No. 19-232

IN THE

Supreme Court of the United States

NEW MIGHTY U.S. TRUST, ET AL.,

Petitioners,

v.

ROBERT SHI, ET AL., AS EXECUTORS OF THE WILL OF YUEH-LAN WANG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* PROFESSOR GEORGE A. BERMANN IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Professor George A. Bermann respectfully requests leave to file this timely *amicus curiae* brief in support of the Petition. His distinguished career and vast experience with transnational litigation, as outlined below, uniquely qualify him to assist the Court in its consideration of the Petition. Professor Bermann's interest in the Petition is to defend the *forum non conveniens* doctrine, which is highly significant to transnational litigation, against errant legal developments in the lower courts.

Professor Bermann moves because Respondents, who have waived their right to oppose the Petition, have nonetheless objected to this brief. Respondents assert that he "has been retained as a paid expert witness in a related matter abroad by the same persons who control [Petitioner] New Mighty U.S. Trust." They refer to Professor Bermann's retention, more than five years ago, by counsel for four Bermuda trusts as an expert witness before the Supreme Court of Bermuda. Counsel included Skadden, Arps, Slate, Meagher & Flom LLP, which represents Petitioners before this Court. In 2013 and 2014, Professor Bermann submitted two sworn affidavits to the Bermuda court, opining on U.S. discovery in aid of foreign litigation pursuant to 28 U.S.C. § 1782.

Respondents' objection to this brief based on Professor Bermann's past expert work lacks merit. This brief has no connection with Professor Bermann's work as a paid expert in the Bermuda litigation. The subject matter of his expert opinions is different from the *forum non conveniens* issues addressed in this brief. Professor

Bermann has had no dealings or contact whatsoever—directly or indirectly—with the trusts since that time, and he has absolutely no financial interest in the outcome of the Bermuda litigation or this litigation. Moreover, Professor Bermann is represented by his own counsel before this Court and, as noted in the *amicus* brief, no counsel for a party authored the brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

For all of these reasons, Professor Bermann respectively requests that the Court grant him leave to file this *amicus curiae* brief in support of Petitioners.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae George A. Bermann is the Jean Monnet Professor of European Union Law, Walter Gellhorn Professor of Law, and the director of the Center for International Commercial and Investment Arbitration at Columbia Law School. A Columbia Law School faculty member since 1975, Professor Bermann teaches courses in, and has written extensively about, transnational dispute resolution (international arbitration and litigation), European Union law, international contracts, administrative law, and World Trade Organization law. He is an affiliated faculty member of the School of Law of Sciences Po in Paris and the MIDS Masters Program in International Dispute Settlement in Geneva. He is also a visiting professor at the Georgetown Law Center.

Professor Bermann is an active international arbitrator in commercial and investment disputes; chief reporter of the American Law Institute's Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration; co-author of the United Nations Commission on International Trade Law ("UNCITRAL") Secretariat Guide on the Convention on

1. No counsel for a party authored the brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. On September 10, 2019, Professor Bermann timely notified counsel of record for Petitioners, and counsel that represented Respondents before the Court of Appeals, of his intent to file this brief. Petitioners consented. The parties have been given at least 10 days notice of amicus' intention to file. Petitioners have consented to the filing of this brief. Respondents have not, so amicus moves for leave to file in the attached motion.

the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center; co-editor-in-chief of the American Review of International Arbitration; and founding member of the governing body of the International Chamber of Commerce Court of Arbitration and a member of its standing committee.

Professor Bermann is interested in this case because the decision below, effectively erases the difference between the time-honored doctrine of *forum non conveniens* and the distinct concept of personal jurisdiction, by giving decisive weight to the defendants' residence in the plaintiffs' chosen of forum. The decision is a significant departure from prior Supreme Court precedent, and accordingly requires thorough review and scrutiny by this Court to ensure the continued vitality of this Court's precedents as well as the survival of *forum non conveniens*, a doctrine that serves a critical function in transnational litigation.

SUMMARY OF ARGUMENT

The Court of Appeals erred as a matter of law by, in effect, according dispositive weight to the fact that the defendants are at home in the foreign plaintiffs' chosen forum. The decision below is contrary to this Court's controlling precedents. Its effect is to displace the *forum non conveniens* doctrine by personal jurisdiction principles. If allowed to stand, the decision below will deprive defendants, witnesses, and forums (both domestic and foreign) of the long-recognized benefits of a *forum non conveniens* dismissal when foreign plaintiffs sue defendants in their home forums on claims with little,

if any, connection to the chosen forums. Even though a foreign plaintiff sues a U.S. defendant at its home, the litigation may still be one that does not, on the balancing of all relevant criteria, belong in U.S. court. To hold otherwise would be to maintain that suits brought against a U.S. party under the general jurisdiction of a U.S. court are immune from dismissal on *forum non conveniens* grounds. No court has taken that position before.

ARGUMENT

Forum non conveniens is a resource-conserving doctrine that permits a trial court, in its discretion, to decline jurisdiction over a case whose connections to the United States are attenuated when there is an adequate alternative foreign forum. *See* George A. Bermann et al., *Application of the Doctrine of Forum Non Conveniens in Summary Proceedings for the Recognition and Enforcement of Awards Governed by the New York and Panama Conventions*, 24 Am. Rev. Int'l Arb. 1, 1 (2013).

In concluding that the District Court committed a "clear abuse of discretion," the Court of Appeals placed too heavy a thumb on the scale in favor of the foreign plaintiffs' chosen forum merely because the defendants are at home there. Indeed, the Court of Appeals effectively accorded dispositive weight to that fact by assigning the defendants' residence in the forum critical importance at each step of its *forum non conveniens* analysis.

First, in determining the amount of deference due to plaintiffs' choice of forum, the Court of Appeals reasoned that the District Court "failed to adequately address" that "the Trusts were sued in their home jurisdiction, which

weighs heavily against dismissal." *Shi v. New Mighty U.S. Trust*, 918 F.3d 944, 950 (D.C. Cir. 2019). Second, in weighing the private interest factors, the Court of Appeals reasoned that "[t]he district court clearly failed to hold the Trusts to their 'heavy burden' to show that a foreign forum is significantly more convenient than a U.S. forum that is their home jurisdiction." *Id.* at 952 (citation omitted). Third, in assessing the public interest factors, the Court of Appeals reasoned that "[t]he Trusts can hardly complain now that they are burdened by being sued in their home jurisdiction when Y.C. Wang specifically bestowed upon the District of Columbia an interest in this case by establishing the Trusts here." *Id.*

Thus, the fact that the defendants are at home in the plaintiffs' chosen forum was critical to the Court of Appeals' attempt to overcome the "substantial deference" it owed to the District Court's *forum non conveniens* dismissal. *Piper Aircraft Co. v. Hartzell Propeller, Inc.*, 454 U.S. 235, 257 (1981). Indeed, the Court of Appeals' *forum non conveniens* inquiry was dominated by the defendants' relationship with the forum, which effectively displaced all the other factors relevant to a proper evaluation of *forum non conveniens*. The fact that a defendant is sued at home does, in and of itself, *favor* a court's retaining jurisdiction to hear a case, but it does not, in and of itself, *dictate* that result. The Court of Appeals' fixation on a single fact flies in the face of this Court's unambiguous admonition against placing "central emphasis . . . on any one factor." *Id.* at 249–50.

The heavy weight that the Court of Appeals placed on the defendants' home is disproportionate to the importance that this Court generally attributes to the

location of parties in the *forum non conveniens* inquiry. In *Piper Aircraft*, the Court reasoned that it may be reasonable to assume that the plaintiff's choice of forum is convenient, but "[w]hen the plaintiff is foreign . . . this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Piper Aircraft*, 454 U.S. at 255–56; *Sinochem Int'l Co. Ltd. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 423 (2007). Thus, when the plaintiff is not at home in its chosen forum, its choice is entitled to less, but certainly still some, deference.

In contrast, the decision below holds that the fact that the defendants are at home in the plaintiffs' chosen forum "weighs heavily against dismissal." *Shi*, 918 F.3d at 950. Thus, the Court of Appeals placed greater weight (against *forum non conveniens* dismissal) on the defendants' being U.S.-based than this Court in *Piper Aircraft* placed (in favor of *forum non conveniens* dismissal) on the plaintiffs' being non-U.S.-based. As this case shows, the Court of Appeals' lopsided weighing has the practical effect of precluding at-home defendants from invoking *forum non conveniens*. The Court of Appeals does not explain why, in a multi-factor analysis centered solely on convenience, a defendant's residence in the forum should, in and of itself, be outcome-determinative when the same is not true for a plaintiff's residence outside the forum.

Significantly, the very fact on which the Court of Appeals fixated—namely, that the defendants are at home in the forum—functions as the basis of the District Court's jurisdiction over the defendants, without which the action could not proceed in the first place. Personal

jurisdiction "goes to the court's power to exercise control over the parties." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

"The primary focus of [the Court's] personal jurisdiction inquiry is the defendant's relationship to the forum . . . ." and "the 'primary concern' is 'the burden on the defendant.'" *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1779, 1780 (2017) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)). That inquiry is central to the due process implications of subjecting a defendant to the burdens of litigating in a distant forum, and to the limits on the forum's power over a defendant that lacks meaningful connections to the forum. *See*, *e.g.*, *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780–81; *World-Wide Volkswagen*, 444 U.S. at 292–94.

But *forum non conveniens* doctrine is highly distinct from personal jurisdiction doctrine. The *forum non conveniens* inquiry does not address the authority of a court to hear a case; it concerns the court's suitability to do so. It is therefore understandably multidimensional. The relevant factors include private interest factors such as the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses," and public interest factors such as "local interest in having localized controversies decided at home" and the appropriateness of "having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947).

Significantly, this Court has explained that *forum non conveniens* analysis "presupposes" that the plaintiff's chosen forum has jurisdiction over the defendant. *Sinochem*, 549 U.S. at 434; *Gilbert*, 330 U.S. at 504. Therefore, the existence of personal jurisdiction should not drive *forum non conveniens* analysis, and it is well established that courts may invoke the *forum non conveniens* doctrine to dismiss an action brought in the defendant's home forum, where the court has personal jurisdiction over the defendant. *See*, *e.g.*, *Piper Aircraft*, 454 U.S.; *Dahl v. United Techs. Corp.*, 632 F.2d 1027 (3d Cir. 1980); *Stewart v. Dow Chem. Co.*, 865 F.2d 103 (6th Cir. 1989); *PTW Energy Servs., Inc. v. Carriere*, 2019 WL 3996874 (D. Colo. Aug. 23, 2019).

By placing the factor that is central to personal jurisdiction analysis—presence—at the core of its assessment of *forum non conveniens*, the Court of Appeals essentially subjected the outcome of a *forum non conveniens* application to jurisdictional analysis. Notably, that is precisely the result advocated by a law review article—entitled "*Retiring Forum Non Conveniens*"—cited by the Court of Appeals in the decision below. *Shi*, 918 F.3d at 951 (citing Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 409 (2017)).

The article expressly advocates "reform" of this Court's *forum non conveniens* doctrine "to exclude its application in cases involving local defendants." Gardner, *supra*, at 417. Under that view, *forum non conveniens* would be entirely displaced where, as here, the court has general jurisdiction over the defendant. Where the issue is specific jurisdiction, the article likewise proposes "to scrap the *forum non conveniens* approach" in favor of a personal jurisdiction

analysis based on "updating and narrowing" the fairness factors set forth in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Gardner, *supra*, at 434. By giving the defendants' home status decisive weight, the Court of Appeals has, in effect, already implemented the article's plan for "retiring" *forum non conveniens*.

Focusing principally, if not exclusively, on the defendant's ties to the forum assumes that the plaintiff's chosen forum is *necessarily* a convenient one for the defendant and witnesses. That assumption is unfounded. *See* William L. Reynolds, *The Proper Forum for A Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1695 (1992) ("Over half of the dismissals in my sample involved American defendants, all of whom were corporate, sometimes joined with foreign defendants. These results should not surprise anyone. Both private and public interests analysis can easily point to a proper forum abroad for an American company."); Walter W. Heiser, *Forum Non Conveniens and Choice of Law: The Impact of Applying Foreign Law in Transnational Tort Actions*, 51 WAYNE L. REV. 1161, 1175 (2005) (concluding that a presumption that the state where a corporate defendant has its principal place of business is a convenient forum is "very weak").

This case illustrates the flaws in that assumption. For example, while there are tools for developing evidence transnationally, Taiwan is not a party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.[2] Thus, compelling evidence

2. U.S. Department of State, *Taiwan Judicial Assistance Information*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Taiwan.html.

production or the deposition of an unwilling witness in Taiwan for use in U.S. litigation requires a lengthy process using letters rogatory[3] and may yield only restricted questioning performed by a judge rather than counsel.[4] By ignoring *Gilbert*'s "flexible" analysis that—like the District Court below—would have considered the totality of circumstances in this case that compel dismissal in favor of Taiwan, and instead fixating on the defendants' residence, the Court of Appeals effectively abrogated a critical antidote to international forum shopping. Under the Court of Appeals' framework, defendants sued in their home forum are left with little, if any, recourse against forum-shopping by foreign plaintiffs.

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3. U.S. Department of State, *Preparation of Letters Rogatory*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html ("Execution of letters rogatory may take a year or more.").

4. According to the U.S. Department of State, "[i]f the letters rogatory requests the taking of evidence, the Taiwan court will not permit examination of witnesses by attorneys; witnesses would be examined by the court on the basis of written questions." U.S. Department of State, *Taiwan Judicial Assistance Information*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Taiwan.html; *see also* FED. R. CIV. P. 28, advisory committee's note to 1963 amendment ("In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. In many noncommon-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct.").

CONCLUSION

Forum non conveniens has long occupied a crucial role in ensuring the fairness and efficiency of transnational proceedings brought in the United States. Because the decision below represents a significant departure from prior Supreme Court precedent, anchored in *Piper Aircraft*, and a significant infringement on this Court's role in defining the doctrine of *forum non conveniens*, it requires thorough review and scrutiny by this Court. This Court should grant the Petition.

Respectfully submitted,

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