ORAL ARGUMENT — 97-1162, 1163, 1164, 1165, 1166
9/9/98
OWENS CORNING V. CARTER

CORNYN: The questions presented for the court's decision are: First of all, can Texas limit the right of foreign litigants with no connection to this state whose cause of action arose elsewhere to sue in Texas courts? The answer to this question, we submit, is unequivocally yes. Stated differently: Are Texas taxpayers compelled by the Texas and Federal Constitutions to subsidize litigation by persons having no connection with this state, and whose claim arose out-of-state? We would just as unequivocally say the answer to that is, no. We ask the court to decide there is no constitutional right to forum shop.

Regarding the privileges of immunity's challenge, this case boils down to what kinds of distinctions can be made between Texas residents on one hand, and residents of other states whose cause of action arose there. This court will not be writing on a clean slate. Forty-four states have borrowing statues like that challenged here. None has ever been invalidated on privileges and immunities grounds.

ENOCH: So I am clear on your position. Under 71.031 provision it says: If the only connection to Texas is that the injured person is a Texas citizen they can sue here. But the next provision says: If they don't have that connection, then they can't sue here. And your position is that Texas can give a Texas citizen rights that it does not give to other citizens of the country?

CORNYN: That's true. And there is at least 2 US SC decisions which have so held. The *Douglas* and *Mayfield* cases unequivocally held that Texas may prefer its own residents to those who have no connection with the state and whose claims arose out-of-state.

The factual scenario given rise to this legislation that was passed in 1997 is important. It starts with this court's decision in *Alfaro*, in which the court held that §71.031 of the Tex. Civil Rem. & Pract. Act abolished the common law doctrine of forum non conveniens in Texas. The court held in that decision that out-of-state litigants whose causes of action arose out-of-state had a right to file their claims in Texas courts. In 1993, the Texas legislature overruled the *Alfaro* decision, but exempted asbestos cases, the kind of cases that are at issue here. Then in 1997, the legislature decided that it needed to patch or to fix the asbestos exemption to the *Alfaro* statute, and enacted the 3 statutes in dispute here: the borrowing statutes, §71.031(a)(3); and the other two statutes challenged here, 71.052(c), and (b).

The factual record the legislature was looking at is important because in 1993, there were less than 10,000 asbestos claims in Texas state courts, and only a fraction of those arose out-of-state. By 1997, that figure had mushroomed to 47,000 claims with more than 40,000 of them arising out-of-state.

The legislature was convinced on good evidence that the combination of a favorable statute of limitations and no forum non conveniens law as it applies to asbestos cases was a magnet that was drawing a disproportionate number of these cases to Texas.

In other words, the legislature identified a problem - thousands of out-of-state lawsuits with no connection to this state were flooding Texas courts, and imposing an unreasonable burden on local and state taxpayers, and on limited judicial resources. And the legislature addressed that problem by passage of these statutes in a fair and a reasonable way.

PHILLIPS: Let's separate out the legislature's decision to do that for future cases, and focus on the effect that the legislature actually purported to have on pending matters.

CORNYN: Judge Dietz held that the borrowing statute was unconstitutional as applied to cases that had accrued but had not yet been filed, but upheld these statutes on all other grounds other than privileges and immunities grounds. And of course, the appellees have brought those claims that they lost on in the TC here for the court's decision.

The TC also had before it, and you have before it here, whether these statutes operate retroactively in violation of art. 1, §16 of the Texas Constitution, and also whether it violates the open courts provision of the Texas Constitution. I guess the simplest answer to whether these are unconstitutionally retroactive is that they don't bar vested claims. Under this court's recent decision in the *Quick* case, which is a reiteration of a long line of authority...

ABBOTT: Before you say that. When you say vested claim, you mean a claim that's been filed as a lawsuit?

CORNYN: I should have said vested rights, which means a final judgment. An accrued claim is not a vested right protected under the retroactivity provision of the Texas constitution - under this court's decision in *Quick v. City of Austin* and other long line of cases.

The important distinction as well is that the borrowing statute does not extinguish a cause of action nor do any of these other two statutes. These are purely procedural statutes that are choice of law rules, the borrowing statute is, saying that in order to prevent the flood of cases from coming from Alabama to the State of Texas, that the statute of limitations in Alabama should be applied to those claims. This kind of borrowing statute has long been held constitutional by the US SC. Back in 1920 in *The Canadian Northern Railway Co. V. Eggen*, the court held that a borrowing statute like this passed constitutional muster under the privileges and immunities clause. The court held that the constitutional requirement of that clause is met if the nonresident is given access to the courts on the terms that are of themselves fair and reasonable even though they may not be technically the same as those accorded to a resident.

SPECTOR: Must you provide a reasonable time for suits to be commenced?

CORNYN: I presume you're referring to appellees' argument of the *Highland Park* case. The analysis there requires some period of time for them to bring their lawsuit. I would say the answer to that is, no. Their right to file the lawsuit here in Texas is purely a creature of statute. Section 71.031, it's a matter of legislative grace that can be withheld or withdrawn at any time. They have no reasonable expectation of bringing a suit in Texas courts based on a claim that arose in Alabama. Texas, in fact, could hold under the *Chambers* case that we cite, that in fact, Texas courts could decline to hear these kinds of cases at all, and to merely hear asbestos cases arising in the State of Texas. And so the Texas legislature has indeed been more generous than required by the controlling authorities of the US SC.

HECHT: The question though is, can we decide not to hear nonresident's other jurisdictional claims rising under other jurisdictions, but hear Texans' claims arising under the law of other jurisdictions? Can we make that discrimination?

CORNYN: The SC has clearly held that the court can exclude out-of-state claims by non Texas residents arising in other states, and prefer to hear only Texas cases brought by Texas residents. These statutes apply only if at the time the cause of action arose, that the plaintiff was not a Texas resident, and the cause of action accrued in that other state. And so the Texas legislature can decide that if it is a Texas resident that it may prefer its own citizens to the use of court facilities and the civil justice system that the Texas resident in fact subsidizes through payment of their tax dollars, and to exclude non residents entirely.

ENOCH: Along that line, does the breadth of the SC's view on this extend to say a business enterprise which meets the long-arm jurisdiction statute where you could sue them, and you could bring them into a state court, does it go to the breadth of saying that we will allow Texas citizens to go to the far reaches of the jurisdictional personal jurisdiction issue and bring a foreign defendant into Texas courts to defend, but we won't permit a foreign plaintiff to use the far reaches of the jurisdiction to bring in a foreign defendant to try this? In other words, looking at the defendant's point of view, can Texas prefer bringing Texas lawsuits and bring that defendant down here, but not let that defendant come down here when a plaintiff is not of the state?

CORNYN: The forum non conveniens statute applies assuming there is already jurisdiction against the defendant. And so I guess the answer is, yes, the legislature can prefer a Texas resident who files suit against an out-of-state corporation over which jurisdiction may be acquired in the state of Texas, and deny access on conditions to an out-of-state resident altogether. As I said, the legislature given the fact that they could under the *Chambers* decision, decline to allow cognizance of these claims in Texas courts at all. Surely then it must be able to do something short of that and allow access to Texas courts based on certain conditions. And the legislature of course was confronted with an emergency, the borrowing statute Senate Bill 220 was passed as an

emergency bill that became immediately effective upon passage as opposed to the traditional 90 day waiting period, September 1, because of the flood of cases that were coming into the Texas courts.

The two other statutes, the one that compels the capping of punitive damages or else a dismissal in the event that there is no voluntary agreement to cap punitive damages, and the mandatory dismissal statute are a rational response to what the legislature saw between the time the legislature convened in Jan. 1997, and April 4, 1997, there were additional 4,900 claims filed in an effort to beat the statute. On May 28, 1997, one day before this statute became effective, there were 2,800 claims filed by a single law firm in an effort to beat the statute. And so, we say that the legislature may constitutionally without running into the open court's doctrine or the retroactivity prohibition of the Texas constitution and without violating the privileges and immunities clause of the US Constitution address a real problem, and that is an attempt to subvert the legislature's efforts to protect the limited judicial resources that we have available in our state courts.

I might just say a word about the fact finding that Judge Dietz purported to make. Of course, we have at present time district judges in Texas in Cass county, who have held these statutes to be constitutional. I've just been advised that in Lamar county there's been a contrary decision holding these statutes unconstitutional as Judge Dietz did, and perhaps, even on additional grounds some of which are discussed here. But of course as this court knows, it's inappropriate for an individual DC to make fact findings at odds with what the legislature has determined the reasons for its actions to be, the basis for its action that would be contrary for the legislature's reasons for passing the statute in the first place.

OWEN: One thing you have not talked about is subsection (b), the statute that requires dismissal on motion of the defendant if you file within a certain time frame. Could you address why that's not an ex post facto law or taking away vested rights?

CORNYN: It's not a vested right. Because under this court's authorities once an accrued claim has been reduced to final judgment is it a vested right that's protected under the retroactivity provision of the Texas Constitution. This is a mandatory dismissal. It's a little different from forum non conveniens, which is a discretionary decision by a TC. But there is no case that would prohibit where it's been held that the legislature would be prohibited from passing such a statute. If the legislature could withhold jurisdiction altogether of these foreign claims, then surely they may allow these claims to proceed on some conditions. And this is one of the conditions in addition to §c, which requires a punitive damage cap election.

OWEN: But (b) there is no condition under which they can proceed?

CORNYN: Right. It's basically designed to address the attempt to subvert the legislature's attempt to pass a statute...

OWEN: Doesn't that run afoul of our Texas Constitution though by being retroactively affected?

CORNYN: No, because the only claims against which that is directed are accrued claims, that is somebody who claims to have an asbestos lawsuit. But since it's not a vested right, because it has not yet been rendered reduced to judgment, under *Quick v. City of Austin* in an unbroken chain of authorities by this court, then it does not run into the retroactivity prohibition of the Texas Constitution.

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APPELLEES

GOFFMAN: Justice Cornyn has presented the court with an articulate constitutional defense of the traditional common law doctrine of forum non conveniens and of borrowing statutes in general. But what I would like to do is focus the court's attention on the actual statutory provision of 71.052 that's at issue here, which bears very little resemblance to the common law doctrine of forum non conveniens that was at issue in other cases which Justice Cornyn cited, and focus the court's attention as well on the particular manner in which the borrowing statute that the Texas legislature has passed has been applied, which is to cutoff the rights of Alabama asbestos victims before they've had any opportunity to discover their injuries.

I am going to start with 71.052(b), and move on later to the borrowing statute. First of all, as I've just alluded to, 71.052 is not a forum non conveniens provision. It is a mandatory, not a discretionary provision as the traditional common law doctrine is. It requires no balancing whatsoever of any public or private interest as the common law doctrine does, as well as 71.051, the prospective forum non conveniens provision that the legislature enacted at the same time. And it has no requirement as the common law did and as 71.051 does that there be an alternative forum where the plaintiff can get an adequate remedy for their claim.

ENOCH: On that score, when you talk about causes of action that have expired before they've had a chance ___________, are you talking about Alabama statute of limitations issues or Texas statute of limitations issues?

LAWYER: We're talking here about the Texas borrowing statute applying Alabama statute of limitations.

ENOCH: So your argument really is that the Alabama statute of limitations is what's affected their rights, because otherwise you're arguing that in Texas the statute of limitations would not have run and they would still have a cause of action?

LAWYER: That's correct. If as would have happened at common law with respect to

people coming from Alabama asserting an Alabama cause of action in a Texas court, if the Texas statute of limitations is applied to the claim as it would have been at common law, their claim is not barred. It's barred by the borrowing statute taking the Alabama limitations rule, which does not include a discovery exception.

ENOCH: I guess the statute of limitations would apply if they came to Texas even if the cause of action didn't arise in Texas?

LAWYER: That's correct.

ENOCH: Because we'd say that's a remedial statute, not a ______ choice of law question.

LAWYER: Texas, like virtually every other jurisdiction at common law applied the law of the forum with respect to limitations rules. And so at common law had this claim been brought by Mr. Horton, or Mr. Moore, or the other clients that I represent in a Texas court, Texas limitations law would apply.

ENOCH: And so what happens, at least when you're talking about 71.052, the argument here is that they had a cause of action that had accrued, the legislature came in and then shortened the statute of limitations on without giving a reasonable period of time to file their lawsuit.

LAWYER: That's the argument with respect to art. 1, §16 of the Texas Constitution, and that is our argument. But with respect to the privileges and immunities clause of the federal constitution, I think Justice Hecht in his question to Justice Cornyn pointed out where that argument comes from. And that is, Texas law 71.052, does not permit a TC to dismiss a claim by a Texas resident that arises in another jurisdiction. Even if there is nothing that that claim has to do with Texas other than the fact that the plaintiff lives in Texas, Texas courts are not permitted to dismiss that claim under §71.052 or 71.051 for that matter. And for that reason, because there is that discrimination on the basis of state residents or state citizenship, the privileges and immunities clause of art. 4, §2 of the US Constitution applies, and at that point the burden shifts to the defendants or to the government to justify that discrimination.

HECHT: What troubles me about that argument the most is that you could take it into account in forum non conveniens decisions, could you not?

LAWYER: Yes.

HECHT: And that wouldn't violate the privileges and immunities clause?

LAWYER: It is one factor to take into account under a traditional forum non conveniens,

but it is not a determinative factor.

HECHT: Let me be sure about this. If a court decided not to dismiss on forum non conveniens a case by a Texas resident on a claim that arose outside the state, but did reach the opposite conclusion in a case involving a non Texas resident, that would not violate the privileges and immunities clause?

LAWYER: I think if the TC had made a fact finding that these two cases are exactly alike except for the fact that the cause of action of one involved a Texas resident and the other not, I think that would be an abuse of discretion and would in fact violate the privileges and immunities clause. Residents is one factor to take into account under the balancing test in forum non conveniens, but it is not the outcome determinate factor. And when it becomes the outcome determinative factor, that becomes exactly the kind of discrimination that the privileges and immunities clause was intended to prohibit, and that doesn't end the inquiry. At that point, the burden shifts to the government and they have to show a substantial reason for the discrimination against citizens of other states. And then they have to show as well that there is a substantial relationship between that reason and the actual discriminatory effect. And on this record Judge Dietz made a fact finding that no substantial reason exist. And I submit contrary to what Justice Cornyn said, that it is not the role of TC's to second-guess the legislature that that standard, which this court has articulated several times, is only applicable in the rational basis context when you have a heightened level of constitutional scrutiny. Here you've got an intermediate level of scrutiny that applies as a matter of federal constitutional law under the privileges and immunities clause, the same standard that would apply under federal law in a gender discrimination case, or in a case involving restrictions on commercial speech.

When you've got an intermediate level of constitutional scrutiny it makes no sense and it is absolutely not appropriate for the TC to defer to the legislature's finding. The TC has a duty to look and see if the government or the defendants, the proponents of the statute have met their constitutional burden of coming forward with evidence that there is a substantial basis for the discrimination.

ABBOTT: Regardless of whether it's the substantial basis test or the rational relation test, is it the concept of what the TC is doing the same, and that is reevaluating what the policy decision was of the legislature? And how can the TC in listening to evidence reevaluate whether or not what the legislature did was based upon some substantial state interest?

LAWYER: I think that that's what courts do in applying the law to the facts in any event.

ABBOTT: When courts are applying the law to the facts typically it is not a situation where they are evaluating policy decisions made by the legislature. So let's focus solely upon reevaluating policy decisions made by the legislature.

LAWYER: I think that under an intermediate level of constitutional scrutiny, that the role of determining whether or not a basis or a governmental interest that has been articulated by the legislature for justifying some discrimination, that role no longer is one where the court is to defer to the legislature. The role becomes one where it is the duty of the court to determine whether the interests articulated is in fact substantial in a constitutional sense.

ABBOTT: What SC decision supports that?

LAWYER: There's a long line of decisions in the gender discrimination context. And as I say, the intermediate level of scrutiny that applies under privileges and immunities is identical: substantial interest; and there must be a substantial relationship between the discrimination and the interest articulated.

ABBOTT: What I'm talking about specifically is SC decisions that say, that the TC does not defer to the legislative policy analysis and that appellate courts cannot undertake a de novo review.

LAWYER: The gender discrimination line of cases is a long line of cases. They address that and say that it is the role of the TC to make sure that the government has met it, for the proponent of the statute has met its burden of showing the substantial basis. And the most recent articulation of that that goes into that in some detail is by the 11th circuit in *Engineering Contractors Ass'n of South Florida v. Metropolitan Dade County*, 1997 cert denied, in which they reviewed under a clearly erroneous standard the TC's finding that there wasn't a substantial basis proven by the government to justify an affirmative action program that had gender discrimination within it.

HECHT: Don't we at least have to defer to their judgment calls about what the facts are? In other words, maybe a burden on the state courts is not enough to justify this under the privilege and immunities clause. But whether there is a burden or not, isn't that a legislative call?

LAWYER: I think not. It clearly would be if we were looking at this under a rational basis level of constitutional scrutiny. But I think as a matter of federal constitutional law, and you need to look at *Engineering Contractors Ass'n of South Florida* is, in fact, the responsibility of the TC to make that factual determination. And then once that factual determination has been made by the TC, it gets reviewed under the same standard that factual determinations always get reviewed. In this context, we're sort of in an odd direct appeal context. I assume that it would be against the great weight and preponderance of the evidence.

ENOCH: I'm not sure - I guess I have the same question. Is there facts in the record for the TC to make the conclusion that the statute is appropriately supported by the legislative facts? It seems to me it is not binding on this court what the TC found as the legislative facts. It seems to me your argument really is, that the proponents of the statute in the face of your challenge did not

produce evidence supporting the factual basis for the statute. And you're not really here arguing that Judge Dietz' conclusions to the opposite, the facts are the opposite of what they said, is really not what you're supporting. You're simply saying there is not factual bases upon which the TC could have found this statute constitutional in the face of your challenge, and we're free to look at those same legislative facts and conclude one way or the other? Either the facts support it or don't and you're argument is that the proponents had the burden? So if there's a question of meeting that burden, then they must lose?

LAWYER: I think that they have a burden, both as a factual burden and a legal burden. And I think they get mixed together here. But as to whether or not for example there is any court backlog or docket backlog or access to courts by Texas residents that is being created by the filing of out-of-state asbestos lawsuits, that's a matter of fact that I believe was up to Judge Dietz to decide. He made a finding with regard to that and I think this court cannot overturn that finding without concluding that it's against the great weight and preponderance of the evidence.

But no matter how the court comes out on that debate this statute still doesn't satisfy the constitutional burden, because there are far less restrictive alternatives that the legislature could have enacted, but they chose not to.

HECHT: Would it violate the privileges and immunities clause for Alabama to pass 71.052?

LAWYER: If they created a situation where there was mandatory dismissal of claims by out-of-staters, yes, I believe that would. In fact, if there was an exclusion for Alabama residents who had a claim that arose out-of-state, then, yes, that would violate the privileges and immunities clause.

HECHT: If it turned out that every other state in the country had a longer statute of limitations and applied the discovery rule why would it violate it?

LAWYER: If I understand your question, I think we're skipping to the borrowing statute issue.

HECHT: No, we're still concerned about the adequate remedy you talked about earlier.

LAWYER: Okay. That would be one provision that Alabama would I guess - it wouldn't be a totally analogous situation, and the alternative forum part of it wouldn't be as onerous ...

HECHT: It wouldn't be onerous at all?

LAWYER: Yes. But on the other hand, it would still be a mandatory provision that wouldn't require any balancing, and there would still be less restrictive alternatives that the Alabama

legislature could enact that they chose not to that would in fact mean that there wasn't a substantial relationship with a substantial state interest. So it would be a less burdensome statute in the sense that probably there are alternative forums available for people other than Alabama, at least in the context of toxic exposure cases. But it would still be a more onerous statute than is required to advance the state interest, which is keeping cases out if they don't have a connection with Alabama.

HECHT: What troubles me here, is the argument that Alabama is out of line, it sort of drives the constitutional analysis about what Texas can do. We're not here concerned about whether New York or Montana is out of line, and I don't see how that can be under the privileges and immunities clause?

LAWYER: The privileges and immunities clause doesn't have a double(?) maiden(?) do it exception. In other words, the fact that Alabama and the Alabama SC's decision is the source of why Alabama residents don't have an adequate remedy doesn't change the fact that the analysis under the privileges and immunities clause looks at what Texas provides to its own residents compares that with what it provides to in terms of access to the courts for citizens of other states, if there is a discrimination there, which there is under 71.052, 71.051, and the borrowing provision of 71.031, that doesn't apply to Texas residents even if their claim doesn't have anything to do with Texas. And because there is that exclusion and because there is that discrimination, you have to look and see whether or not the burden has been satisfied, and here it simply is not.

SPECTOR: You were going to discuss less onerous alternatives?

LAWYER: Yes, and thank you for bringing me back to that. There are at least three, and we pointed them out in our brief. First of all, they could have applied 71.051 or the common law doctrine of forum non conveniens retroactively so that the cases that are now subject to mandatory dismissal could have had applied to them the common law doctrine or 71.051, which is the statement by the legislature of what the prospective policy of this state is going to be with respect to keeping cases in Texas.

If you can satisfy today, as a litigant who files their lawsuit today, a TC judge that you have met 71.051, then your case according to the legislature has sufficient connection with the state to remain here. And yet there are many people who are mandatorily dismissed under 71.052, who in fact would satisfy 71.051. And I submit virtually all Alabama asbestos plaintiffs fall in that category.

And secondly, even if you could just impose a higher filing fee on out-of-state residents who file their claims in Texas, it would eliminate or offset any increased costs that it imposes on the Texas court system.

Or third, you can do what many TC's around the state are already doing, and

have common issues dockets devoted to asbestos cases, which will streamline the process and allow them to go forward smoothly as the legislative record and the factual record in the TC reflects.

ABBOTT: What about this notion, and that is, that if these 40,000 cases are brought here, and let's say that they are grouped together 25 cases at a time in the various TC's that handle these, and not every TC in the state handles these cases, there are only let's say 100 TC's that handle these cases; and if we have 40,000, that means that each court is going to have 400 of these cases; and if they are grouped together 25 at a time that's going to take a lot of years just to handle those cases. With that being the situation, why would that not be depriving Texas citizens of their right of access to the courts in getting their asbestos claims heard and their non asbestos claims heard?

LAWYER: Because the common issues can't be heard commonly by one judge that sits once a month determining whatever pre-trial issues have come up, and they are often common to all of the cases. And that process has been in place in Dallas and Harris counties. And the testimony of the asbestos common issue judges in those two jurisdictions was that there was no deprivation of access to the courts for Texas residents or for any other type of claim, any other non asbestos type of claim, because of the streamline process.

HECHT: Let me ask you though again just to follow-up on something I asked about earlier. Say Alabama had a very short statute of limitations just across-the-board, say a 3-month statute of limitations for all claims that can be brought in the state of Alabama, and the Alabama SC upheld that. Couldn't the surrounding states do virtually anything to keep Alabama citizens from crossing the line and trying to get what obviously they would want but can't get in their own state: Access to the courthouse to urge these claims?

LAWYER: The answer is, if what they do to keep them out is apply the traditional common law doctrine, apply a balancing test that is equally applicable to residents of their state, apply a borrowing provision that is equally applicable to residents of their state, then I think the answer is, yes, they could constitutionally do that.

HECHT: That looks like the constitution requires you to treat your own citizens poorly because Alabama has chosen to treat its citizens poorly?

LAWYER: The constitution requires as a matter of analysis to look at how you're treating your own citizens - vis-a-vis - how you're treating citizens of other states. That's how the analysis works. And for better or worse, that's what the US SC has said.

PHILLIPS: But are there any privileges and immunities cases from any other context that involves cases where the state back home is providing abnormally low benefit. The issue is what does another state have to do?

LAWYER: I'm not aware of that, except to the extent of obviously the borrowing statute case, *Canadian Railway v. Eggen*, that Justice Cornyn cites, is an analogous situation and obviously directly on point with respect to the borrowing provision. In *Canadian Northern Railway v. Eggen* what Justice Cornyn ignores about that decision is that not once, not twice, but three separate times in the opinion, the court emphasizes that the discrimination by excluding state residents from the application of the borrowing statute is only permissible to the extent that the borrowing statute allows a reasonable time for the foreign plaintiff to access the courts, a reasonable time that it will allow an ordinarily diligent person to access to the courts, which of course with respect as applied to Alabama asbestos plaintiffs, this borrowing provision does not and it fails the privileges and immunities test under *Canadian Northern Railway v. Eggen* for that reason.

HECHT: But you do think that the privileges and immunities jurisprudence is different today than it was at the early part of the century?

LAWYER: It is different today than it was in the early part of the century and our brief discusses that. The one thing that they say in the reply brief about that point is in *Missouri v. Mayfield,* that was decided two years after the *Toomer v. Whitsel* case, which is sort of the landmark modern privileges and immunities case.

The thing about *Missouri v. Mayfield* is that it did not involve an attack on a forum non conveniens statute on the basis of the privileges and immunities clause. There is a sentence in the case that is totally dicta about how privileges and immunities is not violated by traditional forum non conveniens doctrine. But the parties did not argue and the court did not purport to decide whether or not privileges and immunities would actually be applicable. What was at issue there was Georgia had determined as a matter of preemption that it could not apply forum non conveniens to FELA cases because the US SC had said, that when you're in federal court a federal court cannot dismiss a FELA case on the basis of forum non conveniens. The US SC said to the Georgia SC: "He did not have to do that. You could have determined as a matter of your state law. Despite what we said, you are not preempted." And that's all that that says and that's been reinforced since then. But the court was not there saying that under a modern privileges and immunities analysis this passes muster. And of course, it would be a very different animal and was a very different animal than 75.052 in any event.

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REBUTTAL

CORNYN: What the appellees are urging this court to hold is that while the Alabama statute of limitations may be constitutionally applied in Alabama, it may not be constitutionally applied in Texas. And of course, if they're right they have greater rights in Texas than they have in their home state, which is a bazaar situation indeed.

The privileges and immunities clause has never been interpreted to require that Alabama residents be given greater rights in Texas than they enjoy in their own state.

Mr. Bauthman argues that this statute is different because it requires a mandatory dismissal. Statute 71.052(b). But as the US SC held in *Chambers,* it's against a privileges and immunities challenge, a state may choose not to allow any out-of-state residents to sue in its courts. In that case it involved a wrongful death statute, which recognized only claims brought on behalf of decedents who are from Ohio. And no one from any other state could file a lawsuit and recover for wrongful death in an Ohio court. And the US SC expressly held that that was permissible as against a privileges and immunities challenge.

Also under *Mayfield* a 1950 FELA case, Justice Frankfort wrote an opinion that said, "That the state may prefer its own residents as against non residents, and choose not to even entertain FELA cases brought in state courts." Those if not exactly the same are equivalent to the mandatory dismissal provision of 71.052(b). It's not common forum non conveniens, but the US SC has held that even if it's not, if it's in essence a refusal to hear the claim outright, that that still passes privileges and immunities muster.

HECHT: I understand the appellant to argue that privileges and immunities clause does not - the appellants themselves argue - that the privileges and immunities clause does not permit discrimination at the time of filing, only at the time the claim arose. But doesn't this statute discriminate at the time of filing, because it allows Texans to bring claims that arose outside the State, but not non-Texans?

LAWYER: Our answer to that is where residency at the time of the claim arose and the time of filing are obviously different times. But the legislature in essence is entitled to hold to address the evil of forum shopping by those folks who are residents of other states when their claim arose out-of-state. And we don't think that that distinction between the time that the claim arose and the time the claim was actually filed is unconstitutionally discriminatory.

The standard of review that Mr. Boffman argues for has never been held to apply in a privileges and immunities context. They have been unable to cite a single case, and indeed, we've been unable...

ABBOTT: What about the *Engineering Contractors* case?

LAWYER: You're talking about the intermediate level of review that he says applies in a gender discrimination case under an equal protection analysis. He says it's the same test that's been applied in a privileges and immunities context, but indeed the intermediate scrutiny level of review is a equal protection standard of review, and has never been held by the US SC in either the *Mayfield* case, which expressly held that there was no violation of privileges and immunities clause in that

case. They didn't purport that ____ intermediate scrutiny of standard of review. And when *Mayfield* was reaffirmed in *American Dredging* in 1994, there was no statement by the court, no implication that a different standard of review, one that would be applied with equal protection analysis in a gender discrimination case would be applied in the privileges and immunities context.

Fundamentally, what the appellees are arguing is that this court should not defer to the legislature's policy judgment, that these out-of-state cases are placing an undue burden on Texas taxpayers and on limited judicial resources in this case. They say, "well they could have passed a different statute, which might have accomplished some of what they intended," but this court's role is not to rewrite the statute. And we ask the court to affirm the constitution and the three statutes in all respect.

ABBOTT: If the court were to rule in your favor, what happens to these plaintiffs' claims?

CORNYN: Presumably the claims that were subject to 71.052(b) would have to be dismissed. And we submit they could not be refiled, because to allow that would subvert the legislative intention. It doesn't make much sense to say they have to be dismissed, but then you can come back and refile them later on.

ABBOTT: Is there some other forum where they would likely be refiled?

CORNYN: Ohio. They've got a discovery rule and no borrowing statute, and they could file suit there, and I believe there are a handful of other states with no borrowing statute.