismiss a case filed in a forum of otherwise proper venue. But, saying that a §1404 transfer can be granted on a lesser showing than a common law *forum non conveniens* dismissal does not mean that the trial judge abused his discretion in not transferring this case to the Northern District of Texas.

As Respondent demonstrates in its merits brief, there are compelling doctrinal arguments for reading §1404 as vesting trial courts with full discretion to decide when transfer is warranted and when it is not.[1] Beyond these doctrinal

[1] This is not to say, of course, that a district court cannot abuse its discretion. But, "in the absence of a failure of the District Court to correctly construe and apply the statute, or to consider the relevant factors incident to ruling upon a motion to transfer, or unless it is necessary to correct a clear abuse of discretion, a Court of Appeals should not entertain motions for Writs of Mandamus to direct District Courts to enter or vacate orders of transfer under §1404(a)." *Ex Parte Chas. Pfizer & Co.*, 225 F.2d 720, 723 (5th Cir. 1955); *see also In re Horseshoe Entm't.*,

arguments Respondent advances, a better understanding of the history surrounding §1404's enactment further makes plain that the Panel's reading of the transfer statute is erroneous. By misunderstanding §1404's important history the Panel turns congressional intent on its head. Perversely, a statute enacted with the understanding that trial courts are in the best position to determine when a transfer sought truly is more convenient and in the interests of justice is cited by the Panel as authority for its conclusion that the district court in this case was required to transfer the action to the Northern District of Texas. With a better understanding of history in mind, the Panel's flawed analysis is revealed.

II. A Clear-Eyed View of History Reveals No Evidence that Congress Intended to Mandate Transfer Under §1404.

In the years preceding §1404's passage, several prominent decisions from the Supreme Court questioned whether the lower courts possessed power to decline to exercise jurisdiction over a case filed in a technically proper venue. Section 1404 was expressly meant to address this uncertainty by delegating to the federal district courts a discretionary authority to decline jurisdiction. There is nothing in the historical record to indicate, however, that in promulgating §1404 Congress thought transfer would now be mandatory when another venue is "clearly" or "substantially" more convenient, as the Panel erroneously concludes, and certainly

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337 F.3d 429 (5th Cir. 2003) (granting mandamus where district court took into account factors not contemplated by §1404(a)).

not when the other forum is only somewhat more convenient, as the Panel's opinion may be read to suggest.

A. Before 1948, A Primary Question Was Whether Courts Lacked Discretion to Decline Jurisdiction Over a Case Filed In A Proper Venue.

Prior to 1948, if a plaintiff filed suit in an improper venue, the only option available to the court was to dismiss the case. *See Camp v. Gress*, 250 U.S. 308 (1919); *Schoen v. Mountain Producers Corp.*, 170 F.2d 707 (3d Cir. 1948); *see also Goldlawr, Inc. v. Heiman*, 288 F.2d 579 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962) (observing that "[p]rior to [28 U.S.C. §1406(a)'s] enactment when venue was found defective, dismissal of the action was mandatory"). The plaintiff would then have to find another forum where venue could be properly laid (assuming one existed at all, and that no other bar to suit existed, such as a limitations bar) and refile there.

But if dismissals of cases brought in an improper venue posed few doctrinal difficulties for the courts, cases filed in a proper venue were another matter. Before 1947, the Supreme Court recognized some judicial discretionary dismissal power,[2] but in the years before *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947) both the

[2] In *Gulf Oil* the Supreme Court is said to have "crystallized" the common law *forum non conveniens* doctrine. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 (1981) (observing that "the doctrine of *forum non conveniens* was not fully crystallized" until *Gulf Oil*); see also Robert Braucher, *The Inconvenient Federal Forum*, 50 HARV. L. REV. 908, 908-09 (1947) (writing shortly after the decision in *Gulf Oil* and concluding that "the Supreme Court has recently given [the forum non conveniens doctrine] a scope it did not clearly have before"). Even before *Gulf*

Supreme Court and lower federal courts struggled with the scope of this common law authority. It was not always clear whether a court was or was not bound to adjudicate a dispute filed in a technically proper venue. The problem was magnified when the plaintiff filed suit in a venue that was specifically authorized by a particular statute. *See generally* Lonny S. Hoffman, *Forum Non Conveniens in Federal Statutory Cases*, 49 EMORY L.J. 1137 (2000). Indeed, one of the leading venue cases, *Baltimore & Ohio R.R. v. Kepner,* 314 U.S. 44 (1941), precisely raised this question of judicial power to decline to adjudicate a case

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Oil, though, the Supreme Court had previously recognized a judicial power to decline to exercise jurisdiction over a case properly before the court, though prior decisions usually referred to the dismissal power without giving it a particular name. The Court first recognized a "discretionary power to decline jurisdiction" in admiralty cases. *See, e.g.*, *The Belgenland*, 114 U.S. 355, 365-66 (1885); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 437 (1869); *see also American Dredging Co. v. Miller*, 510 U.S. 443, 449 (1994) (observing that federal forum non conveniens doctrine "may have been given its earliest and most frequent expression in admiralty cases"). In *Canada Malting Co. v. Patterson Steamships*, 285 U.S. 413 (1932), in upholding a dismissal of an admiralty case, the Court observed, in dicta, that the general power of discretionary dismissal also existed in other non-admiralty contexts:

> Obviously, the proposition that a court having jurisdiction must exercise it is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.

Id. at 422-23. Examples of other cases in which the pre-*Gulf Oil* Court approved a lower court's decision to decline to exercise jurisdiction "in the interest of justice" include disputes involving the internal affairs of a corporation, *see, e.g.*, *Rogers v. Guaranty Trust Co. of N.Y.*, 288 U.S. 123, 130-31 (1933), cases which "might interfere with state proceedings, or state functions, or the functioning of state administrative agencies, *see, e.g.*, *Williams v. Green Bay & W. R.R.*, 326 U.S. 549, 558 (1946)., and cases where the burden on interstate commerce was undue and unreasonably obstructive. *See Davis v. Farmers' Coop. Equity Co.*, 262 U.S. 312, 317 (1923).

brought pursuant to a venue privilege accorded by Congress in a specific federal statute. *Kepner*, as the legislative history of §1404 expressly makes plain, would turn out to be very influential with regard to passage of the transfer statute.

1. *Baltimore & Ohio R.R. v. Kepner*

In *Kepner*, an Ohio employee of the Baltimore & Ohio Railroad who had sustained job-related personal injuries in Ohio, brought an action under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 *et seq.,* in the United States District Court for the Eastern District of New York. Section 6 of FELA provided that venue was permissible "in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." The railroad had a significant New York presence and, thus, jurisdiction was proper over it in New York and venue was properly laid in the Eastern District. *Kepner*, 314 U.S. at 48. In seeking relief outside of his home forum, the plaintiff in *Kepner* was following a common litigation strategy in FELA cases. *See* GEOFFREY C. HAZARD, JR., COLIN C. TAIT & WILLIAM A. FLETCHER, PLEADING AND PROCEDURE: STATE AND FEDERAL CASES AND MATERIALS 464 (8th ed. 1999) (noting that "*Kepner* was typical of a large number of cases in which FELA plaintiffs brought suit in distant forums in order to secure litigation advantage not available at home").

In response to Kepner's complaint, the railroad brought an action in Ohio state court seeking to enjoin Kepner's federal suit in New York. The railroad, which had begun operations one hundred years earlier in Baltimore, did not dispute that it was doing business in New York within the meaning of this venue provision. The railroad argued, however, that suit would have been more conveniently brought in Ohio and that Kepner was "acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum" was at Kepner's "doorstep." *Kepner*, 314 U.S. at 51. The incident occurred in Ohio, and Kepner was from Ohio, as were nearly all of the witnesses who would be required to travel to New York at considerable expense to testify. *Id.* at 48. The continued prosecution of the federal court action would be "an undue burden on interstate commerce" and "an unreasonable, improper and inequitable burden" on it. Thus, the railroad argued, the state courts possess the discretionary power to enjoin an inconvenient suit, notwithstanding the FELA venue provision. *Id.* at 53.

The Ohio courts rejected the railroad's position on the ground that the plaintiff was privileged to enjoy the venue allowed by FELA without judicial interference. *See Baltimore & Ohio R.R. v. Kepner*, 30 N.E. 2d 982, 985 (Ohio 1940), *aff'd*, 314 U.S. 44 (1941). The Supreme Court followed suit.

Relying heavily on Congress's purpose in enacting the FELA venue statute, the Court observed that before this special venue statute was enacted venue over FELA actions was governed by the general venue statute, which at the time permitted suit to be brought only in the district the defendant inhabited. *Kepner*, 314 U.S. at 49. Congress enacted §6 out of concern for ameliorating "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties away from their homes." *Id.* at 49-50. The Court recognized that the language eventually adopted

> must have been deliberately chosen to enable the plaintiff, in the words of Senator Borah, who submitted the report on the bill, "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so."

Id. at 50. In light of what it considered to be a clear expression of legislative intent to expand the available fora for an injured employee to bring suit, the Court rejected the argument that a court could interfere with that venue choice:

> A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative. . . . Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York.

Id. at 54. In consequence, the Court upheld the plaintiff's "privilege of venue" to sue the railroad in New York, specifically because it determined that Congress had

expressed a clear intent that the plaintiff's choice of venue in FELA actions was not to be disturbed.

2. *Miles v. Illinois Central R.R.*

A second pre-1948 FELA decision that also gave great deference to a specific legislative enactment of venue was *Miles v. Illinois Central R.R.*, 315 U.S. 698 (1942). Miles, a Tennessee resident and employee of the defendant railroad, was killed in a railroad accident in Tennessee. The railroad, which was incorporated in Illinois, had its principal place of business in Tennessee. All witnesses to the accident resided in Tennessee. Despite all of these contacts with Tennessee, the administrator of the decedent's estate brought a FELA action against the railroad in Missouri state court. Like the plaintiff in *Kepner*, the administrator apparently believed that she could obtain more favorable relief in a distant jurisdiction than in her home state. Venue of the action was proper in Missouri pursuant to FELA's §6, as the railroad was doing business in Missouri. *Id.* at 701-02.

Echoing *Kepner*, the Illinois Central brought an action in Tennessee chancery court seeking to enjoin the Missouri suit. The railroad again did not petition the forum court in Missouri to dismiss the action. The Tennessee court temporarily enjoined the administrator from prosecuting the Missouri suit, finding that it was more convenient and less of a burden on the railroad for suit to be

maintained in Tennessee. The administrator argued that §6 prevented Tennessee from enjoining the Missouri court because to do so would thwart congressional intent concerning where FELA plaintiffs may bring suit. The Tennessee court rejected the administrator's argument, however, and on appeal, the temporary injunction was made permanent. *Id.* at 704.

Reversing the grant of injunctive relief, the Supreme Court equated the attempt by the Tennessee state court to enjoin one of its citizens from enforcing a federal right in state court with the attempt in *Kepner* by the Ohio state court to enjoin one of its citizens from enforcing a federal right in federal court:

> Since the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right of [sic] sue in federal courts. It is no more subject to interference by state action than was the federal venue in the *Kepner* case.

Id. at 704.

3. *Gulf Oil Corp. v. Gilbert* Continued to Honor Distinction Drawn in *Kepner* and *Miles* Between Special and General Venue Provisions.

Unlike *Kepner* and *Miles*, which are relatively unknown decisions, the Court's opinion in *Gulf Oil* long has enjoyed greater prominence. But what it is known for—having "crystallized" the common law *forum non conveniens* doctrine, *see Piper Aircraft*, 454 U.S. at 248—leaves out one of its most essential aspects. That is, in declaring that a court may dismiss a case filed in a proper venue under

the common law doctrine of *forum non conveniens*, the Court in *Gulf Oil* nevertheless continued to honor the distinction drawn in *Kepner* and *Miles* between "general" and "special" venue provisions, whereby courts possess power to decline jurisdiction in the former instance but not in the latter. In this regard, *Gulf Oil* represents another in the line of cases decided by the Supreme Court in the years before the transfer statute was enacted in which limitations were recognized on judicial discretionary power to decline jurisdiction in certain circumstances.

Gilbert, a Virginia public warehouse operator, sued Gulf Oil Corporation, a Pennsylvania company qualified to do business in both Virginia and New York. Gilbert sued Gulf Oil in the Southern District of New York, alleging that Gulf Oil's negligence resulted in an explosion and fire that destroyed Gilbert's business. Gulf Oil moved to dismiss the suit based on New York's law of *forum non conveniens*, claiming that the suit should be adjudicated in Virginia, the site of the accident giving rise to the action.

In *Gulf Oil*, the Supreme Court most famously declared that a court may dismiss a case under the common law doctrine of *forum non conveniens* even though it has subject matter jurisdiction, personal jurisdiction, and venue. One of the primary arguments Gilbert advanced to counter Gulf Oil's argument for dismissal was to invoke *Kepner* to support the proposition that a "plaintiff's choice of forum cannot be defeated on the basis of forum non conveniens." *Gulf Oil*, 330

U.S. at 505. Perforce, to conclude that discretionary dismissal was justified, the Court had to explain why *Kepner* was not controlling. To do so, the *Gulf Oil* Court drew a sharp distinction between the then-extant general venue statute, 28 U.S.C. § 112 (current version at 28 U.S.C. § 1391) on which Gilbert's action relied, and special venue provisions enacted by Congress, including Section 6 of FELA, on which venue over Kepner's action was based. *Kepner*'s choice to sue in New York had to be honored, the *Gulf Oil* Court found, because "the special venue act"—§6 of FELA—proscribed *forum non conveniens* dismissal of a suit brought in the plaintiff's chosen forum, as long as the plaintiff's chosen forum was proper. *Gulf Oil*, 330 U.S. at 505.

By contrast, the Court noted, Gilbert's choice to bring his diversity action in New York did not have to be honored because it was not founded on a special venue provision. Although neither plaintiff resided in New York (Kepner was from Ohio and Gilbert was from Virginia), and although both decided it was to their litigation advantage to bring suit in New York (a proper forum in both cases), Gilbert's inability to base his action on a special venue statute meant that the district court did not have to give unlimited respect to his choice of forum and could dismiss his action without untoward interference with the will of Congress. *Id.*

B. In Passing the Transfer Statute in 1948, Congress's Primary Purpose Was To Make Clear That Courts Were Not Precluded From Transferring a Case From a Proper Venue.

In 1948 Congress enacted 28 U.S.C. § 1404, for the first time giving statutory authority for a federal district court to transfer a civil action to another federal district court in which the case might have originally been brought. What is clear from the legislative history is that in promulgating a new transfer authority Congress squarely had in mind the *Kepner* case and the problem it exemplified of the extent of the judicial obligation to hear a case filed in a proper venue. The Reviser's Notes to §1404(a) explain the addition of the new statutory section as follows:

> Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R.R. v. Kepner, 314 U.S. 44 (1941), which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for the convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.

See 28 U.S.C. §1404, Reviser's Notes, in H.R. Rep.No.308, 80th Cong., 1st Sess. A 132 (1947) and H.R.Rep.No.2646, 79th Cong., 2d Sess. A 127 (1946). As the Supreme Court has noted, the Reviser's Notes "were before Congress when it considered enactment of the various provisions of the 1948 Judicial Code and Congress relied upon them to explain the significance and scope of each section."

Pope v. Atlantic Coast Line R. Co., 345 U.S. 379, 384 (1953); *accord Ex Parte Collett*, 337 U.S. 55 (1949); *United States v. National City Lines, Inc.*, 337 U.S. 78, 80-82 (1949) (citing same legislative history of §1404 and holding that any civil action, whether brought under Title 28 of the Judicial Code or other statutory authority, is subject to transfer under §1404).

Against the backdrop of *Kepner*, *Miles* and *Gulf Oil* and the uncertain scope of judicial discretion to decline to adjudicate when suit had been filed in a technically proper forum, the legislative history to §1404 makes Congress's intent plain. By enacting §1404, Congress was correcting a deficiency in the law it perceived to exist: that is, that courts had felt they were bound to adjudicate a case brought in a technically proper, if otherwise fortuitous venue. This is the precise problem that prompted Congress in the first place to enact a general transfer authority for the federal courts. There is, however, no historical evidence that in promulgating this transfer power Congress thought transfer would ever be mandatory such that superintendence by appeal or, worse, by mandamus, would be justified.

Finally, in addressing the history surrounding §1404's passage, it is also important to emphasize what Congress did not do in 1948 when it promulgated the new venue transfer statute. It did not cut back on the permissive venue choices available to plaintiffs under FELA. That, in fact, was precisely what the same

proponents of §1404 also asked it to do. The Supreme Court in *Pope v. Atl. Coast Line R. Co.* gives the full history:

> Congress might have gone further . . . In fact, the same Congress which enacted §1404(a) refused to enact a bill which would have amended §6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.
>
> This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the *Miles* and the *Kepner* cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments-both pro and con-were restated. Proponents of the amendment asserted that, as a result of the *Miles* and *Kepner* decisions, injured employees were left free to abuse their venue rights under §6 and 'harass' their employers in distant forums without restriction. They insisted that these abuses be curtailed. These arguments prevailed in the House which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and §6 of the Federal Employers' Liability Act was left just as this Court had construed it.

Pope, 345 U.S. at 386. That Congress chose to leave the FELA venue choices unchanged underscores, as the Supreme Court has noted, that "§1404 was not designed to narrow the plaintiff's venue privilege," *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964). Quite to the contrary, Congress entrusted district courts with discretion to decide whether an action should be transferred from a congressionally authorized forum truly because it would be in the interests of justice and for the convenience of parties and witnesses to do so.

The Panel's narrow focus on the historical evolution from *forum non conveniens* to passage of §1404 in 1948 led it to misunderstand the significance of that history. The Congress that promulgated §1404 in 1948 would have been aghast to learn that the statute it enacted to clarify the existence of judicial discretion is now being cited as authority for the proposition that the district judge lacked discretion to do anything other than to transfer this action to the Northern District of Texas. Even if a transfer should be granted on a lesser showing of inconvenience than is required for a *forum non conveniens* dismissal, a more complete historical understanding demonstrates that the Panel was wrong to conclude that transfer is ever mandatory under §1404 when another forum is "clearly" or even only somewhat more convenient. Any interpretation of §1404 that treats transfer as required in certain circumstances is inconsistent with the best reading of the historical evidence, eliding the discretion Congress accorded to district courts to decide when transfer is warranted and when it is not.

III. Beyond History, Experience Shows it is Unwise to Have Appellate Courts Making Fact-Bound, Discretionary Decisions that Congress Entrusted to District Judges.

Beyond the lack of any historical evidence to support the Panel's reading of 28 U.S.C. §1404, Congress's choice to vest federal district courts with wide discretion is eminently sound as a matter of practical experience. By enacting §1404, Congress clearly believed that district courts were in the best position to

take into consideration all relevant interests and issues bearing upon where the case should be adjudicated.

The district court in this case considered all of the evidence and arguments of counsel and decided, in the exercise of its discretion, that it was not in the interest of justice and for the convenience of parties and witnesses to transfer this case from the Eastern District of Texas to the adjoining Northern District of Texas. Might another district court have reached a different decision than the decision of the district judge in this case to deny transfer? Of course. Might the district judge in this case have reached a different decision had Volkswagen sought transfer elsewhere, such as to the Sherman Division of the Eastern District? Perhaps. The problem with the Panel's opinion, however, is that it invites appellate courts to second-guess district court §1404 determinations.[3] As a consequence, the Panel's decision wrongly turns appellate courts into a defendant's ally by making appellate superintendence, by way of appeal or mandamus, a likely prospect following a trial judge's decision to deny transfer. But appellate courts are ill-suited for this kind of fact-bound determination. As Professors Wright, Miller and Cooper have noted

> a very compelling argument can be made that if there is no question of power, and the only issue is whether the district judge exercised his or her discretion properly in considering the factors mentioned in the statute in granting or refusing the transfer, interlocutory review ought

[3] Notably, this problem exists in both directions: that is, if the §1404 factors "clearly" show that the forum court is more convenient, then on the Panel's reading a district judge's order *granting* transfer would also always be subject to reversal.

> not be available. This is the view of the commentators, it is the view of the American Law Institute, and it has been the view of many distinguished appellate judges.

CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD COOPER, 15 FED. PRAC. & PROC. JURIS. 3d § 3855. The Panel's insistence in the present case on appellate superintendence of district court decisions denying transfer is similarly ill-advised, certain to act as an unwarranted restraint on judicial discretion by the trial court and an unwelcome entanglement by the appellate courts in this field.

Finally, to pick up on a point raised by the historical discussion at the end of Part II, *supra*, in enacting §1404 Congress did not curtail the plaintiff's permissive venue choices or the attendant improvements in legal position that may result from exercise of that privilege. *See Van Dusen*, 376 U.S. at 635 (noting that the "legislative background supports the view that §1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege"); *see also Pope*, 345 U.S. at 384 (rejecting argument that in enacting §1404 Congress intended that courts give no weight to the plaintiff's choice to bring suit in a permissible venue and emphasizing, to the contrary, the simultaneous failure of the Jennings Bill that would have cut back on permissive venue choices under FELA).

Although there are differences between the Panel's reading of §1404 in the present case and the argument (which the Supreme Court has repeatedly rejected)

that in enacting §1404 Congress sought to curtail a plaintiff's permissive venue choices, in a broad sense both operate from the premise that there is something inappropriate, perhaps fundamentally so, about a plaintiff bringing suit in a technically proper, if mostly fortuitous venue. Such an unwarranted bias ought to have no place in §1404 jurisprudence. It devalues the legislative choice to afford plaintiffs multiple permissive venues in which to bring suit.

Worse still, it reinforces the perception that forum shopping is only to be disfavored when it is the plaintiff doing the shopping, ignoring that defendants are equally incentivized to try to use existing tools to gain as many forum advantages as possible. Experience shows that in asking for a change of venue, defendants—like plaintiffs—are frequently motivated by a desire to find the most favorable forum. *See generally* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507 (1995) (empirical study showing differential effects of §1404 transfers on case outcomes). Trial judges, thus, are in the best position to assess whether a transfer truly would be for convenience and in the interests of justice. The brilliant legal historian, Edward Purcell, has made this same point in a different context:

> [T]o understand civil procedure, we must study not just the formal rules of law but the goals, tactics, and achievements of litigators in the specific and concrete social contexts where they deploy those rules in their persistent search for advantage.

EDWARD PURCELL, *The Story of Erie: How Litigants, Lawyers, Judges, Politics and Social Change Reshape the Law*, in CIVIL PROCEDURE STORIES 21 (Foundation Press, 2d ed. 2008).

There is nothing wrong with using existing rules to achieve strategic advantages on behalf of a client. Indeed, this should serve as a reminder that the relevant question is not whether forum shopping is taking place since both plaintiffs and defendants routinely seek forum advantage. The question, instead, is whether a transfer truly is for the convenience of the parties and witnesses and in the interests of justice.

When another forum is clearly more convenient under the §1404(a) factors, district judges are usually going to grant the defendant's motion to transfer. But Congress has wisely entrusted to federal trial courts the discretion to decide when it is for the convenience of parties and witnesses and in the interests of justice to retain a case and when, instead, transfer is justified. There was nothing necessarily unreasonable in the trial court's decision in this case to permit suit to go forward in a venue that Congress has made available as a permissive venue choice, after having concluded that the defendant failed to show the §1404 factors were sufficiently compelling to warrant transfer.

CONCLUSION

For the foregoing reasons, we urge this *en banc* court, therefore, to deny Volkswagen's Petition for Mandamus Review.

Respectfully submitted,

By: _____

PROFESSOR LONNY S. HOFFMAN
George Butler Research Professor
University of Houston Law Center
100 Law Center
Houston, Texas 77204-6060
(713) 743-5206 (direct)
(713) 743-2131 (facsimile)

Professor Debra Lyn Bassett
Professor of Law and Judge Frank M. Johnson, Jr., Scholar
University of Alabama School of Law
Box 870382
101 Paul Bryant Drive East, Room 319
Tuscaloosa, AL 35487
Telephone: (205) 348-9715

Professor Robert C. Casad
John H. and John M. Kane Professor of Law, Emeritus
The University of Kansas School of Law
1535 W. 15th Street
Lawrence, KS 66045
Telephone: (785) 864-9218

Professor Kevin Clermont
James and Mark Flanagan Professor of Law
Cornell Law School
204 Myron Taylor Hall
Ithaca, NY 14853-4901

Telephone: (607) 255-5189
Facsimile: (607) 255-7193

Professor William Dorsaneo
Dedman School of Law
Southern Methodist University
P. O. Box 750116
Dallas, Texas 75275
Telephone: (214) 768-2626

Professor Theodore Eisenberg
Henry Allen Mark Professor of Law
Cornell Law School
104 Myron Taylor Hall
Ithaca, NY 14853-4901
Telephone: (607) 255-6477
Facsimile: (607) 255-7193

Professor Christopher M. Fairman
The Ohio State University
Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210-1391
Telephone (614) 292-2422

Professor Paul George
Texas Wesleyan University School of Law
1515 Commerce Street
Fort Worth, TX 76102
Phone: (817) 212-4120
Facsimile: (817) 212-3965

Professor Jared Gonzalez
Texas Tech University School of Law
1802 Hartford Avenue
Lubbock, TX 79409
Telephone: (806) 742-3990
Facsimile: (806) 742-1629

Professor Laura Hines
The University of Kansas School of Law
1535 W. 15th Street
Lawrence, KS 66045
Telephone: (785) 864-9265

Professor Rachel M. Janutis
Capital University Law School
303 E. Broad Street
Columbus, Ohio 43215
Telephone: (614) 236-6543
Facsimile: 614-236-6956

Professor Elizabeth Gregory Thornburg
Dedman School of Law
Southern Methodist University
P. O. Box 750116
Dallas, Texas 75275
Telephone: (214) 768-2613
Facsimile: (214) 768-3142

Professor Georgene Vairo
Professor of Law and William M. Rains Fellow
Loyola Law School Los Angeles
19 Albany St.
Los Angeles, CA 90015-1211
Telephone: (213) 736-8170
Facsimile: (213) 380-3769

Professor Robert A. Weninger
J. Hadley Edgar Professor of Law, 1974
Texas Tech University School of Law
Campus MS0004
1802 Hartford Avenue
Lubbock, Texas 79409-0004
Telephone: (806) 742-3990 x272
Facsimile: (806) 742-1629

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 29(d) and 32(a)(7)(B) and Fifth Circuit Rule 32.3. Exclusive of the portions that are exempted from the calculation under FED. R. APP. P. 32(a)(7)(B)(iii), the brief is 5,251 words, less than one half of the maximum length authorized for Respondent's brief, pursuant to FED. R. APP. P. 29(d) and Fifth Circuit Rule 29.3.

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font (12-point for footnotes).

Lonny S. Hoffman

CERTIFICATE OF SERVICE

I am over the age of eighteen years, not a party to this action, and that on the 21st day of April 2008 I caused 20 true and accurate paper copies of this brief and one copy in electronic format to be served on the Clerk of the Court. I further certify that on this same date two printed copies were served by Federal Express mail on the trial judge, and upon all counsel of record.

Lonny S. Hoffman