No. 20-____

IN THE

Supreme Court of the United States

THOMAS WOOD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PHILIP TALMADGE WOOD,

Petitioner,

v.

THE BOEING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has repeatedly held that a

> federal court has discretion to dismiss a case on the ground of *forum non conveniens* "when an alternative forum has jurisdiction to hear [the] case, and ... trial in the chosen forum would establish ... oppressiveness and vexation to a defendant ... out of all proportion to plaintiff's convenience, or ... the chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems."

Sinochem Int'l Co. v. *Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (quoting three prior cases using this language) (modifications in original). To the extent the courts below considered that restriction, they found nothing in it to preclude dismissal of a case brought by an American against an American company for conduct undertaken in America that allegedly led to the death of petitioner's brother, another American.

The question presented is whether, as multiple circuits have held, dismissal is improper as a matter of law unless a district court affirmatively finds, based on "positive evidence," that "material injustice is manifest before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country," or, as the court below approved, dismissal of such a lawsuit is proper if, "on balance," the court concludes that another country would be "more convenient."

PARTIES TO THE PROCEEDING BELOW

Petitioner Thomas Wood and other plaintiffs filed lawsuits in state and federal courts in the United States; the state proceedings were removed to federal court. The Judicial Panel on Multidistrict Litigation subsequently transferred the federal cases to the United States District Court for the District of Columbia for coordinated pretrial proceedings.

The parties to the consolidated proceeding below for which review is sought are:

Petitioner Thomas Wood was a plaintiff in the U.S. District Court for the District of Columbia and an appellant in the U.S. Court of Appeals for the D.C. Circuit.

Respondent the Boeing Co. was a defendant in the district court and an appellee in the D.C. Circuit.

The following additional individuals and entities were listed on the D.C. Circuit's docket as defendants-appellees: Malaysia Airlines System Berhad (Administrator Appointed), doing business as Malaysia Airlines; Malaysia Airlines Berhad, doing business as Malaysia Airlines; Allianz Global Corporate and Specialty SE and Henning Haagen, in his capacity as Global Head of Aviation for Allianz Global Corporate and Specialty SE. Petitioner sued only Malaysia Airlines System Berhad (Administrator Appointed), doing business as Malaysia Airlines, and Malaysia Airlines Berhad, doing business as Malaysia Airlines, in a separate proceeding below for which review is not sought.

The following individuals were listed on the D.C. Circuit's docket as other plaintiffs-appellants bringing separate actions against some or all defendants: Thomas Gaspard; Yan Huang; Li Li; Jingbo Gao; Bei Yuan; Guanyi Wang; Xiufang Hu; Yang Chen; Yongli Zhang; Huiyun Li; Lei Feng; Yang Tian; Linna Xiao; Shoujie Pang; Pu Zhang; Junxiu Han; Shengnan Zhou; Yinglei Wang;

Pralhad Shirsath; Narendran Santhamam; Yiliang Jia; Qingshan Liang; Sanved Kolekar; Le Wang; Yvonne Li; Emma Tianwen Li; Kerry Richards; Jianjun Bao; Yuanjuan Bao; Qinping Xu; Xia Wu; Guangzhen Ding; Rongjie Dong; Zhengquian Dong; Zheng Wang; He Xiong; Songrong Duan; Yi Yao; Qiang Yao; Borong Yao; Lian Hua Hu; Jiangtian Lou; Jianghao Lou; Jiangyue Lou; Elizabeth Smith; Jianguo Zhang; Huatian Hu; Jin Liu; Luyue Zhang; Min Huang; Gregory Keith; Amirathan Arupilai; Subramanian Gurusamy; Sri Devi Kanan, individually and on behalf of minors H. Puspanathan T. Puspanathan; Zhou Liu, individually and as Guardian Ad Litem for H.L., a minor; Yan Meng; Zhaojun Zhang; Shusen Yan; Xiyun Tian; Man Zhang; Jia Zhang; Shu Zhang; Dacai Gan; Yurong Lin; Mingfei Mag; Yiming Li; Zhaoxia Sheng; Yongfu Gao, individually and as Guardian Ad Litem for Y.L., a minor; Guohui Wang; Peng Li; Xinmin Li; Yan Lin; Teng Ma; Xishen Ma; Guifen Song; Xiurong Yang; Zhu Mao; Zhu Mao, as Guardian Ad Litem for M.Y.L., a minor; Fan Yang; Qingyuan Yang; Yupei Feng; Zan Wang; Liping Wang; Xiuqin Yang; Mengyao Zhou; Xueliang Zhou; Xiuying Huang; Kailai Zhou; Shufang Li; Yalai Zhou; Shengyuan Zhao; Shiji Zhang; Quilan Li; Shenyuan Zhao, as Guardian Ad Litem for Z.Z., a minor; Lijun Guo, individually and as Guardian Ad Litem for Y.S., a minor; Fengxin Shi; Xingxui Pi; Jian Jiao; Gengxin Yang; Shuying Han; Jinshi Feng; Chengying Liu; Jiehao Feng; Chao Tian; Jinqi Tian; Lamei Li; Shqin Li; Yuehua Li; Ruilin Bo; Limang Cui; Mingsong Gan; Yuzhen Gan; Qi Li; Shuping Li; Xuezheng Li; Yinsui Li; Xueyan Ma; Min Wang; Kefei Wang; Yuzhi Xing; Gang Yan; Nali Yu; Lixia Zhang; Yanmin Zhang; Morjahan Simanjuntak; T.G., a minor, through his Guardian Ad Litem; Q.G, a minor, through his Guardian Ad Litem; and Danica Weeks.

CORPORATE DISCLOSURE STATEMENT

There are no corporate disclosures for petitioner, an individual suing in his individual capacity and as executor and personal representative of the estate of his late brother, Philip Talmadge Wood.

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IN THE

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THOMAS WOOD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF PHILIP TALMADGE WOOD,

Petitioner,

v.

THE BOEING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Wood, individually and as personal representative of the Estate of Philip Talmadge Wood, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment, App., *infra*, 1a-11a, is reported as *In re Air Crash Over the Southern Indian Ocean on March 8, 2014*, 946 F.3d 607 (D.C. Cir. 2020). The court of appeals' order denying rehearing *en banc*, App., *infra*, 75a-76a, is unreported.

The district court's memorandum opinion, App., *infra*, 12a-72a, is reported as *In re Air Crash Over the Southern Indian Ocean*, 352 F. Supp. 3d 19 (D.D.C. 2018). The district court's order granting respondent's motion to dismiss for *forum non conveniens*, App., *infra*, 73a-

74a, is unreported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on January 10, 2020. The court denied rehearing *en banc* on February 28, 2020. App., *infra*, 75a-76a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The doctrine of *forum non conveniens* is governed by no rules or statutes, but only by this Court's guidance.

PRELIMINARY STATEMENT

In March 2014, the world watched in vain as an international search for MH370—Malaysia Airlines Flight MH370—came up empty. The Boeing-made 777 aircraft had disappeared mid-route, with American citizen Philip Wood on board. The world's attention shifted, but MH370 remains missing, and the cause for its demise remains unresolved.

Petitioner is Philip Wood's brother and the executor of his estate. This appeal concerns the right of an American citizen (petitioner) to seek redress in American courts against an American defendant (Boeing) concerning conduct undertaken in America (the manufacture of MH370's aircraft) resulting in harm to an American (Philip Wood).

Most Americans would be astounded that petitioner's access to American courts is even in question. Almost seventy-five years ago, this Court set a standard indicating that such access should not be denied, holding that a court has discretion to dismiss a suit for *forum non conveniens* in only the rarest of circumstances—when trial in the chosen forum would establish "oppressiveness and vexation to a defendant ∗ ∗ ∗ out of all proportion to a plaintiff's convenience, which may be shown to be slight or nonexistent." *Koster* v. *(Am.) Lumbermens Mut. Cas.*

Co., 330 U.S. 518, 524 (1947).[1] The Court reaffirmed this standard in 1981 in *Piper Aircraft* v. *Reyno*, 454 U.S. 235, 241 (1981), and again in 2007, in *Sinochem International Co.* v. *Malaysia International Shipping Corp.*, 549 U.S. 422, 429 (2007).

Despite the vitality and clarity of this command, the lower courts have struggled to apply it. Many have strayed from its demanding stricture, instead deploying an improper "which forum seems best on balance" analysis. Under such a gauzy approach, the outcome "depend[s] more on the individual biases of district court judges than any identifiable legal standard." Elizabeth T. Lear, National Interests, Foreign Injuries, and Federal Forum Non Conveniens, 41 U.C. Davis L. Rev. 559, 602-603 (2007).

This case represents a new low point in that trend. Petitioner sued Boeing in Illinois state court alleging state-law torts (and, in separate proceedings, sued the Malaysian airline carriers under an international treaty). Petitioner's case against Boeing was removed to federal court and transferred as part of multi-district-litigation proceedings (alongside other MH370 litigation) to the district court below. That court dismissed all actions for *forum non conveniens*. App., *infra*, 76a. It concluded that a Malaysian forum was "more convenient" "on balance," even for petitioner's lawsuit against Boeing, the "closest call, ∗ ∗ ∗ given that there are U.S. parties on both sides, and an American decedent, which suggests that much of the relevant discovery involves evidence that is inside the United States." App., *infra*, 15a, 60a-61a, 70a. The district court reached this result favoring Boeing's preference to sue abroad only by (1) "somewhat lessen[ing]" the deference owed to petitioner (an Ameri-

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[1] See also *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1947), decided the same day.

can citizen and resident), and (2) against that mistaken starting point, crediting a speculative need for "potentially" unavailable foreign parties or "evidence," despite the indisputable and "significant *lack* of evidence available[.]" App., *infra*, 54a-55a, 66-71a; JA558 (emphasis added).[2] Applying a "narrow" standard of review, the D.C. Circuit blessed the dismissal with scant written analysis of petitioner's claims. App., *infra*, 1a-11a.

This outcome reflects the unsanctioned loosening of the *forum non conveniens* analysis that scholars have noted and some lower courts have battled. And it stands in stark contrast to *Piper*, this Court's last detailed assessment of the doctrine. *Piper* approved dismissal of a lawsuit pursued by a jurisdictional makeweight (a legal secretary with no prior relationship to the foreign victims) on behalf of the foreign heirs and decedents. 454 U.S. at 238-239. The decision below, in contrast, affirms the dismissal of an all-American suit legitimately asserted in the United States. In short, while the "formal doctrine" has "changed little since 1981, its application has morphed considerably." Pamela Bookman, Litigation Isolationism, 67 Stan. L. Rev. 1081, 1094 (2015).

When an American sues another American on both parties' home turf, a nearly irrebuttable presumption that dismissal is *un*available should arise. Some circuits acknowledge this, affording an American plaintiff expansive deference and permitting dismissal only if a defendant submits "positive evidence of unusually extreme circumstances," and a district court is "thoroughly convinced that material injustice is manifest[.]" *Otto Candies, LLC* v. *Citigroup, Inc.*, 963 F.3d 1331, 1339 (11th Cir. 2020). Other circuits' standards are far less protect-

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[2] "JA" refers to the Joint Appendix in the consolidated appeal below (No. 18-7193).

ing. The Second Circuit has propounded a "sliding scale" approach to decide the deference owed an American plaintiff. *Iragorri* v. *United Techs. Corp.*, 274 F.3d 65, 71-72 (2d Cir. 2001) *(en banc)* ("*Iragorri II*"). The First Circuit has questioned whether an American plaintiff warrants "heightened deference" *at all*, and further questioned whether this Court's "oppressiveness and vexation" standard even governs the inquiry. *Interface Partners Int'l Ltd.* v. *Hananel*, 575 F.3d 97, 101-102 (1st Cir. 2009). The tableau is complex, as described below, and the courts here charted another new path. Beyond requiring no special effort to dismiss an American plaintiff's suit, it diminished the deference owed to an American plaintiff based on an American *decedent*'s temporary work abroad. App., *infra*, 55a.

This Court should resolve the inter-circuit division regarding deference and hold that dismissal is appropriate, if ever, only upon a *clear*—not "close[]"—determination that trial in the United States would produce manifest injustice out of all proportion to an American plaintiff's convenience. Courts should rarely, if ever, dismiss when, as here, an American sues another American for alleged wrongs committed in America. If lower courts allow a contrary result, they either are *not* following current doctrine, or current doctrine should be refined.

This Court alone can clarify this common law vehicle that literally closes the courthouse doors on Americans (and other plaintiffs suing in the United States). No federal rule or statute governs the *forum non conveniens* doctrine. And because it is discretionary and turns on numerous factors, classic "circuit splits" are rare (although, as noted above and discussed below, divisions among the circuits regarding the doctrine's details abound).

The increasing lack of coherence in this area risks a jurisprudence explainable only by whim. It is then that this Court's guidance is most needed—"limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005).

STATEMENT

I. FACTUAL BACKGROUND

Malaysia Airlines Flight MH370 and its 239 passengers disappeared on March 8, 2014, en route from Kuala Lumpur to Beijing. Although the American-made Boeing aircraft's disappearance sparked a years-long multinational search and worldwide media attention, the aircraft remains unfound and the cause for its disappearance remains undetermined. Its passengers, including American citizen Philip Wood ("Mr. Wood," as distinguished from his brother, identified as "petitioner"), are presumed dead.

A. Mr. Wood, an American passenger

MH370's passengers hailed from fourteen different countries, primarily China. App., *infra*, 16a. Only thirty-eight were Malaysians. *Ibid.* Three, including Mr. Wood, were American citizens, and a fourth was a lawful permanent U.S. resident. *Id.* at 16a, 28a-29a.

Mr. Wood was born and raised in the United States, where he lived almost all his fifty years. JA011, 365-370. For over half of his life—nearly thirty years—he worked for International Business Machines Corp., the iconic American company known as IBM and headquartered in New York. App., *infra*, 54a-55a; JA365-424. He spent most of that time in Texas, where he raised his family. JA365-370.

In 2011, Mr. Wood accepted a temporary work as-

signment for IBM in China. JA419-420. He accepted another temporary assignment in Malaysia in 2014, but worked less than a month there before his death. JA420-424. At all times, Mr. Wood maintained a permanent presence in Texas. JA367-417. He paid federal taxes, invested in a partnership to develop property in Texas, and flew home for visits, including to attend his sons' high-school and college graduations. JA367-417, 431. Days before his disappearance, he celebrated his father's birthday in Texas. JA369.

Mr. Wood left a family behind in Texas, including his sons (and beneficiaries), Nicholas and Christopher Wood, and his brother, petitioner Thomas Wood. JA382-390. The probate of Mr. Wood's estate remains pending in a Texas court. See JA426-429.

B. The Boeing 777 aircraft

MH370's passengers flew on a Boeing 777-200ER aircraft designed and manufactured by Boeing at its Washington State facility. App., *infra*, 25a. It is undisputed that all "records related to the 'design, manufacture, assembly, testing, and certification of the 777 model aircraft' are located in Boeing's facilities in Washington, as are the Boeing employees" with relevant knowledge. *Id.* at 25a.

Malaysia Airlines System Berhad ("MAS"), doing business as Malaysia Airlines, operated the Boeing-made aircraft. App., *infra*, 24a. MAS was a "Government Linked Company" but operated as a purely commercial enterprise. *Ibid.*; see *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (a "commercial" activity is a "type of action[] by which a private party engages in trade and traffic or commerce" (internal quotation marks, citation, and emphasis omitted)).

C. The disappearance, search, and investigation

MH370 departed from Kuala Lumpur International

Airport en route to Beijing, China at 12:42 A.M. App., *infra*, 12a. As it left Malaysian airspace at 1:19 A.M., MH370 issued its last-recorded voice transmission, "Good night Malaysian Three Seven Zero." *Id.* at 16a. MH370 disappeared from radar minutes later, and it was never seen again. *Id.* at 17a.

MH370's disappearance drew intense international attention. Over a dozen countries extended search-and-recovery assistance, including the United States. JA087-088, 438.

Australia played an outsized role. On March 17, 2014, the Australian Safety Transport Bureau ("ATSB") "took charge" of the search effort. App., *infra*, 18a. Alongside the United States, the United Kingdom, Malaysia, and others, ATSB studied satellite-communications data collected by a British company, Inmarsat PLC. See *id.* at 17a-19a; ECF 67-5 at 7.[3] That data indicated that MH370 diverted from its flight path and flew southwest for several hours. ECF 67-5 at 9.

Thus, ATSB focused the search efforts on the Southern Indian Ocean. ECF 67-5 at 5. By the time its search ended in 2017, ATSB had published over a dozen reports covering debris, aircraft capabilities, and satellite data. ECF 67-5–67-21.[4] But it never found the plane.

Malaysia, in turn, organized an "Annex 13 Safety Investigation Team." App., *infra*, 21a. That Team included advisors from the United States, ATSB, and Boeing. JA494; App., *infra*, 18a, 20a-21a. On July 2, 2018, the Annex 13 Team issued its final "Safety Investigation Report." App., *infra*, 21a. The Team concluded that MH370 diverted from its flight path and ended its flight

[3] "ECF" refers to the electronic case files docketed in the district court (Misc. No. 16-1184).

[4] These record materials are also available at https://www.atsb.gov.au/mh370.

in the Southern Indian Ocean. JA492. But due to the "significant lack of evidence available," the Team could not "determine the real cause for the disappearance of MH370." JA558-559.

The Annex 13 Team did, however, address various causation theories. The Team could not "conclusively rule[] [aircraft failure] out[.]" JA557. Nor could the Team "determine with any certainty the reasons that the aircraft diverted from its filed flight plan route." JA558. Despite widespread media speculation, the Team found no evidence of malfeasance. Rather, it reported that MH370's pilots exhibited no mental instability, abnormal behavior, or stress. JA505-518, 545, 556-557. They instead were well-trained, "in good health[,] and certified fit to fly[.]" JA505-506, 545. Thus, still today, the cause for MH370's demise remains unresolved.[5]

II. PROCEEDINGS BELOW

A. Petitioner's lawsuits

Petitioner filed two lawsuits in the United States. First, he sued Boeing in Illinois state court, and Boeing removed the action to federal court. See App., *infra*, 27a n.14. Given the circumstances, petitioner sued Boeing under the state-law theory of *res ipsa loquitur*.

Petitioner separately sued MAS and Malaysia Airlines Berhad ("MAB")[6] in the United States District

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[5] See, *e.g.*, Sinéad Baker, The mystery of MH370 remains more than 5 years later, Business Insider, https://www.businessinsider.com/mh370-theories-dead-ends-unanswered-questions-ahead-of-major-new-report-2018-7 (Dec. 20, 2019).

[6] Four months after MH370 disappeared, Russian-backed rebels shot down Malaysia Airlines Flight MH17. JA447. In the wake of the twin disasters, Malaysia adopted "Act 765" and created MAB to serve as the national airline. App., *infra*, 24a; JA171-202. Under Act 765, MAS's assets transferred to MAB, but "liability for MH370 was specifically excluded from the transfer." JA357. A prominent Ma-

Court for the District of Columbia, where he asserted Montreal Convention claims. See App., *infra*, 27a n.13. The Montreal Convention is a treaty governing the "international carriage" of passengers. See Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 309, *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734. In the event of death due to an accident on board the aircraft, the Montreal Convention renders a carrier strictly liable up to 113,000 Special Drawing Rights—approximately $156,000. *Id.*, art. 21(1). A carrier is liable for "exce[ss]" damages unless it "proves that" a "third party" was "solely" responsible. *Id.*, art. 21(2)(b).[7]

B. MDL district-court proceedings

Other litigation—mostly by foreign plaintiffs suing about foreign victims—also commenced in the United States, across five states and the District of Columbia. App., *infra*, 26a-27a. All MH370 cases were transferred to the district court below for coordinated, pretrial proceedings. JA002-08; App., *infra*, 27a. Despite the transfers, petitioner's actions "retain their separate identities" from each other and other plaintiffs' suits. *Gelboim* v. *Bank of Am. Corp.*, 574 U.S. 405, 413 (2015).

The defendants filed five pretrial motions seeking dismissal of the consolidated actions. Among them, MAS and MAB sought dismissal for lack of subject-matter jurisdiction and based on foreign sovereign immunity. No court ever has ruled on those grounds. App., *infra*, 15a,

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laysian solicitor described Act 765 as an "asset-stripping" exercise likely designed to "evade [MAS's] Montreal Convention liabilities." JA450.

[7] MH370 litigation also ensued in other countries, including Malaysia and Australia. See JA465-48. As a "protective measure," petitioner sued MAS, MAB, and others in Malaysia. See JA575, 609. That litigation is ongoing. See *infra* n.11.

72a.

All defendants, including Boeing, filed a motion to dismiss the consolidated actions for *forum non conveniens*. Invoking *Sinochem*,[8] defendants requested dismissal for *forum non conveniens* without reaching jurisdiction. JA570-571.

All plaintiffs opposed dismissal. With respect to *forum non conveniens*, petitioner argued that his choice of forum warranted utmost deference under this Court's precedents and that defendants had not met their heavy burden, especially as to his suit against Boeing. In that suit, the plaintiff, decedent, and defendant *are all American*, and the allegedly tortious conduct occurred *in America*.

On November 21, 2018, the district court dismissed *all* of the consolidated actions for *forum non conveniens* and, citing *Sinochem*, denied the jurisdictional motions "as moot."[9] App., *infra*, 36a, 72a. The dismissal included petitioner's action against Boeing, which the court characterized as the "closest call, ∗ ∗ ∗ given that there are U.S. parties on both sides, and an American decedent[.]" App., *infra*, 70a.

According to the district court, dismissal was appropriate so long as "maintaining the case in the current forum [wa]s comparatively inconvenient." App., *infra*, 36a. Quoting from a separate case, the district court used the terms "oppressive and vexatious" only once in passing and when considering a single factor. *Id.* at 69a (citation

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[8] *Sinochem* authorizes district courts to "dispose of an action by a *forum non conveniens* dismissal, bypassing questions of ∗ ∗ ∗ jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant." 549 U.S. at 432.

[9] The conditions of dismissal included that all defendants "make available" "all documents, witnesses, and other evidence" "that the Malaysian courts deem relevant." App., *infra*, 73a-74a.

omitted).[10]

As for deference, the district court purported to give petitioner's chosen forum the "highest degree of deference" among the plaintiffs, but *not* peak deference. App., *infra*, 55a. It instead reasoned that petitioner was owed "somewhat less[]" deference because his late brother, *Mr. Wood*, was working abroad for IBM "at the time of [his] death[.]" *Ibid.* To support this decedent-centric standard, the district court cited only cases authorizing reduced deference when the (live) *plaintiff* prosecuting the action lives abroad. *Ibid.* (collecting cases).

In its assessment of the public-interest factors, the district court concluded that *Malaysia*, as the country of the carrier, held the greater interest. It acknowledged that "Boeing's status as an aircraft manufacturing company that is founded and headquartered in the United States necessarily means that the United States has a significant public interest in any products liability claims that are brought against it." App., *infra*, 63a. But because the plane is missing and so no "specific" defect could be alleged (which, of course, is always the case in a *res ipsa loquitur* action), the court called the supposed tie for Malaysia. *Id.* at 63a-65a.

With respect to the private-interest factors, the court agreed (with some understatement) that "much of the relevant discovery involves evidence that is inside the United States." App., *infra*, 70a; see *id.* at 66a. And with respect to all plaintiffs' claims, it acknowledged that "both Plaintiffs and Defendants will likely face evidence-related burdens regardless of where the products liability cases are litigated." *Id.* at 68a. But it concluded that

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[10] The D.C. Circuit did the same. App., *infra*, 10a. Neither decision reflects a comprehensive determination that, by defending itself at home, Boeing would face disproportionate "oppressiveness and vexation."

one "circumstance" tipped the scales toward dismissal—"immunity questions" concerning the "extent to which Boeing could, or would, implead all potential defendants." *Id.* at 68a-69a. Although it hinged dismissal on this factor, the district court did not determine that the "potential" defendants' presence was critical to a *res ipsa* litigation. Nor did it determine that the defendants could *not* be impleaded, much less that impleader was the only way to obtain evidence. It instead held that the mere "questions" supported dismissal "on balance[.]" *Id.* at 60a, 68a-69a.

C. Proceedings in the court of appeals

On appeal, petitioner urged reversal, at least as to his lawsuits, on the grounds that (1) the district court failed to accord his actions the appropriate deference, or (2) hold defendants to the weighty burden this Court's cases long have required.

Applying a "narrow" standard of review, the D.C. Circuit affirmed "on substantially the same grounds" as the district court, which applied an "on balance" and "comparatively inconvenient" standard. App., *infra*, 3a, 8a; see *id.* at 36a, 60a. The court "pause[d] to address two points"—deference and the weight afforded to the unresolved immunity issues. *Id.* at 8a-11a. On deference, it recounted without examination the district court's statement that petitioner received "the highest degree of deference." *Id.* at 9a. The decision nowhere acknowledged, much less addressed, that the district court in fact afforded petitioner *diminished* deference based on Mr. Wood's work abroad.

The D.C. Circuit then approved the district court's determination that "potential immunity issues" concerning impleader justified dismissal. App., *infra*, 11a. Although the district court stated that the "immunity questions" *were* the "circumstance" that tipped the "balance"

toward dismissal, the D.C. Circuit held that the district court did not overly weight them; rather, it opined that the district court properly determined that "*all* relevant circumstances" supported dismissal. Compare *ibid.*, with *id.* at 69a.

On February 28, 2020, the D.C. Circuit denied petitioner's petition for rehearing *en banc*. App., *infra*, 75a-76a[11]

REASONS FOR GRANTING THE PETITION

Since this Court's last systematic assessment of the doctrine of *forum non conveniens* forty years ago, many lower courts have eroded the doctrinal bulwarks that this Court so carefully erected. Far more than in 1981, transnational commerce is commonplace; advancements in technology, moreover, largely mute access-to-evidence concerns. The Court may not want America to be the courthouse for the world—but its courts should at least be open to Americans suing other Americans for conduct performed in America.

I. THE LOWER COURTS HAVE STRAYED FROM THIS COURT'S *FORUM NON CONVENIENS* PRECEDENT

Beginning in 1947, this Court has issued at least four decisions establishing the "exceptional circumstances" a court must find to decline jurisdiction for *forum non conveniens*. In each, the Court announced a demanding standard: "A federal court has discretion to dismiss a case on the ground of *forum non conveniens* 'when an alternative forum has jurisdiction to hear [the] case, and . . . trial in the chosen forum would establish . . . oppres-

[11] Petitioner maintains that this Court's precedents also precluded the dismissal of his Montreal Convention lawsuit against MAS and MAB, but to facilitate this Court's expeditious review, proceeds here only as to his separate lawsuit alleging state-law tort allegations against Boeing.

siveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience[.]" *Sinochem*, 549 U.S. at 429 (quoting *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 447-448 (1994), in turn quoting *Piper*, 454 U.S. at 241, in turn quoting *Koster*, 330 U.S. at 524);[12] see *Gilbert*, 330 U.S. at 508.

Two analyses inform this controlling "oppressiveness and vexation" standard: (1) the deference owed to a plaintiff's choice of forum, and (2) the private- and public-interest factors.[13] Both analyses are designed to produce a pre-ordained result—when a plaintiff chooses his home forum, his choice should "rarely be disturbed." *Gilbert*, 330 U.S. at 508. Instead, "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the convenience the defendant may have shown." *Piper*, 454 U.S. at 255 n.23 (quoting *Koster*, 330

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[12] A "chosen forum [may also be] inappropriate because of considerations affecting the court's own administrative and legal problems." *Id.* (citations omitted). That prong for dismissal, which courts interpret to reference docket congestion, is irrelevant here because the district court did not base dismissal on it. See *Guidi* v. *Inter-Cont'l Hotels Corp.*, 224 F.3d 142, 146 n.5 (2d Cir. 2000).

[13] The private-interest factors include: the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Piper*, 454 U.S. at 241 n.6 (citation omitted).

The public-interest factors include: the "administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty." *Id.* (citation and internal quotation marks omitted).

U.S. at 524).[14] Concomitantly, as the Court reiterated, "the presumption in the plaintiff's favor 'applies with less force'" when, as in *Sinochem* itself, "the plaintiff's choice is not its home forum ∗ ∗ ∗." 549 U.S. at 426, 430 (citation omitted).

The Court has not wavered in its instructions. Indeed, Justice Ginsburg took pains in *Sinochem* to cite each time that the Court has articulated the oppressive-and-vexatious formulation. Rather than taking heed, however, many lower courts, including the D.C. Circuit below, have deviated from the Court's command. Sharply contrasting with this Court's careful reiteration, the "oppressiveness and vexation" standard often goes uncited or, when mentioned, is unrecognizable in application. This has transformed the doctrine into a "'current most-suitable-forum' version, under which the judge's belief, for virtually any reason, that trial elsewhere would be more appropriate justifies a forum non conveniens dismissal." Bookman, *supra*, 67 Stan. L. Rev. at 1094 (citation omitted). The decision below exemplifies that problematic trend.

A. The courts below disregarded this Court's teachings and deepened the disarray across the circuits

1. *This Court's precedents establish a demanding standard for dismissal most commonly met when a plaintiff lacks a genuine connection to the lawsuit or forum*

None of this Court's cases goes so far as to support the dismissal of an American's suit against another American for conduct undertaken in America. Instead,

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[14] An "alternative forum [with] jurisdiction to hear [the] case" is also a condition, but petitioner's trial counsel did not dispute that Malaysia is an available alternative forum, so that condition is not at issue. *Sinochem*, 549 U.S. at 429 (citations omitted).

each decision bears a common mark—the plaintiff lacked a sufficient relationship to the forum or the litigation.

In *Gilbert* and *Koster*, for example—albeit, domestic-transfer cases—the plaintiffs' chosen forum indicated gamesmanship. In *Gilbert*, the "plaintiff, [and] every person who participated in the acts charged to be negligent," resided outside of the chosen forum. 330 U.S. at 511. In *Koster*, the plaintiff operated as a mere "phantom plaintiff with interest enough to enable him to institute" a derivative action and "little more." 330 U.S. at 525. With all known evidence in the alternate forum, and a plaintiff "utterly silent" as to why suit should proceed in his chosen forum, this Court approved the dismissal; the defendant had "show[n] much harassment[.]" *Id.* at 531-532.

Piper, the first (and only) of this Court's decisions to consider *forum non conveniens* in detail in the context of transnational litigation, is in kind. Like its predecessors, *Piper* involved a plaintiff who had no legitimate connection to the lawsuit. The implausible plaintiff was a "legal secretary" of the American lawyer who filed suit. 454 U.S. at 239. She had no relationship to the "real parties in interest"—all *Scottish* heirs to all *Scottish* passengers who died when a *Scottish*-operated (but American-manufactured) charter plane crashed, but was recovered for inspection, in *Scotland*. *Id.* at 238-242. The secretary "candidly admit[ted]" that she filed the action in the United States because "its laws" were "more favorable[.]" *Id.* at 240. In short, *Piper* suggested a scenario in which the plaintiff sought a U.S. forum "not because it [was] convenient, but solely in order to harass the defendant or take advantage of favorable law." *Id.* at 249 n.15.

The Third Circuit reversed *a forum non conveniens* dismissal, holding that a foreign forum *must* provide at

least as lucrative a recovery for a plaintiff who (however cynically) chose an American forum. See *id.* at 246. In its "conclu[sion]" reversing that judgment, this Court held that "the possibility of an unfavorable change in law should not, by itself, bar dismissal[.]" *Id.* at 238.

Piper is this case's photographic negative, not its photocopy. Linked only by the fact that there was an airplane crash, its key considerations are entirely different:

Factor	***Piper***	**This case**
Plaintiff	Gaynell Reyno (no relationship to the litigation or affected parties)	Petitioner (U.S. citizen/resident, and Mr. Wood's brother)
Decedent	Scottish	American
Accident site	Scotland	Unknown
Reason for U.S. venue	Favorable law	The real-party-in-interest is at home in the U.S.

Location of evidence	Scotland and elsewhere in Britain, except the manufacturing defendants' own evidence	• The plane is missing; • information or persons connected to MH370 are in Malaysia, the U.K., and Australia; • Mr. Wood's and Boeing's evidence is in the U.S.; • MAS and MAB must make discoverable evidence "available"; and • reported data is available in the Annex 13 Team and Australian reports.
Defendants' showing justifying dismissal	Affidavits listing, *e.g.*, witnesses they "would call" but who were unavailable to a U.S. court	Boeing's declarations merely recited the world-wide locations of evidence and witnesses.
Public-interest considerations	"The accident occurred in [Scottish] airspace" and "[a]ll of the decedents" and "potential plaintiffs" were Scottish.	MH370 presumably crashed outside Malaysian airspace; petitioner, Mr. Wood, and Boeing are all American; and the plane carried mostly Chinese passengers.

2. The decision below replaces this Court's rigorous analysis with an "on balance" more-convenient-elsewhere test

The D.C. Circuit blessed the dismissal of petitioner's suit against Boeing without demanding the clear showing of harassment, oppression, and vexation that this Court's precedents require.

a. The courts below expressly reduced the "oppressiveness and vexation" standard

The decisions below shy from this Court's seventy-five-year "oppressiveness and vexation" mandate and instead apply a more liberal test. To the district court, it was "beyond cavil" that dismissal is available when suit in the "current forum is comparatively inconvenient." App., *infra*, 36a. That relaxed standard, which the court of appeals endorsed, *id.* at 3a, led the court to conclude that dismissal was justified "on balance and comparatively speaking," even for petitioner's case, the "closest call[.]" *Id.* at, 15a, 58a, 60a-61a, 70a, 72a.

Nothing in this language—or the court's opinion, generally—reflects the standard that *is* established "beyond cavil": that dismissal was unavailable absent a comprehensive finding that trial in Boeing's home jurisdiction would cause Boeing "oppressiveness and vexation … out of all proportion to [petitioner's] convenience[.]" *Sinochem*, 549 U.S. at 429. And rather than reverse due to the insouciant treatment of this Court's precedent, the D.C. Circuit held only that the district court "reasonably concluded that Malaysia is a more convenient forum." App., *infra*, 11a.

The difference is not mere words (although the mistaken framing of the standard would be enough to warrant even summary reversal). Substantial daylight exists between the "oppressiveness and vexation" that justified dismissal in *Gilbert*, *Koster*, and *Piper*, and an "on bal-

ance" standard of the sort that controlled here. The former honors the notion that an American plaintiff may access his own courts. The latter transforms lower courts into self-erected Boards of Ideal Venue, empowered to decide which forum *they* think is "best." *That* result stretches *forum non conveniens* beyond acceptable bounds, especially in a case involving significant American interests.

Regardless of whether a court must make an explicit finding of "oppressiveness or vexation," its decision must "reflect a balancing against the home forum that is the substantial equivalent[.]" *Duha* v. *Agrium, Inc.*, 448 F.3d 867, 875 (6th Cir. 2006). Here, it did not.

b. The analysis below does not reflect compliance with this Court's "oppressiveness and vexation" standard

The district court's analysis confirms that it applied a weaker, "comparatively inconvenient" standard it recited. App., *infra*, 36a. Riddled with legal missteps and presumptions favoring Boeing, the opinion pays no homage to a standard that places the "heavy burden" on the defendant. *Sinochem*, 549 U.S. at 430. With its "narrow" review, the D.C. Circuit committed the same error. App., *infra*, 3a.

Deference. As an American citizen and resident with a real and obvious connection to the dispute, petitioner's chosen forum deserved paramount deference. Yet, the district court explicitly diminished the deference it afforded petitioner's choice of forum because Mr. Wood "live[d] abroad * * * at the time of [his] death[.]" App., *infra*, 55a. According to the district court, where a "decedent * * * was * * * located overseas, the inconvenience of having to litigate issues pertaining to damages and other matters in a non-U.S. forum is somewhat lessened." *Ibid.*

The district court cited no authority that supported its decedent-centric analysis. Rather, its cited authorities observe only that "expatriate U.S. citizen" *plaintiffs* residing abroad may receive diminished deference—a questionable observation,[15] but one that does not apply to petitioner in any event. See App., *infra*, 55a (citing two cases focusing on the *plaintiff*'s residence).

The district court's decision (like the D.C. Circuit's) also reflects—implicitly and sometimes explicitly—an *en masse* review that reduces the deference owed to petitioner based on the existence of foreign plaintiffs. See, *e.g.*, App., *infra*, 68a (citing the "dearth of U.S.-based plaintiffs or decedents"). But nothing in this Court's precedent permits that result, and other circuits have rejected it. *See infra* PartI.B.1.b. An *en masse* analysis was especially improper here, where petitioner did not *choose* to sue alongside foreign plaintiffs, and his individual action must "retain [its] separate identity[.]" *Gelboim*, 574 U.S. at 413.

Private-interest factors. Improperly lenient analysis is apparent, too, in the weighting of the private-interest factors below. Although subject to this Court's "oppressiveness and vexation" standard, the district court conceded that the private-interest factors presented a "close[] call[.]" App., *infra*, 66a, 70a. But "close[] call[s]" are not the makings of *forum non conveniens* dismissals, particularly with already-misbalanced scales.

As the district court acknowledged, petitioner asserted "manufacturing and design products liability claims directly against Boeing—a United States party—and it is undeniable that most of the evidence pertaining to th[at] claim[] is inside the United States." App., *infra*, 66a. It likewise acknowledged that Mr. Wood's damages evi-

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[15] This Court has never intimated as much, at least. See *infra* Part I.B.1.c.

dence is in the United States, "given his United States citizenship and family connections, and his employment with IBM." App., *infra*, 58a.

While the court pointed to potential evidence that may exist in Malaysia, it nowhere required Boeing to show that the evidence was unavailable or required. This Court has arguably required more, *Piper*, 454 U.S. at 258-259 & n.27, and other circuits have undoubtedly required that showing. See *infra* Part I.B.2.a. Regardless, the district court's emphasis on Malaysian evidence is misplaced here, where a "significant lack of evidence" exists, where discoverable Malaysian evidence must be produced by MAS and MAB as a condition of dismissal, App., *infra*, 73a-74a, and where what is known about MH370 is already recited in a 449-page presumptively admissible report. App., *infra*, 21a; JA558; *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1481-1483 (D.C. Cir. 1991).[16]

Straying even further, the district court resolved any doubts about "whether Boeing could, or would, seek to implead all potential defendants" in favor of dismissal. App., *infra*, 68a; cf. *Piper*, 454 U.S. at 258-259 & nn.26-27 (requiring at least sufficient information establishing the need "to call" unavailable witnesses). The *res ipsa loquitur* claim petitioner advances likely explains Boeing's silence. With petitioner carrying the burden of proof on a claim that requires *him* to eliminate other causes, Boeing's need to *implead* third parties or compel redundant evidence is, to put it mildly, substantially lessened.

Regardless, other circuits have rightly concluded that, far from a *potential* impleader difficulty justifying dismissal, even an *actual* inability "to implead alleged

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[16] Furthermore, it is undisputed that documents produced in the Malaysian litigation are "largely in the English language" and easily transmitted. JA442-443.

joint tortfeasors" is "by no means determinative[.]" *Boston Telecommc'ns Grp., Inc.* v. *Wood*, 588 F.3d 1201, 1211 (9th Cir. 2009) (citation omitted). The only time the issue has held considerable weight is when *other* factors—such as a suit involving an accident that occurred in the alternative forum and harmed only foreign plaintiffs and decedents, see generally *Piper*, 454 U.S. 235—similarly favor dismissal.

To cap it off, the district court did not actually decide any "immunity questions" that arguably affect access to parties or evidence. When this Court in *Sinochem* authorized courts to "dispose of an action by a *foreign non conveniens* dismissal, bypassing questions of ∗ ∗ ∗ jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant," it did not license courts to *presume* the "bypass[ed]" jurisdictional issues in the defendant's favor for *forum non conveniens* purposes. 549 U.S. at 432. Such a result does not comport with any standard of "fairness" or a doctrine that places a "heavy burden" of persuasion on the *defendant*. *Id.* at 430, 432. It instead builds inference on inference, all in an effort to deny an American access to an American court.

Public-interest factors. The district court's evaluation of the public-interest factors is similarly lenient. The district court reasoned that a *carrier's* country of residence *always* holds a greater public interest, unless a plaintiff alleges a specific product defect. App., *infra*, 63a-65a. That conclusion, as a matter of law, is incorrect—it essentially creates an antiquated venue requirement for airplane crashes that is foreign to this Court's jurisprudence and to logic.

This Court and others have held that an alternative forum holds a greater public interest in a dispute when (1) all decedents and parties-in-interest hailed from the alternative forum, and (2) the accident site is *in* the al-

ternative forum. App., *infra*, 63a-65a (collecting decisions); *Piper*, 454 U.S. at 260-261. This case falls in neither category.

Nor was it appropriate for the district court to elevate Malaysia's interest simply because petitioner could *not* allege a "specific" defect. App., *infra*, 64a-65a. The plane is missing, hence the *res ipsa* theory. By disparaging petitioner's legal theory in this way, the lower courts unduly crept into merits analysis, violating their duty to "accept the complaint's allegations as true" and to assess the issue "from [petitioner's] perspective, and not [Boeing's]." *Otto*, 963 F.3d at 1342-1343 (refusing to presume "ultimate[] responsib[ility]," a "merits" issue, in defendant's favor).

The district court's logic is suspect for yet another reason. Legal scholars have appropriately noted that "[i]n a foreign injury claim involving an American resident plaintiff, the accident forum has no interest in compensating the U.S. resident." Lear, *supra*, 41 U.C. Davis L. Rev. at 581. Courts have agreed: "There is a strong federal interest in making sure that plaintiffs who are United States citizens generally get to choose an American forum for bringing suit[.]" *SME Racks, Inc.* v. *Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1104 (11th Cir. 2004) (citation omitted).

B. Lower-court *forum non conveniens* jurisprudence is in increasing disarray

While sufficient conflict with this Court's own decisions would justify summary reversal, the disarray that has vexed the lower courts warrants plenary review. Uncertain standards have yielded irreconcilable outcomes, and "[c]ircuit splits running the gamut from the petty to the fundamental infect the federal system." Lear, *supra*, 41 U.C. Davis L. Rev. at 603.

1. Lower courts exhibit confusion about the deference owed to an American plaintiff's choice of forum

Perhaps the most prominent debate among the lower courts is the deference owed to an American plaintiff's choice of forum—a primary issue presented here. Although this Court has recognized in passing that an American's right to sue at home is not absolute in every context, *Piper*, 454 U.S. at 255 n.23, it has yet to resolve a case with this premise. The lower courts often have addressed such cases, however, and camps have formed. Review is warranted to clarify this "important mooring" point—arguably the most important consideration in any *forum non conveniens* analysis. *Otto*, 963 F.3d at 1339 n.2. "Without knowing the level of deference to accord the plaintiff's choice of forum," a court's effort to meaningfully weigh the *Gilbert* factors is hopeless. 14D Charles Alan Wright et al., Federal Practice and Procedure § 3828, p. 575 (4th ed. 2013).

a. American plaintiffs, generally

Manifest material injustice. The Eleventh Circuit has long and recently held that American plaintiffs' forum choices are almost insurmountable, an appropriate recognition joined by at least the Fourth and Eighth Circuits. *Otto*, 963 F.3d at 1339.[17] Under those circuits' standard, a "defendant must offer 'positive evidence of unusually extreme circumstances,' and the district court must be 'thoroughly convinced that *material injustice is manifest* before exercising any such discretion as may exist to deny a United States citizen access to the courts of this country.'" *Ibid.* (quoting *SME*, 382 F.3d at 1101-

[17] *DiFederico* v. *Marriott Int'l, Inc.*, 714 F.3d 796, 803 (4th Cir. 2013); *Lehman* v. *Humphrey Cayman, Ltd.*, 713 F.2d 339, 342 (8th Cir. 1983).

1102) (emphasis added).

If that stringent standard accurately states the law, the judgment below was erroneous. With even the district court conceding that "most of the evidence pertaining to the[] claims [against Boeing] is in the United States"—and no showing that evidence abroad is crucial or wholly unavailable—Boeing, as a matter of law, did not establish the "manifest material injustice" necessary to oust petitioner from his home courts. App., *infra*, 66a.

Sliding scale. An oft-cited Second Circuit *en banc* case (a rarity in that circuit)—articulates a sliding scale that permits intermediate deference, adjusting for the extent "it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid[.]" *Iragorri II*, 274 F.3d at 71-72.[18] The Third, Sixth, and Ninth Circuits have embraced this test.[19] Had the D.C. Circuit used it below, petitioner would *at least* have won a remand to ensure that the district court actually *applied* the correct deference standard, as in *Iragorri II* itself. *Id.* at 75-76.

No heightened deference. The First Circuit stands alone in openly doubting (1) whether the "oppressiveness and vexation" standard governs, and (2) whether an American receives "heightened deference" *at all*. *Interface Partners*, 575 F.3d at 101-102. That circuit's acknowledged "tension in [its] caselaw," *id.* at 101, more-

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[18] As noted below, the *Iragorri* case unusually proceeded in both the First and Second Circuits, which reached competing results. The First Circuit version is called *Iragorri I* below.

[19] See *Ayco Farms, Inc.* v. *Ochoa,* 862 F.3d 945, 950 (9th Cir. 2017); *Hefferan* v. *Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 494 (6th Cir. 2016); *Kisano Trade & Invest Ltd.* v. *Lemster*, 737 F.3d 869, 876 (3d Cir. 2013); compare *Shi v. New Mighty U.S. Trust*, 918 F.3d 944, 949-950 (D.C. Cir. 2019) (citing *Iragorri II*), with App., *infra*, 1a-11a.

over, well illustrates the need for this Court's authoritative resolution.

b. Americans suing alongside foreign plaintiffs—intentionally or not

The morass only deepens when, as here, lower courts are forced to decide *forum non conveniens* decisions for Americans suing alongside foreign plaintiffs. In this scenario, at least, the Ninth Circuit has rejected any deference diminution, holding—over a dissent—that "*Piper* does not in any way stand for the proposition that when both domestic and foreign plaintiffs are present, the strong presumption in favor of the domestic plaintiff's choice of forum is somehow lessened." *Carijano* v. *Occidental Petroleum Corp.*, 643 F.3d 1216, 1228, 1237 (9th Cir. 2011). Other circuits agree.[20] Even the D.C. Circuit has done so—but not here.[21]

Had the panel below isolated petitioner's case, it should have reached a different result. Indeed, unlike several aforementioned cases, petitioner's suit was destined for *its own trial* with only American parties; it was only before the D.C. Circuit because of MDL proceedings. Indeed, lower courts have peeled off consolidated

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[20] *E.g.*, *Otto*, 963 F.3d at 1344.

[21] For example, in *Simon* v. *Republic of Hungary* (in which this Court recently granted certiorari but on a different issue, as *Republic of Hungary* v. *Simon*, No. 18-1447), held that "the addition of foreign plaintiffs does not render for naught the weighty interest of Americans seeking justice in their own courts." 911 F.3d 1172, 1183 (D.C. Cir. 2018). That decision involved foreign conduct and a foreign defendant, but the court of appeals carefully analyzed whether the district court's *forum non conveniens* "analysis fit [its] later words," and, concluding "[i]t did not," reversed the dismissal. *Id.* at 1185. This case involves American conduct and an American defendant, but a separate panel quickly affirmed dismissal of petitioner's actions in a short opinion that barely mentioned him while focusing heavily on foreign plaintiffs.

cases asserted by American residents when they concluded that *forum non conveniens* factors required dismissing foreign plaintiffs—and have done so *in the airplane-crash context*.[22]

c. Citizenship versus residency

Still another debate turns on citizenship versus residency. To the extent this Court has commented, it has put American citizens and American residents on equal footing. *Piper*, 454 U.S. at 255 & n.23 ("[c]itizens or residents deserve somewhat more deference than foreign plaintiffs ∗ ∗ ∗."). It certainly has not drained citizenship of entitlement to deference.

But some courts emphasize *residency* over citizenship, approving reduced deference for American plaintiffs who reside abroad. *Hefferan*, 828 F.3d at 493-494. Others elevate residency (and equate foreign citizens residing in American with U.S. citizens residing in America) on the notion that "discrimination against foreign litigants should be unthinkable in this cosmopolitan age of commercial globalization"; the issue is whether a plaintiff is "suing far from home[.]" *Abad* v. *Bayer Corp.*, 563 F.3d 663, 666-667 (7th Cir. 2009) (citation omitted); see *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 101-103 (2d Cir. 2000) (similar).

Under either a citizenship- or residency-approach, petitioner deserved maximum deference; he is an American citizen and lifelong American resident. Yet the courts below chiseled yet another analytical approach, focusing

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[22] See, *e.g.*, *Onita-Olojo* v. *Sellers*, No. 12-62064-CIV, 2014 WL 1319304, at *1 (S.D. Fla. Mar. 31, 2014); *King* v. *Cessna Aircraft Co.*, No. 03-20482-CIV, 2008 WL 276015, at *1-2 (S.D. Fla. Jan. 31, 2008); but see *In re Air Crash Over Mid-Atl. on June 1, 2009 ("Air France")*, 760 F. Supp. 2d 832, 847-848 (N.D. Cal. 2010) (dismissal not appealed).

the deference inquiry on the *decedent*, and not the plaintiff. App., *infra*, 55a. But even if—and this Court has never so held—American citizens temporarily living abroad should receive less deference when suing in the United States, tagging petitioner with that disability because of his decedent's temporary work abroad is an obvious diminution of the strong deference to a plaintiff's forum choice.

2. The lower courts are confused about other aspects of the forum non conveniens *inquiry*

Two additional issues dividing the lower courts with relevance to this case bear mention: (1) a defendant's burden of persuasion and (2) how to consider a defendant seeking to escape his home forum.

a. The defendants' burden of persuasion

To carry its burden, a defendant "must provide enough information to enable the District Court to balance the parties' interests." *Piper*, 454 U.S. at 258. Although *Piper* held that overly "detail[ed]" affidavits are unnecessary, it affirmed dismissal only upon review of "affidavits describing the evidentiary problems [defendants] would fact if the trial were held in the United States." *Id.* at 258-259 & nn.26-27. Ultimately, a defendant must establish what "pieces of evidence" or witnesses "are critical, or even relevant" to the litigation. *Van Cauwenberge* v. *Biard*, 486 U.S. 517, 528 (1988).

Despite this guidance, the lower courts are again divided. *Otto*, 963 F.3d at 1347-1350 & n.7 (outlining circuit split in detail). Some circuits appropriately require "positive evidence of private inconvenience," *id.* at 1346, that identifies, among other things, witnesses or evidence that is crucial but unavailable.[23] Other courts, by contrast,

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[23] See *DiFederico*, 714 F.3d at 806-807 (defendant "must do more than simply point to categories of witnesses who are outside the

permit dismissal on generalized assertions of evidence abroad, sometimes offered only in briefing. See, *e.g.*, *Yavuz* v. *61 MM, Ltd.*, 576 F.3d 1166, 1181 (10th Cir. 2009) (holding that district court "did not abuse its discretion in assuming that critical information" was abroad).

If the former standard controls, the dismissal was erroneous as a matter of law. Boeing offered declarations that did nothing more than cast a wide net of the universe of individuals or documents connected to MH370, with no indication of just what or who was unavailable but necessary. At the very least, the division among the circuits warrants review.

b. A defendant at home

Courts also struggle with how to weight a defendant seeking to escape his home forum, as Boeing seeks to do here. While "reverse forum-shopping" "ordinarily should not enter" the equation, *Piper*, 454 U.S. at 252 n.19, many lower courts appropriately hold that a defendant who is at home in America ups the ante. *Otto*, 963 F.3d at 1343 (collecting authorities). Other decisions question that rule, holding that a "plaintiff's choice of the defendant's home forum provides a much less reliable proxy for convenience." *Pollux Holding Ltd.* v. *Chase Manhattan Bank*, 329 F.3d 64, 74 (2d Cir. 2003). Only the former analysis is rooted in convenience, and this Court should affirm that defendants seeking to escape their home forum properly trigger skepticism and scrutiny.

3. Similar cases yield dissimilar outcomes

The lack of certainty in this area has ensured that the only predictable result is unpredictability itself. The First and Second Circuit's opposite determinations in the *Iragorri* cases—wrongful death actions filed by a natu-

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court's control"); *Duha*, 448 F.3d at 877-879 (defendant did not "carry its burden to show that *unwilling* witnesses exist" or were "relevant").

ralized United States citizen (who resided abroad at the time of the relevant accident) against American defendants—are illustrative.[24] *Iragorri* v. *Int'l Elevator, Inc.*, 203 F.3d 8, 11 (1st Cir. 2000) ("*Iragorri I*"); *Iragorri II*, 274 F.3d at 70-73.

Both district courts dismissed the cases. The First Circuit affirmed, barely referencing the deference prong and concluding that the "oppressiveness and vexation" standard "neither created an independent standard nor raised the bar for dismissal in forum non conveniens cases[.]" *Iragorri I*, 203 F.3d at 15. The Second Circuit reversed and remanded for a new analysis—closely inspecting the deference prong and creating its "sliding scale." *Iragorri II*, 274 F.3d at 73-76.

This Court has even recognized that "uniformity and predictability of outcome [are] almost impossible" under current *forum non conveniens* doctrine. *Am. Dredging*, 510 U.S. at 455. Some divergence based on distinct facts may be inevitable—but the disarray currently exhibited goes beyond that, constituting legal disarray of massive scope that *can* be recalibrated. "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139.

C. If a lower court may plausibly dismiss a lawsuit like this one, this Court should require a heightened standard

"The doctrine of *forum non conveniens* is a drastic exercise of the court's 'inherent power' because, unlike a mere transfer of venue, it results in the dismissal of a plaintiff's case." *Carijano*, 643 F.3d at 1224. In the scenario here—litigation by and against Americans for con-

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[24] The cases originated in one court but were split under 28 U.S.C. § 1404(a). *Iragorri I*, 203 F.3d at 11.

duct in America—it is difficult to imagine when litigating in the United States is sufficiently "oppressive[]" or "vexatio[us]" to warrant that harsh result. If dismissal is available at all in that circumstance, "it should not be easy[.]" *Otto*, 963 F.3d at 1343.

It *was* too easy here—as in certain other circuits. After improperly *diminishing* the deference owed to petitioner, the district court relieved Boeing of its heavy burden, allowing it to suggest—not *prove*—that the factors clearly pointed to a foreign forum, where neither petitioner nor Boeing are at home.

The Court should, at the least, require more. At minimum, this Court should (1) confirm that an American citizen and resident merits full, not reduced, deference—a threshold error that infected the decisions below, and then (2) require a demanding showing from a defendant who seeks to escape his home turf. Similar to the standard applied in the Fourth, Eighth, and Eleventh Circuits, a defendant should be required to offer "positive evidence of unusually extreme circumstances, and the district court must be thoroughly convinced that material injustice is manifest before exercising any such discretion as many exist to deny a United States citizen access to the courts of this country." *Otto*, 963 F.3d at 1339 (citation and internal question marks omitted). *No* presumptions should be made in the American defendant's favor, and merits determinations should not form the subtext of a *forum non conveniens* decision, as they did here.

II. This Case Presents An Ideal Vehicle To Review *Forum Non Conveniens*

The time is ripe for this Court to revisit the *forum non conveniens* doctrine, at least to the extent described above. The Court has not provided significant guidance on the doctrine's contours since *Piper*, and the world (and litigation) have changed considerably. Today, the

"factors are anachronistic; the test is imprecise and incoherent." Martin Davies, Time to Change the Federal Forum Non Conveniens Analysis, 77 Tul. L. Rev. 309 (2002). Moreover, "technology and transportation advances have reduced the inconvenience of litigating in a distant forum." Bookman, *supra*, 67 Stan. L. Rev. at 1095.

Forum non conveniens is, moreover, codified in no rule or statute. This Court's decisions alone govern its contours; outcomes like the one here illustrate that those contours no longer sufficiently restrain the lower courts. The universe of *forum non conveniens* decisions presented for appellate review is small, making it an elusive doctrine for review by the only body that can authoritatively resolve disputes about it. See, *e.g.*, *Van Cauwenberghe*, 486 U.S. at 527 (1988) (holding that the denial of a motion to dismiss for *forum non conveniens* is not "immediately appealable as of right").

This case offers one of few opportunities for this Court to recalibrate its common-law doctrine. The underlying facts are largely undisputed, and the issues on which review are sought are well-preserved. The specific context permits the Court to issue a clear but limited ruling; it is not an invitation to write a treatise.

After forty years of silence, review would provide much-needed assurance that the law governs and not fancy. When this Court formally recognized *forum non conveniens* in 1947, it did so on the express understanding that the doctrine would not produce arbitrary decision-making—"experience ha[d] not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." *Gilbert*, 330 U.S. at 508. If that understanding is no longer true today—and this case suggests that it is not—it is time to consider whether the doctrine still functions in the way this Court intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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