

No. 12-929

IN THE
Supreme Court of the United States



ATLANTIC MARINE CONSTRUCTION
COMPANY, INC.,

Petitioner,

v.

J-CREW MANAGEMENT, INC.

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

**BRIEF OF *AMICUS CURIAE*
TEXAS CIVIL JUSTICE LEAGUE IN SUPPORT
OF PETITION FOR A WRIT OF CERTIORARI**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Texas Civil Justice League (“TCJL”) is a nonprofit business association that represents Texas trade and professional associations, entities doing business in Texas, and individual Texas citizens in addressing state and federal legislative and

regulatory issues.¹ It also serves as a clearinghouse for information pertaining to the civil justice system, develops educational and advocacy programs with respect to the judicial system, and provides leadership for Texas business and industry in addressing issues of public concern. TCJL has more than 3,000 members that represent all sectors of the Texas economy, accounting for billions of dollars of capital investment and tens of thousands of jobs in Texas. TCJL members engage in business activities that require certainty and predictability in the civil justice system and the strict enforcement of contracts executed by sophisticated parties.

In this case, the Fifth Circuit declined to issue a writ of mandamus compelling the trial court to enforce a valid forum-selection clause in a contract for the construction of a facility in Texas and to dismiss the case for “improper” venue under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406(a). Rather, the Fifth Circuit upheld the trial court’s ruling that forum-selection clauses are subject to a discretionary balancing test under the convenience transfer rules of 28 U.S.C. § 1404(a). In light of the number of contracts between entities conducting significant and ongoing business operations in Texas, TCJL members have a direct and substantial interest in this question.

This brief is filed with the written consent of all parties pursuant to this Court’s Rule 37.2(a). Copies

¹ Pursuant to this Court’s Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Texas Civil Justice League or its members made any monetary contribution to the preparation or submission of the brief.

of the requisite consent letters are being filed herewith.

STATEMENT OF THE CASE

TCJL adopts the Statement of the Case contained in Petitioner's Petition for Writ of Certiorari (Pet. 6-10). In addition, TCJL members routinely negotiate and rely on forum-selection clauses in their day-to-day business operations and depend on the state and federal judicial system strictly to enforce valid contracts.

SUMMARY OF ARGUMENT

In this case, the Fifth Circuit's decision contradicts Texas law and encourages forum-shopping, putting Texas businesses at a competitive disadvantage in contract disputes over activities conducted in the state. Costly and extended satellite litigation simply to determine the choice of venue where a contract provision stipulates an otherwise permissible and appropriate forum is antithetical to the stable, predictable, and efficient administration of justice. It also has deleterious effects on the ability of businesses to assess and plan for the potential burdens of dispute resolution, thus skewing the valuation of contract services and introducing unnecessary distortions into the free market.

ARGUMENT

I. TEXAS LAW IS CLEAR THAT FORUM-SELECTION CLAUSES ARE ENFORCEABLE

The Texas Supreme Court has repeatedly granted writs of mandamus to enforce forum-selection clauses under a clear abuse of discretion

standard. *In re ADM Investor Services, Inc.*, 304 S.W.3d 371, 374 (Tex. 2010); *In re AIU Ins. Co.*, 148 S.W.3d 109, 114-115 (Tex. 2004). A trial court abuses its discretion in refusing to enforce a forum-selection clause unless the party opposing enforcement clearly shows that: (1) enforcement would be unreasonable or unjust; (2) the clause is invalid for reasons of fraud or overreaching; (3) enforcement would contravene a strong public policy of the forum where the suit was brought; or (4) the selected forum would be seriously inconvenient for trial. *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231-32 (Tex. 2008). The party challenging enforcement must meet a “heavy” burden of proof. *AIU*, 148 S.W.3d at 113. Moreover, when the inconvenience of litigating in the chosen forum is foreseeable at the time of contracting, the challenging party must “show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.” *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1982); *see also Lyon*, 257 S.W.3d at 234.) The Fifth Circuit opinion stands in stark contradiction to Texas law.

II. THE FIFTH CIRCUIT’S DECISION IN THIS CASE ENCOURAGES CONTRACT EVASION AND FORUM-SHOPPING.

If the Fifth Circuit’s decision stands, the Respondent will have successfully evaded a freely negotiated, fair, and uncoerced agreement to litigate a dispute in a Virginia court of otherwise permissible venue. Moreover, the Respondent will have evaded its bargain without any showing of difficulty or inconvenience, much less a showing “that trial in the

contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.” The Fifth Circuit has thus encouraged parties to shop for a favorable federal forum in Texas for no other reason than that the party now finds it “inconvenient” to live by its word. TCJL submits that no positive public policy objective is served by allowing forum-shopping of this sort and that absent far more extreme circumstances, a party doing business in Texas should be held to the terms of its bargain.

III. THE FIFTH CIRCUIT’S DECISION PLACES BUSINESSES CONDUCTING ACTIVITIES IN TEXAS AT A DISADVANTAGE VIS-À-VIS COMPETITORS IN OTHER STATES AND NATIONS.

Texas has experienced rapid population and economic growth in the past three decades. The state’s strong natural resource base, communications and technology infrastructure, regulatory and liability environment, and relatively low cost of living have attracted significant capital investment and new employment, making Texas one of the best places in the country to conduct business. Nevertheless, as states and foreign nations increasingly compete for investment dollars and employment, even relatively small disturbances in the legal environment can change a business’s cost calculations enough to affect adversely a state’s economic attractiveness and have real impact on business activity.

A business’s ability to enforce contracts in a particular state’s judicial system is a significant consideration when attempting to assess and value

the potential cost of dispute resolution, just as exposure to tort or regulatory liability must be carefully weighed when committing the resources of the business. Uncertainty in this regard increases the cost of doing business and enhances the appeal of a forum with bright line legal rules that, among other things, ensure the enforceability of contracts without protracted and wasteful litigation.

Unfortunately, the Fifth Circuit's decision in this case creates such uncertainty. If the decision is not overturned, a business seeking to contract in Texas will have to account for the real and lost opportunity costs of litigating the appropriate forum in which to resolve a dispute, creating an unnecessary burden with no corresponding public policy benefit. Moreover, the decision will discourage parties from agreeing in advance to certain forum-selection choices simply because the law itself is inconsistent and unstable. This state of affairs is hardly a recipe for the efficient administration of justice at any level and should be corrected.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and reverse the Fifth Circuit decision in this case.

Respectfully submitted,

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