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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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CHARLES SALES and PATRICIA SALES, a married couple,

Respondents,

v.

WEYERHAEUSER COMPANY, a Washington Corporation,

Petitioner.

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MEMORANDUM OF AMICUS CURIAE  
ASSOCIATION OF WASHINGTON BUSINESS  
SUPPORTING PETITION FOR REVIEW

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ORIGINAL

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## I. INTRODUCTION

The Association of Washington Business (“AWB”) files this amicus curiae memorandum urging the court to accept review of the underlying petition. Rarely does a decision of the Court of Appeals evoke, as does the holding below, all four criteria enumerated in RAP 13.4(b). By holding the trial court abused its discretion when it failed to require Weyerhaeuser waive a federally protected right in exchange for an inconvenient forum dismissal, *Sales v. Weyerhaeuser*, 138 Wn. App. 222, 234, 156 P.3d 303 (2007), the Court of Appeals misapplied the abuse of discretion standard as defined by the Supreme Court and Courts of Appeal, RAP 13.4(b)(1)-(2), created a significant question of federal constitutional law, RAP 13.4(b)(3), and raised an issue of substantial public importance to Washington-based corporations, plaintiff and defense litigants, and trial courts throughout the state. RAP 13.4(b)(4). The court should grant review.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

AWB, founded in 1904, is the state’s oldest and largest general business trade association. AWB represents over 6,500 member businesses, of whom 85 percent are small businesses employing fewer than 50 workers, and who are engaged in all aspects of commerce in Washington. In total, AWB members employ over 650,000 individuals in

Washington. Acting as the state's chamber of commerce, AWB is an umbrella organization representing the interests of 114 trade and business associations engaged in industry-specific activities as well as 56 local and regional chambers of commerce across Washington.

The procedural issue in this case is of obvious interest to any Washington company. At stake are fair, predictable, and clearly defined forum rules when an out of state litigant sues a Washington-based business. Unfortunately, the Court of Appeals decision fails to meet this interest.

### **III. ISSUES OF CONCERN TO AMICUS CURIAE**

Does the Court of Appeals holding requiring Weyerhaeuser to waive its federally protected right to diversity jurisdiction in exchange for a proper *forum non conveniens* dismissal violate the Supremacy Clause of the U.S. Constitution? *Cf. Pet. for Review* at 1 (Issue 1).

Does the Court of Appeals holding that the trial court abused its discretion in failing to so condition dismissal of this case conflict with prior *forum non conveniens* case law and misapply the abuse of discretion standard?

#### IV. STATEMENT OF THE CASE

For brevity's sake, AWB adopts, as if set forth herein, the Statement of the Case provided by Weyerhaeuser in its *Petition for Review* at pages 2-4.

#### V. REASONS TO ACCEPT REVIEW

##### A. THE COURT OF APPEALS DECISION RAISES A FEDERAL SUPREMACY CLAUSE ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE.

The Court of Appeals, conducting a de novo review of the trial court decision, conjectured that Arkansas would be an inadequate alternative forum because of “Weyerhaeuser’s refusal to stipulate to [an] Arkansas state court forum.” *Sales*, 138 Wn. App. at 234. The Court of Appeals continued:

The trial court could have solved this problem by requiring Weyerhaeuser to consent to trying the case in Arkansas state court as a condition of granting the dismissal. It abused its discretion in failing to do so.

*Id.* (citations omitted). There are three problems with this holding. First, there is the misapplication of the abuse of discretion standard, discussed in V.B *infra*. Second, requiring Weyerhaeuser to consent to a foreign state court forum means Weyerhaeuser would waive, as a judicially imposed mandate, its constitutionally protected right to federal diversity jurisdiction. Third, this mandate is an unconstitutional condition.

1. The Court of Appeals decision violates the Supremacy Clause.

The Supremacy Clause issue has already been ably briefed by Weyerhaeuser and AWB as amicus does not intend to rehearse that argument. But respondents, in an argument that is half mockery, half distinction-without-a-difference, contend this case raises no constitutional issues because some of the controlling authority is, well, old, and because removal on the basis of diversity jurisdiction is a statutory, rather than constitutional, right. But this approach misses the mark.

First, the Supremacy Clause states the Constitution and the Laws of the United States are paramount and may not be trumped by state law. *See* U.S. Const. art. VI, cl. 2. So it does not matter if the rights to federal diversity jurisdiction and to remove to federal court are federal constitutional rights or federal statutory rights. A state may not infringe upon federal rights – constitutional or statutory. *See Home Ins. Co. of New York v. Morse*, 87 U.S. (20 Wall.) 445, 458, 22 L. Ed. 365 (1874) (stating “[t]he Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789.”); *Goldey v. Morning News*, 156 U.S. 518, 523, 15 S. Ct. 559, 561, 39 L. Ed. 517, 519 (1895) (stating “[t]he judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove

a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal.”); *Harrison v. St. Louis & San Francisco R.R.*, 232 U.S. 318, 327, 34 S. Ct. 333, 335, 58 L. Ed. 621, 624 (1914); *Howlett v. Rose*, 496 U.S. 356, 371, 110 S. Ct. 2430, 2440, 110 L. Ed. 2d 332, 350 (1990) (stating “the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source.”); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs.*, 4 F.3d 614, 619 (8th Cir. 1993) (stating “states cannot indirectly prevent, defeat, or limit the free exercise of the right to remove.”); *Int’l Ins. Co. v. Duryee*, 96 F.3d 837 (6th Cir. 1996) (noting the Supremacy Clause makes state statutes unconstitutional if they conflict with federal law).

Secondly, insofar as Weyerhaeuser relies on *Terral v. Burke Construction Co.*, 257 U.S. 529, 532, 42 S. Ct. 186 (1922) for the proposition that a state court cannot exact from a defendant “a waiver of the exercise of its constitutional rights to resort to federal court,” *Terral*, 257 U.S. at 532, respondents claim *Terral* was overruled by *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S. Ct. 79 (1922). But that is not the case.

*Terral* still stands for the proposition that defendants have a constitutional right to resort to federal courts. Indeed, the Supreme Court

did not even cite *Terral* in *Kline*. However, even if *Kline* reversed *Terral*, it is obvious from the cases cited that the proposition upon which Weyerhaeuser relies is not merely the subject of one case. In contrast, the court should consider respondents' argument is based almost entirely on *Kline*, a student note on campaign finance law, and a footnote in a law review article.<sup>1</sup>

Finally, the court should note *Terral* is still good law. The U.S. Supreme Court has cited *Terral* as recently as 1995 and, in 1967, cited *Terral* for the proposition that:

There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one. *Western Union Tel. Co. v. Kansas*, 216 U.S. 1. Resort to the federal courts in diversity of citizenship cases is another. *Terral v. Burke Constr. Co.*, 257 U.S. 529.

*Garrity v. New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 17 L. Ed. 2d. 562 (1967).

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<sup>1</sup> Not incidentally, *Kline* is also distinguishable and does not stand for the proposition that a defendant must waive its right to federal diversity jurisdiction in conjunction with a motion to dismiss for *forum non conveniens*. In *Kline*, Burke Construction Company filed a breach of contract suit in federal court against Kline. Jurisdiction was based upon diversity. Shortly thereafter, Kline brought a suit in equity against Burke in state court over the same contract. Burke moved the federal court to enjoin prosecution of the state court action. On appeal to the U.S. Supreme Court, the critical question was whether the federal courts had exclusive jurisdiction over a controversy between citizens of different states when the suit was first filed in federal court. Significantly, the Supreme Court did not deny that the district court had jurisdiction over the case. Rather, the court merely held the federal court did not have exclusive jurisdiction. The Court specifically stated the "Construction Company . . . had the undoubted right under statute to invoke the jurisdiction of the federal court and that court was bound to take the case and proceed to judgment." *Kline*, 260 U.S. at 234.

2. A statutory right can form the basis of an unconstitutional conditions claim.

It follows from the foregoing that Weyerhaeuser has a strong argument under the unconstitutional conditions doctrine. Like the Supremacy Clause itself, the unconstitutional conditions doctrine does not depend upon whether the federal right at issue derives from the federal constitution or federal statute. *See Barron v. Burnside*, 121 U.S. 186, 198, 7 S. Ct. 931, 30 L. Ed. 915 (1887) (stating the U.S. Supreme Court “has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States.”).

In addition to being federal constitutional issues, these are matters of substantial public interest. The Court of Appeals decision has substituted its judgment on the perceived efficacy of federal court dispute resolution for the judgment of the framers of the U.S. Constitution and the U.S. Congress. If every state court conditioned a dismissal for *forum non conveniens* on the defendant’s waiver of its right to federal diversity jurisdiction, it would empty the doctrine of much of its purpose.

Particularly in the asbestos context, if every state court so conditioned a dismissal for *forum non conveniens*, simply as a way to circumvent the federal Multi-District Litigation (MDL) process, it would effectively shut

down the MDL. But regulation of the MDL and judgments as to its efficacy are matters reserved for Congress, not the Court of Appeals.

**B. THE COURT OF APPEALS DECISION CONFLICTS WITH PRIOR CASE LAW ON THE ABUSE OF DISCRETION STANDARD.**

The Court of Appeals' handling of the abuse of discretion standard in this case is of interest to litigants and trial courts. Superior Court judges across the state will be surprised to learn they have abused their discretion, merely because the appellate court, on an improper *de novo* review, disagrees on a policy basis with the outcome the law compels.

In this case, the Court of Appeals erred by conducting what can only fairly be called in substance a *de novo* review of the trial court's ruling rather than reviewing it under the abuse of discretion standard. *See Myers v. Boeing*, 115 Wn. 2d 123, 128, 794 P.2d 1272 (1990) (stating "[t]he standard of review applicable to a decision to dismiss on forum non conveniens grounds is abuse of discretion").

Given the record below, the Court of Appeals is on shaky ground determining the trial court did not properly consider each of the elements under Washington's test for *forum non conveniens*. Specifically, Judge Hickman heard two oral arguments on the issue, stated on the record that he carefully read the parties' briefs and cases cited therein, and then wrote a thorough seven page memorandum decision granting Weyerhaeuser's

motion to dismiss. *See* Clerk's Papers ("CP") at 161 (Superior Court stating it "review[ed] the cases cited by counsel"); Report of Proceedings ("RP") at 14:10–12 (Tr. from Hr'g on Pls.' Mot. to Recons., 7/28/06) (Superior Court stating it "exhaustively" reviewed case law in its written opinion). Stated simply, the Court of Appeals could disagree with the Superior Court's decision, but could not reasonably conclude the Superior Court abused its discretion.

Indeed, the Court of Appeals discussion itself confirms that the trial court was within its discretion in its careful determination to grant the motion to dismiss:

After balancing the Myers factors, the trial court granted Weyerhaeuser's motion to dismiss, stating that "[t]here is no question that many of the factors, both private and public, are either neutral or in favor of holding this trial in Arkansas." CP at 160. Indeed, the trial court determined that six of the ten factors favored an Arkansas trial and that the other four factors were neutral. The court did not conclude that a single factor favored a Washington trial.

The record supports the trial court's findings and its legal conclusion that Arkansas is a more appropriate forum for Sales's lawsuit.

*Sales*, 138 Wn. App. at 230-31. The Court of Appeals should have stopped there. Its ensuing discussion on the merits of the MDL and its mistaken belief a state court could condition a dismissal on the waiver of a federally protected right, led to the legal errors discussed herein.

## VI. CONCLUSION

AWB urges the court to accept review.

Respectfully submitted this 4<sup>th</sup> day of September, 2007.

  
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