No. 14-22-00417-CV

IN THE FOURTEENTH COURT OF APPEALS
HOUSTON, TEXAS

FRANK BURFORD, INDIVIDUALLY AND AS REPRESENTATIVE OF THE HEIRS AND ESTATE OF CAROLYN BURFORD, DECEASED, WESLEY BURFORD, INDIVIDUALLY, AND LESLIE SCHELL, INDIVIDUALLY,
Appellants,

v.

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

ON APPEAL FROM 11TH JUDICIAL DISTRICT COURT,
HARRIS COUNTY, TEXAS
TRIAL COURT CAUSE NO. 2017-70076-ASB
HONORABLE JUDGE MARK DAVIDSON, PRESIDING

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, ALLIANCE FOR AUTOMOTIVE INNOVATION, AMERICAN COATINGS ASSOCIATION, AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF APPELLEE

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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 (NFIB Legal Center),[4] Alliance for Automotive Innovation (Auto Innovators),[5] American Coatings Association

[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 37 automobile manufacturers and value chain partners that together produce nearly all light-duty vehicles sold in the United States.

(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.

SUMMARY OF ARGUMENT

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. That chaotic situation came under control largely due to two

[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).

significant judicial events: (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) the Texas Supreme 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), *Borg-Warner*, *supra*, and *Bostic*, *supra*.[10]

As a result, asbestos litigation in Texas has proceeded for many years under the well-crafted and common-sense causation standards established by the Texas Supreme Court in those three cases. In this environment, asbestos litigation in Texas has 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 inconsistent with the basic standards of substantial factor causation proof are dismissed.

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[9] *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005). The federal court silica litigation began in 2003 when the federal Judicial Panel on Multidistrict Litigation centralized for pretrial purposes a large number of silicosis claims that primarily originated in Mississippi state court and were removed to federal court. *In re Silica Prods. Liab. Litig.*, 280 F. Supp. 2d 1381, 1382 (J.P.M.L. 2003). Cumulatively, over 10,000 individual plaintiffs' cases were transferred to Judge Jack. *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d at 573.

[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.

Texas courts have led the way in correcting the many abuses in asbestos litigation during the 1980s and 1990s. In fact, dozens of other courts have followed Texas in requiring legitimate diagnoses and dose-based causation evidence, consistent with general principles of causation and expert testimony.[11]

This appeal threatens to upend the stability that has existed for many years in Texas. The Texas asbestosis docket could return to the chaos of the past if the trial court's grant of summary judgment is reversed.[12] Ms. Burford incurred a relatively common form of related lung disease characterized by *pulmonary fibrosis.* Like many others with 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 becomes this easy to convert a common disease into asbestos litigation, then this

[11] *See, e.g., Nemeth v. Brenntag N. Am.*, 38 N.Y.3d 336 (N.Y. 2022). For a discussion, *see* Bryce Friedman, *New York Contributes to the Demise of Every Exposure Testimony in Asbestos and Talc Litigation*, 38 Mealey's Litig. Rep.: Asbestos (Feb. 7, 2023); William Anderson & Kieran Tuckley, *How Much Is Enough? A Judicial Roadmap to Low Dose Causation Testimony in Asbestos and Tort Litigation*, 41 Am. J. Trial Advoc. 39 (2018); William Anderson & Kieran Tuckley, *The Any Exposure Theory Round III: An Update on the State of the Case Law 2012-2016*, 83 Def. Couns. J. 264 (2016); Joseph Sanders, *The "Every Exposure" Cases and the Beginning of the Asbestos Endgame*, 88 Tul. L. Rev. 1153 (2014); William Anderson, et al., *The "Any Exposure" Theory Round II—Court Review of Minimal Exposure Expert Testimony in Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J. L. & Pub. Pol'y 1 (2012); Mark Behrens & William Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 SW. U. L. Rev. 479 (2008).

[12] For descriptions of the situation as it existed around 2005, the time of Judge Jack's ruling, 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.").

case will encourage the filing of many similar lawsuits over routine pulmonary fibrosis cases linked by happenstance to minor asbestos exposures.

Amici urge the Court to hold the line established under *Havner, Borg-Warner,* and *Bostic* and not permit short-cut causation routes for wrongly-diagnosed asbestosis cases.

ARGUMENT

I. TEXAS COURTS HAVE INSTITUTED SIGNIFICANT REFORMS IN THE LAST TWO DECADES TO PREVENT THE ABUSIVE EXPERT AND LITIGATION PRACTICES RAMPANT IN ASBESTOSIS AND SILICA LITIGATION IN THE EARLY 2000S

Plaintiffs propose a causation approach that, if adopted, would eliminate the need for proof of the high-level, long-term exposures to asbestos required to cause asbestosis.[13] The disease in this lawsuit is known in asbestos parlance as a "take-home" case—the person alleging disease is the spouse of a worker who allegedly carried fibers home on his clothing, thus exposing his wife who did the laundry.

[13] Asbestosis is a description of one form of diffuse lung fibrosis, a common lung ailment including over 100 types of disease. *See Borg-Warner,* 232 S.W.3d at 766. The term asbestosis is a designation used when other persuasive medical evidence demonstrates that asbestos was the source of the pulmonary fibrosis. *See* Victor Roggli, et al, *Pathology of Asbestosis—An Update of the Diagnostic Criteria Report of the Asbestosis Committee of the College of American Pathologists and Pulmonary Pathology Society,* 134 Arch. Pathol. Lab. Med. 462 (2010) (description and definition of asbestosis); Andrew Churg, *Nonneoplastic Disease Caused by Asbestos,* in *Pathology of Occupational Lung Disease* 277, 313-314 (Andrew Churg & Francis H.Y. Green eds., Williams & Wilkins 1998) (1988). Naming the disease "asbestosis" begs the question—where is the evidence that asbestos caused this particular case of fibrosis?

Take-home asbestos disease is a well-recognized potential consequence of long-term, heavy exposure inside a home resulting from worker exposure in the old "dusty trades" workplaces—e.g., insulation workers, miners, millers, and shipyard workers. But because household exposures are orders of magnitude lower than occupational exposures,[14] take-home cases are typically associated only with very high workplace dust environments and typically involve mesothelioma, not asbestosis (asbestosis requires a much higher dose of exposure).

Take-home *asbestosis* is virtually non-existent. That is even more true when the family's worker (the husband in this case) is not an asbestos worker but was a supervisor of an aluminum process for most of his career. In fact, considering her husband's own limited exposures, if Ms. Burford did have asbestosis caused by her husband's Alcoa work, she would be not just a unicorn, but a unicorn among unicorns. Instead, the more obvious and realistic explanation is that Ms. Burford incurred a common form of lung disease from a source that had nothing to do with her extremely limited home exposures to asbestos.

This case does not occur in a vacuum—it is yet another attempt to continue the fifty year old asbestos litigation in Texas by establishing unscientific and

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[14] *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).

meaningless exposure and diagnostic standards for plaintiffs in asbestosis cases. Judge Janis Jack addressed and corrected similar abuses almost twenty years ago in the federal court silica litigation,[15] and the Texas appellate courts have taken strong action since then to eliminate speculative asbestos expert testimony. Those rulings, correctly applied here, will prevent a return to the pre-Judge Jack era.

In 2005, Texas was in the midst of a litigation crisis due to the filing of an overwhelming number of asbestosis and silica cases.[16] Most of the Texas cases were non-impaired plaintiffs whose diagnoses were based on mass screenings and "findings" of disease by a handful of plaintiff experts.[17] Judge Jack, a medical nurse herself, pulled back the curtain on the fraudulent process by which the silicosis plaintiffs were recruited and diagnosed, as set forth in her landmark 249-page decision.[18] Judge Jack stated, "the Court is confident…that the 'epidemic' of

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

[16] *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).

[17] *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).").

[18] *See* Stephen Carroll, et al., *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* (RAND Corp. 2009). For a discussion of Judge Jack's ruling and the abuses it corrected, *see* Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009).

some 10,000 cases of silicosis 'is largely the result of misdiagnosis.'"[19] "[T]hese diagnoses were driven by neither health nor justice," Judge Jack said, "they were manufactured for money."[20]

The asbestos docket in Texas at the time was similarly rife with mass screenings, financial incentives for screening doctors, and fraudulent diagnoses of asbestosis.[21] As Judge Jack acknowledged, "[t]he screening companies were established initially to meet law firm demand for asbestos cases."[22] Another 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."[23]

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

[20] *Id*. at 635.

[21] *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).

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

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

Judge Jack's ruling effectively ended this abuse of the tort system in silica and asbestosis litigation.[24] Thousands of cases were dismissed or withdrawn as a result of her ruling. Today, the Texas asbestos docket is much more closely aligned with the medical basis for disease attribution.

Around the same time, courts around the country began to deal with the key expert testimony that supported asbestos litigation generally—the infamous *any exposure* theory.[25] Experts relying on the *any exposure* theory opine that the dose of asbestos is essentially meaningless, and any dose from a solvent defendant is a cause of asbestos disease.[26] The typical articulation is that "each and every exposure" or "every cumulative exposure" (other than background) is a substantial factor in causing asbestos disease.[27] The *any exposure* approach is characterized by

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[24] *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.").

[25] *See* David E. Bernstein, *Getting to Causation in Toxic Tort Cases*, 74 Brook. L. Rev. 51, 59 (2008) ("The recent, increasingly strict exposure cases…reflect a welcome realization by state courts that holding defendants liable for causing asbestos-related disease when their products were responsible for only *de minimis* exposure to asbestos, and other parties were responsible for far greater exposure, is not just, equitable, or consistent with the substantial factor requirements….").

[26] *See Dempster v. Lamorak Ins. Co.*, 2020 WL 5637210, at *7 (E.D. La. Sept. 21, 2020) ("The 'every exposure' or 'every exposure above background' theory 'represents the viewpoint that…every exposure to asbestos should be considered a cause of injury.' Numerous courts have excluded expert testimony based on this theory finding that the theory is unreliable as it is not supported by sufficient facts or data.").

[27] Over the course of asbestos litigation, plaintiffs have used different names for this theory to avoid adverse court rulings. After the rejection of "single fiber" theory, the approach became the

(continued…)

the experts' failure to recognize the critical need for proof of a minimal exposure level necessary for disease. That proof must be grounded in epidemiological studies showing a doubling of the risk at that lifetime dose level.[28]

Borg-Warner is highly relevant here both as an asbestosis case involving limited exposure, and as one of the earliest and most important *any exposure* cases in the country. The critical ruling in that case was that asbestos, like any other toxin, must reach a reach a range of significant lifetime exposure—the *dose*—before medical science or courts can attribute disease causation to an exposure.[29]

(continued)

"any exposure" theory, then the "each and every exposure" theory, and most recently the "cumulative exposure" theory. "Most courts reviewing these meaningless changes have agreed that the variations all represent the same dose-ignoring approach and are inadmissible*." Krik v. Exxon Mobil Corp.*, 870 F.3d 669, 672 (7th Cir. 2017)); *see also Comardelle v. Pennsylvania Gen. Ins. Co.*, 76 F. Supp. 3d 628, 634 (E.D. La. 2015) ("Although there may be no known safe level of asbestos exposure, this does not support [plaintiff expert's] leap to the conclusion that therefore every exposure [plaintiff] had to asbestos must have been a substantial contributing cause of his mesothelioma."); *In re Garlock Sealing Techs. LLC.*, 504 B.R. 71, 80 (Bankr. W.D.N.C. 2014) (plaintiff experts "both testified that any documented occupational exposure to chrysotile—regardless of how minimal—was sufficient to attribute it as a cause of mesothelioma."); *see generally* Anderson & Tuckley, *How Much Is Enough?*, *supra*, and accompanying text.

[28] For a discussion of the medical basis required for litigation proofs, *see* David Eaton, *Scientific Judgment and Toxic Torts—A Primer in Toxicology for Judges and Lawyers*, 12 J.L. & Pol'y 5 (2003). Prof. Eaton's article is regularly cited by courts. *See Borg-Warner*, 232 S.W.3d at 770-772; *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1242-44 (11th Cir. 2005) (referencing Eaton's dose-response relationship theory of toxicology); *Adams v. Cooper Indus., Inc.*, 2012 WL 2339741, at *1 (E.D. Ky. June 19, 2012) (citing Eaton's statements on expert testimony); *Henrickson v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1156 (E.D. Wash. 2009) (explaining Eaton's criteria for determining chemical exposure); *Watkins v. Affinia Group*, 54 N.E.3d 174, 179 (Ohio Ct. App. 2016) ("All substances are poisonous—there is none which is not; the dose differentiates a poison from a remedy.") (quoting Eaton at 11).

[29] *Borg-Warner*, 232 S.W.3d at 773.

The Texas Supreme Court rejected testimony by Plaintiffs' lead expert that "some" asbestos exposure from years of brake-related work was sufficient to attribute a case of asbestosis to that exposure. In doing so, the Court noted the extremely high doses required to cause asbestosis.[30]

Notably, the asbestosis diagnosis in *Borg-Warner* was not contested, as it is here, and yet the Texas Supreme Court still required proof of an epidemiologically-founded dose capable of causing the disease. Given the *Borg-Warner* court's skepticism regarding a claim by a lifetime brake-worker directly exposed to asbestos, it is hard to image the court giving any credence to a take-home asbestosis claim in light of the attenuated nature of the alleged exposures.

Several years later, in *Bostic*, the Texas Supreme Court extended the *Borg-Warner* ruling to mesothelioma cases. Several opinions from appellate courts expanded on and applied these rulings in various contexts, rejecting testimony that did not demonstrate a dose associated with an epidemiologically-demonstrated doubling of the risk.[31] No court in Texas has ever made an exception to the proof requirements of *Borg-Warner* and *Bostic* for asbestosis cases, or permitted proof

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[30] *Id*. at 771.

[31] *See, e.g., Smith v. Kelly-Moore Paint Co., Inc.,* 307 S.W.3d 829 (Tex. App.-Fort Worth 2010); *Georgia-Pacific Corp. v. Stephens*, 239 S.W.3d 304 (Tex. App.–Houston [1st Dist.] 2007, *pet. denied*); *In re Asbestos Litig. [Pena v. Bondex]*, 2007 WL 5994694 (Tex. Dist. Ct. Harris Cnty. July 18, 2007); *Cano v. Everest Minerals Corp.*, 362 F. Supp. 2d 814 (W.D. Tex. 2005) (uranium ore).

based on an infinite risk from essentially any level of exposure. Nor do Plaintiffs cite an opinion from any court that has approved of these experts' novel approach.

As discussed in the next section, Plaintiffs' case is built on a false foundation of a misdiagnosed asbestosis case, coupled with causation evidence derived largely from the rejected *any exposure* approach (even though Plaintiffs offer a purported "dose"). Those are the twin pillars that supported the version of asbestos litigation that Texas courts and the legislature addressed many years ago. *Amici* request that this Court apply settled Texas law and sound science to avoid undercutting the exemplary work of Judge Jack and prior Texas courts.[32]

II. THE TRIAL COURT CORRECTLY REJECTED PLAINTIFFS' EVIDENCE UNDER *BORG-WARNER* AND *BOSTIC*

This asbestosis case is not part of a mass tort filing, but it bears close similarities to the unsupported cases filed around two decades ago. The diagnosis of asbestosis is suspect and almost certainly wrong. In addition, Plaintiffs' halfhearted attempt at a "dose" estimate seems directed at undercutting the causation requirements of *Borg-Warner* and *Bostic* to make it once again easy to

[32] *See* Victor Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 13 (2012) ("Courts confronting nonmalignant filings generated as a result of screenings should join the enlightened view started by Judge Jack—a view now shared by many asbestos judges that have taken steps to improve the asbestos litigation environment. From both a legal and policy perspective, this approach is far superior to one that abdicates the proper judicial gate-keeping role regarding the admissibility of expert evidence because of its powerful effect in court.").

file cases with minimal exposure. In reality, Ms. Burford's take-home exposures would have been too low by orders of magnitude to produce asbestosis. Plaintiffs are merely leveraging her limited laundry exposure to turn a pulmonary fibrosis into an asbestos case through circular reasoning: she had "some" asbestos exposure somewhere, so her pulmonary fibrosis must be asbestosis.

Because of the risk that the weak proofs offered in this case could return Texas to the prior era of asbestosis litigation, the Court should carefully examine Plaintiffs' evidence of exposure, diagnosis, and causation under the precepts of asbestosis epidemiology, *Borg-Warner*, and *Bostic*. That examination demonstrates massive holes in Plaintiffs' logic and science.

A. The Epidemiology Supports Dismissal

Plaintiffs' two contentions regarding the asbestosis epidemiology make no sense and would undercut *Havner*, *Borg-Warner* and *Bostic*. Those key decisions are foundational under Texas law and should be applied here. There cannot be any "asbestosis exception" to standard medical science or the rules of those cases.

Plaintiffs argue that the Texas courts' "doubling of the risk" requirement is unworkable because the relative risk for asbestosis cannot be calculated. They point to the "zero denominator" for a disease in which all cases (by definition) are caused by asbestos, resulting in an impossible mathematical division that includes infinity. Perhaps the most obvious problem with this argument is that it purports to

prove too much—if Plaintiffs were correct that the level of asbestosis risk cannot be calculated, then asbestosis would have *no* epidemiological basis at all. And yet epidemiologists for years have been measuring and reporting the risk level for asbestosis in the population. Alcoa's experts cited such studies in its brief at p. 11-12 (referencing 2d Supp. CR. 1140, ¶ 6).

For example, the Churg text cited by the Texas Supreme Court in *Borg-Warner* includes an entire section on "epidemiology" in the asbestos chapter.[33] That section includes the following summary:

> There is general agreement from epidemiologic studies that the development of asbestosis requires heavy exposure to asbestos and that there is a threshold fiber dose below which asbestosis is not seen. A variety of studies suggest that this dose is in the range of 25 to 100 fibers per cubic centimeter-year [citations omitted].[34]

The dose range associated with asbestosis is itself thus derived from epidemiology studies. Plaintiffs' attempt to exclude asbestosis from epidemiological proof is contradicted by an entire world of epidemiology studies. Plaintiffs cite no source for the proposition that it is impossible to conduct

[33] Churg, *supra*, at 313-314.

[34] *Id.* at 313. The *Borg-Warner* court included this Churg quote in support of its decision. *See Borg-Warner*, 232 S.W.3d at 771.

epidemiology studies for asbestosis to show a doubling of risk—the argument was invented to support this lawsuit.[35]

Plaintiffs' second major error is their reliance on studies they claim demonstrate increased asbestosis risk at doses as low as 5 f/cc years. Plaintiffs cite to two review articles. The first, by Roggli, et al., discusses a handful of recent articles *suggesting* that asbestosis has a lower exposure level than the widely-accepted 25 f/cc year baseline.[36] The Roggli article, however, then *rejects* the proposed lower level as risking significant "false positive" diagnoses and instead stands on the historical, established 25 f/cc/year level.[37] Plaintiff's second citation is a positional paper by four authors whose conclusion has not been adopted in any major health diagnostic criteria for asbestosis.

Tellingly, Plaintiffs' second argument seems to undercut their first one—apparently, epidemiology studies addressing the risk of asbestosis *do* in fact exist, because Plaintiffs' experts would have no other basis to support their novel 5 f/cc

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[35] "Relative risk" is only one measure of risk in an epidemiology study, and other mathematical approaches are available, including several that do not require placing a 'zero" in the denominator of the equation and that will thus produce measurable risk measurements. *See* Bernard Goldstein & Mary Sue Henifin, *Reference Guide on Toxicology, in* Federal Judicial Center, *Reference Manual on Scientific Evidence, Reference Guide on Epidemiology* 633, 638 n.12 (3d ed. 2011).

[36] Roggli, et al, *supra*, at 468 (critiquing lower estimates as risking "type 2" or false diagnosis errors).

[37] *Id.*

causative level for asbestosis. At bottom, neither of the two articles is sufficient for the Court to overturn *Borg-Warner's* finding as to asbestosis causation levels.

B. The Exposure Evidence and History of Asbestosis Supports Dismissal

The exposure approach in this lawsuit is a thinly veiled attempt to get around the Texas Supreme Court's repeated rejection of "some" or "any" exposure approaches to asbestos causation. Plaintiffs are certainly aware of the dose requirement of *Borg-Warner* and *Bostic*, as applied by Texas appellate courts in numerous cases. They have thus shied away from using the obvious "some" exposure testimony rejected in *Borg-Warner* or the *any exposure* approach rejected by many courts.

Rather than attempt an obvious and unworkable *any exposure* approach, Plaintiffs' expert claims to have developed the required dose assessment. But that assessment is so rife with speculation and error that it is merely another form of *whatever exposure we can identify is enough* approach to litigation. Alcoa's counsel has briefed this issue effectively. *Amici* weigh in only to make certain key points to help prevent a misleading argument from undercutting the effect of the *any exposure* opinions of the Texas courts.

The significant errors in Plaintiffs' new-found "dose" approach include:

- The accepted dose to attribute disease as asbestosis is not 5 f/cc/year but 25 f/cc/yr. The Roggli article and other standard publications make that clear. Nothing has changed since *Borg-Warner* to compel this Court to

depart from that ruling acknowledging the correct minimum exposure level.

- The expert's dose estimate is suspect from the outset because he apparently changed his opinion and calculations repeatedly under cross-examination—a major sign of unreliability.

- The expert's "range" of Ms. Burford's possible clothes-washing exposures is so wide as to be nothing more than speculation. That range runs from 0.8 f/cc/year to 44 f/cc/yr—the first is so low it approaches background exposures,[38] and the second is in the range of shipyard workers and other extensively exposed cohorts.[39] We are not aware of any published peer-reviewed study that has ever found a dose anywhere near 44 fibers/cc/years for at-home clothes washing.[40]

- A large portion of the Plaintiffs' expert's "range" of possible exposures is far below even the 5 f/cc/year standard adopted by Plaintiffs' medical expert. At the lower end of Plaintiffs' estimated range of exposure (0.8 f/cc/years), Ms. Burford would have received a dose that is *five times lower* than today's OSHA standard for working directly with asbestos, eight hours a day for forty years.[41] Thus, the experts' own testimony

[38] The expert's low end of 0.8 fibers/cc year, converted to a daily exposure, is only 0.02 f/cc 8-hour time-weighted average (0.8 divided by 40 years). That level is an order of magnitude lower than the current acceptable OSHA exposure level of 0.1 f/cc. It is also not much more than some of the higher background levels measured in various geographical areas. *See* Sahmel, et al., *supra* (range of ambient or background exposures of up to 0.002 f/cc).

[39] Thomas A. Sporn & Victor L. Roggli, *Asbestosis*, in *Pathology of Asbestos-Associated Diseases* 54 (Victor L. Roggli, et al., eds. 2014) ("Asbestosis occurs in individuals exposed to large amounts of asbestos over long periods of time" and is associated only with "long-term and large-volume exposure, with threshold asbestos fiber dosage of between 25 and 100 fibers per cubic centimeter year," including "spray insulators and asbestos miners and millers.").

[40] The most thorough exploration of take-home exposures from clothes washing is Sahmel, et al., *supra*. This study found the levels of take-home fibers in the breathing zone of the clothes washer to be *1% or less* of the exposures from the work activity itself, and well within the range of ambient or background exposures (see abstract).

[41] OSHA's standard is 0.1 f/cc on an 8-hr time weighted average, which means workers cannot be exposed to more than an 8-hour daily average of 0.1 f/cc over 40 years of employment. The fiber/cc *year* equivalent is 4.0 f/cc/years (40 years x 0.1 f/cc). Spears' claimed range of exposures extends several orders of magnitude *below* the level that OSHA today deems acceptable, even for mesothelioma.

> indicates that Ms. Burford's potential exposures were well below even today's safety guidelines.[42]

Allowing the Plaintiffs' two experts to develop a post-hoc "number" covering such an impossibly wide range of lifetime dose, as a means of complying with *Borg-Warner* and *Bostic*, would undercut the requirement of those cases that a dose assessment be scientifically constructed and result in a reasonable measure of dose. Plaintiffs' estimate is not credible on its face; falls in part outside the range of any alleged causative level; and does not comport with the widely accepted medical 25 f/cc year minimum dose. The testimony is, in short, a Band-Aid intended to evade Texas's required dose assessment. For a take-home case, any scientifically acceptable dose assessment from a non-asbestos worker job would necessarily fall far below the heavy exposures required for asbestosis attribution.

C. The Misdiagnosis of Asbestosis Supports Dismissal

Plaintiffs' case is further undermined by their highly questionable approach to diagnosing asbestosis in the first instance. Plaintiffs' diagnosis is based on circular reasoning. As Plaintiffs' brief argues, Ms. Burford had "uncontested" asbestosis, and she had only one identified asbestos exposure. Therefore, that one exposure must be deemed the cause of her disease. Dose and doubling of the risk

[42] A similar problem undercuts the "infinite risk" argument as well. If the risk is infinite, then it is equally infinitesimally small, as well as large. If this is the best proof Plaintiffs can muster, it is no proof at all.

become irrelevant. This syllogism falls apart at the first step—Ms. Burford almost certainly did not have asbestosis, nor did Plaintiffs develop the best evidence to prove asbestosis when the opportunity to do so was in their hands.

The error in diagnosis is critical because of the virtually nonexistent chance of a take-home asbestosis case, coupled with the high possibility of a false diagnosis. As Dr. Churg states in his widely used text:

> [T]here is a tendency for clinicians and pathologists to regard any diffuse interstitial lung disease in those with a history of asbestos exposure as asbestosis. However, all the other types of interstitial lung disease seen in the general population occur in asbestos-exposed workers. This phenomenon is increasing in importance as progressive lowering of exposure standards greatly reduces the incidence of asbestosis [citations omitted]. ***Some other disease should be suspected when the history does not indicate heavy exposure***, the clinical features are atypical for asbestosis, ***no asbestos bodies can be seen on iron stains in tissue sections,*** or the disease process is morphologically another interstitial lesion.[43]

And as Dr. Roggli noted in his leading article on asbestosis diagnosis, the lungs in people with most forms of pulmonary fibrosis look much like the lungs of a person who incurred asbestosis, making the distinction difficult to discern from scans alone: "The clinical features [of asbestosis] are essentially identical to those encountered with other forms of diffuse interstitial lung disease, such as usual interstitial pneumonia.…"[44]

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[43] Churg, *supra*, at 325.

[44] Roggli, et al, *supra*, at 467.

The problem with Plaintiffs' diagnosis is two-fold. First, since her exposure was from clothes laundering rather than from intensive workplace exposures, it is highly unlikely that Ms. Burford had asbestosis. Ms. Burford is not within the cohorts of heavily exposed asbestos workers known to incur asbestosis. Asbestosis was one of the earliest diseases tied to asbestos exposure. That is because asbestosis occurred with some frequency in very heavily exposed asbestos workers—shipyard workers tearing apart asbestos-laden ships, factory workers dumping and handling bags of asbestos, and insulators who spent years removing loose asbestos from pipes. Those exposures were largely eliminated in the early 1970s due to OSHA's newly imposed exposure limits on workplace asbestos. Thus, Plaintiffs cannot simply assert household asbestos exposure to turn an ordinary pulmonary fibrosis into asbestosis.

To illustrate, here is how the Mayo Clinic describes the incidence of asbestosis in today's workforce:

> Most people with asbestosis acquired it on the job before the federal government began regulating the use of asbestos and asbestos products in the 1970s. Today, its handling is strictly regulated. Getting asbestosis is extremely unlikely if you follow your employer's safety procedures.[45]

[45] Mayo Clinic, *Asbestosis*. *See also* NHS Inform (Scotland's National Health Information Service), *Asbestosis* ("Asbestosis is a relatively rare condition, because it takes a considerable degree of asbestos exposure to cause it, and regulations to restrict exposure have been in place for many years.").

Likewise, the American Thoracic Society notes the decline in cases and need for strong evidence before diagnosing asbestosis today: "In work sites around the world that meet recommended control levels, high exposure to asbestos is now uncommon and clinical asbestosis is becoming a less severe disease that manifests itself after a longer latent interval."[46]

It would be surprising if Ms. Burford's *husband* had asbestosis, because even his exposures are not in the class recognized as sources of this high-exposure disease.[47] It would be even more surprising if his spouse, through the laundering of his clothes, incurred a disease that does not occur among Mr. Burford's own cohort of workers.

The second flaw in Plaintiffs' diagnosis is that they and their lawyers had the most obvious and rational means to prove that her disease was asbestos-associated—her lung tissue. The clearest way to prove that Ms. Burford is, in fact, an extremely rare case of take-home asbestosis would be to present tissue evidence of heavy asbestos exposures in her body.[48] The key would be to demonstrate high

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[46] American Thoracic Society, *Diagnosis and Initial Management of Nonmalignant Diseases Related to Asbestos*, 170 Am. J. Respiratory & Critical Care Med. 691 (2004).

[47] *See* Howard Rockette & Vincent Arena, *Mortality Studies of Aluminum Reduction Plant Workers: Potroom and Carbon Department*, 25 J. Occup. Med. 549 (1983).

[48] *See* Sporn & Roggli, *supra*, at 54 ("The identification of asbestos bodies within tissue sections remains the diagnostic sine qua non in view of the nonspecificity of interstitial fibrosis as a response to diffuse lung injury and the large number of occupational exposures and other disorders that may cause scarring in the lung.").

levels of "asbestos bodies" (structures left behind by the body's immune system trying to destroy fibers) or to show through a lung tissue analysis that she has extremely high amounts of fibers in her lungs consistent with the standard of 25 fibers/cc year exposure.[49] These findings require only a minor biopsy procedure before death or a simple incision and extraction of lung tissue after death. Ms. Burford and her family, for reasons never explained, failed to have either procedure performed, despite being advised by Plaintiffs' lawyers for several years before she died.

Plaintiffs' approach to diagnosis in this case uses circular reasoning to reach a highly questionable outcome, while failing to obtain or preserve the evidence that could most directly prove or disprove the claim. This approach seems too close to the world of misdiagnosis and hidden evidence that Judge Jack shone a spotlight on nearly twenty years ago.

PRAYER

A deep dive into the medical evidence and science of asbestosis is not necessary to resolve this case. Plaintiffs' exposure and causation testimony is contrary to the requirements of science and Texas law, and this case falls well outside the realm of a possible asbestos-induced pulmonary fibrosis. Granting

[49] *See* Roggli, et al, *supra,* at 462, 467-68 (importance of identifying asbestos bodies and lung tissue analysis).

Plaintiffs' request would do significant damage to the work of Judge Jack and the rulings of many Texas courts over the last two decades. *Amici* thus request that the Court reject the appeal and affirm Judge Davidson's ruling below.

Respectfully Submitted,

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Dated: February 14, 2023

CERTIFICATE OF COMPLIANCE

I certify that 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 6,406 words, excluding parts exempted by Tex. R. App. P. 9.4(i)(1).

/s/ Kathleen Frazier
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CERTIFICATE OF SERVICE

I certify that on February 14, 2023, I served a true and correct copy of the foregoing brief on all counsel of record in accordance with Rule 21a of the Texas Rules of Civil Procedure.

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