No. 19-

IN THE

Supreme Court of the United States

MAGHREB PETROLEUM EXPLORATION, S.A. AND MIDEAST FUND FOR MOROCCO LIMITED,

Petitioners,

v.

JOHN PAUL DEJORIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

ROGER D. TOWNSEND
COKINOS | YOUNG
Four Houston Center
1221 Lamar, 16th Floor
Houston, Texas 77010
(713) 535-5500

GEOFFREY L. HARRISON
Counsel of Record
KENNETH MCNEIL
JOHN P. LAHAD
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, Texas 77002
(713) 651-9366
gharrison@susmangodfrey.com

Counsel for Petitioners

293080

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Respondent John Paul DeJoria is a billionaire who co-founded a Moroccan company, was found liable in Moroccan court for defrauding Petitioners and ordered to pay $122.9 million in damages. After the Fifth Circuit in 2015 ruled against DeJoria in his attempt to avoid U.S. recognition of the Moroccan court's judgment, DeJoria lobbied the Texas Legislature to revise Texas's Uniform Foreign-Country Money Judgments Recognition Act to add new defenses and, in 2017, got the Legislature to apply the newly revised Act *retroactively* to allow him to defeat recognition. The first question presented is: Whether the retroactive application of the 2017 Texas Act violates the anti-retroactivity provisions of the Federal and the Texas Constitutions?

2. The district court granted DeJoria's motion to deny recognition of the Moroccan under the retroactively applied 2017 Texas Act. Texas law required the Fifth Circuit to review that judgment *de novo* and the Fifth Circuit applied *de novo* review in its 2015 decision. Yet the panel broke with established precedent in this case and applied the "clear error" standard of review. The second question presented is: Whether, under *Erie*, federal courts of appeal should apply the state-law standard of review in foreign country money judgment recognition cases.

PARTIES TO THE PROCEEDING BELOW

Petitioners Maghreb Petroleum Exploration SA and Mideast Fund for Morocco Limited were the Defendants-Counterclaimants in the district court and the Appellants in the court of appeals.

John Paul DeJoria was the Plaintiff-Counter-defendant in the district court and the Appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Mideast Fund for Morocco Limited is the parent corporation of Petitioner Maghreb Petroleum Exploration SA. Mideast Fund for Morocco Limited has no parent. No publicly held company owns 10% or more of either Petitioner.

RELATED PROCEEDINGS

The following federal trial and appellate court cases are related proceedings as defined by Supreme Court Rule 14.1(b)(iii):

- *John Paul DeJoria v. Maghreb Petroleum Exploration SA and Mideast Fund for Morocco Limited*, Case No. 1:13-cv-654-RP, pending in the United States District Court for the Western District of Texas, Austin Division (judgment entered Mar. 28, 2018).

- *John Paul DeJoria v. Maghreb Petroleum Exploration SA and Mideast Fund for Morocco Limited*, Appeal No. 14-51022, previously before the United States Court of Appeals for the Fifth Circuit (judgment entered September 30, 2015).

- *John Paul DeJoria v. Maghreb Petroleum Exploration SA and Mideast Fund for Morocco Limited*, Appeal No. 18-50348, previously before the United States Court of Appeals for the Fifth Circuit (judgment entered August 15, 2019).

- *John Paul DeJoria v. Maghreb Petroleum Exploration SA et al.*, No. 15-1033, previously before the Supreme Court of the Unites States on a petition for a writ of certiorari (petition denied on June 20, 2016).

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF APPENDICES

Page

Table of Appendices

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

Page

STATUTES AND OTHER AUTHORITIES:

Cited Authorities

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioners Maghreb Petroleum Exploration SA ("MPE") and Mideast Fund for Morocco Limited ("MFM") (collectively, "Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 935 F.3d 381 (App,, *infra*, 1a-27a, hereinafter, "*DeJoria-II*"). The report and recommendation of the magistrate judge is unreported (App., *infra*, 31a-86a). The district court order adopting the report and recommendation is unreported (App., *infra*, 28a-31a). The prior opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 804 F.3d 373 (App., *infra*, 90a-116a, hereinafter, "*DeJoria-I*"). The August 2014 district court order reversed in *DeJoria-I* is reported at 38 F. Supp. 3d 805 (App., *infra*, 117a-142a).

This Court's denial of Respondent DeJoria's 2015 petition for writ of certiorari to this Court is unreported (App., *infra*, 87a). The Fifth Circuit's denial of Respondent DeJoria's 2015 petitions for panel and en banc rehearing is unreported (App., *infra*, 88a-89a). The Fifth Circuit's denial of Petitioners' 2019 petition for en banc rehearing of the decision below is unreported (App., *infra*, 143a).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on August 15, 2019. The court denied rehearing on September

17, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

Because the constitutionality of a state statute is drawn into question, 28 U.S.C. §2403(b) may apply, and this petition has been served on the Attorney General of the State of Texas in accordance with Supreme Court Rule 29.4(c). In accordance with Federal Rule of Appellate Procedure 44(b), Petitioners provided written notice to the Clerk of the Fifth Circuit that one of the issues in the appeal involved a challenge to the constitutionality of a Texas statute. Is it unknown whether either the district court or the Fifth Circuit certified to the Texas Attorney General the fact that the constitutionality of the statute at issue was drawn into question, but the Texas Attorney General filed an amicus brief before the Fifth Circuit on September 5, 2018 and filed an amicus brief in the district court proceedings on November 17, 2017.

STATUTORY PROVISION INVOLVED

Section 36A.004 of the Texas Uniform Foreign-Country Money Judgments Recognition Act, Tex. Civ. Prac. & Rem. Code Ann. § 36A.004 (West 2017), provides:

> (a) Except as otherwise provided in Subsections (b) and (c), a court of this state shall recognize a foreign-country judgment to which this chapter applies.
>
> (b) A court of this state may not recognize a foreign-country judgment if:
>
> (1) the judgment was rendered under a judicial system that does not provide

impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(c) A court of this state is not required to recognize a foreign-country judgment if:

(1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;

(2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present the party's case;

(3) the judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or the United States;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in the foreign court;

(6) jurisdiction was based only on personal service and the foreign court was a seriously inconvenient forum for the trial of the action;

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment

(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law; or

(9) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, would constitute foreign-country judgments to which this chapter would apply under Section 36A.003.

(d) A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in Subsection (b) or (c) exists.

INTRODUCTION

The Fifth Circuit departed from the accepted and usual course of judicial proceedings—and allowed the district court's similar departure—by permitting

retroactive and unconstitutional application of Texas's enactment of the 2005 Uniform Foreign Country Money Judgment's Recognition Act. Respondent DeJoria lobbied for the new Act and its retroactive application after the *DeJoria-I* Court ruled against him and ruled in favor of recognizing the Moroccan judgment.

This Court has repeatedly served as a check against the sovereign's ability to employ lawmaking to alter parties' settled expectations and affect transactions in the past. That fundamental protection applies in both the criminal and civil context, and the presumption against retroactive application of new laws "is an essential thread in the mantle of protection that the law affords the individual citizen" and "'embodies a legal doctrine centuries older than our Republic.'" *Lynce v. Mathis*, 519 U.S. 433, 439, 117 S. Ct. 891, 895 (1997) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S. Ct. 1483, 1497 (1994)); *see also Sveen v. Melin*, 138 S. Ct. 1815, 1826 (2018) (Gorsuch, J., dissenting) ("Because legislation often disrupts existing social arrangements, it usually applies only prospectively. This longstanding and 'sacred' principle ensures that people have fair warning of the law's demands." (Citing *Reynolds v. McArthur*, 2 Pet. 417, 434 (1829)).

The Fifth Circuit acknowledged that DeJoria's lobbying efforts "changed the rules of the game midway through the proceedings," and noted the "whiff of home cooking" present below. App., *infra*, 12a. But the court permitted this rank abuse of power (and means) nonetheless, in violation of the federal and state constitutional prohibitions against retroactive application of the laws.

In affirming the district court, the Fifth Circuit approved the Magistrate Judge's condemnation of the judicial system of Morocco, one of this country's oldest allies. But unlike DeJoria's unsubstantiated speculation about the Moroccan executive's supposed meddling in his proceedings, DeJoria actually and undisputedly engaged in extra-judicial interference in this federal case. DeJoria's extra-judicial actions have now gained the imprimatur of the Fifth Circuit and will invite other parties to seek legislation to alter or affect the outcome of pending court cases. Such successful lobbying efforts risk eviscerating Article III itself. The Fifth Circuit's decision demands this Court's review.

STATEMENT OF THE CASE

I. Background

Respondent DeJoria is the billionaire co-founder of the Paul Mitchell line of hair care products and Patron Tequila and is a recurring guest on television's "Shark Tank." In 1999, DeJoria co-founded a Moroccan company called Lone Star Energy Corporation. C.A.Rec.1900-38; C.A.Rec.2196. DeJoria signed Lone Star's Articles of Association as a director and as a shareholder and agreed in writing that "any disputes that may arise during the course of the Company…are subject to the competent courts" of Morocco. C.A.Rec.1916. DeJoria, his business partner, and their 50/50-owned company Skidmore Energy, Inc. held 90% of Lone Star's shares. C.A.Rec.1958; C.A.Rec.2196; C.A.Rec.2334-36; C.A.Rec.4914.

DeJoria fraudulently induced Petitioner MFM to invest millions in Lone Star by misrepresenting Lone

Star's value as $175 million and by falsely claiming that he and his company Skidmore had invested $27.5 million. C.A.Rec.2197. Accounting firm KPMG audited Lone Star, identified DeJoria's fraud, and reported that DeJoria and Skidmore invested only $3.7 million. C.A.Rec.2200-02. Lone Star removed DeJoria from its board and changed its name to Respondent MPE. *Id.*

In 2002, Petitioners filed the underlying Moroccan lawsuit against DeJoria, Skidmore, and five other U.S. defendants. C.A.Rec.2185-2203, C.A.Rec.2195-99. DeJoria elected not to participate in the Moroccan proceedings.[1] Instead, he retaliated by having his company Skidmore sue MPE, MFM, KPMG, and 18 others in the Northern District of Texas in 2003, seeking $3 billion in damages and an anti-suit injunction to halt the Moroccan lawsuit. *Skidmore Energy, Inc. v. KPMG,* 455 F.3d 564, 566 (5th Cir. 2006), *cert. denied*, 549 U.S. 996 (2006).[2]

In December 2009, the Moroccan court issued a $122.9 million judgment against DeJoria and his partner, absolving the five other U.S. defendants of liability. C.A.Rec.4717-34 (English translation). In March 2013, DeJoria personally was served with the Moroccan judgment and informed in writing that he had 45 days to appeal in Morocco before the judgment became final

1. DeJoria admitted that he "Absolutely" knew about the Moroccan proceedings but "made a decision to…challenge the judgment when it was brought to Texas for recognition." C.A.Rec.4912-13.

2. The district court dismissed Skidmore's lawsuit and sanctioned it and its lawyers over $500,000 for bringing a "factually groundless lawsuit." *Skidmore*, 455 F.3d at 568.

under Moroccan law. C.A.Rec.4781-4860, 4859-60. DeJoria again declined to participate in the proceedings abroad and chose not to exercise his right under Moroccan law to a de novo appeal of the judgment. C.A.Rec.4862; C.A.Rec.4912-13.

II. Proceedings Below

A. The 2013 district court proceedings

In June 2013, DeJoria filed this lawsuit in Texas state court seeking non-recognition of the Moroccan judgment under the original version of Texas's Foreign Country Money Judgments Recognition Act ("Original Act"), promulgated in 1962 by the Uniform Law Commission as the Foreign Money Judgments Recognition Act. C.A.Rec.29-40; C.A.Rec.451-57. The action was removed to the U.S. District Court for the Western District of Texas and ultimately assigned to now-retired Judge James Nowlin.

DeJoria challenged the Moroccan judgment arguing that Moroccan judicial system lacked impartial tribunals and procedures compatible with due process, that the Moroccan court lacked personal jurisdiction, that Morocco would not enforce a Texas judgment reciprocally, that the Moroccan judgment was repugnant to public policy, and that Morocco was an inconvenient forum to litigate the dispute. C.A.Rec.472-515. In 2013, DeJoria retained two Moroccan lawyers to provide affidavits supporting his reciprocity and personal-jurisdiction challenges—he had no support for his due process challenge. C.A.Rec.923-28; C.A.Rec.930-36; C.A.Rec.2729-31; C.A.Rec.2912; C.A.Rec.4906-08; C.A.Rec.5122-27; C.A.Rec.5129-30; C.A.Rec.5144-46.

In 2014, Judge Nowlin refused to recognize the Moroccan judgment, ruling that Morocco's judicial system could not provide DeJoria with due process and impartial tribunals. C.A.Rec.3257-85. He incorrectly viewed the Moroccan royal family as having "a political and economic interest in the outcome of the Moroccan lawsuit," which, he thought, "impacted the judicial oversight." C.A.Rec.3283.

B. The Fifth Circuit's 2015 opinion in *DeJoria I*

Petitioners appealed Judge Nowlin's decision, and in September 2015, the Fifth Circuit reversed and remanded. App., *infra,* 116a. The court rejected DeJoria's system-wide and case-specific due-process arguments, rejected his argument that the Moroccan courts lacked personal jurisdiction, and rejected his argument that Morocco would not reciprocally enforce a Texas judgment. App., *infra,* 105a, 110a, 116a. The Fifth Circuit also rejected any argument based on speculative notions about the King's supposed influence in the proceedings abroad:

> Although our inquiry focuses on Morocco's judicial *system,* we also observe that **the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case**. For example, the Moroccan court (1) appointed experts, (2) took seven years to reach a decision, (3) awarded a lesser judgment than the expert recommended, and (4) absolved five defendants—including DeJoria's company Skidmore—of liability.

App., *infra,* 102a (italics in original).

The *DeJoria-I* Court acknowledged that DeJoria "claims that his life would have been endangered," App., *infra,* 92a, but still rejected his personal-jurisdiction challenge because:

> While litigation in Morocco would have imposed a burden on DeJoria, that burden would not be so heavy as to render jurisdiction unreasonable. *Moroccan courts do not require that the defendant appear personally, and* ***DeJoria could have litigated entirely through counsel without returning to Morocco****.*

App., *infra*, 116a.

DeJoria sought rehearing and rehearing en banc. The Fifth Circuit denied those petitions in November 2015, App., *infra*, 88a-89a, and in June 2016, this Court denied DeJoria's petition for a writ of certiorari. App., *infra,* 87a.

C. Proceedings After Remand

On remand, Judge Nowlin referred the case to Magistrate Judge Andrew Austin, who indulged DeJoria's requests for delay, allowed DeJoria to re-raise "public policy" and "inconvenient forum" challenges that the *DeJoria-I* Court had held he waived, App., *infra,* 105a, and allowed DeJoria to challenge recognition under the 14th Amendment's Due Process Clause. C.A.Rec.3828-46; C.A.Rec.3900-01; C.A.Rec.4184-94; C.A.Rec.4250-52.

Meanwhile, without disclosure to the district court, Magistrate Judge Austin, or Petitioners, DeJoria and his lawyers of record used the litigation delay to lobby the

Texas Legislature to change the governing substantive law and apply it *retroactively* to this pending case. In June 2017, at DeJoria's urging, the Texas Legislature replaced the Original Act with a new version ("2017 Texas Act") based on the 2005 Uniform Foreign County Money Judgment Recognition Act ("2005 Uniform Act"). C.A.Rec.4993-5018.

The 2017 Texas Act included two new challenges to a foreign judgment that were not enumerated in the Original Act, allowing non-recognition (one) if "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" under §36A.004(c)(7), or (two) if "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law" under §36A.004(c)(8). *See* Tex. Civ. Prac. & Rem. Code §36A *et seq.*; C.A.Rec.5020-26. While the 2005 Uniform Act applies prospectively only, DeJoria persuaded the Texas Legislature to apply the 2017 Texas Act retroactively to "a pending suit in which the issue of recognition of a foreign country judgment is or has been raised without regard to whether the suit was commenced before, on, or after the effective date of this Act." C.A.Rec.5025-26 (Senate Bill 944 §3, Act of May 22, 2017, 85th Leg.) (emphasis added).[3]

D. The Magistrate Judge's report and recommendation

In July 2017, DeJoria moved for non-recognition under his new, lobbied-for 2017 Texas Act, primarily focusing

3. Two dozen other states have adopted the 2005 Uniform Act, but Texas is the only one to apply it retroactively to pending cases. C.A.Rec.5018; C.A.Rec.5025-26.

on the §36A.004(c)(8) specific-proceeding challenge. C.A.Rec.4472-4513. DeJoria did not cite any new evidence. He expressly disavowed the need for any additional evidence, relying on the same record, same speculation, and same improper inferences about partial tribunals, inability to retain counsel, and biased court-appointed experts that the Fifth Circuit rejected in *DeJoria-I* in 2015.

On February 26, 2018, *without oral argument or a hearing*, Magistrate Judge Austin issued his Report and Recommendation recommending non-recognition under the retroactive 2017 Texas Act's §36A.004(c)(8) "due process" ground. App., *infra*, 31a-86a. The Magistrate Judge exhumed several of Judge Nowlin's reversed findings based on the latter's view that the King had his thumb on the scale, even going so far as staying that it would be "inappropriate for this judge to reweigh the very same evidence that Judge Nowlin already weighed." App., *infra*, 64a.[4]

The Magistrate Judge then made three unsupported "additional findings." First, the Magistrate Judge found that "DeJoria was unable to personally appear to defend himself and offer testimony to rebut the claims

4. This Court held in *Butler v. Eaton*, 141 U.S. 240, 244 (1891) that a judgment or opinion reversed on appeal is "without any validity, force, or effect, and out to never have existed." *See also* 5 C.J.S. *Appeal and Error* §1106 (2018) ("The effect of a general and unqualified reversal of a judgment, order, or decree is to *nullify it completely* and to leave the cause standing as if such judgment, order, or decree *had never been rendered*…."); 36 C.J.S. *Federal Courts* §739 (2018) (same). The Magistrate Judge's view that it would be inappropriate to reweigh evidence overlooks the *Butler* rule.

made against him in the Moroccan lawsuit" because of a supposed hearsay "death threat" and "fear" that rendered him "unable to personally appear at any of the court proceedings." App., *infra*, 73a. Second, the Magistrate Judge embraced DeJoria's counter-factual assertion that he was "unable to retain counsel" because, he says, "he was a defendant in a case that was of great political interest to the King." App., *infra*, 74a. Finally, the Magistrate Judge credited a groundless, 100% made-up theory about the Moroccan Court cycling through experts until it landed on one that would provide a large enough damages figure. App., *infra*, 80a-83a.

Just two days after DeJoria responded to Petitioners' 60+ pages' worth of objections to the recommendation, the newly-assigned district court (Judge Pitman) issued a 1 ½ page order adopting it. App., *infra*, 28a-30a.

E. The Fifth Circuit's 2019 opinion in *DeJoria-II*

The Fifth Circuit affirmed. The *DeJoria-II* Court first determined that retroactive application of the 2017 Act to pending cases did not violate the Texas Constitution's prohibition against retroactive laws. App., *infra*, 8a-12a. The Texas Constitution provides in Article I §16 that "No bill of attainder, ex post facto law, *retroactive law*, or any law impairing the obligation of contracts, shall be made." Despite this clear text, the panel found "limited interference" with Petitioners' legitimate rights and held that "[Petitioners'] expectation that [they] would prevail was, in other words, not yet settled." App., *infra*, 10a-11a. The panel did not address any of the U.S. Constitutional underpinnings of the anti-retroactivity principles incorporated in the Texas Constitution's Article I §16.

The Fifth Circuit compounded its constitutional error by holding that contrary to *DeJoria-I* and other Fifth Circuit decisions, the appropriate standard of review was "clear error." App., *infra*, 14a. The *DeJoria-II* Court acknowledged that "the appeal's outcome largely turns on" and "ends up being resolved on" its decision to review for clear error what it acknowledges are factual findings "subject to vigorous debate." App., *infra*, 13a, 23a, 27a. Even though dispositive, the panel deviated from established law and applied a new standard of review.

On the merits, the Fifth Circuit noted the Magistrate Judge's "three major findings to support nonrecognition"—a hearsay death-threat story, DeJoria's purported inability to retain counsel, and an utterly baseless conspiracy theory about court-appointed experts. App., *infra*, 19a. These "findings" are based on the false but persistent narrative about the King's supposed "political and other interests," C.A.Rec.5648-49. The *DeJoria-I* Court, however, expressly rejected such innuendo and speculation. But the court, citing a new standard of review for these cases, shrugged its shoulders saying that the "problem is that there is evidence on both sides" and even if Petitioners' evidence is stronger, "that is not enough to establish that the district court's crediting of DeJoria's evidence is implausible." App., *infra*, 20a.[5]

5. The Magistrate Judge's additional findings should never have been measured against some "implausibility" benchmark because they ran afoul of the law of the case. When a court decides an issue of law or fact, "that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16, 108 S. Ct. 2166, 2177 (1988). The *DeJoria-II* Court, however, incorrectly said that "the prior panel's opinion did not preclude the findings the district court

Petitioners sought rehearing en banc, arguing that the *DeJoria-II* Court applied the incorrect standard of review, effectively overruling (improperly) an express decision reached in *DeJoria-I*, and that the panel improperly allowed DeJoria's unconstitutional legislative gamesmanship. The court denied rehearing on September 17, 2019. App., *infra*, 143a-144a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit permitted wanton abuse of power by allowing retroactive application of a new law lobbied for by a party in this case

The Fifth Circuit ignored Petitioners' well-settled expectations and destroyed the existing social and legal arrangements in effect for most of this case. The Fifth Circuit wrongly held that the retroactive application of the changed law—lobbied for by DeJoria and his counsel of record to undo *DeJoria-I*—did not violate the prohibition against retroactive application because of its "limited interference with [Petitioners'] legitimate rights." App., *infra*, 10a. In *Lynce*, this Court rightly noted that the Constitution's "limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects" is "a basic principle that protects not only the rich and the powerful." 519 U.S. at 440.

---

made on remand." App., *infra*, 24a. The court pointed to the 2017 Texas Act as a "new playing field" and dismissed the prior panel's findings as "general statements about usual Moroccan practices" and "admittedly" dicta. App., *infra*, 25a. The prior panel's conclusions, for example, about royal influence and counsel availability, govern as law of the case regardless of the new legal framework.

In this case, the courts below sanctioned the rich and powerful's efforts to unravel unfairly and unconstitutionally the "essential thread in the mantle of protection that the law affords the individual citizen." *Id.* at 439. A billionaire committed fraud in a business transaction overseas, and when called to account for his misconduct, changed the governing law in this U.S. suit in the middle of the proceedings, and neither the district court nor the Fifth Circuit found anything wrong with that. The lower courts' lack of constitutional concern and oversight on this exact conduct screams out for the exercise of this Court's supervisory power.

A. Retroactivity offends constitutional protections

In *Landgraf*, this Court explained that the "antiretroactivity principle finds expression in several provisions of our Constitution." 511 U.S. at 266. This Court pointed to the Ex Post Facto Clause, the Contracts Clause, the Fifth Amendment's Takings Clause, the prohibitions against Bills of Attainder, and the Due Process clause, which "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Id.*; *see also id.* at 272 ("Because it accords with widely held institutions about how statutes should ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectation."); *Sveen*, 138 S. Ct. at 1826 (Gorsuch, J., dissenting) (noting that prospective application "prevents majoritarian legislatures from condemning disfavored minorities for past conduct they are powerless to change" (citing *Landgraf*)).

Article I §16 of the Texas Constitution echoes those protections even more ardently, stating that "No bill of

attainder, ex post facto law, *retroactive law*, or any law impairing the obligation of contracts, shall be made." In *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 139 (Tex. 2010), the Texas Supreme Court—repeatedly citing *Landgraf*—recognized that provisions limiting retroactive legislation, like Article I §16, must "be applied to achieve their intended objectives—protecting settled expectations and preventing abuse of legislative power."

Well before *Robinson* and cases like it, this Court warned against abuse of legislative power, at least through the lens of separation of powers, that arises when new legislation affects pending lawsuits. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222 115 S. Ct. 1447, 1455 (1995) ("A legislature without exceeding its province cannot reverse a determination once made, in a particular case though it may prescribe a new rule for future cases." (quoting The Federalist No. 81, p. 545 (J. Cooke ed. 1961))); *see also Patchak v. Zinke*, 138 S. Ct. 897, 916 (2018) (Roberts, C.J., dissenting) (noting that "changing the rules of decision for the determination of a pending case would impermissibly interfere with judicial independence" (quoting *Pope v. United States*, 323 U.S. 1, 9, 65 S. Ct. 16 (1944))). The legislature cannot, as it did here, affect the judicial powers of the United States "in a manner repugnant to the text, structure, and traditions of Article III." *Plaut*, 514 U.S. at 218, 115 S. Ct. at 1452.

B. DeJoria-II marginalized constitutional protections and condoned legislative abuse of power

DeJoria-II throws these constitutional protections by the wayside and openly invites other litigants to undo

judicial decisions in their cases by secretly lobbying legislatures and mischaracterizing what courts have said and done. The Fifth Circuit expressly recognized that it was DeJoria's lobbying "that changed the rules of the game midway through the proceedings" but found no infirmity when Petitioners' rights were compared to the "immediate protection to the due process rights of its citizens." App., *infra*, 12a.

The court found that retroactive application of the law resulted in "limited interference" with Petitioners' rights because, according to the court, it was "not even certain that the law as it stood before the adoption of the updated act would have led to recognition of the Moroccan judgment." App., *infra*, 10a. But this case was all-but-over after *DeJoria-I*. DeJoria had asserted five nonrecognition challenges under the prior version of the statute, and the Fifth Circuit had squarely rejected DeJoria's strongest three grounds (due-process, jurisdiction, reciprocity). As to the other two, the court held he "waived" his public policy and inconvenient forum grounds, App., *infra*, 105a, but even on the merits, those grounds were so weak that DeJoria did not raise them as alternative grounds for affirmance. DeJoria's policy challenge was founded on the laughable notion that "joint and several liability" was repugnant to Texas law, C.A.Rec.4509, and he later fully abandoned his challenge that Morocco was a "seriously inconvenient forum" for this Morocco-based dispute—a sure loser considering DeJoria's signed, written consent to litigate "any disputes" in Morocco. C.A.Rec.4511, C.A.Rec.1916. Petitioners rightly had a strong and settled right to recognition of the Moroccan judgment after remand. Indeed, Petitioners' rights and expectations—along with DeJoria's miserable prospects—are *the very reason* DeJoria engaged in his extra-judicial lobbying.

In finding this gamesmanship unobjectionable, the court stated that retroactive application of the 2017 Texas Act did not "strip" Petitioners of the ability to seek recognition of the Moroccan judgment" and that "the only right that has been impinged is the right to automatic recognition of a judgment obtained in proceedings that denied the judgment debtor fundamental fairness." App., *infra*, 11a. As a threshold point, Petitioners never sought "automatic recognition"—they litigated for years and demonstrated that Morocco generally *and in this case* provided impartial tribunals, due-process protections, and had personal jurisdiction. Petitioners proved these facts even though DeJoria bore the burden of proof under the statute to prove a ground of non-recognition.

The Fifth Circuit misplaced its focus on Petitioners' right to seek recognition. Rather, under either version of the statute, DeJoria as the debtor/challenger exclusively and always bears the burden of proving a ground of non-recognition. Section 36A.004(a) states: "Except as otherwise provided in Subsections (b) and (c), a court of this state ***shall*** recognize a foreign-country judgment to which this chapter applies." Tex. Civ. Prac. Rem. Code §36A.004(a) (emphasis added). Section 36.004(d) adds that a "party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in Subsection (b) or (c) exists." *Id.* at §36A.004(d). In other words, recognition of the judgment is the default outcome unless the challenger can meet its burden to prove a statutory ground of non-recognition. The Original Act included the same presumption of recognition and likewise placed the burden on the debtor to prove a non-recognition ground. App., *infra*, 97a. That DeJoria bears the burden of proof underscores the flaw

in the Fifth Circuit's reasoning. Retroactive application of the 2017 Texas Act gave DeJoria two new challenges that he did not have when this case was filed, effectively undid Texas law's default rule of recognition, and wrongly relieved DeJoria of his burden.

C. Retroactive application of the 2017 Texas Act is unconstitutional

The Fifth Circuit's holding is precisely the type of disruption of existing arrangements by the legislature that the Constitution must prevent. In *INS v. St. Cyr*, 533 U.S. 289, 326, 121 S. Ct. 2271 (2001), this Court addressed §212(c) of the Immigration and Nationality Act of 1952, which granted the Attorney General discretionary authority to admit aliens who would otherwise be excluded or deportable. Section 212(c), for example, permitted the Attorney General authority to admit permanent residents who had been convicted of *or plead guilty to* aggravated felonies. 533 U.S. at 294-295. According to this Court, "the class of aliens whose continued residence in this country has depended on their eligibility for §212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for 212(c) relief have been granted." *Id.* at 295-296.

In 1996, Congress repealed §212(c) and replaced it with a statute that gives the Attorney General authority to cancel removal for a much narrower class of aliens. *Id.* at 297 (citing 8 U.S.C. §1229b). Nevertheless, this Court held that the broader relief afforded by §212(c) must remain available, on the same terms as before, to an alien whose removal is based on a guilty plea entered before §212(c)'s repeal. *Id.* at 321. This Court reiterated

that retroactive application of a statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 269). This Court held that ""IIRIRA's elimination of any possibility of §212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly attaches a new disability, in respect to transactions or considerations already past." *Id.* (quotations omitted). Because aliens had entered pleas with possibility of discretionary relief in mind, this Court held that eliminating that prospect would not have comported with familiar considerations of fair notice and reasonable reliance. *Id.*

Similarly, in *Lynce*, Florida passed a statute canceling certain prisoners' early release credits, which were awarded to alleviate prison overcrowding. 519 U.S. at 435-436. Lynce filed a habeas petition alleging that retroactive cancellation of his credits violated the Ex Post Facto Clause. The courts below found no violation, denied the petition, and denied a certificate of probable cause. *Id.* at 436. This Court reversed, holding that the Florida statute violated the Ex Post Facto Clause because it retroactively increased the prisoner's punishment. According to this Court, the statute "made ineligible for early release a class of prisoners who were previously eligible." *Id.* at 447.

In this case, at the time Petitioners sought recognition of the Moroccan judgment, the challenges to recognition were finite, and did not include the two challenges DeJoria lobbied for and received with the 2017 Texas Act. The parties briefed the issues in the district and circuit courts

in 2013-2015, and the Fifth Circuit issued its decision in *DeJoria-I* in September 2015. On remand the district court considered multiple matters and issued rulings in 2016 and 2017. All of this transpired before DeJoria's undisclosed efforts led to passage of the 2017 Texas Act in June 2017.

After remand, DeJoria disclaimed additional discovery, C.A.Rec.5818, meaning that the record would be same as the one before the *DeJoria-I* Court. Petitioners had already rebutted, thoroughly and conclusively, DeJoria's remaining public policy and inconvenient forum challenges. Just as St. Cyr relied on the availability of discretionary relief under §212(c) and Lynce relied on his early credits, Petitioners relied on default presumption that the Moroccan judgment would be recognized. While DeJoria could not meet his burden under any ground for non-recognition, old or new, retroactive application of the 2017 Texas Act "attach[ed] a new disability in respect to transactions or considerations already past" and deprived Petitioners of "fair warning of the law's demands." *Sveen*, 138 S. Ct. at 1826 (Gorsuch, J., dissenting).

These new disabilities were imposed through legislation sought by DeJoria. The *DeJoria-II* Court noted that "**it was [DeJoria's] lobbying efforts that changed the rules of the game midway through the proceedings**," App., *infra*, 12a (emphasis added), and recognized the "whiff of home cooking" and "deep irony," *id.*, but still allowed retroactive application of the new law because, it said, "'unfair does not always equal unconstitutional.'" *Id*. Retroactive application of governing law midway through a case demands painstaking scrutiny. Courts cannot blindly defer to the sovereign and must closely

examine the reasons, justifications, and circumstances behind subverting the presumption against retroactivity. At every level, courts must serve as bulwarks against sovereign's ability to "modify the bargains it has made with its subjects." *Lynce*, 519 U.S. at 440. The Fifth Circuit abdicated this duty and blessed a statute that directly impaired the rights and expectations of parties in active litigation and concluded that the impairment did rise to an unconstitutional level.

In addition to violating the bargain between the sovereign and its subjects, retroactive application of the statute—specifically designed to undo *DeJoria-I*—runs afoul of the separation of powers. Abuse of power is near its zenith when a party runs to the legislature seeking a change in the law governing a *pending case*. Retroactive application of the 2017 Texas Act might not have reopened a judgment or robbed a party of a forum, but it did disingenuously target and abrogate a federal appellate court decision *in the same case*. These actions harken back to the "ruins of a system of intermingled legislative and judicial powers" that Judge Scalia described in *Plaut*, 514 U.S. at 219, and cross the constitutional line drawn by the separation of powers.

There is little daylight between the circumstances behind the 2017 Texas Act and those undergirding the Texas Supreme Court's decision in *Robinson*. In *Robinson*, the Texas Legislature passed a law, Chapter 149, that capped successor liability for asbestos claims. 335 S.W.3d at 130. The legislature made Chapter 149, like the 2017 Texas Act here, applicable actions pending at the time, not just those commenced on or after the statute's effective date. *Id.* at 131. The Texas Supreme Court found

retroactive application of Chapter 149 violative of the Texas Constitution's prohibition against retroactive laws because "Chapter 149 was enacted to help only Crown and no one else," "Crown itself has been unable to identify to us any other company affected," and "the Legislature made no findings to justify Chapter 149" retroactivity. *Id.* at 149-50. It held that "the public interest served by Chapter 149 is slight."

As in *Robinson,* retroactivity here benefited only DeJoria, and as the *DeJoria-II* panel itself recognized, the "only pending case the legislators were told about was this one." App., *infra*, 7a. Further, the Texas Legislature did not make any findings to justify retroactivity of the 2017 Texas Act. The "Sponsor's Statement of Intent" for the 2017 Texas Act refers to a "recent federal court decision"—*DeJoria-I*—that purportedly "called into question whether the Texas Act protects Texans' individual due process rights by foreign court systems." C.A.Rec.5028. The Statement does not say how or whether retroactivity affords judgment debtors more individual due-process protections than they had under the old Act, not to mention that the law, especially its retroactive application, was promoted with substantial involvement from DeJoria and his lawyers and lobbyists. The *Robinson* Court relied on this Court's jurisprudence and highlighted that one of the intended objectives of prohibiting retroactive applications was to prevent abuse of power. 335 S.W.3d at 139. The same abuse of power that supported finding Chapter 149 unconstitutional warrants the same finding as to the 2017 Texas Act.

As this Court recognized in *Landgraf*, some "retroactivity provisions often serve entirely benign and

legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." 511 U.S. at 268. That was not the case here. The only emergency was that DeJoria was about to lose his case and reckon with his misconduct abroad and his choice to ignore the Moroccan lawsuit. Faced with that, DeJoria leveraged his considerable resources to change the rules of decision for the determination of a pending case. DeJoria's underhandedness might not be actionable under the Constitution, but Texas's decision to depart from 2005 Uniform Act and make the new law applicable to this case (to benefit DeJoria and only DeJoria) represents a gross abuse of power and a rank violation of the Due Process Clause and the separation of powers. This decision demands this Court's review.

II. The Fifth Circuit disregarded *Erie* and crafted a new standard of review

The *DeJoria-II* Court's outcome-determinative "clear-error" review directly conflicts with *DeJoria-I*'s application of *de novo* review. *DeJoria-II* caused an intra-case rift and also causes a dangerous rift between state and federal outcomes in recognition cases in contravention of *Erie*'s rule that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S. Ct. 817, 822 (1938). *DeJoria-II*'s unapologetic refusal to follow *Erie* likewise constitutes a departure from the usual course of judicial proceedings worthy of this Court's review.

In *Derr v. Swarek,* 766 F.3d 430, 436 n.2 (5th Cir. 2014), the Fifth Circuit highlighted its prior panels' disagreements about the standard of review in foreign country money judgment recognition cases, held that state law controls, and applied Mississippi's abuse-of-discretion standard (because Mississippi law governed). In accordance with *Derr*, the *DeJoria-I* Court "similarly look[ed] to Texas law to determine the applicable standard of review here" and cited five Texas recognition cases applying *de novo* review, including to fact-findings. App., *infra*, 94a-95a.

DeJoria-II ignored *Derr* and its alignment of state and federal review standards in diversity-jurisdiction recognition cases, and instead concluded that "our appellate standard of review is governed by federal law, even in this diversity case." App., *infra*, 14a. *DeJoria-II*'s only support is a citation to a rote phrase in an automobile design-defect case, *Goodner v. Hyundai Motor Co.,* 650 F.3d 1034, 1040 (5th Cir. 2011), that predates *Derr* and *DeJoria-I*. *Id*.

The *DeJoria-II* Court said that it looked at Texas recognition law, but somehow found "Nothing" that "counsels in a different direction" from clear-error review. App., *infra*, 16a. The panel failed even to mention the first two Texas recognition cases cited in *DeJoria-I* for *de novo* review—*Reading & Bates Construction Company v. Baker Energy Resources Corporation,* 976 S.W.2d 702 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) and *Presley v. N.V. Masureel Verdeling,* 370 S.W.3d 425 (Tex. App.—Houston [1st Dist.] 2012, no pet.). The panel also overlooked that in *The Courage Corp. v. Chemshare Corp.,* 93 S.W.3d 323, 331 (Tex. App.—Houston [14th Dist.] 2002, pet. denied), the Texas appeals court reviewed "findings and conclusions" *de novo.*

The *DeJoria-II* Court wrongly noted that the prior panel did not "determine the proper standard of review for the factual findings that underpin the district court's legal decision." App., *infra*, 14a. DeJoria himself specifically argued in *DeJoria-I* that "the bulk of the district court's judgment is factual findings and those should be reviewed under the clear error standard." C.A.Rec.4910-12. He likewise complained in his rehearing and certiorari petitions in 2015 and 2016 that "***de novo review allowed the Fifth Circuit to weigh the facts in the first instance***," C.A.Rec.4018 (emphasis added), complained that *DeJoria-I* "reweighed" evidence and was not "deferential…to the district court's findings," C.A.Rec.3374; C.A.Rec.4015, and said "reweighing of disputed evidence and inferences is illustrated by [*DeJoria-I's*] treatment of the availability of counsel in the Moroccan proceedings," C.A.Rec.4957. DeJoria's own filings and judicial admissions show that the *DeJoria-II* Court used a demonstrably false justification for substituting its outcome-determinative "clear error" review in place of the *DeJoria-I* Court's (and Texas law's) *de novo* review—the *DeJoria-I* Court absolutely did review the evidence and the district court's fact-findings *de novo*.

In *Guaranty Trust Co. v. New York*, 326 U.S. 99, 109, 65 S. Ct. 1464, 1470 (1945), this Court made clear that "where a federal court is exercising jurisdiction solely because of diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." In *Hanna v. Plumer*, 380 U.S. 460, 468, 85 S. Ct. 1136, 1142 (1965), this Court advised that *Guaranty Trust*'s "outcome-determination" test must be guided by

"the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." And in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S. Ct. 2211 (1996), this Court applied *Guaranty Trust* in light of *Erie*'s twin aims and held that New York law supplied the standard for reviewing a verdict's excessiveness.

Under this Court's precedent, state law supplies the standard of review in foreign recognition cases. If this case had stayed in state court where it was originally brought, the state appellate court very likely, if not most certainly, would have applied a *de novo* standard of review. The Fifth Circuit conceded that the standard of review in this case was dispositive, admitting that "the appeal's outcome largely turns on" the question of the appropriate standard of review. App., *infra*, 13a. The resulting disconnect between federal and state standards and outcomes implicates *Erie*'s twin aims. In cases like this, parties will try to keep cases in state court or remove them to federal in order to affect the result. That forum shopping is precisely what the *Erie/Hanna* rule seeks to avoid.

In *Gasperini*, this Court said, "Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor." 518 U.S. at 427, 116 S. Ct. at 2219. In this case, it should have been easy. The standard of review is clear under Texas law and would have led to a different result had the Court applied it rather than clear error. The Fifth Circuit's flouting of the *Erie* rule justifies this Court's supervisory power as well.

III. These issues must not evade review

The questions before this Court are important and recurring and this case presents an appropriate vehicle for addressing them.

A. The Fifth Circuit's decision sanctions retroactive application of a new law in the most egregious circumstances

The Fifth Circuit said that "immediate protection to the due process rights of its citizens" justified (or excused) retractive application of the new law. App., *infra*, 12a. But the Original Act already provided due process and other protections as it required systemwide fairness and due process, personal jurisdiction, sufficient notice and time to defend, a convenient forum, and more. C.A.Rec.3964, C.A.Rec.4173; *see also* Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in U.S. Courts: A Practical Perspective*, 29 Pepp. L. Rev. 147, 163-164 (2001) (correlating the Uniform Act's due process ground to *Guyot's* "opportunity for a full and fair trial," "a trial upon regular proceedings," and "proceedings under a system likely to secure an impartial administration of justice with respect to citizens of other countries"). The purported desire for "immediate protection" was solely for DeJoria's benefit to try to undo his 2015 loss in the Fifth Circuit in *DeJoria-I*, which is exactly why he lobbied for retroactive application. The only affected case known at the time DeJoria was lobbying the legislature was *this* one. App., *infra*, 7a.

DeJoria's prospects were bleak after the first Fifth Circuit panel rejected his arguments. He went to the

Texas Legislature for assistance in his case, and he got it. *DeJoria-II* dangerously countenances—indeed, encourages—other litigants to try and affect the outcome of pending lawsuits by lobbying for retroactive changes in the law. DeJoria's tactics will be followed by other (especially well-heeled) litigants faced with adverse prospects. During the Texas House Committee hearing on this statute, the Committee Chairman himself warned that "we have to be very careful when somebody comes in here and says, 'I'm in the middle of litigation. Will you change the rules to help me out in this litigation?' Otherwise, we're going to have everybody – every big entity that is capable of hiring lobbyists coming in here and wanting us to change the law to affect their litigation. That is a matter of concern." C.A.Rec.5101. The Fifth Circuit's *DeJoria-II* opinion invites others to follow DeJoria's extra-judicial playbook.

B. The Fifth Circuit's opinion encourages forum shopping

The *DeJoria-II* Court's refusal to honor and apply the *DeJoria-I* Court's (and Texas law's) *de novo* standard of review was dispositive. App., *infra*, 13a. The Fifth Circuit's opinion in *DeJoria-II* thus violates *Erie*'s "twin aims" and leads to divergent results by providing different standards of review depending on whether the same case is in state or federal court. *Erie,* 304 U.S. at 78, 58 S. Ct. at 822; *Hanna*, 380 U.S. at 468, 85 S. Ct. at 1142. Texas law is clear. Decisions regarding recognition of foreign judgments are reviewed de novo. *See Reading & Bates,* 976 S.W.2d at 708; *Presley,* 370 S.W.3d at 432; *The Courage Corp.,* 93 S.W.3d at 331. Until *DeJoria-II* undid it, the federal courts were in accord. A different standard

of review between state and federal forums invites the kind of forum shopping that *Erie* and its progeny were designed to prevent.

C. This case presents an appropriate vehicle

This case presents a clean and appropriate vehicle for deciding these issues. The Fifth Circuit's willingness to permit retroactive application despite "the whiff of home cooking" and the "deep irony" in the arguments given DeJoria's tactics dictated the outcome. Had the Fifth Circuit given appropriate weight, indeed any meaningful weight, to the legal doctrine "centuries older than our Republic," 511 U.S. at 265, it would have swiftly reversed the lower court's decision. Likewise, had the Fifth Circuit adhered to its own precedent, it would have reversed, as the prior panel did. DeJoria's speculation and innuendo are not enough to meet his burden under any standard, but certainly not under the de novo standard that should have been applied.

The consequences of the Fifth Circuit's deviation from the standard of review applied before its opinion are not limited to Texas. In *Derr,* the Fifth Circuit looked to Mississippi law and applied an abuse of discretion standard of review. 766 F.3d at 436 n.2 Under *DeJoria-II*, the next foreign judgment recognition decision from Mississippi will be reviewed under a different standard, presumably clear error. The same is true for Louisiana cases, and cases in other circuits. Other appellate courts will view *DeJoria-II* as justification to depart from state law.

The predictability required in appellate-court proceedings, especially after a remand, warrants

review by this Court. More critically, this Court must necessarily review these proceedings to uphold elementary considerations of fairness and to protect a party's settled expectations from disruption at the hands of the sovereign—this time at the request and encouragement of one of the parties.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROGER D. TOWNSEND
COKINOS | YOUNG
Four Houston Center
1221 Lamar, 16th Floor
Houston, Texas 77010
(713) 535-5500

GEOFFREY L. HARRISON
Counsel of Record
KENNETH MCNEIL
JOHN P. LAHAD
SUSMAN GODFREY LLP
1000 Louisiana, Suite 5100
Houston, Texas 77002
(713) 651-9366
gharrison@susmangodfrey.com

Counsel for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED AUGUST 15, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50348

JOHN PAUL DEJORIA,

Plaintiff - Appellee

v.

MAGHREB PETROLEUM EXPLORATION, S.A.;
MIDEAST FUND FOR MOROCCO, LIMITED,

Defendants - Appellants

August 15, 2019, Filed

Appeal from the United States District Court
for the Western District of Texas

Before JOLLY, COSTA, and ENGELHARDT, Circuit Judges.

GREGG COSTA, Circuit Judge:

In 1999, philanthropist, environmental activist, and haircare and liquor tycoon John Paul DeJoria was attempting to achieve yet another title: oil magnate. It

did not go well. What started as a project that promised to provide Morocco with decades of energy independence ended with a Moroccan court's levying a judgment north of $100 million against DeJoria and his business partner. Whether Texas should recognize that foreign judgment is now the centerpiece of this decades-long dispute. In fact, proving that it is often harder to collect a judgment than win one, this is the second time the question of the judgment's validity has come before us. This time around we decide whether an interim change in the Texas recognition law violates the state's constitutional ban on retroactive laws. If not, we must determine whether the district court properly followed this court's 2015 mandate and whether it properly applied the new law.

I.

The facts of this case are littered across the pages of the Federal Reporter. *See DeJoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373 (5th Cir. 2015); *Skidmore Energy, Inc. v. Maghreb Petroleum Expl., S.A.*, 337 F. App'x 706 (9th Cir. 2009); *Skidmore Energy, Inc. v. KPMG*, 455 F.3d 564 (5th Cir. 2006). Because this court has already described the background of this corner of the dispute, we will do our best not to spill unnecessary ink. *See DeJoria*, 804 F.3d at 377-78. The winding path the case followed after our court's 2015 remand will spill enough as it is. For now, suffice it to say that in 1999 DeJoria and his business partners started Lone Star Energy Corporation in Morocco with the help of King Mohammed VI's first cousin. The enterprise hoped to discover oil reserves in Northeastern Morocco. The prospects looked good—so

good that the King took to Moroccan airwaves to announce that the country would soon be in possession of "copious and high-quality" oil that would allow Morocco to be self-sufficient for 30 years. The King's announcement made the Moroccan stock market jump more than five percent in anticipation of the expected riches.

But when the promised reserves did not materialize, the project quickly soured. DeJoria and his business partner were forced off Lone Star's board, and, fearing for their lives because of an alleged death threat, fled Morocco, never to return.

Not long after their ouster, DeJoria and his associates were sued in Moroccan commercial court by Lone Star's new management (now called Maghreb Petroleum Exploration, S.A.) and its major investor, Mideast Fund for Morocco. Maghreb, the term we will use to collectively refer to those two entities, alleged that DeJoria and his partners mismanaged Lone Star and fraudulently induced investment in the doomed oil project. Seven years later, the Moroccan court returned a large judgment for Maghreb. It dismissed claims against five of the seven defendants, placing the blame—and the bill for 969,832,062.22 Moroccan dirhams[1]—squarely on DeJoria and his partner.

Before going further, a little bit about the legal backdrop is helpful. In order to collect its winnings from DeJoria's assets in the United States, Maghreb must

1. Because Maghreb has yet to secure recognition of its judgment, the district court has not calculated how much it is worth in U.S. dollars. But the parties put the value at around $123 million.

convince an American court to recognize and enforce the Moroccan judgement.[2] Recognition of foreign-country judgments is a matter of state law and was once mostly governed by principles of comity. *See Hilton v. Guyot*, 159 U.S. 113, 163-64, 180-81, 16 S. Ct. 139, 40 L. Ed. 95 (1895). In some jurisdictions, comity is still the rule. *See, e.g., Kwongyuen Hangkee Co., Ltd. v. Starr Fireworks, Inc.*, 2001 SD 113, 634 N.W.2d 95, 96 (S.D. 2001). But most states have codified their recognition standards and procedures by enacting the 1962 Uniform Foreign Money Judgments Recognition Act[3] or its 2005 successor, the Uniform Foreign-Country Money Judgments Recognition Act.[4] Both acts make foreign judgments that are final and conclusive where rendered "enforceable" in the relevant state court just like another state's judgment would be.

---

2. Recognition is different from enforcement, but the former is necessary for the latter. *See* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It*?, 31 BERKELEY J. INT'L L. 150, 155 (2013) (describing recognition as akin to domesticating the judgement and enforcement as enlisting the courts and law enforcement to aid in collection). Only recognition is at issue in this case.

3. For a list of the 34 jurisdictions that have enacted the 1962 version, *see Foreign Money Judgments Act*, Uniform Law Commission, https://www.uniformlaws.org/ committees/community-home?CommunityKey=9c11b007-83b2-4bf2-a08e-74f642c840bc (last visited August 6, 2019).

4. For a list of the 25 jurisdictions that have enacted the 2005 version (for some, repealing the 1962 version in the process), *see Foreign-Country Money Judgments Recognition Act*, Uniform Law Commission, https://www.uniformlaws.org/committees/community-home?CommunityKey=ae280c30-094a-4d8f-b722-8dcd614a8f3e (last visited August 6, 2019).

Unif. Foreign-Country Money Judgments Recognition Act § 7(2), U.L.A. (2005) (West); Unif. Foreign Money Judgment Act § 3, U.L.A. (1962) (West). Although these acts presumptively treat properly filed foreign judgments as enforceable, exceptional circumstances can rebut that presumption. Some of those exceptions are mandatory, others discretionary. If the rendering court did not have personal jurisdiction over the judgment debtor, for instance, the state court (or federal court sitting in diversity) cannot recognize the foreign judgment. 2005 Unif. Act § 4(b)(2); 1962 Unif. Act § 4(a)(2). Other grounds for nonrecognition, like fraud in obtaining the judgment, instead give the American court the option of not recognizing the foreign judgment. 2005 Unif. Act § 4(c)(2); 1962 Unif. Act § 4(b)(2).

So, in 2013, Maghreb came to the United States seeking recognition of the Moroccan judgment.[5] DeJoria resisted in several ways. At the time, Texas had adopted (with slight modification) the 1962 Uniform Recognition Act. *See* Tex. Civ. Prac. & Rem. Code § 36.001-08 (Vernon's 2015). That law included ten nonrecognition grounds. DeJoria pressed seven of them. The district court focused on only one avenue to nonrecognition. It determined that

5. The procedural history is a bit more complicated. DeJoria, perhaps believing the best defense is a good offense, went to Texas court first, seeking preemptive nonrecognition of the Moroccan judgment and an antisuit injunction. Maghreb removed to federal court and counterclaimed for recognition. But DeJoria eventually dismissed his affirmative claims, conforming this action to the more typical posture—judgment creditor seeking recognition, judgment debtor resisting.

the Moroccan judgment was "rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." *Id.* § 36.005(a)(1). Because this was a mandatory nonrecognition ground, the district court refused to recognize the Moroccan judgment and dismissed the case.

We reversed. *DeJoria*, 804 F.3d at 389. The panel held that, under Texas's version of the 1962 Uniform Recognition Act, DeJoria could not obtain nonrecognition by showing he was denied due process or impartial tribunals in his case, but instead had the much greater burden of showing that Morocco's legal "system as a whole" was so deficient that no Texas court should ever recognize a Moroccan judgment. *Id.* at 381.[6] And although the prior panel's inquiry focused on whether the Moroccan judicial *system* could provide Americans fair proceedings, it remarked that "the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case." *Id.* at 382 n.9. The case was remanded.

Back before the district court, and in front of the magistrate judge to whom the matter was referred, the parties immediately began to squabble over the scope of that court's power on remand.[7] DeJoria was adamant

6. That panel also rejected another two of DeJoria's arguments for nonrecognition—that Morocco would not reciprocally recognize a Texas judgment and that the Moroccan court did not have personal jurisdiction over DeJoria. *DeJoria*, 804 F.3d at 384-89.

7. Because the district court adopted the magistrate's recommendations in all relevant respects, we will describe the postremand rulings as district court rulings.

that he should still be allowed to push for nonrecognition on grounds not addressed by the Fifth Circuit. Maghreb disagreed and moved for entry of judgment. The district court denied Maghreb's motion, agreeing with DeJoria that he could still attempt to establish other grounds for nonrecognition.

While the sound and fury continued apace in the trial court, a second front in this dispute opened, this time in the Texas legislature. With the testimonial aid of one of DeJoria's lawyers, the 2017 legislative session was considering updating the Recognition Act to the 2005 uniform act. Among other changes, the new law would add two discretionary grounds for nonrecognition: a court would be able to deny recognition if "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment" or, more importantly in this case, if "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." 2005 Unif. Act § 4(c)(7)-(8).

These substantive differences between the old and new law were not the focus of hearings on the bill. Instead, a change not found in the new Uniform Law nor in the versions of that law passed by other states drew the most attention. The drafters had made the law retroactive to pending cases. The only pending case the legislators were told about was this one. Despite the concern of at least one legislator that the law was going to change the outcome of this case midstream, the law was adopted with the retroactivity provision. 2017 Tex. Sess. Law Serv. Ch. 390

(S.B. 944) (Vernon's), *codified at* Tex. Civ. Prac. & Rem. Code § 36A.001-11.

With his legislative victory in hand, DeJoria returned to the district court to inform it of the change in Texas law. Although he argued that nonrecognition was warranted on multiple grounds, the district court again focused on only one. Finding the new law did not run afoul of the Texas Constitution's prohibition of retroactive laws, this time the court granted DeJoria's motion for nonrecognition after determining that the specific proceedings leading to the judgment against him were incompatible with the requirements of due process.[8] To reach that decision, the district court readopted many of the case-specific findings underlying the order this court had reversed. But it also made new findings: that DeJoria was unable to attend the Moroccan proceedings, that he was unable to obtain counsel to represent him in those proceedings, and that, although the Moroccan court relied on an expert's opinion to determine damages, that expert lacked independence. The court again dismissed the case. Maghreb again appealed.

II.

We have jurisdiction over this case owing to the diversity of the parties, so we apply Texas substantive

8. The court declined to reach DeJoria's other arguments for nonrecognition: that 1) the Moroccan judgment was rendered under circumstances that raise substantial doubt about the integrity of the rendering court, 2) the Moroccan judgment was repugnant to Texas public policy, and 3) recognition of the judgment would violate the Due Process Clause of the Fourteenth Amendment.

law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). In doing so, we are bound by the decisions of the Supreme Court of Texas. *Comm'r v. Bosch's Estate*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967). But when no decision of that court directly addresses the case before us, we are forced to make an *Erie* guess, doing our best to write the opinion the Texas high court would if it had the chance.[9] *Meador v. Apple, Inc.*, 911 F.3d 260, 264 (5th Cir. 2018).

We must make such a guess to determine which of the Uniform Recognition Acts applies. The Texas Constitution provides that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Tex. Const. art. I, § 16. Although phrased as an absolute prohibition, "[m]ere retroactivity is not sufficient to invalidate a statute." *Robinson v. Crown*

9. Although neither party asks us to certify this question to the state court, in an amicus brief the State of Texas suggests we should consider it, especially if we are inclined to overturn the statute. We decline to do so because we do not think application of the Supreme Court of Texas's many retroactivity precedents to this statute leaves us with a close call. *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir. 1998) (noting that the "closeness of the question" and "the existence of sufficient sources of state law" are the most important factors in deciding to certify (quotation omitted)). Moreover, a case in which a foreign corporation is attempting to argue that a state legislature has passed a law as a favor to one of its wealthiest citizens seems like the quintessential case for the exercise of diversity jurisdiction. *Cf.* 13E Charles Alan Wright et. al, Fed. Prac. & Proc. § 3601 (3d ed. 2019) (describing the most common justification for federal diversity jurisdiction as "the fear that state courts would be prejudiced against out-of-state litigants, particularly when opposed by an in-stater").

Cork & Seal Co., Inc., 335 S.W.3d 126, 139 (Tex. 2010) (quotation omitted). Texas courts have tailored the scope of the prohibition to "protect[] settled expectations and prevent[] abuse of legislative power." *Id.* Three factors determinine whether a law runs afoul of those objectives: "the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; the nature of the prior right impaired by the statute; and the extent of the impairment." *Id.* at 145. The nature and extent of the interference with a party's rights loom particularly large. For that reason, "changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive." *Id.* at 146; *see also Univ. of Tex. Sw. Med. Ctr. at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010) ("Statutes . . . that do not deprive the parties of a substantive right . . . may be applied to cases pending at the time of enactment.").

The new law's limited interference with Maghreb's legitimate rights resolves the question before us. Unlike *Robinson*—the seminal Texas case on retroactivity—this is not a case in which a law that allowed a party's recovery was changed to "abrogate their claim." *Robinson*, 335 S.W.3d at 148. It is not even certain that the law as it stood before the adoption of the updated act would have led to recognition of the Moroccan judgment. As we mentioned, the district court agreed to allow DeJoria to press several arguments for nonrecognition after this court returned the case to its hands.[10] Because the passage of the new

10. In particular, prior to the update of the law, DeJoria retained the ability to argue that two additional nonrecognition

act made it unnecessary to address those claims, we do not know how likely they were to succeed. Maghreb's expectation that it would prevail was, in other words, not yet settled. *See Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 58 (Tex. 2014) (upholding retroactive application of a law because the plaintiff's "recovery was not yet predictable" at the time the law went into effect).

The bigger point, though, is that the retroactive law does not abrogate Maghreb's claim. It does not strip Maghreb of the ability to seek recognition of the Moroccan judgment. It just gives a district court the ability to deny recognition if it finds the judgment was obtained in proceedings that were incompatible with the requirements of due process. So the only right that has been impinged is the right to automatic recognition of a judgment obtained in proceedings that denied the judgment debtor fundamental fairness. To state that "right" is to show why we cannot recognize it, let alone allow its protection to sink a state statute. *Robinson*, 335 S.W.3d at 146 ("[C]ourts must be mindful that statutes are not to be set aside lightly."). Indeed, the absurdity of lending a court's power to the vindication of fundamentally unfair proceedings is why the 2005 Uniform Act recognizes an absence of due process as one of the rare situations when an American court may not recognize a foreign judgment. It is also noteworthy that

---

factors applied: that the "cause of action on which the judgment is based is repugnant to the public policy" of Texas and that Morocco was a "seriously inconvenient forum." Tex. Civ. Prac. & Rem. Code §§ 36.005(b)(3) and (6) (Vernon's 2015). Beyond the Recognition Act›s domain, DeJoria was also raising a federal due process challenge to recognition of the Moroccan judgment.

the Supreme Court of Texas has only upheld challenges to the retroactive application of a law on four occasions, all of which dealt with laws that revived expired claims or fully extinguished vested rights. *Tenet Hospitals Ltd. v. Rivera*, 445 S.W.3d 698, 708 (Tex. 2014) (collecting cases). The updated recognition act does neither.

We are mindful that the whiff of home cooking also pervades the Texas side of this case. There is a deep irony in allowing DeJoria to contend he was denied due process in Morocco when it was his lobbying efforts that changed the rules of the game midway through the proceedings in the United States. Indeed, the Supreme Court of Texas has been suspicious of retroactive laws that inure to the benefit of only one company or individual.[11] *Robinson*, 335 S.W.3d at 149. But in the retroactivity context as in others, "unfair does not always equal unconstitutional." *Id.* at 160 (Willett, J. concurring). And it cannot be said that a state's desire to provide immediate protection to the due process rights of its citizens is not compelling. When balanced against the slight imposition on a right of dubious provenance, retroactive application of the updated Recognition Act does not violate the Texas Constitution.

11. DeJoria points to one other recognition case that was pending at the time the law was passed, *In re Carmona*, 580 B.R. 690 (Bankr. S.D. Tex. 2018). But the Texas legislature was only made aware of one case that would be affected by the retroactivity provision—this one.

III.

A.

Having decided that Texas's choice to apply its new Recognition Act to pending cases was proper, we now must review the district court's application of that law. And to do that we must determine how closely we should scrutinize that court's work.

Reciting the standard of review in an appellate opinion is often a rote exercise. Not here. Recognizing that the appeal's outcome largely turns on this question, the parties have spent considerable energy contesting whether we owe deference to certain district court rulings. Maghreb insists that we should review all aspects of the district court's denial of recognition de novo, likening the inquiry to a review for legal sufficiency. DeJoria counters that we should review the court's factual findings only for clear error.

Much of the confusion surrounding the standard of review arises from this case's odd posture. The district court did not rule on a motion for summary judgment or conduct a bench trial, but instead resolved a "motion for nonrecognition." That motion is a creature of state law.[12]

12. It is not clear, then, how this type of motion found its way to federal court. In federal court, the Federal Rules of Civil Procedure should govern how the parties seek and resist recognition of the judgment. *See, e.g., Sw. Livestock and Trucking Co., Inc. v. Ramon*, 169 F.3d 317, 321 & n.3 (5th Cir. 1999) (disposing of the recognition issue on a federal motion for summary judgment). Neither party,

Regardless of the styling of the motion on which the district court ruled, however, our appellate standard of review is governed by federal law, even in this diversity case. *See Goodner v. Hyundai Motor Co., Ltd.*, 650 F.3d 1034, 1040 (5th Cir. 2011); *Tax Track Sys. Corp. v. New Investor World, Inc.*, 478 F.3d 783, 789 (7th Cir. 2007); *Hershon v. Gibraltar Bldg. & Loan Ass'n, Inc.*, 864 F.2d 848, 852, 275 U.S. App. D.C. 26 (D.C. Cir. 1989).[13]

The prior panel explained that "[w]hether the judgment debtor established that [a] non-recognition provision[] applies is a question of law reviewed de novo." *DeJoria*, 804 F.3d at 379. We agree. But the panel had no cause to determine the proper standard of review for the factual findings that underpin the district court's legal decision. After all, the issues in that appeal—whether the Moroccan system provides procedures compatible with due process, whether Moroccan law provides a mechanism to reciprocate recognition of Texas judgments, and whether the Moroccan court had personal jurisdiction over DeJoria—were all legal determinations. *See* FED. R. CIV. P. 44.1 ("The court's determination [of foreign law] must be treated as a ruling on a question of law."); *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Product*

---

however, has objected to the use of state procedure in this federal action, leaving this panel in somewhat uncharted territory.

13. If the Recognition Act demanded a particular standard of review for "manifestly substantive" ends, that might be a different story. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 429, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996) (holding that state law governs the trial court standard for determining whether a verdict is excessive). It does not.

Liability Litig., 888 F.3d 753, 778 (5th Cir. 2018) ("This court reviews [the] district court's exercise of personal jurisdiction *de novo*." (quotation omitted)).

But it is a venerable principle that a district court's factual findings are reversed only if clearly erroneous. FED. R. CIV. P. 52(a)(6) (standard for bench trials); *see also* Steven Alan Childress & Martha S. Davis, 1 FEDERAL STANDARDS OF REVIEW § 2.03[8] 2-32-33 (4th ed. 2010) (explaining that "[m]any courts . . . have assumed that [the] clearly erroneous rule applies to findings made on motions in addition to trial findings"). Even when an appellate court considers a legal question de novo, that plenary power of review does not extend to subsidiary factual findings. *See Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007) ("[S]ubsidiary facts are reviewed for clear error.") (*citing Maine v. Taylor*, 477 U.S. 131, 144-45, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986)). To take just one example, jurisdiction is a legal question. But the facts that underlie a jurisdictional determination are still reviewed only for clear error. *See, e.g., id.; DePuy Orthopaedics*, 888 F.3d at 778 (applying clear error review to "underlying jurisdictional findings of fact" and de novo review to ultimate personal jurisdiction holding (quotation omitted)); *Pederson v. La. State Univ.*, 213 F.3d 858, 869 (5th Cir. 2000) ("If the district court resolves any factual disputes in making its jurisdictional findings," those resolutions are overturned only if "clearly erroneous." (quotation omitted)). The same must be true for factfinding that underpins the legal conclusion of nonrecognition.

Appellate court deference to district court factfinding is grounded in concerns of both expertise and efficiency. Maghreb points out that one of the strongest justifications for deference—the trial court's ability to assess the credibility of live testimony, *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)—is not present because the testimony of the foreign witnesses was presented on paper. But we defer even when the trial court's findings are "based . . . on physical or documentary evidence or inferences from other facts." *Id.* at 574. That is because "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." *Id.* Clear error review also promotes judicial efficiency. *Id.* at 574-75 ("Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."). District court judges, who do the lion's share of the work in our federal system, do not dig through voluminous records only to have courts like this one restart the factfinding from scratch. Instead of redoing their work, we defer to their findings so long as they take a permissible view of the evidence. *Id.* at 574.

Although the standard of review is a federal issue, like the prior panel we "look to Texas law" governing recognition to see if anything counsels in a different direction.[14] *DeJoria*, 804 F.3d at 379. Nothing does. We see

14. As we have explained, the proper standard of appellate review is a question of federal law. We do not read this court's 2015 opinion as out of step with that conclusion. It may be that the prior panel looked to Texas law only to ascertain whether recognition was

no Texas recognition case that conflicts with the principles of federal appellate review outlined above. When a trial court is presented with conflicting evidence in recognition proceedings, Texas courts "defer to the trial court's . . . resolution of those conflicts." *Mariles v. Hector*, No. 05-16-00814-CV, 2018 Tex. App. LEXIS 6106, 2018 WL 3723104 *6 (Tex. App.—Dallas Aug. 6, 2018, pet. denied). Maghreb cites some Texas cases that explain what we have acknowledged: that review of the district court's ultimate determination of the application of a nonrecognition factor should be de novo. *See, e.g., Sanchez v. Palau*, 317 S.W.3d 780, 785 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) ("[W]e review de novo a trial court's ruling on recognition of a foreign country judgment."); *The Courage Co., L.L.C. v. The Chemshare Corp.*, 93 S.W.3d 323, 331 (Tex. App.—Houston [14th Dist.] 2002, no pet.)

---

a legal or factual question. *See* Childress & Davis, *supra* § 2.03[7] 2-32 n.158 (noting that, despite application of federal standards of review in diversity cases, "[u]se of state law-fact characterization may be more defensible" as that question borders on the substantive). But to the extent the prior panel's opinion could be read to suggest that state law controls the applicable standard of review in federal court, it announced principles with respect to "the district court's recognition decision." *DeJoria*, 804 F.3d at 379. Again, we answer a different question—what level of scrutiny should we apply to the findings of fact subsidiary to that ultimate legal conclusion? That question, at least, is controlled by federal law.

In any event, we have perused Texas caselaw only out of an abundance of caution. It is less useful this time around—no Texas case has yet analyzed the new factbound nonrecognition factors added by the updated act.

(same).[15] But they have pointed to no case that instructs a court of appeals to start on a blank slate in determining the facts. That is not surprising. Consistent with the standard practice, Texas courts also generally defer to trial court factfinding. *In re I.I.G.T.*, 412 S.W.3d 803, 806 (Tex. App.—Dallas 2013, no pet.) (explaining that an appellate court should not normally "disturb the [trial] court's resolution of evidentiary conflicts that turn on . . . the weight of the evidence"). We thus can disturb the district court's findings only if they are not "plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 574.

B.

Maghreb's primary argument on appeal—that DeJoria lost his opportunity to complain about the Moroccan proceedings because he failed to participate in them—must overcome this deference to the district

15. Varying procedural postures and a lack of clarity with respect to whether the standard of review depends on the nonrecognition factor at issue further frustrate the search for coherence on this question. *See Ramon*, 169 F.3d at 318 (analyzing recognition decision on summary judgment, which is always reviewed de novo); *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1004 (5th Cir. 1990) (reviewing for abuse of discretion a trial court's choice to apply a discretionary nonrecognition ground, like the ground at issue in this case); *Dart v. Balaam*, 953 S.W.2d 478, 482-83 (Tex. App.—Fort Worth 1997, no pet.) (reviewing for abuse of discretion the trial court's determination whether Australia was an inconvenient forum). The important point for this appeal is that we have seen no appellate court in a recognition dispute engage in de novo factfinding.

court's factfinding. Maghreb notes that we have "flatly reject[ed]" the due process objections of judgment debtors who were "given, and waived, the opportunity of making [an] adequate presentation" in the foreign tribunal. *Society of Lloyd's v. Turner*, 303 F.3d 325, 331 n.20 (5th Cir. 2002) (quotation omitted); *see also Dart*, 953 S.W.2d at 480 ("Grounds for nonrecognition may be waived if a party had the right to assert that ground as an objection or defense in the foreign country but failed to do so.").

But our limited authority when it comes to facts makes short work of that argument. The district court made three major findings to support nonrecognition: 1) DeJoria's fear for his safety should he return to Morocco to litigate was credible and arose directly from his involvement in the Moroccan lawsuit, 2) because DeJoria's position in the Moroccan lawsuit was directly adverse to the interests of the royal family he was unable to retain a lawyer to appear for him in the initial proceedings or to bring an appeal, and 3) although the determination of damages was based on expert opinion, the Moroccan court manipulated that process when it went through four experts before finding one that would deliver its preferred recommendation. Taken together, the first and second findings mean that DeJoria was never "given . . . the opportunity of making [an] adequate presentation" in Moroccan court and the third means his case did not otherwise receive fair treatment. *Turner*, 303 F.3d at 331 n.20. So unless those findings were clearly erroneous, Maghreb's "waiver" argument fails.

To be sure, Maghreb points to substantial evidence that could support contrary findings. Its problem is that there is evidence on both sides of these disputes. Even if Maghreb can convince us that its evidence is stronger, that is not enough to establish that the district court's crediting of DeJoria's evidence is implausible. *Theriot v. Par. of Jefferson*, 185 F.3d 477, 490 (5th Cir. 1999) ("Where the evidence can support findings either way, a choice by the trial judge between two permissible views of the weight of the evidence is not clearly erroneous.")

Take for instance the finding that DeJoria credibly feared for his life and so was unable to attend the Moroccan proceedings in person. Michael Gustin, DeJoria's business partner, described receiving a death threat and explained that it was directed at both him and DeJoria. DeJoria himself declared that Gustin communicated that threat to him and that he believed it was credible. And the record contains evidence that their unsuccessful attempts to obtain representation in Morocco may have only heightened their fear. A French attorney with some Moroccan experience told them that it was not only unsafe for DeJoria and Gustin to return to Morocco, but it would be "unsafe and unwise for any lawyer" or "any sane person," for that matter, to participate in a case that so closely touched the royal family's interests. Nearly a decade later, that attorney repeated his concerns. The general counsel for Skidmore, DeJoria's company that spearheaded the Moroccan project, also says he was told to stay out of the country by a Moroccan attorney who had been hired to handle various clerical tasks as the Moroccan lawsuit proceeded. She warned that "any

appearance by Skidmore or any personal representative of Skidmore in the Moroccan lawsuit would be dangerous."

Of course, these assertions all come from individuals who may have an axe to grind in this case. And we are not told much about the circumstances or content of the death threat because Gustin maintains that he "cannot reveal [the] details . . . without compromising the safety of innocent people still in Morocco." Bias and lack of detail are classic impeachment evidence. But impeachment usually goes to the weight of the evidence. Arguing about the weight of the evidence is not the terrain an appellant wants to be on. *See La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 480 (5th Cir. 2002) (noting that it is the factfinder who "ultimately . . . decide[s] which side has the greater weight of the evidence").

Nor does Maghreb get over the clearly-erroneous hurdle because it presented testimony that DeJoria could have appeared and obtained counsel in the Moroccan litigation. Choosing between conflicting testimony is the province of the factfinder. *See Anderson*, 470 U.S. at 575 (concluding it "can virtually never be clear error" when a trial court "credit[s] the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence"). And while Maghreb emphasizes the testimony of its expert on Moroccan law, expert testimony does not automatically trump lay testimony. *Breland v. United States*, 372 F.2d 629, 633 (5th Cir. 1967) ("[L]ay testimony can be sufficient to satisfy [a party's] burden even though there is expert testimony to the contrary."); *see also* FIFTH

CIRCUIT PATTERN JURY INSTRUCTIONS 3.5 (Civil) (2014) (explaining that, for expert witness testimony, "[a]s with any other witness, it is up to [the factfinder] to decide whether to rely on it").

To undo factual determinations on appeal, Maghreb must convince us not that it has the more compelling evidence, but that the other side's testimony is not "plausible." *Anderson*, 470 U.S. at 574. Maghreb's expert witness, a Moroccan attorney, contends that DeJoria's worries were "baseless and reflect[] his poor understanding of Morocco." And they also point to several instances in which Moroccan courts have ruled against royal interests. But that a trier of fact could plausibly infer that the death threat was fabricated does not mean it is implausible to find that the threat was real. *Id.* at 574.

The same may be said for the other two key findings. For instance, although DeJoria was able to retain Moroccan attorneys as experts in proceedings stateside after the Moroccan trial court handed down its judgment, there was evidence that two of his attempts to obtain representation in the Moroccan proceedings were rebuffed. And though there was no smoking gun, it was not clear error for the district court to conclude that the Moroccan court went fishing for an expert who would determine DeJoria and his partner had caused Maghreb substantial damages. After all, the expert who found those damages was the fifth appointed by the Moroccan court—the first three "concluded that they could not provide any firm opinion on the matter" and the fourth was replaced for reasons that remain unclear.

Although the district court's assessment of the evidence may be subject to vigorous debate, it is the district court's job to resolve evidentiary disputes, not ours. *Guzman v. Hacienda Records & Recording Studio, Inc.*, 808 F.3d 1031, 1036 (5th Cir. 2015) (explaining that, even when "there are two permissible views of the evidence," the trial court's choice between them is typically owed "great deference"). Maghreb has not shown clear error.[16]

C.

Perhaps realizing that its argument founders on the district court's difficult-to-undo findings, Maghreb's primary challenge to those findings is that they should not have been made in the first place. Each of the pertinent findings, it argues, was precluded by the prior panel's opinion.

Under the law-of-the-case doctrine—and its corollary, the mandate rule—when a district court receives a case on remand, it may not reexamine the legal or factual determinations of this court or otherwise disobey our

16. It is worth noting that the three trial judges who handled aspects of this case all generally found DeJoria's evidence about what happened in Morocco more persuasive than Maghreb's. Three trial judges have reviewed the case because this appeal comes from findings of a magistrate judge, adopted by the district judge, and the earlier appeal came from findings of a different district judge. Although some of the findings in this phase of the case are new, they rely on much of the same testimony the district court relied on the first time around.

mandate. *See Tollett v. City of Kemah*, 285 F.3d 357, 363-64 (5th Cir. 2002). The reach of those related doctrines extends only to matters decided expressly or by necessary implication. *In re Felt*, 255 F.3d 220, 225 (5th Cir. 2001). And an issue is tacitly decided only when its disposition is a "necessary predicate[] to the ability to address the issue or issues specifically discussed" in the appellate court's opinion. *Id.*

The prior panel's opinion did not preclude the findings the district court made on remand. First and foremost, the prior appeal was decided under a different law. *United States v. Matthews*, 312 F.3d 652, 657 (5th Cir. 2002) (describing an exception to the law-of-the-case doctrine when "there has been an intervening change of law by a controlling authority"). That law did not require the prior panel to determine whether DeJoria's "specific proceeding[s]" were "compatible with the requirements of due process of law." Tex. Civ. Prac. & Rem. Code § 36A.004(c)(8). So that panel had no cause to determine whether DeJoria could in fact safely return to Morocco or whether DeJoria could in fact retain representation. In determining whether the Moroccan legal system made fair proceedings impossible, whether Moroccan courts would reciprocate recognition, and whether the Moroccan commercial court had personal jurisdiction over DeJoria, the prior panel's analysis was focused on legal questions. The fact-intensive inquiry demanded by Texas's updated Recognition Act put the case on a new playing field.

But even if the district court were operating in the same legal landscape, nothing in the prior panel's opinion

forecloses the district court's findings. The panel held that the Moroccan court's exercise of jurisdiction over DeJoria did not violate traditional notions of "fair play and substantial justice" because, despite any burden litigating in Morocco might place on DeJoria, "Moroccan courts do not require that the defendant appear personally, and DeJoria could have litigated entirely through counsel without returning to Morocco." *DeJoria*, 804 F.3d at 389. And, relying on testimony from a Moroccan attorney acting as Maghreb's expert, the court pointed out that "it is 'not at all uncommon' for Moroccan attorneys to represent unpopular figures in Moroccan courts." *Id.* at 383. But these general statements about usual Moroccan practices did not address whether DeJoria could have found a willing attorney in Morocco in his high-profile case.[17] Nor does it avail Maghreb to draw our attention to the previous panel's aside that, "[a]lthough our inquiry focuses on Morocco's judicial *system*, we also observe that the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case." *Id.* at 382 n.9 (emphasis in original). For one, the comment is admittedly dicta—the footnote could have been erased from the opinion without disrupting its systemwide holding in the slightest. *Pegues v. Morehouse Parish Sch. Bd.*, 706 F.2d 735, 738 (5th Cir. 1983) (explaining that law of the case does not apply to dicta). And in any case, the question under the Texas statute is not whether the King actively undermined the proceedings, but whether

17. And nothing in the prior panel's opinion foreclosed the district court's finding that DeJoria could not safely return to Morocco. Indeed, the prior panel did not even mention the alleged threat on DeJoria's life, let alone determine its credibility.

DeJoria was afforded a fundamentally fair hearing. The prior panel's general observations did not foreclose the more searching factual inquiry now required under Texas law.[18]

D.

Our holding that the district court did not clearly err in its factfinding nor adopt those findings in the face of a contrary mandate from this court leaves us little left to do. Maghreb does not dispute the nonrecognition conclusion if we uphold the findings that DeJoria could neither appear personally nor find a lawyer to appear for him. That is a sensible stance. Recognition of a foreign-country judgment does not require the foreign court to "comply with the traditional rigors of American due process." *Turner*, 303 F.3d at 330. But the opportunity to present one's case is no minor twist or turn of modern due process jurisprudence: "The fundamental requirement of due process is the opportunity to be heard at a meaningful

18. Maghreb also argues at some length about the propriety of a host of other findings that the magistrate made by readopting the findings made before the first appeal. For reasons similar to those discussed above, we doubt there is much to Maghreb's argument that those readopted findings were barred by the law of the case. Nor do we believe its argument that this court's 2015 reversal rendered those factual findings "null and void" holds much water. In many other contexts, a district court will readopt its findings without fanfare when an appeals court returns the case after locating a legal error. *See, e.g., Chemtech Royalty Assocs., L.P. v. United States*, 823 F.3d 282, 287-88 (5th Cir. 2016); *United States v. Ellis*, 201 F. App'x 170 (4th Cir. 2006) (per curiam). But because we believe the new findings made by the district court are sufficient to justify its nonrecognition decision, we see no need to explore this issue further.

time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quotation omitted). In light of the facts as found by the district court, it properly determined that DeJoria was denied due process in Morocco. The district court thus had and properly exercised discretion to deny recognition to the Moroccan judgment.[19]

* * *

So despite the seeming complexity of this case—royal intrigue, a foreign proceeding, almost a billion dirhams at stake—it ends up being resolved on one of the most basic principles of appellate law: deference to the factfinder. The judgment is AFFIRMED.

---

19. The parties also contest whether recognition should be denied because the Moroccan judgment is repugnant to public policy or because failing to do so would violate the Fourteenth Amendment's due process guarantee. Because we affirm the district court's nonrecognition decision on another ground, there is no need to discuss those disputes.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED MARCH 28, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

1:13-CV-654-RP

JOHN PAUL DEJORIA,

Plaintiff, Counterclaim Defendant,

v.

MAGHREB PETROLEUM EXPLORATION, S.A.,
and MIDEAST FUND FOR MOROCCO LIMITED,

Defendants, Counterclaim Plaintiffs.

ORDER ON REPORT AND RECOMMENDATION

Before the Court is John Paul DeJoria's Motion for Non-Recognition, (Dkt. 128). The motion was referred to United States Magistrate Judge Andrew W. Austin for findings and recommendations pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1(d) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. The Magistrate Judge entered his report and recommendation on February 26, 2018, (Dkt. 136), recommending that

this Court grant DeJoria's motion. Maghreb Petroleum Exploration, S.A. ("MPE") and Mideast Fund for Morocco Limited ("MFM") (together, "MPE/MFM") timely filed objections to the report and recommendation. MPE/MFM are therefore entitled to *de novo* review of the portions of the report and recommendation to which they have objected. *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified findings or recommendations to which objection is made.").

In light of the objections, the Court has undertaken a *de novo* review of the briefs filed concerning the motion. MPE/MFM's objections raise only one any additional argument that has not already been considered by Judge Austin in his report and recommendation: that Judge Austin erred in finding that the parties had agreed to make their arguments based on the record as it stood, declining to consider MPE/MFM's attempt to supplement the record without seeking leave to do so, and finding that consideration of that additional material would not have changed the outcome anyway. (Obj., Dkt. 138, at 27). Having reviewed the portion of the report and recommendation related to the finding and the transcript of the hearing upon which this finding was based, the Court agrees with Judge Austin's conclusion.

The Court, having thoroughly reviewed the rest of the Magistrate Judge's comprehensive findings and conclusions and finding no error, will accept and adopt the report and recommendation for the reasons stated therein.

IT IS THEREFORE ORDERED that MPE/MFM's Objections to the Report and Recommendation of the United States Magistrate Judge, (Dkt. 137), are **OVERRURLED**.

IT IS FURTHER ORDERED that the Report and Recommendation of the United States Magistrate Judge, (Dkt. 136), is hereby **ACCEPTED AND ADOPTED** by the Court. John Paul DeJoria's Motion for Non-Recognition under § 36A.004(c)(8) of the Texas Uniform Foreign-Country Money Judgments Recognition Act, (Dkt. 128), is **GRANTED**.

SIGNED on March 28, 2018.

/s/ Robert Pitman
ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED FEBRUARY 26, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

A-13-CV-654-RP-AWA

JOHN PAUL DEJORIA

v.

MAGHREB PETROLEUM EXPLORATION, S.A.
AND MIDEAST FUND FOR MOROCCO LIMITED

February 26, 2018, Decided
February 26, 2018, Filed

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

Before the Court are: John Paul DeJoria's Motion For Non-Recognition (Dkt. No. 128); MPE's and MFM's Response to DeJoria's Motion for Non-Recognition (Dkt. No. 129); Reply in Support of John Paul DeJoria's Motion

for Non-Recognition (Dkt. No. 130); MPE/MFM's Sur-reply (Dkt. No. 133);[1] and Brief of the State of Texas as Amicus Curiae in Support of Counterclaim Defendant John Paul DeJoria (Dkt. No. 135).

The District Court referred the above-matter to the undersigned Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b) and Rule 1(c) of Appendix C of the Local Rules.

I. FACTUAL BACKGROUND

As summarized by the Court of Appeals for the Fifth Circuit, the factual background of this case is as follows:

> John Paul DeJoria ("DeJoria") was a major investor in an American company called Skidmore Energy, Inc. ("Skidmore"), which was engaged in oil exploration and technology projects in Morocco. In pursuit of its goals, Skidmore formed and capitalized a Moroccan corporation, Lone Star Energy Corporation ("Lone Star") (now Maghreb Petroleum Exploration, S.A., or "MPE"). Corporations established under Moroccan law are required to have a "local" shareholder. For Lone Star, that local shareholder was Mediholding, S.A., owned by Prince Moulay Abdallah Alaoui,

1. The Court has reconsidered its previous ruling denying MPE/MFM leave to file a sur-reply and now **GRANTS** the Motion for Leave to File a Sur-Reply (Dkt. No. 133). Thus, the Court has considered the arguments contained in the Sur-Reply.

a first cousin of the Moroccan King, King Mohammed VI.

In March 2000, Lone Star entered into an "Investment Agreement" obligating it to invest in hydrocarbon exploration in Morocco. King Mohammed assured DeJoria that he would line up additional investors for the project to ensure adequate funding. Armadillo Holdings ("Armadillo") (now Mideast Fund for Morocco, or "MFM"), a Liechtenstein-based company, agreed to make significant investments in Lone Star. In the negotiations leading up to this agreement, Skidmore represented to Armadillo that Skidmore previously invested $27.5 million in Lone Star and that Lone Star's market value was roughly $175.75 million.

On August 20, 2000, King Mohammed gave a nationally televised speech to announce the discovery of "copious and high-quality oil" in Morocco. Three days later, then-Moroccan Minister of Energy Youssef Tahiri, accompanied by DeJoria and DeJoria's business partner Michael Gustin, traveled to the site and held a press conference claiming that the discovered oil reserves would fulfill Morocco's energy needs for decades. Moroccans celebrated this significant news, as the King's announcement was the only stimulus likely to revive Morocco's sluggish economy. The Moroccan stock market soared.

There was one major problem: the oil reserves were not as plentiful as announced. The "rosy picture" of Moroccan energy independence did not materialize, damaging both the Moroccan government's credibility and Lone Star's viability. As a result, the business relationship between MFM and Skidmore/DeJoria suffered. Lone Star replaced DeJoria and Gustin on Lone Star's Board of Directors. DeJoria has not been to Morocco since 2000 and claims that his life would have been endangered had he returned.

Unhappy with the return on its initial investment in Lone Star, MFM sued Skidmore, DeJoria, Gustin, and a number of other Skidmore officers in their individual capacities in Moroccan court. MFM asserted that Skidmore fraudulently induced its investment by misrepresenting Skidmore's actual investment in Lone Star. MPE later joined as a plaintiff in the suit and claimed that Skidmore's fraudulent misrepresentations deprived Lone Star of necessary capital. In response, Skidmore filed two quickly-dismissed lawsuits against MPE, MFM, and other parties in the United States.

After nearly seven years of considering MPE and MFM's suit, the Moroccan court ruled against DeJoria and Gustin but absolved five of their co-defendants—including Skidmore—of liability. The court entered judgment in favor of MPE and MFM for approximately $122.9 million.

Appendix C

Dejoria v. Maghreb Petroleum Exploration, S.A., 804 F.3d 373, 384 (5th Cir. 2015), *cert. denied*, 136 S.Ct. 2486, 195 L. Ed. 2d 822 (2016).

II. PROCEDURAL BACKGROUND

A. Original District Court Proceedings

After the Moroccan court entered the $122.9 million judgment against DeJoria, he sued MPE and MFM in Texas state court, challenging recognition of the judgment under the previous version of Texas's Uniform Foreign Country Money-Judgment Recognition Act (hereinafter the "1981 Texas Recognition Act").[2] MPE/MFM removed the action to federal district court based on diversity of citizenship and the case was assigned to United States District Judge James R. Nowlin. Dejoria then filed a "Motion for Nonrecognition of Foreign Judgment" in the District Court arguing that the Moroccan judgment should not be recognized under the 1981 Texas Recognition Act because: (1) the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the Moroccan court lacked personal jurisdiction over DeJoria; (3) the cause of action on which the judgment is based is repugnant to the public policy of Texas; (4) the court rendering the judgment is a seriously inconvenient forum for the trial of the action; (5) Moroccan courts do not recognize Texas judgments; (6) the judgment was not final and conclusive; and (7) the judgment was not authenticated.

---

2. Act of May 15, 1981, 67th Leg., R.S., ch. 808, § 1 (codified at Tex. Civ. Prac. & Rem. Code §§ 36.001, et seq.) (amended 2017; current version at Tex. Civ. Prac. & Rem. Code § 36A.001, et seq.).

Appendix C

The District Court began and ended its analysis with DeJoria's first argument, finding that the Moroccan Judgment should not be recognized under § 36.005(a)(1) of the 1981 Texas Recognition Act ("the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law"). *DeJoria v. Maghreb Petroleum Exploration, S.A.*, 38 F. Supp.3d 805 (W.D. Tex. 2014), *rev'd and remanded*, 804 F.3d 373 (5th Cir. 2015). The District Court found that Moroccan judges are not independent and are susceptible to being pressured by members of the Moroccan royal family, finding that

> the Moroccan royal family's commitment to the sort of independent judiciary necessary to uphold the rule of law has and continues to be lacking in ways that raise serious questions about whether any party that finds itself involved in a legal dispute in which the royal family has an apparent interest—be it economic or political—in the outcome of the case could ever receive a fair trial.

Id. at 812. Based on the evidence before it, the District Court held that "DeJoria or some similarly situated party" could not have received adequately fair procedures to warrant enforcement of the Moroccan judgment. *Id.* at 818. The District Court concluded, "[a]bsent an act of tremendous bravery by the judge, there is no conceivable set of facts or circumstances in which DeJoria could have prevailed in the underlying case. Such a proceeding is not, was not, and can never be 'fundamentally fair.'" *Id.*

B. The Fifth Circuit's Opinion

MPE/MFM appealed the District Court's ruling to the Court of Appeals for the Fifth Circuit, arguing that the judgment should be reversed because DeJoria had failed to meet his burden to prove that the entire Moroccan judicial system does not meet due process standards as required under § 36.005(a)(1) of the 1981 Texas Recognition Act. The Fifth Circuit agreed and held that DeJoria had failed to meet his heavy burden under § 36.005(a)(1) to demonstrate that the Moroccan judicial system "as a whole is so lacking in impartial tribunals or procedures compatible with due process so as to justify routine non-recognition of the foreign judgments." *Dejoria*, 804 F.3d at 382. The Court found that '[t]he Moroccan judicial system does not present an exceptional case of 'serious injustice' that renders the entire system fundamentally unfair and incompatible with due process."*Id* at 384. The Fifth Circuit also rejected DeJoria's alternative arguments that the Moroccan court lacked personal jurisdiction over him, and that Moroccan courts do not recognize Texas judgments. *Id.* at 384-387. The Court did not address DeJoria's public policy and inconvenient forum claims, however, stating in a footnote that those "arguments were not raised on appeal and are thus waived." Id. at 384 n.12. The Fifth Circuit concluded its Opinion with the boilerplate directive: "For the foregoing reasons the judgment of the district court is REVERSED and this matter is REMANDED for further proceedings consistent with this opinion." *Id.* at 389.[3] On

3. The Fifth Circuit denied DeJoria's Petition for Rehearing and request to clarify its use of the word "waived" in footnote 12 regarding the public policy and inconvenient forum arguments. Dkt. No. 63.

June 20, 2016, the Supreme Court denied the petition for writ of certiorari. Dkt. No. 84.

C. Proceedings after Remand

After remand, the case was referred to the undersigned. The parties disagreed on the scope of the Court's authority on remand to consider DeJoria's alternative arguments for non-recognition. After a delay to await the Supreme Court's decision on DeJoria's petition for writ of certiorari, the undersigned concluded that DeJoria was entitled to raise two alternative arguments that were not addressed on the merits in either the trial court or the Circuit, and on September 7, 2016, Judge Nowlin adopted the undersigned's recommendation on this issue. On September 19, 2016, Judge Nowlin transferred the case to United States District Judge Robert Pitman.

The Court then set a status conference to address the logistics of disposing of the remaining issues, at which DeJoria informed the Court that he wished to seek leave to amend his complaint to add two new claims: (1) a defense to enforcement of the Moroccan judgment based on the Due Process Clause of the United States Constitution, and (2) a counterclaim to enjoin recognition and enforcement of the Moroccan judgment based on fraud. On November 30, 2016, the undersigned recommended that the District Court grant the motion to leave to add a defense to enforcement of the Moroccan judgment based on the Due Process Clause, but deny the motion for leave to add a counterclaim to enjoin recognition and enforcement of the Moroccan judgment based on fraud. On February

14, 2017, the District Court adopted the Report and Recommendation. Dkt. No. 114.

On April 23, 2017, the undersigned ordered the Parties to file briefing on DeJoria's Motion for Non-Recognition by July 31, 2017. Dkt. No. 121.[4] However, on June 1, 2017, the Texas Legislature repealed the 1981 Texas Recognition Act and enacted an updated version of the Act. *See* Uniform Foreign-Country Money Judgments Recognition Act, Act of May 22, 2017, 85th Leg., R.S., ch. 390 (codified at TEX. CIV. PRAC. & REM. CODE § 36A.001, et seq.). Because the statute had a direct impact on issues before the Court and the legislature made the statute retroactive to pending cases, the Court extended the Parties' briefing deadlines in the case.

DeJoria argues in his Motion for Non-Recognition that the Moroccan judgment should not be recognized because: (1) the Moroccan judgment falls squarely within the Amended Act's provisions allowing non-recognition where the particular foreign proceedings lacked due process or where there is substantial doubt about the integrity of the rendering court with respect to the judgment; (2) the Due Process Clause of the United States Constitution prohibits

4. At this time, the issues were whether the Moroccan judgment should not be recognized because: (1) the cause of action on which the judgment is based is repugnant to the public policy of Texas under § 36.005(b)(3) of the 1981 Texas Recognition Act; (2) the Moroccan court which rendered the judgment was a seriously inconvenient forum for the trial of the case under § 36.005(b)(6) of the 1981 Texas Recognition Act, or (3) recognition of the judgment would violate DeJoria's right to due process under the Fourteenth Amendment.

enforcing the Moroccan judgment; and (3) the Moroccan judgment is repugnant to Texas public policy.

In response, MPE/MFM argue that the Court should recognize the Moroccan judgment against DeJoria because (1) Judge Nowlin's opinion is "null and void" after the Fifth Circuit reversed it and DeJoria, therefore, cannot satisfy his burden of proof by relying on it; (2) DeJoria's "integrity of the rendering court" and "specific proceeding" challenges under §§ 36A.004(c)(7) & (c)(8) fail as a matter of fact and law; (3) DeJoria's failure to participate in Morocco defeats his §§ 36A.004(c)(7) and (c)(8) challenges; (4) DeJoria's Due Process Clause challenge duplicates his statutory challenges and fails as a matter of fact and law; (5) the Moroccan judgment is consistent with Texas and U.S. public policy and is based on substantial evidence of DeJoria's personal involvement, fraud, and misconduct; and (6) retroactively applying the Amended Act violates the Texas Constitution.

III. ANALYSIS

As noted, after the remand of this case by the Fifth Circuit, the Texas Legislature repealed the 1981 Texas Recognition Act and replaced it with the updated model statute produced by the National Conference of Commissioners on Uniform State Laws. The bill's sponsor stated that the bill "updates the Act based on the 2005 Uniform Foreign-Country Money Judgments Recognition Act, ensuring that Texans enjoy due process protection when defending against foreign country judgments in Texas courts." Bill Analysis, S.B. 944, 85th

Leg., R.S. (March 21, 2017). The Amended Act retained the prior statute's grounds for non-recognition, including the mandatory due process requirement, but adds the following case-specific bases for non-recognition:

> (7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment;
>
> (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

Id. at §§ 36A.004(c)(7) & (8). In addition, the Amended Act now permits non-recognition when "the judgment or the cause of action on which the judgment is based is repugnant to the public policy of this state or the United States." *Id.* at § 36A.004(c)(3). Each of these new grounds for non-recognition are discretionary grounds. The new amendments apply to all pending lawsuits, such as the instant case, without regard to whether the suit was commenced before or after the effective date of the Act (June 1, 2017). Tex. Civ. Prac. & Rem. Code § 36A.004 historical note (West 2017 Supp.) [Act of May 22, 2017, 85th Leg., § 3 (S.B. 944)].

As was the case under the previous version, the party resisting recognition of the foreign judgment—here DeJoria—has the burden of establishing a ground for nonrecognition exists. Amended Act at § 36A.004(d); *Diamond Offshore (Bermuda), Ltd. v. Haaksman*, 355

S.W.3d 842, 845 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) ("Unless the judgment debtor satisfies its burden of proof by establishing one or more of the specific grounds for nonrecognition, the court is required to recognize the foreign judgment.").

A. Does the Amended Act's Retroactivity Clause Violate the Texas Constitution?

Section 3 of the Amended Act provides: "This Act applies to a pending suit in which the issue of recognition of a foreign-country money judgment is or has been raised without regard to whether the suit was commenced before, on, or after the effective date [June 1, 2017] of this Act." Amended Act § 36A.004 historical note (West 2017 Supp.) [Act of May 22, 2017, 85th Leg., § 3 (S.B. 944)]. MPE/MFM argue that this section of the Amended Act violates the Texas Constitution's prohibition on retroactive laws.

1. Standard of Review

"Texas courts afford state statutes a strong presumption of constitutionality under the Texas Constitution." *Miller v. Raytheon Co.*, 716 F.3d 138, 148 (5th Cir. 2013) (citing *Walker v. Gutierrez*, 111 S.W.3d 56, 66 (Tex. 2003)); *see also, Robinson v. Crown Cork & Seal Col., Inc.*, 335 S.W.3d 126, 146 (Tex. 2010). Therefore, in addressing the constitutionality of a statute, courts must "begin with a presumption that it is constitutional." *Enron Corp. v. Spring Indep. Sch. Dist.*, 922 S.W.2d 931, 934 (Tex. 1996). "Courts presume that the Legislature 'understands and correctly appreciates the needs of its

own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.'" *Id.* (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex.1968)). The party challenging the constitutionality of a statute bears the burden of demonstrating that the enactment fails to meet constitutional requirements. *Enron Corp.*, 922 S.W.2d at 934 (Tex. 1996). Because of this strong presumption of constitutionality, the Texas Supreme Court has invalidated statues as prohibitively retroactive in *only four cases* — all of which involved extensions of statutes of limitations. *See Robinson*, 335 S.W.3d at 146 (citing cases).

2. Article I, Section 16 of the Texas Constitution

The Texas Constitution provides that: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Tex. Const. Art. I, § 16. The constitutional prohibition on retroactive laws "protects the peoples's reasonable, settled expectations" and "protects against abuses of legislative power." *Robinson*, 335 S.W.3d at 139. The Texas Supreme Court has defined a retroactive law as "a law that acts on things which are past." *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002). "Mere retroactivity is not sufficient to invalidate a statute. . . . Most statutes operate to change existing conditions, and it is not every retroactive law that is unconstitutional." *Robinson*, 335 S.W.3d at 139 (quoting *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971)); see also, *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 55 (Tex. 2014). While there is

"[n]o bright-line test" for determining whether a statute is unconstitutionally retroactive, the Texas Supreme Court has directed courts to look at three factors: (1) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual findings; (2) the nature of the prior right impaired by the statute; and (3) the extent of the impairment. *Robinson*, 335 S.W.3d at 145.

a. Public Interest Served by the Statute

In *Robinson*, the Texas Supreme Court stated that "[t]here must be a compelling public interest to overcome the heavy presumption against retroactive laws." *Robinson*, 335 S.W.3d at 146. The legislative record in this case indicates that the Legislature enacted the Amended Act after the Fifth Circuit's decision in this case in order to protect the due process protections for Texas citizens involved in international business. The bill's sponsor in the Texas Senate explained the intent of the legislation:

> A recent federal court decision called into question whether the Texas Act protects Texans' individual due process rights by foreign court systems. S.B. 944 updates the Act based on the 2005 Uniform Foreign-Country Money Judgments Recognition Act, ensuring that Texans enjoy due process protection when defending against foreign country judgments in Texas courts.
>
> According to the Uniform Law Commission, the increase in international trade in the United

> States has also meant more litigation in foreign judicial systems. This means more judgments to be enforced from country to country. There is strong need for uniformity between states with respect to the law governing foreign country money-judgments. There is also a strong public policy need to make sure basic individual protections and rights are recognized in any foreign court system that attempts to use our Texas courts to enforce their judgments on our citizens and businesses.
>
> Unfortunately, not all foreign court systems honor basic individual and system due process protections recognized by U.S. state courts (such as the Texas state court system). The provisions of S.B. 944 ensure that Texans' individual due process rights continue to be recognized by foreign judicial systems before those foreign judgments are enforced by Texas courts.

Bill Analysis, S.B. 944, 85th Leg., R.S. (March 21, 2017). The stated purpose of the Amended Act is thus to greater protect the due process rights of Texas citizens. Obviously, protecting the due process rights of its citizens is a *compelling* public interest. *See Carey v. Piphus*, 435 U.S. 247, 266, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) ("[T]he right to procedural due process is "absolute."); *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971) ("At its core, the right to due process reflects a fundamental value in our American constitutional system.").

While MPE/MFM cannot dispute that the Amended Act serves a compelling public interest, they argue that as was the case in *Robinson*, the Amended Act was enacted only to benefit DeJoria and no one else and thus it was not in the public interest. But the facts in this case are easily distinguishable from *Robinson*. There, Barbara and John Robinson sued Crown Cork & Seal, the successor to John's former employer, alleging that John contracted mesothelioma due to asbestos exposure. 335 S.W.3d 126. After the lawsuit had proceeded to the discovery stage, the Legislature enacted Chapter 149 of the Texas Civil Practice and Remedies Code, which altered the choice of law rules in successor-liability asbestos cases. *Id.* at 130. The statute functioned to absolve Crown Cork & Seal of liability for John's mesothelioma and barred the Robinsons' claims. *Id.* at 132-33. The trial court granted summary judgment to Crown Cork & Seal based on Chapter 149's limitation of liability. *Id.* at 133. The Robinsons appealed, arguing that Chapter 149 was a retroactive law in violation of the Texas Constitution. *Id.* Looking to whether Chapter 149 served the public interest, the Texas Supreme Court found that "the legislative record is fairly clear that chapter149 was enacted to help only Crown and no one else." *Id.* at 149. The Court emphasized that "[t]he Legislature made no findings to justify Chapter 149." *Id.* "The only public benefit achieved by the statute was the reduction of Crown Cork & Seal's liability due to asbestos litigation—a benefit we declined to find sufficiently compelling to overcome the presumption that retroactive laws are unconstitutional." *Union Carbide*, 438 S.W.3d 39 at 57. Under the second and third factors, the Court found that the legislation significantly impacted a substantial

interest the Robinsons had in a well-recognized common law cause of action. *Robinson*, 335 S.W.3d at 149. Given the minimal public interest served and the grave impact on the Robinsons' right to recover, the Court held that Chapter 149 was unconstitutionally retroactive. *Id.* at 150.

In contrast to *Robinson*, the Legislature's stated purpose for adopting the Amended Act (as explained above) was to better protect Texans' due process rights with regard to the enforcement of foreign judgments. Unlike the case in *Robinson*, the Legislature did not enact the legislation to abrogate a plaintiff's common law cause of action in order to benefit one corporate party. In addition, the fact that DeJoria lobbied for the passage of the Amended Act and may have directly benefitted from that legislation does not mean that the Amended Act is not in the public interest. By the express terms of the statute, its application is not limited just to DeJoria and instead provides due process protection to all similarly situated parties.

b. Nature of the Rights and Extent of Their Impairment by the Statute

Even if MPE/MFM could demonstrate that the Amended Act was not in the public interest, the other two *Robinson* factors clearly demonstrate that the Amended Act does not violate the Texas Constitution. The second and third prongs of the *Robinson* test consider "the nature of the prior right impaired by the statute," and "the extent of the impairment." *Robinson*, 335 S.W.3d at 145.

MPE/MFM have failed to identify what prior right was impaired by the Amended Act. Instead, MPE/MFM argue that the "new Act changed the controlling law and provided DeJoria with two new non-recognition grounds in §§ (c)(7) and (c)(8) and altered the § (c)(3) policy ground." Dkt. No. 129 at 50. Unlike the case in *Robinson* where the statute entirely extinguished the plaintiff's common law causes of action against the corporate defendant, the Amended Act does not eliminate any of MPE/MFM's grounds for recognition of the foreign judgment in this case. Instead, it simply provides additional grounds for non-recognition. Statutes "that do not deprive the parties of a substantive right . . . may be applied to cases pending at the time of enactment." *Univ. of Texas Sw. Med. Ctr. at Dallas v. Estate of Arancibia ex rel. Vasquez-Arancibia*, 324 S.W.3d 544, 548 (Tex. 2010); s*ee also, Robinson*, 335 S.W.3d at 146. MPE/MFM have failed to demonstrate that the Amended Act impaired any of their rights whatsoever.

Accordingly, the Court rejects MPE/MFM's contention that the Amended Act cannot be applied retroactively to this case.

B. Amended Act

DeJoria devotes the majority of his briefing to argue that the Court should not recognize the Moroccan judgment based on § 36A.004(c)(8) of the Amended Act, and the Court will do the same. That section is a discretionary provision which provides that a court is not required to recognize a foreign judgment if "the specific proceeding in the foreign court leading to the judgment

was not compatible with the requirements of due process of law." Amended Act at § 36A.004(c)(8). The Amended Act does not define "due process of law." However, the Comments to the 2005 Uniform Act, which the Amended Act was modeled on, explain that this subsection "allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of *fundamental fairness*." Unif. Foreign-Country Money Judgments Recognition Act § 4 at comment 12 (emphasis added).[5] In looking at the meaning of due process of law as used in § 36.005(a)(1) of the 1981 Texas Recognition Act, the Fifth Circuit stated "the statute requires only the use of procedures compatible with the requirements of due process" and that "the foreign proceedings need not comply with the traditional rigors of American due process to meet the requirements of enforceability under the statute." *DeJoria*, 804 F.3d at 380 (quoting *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002)). "That

5. As the comments to the 2005 Uniform Act explain: "While the focus of subsection 4(b)(1) is on the foreign country's judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment." Unif. Foreign-Country Money Judgments Recognition Act § 4 at comment 12.

is, the foreign judicial system must only be 'fundamentally fair' and 'not offend against basic fairness.'" *Id.* The United States Supreme Court has repeatedly held that "[a] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). In the context of foreign judgments, the Supreme Court has also noted that "[i]t must, however, always be kept in mind that it is the paramount duty of the court before which any suit is brought to see to it that the parties have had a fair and impartial trial." *Guyot*, 159 U.S. 113, 205, 16 S. Ct. 139, 40 L. Ed. 95 (1895); *see also, Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410 (9th Cir.) *cert. denied*, 516 U.S. 989, 116 S. Ct. 519, 133 L. Ed. 2d 42 (1995).[6]

1. The Record

DeJoria contends that, under the new statute, the facts found by Judge Nowlin in the original proceedings make it a foregone conclusion that DeJoria has demonstrated the requirements of non-recognition under § 36A.004(c)(8) of the Amended Act. In response, MPE/MFM open their post-remand briefing by contending that "Judge Nowlin's opinion is null and void after the Fifth Circuit reversed it, and DeJoria cannot satisfy his burden of proof

6. Although MPE/MFM emphasize that the foreign procedures need not comply with "the traditional rigors of American due process," they do not dispute that due process of law under the Amended Act would also require the right to a fair tribunal in the individual case itself.

by relying on it." Dkt. No. 129 at 1. They further contend that the Circuit already made the relevant findings, and these findings are the law of the case and bind this Court on remand.

The problem with MPE/MFM's argument on this issue is what they do not say. If the findings Judge Nowlin originally made are "null and void," are they suggesting that completely new findings need to be made on remand? If so, they do not say this directly. Or, are they contending that no new findings are needed, because the Circuit's opinion already considered the record and made all of the relevant findings? Though at times their brief reads as if this is their position, the fact that MPE/MFM devote over half of their briefing to a discussion of the facts seems to belie this. At the end of the day, it is not at all clear what MPE/MFM are arguing with regard to the factual record. Given this state of affairs, it is important for the Court to state precisely what its conclusions are on this point.

First, with regard to what the universe of evidence before the court is, the parties agreed that the record for this Court on remand would be the record that was created before Judge Nowlin. At the status conference to address the briefing and process on remand, the Court specifically inquired whether there would be need for any additional evidence, or whether the record created during the proceedings before Judge Nowlin would remain the record on remand:

THE COURT: The—so do I take that, then, that you don't think there's any need for

any additional—anything to add to the factual record. We're fine with the factual record that the Court has.

MR. ENOCH: Your Honor, we believe we are. [for DeJoria]

Dkt. No. 105 at 6. For his part, Mr. Harrison (on behalf of MPE/MFM) was less direct, *id.* at 7-10, but when considered in full, his response also indicates that he believed the record that existed would remain the record on which the Court would make its findings on remand. First, he suggested that there should be no more briefing, as the two issues that originally remained to be decided (before the change in the law) had already been briefed prior to the appeal, and the Court could simply make its decision on those briefs. (Those briefs, of course, were based on the record created before Judge Nowlin.) Second, when he summed up his position, he commented that, "On remand, the Court looks at the record and decides." *Id.* at 8.

Despite this, and though they did not seek leave to submit any additional evidence on remand, MPE/MFM included a number of new exhibits with their briefing. Some of the new material is simply legislative history related to the Texas Legislature's adoption of the Amended Act. Dkt. Nos. 129-31 to 129-38. Some are filings or transcripts from the Fifth Circuit proceedings in this case. Dkt. Nos. 129-25 to 129-28; 129-54. These are all things the Court can take judicial notice of, and are thus

unremarkable. But some of the exhibits are news articles and website information intended to demonstrate that certain entities are owned by the Moroccan royal family, as well as four judgments entered against those entities in Moroccan courts. Dkt. Nos. 129-39 to 129-52; 129-55; 129-56; and 129-58. MPE/MFM did not seek leave of court to supplement the record with these items, and do not even acknowledge in their briefing that these materials are not part of the record. As a result, the Court will not consider them.[7]

2. The Impact of the Reversal

Though MPE/MFM are correct that the reversal of a judgment nullifies that judgment, and makes it as if that judgment had never been rendered, that point was never in doubt. Rather the question is, when a trial court's judgment is reversed, and the case is remanded for further proceedings, may the trial court re-adopt findings of fact made in the judgment, and if so, in what circumstances? And to state the precise question presented *here*, when the reason the judgment was reversed is that the trial court applied the wrong legal standard, what is the status of

---

7. Consideration of the material would not have changed the outcome. These evidence merely shows is that in the years *after* the judgment against DeJoria, Moroccan courts entered judgments in four cases against entities in which the Moroccan royal family owned an interest. As DeJoria notes, unlike his case, these were run-of-the-mill commercial cases, with no political overtones, and no issue of the King needing to "save face." And the largest of the judgments was approximately $750,000, while the judgment here was for over $120 million.

the previously-made fact findings? On direct appeal, the Supreme Court has relied on findings of fact made by a district court, despite finding that the court applied the wrong legal standard, suggesting that such fact findings maintain validity even when the trial court gets the law wrong. *See, e.g., Ford Motor Co. v. EEOC*, 458 U.S. 219, 224 n.7, 102 S. Ct. 3057, 73 L. Ed. 2d 721 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 783 n.10, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). This conclusion is consistent with common sense, and, more importantly, with the law of the case doctrine. That doctrine provides that "an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *Tollett v. City of Kemah*, 285 F.3d 357, 364 (5th Cir.), *cert. denied*, 537 U.S. 883, 123 S. Ct. 105, 154 L. Ed. 2d 141 (2002). When a case is reversed because the wrong legal standard was applied, in most instances the fact findings are "untouched" by that ruling, because "the law of the case doctrine applies only to issues that were *actually decided*, rather than all questions in the case that might have been decided, but were not." *Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (citation omitted) (emphasis added). So "when a judgment has come before us for review, and certain findings of fact were not examined in, relied on, or otherwise necessary to our decision in that appeal, law of the case does not prevent the trial court on remand from reexamining those findings . . . ." *See Exxon Corp. v. United States*, 931 F.2d 874, 878 (Fed. Cir. 1991).

Appendix C

Notwithstanding MPE/MFM's valiant attempts to characterize the decision otherwise, in reversing Judge Nowlin, the Fifth Circuit expressly concluded that he applied the wrong legal standard, and, on that basis, reversed his ruling. A simple review of both opinions makes this clear. In his order, Judge Nowlin only addressed one of DeJoria's non-recognition arguments—DeJoria's argument under § 36.005(a)(1) of the 1981 Texas Recognition Act. He began and ended his analysis with this issue, and found that the Moroccan proceedings in DeJoria's case did not provide DeJoria with adequate due process to warrant recognition of the judgment against him under § 36.005(a)(1). *DeJoria*, 38 F. Supp.3d at 811. Although Judge Nowlin at times discussed the lack of due process in the Moroccan system as a whole, his focus was on the political and economic bias that impacted DeJoria's specific case:

> As a general matter, MPE/MFM's suggestion that the circumstances surrounding the case do not warrant real concerns that the King or royal family corrupted the judicial proceedings is simply not credible. *Id.* at 815
>
> * * *
>
> [T]he likelihood that DeJoria could have or did receive a fair hearing in which the outcome was not pre-ordained is too minimal to permit the Court to overlook the serious issues with both the system and the application present in this case. *Id.* at 817

Appendix C

* * *

> Additionally, the evidence plainly shows that members of the royal family had a political and economic interest in the outcome of the underlying case. *Id.*

* * *

> [T]here is no conceivable set of facts or circumstances in which DeJoria could have prevailed in the underlying case. Such a proceeding is not, was not, and can never be "fundamentally fair." *Id.* at 818

* * *

On appeal, MPE/MFM argued that Judge Nowlin "incorrectly evaluated the particular Morocco Court *judgment* at issue rather than properly evaluating whether 'the judgment was rendered under a *system* that does not provide impartial tribunals or procedures compatible with the requirements of due process of law,' as required under the [1981] Texas Recognition Act.'" Dkt. No. 72-1 at 2 (emphasis original). MPE/MFM further argued that Judge Nowlin ignored Fifth Circuit precedent requiring courts to focus on whether the entire country's judicial system as a whole was incompatible with due process and "erroneously applied a 'retail approach' to evaluate the 'particular judgment' at issue instead of evaluating Morocco's judicial 'system' in which the judgment was rendered." *Id.* at p. 20. The Fifth Circuit

agreed and reversed Judge Nowlin.[8] In doing so, the Circuit emphasized that a court's focus under § 36.005(a)(1) is on "the system as a whole:"

> The court's inquiry under Section 36.005(a)(1) focuses on the fairness of the foreign judicial system as a whole . . . . The plain language of the Texas Recognition Act requires that the foreign judgment be "rendered [only] under a *system* that provides impartial tribunals and procedures compatible with due process."

DeJoria, 804 F.3d at 381 (emphasis original). The Circuit concluded that, based on the record before it, "we cannot agree that the Moroccan judicial system lacks sufficient independence such that fair litigation in Morocco is impossible" and that "any judgment rendered by a Moroccan court is to be disregarded as a matter of course." *Id.* All throughout its opinion, the Circuit emphasized the distinction between a **system** lacking fundamental fairness and a single instance of a litigant being denied fundamental fairness. Indeed, in the eight pages of opinion discussing § 36.005(a)(1), the Circuit used the word "system" no less than 36 times. *Id.* at 377-84. And because its focus was "on the fairness of the foreign judicial system as a whole," the Circuit specifically noted it would not "parse the particular judgment challenged." *Id.* at 381.

---

8. The Fifth Circuit also rejected two of DeJoria's alternative arguments (that the Moroccan court lacked personal jurisdiction over him and that Moroccan courts do not recognize Texas judgments), which had not been reached by Judge Nowlin, and which are not at issue here.

Appendix C

The Circuit has noted that "[w]hile we recognize that 'the law of the case' doctrine comprehends things decided by necessary implication as well as those decided explicitly, it nevertheless applies only to issues that were decided and does not include determination of all questions which were within the issues of the case and which, therefore, might have been decided." *Conkling v. Turner*, 138 F.3d 577, 587 (5th Cir. 1998) (internal quotations and citations omitted). It does not apply to *dicta*. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4478 (2d ed. 2002). The Fifth Circuit clearly stated that its inquiry under § 36.005(a)(1) focused only on "the fairness of the judicial system as a whole." *DeJoria*, 804 F.3d at 382. Any discussion of whether the facts demonstrated something more or less than this, therefore, was *dicta*. *In Re Hearn*, 376 F.3d 447, 453 (5th Cir. 2004) (relying on the Black's Law Dictionary's definition of *dicta*: "judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential"). Thus, the Fifth Circuit's opinion contains no "law of the case" on whether "the *specific* proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." Indeed, because § 36A.004(c)(8) of the Amended Act had yet to be enacted, and because the Fifth Circuit expressly found that 1981 Texas Recognition Act did not address due process at the case-specific level, the Circuit never addressed the question the Amended Act presents here. So unless the Circuit either expressly or implicitly rejected Judge Nowlin's findings, those findings are alive and well, and may be re-adopted on remand.

In apparent recognition of this, MPE/MFM also contend that "the Fifth Circuit weighed the evidence and disagreed with Judge Nowlin." Dkt. No. 129 at 4. In doing so, however, they grossly overstate the Circuit's findings; indeed, DeJoria's characterization of the briefing is apt: "MPE/MFM's Response takes place in an alternate reality." Dkt. No. 130 at 1. Nowhere did the Circuit state that Judge Nowlin's factual findings were erroneous or unsupported by the record; instead, they focused on the legal standard applied, stated the correct standard, and then found the facts were insufficient to meet that standard. Regardless, to hear MPE/MFM tell it, the Circuit rejected each and every one of Judge Nowlin's findings. A good example of MPE/MFM's twisting of the Circuit opinion is this statement:

> • [The Circuit] [f]ound unpersuasive DeJoria's "claim[] that his life would have been endangered had he returned," and held that "DeJoria could have litigated entirely through counsel without returning to Morocco." *Id.* at 389.

Dkt. No. 129 at 6. Though only one page of the opinion is cited here, the two quoted statements come from totally different parts of the opinion. The first—that DeJoria "claimed that his life would have been endangered had he returned"—is in the very first pages of the opinion where the Circuit is reciting the facts, and there is nothing there suggesting that the Circuit found DeJoria's claim "unpersuasive." 804 F.3d at 378. The second quotation—that "DeJoria could have litigated entirely through counsel without returning to Morocco"—is found 11 pages later,

in the personal jurisdiction discussion, and is merely a statement of law—that is, under Moroccan law a person is not required to be personally present to defend a case, and may appear solely through counsel. Again, there is nothing in this portion of the opinion where the Circuit challenges DeJoria's claim that he would be endangered if he traveled to Morocco. Thus, the cobbled-together quotation disingenuously makes it appear as if the Circuit reached a factual conclusion that it plainly did not. And, to make matters worse, when the entire factual record on this issue is reviewed, the evidence suggests the opposite of what MPE/MFM claim.

MPE/MFM get closer on this point when they discuss the Circuit's statements in footnote nine of its opinion. After its statement that "we cannot agree that the Moroccan judicial system lacks sufficient independence such that fair litigation in Morocco is impossible," the Circuit dropped the following footnote:

> Although our inquiry focuses on Morocco's judicial system, we also observe that the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case. For example, the Moroccan court (1) appointed experts, (2) took seven years to reach a decision, (3) awarded a lesser judgment than the expert recommended, and (4) absolved five defendants—including DeJoria's company Skidmore—of liability.

DeJoria, 804 F.3d at 382 n. 9.[9] But even this statement is plainly *dicta* and as discussed above, *dicta* is not the law of the case. 18 WRIGHT, MILLER & COOPER at § 4478. "The law of the case doctrine applies to an issue that has actually been decided, not to statements made by the court in passing, or stated as possible alternatives, or dictum." *United States v. O'Keefe*, 169 F.3d 281, 283 (5th Cir. 1999). The Fifth Circuit's "observations" about whether the King actually exerted improper influence on the Moroccan court in this case were not pertinent to the issue resolved on appeal—whether *the system as a whole* was unfair—which is likely why that observation was contained in a footnote. Because the Fifth Circuit "would have arrived at the same conclusion without the passing observation it made in footnote [9]," which "could have been deleted without seriously impairing the analytical foundations of the holding," the footnote is *dicta* and does not bind the Court on remand. *Segura*, 747 F.3d at 329. And again, because the appeal was not focused on the matters mentioned in footnote nine, it is not surprising that, while the four enumerated facts are indisputably true, there were significant deficiencies in the proceedings.

---

9. MPE/MFM also argue that the Fifth Circuit's comment in the background section of the opinion ("[a]fter nearly seven years of considering MPE and MFM's suit, the Moroccan court ruled against DeJoria and Gustin but absolved five of their co-defendants—including Skidmore—of liability") somehow demonstrates that the Fifth Circuit ruled that DeJoria's specific proceedings did not violate due process. This statement is not even dictum but rather a mere recitation of the facts of the case.

At the end of the day, the Fifth Circuit did not decide—either explicitly or by necessary implication—that the *specific proceedings* leading up to the Moroccan judgment against DeJoria were compatible with the requirements of due process of law. Thus, the law of the case doctrine does not prevent the Court from reexamining the fact findings that the Circuit left undisturbed, and, if appropriate, adopting them again on remand.[10]

Which brings us to the final question on this point—since there is not a legal barrier to the findings being re-adopted, *should* the Court do so? From a judicial efficiency standpoint, it of course makes sense not to revisit each

---

10. The mandate rule—which is a corollary to the law of the case doctrine—does not change the result. That rule "prohibits a district court on remand from reexamining an issue of law or fact previously decided on appeal and not resubmitted to the trial court on remand." *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006). "This prohibition covers issues decided both expressly and by necessary implication, and reflects the jurisprudential policy that once an issue is litigated and decided, 'that should be the end of the matter.'" *Id.* While a mandate controls "on all matters within its scope . . . a district court on remand is free to pass upon any issue which was not expressly or impliedly disposed of on appeal." *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 826 (5th Cir. 1986). The Fifth Circuit's mandate contained the general remand language: "It is ordered and adjudged that the judgment of the District Court is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court." See Dkt. No. 63. "Such general language suggests that the appellate court did not intend to decide a factual issue that was not within its province. . . ." *Chapman v. Nat'l Aeronautics & Space Admin.*, 736 F.2d 238, 242 (5th Cir.), *cert. denied*, 469 U.S. 1038, 105 S. Ct. 517, 83 L. Ed. 2d 406 (1984).

and every factual finding made by Judge Nowlin. This case has been pending for almost five years. Judge Nowlin made the factual findings in this case after carefully considering the evidence submitted by the parties in this case. It would be a waste of judicial resources to reexamine all of the evidence in the case yet again. "A trial court could not operate if it were to yield to every request to reconsider each of the multitude of rulings that may be made between filing and judgment. . . . A presumption against reconsideration makes sense." 18 WRIGHT, MILLER & COOPER at § 4478.1.

Similarly, the fact that the judge presiding over the case has changed does not mean the findings should change. Judge Politz explained the underlying principles well in an unpublished opinion from 2000:

> The "law of the case" doctrine is a common label used to describe what is really four distinct rules. Under each of its variations, the doctrine counsels the courts to refrain from revisiting issues that have been decided in the same case. Such is the result of the "sound policy that when an issue is once litigated and decided, that should be the end of the matter." The impact given to the doctrine, however, depends on the circumstances: in some cases it is discretionary, in others it is mandatory.
>
> When applied to decisions by judges on the same district court without an intervening appeal, the doctrine represents a rule of comity, not

> a limit on judicial power. Generally speaking, "when a district judge has rendered a decision in a case, and the case is later transferred to another judge, the successor should not ordinarily overrule the earlier decision." But unlike the doctrines of *stare decisis* and *res judicata*, the law of the case doctrine does not demand unwavering observance in this context. It must give way "to the interests of justice and economy when those interests are flouted by rigid adherence to the rule."

Williams v. Bexar County, 2000 U.S. App. LEXIS 39928, 2000 WL 1029171 (5th Cir. July 14, 2000) (footnotes and citations omitted). Here, there are no "interests of justice" or "economy" suggesting that the normal rule—that a court should "refrain from revisiting issues that have been decided in the same case"—should not apply here. Thus, it would, absent good reason, be inappropriate for this judge to reweigh the very same evidence that Judge Nowlin already weighed, merely because MPE/MFM believe that Judge Nowlin should have reached different conclusions, and credited their evidence rather than DeJoria's.

Based upon the foregoing, in deciding whether DeJoria has carried his burden under the Amended Act, the Court will rely upon facts found by Judge Nowlin, so long as those were not rejected or questioned by the Circuit. Further, because the new statute expressly adopted a new standard, the Court has also reviewed the existing record and made additional findings from that evidence that are appropriate. "Absent contrary instructions, a

remand for reconsideration leaves the precise manner of reconsideration—whether on the existing record or with additional testimony or other evidence—to the sound discretion of the trial court." *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1577 (Fed. Cir. 1991).

3. Judge Nowlin's Findings

Judge Nowlin made the following findings relevant to whether DeJoria received due process in the Moroccan proceedings specific to him, and the Court adopts these findings here:

> [T]the Moroccan royal family's commitment to the sort of independent judiciary necessary to uphold the rule of law has and continues to be lacking in ways that raise serious questions about whether any party that finds itself involved in a legal dispute in which the royal family has an apparent interest—be it economic or political—in the outcome of the case could ever receive a fair trial. *DeJoria*, 38 F. Supp. 3d at 812.
>
> * * *
>
> Together, the USAID report and the foreign minister's comments paint a picture of a judicial system in which judges feel tremendous pressure to render judgments that comply with the wishes of the royal family and those closely affiliated with it. *Id.* at 814.

* * *

As a general matter, MPE/MFM's suggestion that the circumstances surrounding the case do not warrant real concerns that the King or royal family corrupted the judicial proceedings is simply not credible. *Id.* at 815.

* * *

As for MPE/MFM's suggestion that there is no evidence that the King particularly cared about DeJoria or his role in the Talsint oil project, the evidence plainly suggests otherwise. On Monday, January 27, 2007, "Le Journal," a Moroccan daily newspaper, ran a feature story under the headline "The Talsint Oil Lie." Citing a letter sent by Skidmore Chairman (and DeJoria partner) Michael Gustin to the King and other top officials, the article "accused the King and some officials of bribery and disinformation" in regards to Skidmore's exploration and attempted production of oil in south eastern Morocco in 2000. Neither the story nor the paper would survive for very long. The next day, Le Journal suddenly retracted the story, stating (without any meaningful explanation) that everything they had published was untrue. The paper also announced—again without any explanation—that it would voluntarily go out of circulation for an undisclosed period of time. Two days later, a sister publication reported

that the author of the "offensive" Le Journal article (who also served as Le Journal's editor-in-chief) and Le Journal's publisher were both compelled to appear at the Justice Center so that they could be interrogated by criminal prosecutors about their involvement with the story. *Id.* (internal citations omitted)

* * *

Given the narrative power that [a] verdict [against them] would undoubtedly have, MPE/MFM's suggestion that a man who cared enough about maintaining his image to intimidate and prosecute a whole paper into submission had no interest in the outcome of a case which could either re-enforce his favored image or, alternatively, make him appear foolish if not downright dishonest for having promised so much oil during his now infamous speech simply does not add up.

These facts would have been readily apparent to any judge presiding over this case. Given the King's history of retaliation, not only against judges who displease him but against anyone who threatens his narrative relating to his involvement in Talsint, the Court cannot conceive of any set of circumstances in which the presiding judge in the underlying case would not have felt tremendous pressure to side with MPE/MFM.

* * *

The King's behavior suggests a strong preference that DeJoria be portrayed as a fraudster who misled the King (since, if DeJoria did not, the King appears dishonest, incompetent, or both in retrospect). Whether or not the King, Prince, or some other official picked up the phone and ordered the judge to find against DeJoria is, in some sense, beside the point. Even if no such phone call was ever made, the Court nevertheless cannot, in good conscience, conclude that Morocco provided Mr. DeJoria with adequate due process to warrant enforcement in this country.

* * *

[T]he likelihood that DeJoria could have or did receive a fair hearing in which the outcome was not pre-ordained is too minimal to permit the Court to overlook the serious issues with both the system and the application present in this case. *Id.* at 816-817.

* * *

Here, there is extensive evidence suggesting that Morocco's judiciary is dominated by the royal family (through no fault of the judiciary, which would prefer to be left alone to do its job). Additionally, the evidence plainly shows

that members of the royal family had a political and economic interest in the outcome of the underlying case. This is a deadly combination, for the confluence of circumstances makes it highly likely that the royal family impacted the judicial oversight of a proceeding in which they themselves had an interest. *Id.* at 817.

* * *

"[A] common sense reading of the evidence" in this case unequivocally supports the conclusion that John Paul DeJoria could not have expected to obtain a fair hearing in Morocco had he attempted to fight the charges against him. While the evidence plainly suggests that Morocco's judges wish to obtain the freedom from pressure necessary to impartially conduct the business of the court system, the evidence also reveals that any judge presiding over DeJoria's case would have had to ignore either an explicit or implicit threat to his career—if not to his safety and well-being—in order to find against MPE/MFM. Absent an act of tremendous bravery by the judge, there is no conceivable set of facts or circumstances in which DeJoria could have prevailed in the underlying case. Such a proceeding is not, was not, and can never be "fundamentally fair." *Id.* at 817-18.

Appendix C

4. Additional Factual Findings

In addition to Judge Nowlin's factual findings, the record in this case contains the following evidence showing that DeJoria was denied due process in this case.

a. DeJoria's Ability to Attend the Proceedings

DeJoria contends that he was unable to personally appear at any of the court proceedings, as he had a legitimate fear that either his safety or liberty would be at risk had he traveled to Morocco once the dispute leading to the lawsuit arose. MPE/MFM contend that DeJoria has exaggerated the threat, and also suggest that the Fifth Circuit has effectively rejected this argument. Dkt. No. 129 at 18-19. On the latter point, and as they do throughout their brief, MPE/MFM have significantly overstated what the Circuit opinion says. The section of the opinion they quote from is addressing DeJoria's personal jurisdiction argument and DeJoria's contacts with Morocco, and, moreover, is looking at those contacts *before* the dispute arose. It says nothing about whether the Fifth Circuit found DeJoria's concern for his safety credible. The only record evidence that MPE/MFM offer to controvert DeJoria's claim comes from their retained expert's affidavit, dated in 2013—a dozen years after the relevant events—in which he brushes off Gustin and DeJoria's fear as a simple "poor understanding of Morocco." Dkt. No. 37-1 at ¶ 54. But it is clear that DeJoria was not basing his fear on some sort of misunderstanding, but instead on a specific death threat delivered to his business partner. As Mr. Gustin explained:

Appendix C

> On May 22, 2001, after having received a death threat in connection with Lone Star's activities in Morocco, at a meeting of Lone Star's Board of Directors, I resigned as Lone Star's President/CEO and Chairman as a result of the death threat. I cannot reveal details of this threat without compromising the safety of innocent people still in Morocco. . . . I left the Board meeting in progress in Rabat, Morocco for the reason that I no longer felt secure as to my personal safety if I remained in Morocco and/or in my two executive positions with Lone Star. I left Morocco on May 23, 2001, and I have never been back to Morocco since that time.

Dkt. No. 30-19 at ¶ 7. He further explained that "I told Mr. DeJoria that I understood the threat to be directed at Mr. DeJoria, as well as at me, and that I believed it was unsafe for either me or Mr. DeJoria to return to Morocco." *Id.* at ¶ 8. DeJoria testified that immediately following the board meeting, Gustin informed him of the threat, "and on many occasions thereafter, he related to me the facts of the death threat and his concern for our personal safety should either of us ever return to Morocco." Dkt. No. 30-11 at ¶ 6. DeJoria's own understanding, from this information, was that it would not be safe for him to attend the court proceedings in Morocco. *Id.*

And though MPE/MFM's paid expert belittled these fears, third party attorneys who practiced or resided in Morocco, and who addressed these issues during the relevant time frame, found the fears credible. A French

attorney, licensed to practice in Morocco, who was approached in 2005 by Gustin on behalf of Skidmore to represent them, advised that "[c]learly it is . . . unsafe for Mr GUSTIN and Mr DEJORJA to go to Morocco in a case involving his Highness Prince Moulay Abdellah Alaoui, a first cousin of his Majesty King Mohammed VI, King of Morocco, and his partners." Dkt. No. 30-19 at 43. He described the risks to their welfare as "unacceptable," and he did "not think it prudent, safe, or wise for any sane person to go there for any reason concerning this case." *Id.* Further, a Norwegian attorney, licensed in France and located in Paris, who had represented Skidmore in a matter before the ICC Arbitration Court, assisted Skidmore in 2007 in locating a Moroccan attorney to review documents in the case. He testified that the Moroccan attorney "repeatedly advised the defendant parties not to enter Morocco," and "pointedly advised and warned on more than one occasion that any appearance by Skidmore or any personal representative of Skidmore in the Moroccan lawsuit would be dangerous." Dkt. No. 42-10 at 3-4.[11]

Weighing all of this evidence, the Court concludes that DeJoria's fear of traveling to Morocco was credible, and that the fear arose not from a general danger of traveling

11. This attorney—Amina Ben Brik—is a bit of an enigma, as the record reflects that she may have actually represented MFM in this very litigation at one time, though the Norwegian attorney testified that he hired her on behalf of Skidmore for the limited purpose of reviewing documents. About the only thing that is clear about her role in this case is that her role is unclear. She is discussed in more detail in the next section.

in Morocco, but rather from this specific litigation, and the political and other interests of the Moroccan royal family in the litigation. Moreover, Mr. Kabbaj's vague after-the-fact discounting of those fears fails to counter DeJoria's evidence, and indeed, it does not even attempt to directly rebut the far more specific evidence DeJoria offers. Thus, the Court finds that in the circumstances of this particular case, DeJoria was unable to personally appear to defend himself and offer testimony to rebut the claims made against him in the Moroccan lawsuit.

b. DeJoria's Abiliy to Retain Counsel

The parties hotly contest whether the political nature of DeJoria's case, and the King's political interest in the underlying oil exploration project and in the case itself, prevented DeJoria from being able to obtain legal counsel in the Moroccan proceedings. The Circuit did not address the issue specific to DeJoria, though it noted that one of DeJoria's co-defendant's "did briefly retain Moroccan attorney Azzedine Kettani until a conflict of interest forced his withdrawal." *DeJoria*, 804 F.3d at 383. It also noted that MPE/MFM's expert Mr. Kabbaj "opined that it is 'not at all uncommon' for Moroccan attorneys to represent unpopular figures in Moroccan courts." *Id.* This was, of course, a general statement, and said nothing about whether DeJoria himself was able to find an attorney to represent him in Morocco.[12]

12. MPE/MFM claim that the Fifth Circuit resolved this issue completely, because the Circuit noted that under Moroccan law, "DeJoria could have litigated entirely through counsel without returning to Morocco." Dkt. No. 129 at 15. As already noted in the

Appendix C

A review of the record leads the Court to conclude that DeJoria was in fact unable to retain counsel to represent him, and again, this was due to the fact that he was a defendant in a case that was of great political interest to the King of Morocco, and his interests were adverse to the King's. First, the only testimony MPE/MFM offer to directly address this point (again, from their retained expert, Moroccan attorney Azeddine Kabbaj) does not identify any Moroccan attorney that actually was willing to represent DeJoria in the case. Kabbaj only makes conclusory statements such as "it is not at all uncommon for Moroccan attorneys to represent unpopular figures in Moroccan courts." And though he claims that "there are many attorneys in Morocco who would have been willing to represent DeJoria," he notably fails to identify a single one, nor does he even indicate that *he* would have represented DeJoria had he been approached. DeJoria's evidence was more specific. DeJoria explained that Gustin contacted Bernard Dessaix, a French attorney licensed to practice in Morocco, about representing their interests in the case. Dkt. No. 30-11 at ¶ 13. After "multiple phone conferences and letters" Dessaix declined representation, *id.*, and explained the risks an attorney would face if he or she represented Skidmore, DeJoria or the other defendants in the case:

---

text, this comment was made in the section of the opinion discussing personal jurisdiction, and is merely a statement of law—that is, under Moroccan law a person is not required to be personally present to defend a case, and he may appear solely through counsel. The Circuit quite clearly did *not* find there were Moroccan attorneys willing to represent DeJoria in this case.

> Clearly it is not only unsafe for Mr GUSTIN and Mr DEJORJA to go to Morocco in a case involving his Highness Prince Moulay Abdellah Alaoui, a first cousin of his Majesty King Mohammed VI, King of Morocco, and his partners, but it is also unsafe and unwise for any lawyer/barrister from any country to go there and plead against his Highness Prince Moulay Abdallah Alaoui and his partners to argue that anyone descending from the Prophet Mohammed did not keep his word.
>
> The potential risks to one's welfare are unacceptable

Dkt. No. 30-19 at 43.

The record also reflects that in the early days of Skidmore and DeJoria's involvement in the Moroccan oil exploration project, Gustin hired the Moroccan attorney Azzedine Kettani to assist with "reviewing Lone Star's documents and forms of agreements." Dkt. No. 30-19 at ¶ 10. MPE/MFM point to this to argue that Moroccan attorneys were available to, and willing to work for, DeJoria in the litigation. First, this work was done before the dispute arose. And further, by the middle of 2001, after the dispute arose, but before the lawsuit was filed, Mr. Kettani withdrew from any future representation of Lone Star or Skidmore because MFM had attempted to engage another attorney in the firm—Nadia Kettani—who was apparently unaware of the firm›s previous representation of Skidmore. When the potential conflict came to light,

Azzedine Kettani informed MFM that his firm could not represent it as it already had an ongoing relationship with Skidmore. Dkt. No. 37-20 at 6. MFM, through counsel, demanded that Kettani withdraw from representing Skidmore as well, and Kettani quickly relented. *Id.* at 4, 5.[13] Thus, this firm—which MPE/MFM describe as "Morocco's largest independent law firm"—was no longer available to represent DeJoria.

Next, there is the situation with the mysterious Amina Ben Brik. MPE/MFM assert that Ms. Ben Brik represented Skidmore in the Moroccan proceedings, relying on two letters, written in Arabic, and translated into English. The first letter purports to be a notice to the court that she represented Skidmore, and requested approval to copy documents from the file. Dkt. No. 37-23 at 2-4. The second letter, dated nearly a year later, is more cryptic, and is addressed to the expert, and also refers to her "client Skidmore Energy." There is, however, no evidence of what, other than send these letters, Ben Brik did in the case, and, from the record as a whole, it is less than clear who she was representing in the little involvement she had. As DeJoria points out, the final expert refers in his report to her being counsel for MPE. Dkt. No. 37-22 at 5. And the Moroccan judgment lends further confusion, suggesting Ben Brik represented *both* MPE and Skidmore. Dkt. No. 6-2 at 13. The most clarity

13. DeJoria complains that this was an engineered conflict of interest, intended to conflict out of the case the one Moroccan attorney he could find to represent him. Though this may have been true, there is not enough evidence in the record for the Court to reach that conclusion.

regarding her role comes from the Norwegian attorney who appears to have retained her, on behalf of Skidmore (not DeJoria), who testified that she was hired for the limited purpose of trying to gain access to the court file, and to observe proceedings. She was never hired to represent Skidmore in any other capacity. Dkt. No. 42-10 at 3. Further, the Norwegian attorney reported that Ben Brik specifically warned that "any appearance by Skidmore or any personal representative of Skidmore in the Moroccan lawsuit would be dangerous," which may explain why the judges and experts in Morocco were never quite clear on who her client was, as she herself may not have wanted to make that clear. *Id.* at 4.

MPE/MFM also point to correspondence in the file between Skidmore's general counsel and Moroccan attorney Hammadi Manni as evidence that Moroccan attorneys were willing to represent Skidmore and the defendants. Dkt. No. 129 at 17. But those letters suggest nothing more than that Skidmore asked Manni to indicate the terms on which he would represent Skidmore, and then followed up in another letter indicating that it "look[ed] forward to your reply." Dkt. No. 37-23 at 9-14. The record contains no other evidence regarding any communication with Manni, and thus no indication that Manni ever responded to the letters, or if so what he said. And the record *is* clear that Manni never made an appearance for Skidmore, so this evidence actually supports the inference that Manni ultimately was not willing to appear on Skidmore's behalf.

Finally, MPE/MFM note that the American law firm Baker & McKenzie, which has an office in Morocco, represented DeJoria in *this* case, and suggests from the fact its Moroccan offices are still open and no attorneys there have suffered reprisals, that the King must not be too upset about this matter. But as DeJoria notes, this does not prove that in 2002, when the case against DeJoria was filed, and shortly after the death threat was delivered, DeJoria could have retained a Moroccan attorney. Baker & McKenzie opened its small Casablanca office in late 2012, more than two years *after* the judgment against DeJoria was entered, and eleven years after DeJoria needed Moroccan counsel. At best, the fact that Baker & McKenzie—a firm with more than 5,000 attorneys in 44 countries, only two of whom are permanently resident in the Casablanca office—was for a time part of the team that has represented DeJoria in this proceeding, indicates only that if any pressure was placed on Baker & McKenzie to decline the representation here in the U.S., it was not sufficient to lead to it to do so. Further, it is difficult to know what to make of MPE/MFM's new evidence showing that Baker & McKenzie's Paris and Casablanca offices advised Societé Nacionale d'Investissement in a large M&A transaction in 2016 (MPE/MFM describe SNI as a multi-billion dollar company controlled by the Moroccan royal family). While one inference that might be drawn from this is that, at least in 2016, the King of Morocco was not inclined to punish a law firm representing DeJoria in this case, another inference might be that the King and royal family are pragmatic, and in 2016, more than 15 years after the events underlying the dispute with Skidmore and DeJoria, they found it worth their while to

have Baker & McKenzie represent one of their companies in a large international merger from which they stood to benefit greatly, *even though* the royal family was upset that the firm had also represented DeJoria in this case. Whatever the case, the evidence simply does not show anything about DeJoria's ability to find an attorney willing to represent him in Morocco when it mattered—in 2001 and the few years thereafter.

Again, weighing all the evidence before it, the Court concludes that DeJoria was in fact unable to retain counsel to represent him during the time the Moroccan case was active, and again, this was due to the fact that he was a defendant in a case that was of great political interest to the King of Morocco, and his interests were adverse to the King's. In reaching this conclusion, the Court has taken into account not only that which is set out above, but also that numerous Moroccan attorneys warned DeJoria or his partners of the personal risks they faced if they returned to Morocco, and that an attorney could face if he represented them, that DeJoria had substantial resources with which to hire an attorney and yet nevertheless no attorney made an appearance for him, and finally, that direct evidence of the King's feelings with regard to those who took up DeJoria's side of things was demonstrated in his shutting down a newspaper that dared to suggest that perhaps MPE/MFM's narrative of the events with Skidmore, et al. was incorrect (as Judge Nowlin detailed in his findings).[14]

14. MPE/MFM argue that even if the underlying proceedings suffered from all of these defects, DeJoria waived any complaint he might have because he did not file an appeal, which would have led

c. The Independence of the Experts

Lastly, the evidence in the record shows that the Moroccan court was determined to award damages against DeJoria, even when the very experts the court retained advised otherwise. Specifically, the Moroccan court record indicates that over the seven years that the case remained pending, the court retained five experts to advise the court on whether any damages had been suffered as a result of the defendants' allegedly wrongful acts. After reciting in detail that experts were engaged to "determine the value of the damages and losses that may have been incurred by the Claimants as a result of the Defendants' actions," the judgment notes that reports were submitted by three experts—Saleh Al-Ghazouli, Al-Saadiya Fatthi, and Mohamed Al-Karimi. Dkt. No. 6-2 at 11. These three experts, according to the judgment "concluded that they could not provide any firm opinion on the matter." *Id.* at 13. So, rather than entering judgment that the claimants take nothing, the court "ordered a new assessment and assigned the task to expert Saad Al-Omani." *Id.* And what was this expert's assessment? We do not know, because the judgment states, without

---

to a de novo review of the case. The problem with this argument is that it assumes DeJoria could have retained an attorney to file the appeal, and participate in the de novo review. As already found, that was not the case. So this is not like the cases MPE/MFM cite, where the party who was contesting recognition of a judgment was not prevented from participating in their appeal, but instead simply chose to stop fighting in the foreign country, and to bring their fight back to the U.S. Here, DeJoria was denied the ability to fight the case in Morocco at trial or on appeal.

explanation, that he was too was replaced, this time by Ahmed A-Khardal, the fifth expert to be engaged by the court. Khardal submitted his report on January 22, 2009, and was the first of the experts to conclude that there were damages incurred. This time, there was no dismissal of the expert, and by the end of 2009, the Moroccan court entered judgment against Gustin and DeJoria for 98% of the damages Khardal recommended. *Id.*

MPE/MFM attempt to discount all of this, through their retained expert Kabbaj, and American lawyer and adjunct law professor Abed Awad. The majority of the experts' testimony on these issues does not address the precise point before the Court, but instead discusses non-controversial issues such as it being common for legal systems like Morocco's to retain experts for the purposes for which the experts were retained in DeJoria's case. Further, their testimony discusses the procedural protections parties have in Morocco with regard to experts, such as the right to nominate or object to experts. Such procedural protections were of little value to DeJoria, however, given the Court's conclusion that DeJoria could not appear or retain counsel to represent him in the case; regardless, they say nothing about whether what happened in *this* case was fair. Further, MPE/MFM not very subtly suggest that the first three experts may have been dismissed because they failed to do any work in the case, or failed to do it timely. Dkt. No. 129 at 26 (quoting Kabbaj's testimony that "[i]f the expert does not turn in his report within the time frame set by the commercial court judge or if the expert does not accept the assignment, then the commercial court judge

usually will appoint another expert and inform the parties accordingly."). But there is no need to speculate about why the experts were dismissed, because the judgment says what happened—the three experts "concluded that they could not provide any firm opinion on the matter." Dkt. No. 6-2 at 13. That is a gentle way of saying the three experts could not recommend that *any* damages be awarded. And MPE/MFM's claim that the fourth expert was dismissed because he was ill has no factual basis, other than the bald statement contained in Awad's affidavit that "at least one of [the experts] became ill and was replaced." Dkt. No. 37-2 at 18 ¶ 48(l). Awad offers no explanation of where that information comes from. The judgment—which is far more credible evidence—says only that after the first three experts were unable to recommend any damages, "the court ordered a new assessment and assigned the task to expert Saad Al-Omani, who was subsequently replaced by expert Ahmed A-Khardal." Dkt. No. 6-2 at 13.

In isolation, this history may not be troubling. But when taken in conjunction with the other evidence—the King's intense interest in the case, the death threat, the recommendation of Moroccan attorneys that DeJoria stay out of Morocco, the unwillingness of attorneys to represent DeJoria, the closing of the newspaper that reported on the energy project in a manner unfavorable to the King and the threatening of the paper's editor and publisher with criminal charges—the sequence of events with regard to the experts takes on far more significance, and is yet one more piece of evidence leading the Court to conclude that the specific proceedings in the Moroccan court leading to the judgment against DeJoria were not compatible

with due process. Thus, while MPE/MFM point to the existence of experts, the seven-year tenure of the case, the exoneration of the defunct corporate entities, and the two percent reduction in the final expert's damage calculation as evidence that DeJoria received due process, this would appear to be more spin than fact. Instead, the number of experts engaged, and the length of time the case was pending appears to be evidence of the difficulty the commercial court judges had in coming up with a colorable basis on which to impose liability on Gustin and DeJoria, and the struggle they had finding an expert to support an award of damages.

5. Conclusions

Based upon the findings made by Judge Nowlin, and those made herein, the Court finds that DeJoria has presented sufficient evidence to demonstrate that "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law." Amended Act § 36A.004(c)(8). The facts demonstrate that DeJoria was denied an impartial tribunal because the royal family had a clear political interest in the outcome of the underlying case which "was not compatible with the requirements of due process of law." The Comments to the 2005 Uniform Act provide that non-recognition will be satisfied by "a showing that *for political reasons* the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment." § 4 cmt. ¶ 12 (emphasis added.) This is the situation in the case at bar.

Appendix C

The failed oil exploration project was a significant political embarrassment for the King. This in turn led to a death threat being lodged against DeJoria and him having to remain outside of Morocco, to him being unable to find an attorney willing to represent him in the dispute, and thus to MPE/MFM being completely unopposed in their suit. Despite the lack of opposition, the court struggled to find an expert who would certify the award of any damages, but the Court doggedly persisted until such an expert was located, and once located, awarded 98% of what he recommended. The ability to appear, either in person or through counsel, is a fundamental requirement of due process, as is a fair tribunal that acts independently of political influence. All of that was lacking here. Section (c)(8) presents a discretionary ground for non-recognition, and, as Judge Nowlin found in the initial proceedings, the Court once again believes that the proper exercise of its discretion in this case is to grant the motion for non-recognition.[15]

---

15. DeJoria also requests non-recognition based on § 36A.004(c)(7) of the Amended Act, which applies to cases that "raise substantial doubt about the integrity of the rendering court with respect to the judgment." Given the findings regarding the pressures on Moroccan judges in cases involving political issues impacting the King, as well as the findings on there being musical chair experts, there may be sufficient evidence to support a (c)(7) finding. But because the finding under (c)(8) is stronger, and sufficient in its own right to support this outcome, the Court will not reach that issue. Likewise, for the same reason, the Court need not reach the public policy argument under (c)(3), nor decide whether there is an independent Due Process right to non-recognition, and if that argument is subsumed within the terms of subsection (c)(8) of the Amended Act.

Appendix C

IV. RECOMMENDATION

The undersigned **RECOMMENDS** that the District Court **GRANT** John Paul DeJoria's Motion For Non-Recognition under § 36A.004(c)(8) of the Texas Uniform Foreign-Country Money Judgments Recognition Act (Dkt. No. 128).

V. WARNINGS

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from *de novo* review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. 28 U.S.C. § 636(b)(1)(c); *Thomas v. Arn*, 474 U.S. 140, 150-53, 106 S. Ct. 466, 472-74, 88 L. Ed. 2d 435 (1985); *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc).

SIGNED this 26th day of February, 2018.

/s/ Andrew W. Austin
ANDREW W. AUSTIN
UNITED STATES MAGISTRATE
JUDGE

APPENDIX D — DENIAL OF WRIT OF CERTIORARI OF THE UNITED STATES SUPREME COURT, DATED JUNE 20, 2016

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543-0001

June 20, 2016

Mr. Geoffrey L. Harrison
Susman Godfrey, LLP
1000 Louisiana, Suite 5100
Houston, TX 77002

Re: John Paul DeJoria
v. Maghreb Petroleum Exploration, S.A., *et al.*
No. 15-1033

Dear Mr. Harrison:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/_____
Scott S. Harris, Clerk

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED NOVEMBER 16, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-51022

JOHN PAUL DEJORIA,

Plaintiff-Appellee,

v.

MAGHREB PETROLEUM EXPLORATION, S.A.;
MIDEAST FUND FOR MOROCCO, LIMITED,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas, Austin

ON PETITION FOR REHEARING AND REHEARING *EN BANC*

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before STEWART, Chief Judge, BARKSDALE, and PRADO, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing *En Banc*, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing *En Banc* is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing *En Banc* is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause *en banc*, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 30, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-51022

JOHN PAUL DEJORIA,

Plaintiff-Appellee.

v.

MAGHREB PETROLEUM EXPLORATION, S.A.;
MIDEAST FUND FOR MOROCCO, LIMITED,

Defendants-Appellants

September 30, 2015, Filed

Appeal from the United States District Court
for the Western District of Texas

Before STEWART, Chief Judge, and BARKSDALE and PRADO, Circuit Judges.

CARL E. STEWART, Chief Judge:

This appeal arises from the district court's grant of Plaintiff-Appellee's motion for non-recognition of a Moroccan judgment under Texas's Uniform Foreign

Country Money-Judgment Recognition Act (the "Texas Recognition Act" or "Act"). The district court determined that Morocco's judicial system failed to provide impartial tribunals and procedures compatible with due process as required by the Texas Recognition Act and that the Moroccan judgment was thus unenforceable domestically. Because we conclude Plaintiff-Appellee has not met his burden under the Act, we REVERSE.

I.

John Paul DeJoria ("DeJoria") was a major investor in an American company called Skidmore Energy, Inc. ("Skidmore"), which was engaged in oil exploration and technology projects in Morocco. In pursuit of its goals, Skidmore formed and capitalized a Moroccan corporation, Lone Star Energy Corporation ("Lone Star") (now Maghreb Petroleum Exploration, S.A., or "MPE"). Corporations established under Moroccan law are required to have a "local" shareholder. For Lone Star, that local shareholder was Mediholding, S.A., owned by Prince Moulay Abdallah Alaoui, a first cousin of the Moroccan King, King Mohammed VI.

In March 2000, Lone Star entered into an "Investment Agreement" obligating it to invest in hydrocarbon exploration in Morocco. King Mohammed assured DeJoria that he would line up additional investors for the project to ensure adequate funding. Armadillo Holdings ("Armadillo") (now Mideast Fund for Morocco, or "MFM"), a Liechtenstein-based company, agreed to make significant investments in Lone Star. In the negotiations

leading up to this agreement, Skidmore represented to Armadillo that Skidmore previously invested $27.5 million in Lone Star and that Lone Star's market value was roughly $175.75 million.

On August 20, 2000, King Mohammed gave a nationally televised speech to announce the discovery of "copious and high-quality oil" in Morocco. Three days later, then-Moroccan Minister of Energy Youssef Tahiri, accompanied by DeJoria and DeJoria's business partner Michael Gustin, traveled to the site and held a press conference claiming that the discovered oil reserves would fulfill Morocco's energy needs for decades. Moroccans celebrated this significant news, as the King's announcement was the only stimulus likely to revive Morocco's sluggish economy. The Moroccan stock market soared.

There was one major problem: the oil reserves were not as plentiful as announced. The "rosy picture" of Moroccan energy independence did not materialize, damaging both the Moroccan government's credibility and Lone Star's viability. As a result, the business relationship between MFM and Skidmore/DeJoria suffered. Lone Star replaced DeJoria and Gustin on Lone Star's Board of Directors.[1] DeJoria has not been to Morocco since 2000 and claims that his life would have been endangered had he returned.

---

1. DeJoria disputes that he was ever a director and asserts that he was merely a "passive investor."

Unhappy with the return on its initial investment in Lone Star, MFM sued Skidmore, DeJoria, Gustin, and a number of other Skidmore officers in their individual capacities in Moroccan court. MFM asserted that Skidmore fraudulently induced its investment by misrepresenting Skidmore's actual investment in Lone Star. MPE later joined as a plaintiff in the suit and claimed that Skidmore's fraudulent misrepresentations deprived Lone Star of necessary capital. In response, Skidmore filed two quickly-dismissed lawsuits against MPE, MFM, and other parties in the United States.

After nearly seven years of considering MPE and MFM's suit, the Moroccan court ruled against DeJoria and Gustin but absolved five of their co-defendants—including Skidmore—of liability. The court entered judgment in favor of MPE and MFM for approximately $122.9 million.

DeJoria sued MPE and MFM in Texas state court, challenging domestic recognition of the Moroccan judgment under Sections 36.005(a)(1), (a)(2), (b)(3), (b)(6), and (b)(7) of the Texas Recognition Act. MPE and MFM removed the action to federal district court based on diversity of citizenship. After reviewing the evidence presented by the parties on the state of the Moroccan judicial system and the royal interest in this particular suit, the district court granted DeJoria's motion for non-recognition, concluding that DeJoria had not been provided with procedures compatible with due process as required under Section 36.005(a)(1) of the Act. The district court did not address the remaining grounds for

non-recognition that DeJoria asserted. MPE and MFM timely appealed.

II.

Because federal jurisdiction in this case is based on diversity of citizenship, we apply Texas law regarding the recognition and enforcement of foreign judgments. *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000, 1003 (5th Cir. 1990) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)). The enforcement of foreign judgments in Texas is governed by the Texas Recognition Act. Tex. Civ. Prac. & Rem. Code Ann. §§ 36.001-36.008 (West 2012).

A.

We first consider the standard of review applicable to the district court's recognition decision. This court has previously applied both *de novo* review and abuse of discretion to evaluate a district court's recognition decision. *Compare Derr v. Swarek*, 766 F.3d 430, 436 (5th Cir. 2014) (recognizing inconsistency but applying abuse of discretion in Mississippi recognition case), *with Sw. Livestock & Trucking Co. v. Ramon*, 169 F.3d 317, 321 (5th Cir. 1999) (applying *de novo* review under Texas Recognition Act). In *Derr*, we looked to Mississippi law in deciding that abuse of discretion review applied. 766 F.3d at 436 n.2. Thus, we similarly look to Texas law to determine the applicable standard of review here.[2]

2. At oral argument, DeJoria claimed that the district court proceedings "most closely resembled a bench trial on documentary

Appendix F

The Texas Recognition Act establishes three mandatory grounds and seven discretionary grounds for non-recognition of a foreign judgment. *See Beluga Chartering B.V. v. Timber S.A.*, 294 S.W.3d 300, 304 (Tex. App.—Houston [14th Dist.] 2009). Whether the judgment debtor established that one of these non-recognition provisions applies is a question of law reviewed *de novo*.[3] *Reading & Bates Constr. Co. v. Baker Energy Res. Corp.*, 976 S.W.2d 702, 708 (Tex. App.—Houston [1st Dist.] 1998); *see also Presley v. N.V. Masureel Veredeling*, 370 S.W.3d 425, 432 (Tex. App.—Houston [1st Dist.] 2012) ("A trial court's enforcement of a foreign country judgment presents a question of law, and, thus, we review *de novo* a trial court's recognition of a foreign country judgment."); *Sanchez v. Palau*, 317 S.W.3d 780, 785 (Tex.

---

evidence" and that the standard of review is thus clear error. We disagree. The Texas Recognition Act specifically provides that a "party filing [a] motion for nonrecognition shall include with the motion all supporting affidavits, briefs, and other documentation" and the "party opposing the motion must file any response, including supporting affidavits, briefs, and other documentation." Tex. Civ. Prac. & Rem. Code Ann. § 36.0044(b), (c). Texas courts have not treated this procedure as establishing a bench trial. *See Presley v. N.V. Masureel Veredeling*, 370 S.W.3d 425, 431-32 (Tex. App.—Houston [1st Dist.] 2012) (explaining Texas's procedure for contesting recognition of a foreign judgment and applying *de novo* review to the trial court's decision).

3. If the district court finds that one of the seven discretionary grounds applies, it then makes a "secondary" decision regarding non-recognition. *See Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 331 n.23 (5th Cir. 2002). The district court's secondary discretionary decision "can only be set aside upon a clear showing of abuse." *Khreich*, 915 F.2d at 1004.

App.—Houston [1st Dist.] 2010). Accordingly, we review *de novo* the district court's decision not to recognize the foreign judgment.[4]

B.

In Texas, the recognition of foreign judgments is governed by the Texas Recognition Act. Tex. Civ. Prac. & Rem. Code Ann. §§ 36.001-36.008. Under the Act, unless a ground for non-recognition applies, the judgment of a foreign country is "conclusive between the parties" and "enforceable in the same manner as a judgment of a sister state that is entitled to full faith and credit." *Id.* § 36.004. The ten statutory grounds for non-recognition are the only defenses available to a judgment debtor.[5] *See Beluga Chartering B.V.*, 294 S.W.3d at 304.

---

4. Nevertheless, applying an abuse of discretion standard would not alter our decision here. As this court and Texas courts have recognized, a mistake of law may be corrected regardless of the standard of review applied. *See Derr*, 766 F.3d at 436 n.2 ("[L]ittle turns on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction." (quoting *Ramon*, 169 F.3d at 321 n.4)); *Reading & Bates Constr. Co.*, 976 S.W.2d at 708 (noting that trial court has "no 'discretion'" to improperly determine or to misapply law) (citing *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992)).

5. Section 36.005(a) provides the mandatory grounds for non-recognition: "(1) the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign country court did not have personal jurisdiction over the defendant; or (3) the foreign country court did not have jurisdiction over the subject matter." Tex. Civ. Prac. & Rem. Code Ann. § 36.005(a).

The party seeking to avoid recognition of a foreign judgment has the burden of establishing one of these statutory grounds for non-recognition. *Presley*, 370 S.W.3d at 432; *see also Diamond Offshore (Bermuda), Ltd. v. Haaksman*, 355 S.W.3d 842, 845 (Tex. App.—Houston [14th Dist.] 2011) ("Unless the judgment debtor satisfies its burden of proof by establishing one or more of the specific grounds for nonrecognition, the court is required to recognize the foreign judgment."). DeJoria asserts, as mandatory grounds for non-recognition of the Moroccan judgment, that the Moroccan judicial system does not provide due process and that the Moroccan court lacked personal jurisdiction. DeJoria also asserts, as a discretionary ground for non-recognition, that the Moroccan judgment should not be recognized because Moroccan courts do not recognize Texas judgments.

Section 36.005(b) provides the discretionary grounds: "(1) the defendant in the proceedings in the foreign country court did not receive notice of the proceedings in sufficient time to defend; (2) the judgment was obtained by fraud; (3) the cause of action on which the judgment is based is repugnant to the public policy of this state; (4) the judgment conflicts with another final and conclusive judgment; (5) the proceeding in the foreign country court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; (6) in the case of jurisdiction based only on personal service, the foreign country court was a seriously inconvenient forum for the trial of the action; or (7) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of 'foreign country judgment.'" Tex. Civ. Prac. & Rem. Code Ann. § 36.005(b).

C.

DeJoria contends that the Moroccan judgment is unenforceable because the Moroccan judicial system does not meet due process standards. Under the Texas Recognition Act, a foreign judgment is not conclusive and is thus unenforceable if "the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Tex. Civ. Prac. & Rem. Code Ann. § 36.005(a)(1). "[T]he statute requires only the use of procedures *compatible* with the requirements of due process[. T]he foreign proceedings need not comply with the traditional rigors of American due process to meet the requirements of enforceability under the statute." *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002) (internal quotations omitted). That is, the foreign judicial system must only be "fundamentally fair" and "not offend against basic fairness." *Id.* (internal quotations omitted); *see also Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 688 (7th Cir. 1987) (evaluating a similar provision of the Illinois Recognition Act and noting that "the issue is only the basic fairness of the foreign procedures"). This concept sets a high bar for non-recognition. *See Turner*, 303 F.3d at 330 n.16 ("A case of serious injustice must be involved.") (quoting Uniform Foreign Money-Judgments Recognition Act § 4 cmt., U.L.A. (1986)).

The court's inquiry under Section 36.005(a)(1) focuses on the fairness of the foreign judicial system as a whole, and we do not parse the particular judgment challenged. *See Turner*, 303 F.3d at 330. The plain language of

the Texas Recognition Act requires that the foreign judgment be "rendered [only] under a *system* that provides impartial tribunals and procedures compatible with due process." *Id.* (internal quotations omitted); *see also Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477-78 (7th Cir. 2000) (emphasizing that a similar provision of the Illinois Recognition Act does not allow the reviewing court to evaluate "particular judgments"). Accordingly, we now consider whether Morocco's judicial system as a whole is "fundamentally fair" and inoffensive to basic notions of fairness.

To justify non-recognition of the Moroccan judgment, DeJoria argues that Morocco's judiciary is made up of judges beholden to the King and therefore lacks independence. Under the Moroccan Constitution, Morocco is an executive monarchy headed by a King who serves as the supreme leader. As described in a 2003 World Bank publication (the "World Bank Report"), the King has the final authority over the appointment of judges. A United States Agency for International Development report (the "USAID Report")[6] observes that the Moroccan judicial system is "permeable to political influence" and that judges are "vulnerable to political retribution." State Department Country Reports also question the independence of the Moroccan judiciary. For example, the 2009 State Department Country Report explains that

6. We note that the USAID Report was prepared by an independent contractor and contains the following disclaimer: "The views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government."

"in practice the judiciary . . . was not fully independent and was subject to influence, particularly in sensitive cases." Moroccan courts also battle a public perception of ineffectiveness. In 2012, nearly 1,000 Moroccan judges protested for "greater independence for the judiciary." Though this evidence led the district court to find that Morocco's judicial system was not compatible with the requirements of due process, we conclude that it does not present the entire picture.[7]

Azzedine Kabbaj, a Moroccan attorney who has been practicing for thirty-five years, testified that Moroccan judges must pass an admissions test and complete two years of judge-specific training. Kabbaj noted that the Moroccan system "places great emphasis" on providing "actual notice" of lawsuits to defendants, allows for numerous challenges to the appointments of experts, and gives defendants a *de novo* appeal after an initial judgment. Abed Awad, an adjunct professor at Rutgers University School of Law, further explained that the procedures followed in Moroccan commercial courts resemble those followed in United States courts.[8] The

7. MPE and MFM contend the district court improperly conducted outside Internet research on this issue. The district court relied on the Seventh Circuit's decision in *Ashenden*, concluding that whether a foreign judicial system meets due process "is a question about the law of a foreign nation" and that a court may thus consider "any relevant material or source." *Ashenden*, 233 F.3d at 477 (citing Fed. R. Civ. P. 44.1). Because the district court's outside research does not influence our analysis, we need not decide whether Rule 44.1 actually applies.

8. While DeJoria described the testimony of Kabbaj and Awad as "unsupported, conclusory opinions," such expert testimony

law firm of DeJoria's expert advertised Morocco's judicial system as "adher[ing] to international standards." The same USAID Report cited by DeJoria notes that the King's government "has made judicial reform one of its key objectives," explains that the "rule of law" is a "critical factor" in Morocco's development, and observes that the Moroccan government "is making strides" toward building a state reliant on the rule of law. The USAID Report, while acknowledging fundamental concerns about judicial independence, concludes that the "Monarchy's interest in reforming the justice sector is a positive sign." The World Bank Report describes the advances in Morocco's judicial system as "indisputable" and recognizes Morocco's "enhanced drive toward an independent judiciary." Finally, the State Department has recognized that the Moroccan government has implemented reforms intended to increase judicial independence and impartiality.

The Texas Recognition Act does not require that the foreign judicial system be perfect. Instead, a judgment debtor must meet the high burden of showing that the foreign judicial system as a whole is so lacking in impartial tribunals or procedures compatible with due process so as to justify routine non-recognition of the foreign judgments. *See Turner*, 303 F.3d at 330. DeJoria has not met this burden. Based on the evidence in the

---

is relevant in recognition proceedings. *See Khreich*, 915 F.2d at 1005-06 (using expert testimony to determine reciprocity under the Texas Recognition Act); *see also S.C. Chimexim S.A. v. Velco Enters., Ltd.*, 36 F. Supp. 2d 206, 214 (S.D.N.Y. 1999) (relying on expert testimony to evaluate due process under New York's statute governing enforcement of foreign judgments).

record, we cannot agree that the Moroccan judicial system lacks sufficient independence such that fair litigation in Morocco is impossible.[9] The due process requirement is not "intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts." *Ashenden*, 233 F.3d at 476. Thus, the record here does not establish that any judgment rendered by a Moroccan court is to be disregarded as a matter of course.

Even under DeJoria's characterization, the Moroccan judicial system would still contrast sharply with the judicial systems of foreign countries that have failed to meet due process standards. For example, in *Bank Melli Iran v. Pahlavi*, the Ninth Circuit refused to enforce an Iranian judgment and concluded that the Iranian judicial system did not comport with due process standards. 58 F.3d 1406, 1411-13 (9th Cir. 1995). The court relied on official reports advising Americans against traveling to Iran during the relevant time period and identifying Iran as an official state sponsor of terror. *Id.* at 1411. Further, the court noted that Iranian trials were private, politicized proceedings, and recognized that the Iranian government itself did not "believe in the independence of the judiciary." *Id.* at 1412. Judges were subject to continuing scrutiny

9. Although our inquiry focuses on Morocco's judicial *system*, we also observe that the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case. For example, the Moroccan court (1) appointed experts, (2) took seven years to reach a decision, (3) awarded a lesser judgment than the expert recommended, and (4) absolved five defendants—including DeJoria's company Skidmore—of liability.

and potential sanction and could not be expected to be impartial to American citizens. *Id.* Further, "revolutionary courts" had the power to usurp and overrule decisions of the Iranian civil courts. *Id.* Attorneys were also warned against "representing politically undesirable interests." *Id.* Based on this evidence, the court concluded that the Iranian judicial system simply could not produce fair proceedings. *Id.* at 1412-13; *see also Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1357 (11th Cir. 1982) ("[T]he Islamic regime now governing Iran has shown a deep hostility toward the United States and its citizens, thus making effective access to the Iranian courts unlikely.").

Similarly, in *Bridgeway Corp. v. Citibank*, the Second Circuit declined to recognize a Liberian judgment rendered during the Liberian Civil War. 201 F.3d 134, 144 (2d Cir. 2000). There, the court observed that, during the relevant time period, "Liberia's judicial system was in a state of disarray and the provisions of the Constitution concerning the judiciary were no longer followed." *Id.* at 138. Further, official State Department Country Reports noted that the Liberian judicial system—already marred by "corruption and incompetent handling of cases"—completely "collapsed" following the outbreak of fighting. *Id.* Because the court concluded that there was "sufficiently powerful and uncontradicted documentary evidence describing the chaos within the Liberian judicial system during the period of interest," it refused to enforce the Liberian judgment. *Id.* at 141-42.

Pahlavi and *Bridgeway* thus exemplify how a foreign judicial system can be so fundamentally flawed as to offend basic notions of fairness.[10] Unlike the Iranian system in *Pahlavi*, there is simply no indication that it would be impossible for an American to receive due process or impartial tribunals in Morocco. In further contrast with *Pahlavi*, there is no record evidence of a demonstrable anti-American sentiment in Morocco; in fact, American law firms do business in Morocco.[11] While the judgment debtor in *Pahlavi* could not have retained representation in Iran, Skidmore—a co-defendant in the Moroccan case—did briefly retain Moroccan attorney Azzedine Kettani until a conflict of interest forced his withdrawal. One expert opined that it is "not at all uncommon" for Moroccan attorneys to represent unpopular figures in Moroccan courts. *Bridgeway* presents an even more stark contrast. Morocco's judicial system is not in a state of complete collapse, and there is no evidence that Moroccan courts or the Moroccan government routinely disregard constitutional provisions or the rule of law. Because Morocco's judicial system is not in such a dire situation, it does not present the unusual case of a foreign judicial system that "offend[s] against basic fairness." *Turner*, 303 F.3d at 330 (internal quotations omitted).

---

10. Though *Pahlavi* and *Bridgeway* involved California and New York law, respectively, those states' recognition statutes each provided that a foreign judgment was not enforceable if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process [of law]." *Pahlavi*, 58 F.3d at 1410; *Bridgeway*, 201 F.3d at 137. These provisions are nearly identical to the Texas provision at issue here.

11. For example, DeJoria's law firm in this appeal, Baker & McKenzie, has an office in Casablanca, Morocco.

The Texas Recognition Act's due process standard requires only that the foreign proceedings be fundamentally fair and inoffensive to "basic fairness." *Presley*, 370 S.W.3d at 434. This standard sets a high bar for non-recognition. The Moroccan judicial system does not present an exceptional case of "serious injustice" that renders the entire system fundamentally unfair and incompatible with due process. The district court thus erred in concluding that non-recognition was justified under Section 36.005(a)(1) of the Texas Recognition Act.

D.

As alternative grounds for non-recognition, DeJoria asserts that Morocco does not recognize judgments rendered by Texas courts and that the Moroccan court lacked personal jurisdiction.[12] Although the district court did not reach these arguments, its judgment may be affirmed "on any grounds supported by the record." *Sobranes Recovery Pool I, LLC v. Todd & Hughes Constr. Corp.*, 509 F.3d 216, 221 (5th Cir. 2007) (quoting *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992)). Therefore, we address these arguments in turn.

---

12. In the district court, DeJoria raised "public policy" and "inconvenient forum" challenges to recognition of the Moroccan judgment, both of which are discretionary grounds for non-recognition under Section 36.005(b) of the Texas Recognition Act. These arguments were not raised on appeal and are thus waived. *See United States v. Whitfield*, 590 F.3d 325, 346 (5th Cir. 2009) ("[A] party waives any argument that it fails to brief on appeal.").

Appendix F

1.

Under the Texas Recognition Act, a court may refuse to enforce a foreign judgment if "it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of 'foreign country judgment.'" Tex. Civ. Prac. & Rem. Code Ann. § 36.005(b)(7). This "reciprocity" ground for non-recognition is discretionary. *Beluga Chartering B.V.*, 294 S.W.3d at 304 & n.1. Even if reciprocity is lacking, a reviewing court may still elect to recognize the foreign judgment. *See Royal Bank of Canada v. Trentham Corp.*, 665 F.2d 515, 518-19 (5th Cir. 1981) ("Even though . . . the trial court [has] discretion to recognize the judgment despite nonreciprocity by the foreign forum, . . . the clear message . . . is that foreign judgments which would not be reciprocally recognized if made in Texas are not favored."). The party seeking non-recognition has the burden of establishing non-reciprocity. *Khreich*, 915 F.2d at 1005; *Presley*, 370 S.W.3d at 432. The central question is whether the foreign country would enforce a Texas judgment "to the same extent" that it would enforce a judgment rendered within its own borders. *Reading & Bates Constr. Co.*, 976 S.W.2d at 710.

In *Khreich*, we affirmed the district court's refusal to recognize an Abu Dhabi judgment for lack of reciprocity. 915 F.2d at 1006. There, the party seeking non-recognition provided the affidavit of an American attorney practicing in Abu Dhabi. *Id.* at 1005. This testimony provided that no Abu Dhabi courts had previously enforced United States judgments, that there had been no attempts to enforce

United States judgments in Abu Dhabi courts, that Abu Dhabi courts preferred to resolve disputes under local law, and that it was doubtful that Abu Dhabi courts would exercise their discretion to actually enforce an American judgment. *Id.* at 1005-06. The only contrary testimony offered was a translation of Abu Dhabi law relating to recognition of foreign judgments. *Id.* We concluded that this evidence was sufficient to find non-reciprocity. *Id.* at 1006.

DeJoria contends that his showing on lack of reciprocity is "at least as strong" as the showing we found sufficient in *Khreich*. This argument, however, fails to consider MPE and MFM's rebuttal evidence. In contrast with the minimal showing in *Khreich*, MPE and MFM have identified the relevant statutory provisions under Moroccan law and offered expert testimony that Moroccan courts would recognize American judgments and have routinely recognized other foreign judgments. Thus, MPE and MFM have done more than merely point to a "translation of [Moroccan] law" or simply identify a relevant statutory provision. *See Khreich*, 915 F.2d at 1005-06; *see also Karim v. Finch Shipping Co.*, 265 F.3d 258, 272 (5th Cir. 2001) (finding that, in the context of determining foreign law, the party seeking recognition in *Khreich* "did not call any expert witnesses" and provided only "a copy of a statute and general materials").

Further, Moroccan law specifically allows for the recognition of foreign judgments.[13] Article 430 of the

13. This court's understanding of the content of the Morocco Code of Civil Procedure is based on the undisputed evidence presented to the district court.

Morocco Code of Civil Procedure provides that, in order to enforce a foreign judgment, a Moroccan court "shall determine the judgment is genuine and that the foreign court that issued the judgment had jurisdiction, and shall verify that no part of the judgment violates Moroccan public policy." On its face, Article 430 seems to answer the reciprocity question; however, DeJoria insists that it is uncertain whether Article 430 would actually allow recognition of a United States judgment. DeJoria's expert, Kettani, observed "that there is no certainty as to how . . . the statutory criteria of 'public order' . . . would be used in practice to deny enforcement." Such speculation is insufficient to justify non-enforcement. The statutory criteria for non-enforcement under Article 430, lack of jurisdiction and violation of public policy, are no different than three of the grounds for non-recognition under the Texas Recognition Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 36.005(a)(2), (a)(3), (b)(3).

DeJoria asserts that MPE and MFM cannot demonstrate reciprocity because "Morocco never has [recognized a Texas judgment], and what it might do in the future is sheer speculation." The Texas Recognition Act, however, gives the court discretion to not recognize a judgment if "it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in [Texas] that, but for the fact that they are rendered in [Texas], conform to the definition of 'foreign country judgment.'" Tex. Civ. Prac. & Rem. Code Ann. § 36.005(b)(7). The plain language of this provision requires the judgment debtor to demonstrate that the foreign country does not recognize Texas judgments

because they were rendered in Texas. Therefore, MPE and MFM are not required to prove that Morocco has previously recognized Texas judgments. Instead, the burden is on DeJoria to show that Morocco would not recognize an otherwise enforceable foreign judgment only because the judgment was rendered in Texas. *See id.* 36.005(b)(7); *Khreich*, 915 F.2d at 1005. DeJoria provides no evidence that this is the case. Thus, the mere fact that a Moroccan court has not previously recognized a Texas judgment is insufficient to establish non-reciprocity.[14]

Finally, DeJoria argues that a Moroccan court would not enforce an American judgment impinging on Moroccan royal interests without looking into the merits of the case. Even if a Moroccan court would look to the underlying merits of a Texas judgment rendered under similar circumstances, such an inquiry alone is not sufficient to establish non-reciprocity. For example, though Belgium's recognition statute authorizes some inquiry into the merits of the underlying foreign claim, American courts

---

14. In fact, courts have rejected non-reciprocity arguments or chosen to recognize foreign judgments even where there was no evidence of a foreign court previously recognizing an American judgment. *See, e.g., Tahan v. Hodgson*, 662 F.2d 862, 868, 213 U.S. App. D.C. 306 & n.25 (D.C. Cir. 1981) (noting that the presence of an Israeli reciprocity statute, cases allowing other foreign judgments, and economic cooperation between Israel and the United States was sufficient to find reciprocity); *McCord v. Jet Spray Int'l Corp.*, 874 F. Supp. 436, 440 (D. Mass. 1994) (finding that Belgium law "officially recognizes a cause of action based upon an American judgment"); *Reading & Bates Constr. Co.*, 976 S.W.2d at 710 (considering whether Canada "would recognize and enforce a (hypothetical) Texas judgment").

have still previously enforced Belgian judgments. *See Presley*, 370 S.W.3d at 434 (enforcing Belgian judgment under Texas Recognition Act); *McCord v. Jet Spray Int'l Corp.*, 874 F. Supp. 436, 439-40 (D. Mass. 1994) ("The fact that the Belgian courts allow a limited inquiry into the substance of the action does not erase the fact that Belgium officially recognizes a cause of action based upon an American judgment.").

We conclude that DeJoria has not established, as required by the Texas Recognition Act, that Morocco would refuse to recognize an otherwise enforceable foreign judgment simply because it was rendered in Texas.

2.

Under the Texas Recognition Act, a court cannot enforce a foreign judgment if the foreign court did not have personal jurisdiction over the defendant. Tex. Civ. Prac. & Rem. Code Ann. § 36.005(a)(2); *see Haaksman*, 355 S.W.3d at 850. The party seeking non-recognition must prove lack of personal jurisdiction. *See The Courage Co. v. The ChemShare Corp.*, 93 S.W.3d 323, 331 (Tex. App.—Houston [14th Dist.] 2002). Personal jurisdiction consists of two components: service of process and amenability to jurisdiction. *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1264 (5th Cir. 1983).

a.

We turn first to service of process, which is "simply the physical means by which . . . jurisdiction is asserted."

Id. We apply Moroccan law to determine whether service of process was proper. *See, e.g., Naves v. Nat'l W. Life Ins. Co.*, No. 03-08-00525-CV, 2009 Tex. App. LEXIS 7153, 2009 WL 2900755, at *2 (Tex. App.—Austin 2009) (evaluating service of process under Brazilian law). One expert explained that service of process under Moroccan law is proper if it is carried out through "means that ensure the recipient receives actual notice." There is no dispute that DeJoria had actual notice of the Moroccan lawsuit. DeJoria, however, argues that service could not be proper under Moroccan law until Morocco became a signatory to the Hague Convention in 2011. Article 37 of the Morocco Code of Civil Procedure, which was in effect at the time of the suit, provides: "If the recipient resides in a foreign country, [the notification of the suit must be] transmitted through the hierarchy to be sent through the diplomatic channel, subject to the provisions of the diplomatic conventions." Because there was no convention or treaty governing service on a foreign defendant, DeJoria contends there was no statutory means to ensure actual notice and that this situation "falls squarely" within the Seventh Circuit's decision in *Koster v. Automark Industries, Inc.*, 640 F.2d 77 (7th Cir. 1981).

In *Koster*, the Seventh Circuit, in dicta, explained that the Dutch statute governing service of process did not require that service on a foreign defendant be made by certified mail or any other reasonable means; instead, the method of service was left up to the discretion of the Dutch Department of Foreign Affairs. 640 F.2d at 81 n.3. The court determined that this method of service violated due process. *Id.* Because DeJoria received actual notice,

we conclude that his reliance on *Koster* is misplaced. The *Koster* court noted that the issue of service was of "particular significance" because the defendant claimed it never received notice of the foreign lawsuit. *Id.* In contrast, DeJoria received a copy of the Moroccan lawsuit, even though the process server's access to DeJoria's property was allegedly obtained deceptively. DeJoria assumed that the documents were "related to the Moroccan lawsuit" and turned them over to his attorneys. In addition, Skidmore filed an anti-suit injunction against the Moroccan lawsuit and included an affidavit from DeJoria. Though DeJoria disputes whether service was technically proper, it is evident from the record that DeJoria had actual notice of the Moroccan lawsuit.

Regardless, foreign courts are not required to adopt "every jot and tittle of American due process." *Ashenden*, 233 F.3d at 478. Instead, only "the bare minimum requirements" of notice must be met. *Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV*, 347 F.3d 589, 594 (5th Cir. 2003). The Supreme Court has emphasized that a basic requirement of due process is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950). Thus, while due process requires only "reasonably calculated" notice, DeJoria had actual notice of the Moroccan lawsuit, which "more than satisfie[s]" his due process rights and meets the bare minimum requirements of notice sufficient to enforce a judgment. *United Student Aid Funds, Inc. v.*

Espinosa, 559 U.S. 260, 272, 130 S. Ct. 1367, 176 L. Ed. 2d 158 (2010); *see also Int'l Transactions, Ltd.*, 347 F.3d at 594; *Ma v. Cont'l Bank N.A.*, 905 F.2d 1073, 1076 (7th Cir. 1990) ("[N]ot all of the technical requirements of service are sufficient grounds for a collateral attack. Service is designed to produce knowledge. . . .").

b.

Finally, DeJoria challenges his amenability to jurisdiction. "Amenability to jurisdiction means that a defendant is within the substantive reach of a forum's jurisdiction under applicable law." *DeMelo*, 711 F.2d at 1264. Courts generally apply the standards of the rendering court to determine jurisdiction. *See, e.g., Naves*, 2009 Tex. App. LEXIS 7153, 2009 WL 2900755, at *2 (applying Brazilian law to determine personal jurisdiction).

DeJoria argues that the Moroccan court lacked jurisdiction because no curator was appointed. Under Article 39 of the Morocco Code of Civil Procedure, "[i]n all cases where the domicile and residence of a party are unknown, the judge appoints, in the capacity as curator, an officer of the court to whom the summons is notified." Expert testimony revealed that under Moroccan law, the failure to appoint a curator where required violates due process and can result in nullification of a judgment. However, expert testimony further clarified that a "Moroccan court would never appoint a curator for a defendant with a known address." The Moroccan court was not required to appoint a curator, because DeJoria's

domicile and residence were known. In fact, DeJoria was served with process at his home and was later served with the judgment in Texas. Accordingly, we conclude that Article 39 is not applicable to this case.

Under Moroccan law, if the defendant is not domiciled in Morocco, jurisdiction is proper at the domicile or place of residence of the plaintiff. Article 27 of the Morocco Code of Civil Procedure provides: "If the defendant has no domicile or residence in Morocco, [a suit] may be brought before the court of the domicile or residence of the applicant or one of them if there are several." Thus, jurisdiction was proper in Morocco, where MPE was domiciled.

Further, jurisdiction is proper even under the stricter requirements of American due process. "Texas courts may exercise personal jurisdiction over a nonresident if (1) the Texas long-arm statute authorizes the exercise of jurisdiction, and (2) the exercise of jurisdiction is consistent with federal and state constitutional due-process guarantees." *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 149 (Tex. 2013) (internal quotations omitted). "The long-arm statute allows the exercise of personal jurisdiction over a nonresident defendant who 'commits a tort in whole or in part in this state.'" *Id.* (quoting Tex. Civ. Prac. & Rem. Code Ann. § 17.042(2)). "Asserting personal jurisdiction comports with due process when (1) the nonresident defendant has minimum contacts with the forum state, and (2) asserting jurisdiction complies with traditional notions of fair play and substantial justice." *Id.* at 150.

Applying the Texas standard as if it were the standard applied by Moroccan courts, we conclude that Morocco obtained personal jurisdiction over DeJoria. "[A]llegations that a tort was committed in [the forum] satisfy [the] long-arm statute. . . ." *Id.* at 149. Here, MPE and MFM alleged that DeJoria committed torts in Morocco related to his investment in Skidmore and its relationship with Lone Star. Specifically, MFM alleges that DeJoria made fraudulent misrepresentations regarding his investment in Lone Star, and MPE alleges that DeJoria's misrepresentations deprived it of necessary capital. These allegations are sufficient to satisfy the long-arm statute.

"A defendant establishes minimum contacts with a state when it 'purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.'" *Retamco Operating, Inc. v. Republic Drilling Co.*, 278 S.W.3d 333, 338 (Tex. 2009) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). DeJoria voluntarily started a Moroccan corporation to explore for oil reserves in Morocco through Lone Star. DeJoria's investment activity was in Morocco. DeJoria visited Morocco in connection with his relationship with Lone Star, including a visit to a drilling site with Morocco's then-Energy Minister. Nearly all of the alleged acts and omissions in the underlying case occurred in Morocco. DeJoria thus has sufficient, purposeful contacts with Morocco to render jurisdiction reasonable.

"In addition to minimum contacts, due process requires the exercise of personal jurisdiction to comply with traditional notions of fair play and substantial justice." *Moncrief Oil*, 414 S.W.3d at 154. "If a nonresident has minimum contacts with the forum, rarely will the exercise of jurisdiction over the nonresident not comport with traditional notions of fair play and substantial justice." *Id.* at 154-55. While litigation in Morocco would have imposed a burden on DeJoria, that burden would not be so heavy as to render jurisdiction unreasonable. Moroccan courts do not require that the defendant appear personally, and DeJoria could have litigated entirely through counsel without returning to Morocco. When weighed against Morocco's substantial interest in adjudicating a dispute involving a Moroccan corporation and Moroccan resources, DeJoria's burden of litigating in Morocco would not have been unfair in relation to his contacts with the forum. Because DeJoria voluntarily engaged in purposeful contacts with Morocco, the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice." *Id.* at 154.

DeJoria has not established that the Moroccan court lacked personal jurisdiction, and non-recognition is thus not justified under Section 36.005(a)(2) of the Act.

III.

For the foregoing reasons, the judgment of the district court is REVERSED and this matter is REMANDED for further proceedings consistent with this opinion.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED AUGUST 13, 2014

CIVIL ACTION NO. 1:13-cv-654-JRN

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

JOHN PAUL DEJORIA,

Plaintiff-Counterclaim-Defendant,

v.

MAGHREB PETROLEUM EXPLORATION S.A.; MIDEAST FUND FOR MOROCCO LIMITED, JOHN DOE #1, and JOHN DOE #2,

Defendant-Counterclaim-Plaintiffs,

August 12, 2014, Decided
August 13, 2014, Filed

ORDER

Before the Court are John Paul DeJoria's ("DeJoria") Motion for Nonrecognition of Foreign Judgment (Dkt. No. 25); DeJoria's Memorandum in Support of his Motion for Non-Recognition (Dkt. No. 30); Maghreb Petroleum Exploration, S.A., Mideast Fund for Morocco Limited's ("MPE/MFM") Response in Opposition to DeJoria's

Motion for Non-Recognition (Dkt. No. 37); and MPE/MFM's Sur-Reply in Opposition to Motion and in further support of Recognition and Enforcement of the Morocco Court Judgment. (Dkt. No. 43).

The parties in this case are former partners in a Moroccan oil venture. In 2002, MPE/MFM filed suit in Morocco against seven of its former partners, including DeJoria, alleging that DeJoria and his fellow defendants fraudulently represented the value of their company to induce MPE/MFM to invest in it, as well as alleging that DeJoria and the other named defendants mismanaged the company. On December 31, 2009, a court in Morocco entered judgment in favor of Defendant/Counterclaim Plaintiffs MPE/MFM and against DeJoria and one other person for an amount approximately equaling approximately $122.9 million.

In the instant case, the parties have, in essence, filed dueling motions for declaratory judgment. DeJoria argues that Texas law mandates non-enforcement of the Moroccan court judgment and requests that the Court therefore grant its motion for non-recognition of the Moroccan Court's judgment. MPE/MFM counters that Texas law supports enforcement of the Moroccan court's judgment and correspondingly requests that the Court enter judgment in favor of MPE/MFM.

For reasons set out in detail below, the Court finds that the Texas Uniform Foreign Country Money Judgments Recognition Act proscribes the Court from enforcing the Moroccan Court's December 2009 judgment against

DeJoria. As such, the Court GRANTS DeJoria's Motion for Non-Recognition. (Dkt. No. 25).

I. OVERVIEW/ PROCEDURAL HISTORY

Plaintiff and Counterclaim Defendant is John Paul DeJoria ("DeJoria"). A resident of Austin, DeJoria is an extremely successful entrepreneur who co-founded John Paul Mitchell hair products, the Patron Spirit Company, and the House of Blues nightclub chain. His involvement in this case, however, stems from his relationship with a company called Skidmore Energy. Between 1998 and 2001, DeJoria invested in an American company called Skidmore Energy, Inc. ("Skidmore") in order to fund an oil exploration and technology project that Skidmore was pursuing in Morocco. (Dkt. No. 30, Ex. G).

In order to carry on its business in Morocco, Skidmore formed and capitalized a Moroccan corporation called Lone Star Energy Corporation ("Lone Star") in order to develop energy resources in Morocco.[1] (Dkt. No. 37, Ex. X-10). The new entity would focus on developing energy resources in Morocco. Under Moroccan law, Moroccan corporations require a "local" partner/shareholder. In Lone Star's case, the local partner/shareholder was Mediholding, S.A., which is owned by Prince Moulay Abdallah Aloaoui of Morocco (King Mohammed VI's first cousin). (Dkt. No. 30, Ex. J-A).

---

1. Lone Star was subsequently renamed "Magrheb Petroleum Exploration S.A. ("MPE"). MPE is a party in this case seeking enforcement of the Moroccan court's judgment.

Appendix G

In March of 2000, Lone Star entered into an "Investment Agreement" with the Kingdom of Morocco in which Lone Star agreed to invest in hydrocarbon exploration in Morocco in return for obtaining mineral rights concessions and other benefits from Morocco. In that agreement, Lone Star agreed to drill at least three exploration wells in Morocco and invest roughly $150 million to explore hydrocarbons in Morocco. (Dkt. No. 6, Ex. 1).

On June 20, 2000, DeJoria and his business partner, Michael Gustin, attended a White House dinner honoring King Mohammed VI. Less than a month later, on July 8, 2000, DeJoria traveled to Morocco and personally met with King Mohammed VI, Prince Moulay Alaoui, and Mohammed Benslimane (brother-in-law of Prince Moulay Hicham). (Dkt. No. 30, Ex. J-A). At the meeting, the men discussed the need for Lone Star to secure more funding to support its rapidly expanding drilling projects. (*Id.*, Ex. G at ¶ 3). At that meeting, DeJoria claims that the King assured him that he would line up investors for Lone Star and that funding would not be an issue for the company going forward. (*Id.*).

Sure enough, in early August of 2000, a Lichtenstein based company called Armadillo Holdings[2] approached Lone Star and expressed an interest in investing in the company. During the negotiations the followed, Skidmore represented to the potential investors that it had (up until

2. Armadillo Holdings has since been re-named Mideast Fund for Morocco ("MFM").

that point) invested roughly $27.5 million in Lone Star. (Dkt. No. 6, Ex. 1). Skidmore also estimated that Lone Star's conservative market value was around $175.75 million. (*Id.*). Based on these representations, Armadillo/MFM agreed to invest $13.5 million in Lone Star in exchange for 50% of Skidmore shares and 50% of "all assets, including exploration licenses, technology licenses, SBK#1 well and lease, all inventories and supplies, etc." (*Id.*).

On August 20, 2000, King Mohammed gave a nationally televised speech during which he announced the discovery of what he described as "copious and high quality oil" in Morocco. (Dkt. No. 30, Ex. I.3). Three days later, on August 23, 2000, the then Moroccan energy minister, Yousesef Tahiri, traveled to the site of the "discovery" and—with DeJoria and Gustin at his side—held a press conference during which he exclaimed that the oil discovery was such that it was expected to yield enough oil to supply the Kingdom for roughly 30 years. (*Id.*).

The King's announcement was huge news in Morocco. Located on the northwestern tip of the African continent, the Kingdom of Morocco sits next to some of Africa's largest oil and gas producing nations. Yet while its neighbors on the African coast have emerged as major producers of energy, Morocco has not discovered a reliable domestic source of oil and gas. As a result, the country imports about 95 percent of its energy needs, leaving the nation vulnerable to the ebbs and flows of the international energy markets. The King's remarks seemed to presage the end of Morocco's longstanding energy insecurity,

a prospect that so excited Moroccan traders that the Moroccan stock market jumped 5% following the King's announcement. (*Id.*).

There was only one problem. There was no oil—or not very much of it, anyway. In the end, Morocco's natural resources proved to be less plentiful than the King suggested, a reality which adversely affected both the King's credibility and Lone Star's long term business prospects. (*Id.*, Ex. 1-8). By the summer of 2001, it had become clear that Lone Star would require an infusion of additional capital in order to stay afloat.

This turn of events led the partnership between MFM and Skidmore to break down. MFM and its partners became convinced that Gustin and DeJoria were culpable for the problems at Lone Star. Meanwhile, both DeJoria and Gustin fled Morocco for good. DeJoria claims that he and Gustin's lives would have been in danger had either stayed in or traveled to Morocco. (*Id.*, Ex. G at ¶¶ 6-7). MFM attributes DeJoria and Gustin's absence to a conscious decision to flee the jurisdiction in order to avoid having to answer for Skidmore's fraudulent representations.

Whatever actually motivated the men to get out of Dodge, neither DeJoria nor Gustin attended the May 2001 meeting of Lone Star's Board of Directors in Morocco. (*Id.*, Ex. J). During that meeting, the Board voted to remove Gustin as its Chairman. (*Id.*, Ex. J-B). Two months later, during the July 2001 Lone Star Board meeting, Lone Star's Board finalized plans to recapitalize the company

with an additional $15.9 million in funds. (Dkt. No. 6, Ex. 1 at 6.). At the same meeting, the Board voted to remove both DeJoria and Gustin as Directors.[3] (*Id.*).

Legal fireworks ensued. Displeased that their investment in Lone Star had not yielded the returns that it had expected when it entered into the Memorandum of Understanding ("MOU") with Skidmore, MFM brought suit against Skidmore, as well as a number of its officers in their individual capacities (DeJoria included), in Moroccan court. The Plaintiffs in that lawsuit made a plethora of allegations, namely that Dejoria and his partner had mismanaged the company and lied during negotiations. Specifically, MFM argued that Skidmore fraudulently induced it into investing in Skidmore by misrepresenting the true extent of Skidmore's investment in Lone Star.[4] (Dkt. No. 6, Ex. 1). According to the Plaintiffs in the suit, Skidmore's fraudulent representations deprived Lone Star of the capital the company needed to fund ongoing business operations, thereby forcing the company to obtain an additional $15.9 million in emergency funding from MFM and others to fill the funding void that existed as a result of Skidmore's failure to live up to the promises it made in the MOU. (*Id.*).

---

3. Somewhat bizarrely given all of the things DeJoria and Gustin are alleged to have done to Armadillo, MPE/MFM report that Skidmore was nevertheless invited to participate in the recapitalization of the company. (Dkt. No. 6, Ex. 1 at 11).

4. MFM alleged that at the time that Skidmore represented that it had invested $27.5 million when in fact it had in fact only invested $3,708,812.49. (Dkt. No. 6, Ex. 1).

Skidmore, for its part, responded to the breakdown in relations by filing two obviously frivolous lawsuits against MPE, MFM, and scores of other tangentially related parties in the United States, each of which was dismissed in short order.[5]

The subject of this Court's analysis *in this case* is the outcome of MPE's suit against Skidmore in Morocco. On

---

5. In its first suit, *Skidmore Energy, Inc. and Geoscience Int'l, Inc. v. KPMG et al*, Case No. 3:03-cv-02128-B (N.D. TX Sept. 19, 2003), Skidmore and Geoscience sought $3 billion in damages from MPE, MFM, KPMG, and 18 other individuals and entities for anti-trust and RICO violations, breach of contract, fraud, and aiding and abetting breach of fiduciary duty. US District Judge Boyle found that the lawsuit against MPE, MFM, and nine other defendants was "factually and legally groundless" and cited a "puzzling lack of legal or factual support" for the allegations included in Skidmore's pleadings. *Skidmore Energy, Inc. and Geoscience Int'l, Inc. v. KPMG et al*, Case No. 3:03-cv-02128-B (N.D. TX Mar. 17, 2005 and 2005 U.S. Dist. LEXIS 49180, May 18, 2005). The district court subsequently awarded $530,667.32 in sanctions against Skidmore, Geoscience, and their lawyer Gary Sullivan.

Unfazed by Judge Boyle's decision, Skidmore filed a virtually identical action in federal district court in California (only it named fewer defendants). *See Skidmore Energy, Inc. v. Mediholdings S.A. et al.*, Case No. 2:05-cv-04742 (CD. Cal. June 29, 2005). Not surprisingly, the case did not fare any better than Skidmore's previous effort (unless one counts not being assessed over a half a million dollars in court costs and sanctions an improvement, which the Court supposes it is). On October 24, 2007, the district court granted MPE and other defendant's motions to dismiss. *Id*. The US Court of Appeals for the Ninth Circuit subsequently affirmed the district court in *Skidmore Energy Inc. v. Maghreb Petroleum S.A.*, 337 Fed. Appx. 706, 707 (9th Cir. July 16, 2009).

December 31, 2009, after nearly seven years of considering the case, a Moroccan court entered judgment in favor of MPE and MFM and against DeJoria and Gustin in the amount of 969,832,062.22 Moroccan Dirhams, or approximately $122.9 million. (Dkt. No. 6, Ex. 1 at p. 18).

The only question before this Court is whether or not the Moroccan court's $122.9 judgment against DeJoria is enforceable in the United States.

II. APPLICABLE LAW

There is no federal statute or common law applicable to the recognition of foreign judgments. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1212 (9th Cir. 2006) (en banc). In diversity cases, the law of the state in which the federal court sits governs recognition of foreign judgments. *Id.* at 1213; *British Midland Airways Ltd. v. Int'l Travel, Inc.*, 497 F.2d 869, 871 n.2 (9th Cir. 1974).

The Uniform Foreign Country Money-Judgment Recognition Act has been adopted by Texas and governs whether a judgment entered by a foreign nation will be recognized in this country. Tex. Civ. Prac. & Rem.Code Ann. §§ 36.001-36.008 (Vernon 2000).

Under this Act, once a copy of a foreign judgment is filed with the clerk of the court in the county of residence of the party against whom recognition is sought, the party against whom recognition is sought may contest the judgment's recognition by filing a motion for non-recognition. *Id.* §§ 36.0041, 36.0044.

Appendix G

The Texas Recognition Act provides that a foreign country judgment is enforceable in the same manner as a judgment of a sister state that is entitled to full faith and credit." *Id.* § 36.004. Accordingly, the Texas Recognition Act presumes recognition and mandates enforcement unless the opposing party proves to the Court that it cannot or should not enforce the judgment. *Dart v. Balaam*, 953 S.W.2d 478, 480 (Tex.App.—Fort Worth 1997, no writ) (noting that "[t]he party seeking to avoid recognition has the burden of proving a ground for nonrecognition").

§36.005(a) sets the circumstances under which a court cannot enforce a foreign money judgment:

(1) the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign country or court did not have personal jurisdiction over the defendant; or

(3) the foreign country court did not have jurisdiction over the subject matter.

Per the dictates of §36.005(b), the Court may also decide not to enforce a foreign judgment if:

(1) the defendant in the proceedings in the country did not receive notice of the proceedings in sufficient time to defend;

(2) the judgment was obtained by fraud;

(3) the cause of action on which the judgment is based is repugnant to the public policy of the state of Texas;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceedings in the foreign country court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceeding in that court;

(6) in the case of jurisdiction based only on personal service, the foreign country court was a seriously inconvenient forum for the trial of the action; or

(7) it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of "foreign money judgment."

Tex. Civ. Prac. & Rem.Code Ann. § 36.005 (West 1998).

Applying the Texas Act is neither purely a question of law nor purely a question of fact. Instead, "it is a question about the law of a foreign nation, and in answering such questions a federal court is not limited to the consideration of evidence that would be admissible under the Federal Rules of Evidence; any relevant material or source may be consulted." Fed.R.Civ.P. 44.1; *Pittway Corp. v. United States*, 88 F.3d 501, 504 (7th Cir.1996); 9 Charles A. Wright

& Arthur R. Miller, *Federal Practice and Procedure* § 2446 (1995).

III. DISCUSSION

In his briefs, DeJoria argues that the Court is barred from enforcing the judgment since, he claims, the judgment against DeJoria violates mandatory grounds §36.005(a)(1) and (a)(2). DeJoria additionally challenges recognition under discretionary grounds 36.005(b)(3), (b)(6), and (b)(7). MPE/MFM counter on all points and assert that the Court should recognize the Moroccan Court's judgment.

The Court need not address DeJoria's arguments for discretionary non-recognition if it finds that DeJoria has met his burden and proved either that Moroccan tribunals do not afford sufficient due process or that the Moroccan trial court never obtained personal jurisdiction over him. DeJoria's prevailing on either point suffices to bind the Court's hands and forces non-recognition. Thus the Court will begin (and, as it turns out, end) its analysis with DeJoria's argument that the Moroccan court did not provide him with adequate due process to warrant recognition under the Texas Act.

A. The Moroccan Court Judgment Was Not Rendered Under a System that Provides Impartial Tribunals and Procedures Compatible with Due Process.

A foreign judgment cannot be recognized in Texas if it was "rendered under a system which does not provide ... procedures compatible with the requirements of due

process of law." Tex. Civ. Prac. & Rem.Code § 36.005(a)(1). The term "due process" in this context does not refer to the "latest twist and turn of our courts" regarding procedural due process norms, because it is not "intended to reflect the idiosyncratic jurisprudence of a particular state." *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 476-77 (7th Cir. 2000) (interpreting an identical provision of the Uniform Foreign Money-Judgments Recognition Act under Illinois law). Instead, "this provision has been interpreted...to mean that the foreign procedures [must only be] 'fundamentally fair' and ... not offend against 'basic fairness.'" *Soc'y of Lloyd's v. Turner*, 303 F.3d 325, 330 (5th Cir. 2002) (quoting *Ashenden*, 233 F.3d at 477); 18B Charles Alan Wright et al., *Federal Practice and Procedure* § 4473 n. 7 (2d ed.2002) (quoting *Ashenden*, 233 F.3d at 477).

The "international due process standard" first described by Judge Posner in *Ashenden* sets a very low bar for enforcement. *Ashenden*, 233 F.3d at 477. The virtue of this construction—and one of the reasons that so many courts have adopted the standard—is that any country that has a history of commitment to the rule of law will pass the test. Given this fact, it is not surprising that the vast majority of courts faced with claims that a foreign court system did not provide adequate due process to warrant enforcement have found that the issuing court in fact provided sufficient due process to justify recognition.

Yet, from time to time, judgments are rendered against Americans in countries "whose adherence to the rule of law and commitment to the norm of due process are open to serious question." *Id.* Where there is evidence that a

country's judiciary is dominated by the political branch of government or by an opposing litigant, or where a party cannot obtain counsel, secure documents, or secure a fair appeal, recognition of a foreign judgment may not be appropriate. *See, e.g., Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411-12 (9th Cir.1995); *Choi v. Kim*, 50 F.3d 244, 249-50 (3d Cir.1995); *Banco Minero v. Ross, supra*, 172 S.W. at 715; *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276, 286-88 (S.D.N.Y. 1999); *see also* Restatement (Third) of Foreign Relations Law of United States § 482, comment b (1987).

A close examination of Morocco's legal system reveals structural and practical issues that are not present in countries like England, France, or South Korea. While Morocco has made serious strides in many areas and appears to have a populous genuinely desirous of and committed to establishing a societal framework founded upon the rule of law, the Moroccan royal family's commitment to the sort of independent judiciary necessary to uphold the rule of law has and continues to be lacking in ways that raise serious questions about whether any party that finds itself involved in a legal dispute in which the royal family has an apparent interest—be it economic or political—in the outcome of the case could ever receive a fair trial.

i. Moroccan Judges Are Not Independent And Are Susceptible To Being Pressured By Members Of The Royal Family.

In September of 2010, USAID released its "Morocco Rule of Law Report."[6] (Dkt. No. 30, Ex. H.2). Spanning

6. "The assessment took place in two phases with an initial assessment in October 2008, followed by an additional in-country visit

a total of 66 pages, the report touches on a broad array of topics including many that are directly relevant to the Court's inquiry in this case.

Right off the bat, the authors of the report paints a bleak picture of the state of the rule of law generally, and the functioning of the judicial system specifically, in Morocco. In the last sentence of the very first paragraph of the report's Executive Summary, the authors observe that among Moroccan citizens, "there is a widely held perception that corruption is tolerated, that a political and security elite act with impunity, and that strong actions are taken against those who would challenge power." (*Id.* at ii).

Before launching into the body of the report, though, the authors provide the reader with seven bullet points intended to broadly describe their findings. The first bullet point reads: "**Judicial independence is lacking** due to a number of factors, including deficiencies in both law and practice...[t]he roles of the Ministry of Justice (MOJ) and the King further complicate this issue." (Emphasis in

---

in November 2009. The assessment teams conducted documentary reviews; interviews with governmental officials, private sector and civil society representatives, and other international donors; and targeted group meetings. Based on an analysis of this information the teams developed an assessment of the status of rule of law in Morocco and provided recommendations for a strategic approach to future rule of law programming." (Dkt. No. 30, Ex. H.2). The Court adds that the investigations took place simultaneously with the proceedings in Morocco and are therefore directly relevant to the reliability of the Moroccan legal system that gave rise to the judgment at issue in this case.

original). (*Id.*). The last bullet point is equally ominous. It simply states: "Corruption is one of the most significant challenges confronting Morocco." (*Id.*).

The USAID report's findings with respect to the Moroccan judiciary—especially those related to the subject of judicial independence—are particularly relevant to the Court's inquiry in this case. The authors describe the current judicial system as "permeable to political influence" and go on to explain that "the mechanisms through which judges are appointed, promoted, sanctioned, and dismissed leave them [Moroccan judges] vulnerable to political retribution." (*Id.* at 12). As a result, "the judiciary still suffers from persistent complaints that it is plagued with corruption, is not independent or accountable, does not have effective mechanisms for enforcement, and is encumbered by delays." (*Id.* at 12).

The judiciary's struggle to remain independent is in part a result of structural factors. While the 1996 Constitution guarantees judicial independence, the judiciary remains under the administrative control of the Ministry of Justice, which of course answers directly to the King. (*Id.*). Moreover, the Constitution does not establish the judiciary as an autonomous entity. (*Id.*).

That the judiciary is not structurally insulated from the other political branches of government is unremarkable, at least in the context of other international judicial systems. In fact, the Moroccan Constitution's language relating to the judiciary is modeled on France's Constitution. Unfortunately, members of Morocco's

judiciary must also contend with forces that do not exist in France. Specifically, "[j]udicial independence [in Morocco] is further complicated by the King's role." (*Id.*). Not only are all judgments rendered by Moroccan courts issued in the name of the King, but the King also presides over the Conseil Supérieur de la Magistrature (High Judicial Council), which is the body that appoints, disciplines, and promotes judges. (*Id.*).

Additionally, per Article 24 of the Moroccan Constitution, the King appoints the Minister of Justice. (*Id.*). Given that the MOJ sits on the High Judicial Council, this gives the King considerable indirect influence over the makeup of the judiciary since "[t]he MOJ exercises significant influence over the appointment, discipline, transfer, and promotion of judges." (*Id.*). This fact "makes judges beholden to the MOJ not only for their initial appointment but for their continued job security as well, with obvious negative implications for judicial independence." (*Id.*).

MPE/MFM argue that the USAID report overstates the severity of the problems afflicting the Moroccan legal system. They cite various reports which detail the exceedingly modest steps that the King has implemented in recent years to combat corruption. Yet this evidence does little to persuade the Court that the Moroccan legal system's most troubling flaws are a thing of the past. Indeed, in March of 2011—*two years after the Moroccan Court issued its judgment against DeJoria*—Morocco's very own Foreign Minister all but confirmed the veracity of the USAID report's findings pertaining to judicial

independence in Morocco. Speaking to an audience at the Brookings Institute in Washington DC, Foreign Minister Taieb Fassi-Fihri, described Morocco's continuing problem with "phone call justice." Judicial independence, he explained, "is not the reality today, because (there are) some calls from time to time, from the Justice Department to some judge." (*Id.*, Ex. H.22; a complete transcript of the Foreign Minister's remarks are available at http://www.brookings.edu/~/media/events/2011/3/23%20morocco/032311_morocco_transcript.pdf).

Together, the USAID report and the foreign minister's comments paint a picture of a judicial system in which judges feel tremendous pressure to render judgments that comply with the wishes of the royal family and those closely affiliated with it. Yet perhaps the most powerful piece of evidence that all is not well in the Moroccan judicial system came from the Moroccan judges themselves. On October 6, 2012, roughly 1,000 Moroccan judges staged a sit-in in front of the Moroccan Supreme Court demanding more independence for the judiciary. (Dkt. No. 30, Ex. H.23). With them, the protesting judges carried a petition signed by 2,200 Moroccan judges—*roughly 2/3rds of the country's total judges*—demanding structural reforms to guarantee their independence from the King. (*Id.*). The gesture speaks for itself, but it is worth noting that every judge that signed the aforementioned petition did so knowing that by publicly opposing the King, they were opening themselves to precisely the kinds of retribution discussed by the USAID report.

ii. The King's Actions In 2007 Reveal That The King Actively Sought To Shape The Public's Perception Of His (And Dejoria's) Role In The Talisint Oil Project Through Intimidation.

MPE/MFM do not dispute the fact that the King *could* intervene in the legal process if he wishes to do so. They do not deny that Skidmore played an important role in the process that ultimately lead the King to give his ill fated speech announcing the existence of large, exploitable oil reserves in Morocco. They do not dispute that the Prince of Morocco himself received shares (however small the interest) in the company Skidmore created in Morocco for the purpose of facilitating its aims and objectives there. MPE/MFM do not even quibble with the assertion that DeJoria had personal contact with members of the royal family, including the King himself, in advance to the creation of the partnership between the Moroccans and Skidmore, or. Nevertheless, MPE/MFM argue that the Court need not worry about these factors since DeJoria's case simply did not matter enough to the King or royal family to warrant genuine concern that the royal family would corrupt the process. After all, MPE/MFM note, the Prince's financial stake in MPE was too small to matter. Moreover, according to MPE/MFM, there is no evidence that "the King or anyone else in Morocco these days cares about [DeJoria] at all or even remembers who he is or the bad acts he perpetrated." (Dkt. No. 37 at p. 25).

As a general matter, MPE/MFM's suggestion that the circumstances surrounding the case do not warrant

real concerns that the King or royal family corrupted the judicial proceedings is simply not credible. For one, the Prince's "insignificant" financial interest (MPE/MFM claim that the Prince owns 0.00026% of MPE) is not insignificant at all. Even assuming that MPE would only receive 50% of the settlement award of $122.9 million, the value of the Prince's ownership interest in the company would be boosted by at least $15,977.[7] Given that the Prince appears to have paid zero consideration in return for his ownership interest in Armadillo (now MPE), such an award would represent quite a nice windfall.

As for MPE/MFM's suggestion that there is no evidence that the King particularly cared about DeJoria or his role in the Talsint oil project, the evidence plainly suggests otherwise.

On Monday, January 27, 2007, "Le Journal," a Moroccan daily newspaper, ran a feature story under the headline "The Talsint Oil Lie." (Dkt. No. 30, Ex. I.1-I.2). Citing a letter sent by Skidmore Chairman (and DeJoria partner) Michael Gustin to the King and other top officials, the article "accused the King and some officials of bribery and disinformation" in regards to Skidmore's exploration and attempted production of oil in south eastern Morocco in 2000.[8] (*Id*., Ex. I.2). Neither the story

7. (0.00026 x 122.9 million)/2=15,977.

8. Asked about the Le Journal story, Abdulomoneim Delmy—the chairman of the Moroccan Federation of Newspaper Publishers and publisher of two daily newspapers—remarked that Le Journal had "breach[ed] the ethics and applicable laws of Morocco." (Dkt.

nor the paper would survive for very long. The next day, Le Journal suddenly retracted the story, stating (without any meaningful explanation) that everything they had published was untrue. (Dkt. No. 30, Ex. I.1-I.2). The paper also announced—again without any explanation—that it would voluntarily go out of circulation for an undisclosed period of time. (*Id*, Ex. I.1). Two days later, a sister publication reported that the author of the "offensive" Le Journal article (who also served as Le Journal's editor-in-chief) and Le Journal's publisher were both compelled to appear at the Justice Center so that they could be interrogated by criminal prosecutors about their involvement with the story. (*Id*., Ex. I.1).

Unsurprisingly, it appears that the above series of events was not an aberration. The King has a history of suspending (and punishing) publications that displease him. Indeed, when Le Journal resumed publishing, it was not the only news publication that was re-emerging after a lengthy suspension. Shortly after Le Journal returned to print, so too did a magazine called Nishan. (*Id*., Ex. I.2). Nishan was reportedly suspended from circulation for a period of two months by a Moroccan court for "publishing jests that were deemed offensive to King Mohammed VI and Islam." (*Id*.). The article also noted that the editor of

---

No. 30, Ex. I.1). Mr. Delmy proceeded to profess his professional allegiance to the King:"we [Moroccan newspaper publishers/ editors]... have a basic reference being the charter of the profession's ethics that was adopted by the Confederation which provides 'the due respect owed to the President of the State, his majesty the King, who is the Emir of the Believers at the same time.'" Somewhere, Ben Bradlee just threw up.

the offending issue of Nishan, along with another former member of the magazine's editorial board, was sentenced by a Moroccan judge to *three years prison with probation*, along with a $9,500.00 fine, for his role in "offending the King." (*Id.*).

The King may or may not have disliked DeJoria personally, but the lengths his government went to silence and punish Le Journal for suggesting, in public, that the King's involvement and sponsorship of the Talsint oil project may not have been completely aboveboard certainly suggests that the King cared a great deal about how his involvement in the project was presented to the public. Moreover, the government's response revealed that the King's government was willing to intimidate and retaliate in order to protect that public image.

Consider now the lawsuit against DeJoria and his partners. Lawsuits are legal vehicles for apportioning blame. Lawsuits also tell stories. In the underlying lawsuit, the Moroccans accused DeJoria and his partners of being fraudsters. The implication of that allegation, if true, is that DeJoria and his partners lied to their partners and mismanaged the company. Yet the inverse is also true: the implication of a finding absolving DeJoria and his partners of any liability would suggest that DeJoria and his partners had dealt fairly with the Moroccans... and that they were all equally responsible for the failure of the project. Given the narrative power that the verdict would undoubtedly have, MPE/MFM's suggestion that a man who cared enough about maintaining his image to intimidate and prosecute a whole paper into submission

had no interest in the outcome of a case which could either re-enforce his favored image or, alternatively, make him appear foolish if not downright dishonest for having promised so much oil during his now infamous speech.

These facts would have been readily apparent to any judge presiding over this case. Given the King's history of retaliation, not only against judges who displease him but against anyone who threatens his narrative relating to his involvement in Talsint, the Court cannot conceive of any set of circumstances in which the presiding judge in the underlying case would not have felt tremendous pressure to side with MPE/MFM. The Prince had an economic interest. The King's behavior suggests a strong preference that DeJoria be portrayed as a fraudster who misled the King (since, if DeJoria did not, the King appears dishonest, incompetent, or both in retrospect). Whether or not the King, Prince, or some other official picked up the phone and ordered the judge to find against DeJoria is, in some sense, beside the point. Even if no such phone call was ever made, the Court nevertheless cannot, in good conscience, conclude that Morocco provided Mr. DeJoria with adequate due process to warrant enforcement in this country.

Judges are not stupid people oblivious to outside pressures. As evidenced by the mass judicial protests, Moroccan judges are keenly aware that their livelihoods (present and future) depend on remaining in the good graces of the King and the royal family. Given this fact, along with the circumstances outlined at length surrounding this case, the likelihood that DeJoria could

have or did receive a fair hearing in which the outcome was not pre-ordained is too minimal to permit the Court to overlook the serious issues with both the system and the application present in this case.

iii. Existing Case Law Supports Non-Recognition In This Case.

While it is true that few courts have declined enforcement of a foreign judgment on due process grounds, this case presents precisely the types of issues that courts have found sufficient to justify non-enforcement of a foreign money judgment on due process grounds. As previously noted, courts have declined to enforce foreign judgments in instances in which the evidence demonstrated that a country's judiciary is dominated by the political branch of government or by an opposing litigant, as well as when a party cannot obtain counsel, secure documents, or secure a fair appeal. *See, e.g., Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1411-12 (9th Cir.1995); *Choi v. Kim*, 50 F.3d 244, 249-50 (3d Cir.1995); *Banco Minero v. Ross, supra*, 172 S.W. at 715; *Bridgeway Corp. v. Citibank*, 45 F.Supp.2d 276, 286-88 (S.D.N.Y.1999); *see also* Restatement (Third) of Foreign Relations Law of United States § 482, comment b (1987).

Here, there is extensive evidence suggesting that Morocco's judiciary is dominated by the royal family (through no fault of the judiciary, which would prefer to be left alone to do its job). Additionally, the evidence plainly shows that members of the royal family had a political and economic interest in the outcome of the underlying

case. This is a deadly combination, for the confluence of circumstances makes it highly likely that the royal family impacted the judicial oversight of a proceeding in which they themselves had an interest.

Of the few cases in which courts have declined to enforce a judgment on due process grounds, *Bank Melli Iran v. Pahlavi* is the most applicable to this case. 58 F.3d 1406. In that case, the district court refused to enforce a judgment entered by an Iranian court against the sister of the recently deposed Shah after the 1980 revolution, and the US Court of Appeals for the 9th Circuit affirmed. While the Shah's sister did not present any declaration which specifically stated that she would be treated badly by the regime, the court nevertheless concluded that "a common sense reading of the evidence indicates...that she could not possibly have obtained a fair hearing before the courts of Iran had she attempted to fight the Banks' claims against her." *Id.* at 1412.

While this case presents less extreme circumstances (no American probably could have received a fair hearing in Iran at that time, much less the sister of the widely reviled Shah), the Court nevertheless believes that "a common sense reading of the evidence" in this case unequivocally supports the conclusion that John Paul DeJoria could not have expected to obtain a fair hearing in Morocco had he attempted to fight the charges against him. While the evidence plainly suggests that Morocco's judges wish to obtain the freedom from pressure necessary to impartially conduct the business of the court system, the evidence also reveals that any judge

presiding over DeJoria's case would have had to ignore either an explicit or implicit threat to his career—if not to his safety and well-being—in order to find against MPE/MFM. Perhaps the evidence did not ever present the judge with this hard choice, but the Court's job is not to determine whether the judge in the underlying case reached the right decision. Instead, the Court is tasked with deciding whether, based on the evidence, DeJoria or some similarly situated party could have received adequately fair procedures to warrant enforcement. The answer to this question is no. Absent an act of tremendous bravery by the judge, there is no conceivable set of facts or circumstances in which DeJoria could have prevailed in the underlying case. Such a proceeding is not, was not, and can never be "fundamentally fair."

IV. CONCLUSION

For reasons set out above, the Court GRANTS John Paul DeJoria's Motion for Non-Recognition. (Dkt. No. 25).

SIGNED this 12th day of August, 2014.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES
DISTRICT JUDGE

APPENDIX H — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 17, 2019

IN THE UNITED STATES COURT OF APPEALS FOF THE FIFTH CIRCUIT

No. 18-50348

JOHN PAUL DEJORIA,

Plaintiff-Appellee,

v.

MAGHREB PETROLEUM EXPLORATION, S.A.; MIDEAST FUND FOR MOROCCO, LIMITED,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING *EN BANC*

(Opinion 08/15/19, 5 Cir., _____, _____ F.3d _____)

Before Circuit Judges.

PER CURIAM:

(x) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor

judge in regular active service of the court having requested that the court be polled on Rehearing *En Banc* (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

( ) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT:

/s/ Gregory Costa
UNITED STATES CIRCUIT JUDGE