IN THE SUPREME COURT OF FLORIDA
STATE OF FLORIDA

CASE NO. 84,329

KINNEY SYSTEM, INC.,

Petitioner,

vs.

THE CONTINENTAL INSURANCE COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE, CARNIVAL CORPORATION, HARRIS CORPORATION, HOME SHOPPING NETWORK, INC., and IVAX CORPORATION

IN SUPPORT OF RESPONDENT
THE CONTINENTAL INSURANCE COMPANY
ON CERTIFICATION FROM THE
FOURTH DISTRICT COURT OF APPEAL
CASE NO. 93-2854

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INTRODUCTION AND STATEMENT OF INTEREST

Carnival Corporation, formerly known as Carnival Cruise Lines, Inc. ("Carnival"), Harris Corporation ("Harris"), Home Shopping Network, Inc. ("Home Shopping") and Ivax Corporation ("Ivax") (collectively, the "Citizen Corporations") are corporations that maintain their principal places of business in Florida. As such, they have a strong interest in the certified question before the Court on this appeal.

The Citizen Corporations believe that the rule reaffirmed by this Court in Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978) -- which limits the application of the forum non conveniens doctrine to cases where all the parties are nonresidents of Florida and the cause of action arose outside of Florida -- is beneficial and should remain the law in Florida. The Citizen Corporations submit this brief in support of respondent The Continental Insurance Company ("Continental") to the extent of urging the Court not to overrule the Houston rule, which has served Florida well and has functioned precisely as this Court intended.

As residents of Florida, the Citizen Corporations believe that they are entitled to access to the courts of the State, as guaranteed by the Florida Constitution art. I, § 21, and to sue and be sued in Florida. A group of foreign corporations that do not maintain their principal places of business in Florida have submitted an amicus brief asking,

along with certain other amici, the Court to overrule Houston. These amici (the "Kinney Amici") imply that the business community is solidly aligned behind Petitioner Kinney System, Inc. ("Kinney") and in favor of overruling Houston. We submit that these nonresident corporations have little interest in access to the Florida courts -- they would undoubtedly prefer to sue and be sued in the states where they maintain their principal places of business -- and we do not believe that their views are representative of Florida's business community. Their interests, we submit, are entitled to little weight, and the arguments they advance against the Houston rule are based upon mere speculation. We submit that the views of Florida's corporate citizens are represented in this case by the Citizen Corporations, which emphatically believe that the Houston rule has worked well and should not be overruled.

The Citizen Corporations are substantial businesses that employ many thousands of people in Florida. Carnival is a Panamanian corporation with its principal place of business in Miami. It has approximately 1,500 shore-side employees in Florida, and approximately 4,800 more on its Florida-based ships. Harris is a Delaware corporation with its principal place of business in Melbourne. It is the largest industrial corporation headquartered in Florida, with approximately 10,000 Florida

employees. Home Shopping is a Delaware corporation with its principal place of business in St. Petersburg. It has approximately 4,300 employees in Florida. Ivax is a Florida corporation with its principal place of business in Miami. It has approximately 900 employees in Florida.

As we discuss below: (1) the issue of overruling Houston is not properly before this Court; (2) abrogating the Houston rule would needlessly infringe on the constitutional rights of Florida residents; (3) the policy decision this Court made in Houston was sound and nothing has occurred since that decision which merits modifying the Houston rule; and (4) any modification of the existing forum non conveniens law should be made by the Legislature.

STATEMENT OF THE CASE AND FACTS

The Citizen Corporations adopt and incorporate the factual counterstatement of Respondent Continental.

ISSUE ON REVIEW

The question certified by the Fourth District Court of Appeal to this Court is the following:

> Is a trial court precluded from dismissing an action on the basis of forum non conveniens where one of the parties is a foreign corporation that:
>
> (a) is doing business in Florida?
>
> (b) is registered to do business in Florida?
>
> (c) has its principal place of business in Florida?

Continental Ins. Co. v. Kinney System, Inc., 641 So. 2d 195, 197 (Fla. 4th DCA 1994).

SUMMARY OF THE ARGUMENT

The Citizen Corporations respectfully submit that this Court should not overturn the rule it established in Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978), which limits the application of the forum non conveniens doctrine to cases where all of the parties are nonresidents of Florida and the cause of action arose outside of Florida. Kinney, the petitioner on this appeal, has not argued in its principal brief that this Court should overrule Houston. Moreover, it has conceded that both Florida corporations and corporations with their principal places of business in Florida are residents for purposes of the Houston rule. Accordingly, these issues are not properly before the Court, which has ruled that it will consider only those arguments for reversal urged by the appellant.

In addition, we submit that even if this Court is willing to consider the arguments of the Kinney Amici for overruling Houston, the Court should not take that drastic step. Article I, section 21 of the Florida Constitution provides Florida residents with a right of access to the courts of the State for redress of injury. A change in the law to abrogate or restrict access to the courts is permissible only if a reasonable alternative remedy or

commensurate benefit is provided or upon a showing of "overpowering public necessity" if there is "no alternative method of meeting such public necessity." Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992). No alternative remedy can be provided if Houston is overruled. Nor has any showing been made of public necessity and the lack of alternative solutions. Moreover, the necessity for providing an alternative remedy or making a specific factual determination -- which cannot be made on the record of this case -- strongly suggests that any modification of the Houston rule should be made by the Florida Legislature. In the 16 years since the Houston decision, the Legislature has not seen the need to make any changes in the rule, presumably because it believes that the rule is serving Florida well.

Finally, we demonstrate below that the policy decision this Court made in Houston -- that the certainty of resolution outweighs any possible benefits from broadening the application of forum non conveniens -- was sound. In deciding that Florida's fundamental interest in resolving controversies involving its citizens creates an irrebuttable presumption that Florida is a proper forum, the Court considered and rejected the identical arguments that the Kinney Amici make now in favor of modifying the rule. Nothing has occurred in the 16 years since Houston to alter

the Court's conclusion, and the Kinney Amici have not presented the Court with any evidence to support their speculation that the Court's policy decision was misguided. In fact, we submit that the changes in the years since Houston militate in favor of maintaining the rule. Accordingly, we respectfully submit that this Court should not overrule Houston.

ARGUMENT

I

THE ISSUE OF WHETHER TO OVERRULE HOUSTON v. CALDWELL IS NOT BEFORE THIS COURT

Petitioner Kinney, in its principal brief on this appeal, has not argued that this Court should overrule Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978). Kinney states that it "leaves to the various presentations of amici the debate whether Florida should depart in whole or in part from Houston and Swain . . . ." (Kinney Br. at 20 n.6.) Moreover, Kinney does not contend that a corporation with its principal place of business in Florida is not a resident of Florida for purposes of application of the Houston rule. (Kinney Br. at 2-3, 13.) While certain amici do urge the Court to overrule Houston or to hold that corporations principally located in Florida are not residents, those issues have not been raised by the facts of this case nor

preserved by Kinney and, therefore, they are not before the Court.

The law is clear that only those issues raised and briefed by petitioner, in separate arguments supported by authority, are before the Court. See Higbee v. Housing Authority, 143 Fla. 560, 197 So. 479, 485 (1940); Rodriguez v. State, 502 So. 2d 18, 19 (Fla. 3d DCA 1986); Singer v. Borbua, 497 So. 2d 279, 281 (Fla. 3d DCA 1986), review dismissed, 503 So. 2d 328 (Fla. 1987); Acton v. Ft. Lauderdale Hosp., 418 So. 2d 1099, 1101 (Fla. 1st DCA 1982), approved, 440 So. 2d 1282 (Fla. 1983). This Court has recognized that appellate courts will only consider the arguments for reversal preserved by the appellant. See Gifford v. Galaxie Homes of Tampa, Inc., 204 So. 2d 1, 3 (Fla. 1967); see also Dober v. Worrell, 401 So. 2d 1322 (Fla. 1981).

Here, Kinney has argued only that the Court should adopt the reasoning of the Third District Court of Appeal, which has repeatedly held that a corporation's residency is determined by its principal place of business for purposes of application of the Houston rule. See, e.g., National Rifle Ass'n v. Linotype Co., 591 So. 2d 1021 (Fla. 3d DCA 1991); Moliver v. Avianca, Inc., 580 So. 2d 787 (Fla. 3d DCA 1991). Kinney thus asks the Court to reject the rule enunciated by the Fourth District Court of Appeal, that a

corporation that is merely registered to do business or doing business in Florida is a resident for purposes of forum non conveniens. See Continental Ins. Co. v. Kinney System, Inc., 641 So. 2d 195 (Fla. 4th DCA 1994); National Aircraft Serv., Inc. v. New York Airlines, Inc., 489 So. 2d 38 (Fla. 4th DCA 1986); Waite v. Summit Leasing & Capital International Corp., 441 So. 2d 185 (Fla. 4th DCA 1983). Accordingly, only that issue -- whether or not a corporation either licensed or doing business in Florida is a resident -- is presented to the Court by this appeal.

The Citizen Corporations take no position on the issue of which definition of resident -- the Third or Fourth District's -- should be used for forum non conveniens analysis. In either case, the Citizen Corporations would be considered Florida residents. Shortly after deciding Houston, in Seaboard Coast Line R.R. Co. v. Swain, 362 So. 2d 17, 18 (Fla. 1978), this Court held that a corporation maintaining its principal place of business in Florida is a resident for forum non conveniens purposes. Kinney agrees that Florida corporations and those with their principal place of business in Florida are residents for purposes of the Houston rule. (Kinney Br. at 2-3, 13.)

Moreover, the Court should exercise restraint and not reach beyond the controversy before it. Continental, a New Hampshire corporation with its principal place of

business in New Jersey, is registered to do business in Florida. Continental Ins. Co., 641 So. 2d at 196. Kinney, a Delaware corporation with its principal place of business in New York, conducts business in Florida, where it maintains an office, but it is not registered to do business here. Id. Thus, the Court can fully decide the controversy before it by deciding the first two subparts in the question certified by the Fourth District: whether foreign corporations are residents for purposes of application of the forum non conveniens doctrine if they are (a) registered to do business in Florida or (b) unregistered but doing business in Florida. The Citizen Corporations respectfully submit that the Court should resolve only that controversy -- the only question now presented.

II

THE COURT SHOULD NOT OVERRULE HOUSTON

If the Court decides to consider the arguments presented by the Kinney Amici for overruling Houston, the Citizen Corporations submit that the Houston rule has served Florida and its residents well and urge the Court not to overrule Houston.

A. Overruling Houston Would Violate Florida's Constitutional Right of Access to the Courts

Article I, section 21 of the Florida Constitution provides that:

> The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

As interpreted by this Court, this constitutional mandate grants to residents of the State a right of access to the courts for redress of injury. See Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992); Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). As the Court noted in Siegel: "The right to go to court to resolve our disputes is one of our fundamental rights . . . . The history of the [constitutional] provision shows the court's intention to construe the right liberally in order to guarantee broad accessibility to the courts for resolving disputes." 610 So. 2d at 424.

Thus, in Siegel, this Court held that sections 395.011(10)(b), 395.0115(5)(b), and 766.101(6)(b), Florida Statutes, which required a plaintiff bringing an action against someone who participated in a medical review board process to post a bond sufficient to cover the defendant's costs and attorney's fees before commencing the action, was unconstitutional. Id. at 421. The Court reasoned, inter alia, that the bond requirement imposed by these sections

"infringes on the plaintiff's fundamental right of access to the courts without providing an alternative remedy, commensurate benefit or a showing that no alternative method exists for meeting the medical malpractice crisis [the purported justification for the bond requirement]." Id. Such a showing is necessary because the legislature may only "abrogate or restrict a person's access to the courts if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, and finds that there is no alternative method of meeting such public necessity." Id. at 424 (original emphasis) (citing Kluger, 281 So. 2d at 4; Smith v. Department of Ins., 507 So. 2d 1080, 1088 (Fla. 1987)).

The same standard should apply where this Court considers overruling its prior decisions, the net effect of which would be to "abrogate or restrict a person's access to the courts." Here, those advocating the abandonment of the Houston rule cannot possibly meet this standard. First, no reasonable alternative remedy or commensurate benefit whatsoever would be provided in Florida to Florida residents if Houston were overruled. And, with respect to alternative remedies outside of Florida, the Court noted in Houston that if a case is dismissed on the grounds of forum non conveniens after the trial court makes the essential finding

that the defendant is amenable to process elsewhere, "such a determination by the trial court does not have a binding effect on the courts of the more convenient forum." Houston, 359 So. 2d at 860.[1/] Second, as we discuss below, there has been no showing of an overpowering public necessity for overruling Houston nor any basis for finding that there is no alternative method of meeting any purported public necessity. Moreover, as we argue, infra at 17-18, and as many other states have concluded, this type of policy decision is best left to a deliberative body such as the Legislature -- which has left the Houston rule undisturbed for 16 years.

Residents of Florida such as the Citizen Corporations have a strong interest in being able to sue and be sued in their home state. They have ordered their business affairs in cognizance of the Houston rule. Application of the forum non conveniens doctrine to actions they bring would impose increased litigation expense and, if their actions were dismissed in favor of another forum, would impose tremendous travel and other increased litigation costs that burden their right to seek redress

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[1/] Unlike the plaintiff in Siegel who could assure himself of access to the courts by posting a bond, there can be no guarantee that plaintiffs whose actions were dismissed under an expanded forum non conveniens doctrine would have any means of gaining access to the courts.

just as much as or more than the bond requirements struck down in Siegel. Accordingly, the Citizen Corporations submit that Houston should not be overruled.

B. The Policy Decision This Court Made in Houston Was Sound

Reaffirming a longstanding principle of Florida law, this Court in Houston made a policy decision that the forum non conveniens doctrine should apply only to actions involving nonresidents where the cause of action arose outside of Florida. Houston, 359 So. 2d at 860-61; see Hagen v. Viney, 124 Fla. 747, 169 So. 391, 392-93 (1936). The Court expressly considered -- and rejected -- many of the arguments propounded here by the Kinney Amici:

> The district court in the present case stated that the nonresidency of the parties should not be an essential prerequisite to the application of the doctrine of forum non conveniens, but rather, it should be merely another factor considered when evaluating the appropriateness of a motion to dismiss in favor of a more convenient forum. The district court reasoned that the rule of law set forth in Adams [v. Seaboard Coast Line R.R. Co., 224 So. 2d 797 (Fla. 1st DCA 1969)] restricted the flexibility of this doctrine and made the considerations of justice, fairness, and convenience subservient to the single factor of the residency of the parties.

359 So. 2d at 860. This court also expressly considered -- and rejected -- the reasoning of the New York Court of Appeals in Silver v. Great American Ins. Co., 29 N.Y.2d 356, 328 N.Y.S.2d 398, 278 N.E.2d 619 (1972), which relaxed the New York State forum non conveniens doctrine, holding that

"the residency factor is only one of many factors considered in determining whether or not New York is an inconvenient forum." Houston, 359 So. 2d at 860.

In rejecting the approach taken by the Fourth District in Houston -- and the arguments urged here by the Kinney Amici -- the Court based its decision on a number of considerations, including (1) the drastic nature of dismissal of an action, which should only be ordered under the most compelling of circumstances; (2) the favored nature under Florida law of a plaintiff's choice of venue, if properly based on the applicable statutes; (3) the absence of statutory authority for the courts of the State to transfer an action to a forum in another state; (4) the lack of binding force in a trial court's conclusion that the defendant is amenable to process in the purportedly more convenient forum; and (5) the great expenditure of judicial labor required to resolve the often complicated question of the defendant's amenability to process in another jurisdiction. Id. at 860-61. In light of these considerations, this Court concluded:

> In comparison, the rule of law as set forth in Adams, although less flexible, is just, is serving well, and is easier to apply. If venue has been properly established because one of the parties is a resident of this state, then the suit may not be dismissed because another state may be more appropriate. We believe the certainty of resolution of the dispute outweighs the possible benefits achieved by dismissal in favor of a more convenient forum. This state has a fundamental

> interest in resolving controversies involving its citizens.

Id. at 861.

The policy decision made by this Court 16 years ago in Houston is no less sound today. At bottom, this Court decided that any applicable convenience and fairness concerns are fully vindicated by granting to Florida residents access to the Florida courts. In light of Florida's fundamental interest in resolving controversies involving its citizens, the Court concluded that residency creates an irrebuttable presumption that Florida is an appropriate forum to hear such controversies.

There is no evidence before this Court which indicates, let alone compels the conclusion, that the policy decision of Houston was misguided. The Kinney Amici contend that failure to overrule Houston will result in reduced business activity and resultant damage to the State's economy.[2/] Notably lacking in these predictions of doom is the slightest hint of any empirical evidence to support this speculation that the Houston rule either has caused or will cause any harm to the State. Indeed, the Kinney Amici do not even offer any anecdotal evidence of ill effects -- which is hardly surprising in light of the fact that the

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2/ See Department of Commerce Br. at 4; Chamber of Commerce Br. at 14.

booming Florida economy has by far outperformed the national economy over the past 16 years.

The Kinney Amici also contend that the Florida courts are awash in cases attracted to this State by the Houston rule.[3/] As noted, no evidence supports their claim that congestion in Florida courts is due to cases that would be dismissed if Houston were overruled. While the Kinney Amici point to mass tort and product liability cases and the like, such as the Bhopal disaster and asbestos cases (Chamber of Commerce Br. at 12-14, 19), the fact is that the Bhopal case was filed in New York, not Florida. As for asbestos cases, huge numbers of such actions crowd dockets around the nation. For example, thousands of asbestos cases have been filed in New York, where joint action has been taken by federal and state courts in appointing a Special Master/Referee to deal with the caseload demands. See, e.g., In re New York City Asbestos Litig., NYCAL Index No. 4000, 1992 U.S. Dist. LEXIS 3721 (S.&E.D.N.Y. Mar. 13, 1992). This experience is replicated in many other states around the nation. See, e.g., In re Asbestos Litig. Pusey Trial Group, 1994 WL 553234 (Del. Super. 1994); Pickering v. Owens-Corning Fiberglas Corp., 638 N.E.2d 1127 (Ill. App. 1994); In re Complex Asbestos Litig., 283 Cal. Rptr. 732

3/ See Chamber of Commerce Br. at 9-14; Product Liability Advisory Council Br. at 27-32; AT&T, et al. Br. at 17-24.

(Cal. App. 1991); In re Conn. Asbestos Litig., 677 F. Supp. 70 (D. Conn. 1986). There is no evidence before the Court that even remotely suggests that Florida has more than its commensurate share of such cases -- given its mix of businesses and its demographics -- or that there is any meaningful correlation between the number of such cases it does have and the Houston rule. Moreover, by avoiding the necessity of litigating many futile forum non conveniens dismissal motions, it is highly likely that, as the Houston Court stated, the net effect of the Houston rule is to reduce the burden on our courts.

At bottom, the Kinney Amici try to make the case for overruling Houston by offering up a parade of horribles, many of which are hypothetical, supposedly showing the hardships imposed upon corporations doing business in Florida. (Chamber of Commerce Br. at 10-14; Department of Commerce Br. at 7-12.) But horrible hypotheticals can be invented to support any proposition and lend no support at all for overruling Houston.

The Department of Commerce brief points to the decision Carnival Cruise Lines, Inc. v. Oy Wartsila Ab, 159 B.R. 984 (S.D. Fla. 1993), as a "real world example." (Department of Commerce Br. at 6 n.2) That case, however, in which Carnival, one of the Citizen Corporations, is a party, is in fact a perfect example of the beneficial nature

of the Houston rule. In Carnival Cruise Lines, Carnival brought a fraud claim against two Finnish companies, Oy Wartsila Ab and Valmet Oy, alleging that they "fraudulently induced Carnival to enter into a contract with an undercapitalized subsidiary, which agreement was subsequently breached, for the construction of three luxury cruise ships by misrepresenting the financial strength of the subsidiary." 159 B.R. at 987-88. Carnival alleged that the defendants made misrepresentations to it during negotiations and in a "comfort letter" that they "faxed . . . to Carnival [in Miami] detailing the capitalization of [the subsidiary]." Id. at 988.

Despite the fact that the complaint alleged a fraud targeted at a Florida citizen and perpetrated in Florida, applying the federal forum non conveniens doctrine, the United States District Court dismissed Carnival's case, in favor of litigation in Finland. Id. at 1003. Carnival disagrees with the conclusions of the court for many reasons, including the need for a Finnish court to apply Florida law to the claims, the lack of effective pretrial discovery in Finland, differing legal concepts and definitions which fundamentally affect and diminish Carnival's claims, the unavailability of certain types of damages in Finland, and the unavailability of a jury trial in Finland. Id. at 991-94, 999. Rather than pursue an

appeal challenging the forum ruling, Carnival relied on the authority of Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988), and refiled its action in State court where, under the Houston rule Carnival will not be compelled to engage in the hugely expensive -- and possibly futile -- exercise of seeking redress in Finland, the home territory of the tortfeasors.

This case also shows how distracting and time consuming litigation over forum non conveniens issues can be -- a consideration that underlies the Houston rule. The Carnival Cruise Lines case was filed in 1990. The parties took discovery for approximately two years on issues of forum non conveniens (and jurisdiction) and the District Court did not issue its decision until October 1993. Thus, it took more than three years after filing to resolve the forum non conveniens issues at the trial court level, even before appellate proceedings. As the Carnival Cruise Lines case shows, the Houston rule advances the resolution of litigation by enabling courts and litigants to get to the merits quickly.

The Houston rule, thus, is of particular significance in protecting Florida residents that are victims of fraud from having to prosecute actions in distant forums at great cost, inconvenience and reduced likelihood of recovery. It also reduces litigation delay. The Citizen

Corporations submit that Florida residents are entitled to seek remedies for the tortious conduct of others in the Florida courts. Where foreign corporations or individuals come into Florida and commit tortious acts against Florida residents, they should not be permitted to evade the justice of the Florida courts by claiming the forum is too inconvenient.[4/]

C. Florida Is Entitled To Chart An Independent Course

The Kinney Amici contend that in the 16 years since the Court decided Houston, the tides have shifted in favor of broad application of forum non conveniens. (AT&T, et al. Br. at 12-16.) As noted, however, this Court fully considered the adoption by other jurisdictions of broader forum non conveniens inquiries when in Houston it reaffirmed the existing law of this State, which "is just, is serving well, and is easier to apply." Houston, 359 So. 2d at 861. The Citizen Corporations submit that the Houston rule continues to serve Florida well today.

As this Court recognized in Houston, Florida is entitled to chart an independent course in consideration of its legal traditions, its fundamental interests, and the

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4/ The same result should obtain where foreign corporations or individuals commit tortious acts against Florida residents outside of Florida if the defendants are subject to personal jurisdiction in Florida.

interests of its residents. The United States Supreme Court has expressly noted the independence of the states in formulating their own rules for application of the forum non conveniens doctrine. In Chick Kam Choo v. Exxon Corp., the plaintiff's federal court action was dismissed under the federal forum non conveniens doctrine. Rather than litigate in Singapore, the plaintiff refiled her action in the Texas state court. In reversing the federal court's issuance of an injunction barring plaintiff from pursuing her state court action, the United States Supreme Court stated: "Federal forum non conveniens principles simply cannot determine whether Texas courts, which operate under a broad 'open-courts' mandate, would consider themselves an appropriate forum for petitioner's lawsuit." 486 U.S. 140, 148 (1988).

Moreover, contrary to the views of the Kinney Amici, the salient changes in the last 16 years all point toward maintenance of the Houston rule. The quantity of interstate and international commerce has increased markedly in recent years, particularly in Florida, the gateway to South America. Accordingly, Florida-resident corporations are in greater need than ever of access to the courts of their home state when they are injured in their dealings with out-of-state interests. In addition, the burden upon those out-of-state interests of litigating in Florida has

significantly diminished in the past 16 years with the development of faster and easier travel and instantaneous transmission of documents and information.

D. The Legislature Should Make Any Changes in the Settled Forum Non Conveniens Law of Florida

In the 16 years since this Court decided Houston and, indeed, in the almost 60 years since its decision in Hagen v. Viney, 124 Fla. 747, 169 So. 391 (1936), the Legislature has not seen the need to enact legislation modifying the law regarding forum non conveniens. Presumably the Legislature has reached the same conclusion as this Court did in Houston -- that the existing rule is serving Florida well.

As indicated by the divergent views of the effects of the Houston rule held by the various amici on this appeal, this issue is precisely the type that is best left to a deliberative body such as the Legislature, which can develop a complete factual record of the impact of the existing rule and the anticipated effects of any changes.[5/] The federal government and many states have explicit legislative provisions dealing with forum non

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5/ If an urgent need to change course is identified, the Legislature then would have to consider whether it is possible to satisfy the requirements for limiting the constitutional right of access to the courts. See Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992).

conveniens. See, e.g., 28 U.S.C. § 1404 (1994); Cal. Civ. Proc. Code § 410.30 (West 1994); Mass. Gen. Laws Ann. ch. 223A § 5 (West 1994); N.Y. Civ. Prac. L. & R. 327 (McKinney 1994); Tex. Civ. Prac. & Rem. Code Ann. § 71-051 (West 1994).[6/] Accordingly, the Citizen Corporations submit that the product liability and tort reform issues upon which the Kinney Amici focus are best addressed in a unified fashion by the Legislature, rather than piecemeal by the courts.

6/ The Kinney Amici have misrepresented the status of the law in California. See Product Liability Advisory Council Br. at 29; Chamber of Commerce Br. at 8; AT&T, et al. at 16. While it is correct that California has adopted a version of the forum non conveniens doctrine by statute, Cal. Civ. Proc. Code § 410.30 (West 1994), that version does not permit the dismissal of an action where the plaintiff is a California resident. See Archibald v. Cinerama Hotels, 15 Cal. 3d 853, 858-59, 126 Cal. Rptr. 811, 544 P.2d 947 (1976). In 1986, the California Legislature temporarily modified the rule by amending section 410.30 to provide that residence in California of any party would not preclude application of the forum non conveniens doctrine. 1986 Cal. Stat. ch. 968, § 4. This amendment, however, contained a sunset provision specifying that, in the absence of further legislative action, the amendment expired as of January 1, 1992, at which time section 410.30 "shall have the same force and effect as if this temporary provision had not been enacted." Id. No further legislation was enacted by the California Legislature to extend the temporary provision and, accordingly, the application of the forum doctrine to actions brought by California residents terminated on January 1, 1992. See Beckman v. Thompson, 4 Cal. App. 4th 481, 6 Cal. Rptr. 2d 60, 63-64 (2d Dist. 1992). After a six-year experiment with expanded application of the doctrine, the California Legislature apparently determined that the purported benefits of expansion, which have been touted here by the Kinney Amici, were not forthcoming and allowed the law to revert to a narrower forum non conveniens doctrine similar to the Houston rule.

E. Any Change in the Houston Rule Should Apply Prospectively

The Citizen Corporations have not taken a position on the first two subparts of the certified question before the Court. We submit, however, that any change in the forum non conveniens doctrine of the State, particularly any modification of the Houston rule, should apply prospectively only. It is a "well-recognized" principle that "where a statute has received a given construction by a court of supreme jurisdiction and property or contract rights have been acquired under and in accordance with such construction, such rights should not be destroyed by giving to a subsequent overruling decision a retrospective operation." Florida Forest & Park Serv. v. Strickland, 154 Fla. 472, 18 So. 2d 251, 253 (Fla. 1944); see National Distributing Co. v. Comptroller, 523 So. 2d 156, 158 (Fla. 1988); City of Miami v. Bell, 634 So. 2d 163, 166 (Fla.), cert. denied, 115 S. Ct. 316 (1994).

This Court in Houston gave full effect to "the plaintiff's choice of venue [which] is usually favored if the election is one which has been properly exercised under the applicable statutes." Houston, 359 So. 2d at 860. In so doing, the Court conferred on Florida residents property and contract rights which would be destroyed by a retroactive ruling reversing Houston. The Houston rule, in effect, wrote a valid and enforceable forum selection clause

into every contract and course of dealing between a Florida resident and an out-of-state resident. Florida businesses and business people, such as the Citizen Corporations, have acted for decades in reliance on the availability of the Florida courts in all their dealings with out-of-state persons and entities.

If this court were inclined to modify Houston v. Caldwell, Florida residents should be afforded the opportunity to protect themselves in the future with forum selection clauses and other such measures. See Amusement Equipment, Inc. v. Mordelt, 779 F.2d 264, 271 (5th Cir. 1985) (forum selection clause is one of the means by which a party may protect himself from litigating in burdensome forums). Accordingly, any such ruling should be given prospective application only.

CONCLUSION

For the foregoing reasons, the Citizen Corporations respectfully submit that this Court should not overrule Houston v. Caldwell.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to RAOUL G. CANTERO, III, ESQ., Adorno & Zeder, P.A., counsel to Respondent The Continental Insurance Co., 2601 South Bayshore Drive, Suite 1600, Miami,

Florida 33131; ARTHUR J. ENGLAND, JR., ESQ., Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., counsel to Petitioner Kinney System, Inc., 1221 Brickell Avenue, Miami, Florida 33131; MITCHELL W. BERGER, ESQ., Berger, Shapiro & Davis, P.A., counsel to amicus curiae the Florida Chamber of Commerce, 100 N.E. Third Avenue, Suite 400, Ft. Lauderdale, Florida 33301; MARK A. COHEN, ESQ., Mark A. Cohen & Associates, P.A., counsel to amicus curiae AT&T, et al., 1221 Brickell Avenue, Suite 1780 Miami, Florida 33131; WENDY F. LUMISH, ESQ., Popham, Haik, Schnobrich & Kaufman, Ltd., counsel to amicus curiae Product Liability Advisory Council, Inc., 4000 International Place, 100 SE Second Street, Miami, Florida 33131; ROBIN C. NYSTROM, ESQ., counsel to amicus curiae the State of Florida, Department of Commerce, 107 West Gaines Street, 535 Collins Building, Tallahassee, Florida 32399-2000; and JOEL S. PERWIN, ESQ., Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A., counsel to amicus curiae the Academy of Florida Trial Lawyers, 25 West Flagler Street, Suite 800, Miami, Florida 33130 this 3 day of January, 1995.

Respectfully submitted,

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