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 AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

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Supplemental Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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Interest of Amicus Curiae

This brief is submitted by Amicus Curiae the Product Liability Advisory Council, Inc. ("PLAC"). PLAC is a non-profit association with over 120 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 825 briefs as amicus curiae in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix 1. PLAC alone is paying for the preparation of this brief. All of the parties have consented to PLAC filing this brief. FED. R. CIV. P. 29(a).

Argument

I. This is the Type of Exceptional Case Where Mandamus Should Issue

Mandamus is appropriate where, as here, the district court abused its discretion in construing and applying the relevant venue statute, determining which factors to consider, and deciding the motion to transfer. Any one of these grounds supports the exercise of mandamus jurisdiction. *Cf. Ex Parte Charles Pfizer & Co.*, 225 F.2d 720, 723 (5th Cir. 1955) (holding that mandamus is available where there is "a failure of the District Court to correctly construe and apply [Title 28 U.S.C. § 1404(a)], or to consider the relevant factors incident to ruling upon a motion to transfer, or . . . it is necessary to correct a clear abuse of discretion"). Of course, PLAC recognizes that "mandamus is an extraordinary remedy reserved for extraordinary cases." *S. Pac. Transp. Co. v. City of San Antonio Public Serv. Bd.*, 748 F.2d 266, 270 (5th Cir. 1984). As discussed *infra,* this is just such a case.

A. District Courts have No Discretion in Properly Applying the Law — But the Law has Become Unclear to Some Courts

1. Courts have Differed over the Standard to be Applied

This Court should the take the opportunity to articulate a comprehensive test under which district courts are to determine § 1404(a) transfer motions. The Second Panel in *In re Volkswagen of Am., Inc.* highlighted the need for a fresh and macroscopic statement of the law when it wrote, "[t]he role of the plaintiff's choice of forum in the venue transfer analysis has not been clearly specified in our recent

§ 1404(a) cases." 506 F.3d 376, 381 (5th Cir. 2007) ("*Volkswagen II*"). The lack of a recent, comprehensive statement from this Court on venue transfer under § 1404(a) has led to incongruous statements and inconsistent application of the law in the district courts.

As one example, district courts have disagreed as to the appropriate deference or weight to be afforded a plaintiff's choice of forum. In *Hoeme v. Union Pac. R.R. Co.*, the district court concluded that because the plaintiffs had no substantial connection to the forum, their choice of forum was entitled to little or no deference. No. G-06-050, 2006 WL 1195662, at *1-2 (S.D. Tex. May 1, 2006); *accord Icon Indus. Controls Corp. v. Cimetrix, Inc.*, 921 F. Supp. 375, 384 (W.D. La. 1996). In contrast to *Hoeme,* the district court in *Mohamed v. Mazda Motor Corp.* stated that "it is safe to say that ordinarily plaintiff's choice of forum is given significant weight and will not be disturbed unless the other factors weigh substantially in favor of transfer" — even though the plaintiffs there had no connection to the chosen forum. 90 F. Supp. 2d 757, 774 (E.D. Tex. 2000) (citing *Robertson v. Kiamichi R.R. Co.*, 42 F. Supp. 2d 651, 656 (E.D. Tex. 1999)); *see also Singleton v. Volkswagen of Am., Inc.*, No. 2-06-CV-222, 2006 WL 2634768, at *2 (E.D. Tex. Sept. 12, 2006) ("The plaintiff's choice of forum is 'a paramount consideration in any determination of [a] transfer request, and that choice should not be lightly disturbed.'" (citations omitted)).

Other courts have held that although a plaintiff's choice of forum is entitled to some deference, a court may not attribute "decisive weight" to the plaintiff's choice. *See Busch v. Robertson*, No. 3:05-CV-2043-L, 2006 WL 1222031, at *4-7 (N.D. Tex. May 5, 2006).

Conflict has also developed among the district courts in their application of the § 1404(a) transfer factors; some district courts have even added to the factors. For example, in *Mohamed*, the court listed eleven private and public convenience factors, including several factors not present in the Fifth Circuit's established considerations. 90 F. Supp. 2d at 771 (district court factors included, among others, (1) plaintiff's choice of forum . . . (3) the place of the alleged wrong . . . (4) the location of counsel . . . (7) the possibility of delay and prejudice if transfer is granted). *Accord Singleton*, 2006 WL 2634768, at *2-4. *See also Holmes v. TV-3, Inc.*, 141 F.R.D. 697, 698 (W.D. La. 1991) (this court's list of factors included "(4) the possibility of a view of the premises, if appropriate; (5) the enforceability of a judgment . . . (10) the possibility that trial in the original forum will result in inconvenience, vexation, oppression, or harassment of the defendants . . . ."). Some courts have analyzed transfer under § 1404(a) based on only six factors, including the availability of witnesses, cost of trial, and plaintiff's choice of forum. *Hoeme*, 2006 WL 1195662, at *1-2. *Accord Lajaunie v. L&M Bo-Truc Rental, Inc.*, 261 F. Supp. 2d 751, 753-755 (S.D. Tex. 2003).

In contrast, other district courts more closely follow the considerations set forth in *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*Volkswagen I*"). *See Calloway v. Triad Fin. Corp.*, No. 3: 07-CV-1292-B, 2007 WL 4548085, at *3-4 (N.D. Tex. Dec. 27, 2007) (giving no weight to the location of parties' counsel and not including as a factor the plaintiff's choice of forum); *Busch*, 2006 WL 1222031, at *4-7 (utilizing only those factors listed by the Court in *Volkswagen I*).

No small disarray has developed among the district courts; clear and comprehensive guidance from this Court is needed.

2. Courts have Applied the "Same" Standards Differently

Even when district courts analyze the same factor, they often conflict in their understanding and application of that factor. For example, when analyzing the relative ease of access to sources of proof, the *Mohamed* court in the Eastern District stated that "the accessibility and location of sources of proof should weigh only slightly in this Court's transfer analysis, particularly . . . due to advances in copying technology and information." 90 F. Supp. 2d at 778. However, the Northern District court in *Busch* readily held that "the relevant sources of proof, including books and records" were located in the proposed venue and that "[w]hile Plaintiff is correct that these 'documents may be copied and shipped to Texas,' this factor definitely weighs in favor of transfer." 2006 WL 1222031, at *4.

Further, when analyzing the cost of attendance for witnesses, the Northern District court in *Calloway* presumed that the defendant's witnesses would have some significance to the defendant's case and therefore that their location should be considered, even though the defendant did not detail the nature of each of the witnesses' testimony. 2007 WL 4548085 at *3. Compare this to the Eastern District court in *Singleton*, where because the defendant purportedly "did not outline the substance of the . . . witnesses' testimony . . . the Court ***cannot determine*** that they are indeed key fact witnesses whose convenience should be assessed in this analysis."[1] 2006 WL 2634768 at *3 (emphasis added).

And even after this Court's decision in *Volkswagen I*, courts continue to disagree on how to weigh the distance between venues in considering transfers under § 1404(a). For example, the *Singleton* court under review here held that the distance of some 150 miles between Marshall and Dallas was ***not*** substantial; further, the *Singleton* court used this conclusion to support its analysis of no less than four other venue–transfer factors before holding that the transfer would be denied. *Id*. at *3-4 (citing *Mohamed*, 90 F. Supp. 2d at 776 for the proposition that "the [150 mile] distance between Marshall and Dallas is negligible.").

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[1] Contrary to the *Singleton* court's erroneous assertion, the Panel correctly concluded that Volkswagen had submitted ample evidence delineating the importance of its potential witnesses. *Volkswagen II*, 506 F.3d at 385-86.

In sharp contrast, in the case of *Bascom v. Maxim Integrated Prods., Inc.*, the court there considered facts similar to those in *Singleton* but concluded that San Antonio was more convenient than Austin, even though Austin was only 80 miles away. -- F. Supp. 2d --, No. A-07-CA-947-SS, 2008 WL 436971 at *2-3 (W.D. Tex. Feb. 13, 2008) ("the Plaintiffs fail to provide any credible reason why Austin would be more convenient, instead essentially arguing that Austin is not that inconvenient because the two are only 80 miles apart."). In yet another example of inconsistent results because of the lack of clear standards, the district court in *Calloway* held that transfer was appropriate from the Dallas Division to the Fort Worth Division (less than 40 miles away) ***without mentioning distance at all***. *See Calloway*, 2007 WL 4548085 at *3-4.

Because there is no recently–articulated, comprehensive standard in the Fifth Circuit for determining when transfer under §1404(a) is warranted, district courts will continue to apply their own tests — sometimes yielding jarringly incongruous results and making this area of the law unpredictable and potentially vexatious. PLAC members — as national manufacturers of products — have an acute interest in settled venue transfer law. Without an effective safety valve under §1404(a), national product manufacturers can easily find themselves wholly without recourse when faced with the significant pressures of being sued in a distant forum that has

no material nexus to them, their products, the operative events, or even the parties themselves.

B. A Comprehensive, Detailed Standard Would Reduce Petitions for Writ of Mandamus in the § 1404(a) Realm

The district courts are closely watching for guidance from this Court as to proper application of § 1404(a). The decision in *Volkswagen II* helped clarify the law; district courts have themselves made this observation. *Shelby v. Pods, Inc.*, No. Civ. A. 4-07-2145, 2007 WL 4002850, at *1 (S.D. Tex. Nov. 15, 2007) (observing that the Panel's decision in *Volkswagen II* clarified "conflicting precedents regarding the standard for transfer of cases pursuant to § 1404(a)."). WestLaw searches reveal that since *Volkswagen II*, district court venue transfer decisions in nearly twenty (20) cases in this Circuit have yielded not even one petition for writ of mandamus. While correlation is not causation, having a clear and comprehensive articulation of the law from this Court can only help reduce uncertainties in the rules and decisional process — uncertainties that are a breeding ground for mandamus proceedings. The Court should take this opportunity to bring uniformity and greater clarity to the law governing § 1404(a) transfers in the Fifth Circuit.

II. The Proper Weight or Deference to be Ascribed to a Plaintiff's Choice of Forum Should Turn on that Particular Plaintiff's Nexus to the Chosen Forum — Such an Approach Harmonizes the Case Law and Provides a Meaningful Analytical Paradigm

A. The Burden on Movants under § 1404(a) is Lower than that under Forum Non Conveniens

28 U.S.C. § 1404(a) states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The Historical and Revision Notes state that § 1404(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 such, the drafters intended that the doctrine of forum non conveniens inform on a court's determination as to whether transfer under §1404(a) is proper.

The forum non conveniens doctrine was firmly established in the federal courts in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). In *Gilbert*, the Supreme Court held that "[t]he principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Id.* at 507. Whether to resist imposition upon its jurisdiction is to be determined by the district court through weighing private and public interest factors. *Id*. at 508.

Although guided by the forum non conveniens doctrine, the drafters of 28 U.S.C. § 1404(a) did not intend to simply codify the existing law. "As this Court said in *Ex parte Collett*, 337 U.S. 55[, 61 (1949)], Congress, in writing § 1404(a), which was an entirely new section, was revising as well as codifying. The harshest result of the application of the old doctrine of *forum non conveniens*, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer." *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (affirming § 1404(a) transfer of venue away from plaintiff's home district to the location of the train derailment at issue in the case).

Instead of codifying the forum non conveniens doctrine, Congress intended to create a method to transfer cases from a forum without requiring dismissal. The Supreme Court has stated, "[a]s a consequence, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader." *Id.*

The Fifth Circuit has correctly followed the Supreme Court's decision in *Norwood* as establishing a lower threshold of inconvenience to warrant transfer under § 1404(a). *See Veba-Chemie A.G. v. M/V Getafix*, 711 F.2d 1243, 1247 (5th

Cir. 1983). Distinguishing forum non conveniens from § 1404(a), a panel of this Court observed, "[t]he 'substantially more convenient standard' [of forum non conveniens] assures both that defendant will have less control in obtaining an alternative forum and that the enhanced convenience – both public and private – achieved by dismissal will justify disturbing plaintiff's choice." *Id.* However, "[t]he heavy burden traditionally imposed upon defendants by the forum non conveniens doctrine – dismissal permitted only in favor of a substantially more convenient alternative – was dropped in the § 1404(a) context. In order to obtain a new federal forum, the statute requires only that the transfer be '[f]or the convenience of the parties, in the interest of justice.'" *Id*. (quoting *Norwood*, 349 U.S. at 32).

It is well accepted that the required showing of inconvenience is less in the § 1404(a) context than in forum non conveniens. *See Humble Oil & Ref. Co. v. Bell Marine Serv., Inc.*, 321 F.2d 53, 56 (5th Cir. 1963) ("the avoidance of dismissal through § 1404(a) lessens the weight to be given the choice of forum factor"). That said, the level of the requisite showing, and the application of the factors required to meet that burden, have become unclear as district courts offer varying articulations and applications of the law.

B. The Language of § 1404(a) Outlines a Two-Level Analysis

Section 1404(a) requires courts to analyze the convenience of the parties ***and*** witnesses in the interest of justice. 28 U.S.C. § 1404(a). Importantly, Congress separately enumerated parties and witnesses in drafting this statute.

However, in practice, court's often look solely to the witnesses' convenience. In fact, in some decisions listing the public and private factors, the convenience of the parties is not mentioned at all. And courts have repeatedly held that the convenience of the witnesses is more important than that of the parties, a ranking Congress did not make. *See Reed v. Fina Oil & Chem. Co.*, 995 F. Supp. 705, 714 (E.D. Tex. 1998) ("The convenience of the witnesses is arguably the most important factor in deciding whether a case should be transferred pursuant to section 1404(a)") (citations and quotation marks omitted); *Dupre v. Spanier Marine Corp.*, 810 F. Supp. 823, 825 (S.D. Tex. 1993) (the most important factor is whether substantial inconvenience will be visited upon key fact witnesses should the court deny transfer). *Cf. State St. Cap. Corp. v. Dente*, 855 F. Supp. 192, 198 (S.D. Tex. 1994) ("Moreover, it is the convenience of non-party witnesses, rather than that of party witnesses, that is the more important factor and is accorded greater weight in a transfer of venue analysis.") (citations omitted).

A literal reading of the statute requires a court to determine both the convenience of the parties and the convenience of the witnesses. And because this

Court has determined that a plaintiff's choice of forum is not a public or private factor to be weighed in § 1404(a) analysis, *see Volkswagen I*, 371 F.3d at 203, the convenience of the parties must be determined separately from the convenience of the witnesses.

From the express wording it chose, Congress intended that the § 1404(a) analysis determine the convenience of the parties and the convenience of the witnesses separately. *See* 28 U.S.C. § 1404(a). Therefore, a two-step analysis is appropriate, first analyzing the deference to the plaintiff's choice of forum and, second, determining the convenience of the witnesses.

1. Plaintiff's Connection with the Forum Must Inform on the Applicable § 1404(a) Burden

a. A Plaintiff's Choice is Not Conclusive or Determinative

Courts have long recognized the importance of allowing a plaintiff to choose his or her forum for suit. *See, e.g., Koster v. Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 524 (1947); *Chicago, Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299, 304 (7th Cir. 1955) ("A large measure of deference is due to the plaintiff's freedom to select his own forum"); *Pac. Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968).

But a plaintiff's choice cannot be absolute. The Supreme Court gave force to this premise through the forum non conveniens doctrine. "[The general venue]

statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment." *Gilbert*, 330 U.S. at 507 ("[t]he general venue statute plus the *Nierbo* [*Co. v. Bethlehem Shipbuilding Corp.*, 308 US. 165, 168 (1939)] interpretation do not add up to a declaration that the court must respect the choice of the plaintiff, no matter what the type of suit or issues involved. The two taken together mean only that the defendant may consent to be sued, and it is proper for the federal court to take jurisdiction, not that the plaintiff's choice cannot be questioned.").

The Court continued, "[i]t is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." *Id*. at 508. Certainly, a plaintiff's choice is never absolute. *See also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 n.23 (1981) (a plaintiff's "forum choice should not be given dispositive weight").

b. This Circuit Supports Giving a Plaintiff's Choice Some Deference but the District Courts Lack a Comprehensive Standard

The policy allowing a plaintiff wide berth to choose the forum is primarily to honor a plaintiff's right to sue in the plaintiff's home forum. *See id.* at 255 ("In

Koster, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum.") (citation omitted). "When the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Id*. Further, "[i]n any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Koster*, 330 U.S. at 524. As expressed in *Koster* and *Piper*, the Supreme Court has given greater weight to a plaintiff's choice when it is his home forum.

Sister circuits have applied the Supreme Court's sliding scale in *Koster* to calculate the deference or weight to be afforded the plaintiff's choice of forum. *See, e.g., Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 720 (1st Cir. 1996); *Guidi v. Inter-Continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000); *Samsung Elec. Co. v. Rambus, Inc.*, 386 F. Supp. 2d 708, 716 (E.D. Va. 2005); *Duha v. Agrium, Inc.*, 448 F.3d 867, 873-74 (6th Cir. 2006); *Pence*, 403 F.2d at 954 ("If the operative facts have not occurred within the forum of original selection and that forum has no particular interest in the parties or the subject matter, the plaintiff's choice is entitled only to minimal consideration."). *Cf. Igoe*, 220 F.2d at 304 (the deference to a plaintiff's choice "has minimal value where none of the conduct complained of occurred in the forum selected by the plaintiff").

This Court has also recognized the significance (but not conclusiveness) of a plaintiff's choice of forum. *Volkswagen II*, 506 F.3d at 384 ("Plaintiff's choice of forum is entitled to deference."); *see also Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989). But a plaintiff's choice is not determinative. *In re Horseshoe*, 337 F.3d at 434 ("We believe that it is clear under Fifth Circuit precedent that the plaintiff's choice of forum is clearly a factor to be considered but in and of itself it is neither conclusive nor determinative.") (citing *Garner v. Wolfinbarger*, 433 F.2d 117, 119 (5th Cir. 1970)).

And both this Court and district courts in the Fifth Circuit have held that the plaintiffs' choice of forum is entitled to less deference when — as in the present case — the plaintiffs have no material connection to the forum. *See, e.g., In re Horseshoe*, 337 F.3d at 434; *Speigelberg v. Collegiate Licensing Co.*, 402 F. Supp. 2d 786, 790 (S.D. Tex. 2005); *Salinas v. O'Reilly Auto. Inc.*, 358 F. Supp. 2d 569, 571 (N.D. Tex. 2005) ("the importance of a plaintiff's choice of forum should be discounted where the plaintiff is a nonresident of the forum") (internal quotation marks and citations omitted).

Logically, courts also diminish the weight given to a plaintiff's choice when the chosen forum has no factual nexus to the case. *Hanby v. Shell Oil Co.*, 144 F. Supp. 2d 673, 677 (E.D. Tex. 2001) (citing *Kiamichi*, 42 F. Supp. 2d at 656); *Cimetrix*, 921 F. Supp. at 384 (plaintiff's choice of forum is "lessened when the

operative facts of the dispute occur outside Plaintiff's chosen forum") (citations omitted).

However, this Court has not recently delineated a clear and comprehensive standard by which to gauge the deference or weight to be afforded a plaintiff's choice of forum in the § 1404(a) context. This Court has held that plaintiff's choice of forum should establish the burden of proof for the movant for a transfer under § 1404(a). *See Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966) ("the plaintiff's privilege of choosing venue places the burden on the defendant to demonstrate why the forum should be changed"). But only the *Volkswagen II* Panel has recently endeavored to flesh out the particulars of what that burden is. *Volkswagen II*, 506 F.3d at 384.

c. The Weight or Deference to be Ascribed a Plaintiff's Choice of Forum Should Turn on the Plaintiff's Actual Nexus to the Chosen Forum

The venue transfer statute directs that district courts take into consideration the convenience of the parties as well as convenience of the witnesses. 28 U.S.C. § 1404(a). And the Panel has explained that a party seeking a transfer "must show good cause." *Id.* (citing *Humble Oil*, 321 F.2d at 56) (quotation marks omitted). By further expanding on the detail provided in *Volkswagen II*, this Court can provide a paradigm to give force to this feature of § 1404(a). That is, if district courts are instructed that the deference or weight to be a afforded a plaintiff's

choice of forum must be gauged based upon the plaintiff's nexus to that forum, district courts will be far less apt to summarily and erroneously conclude that transfers should be denied because the plaintiff's choice is "paramount."

PLAC submits that one meaningful paradigm would be to explicitly depend the "good cause" burden of proof on the plaintiff's connections with the forum. When a plaintiff has chosen a forum that is actually his or her residence or "home forum," courts should give a plaintiff's choice significant weight or deference. In such a circumstance, "good cause" might require a showing that the balance of convenience and justice "clearly" weighs in favor of transfer. *See id*. At the other extreme, when the plaintiff has chosen a forum with which he or she has no connections whatsoever, courts should give the plaintiff's choice minimal deference. Thus, the applicable "good cause" burden of proof might require only a showing of "more convenient than not." *See id.* ("When the transferee forum is no more convenient than the chosen forum, the plaintiff's choice should not be disturbed.").

Calibrating the movant's burden of proof according to the connections the plaintiff has with the chosen forum would further the interest of justice. This approach incorporates the balance previously struck in the Supreme Court's *Gilbert* case. Under a plaintiff/forum/nexus approach, a plaintiff would be able to maintain suit in his home forum in many circumstances. On the other hand, a party

would not be forced to defend in a forum wholly unrelated to, and inconvenient for, both parties and witnesses solely because the plaintiff's attorney elected to sue there.

Conclusion and Prayer

This product liability case is important to PLAC's membership because the standard for venue transfer under 28 U.S.C. § 1404(a) should be clear and uniformly applied. Unfortunately, the standard has become less than clear for some district courts as they grapple to apply § 1404(a). Not surprisingly, some district courts have effectively created varying standards — some directly contrary to this Court's decisions.

National manufacturers of products are especially susceptible to being sued in distant and disconnected fora simply because, often by mere fortuity, their products may be found there. Thus, PLAC's members have a significant interest in preserving meaningful access to appropriate venue transfers under § 1404(a).

In the present case, the district court's failure to conduct a proper and meaningful analysis on whether Petitioners are entitled to a venue transfer effectively nullifies important rights under the statutory scheme dictated by Congress. Once this process is bypassed, it cannot be recovered. Plainly put, this is a textbook scenario for mandamus review and relief.

This Court should exercise its mandamus jurisdiction to review and correct the district court's order, an order that radically alters venue transfer practice and fails to properly balance a plaintiff's venue choice with the purpose of allowing a plaintiff this choice in the first place. Amicus Curiae PLAC respectfully prays that this Court grant the petition for writ of mandamus and write on these important issues.

Respectfully submitted,

Dated: March ___, 2008

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Certificate of Service

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that true and correct copies of the foregoing brief were served upon the below–listed by certified mail, return receipt requested, and that the original and requisite paper and electronic copies, were forwarded to the Clerk of the Fifth Circuit Court of Appeals by FedEx on March __, 2008, for delivery on March ___, 2008.

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Certificate of Compliance

This brief complies with the type-volume limitations in Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it contains 4,569 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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