No. _____

IN THE

Supreme Court of the United States

MÁXIMA ACUÑA-ATALAYA, DANIEL CHAUPE-ACUÑA, JILDA CHAUPE-ACUÑA, CARLOS CHAUPE-ACUÑA, YSIDORA CHAUPE-ACUÑA, ELIAS CHAVEZ-RODRIGUEZ, MARIBEL HILBRIONES,
Petitioners,
v.
NEWMONT MINING CORPORATION, NEWMONT SECOND CAPITAL CORPORATION, NEWMONT USA LIMITED, AND NEWMONT PERU LIMITED,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The *forum non conveniens* ("FNC") doctrine only allows a court to dismiss a case to a more convenient forum if that forum is fair and adequate. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55 and n.22 (1981). Since *forum non conveniens* dismissal is a "harsh result," defendants are supposed to "bear[] a heavy burden in opposing the plaintiff's chosen forum." *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 66 n.8 (2013) (quotation marks omitted), and dismissals are supposed to be "rare." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947). In practice, though, such dismissals are ubiquitous and not difficult to obtain. Part of the problem, and the issue here, is that many lower courts do not actually ensure that the alternative forum is fair and adequate.

The problem is particularly acute where, as here, the defendant has been sued in its home forum. In such cases, claims of inconvenience are suspect and courts should be particularly loathe to dismiss to a forum whose adequacy is in question.

Here, the district court dismissed in favor of Peru, despite an unprecedented judicial corruption crisis and evidence that Respondents engaged in corruption, including in cases against Petitioners. It held that though these facts are "concerning[,] . . . Peru is an adequate alternative forum." App. 18a. In affirming, the Third Circuit deepened at least a three-way circuit conflict on how to address a forum's adequacy.

The questions presented are:

1. Does the *forum non conveniens* doctrine permit dismissal from a defendant's presumptively fair and convenient home forum when the adequacy of the foreign forum preferred by defendant is in question?

2. Where plaintiffs have presented significant evidence that the foreign forum is inadequate, may a court dismiss if it is merely "persuaded" by any standard that the forum is adequate (even if there remains significant doubt) as the Third Circuit held or must it, as most Circuits hold, either treat plaintiffs' showing as conclusive or require defendants to prove that the forum is adequate by clear and convincing evidence?

PARTIES TO THE PROCEEDING

Petitioners and Respondents are listed in the caption.

RELATED PROCEEDINGS

Proceedings directly on review:

Acuna-Atalaya v. Newmont Mining Corp., No. 20-1765 (3rd Cir. Dec. 11, 2020).

Acuna-Atalaya v. Newmont Mining Corp., No. 17-1315 (D. Del. March 10, 2020).

Acuna-Atalaya v. Newmont Mining Corp., No. 18 -2042 (3rd Cir. March 20, 2019).

Acuña-Atalaya v. Newmont Mining Corp., No. 17-1315 (D. Del., April 11, 2018).

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The opinion of the Third Circuit is available at 838 F. App'x 676. The order of the district court is available at 2020 U.S. Dist. LEXIS 41132. The Third Circuit also previously addressed this case at 765 F. App'x 811. The original district court decision is reported at 308 F. Supp. 3d 812.

JURISDICTION

The court of appeals issued its judgment on December 11, 2020, and denied a timely petition for rehearing on February 9, 2021. This petition is timely filed within 150 days of February 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED

There are no such provisions at issue here.

INTRODUCTION

No federal rule or statute creates or constrains the *forum non conveniens* (FNC) doctrine. It is a creature of judge-made, federal common law. But this Court has not addressed the applicable standards in the forty years since *Piper*, and it shows. Lacking guidance, the Circuits have adopted vague and conflicting rules. The FNC doctrine as currently applied ignores its original justification as a check on excessive assertions of jurisdiction over *nonresident* defendants. District courts exercise virtually standard-less discretion to dismiss meritorious claims. And the doctrine allows courts to abdicate jurisdiction Congress granted. *See, e.g.,* Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 826

(2008) ("*[F]orum non conveniens* might be said to exist not only in the absence of enacted law on point but in spite of . . . jurisdiction and venue statutes that arguably instruct a district court to adjudicate."); s*ee also* Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. Int'l L. & Pol. 1063, 1075 (2013) (arguing that the FNC doctrine empowers the courts to decline to exercise jurisdiction Congress authorized).

Despite this Court's assumption that FNC dismissals would be rare, they are quite common, even where there are concerns about the foreign forum's adequacy, including rampant corruption. Indeed, lower courts refuse jurisdiction despite such doubts even when a U.S. defendant is sued in its home forum, which is presumptively fair and convenient and is the one clear place this Court has said a plaintiff is assured a fair shake.

This case presents in stark relief the consequences of this doctrine run amok. The district court dismissed this case from Respondents' home forum, in spite of its continuing concerns about the adequacy and fairness of Respondents' preferred alternative forum – a jurisdiction in the throes of an unprecedented judicial corruption crisis, from which the very same Defendant had previously benefitted.

There is disarray among the circuits over the standard for determining whether a foreign forum has been sufficiently proven to be adequate and fair. The Third Circuit's decision below deepened circuit conflicts over how the burden of proof is distributed and the standard a defendant must meet to prove an alternative forum is adequate. It held that defendants must merely "persuade" the court of a "justifiable

belief" in an alternative forum's adequacy, even when defendants are sued in their own home forum and plaintiffs produce substantial evidence of the alternative forum's inadequacy. App. 7a-8a. The Third Circuit adopted the Eleventh Circuit's burden-shifting framework, which other circuits have rejected. And the Third Circuit declined to follow most circuits in requiring defendants to meet what amounts to a clear and convincing standard of proof, misinterpreting the Second Circuit's standard. *Compare* App. 7a-8a *with Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pak.*, 273 F.3d 241, 248 (2d Cir. 2001) (applying a higher standard of proof where dismissal conditions are insufficient).

These multifarious and poorly articulated rules create significant uncertainty. The doctrine is supposed to ensure that the cases will not be sent to an unfair or inadequate forum. But the doctrine currently affords no such guarantee. Instead, the outcome often depends on where the case was filed. Indeed, a moving party may even have an easier time *dismissing* a case on *forum non conveniens* grounds than securing a domestic venue transfer under 28 U.S.C. § 1404, depending on where they are litigating.

Petitioners challenge the adequacy of the Peruvian forum, presenting substantial and often uncontested evidence of widespread judicial corruption, including involving the same Respondent. The district court recognized "it cannot be questioned that Plaintiffs have satisfied their burden" in producing significant evidence calling the adequacy of the Peruvian forum into doubt. App. 38a. Yet the district court dismissed Petitioners' claims, holding

that "[t]hough the events described are [] concerning, . . . Peru is an adequate alternative forum." *Id.* at 18a.

The Third Circuit affirmed. App. 3a-13a. Its Opinion conflicts with both the fundamental requirement that defendants *establish* the adequacy of the foreign forum, and this Court's guidance that defendants' burden is "heavy." Its lowered standard of proof contradicts precedent from other Circuits. And it sent Petitioners off to litigate in a court system that *itself* has recognized it is in the midst of an unprecedented judicial corruption crisis. This approach would lead to divergent results in like cases and hollow out defendants' burden to demonstrate adequacy.

The Opinion is also at odds with both the FNC doctrine's history – the doctrine did not allow dismissals from a defendant's home forum – and this Court's recent general personal jurisdiction jurisprudence, which contemplates a corporation's home forum as the one clear place a plaintiff is assured a fair day in court. A defendant sued in its home in a fair forum should not be granted a dismissal because it is purportedly more convenient to litigate in a questionable forum. Indeed, since that caselaw has substantially narrowed the availability of general jurisdiction, the FNC doctrine is less necessary to dismiss claims filed in forums inconvenient to Defendants or to police forum shopping.

Given the increasing frequency of FNC motions, lower courts need to know how certain a district court must be that a plaintiff will receive a fair hearing in a fair court before dismissing. They need clear guidance on the allocation of the burden of proof and the

applicable standard of proof defendants must meet to satisfy their burden. This case presents an ideal opportunity to address these questions. *Certiorari* is warranted to clarify this exceptionally important area of law.

STATEMENT OF THE CASE

1. The *forum non conveniens* doctrine guarantees a fair, impartial forum. While it sometimes upends a litigant's choice of an inconvenient forum, it does so only if the alternative forum is adequate. "At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum" that is adequate in order to guard against the "danger that [plaintiffs] will be deprived of any remedy or treated unfairly." *Piper Aircraft*, 454 U.S. at 254-55 & n. 22. Where the more convenient forum may not guarantee the litigants a fair, impartial, or otherwise adequate hearing, convenience yields to fairness, and the motion must be denied.

This Court has never "spoken to particular burdens or standards associated with a Petitioner's assertion of unfair treatment." App. 25a. The resulting law has been anything but clear, or consistent. That unpredictability has endured for decades now, *infra*, I-II.

2. Petitioners are members of the Chaupe family, which holds possession rights to and has lived on and farmed a small plot in the department of Cajamarca in the Peruvian Andes since 1994. Pls.' Opp. to Defs.'

Forum Non Conveniens Mot. to Dismiss 3 (DE 43).[1] Respondents are Delaware corporations that head and form part of Newmont, a multinational mining enterprise. *Id.* at 2-3.

Respondents wish to build a gold mine on Petitioners' farm. That mine "would eradicate four mountain lakes." App. 69a. Petitioners and others have raised concerns that the project "threaten[]s the water supply serving over 200 communities." *Id.*

Since Petitioners do not wish to sell their farm, Respondents are trying to force them off their land. Pls.' Opp. to Defs.' *Forum Non Conveniens* Mot. to Dismiss 3 (DE 43). Overseen by their U.S.-based Security Director, Respondents' agents have threatened, beaten, and terrorized Petitioners. *Id.* at 3-4. They have also hired the Peruvian police and private security, who have invaded Petitioners' farm at least nineteen times – with swarms of men armed with batons – destroying property, entering the Chaupes' house, digging up crops, and killing or maiming their livestock and dogs. Pls.' Br. Mot. for Preliminary Injunction 4-5 (DE 28).

The Inter-American Commission on Human Rights recognized that Petitioners "have been the object of continuous acts of harassment and threats, with the intent to allegedly dislodge them from the

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[1] Unless otherwise noted, citations to "DE" refer to the litigation docket in the district court below. *Acuna-Atalaya v. Newmont Mining Corp.*, No. 17-1315 (D. Del.) Citations to "App. DE" refer to the appellate litigation docket below. *Acuna-Atalaya v. Newmont Mining Corp*, No. 20-1765 (3rd Cir.).

land where they live." *Id.* at 6. Petitioners constantly fear for their lives and livelihoods. *Id.* at 5-6.

3. In September 2017, Petitioners filed this suit seeking damages for these harms in the District of Delaware, invoking federal jurisdiction under 28 U.S.C. § 1332(a)(2). Compl. 20, 79-90 (DE 1). Petitioners filed in Delaware both because it is Respondents' place of incorporation and because of judicial corruption in Peru. *Id.* Asserting that it would inconvenience them to litigate at home, Respondents sought dismissal to Peru, where Respondents themselves have improperly influenced courts, including in cases against Petitioners and at the Peruvian Supreme Court, and where courts are now in the throes of the worst judicial corruption crisis in recent Latin American history. Pls.' Opp. to Defs.' *Forum Non Conveniens* Mot. to Dismiss 2-4, 7-10 (DE 43); Pls.' Opening App. Br. 7-20 (App. DE 18).

Indeed, during these very proceedings, the Peruvian government declared multiple judicial emergencies based on unprecedented systemic corruption in its courts, including in Cajamarca. Pls.' Supp. Opp. to Defs.' *Forum Non Conveniens* Mot. to Dismiss 4-5 (DE 99). Peru was thrown into a constitutional crisis triggered by a fight over corruption reforms in which Congress was dissolved and two officials were simultaneously claiming the presidency. Pls.' Notice of Supp. Evid. (DE 124). An extensive Peruvian government report recently confirmed that the judicial corruption crisis is ongoing and unaddressed. Pls.' Motion for Judicial Notice 3-6 (App. DE 19). And the even more recent ouster of a sitting president to halt corruption reforms,

subsequent massive deadly protests, and extreme corruption-fueled political instability has threatened any short term hope for reform. Pls.' 2nd Motion for Judicial Notice 3-9 (App. DE 43-1).

4. When Respondents first moved for *forum non conveniens* dismissal, Petitioners submitted evidence that judicial corruption was endemic and that Respondents participated in it. Pls.' Opp. to Defs.' *Forum Non Conveniens* MTD 3-4, 7-9 (DE 43); Pls.' Opening App. Br. 9-16 (No. 18-2042). The district court found this evidence "concerning." App. 66a, 85a, 90a.

The district court recognized that the U.S. State Department "cautioned in its 2016 Human Rights Report that there are allegations in the press and by non-governmental organizations that judges have been corrupted and influenced by outsiders" and that other experts found that Peru's judicial system "carries a very high risk of corruption." App. 81a.

Indeed, Petitioners' experts emphasized "the prevalence of corruption as a determining factor in the final ruling in many cases." Pls.' Opening App. Br. 7-8 (App. DE 18). They cited extensive corruption in Cajamarca courts, and "categorically" stated that "a legal process filed by a rural community or family . . . against a multimillion-dollar mining company has absolutely no chance of justice." *Id.* at 18.

The district court also recognized Newmont's "well documented" attempts to influence the decision of Peru's Supreme Court during the Fujimori regime to "ensur[e] that [it] would rule in favor of Newmont." App. 83a. Indeed, Petitioners produced evidence that Newmont paid a more than half-million dollar bribe through a notorious secret police chief, Vladimiro

Montesinos, in 1998 to swing a Peruvian Supreme Court opinion, which decided Newmont owns the gold mines it now operates. Pls. Notice of Supp. Evid. (DE 79); Pls.' Opening App. Br. 19 (App. DE 18).

More recently, Respondents filed a false criminal complaint against the Chaupes for criminal trespass, leading local trial courts to twice convict the Chaupes and sentence them to prison. Pls.' Opening App. Br. At 16-18 (App. DE 18). Petitioner Ysidora Chaupe declared in an affidavit that she saw Respondents' lawyers produce the guilty sentence before the judge issued it. *Id*. The same judge admitted that Respondents had given an "economic benefit" to the prosecutor to bring the case against the Chaupes. *Id.* After a six year prosecution, the Supreme Court spared the Chaupes prison but the harassment they suffer has not abated. *Id.* The district court was not willing "to discount the veracity" of this "sworn testimony." App. 45a, 85a-86a.

Nor did the district court dispute that local trial courts and prosecutors failed to move forward with any of the Chaupe family's ten criminal complaints against Respondents' local subsidiary, Minera Yanacocha, for physical attacks, property destruction and breaking and entering into their house, asserting the double standard that the land dispute did not belong in criminal court. Pls.' Opening App. Br. 16-18 (App. DE 18); Compl. ¶ 348 (DE 1); App. 85a.

Respondents' only contrary evidence was declarations from an expert who leads a Peruvian law firm that was slated for investigation by a congressional corruption commission, asserting that

the Peruvian judiciary rules based on facts and law. Pls.' Op. App. Br. 8 (App. DE 18).

Petitioners also showed that their local attorney's and her colleagues' communications have been intercepted by security firms tied to Respondents, and that she has received death threats. *Id.* at 7.

5. In April, 2018, the district court granted Respondents' motion, relying heavily on the fact that the Fujimori regime is no longer in power and that the appellate courts in Peru had ultimately spared Petitioners prison and thus protected them from Respondents' false criminal complaint. App. 81a-90a. The court concluded, "although Plaintiffs have shown cause for concern over Peruvian courts, I cannot say that they are 'clearly unsatisfactory' under *Piper*." App. 90a.

6. Petitioners appealed. During the appeal, "a set of secretly recorded phone conversations among Peruvian judges and judicial officials surfaced, revealing a disturbing series of improper quid pro quo exchanges." App. 57a. The "widening scandal also prompted the Peruvian Judicial Branch to declare a ninety-day state of emergency starting in July of 2018. And around the same time, Peru's Congress declared a nine-month state of emergency . . . for Peru's National Magistrates Council, the body that appoints judges and prosecutors." *Id.* at 58a. "Following these state-of-emergency declarations, Peru's president issued a statement that the Peruvian 'system for administering justice has collapsed.'" *Id.* at 58a-59a.

The Third Circuit vacated the district court's opinion, instructing it to "reconsider its prior determination that Peru is an adequate forum,"

"taking account of the recent developments in Peru." *Id.* at 57a, 62a. The Court also laid out what it found to be "the proper allocation of the burden of proof and the standards that must be satisfied." *Id.* at 60a.

Noting that "the Supreme Court has not yet spoken to particular burdens or standards associated with a plaintiff's assertion of unfair treatment in this context," the court adopted the Eleventh Circuit's approach: "'[D]efendants have the ultimate burden of persuasion, but only where the [Petitioner] has substantiated his allegations of serious corruption.'" *Id.* at 61a (citing *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001)).

7. On remand, Petitioners submitted five expert declarations and over 20 articles describing the extent of judicial corruption in Peru. Pls.' Supp. Opp. to Defs.' *Forum Non Conveniens* Mot. to Dismiss 4-7 (DE 99); Pls.' Supp. Reply to Defs.' *Forum Non Conveniens* Mot. to Dismiss 2-7 (DE 114).

Petitioners' experts explained that that through the judiciary's governing bodies, corruption networks of businessmen, lawyers, and judicial officials exercised influence over the entire justice system, exchanging benefits to influence cases' outcomes. Pls.' Opening App. Br. 8-10 (App. DE 18). The State Department's 2018 and 2019 Country Reports made clear the corruption networks the scandal revealed involve judges at all levels and interference in judicial decisions. *Id.* at 15. The U.N. Special Rapporteur on the Independence of Judges and Lawyers concluded that the situation in Peru "greatly surpasses" any corruption scandal in recent Latin American history. *Id.* at 14-15. Four national judicial institutions

declared emergencies, with thousands of judicial appointments and recordings yet to be investigated. *Id.* at 8-11.

The crisis affects Cajamarca, where the Chaupes' land lies. In August 2018, the Higher Court of Cajamarca requested *13 judges* out of approximately 100 be suspended or dismissed. *Id.* at 11-12. And leaked recordings linked "two attorneys who worked in the High Court of Cajamarca" to key actors in the corruption scandal. *Id.*

Multiple experts declared that the Peruvian government's efforts to address the crisis "fail to target key stakeholders and address the critical components of judicial corruption." *Id.* at 13. They are therefore insufficient or will take years to work. *Id.* at 12-13.

Respondent admitted that "for the most part, [they] do not take issue with [Petitioners'] general descriptions" of the crisis. App. 39a.

After briefing on remand but before the district court ruled, Peru's President dissolved Congress after it sidestepped his reform attempt by appointing judges to the Constitutional Court who were accused of corruption. Pls.' Opening App. Br. 16 (App. DE 18). When the President dissolved Congress, it suspended him, creating the "deepest political crisis in at least three decades." *Id.* (DE 124-1).

8. In March, 2020, the district court again dismissed Petitioners' claims, holding that "[t]hough the events described are again concerning, they do not suffice to supplant my previous conclusion that Peru is an adequate alternative forum." App. 18a.

The district court held that "it cannot be questioned that Plaintiffs have satisfied their burden" in producing significant evidence calling the adequacy of the Peruvian forum into doubt. *Id.* at 26a, 38a. And it did not dispute that Peru has suffered an unprecedented judicial corruption crisis or that Newmont corrupted Peruvian proceedings, including involving these Petitioners. Instead, the court based its holding principally on the (mistaken) assertions that Peru's reforms have the judicial corruption crisis under control and political stability had returned, that the corruption crisis did not reach Cajamarca or involve manipulation of case outcomes, and that Respondents' acts of corruption are unlikely to recur due to changes in Respondents' stated policies and the existence of cases in which Petitioners were said to have prevailed against Respondents. *Id.* at *40a-50a. The district court did not reach a definitive judgment that the forum is adequate. Instead, it "remain[ed] concerned that Plaintiffs' ability to be fairly heard in Peru is compromised." *Id.* at 18a.

9. Petitioners appealed. Concurrently with their brief, Petitioners moved for judicial notice, explaining that after the district court ruled, Peru's Anti-Corruption Prosecutor's Office concluded that the corruption pervading the Peruvian judiciary is even *more* widespread and intractable than earlier reports suggested, including in Cajamarca. Pls.' Motion for Judicial Notice 3-6 (App. DE 19). The Prosecutor's Office also concluded that the rampant corruption cannot be fixed quickly and that efforts to rein in the corruption are "without a doubt insufficient" and "have been failing every day." *Id.*

Then, just weeks before the Third Circuit ruled for a second time, another corruption-fueled political crisis rocked Peru. In November 2020, Peru's Congress ousted then-President Vizcarra on highly questionable grounds to halt anti-corruption campaigns and investigations he supported. Pls.' 2nd Motion for Judicial Notice 3-9 (App. DE 43-1). At the time, at least 68 of the Peruvian Congress's 130 members were the subject of criminal investigations, including for corruption. *Id.* at 5.

The day after Vizcarra's ouster, Manuel Merino, the head of Congress, was sworn in as president, sparking massive protests in which two protesters were killed and over 100 people hospitalized. *Id.* After serving less than six days, Merino resigned, leaving the nation without a president. *Id.* The next day, Congress appointed an interim president, the country's third head of state that week, to run a caretaker government until a new one is installed this month. *Id.*

10. Despite systemic corruption at emergency levels, including in Cajamarca, Respondents' track record of corruption, and political chaos undermining hope of meaningful reform, the Third Circuit affirmed the district court's dismissal. App. 3a-13a. It ruled that 1) an adequate alternative forum need not be established conclusively, finding a defendant need only to "persuade" the court that the alternative forum is adequate and a "justifiable belief" is sufficient; and 2) that the record supports the district court's adequacy finding, citing political stability, corruption reforms, and dissimilarities between the corruption crisis and Petitioners' claims. *Id.* at 7a-9a. The panel

did not address the former President Vizcarra's recent ouster, though acknowledged that ongoing investigations have "not yet" reformed Peru's judiciary. *Id.* at 11a.

Petitioners sought rehearing, arguing that the panel overlooked material facts, including the president's ouster, and that *en banc* review was necessary to secure uniformity and clarity regarding the requirement that Respondents *establish* the adequacy of the foreign forum. Pls.' Pet. for Reh'g (App. DE 52). The petition was denied. App. 102a.

REASONS FOR GRANTING THE WRIT

Forum non conveniens dismissals are increasingly routine and often amount to dismissal on the merits, given the difficulty of refiling or the inadequacy of the alternative forum. Thus, such motions are frequently filed even by defendants who claim that it is inconvenient for them to litigate in their own home forum, and who seek to dismiss in favor of a forum whose adequacy is questionable. Indeed, defendants have every incentive to seek dismissal to a forum that will *not* adequately address plaintiffs' claims.

Since this Court has never detailed what is required for a forum to be adequate, it is not even clear *what* litigants must prove. And the lower courts are divided over how to distribute the burden of proof and the evidentiary standards for assessing the burdens. The competing standards are often too vague to provide district courts real guidance.

The result has been the all-too-frequent dismissal of claims to forums whose adequacy is uncertain, contrary to this Court's assurances that *forum non*

conveniens dismissal should be rare, the alternative forum must be adequate and plaintiffs are always guaranteed a fair forum in defendants' home. In particular, "the argument that the alternative forum is too corrupt to be adequate does not enjoy a particularly impressive track record," in part because "courts have not always required that defendants do much to refute allegations of partiality." *Leon*, 251 F.3d at 1311-12 (internal quotation marks omitted).

The lack of guidance from this Court has led to untenable circuit splits. The Court should grant this petition and resolve the conflicts.

I. The Decision Below Deepens a Three-Way Circuit Split on Assessing the Adequacy of an Alternative Forum.

When a defendant moves for *forum non conveniens* dismissal, it bears the burden of proof. *Atl. Marine Constr. Co.*, 571 U.S. at 66 n.8. And the doctrine requires that the alternative forum be fair and adequate. *Piper*, 454 U.S. at 254-55, 254 n. 22. But *Piper* provided no guidance on how courts should ensure that the forum is fair and adequate. Indeed *Piper* places the burden on defendants, but also admonishes that finding the alternative forum inadequate is a "rare circumstance[]." *Id.*; *see also Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988) ("[I]t is unclear from *Piper* how much detail by a moving party is required . . . .").

Given this lack of direction, the lower courts have developed a complicated array of vague and conflicting standards regarding which party has the burden and how much evidence is required from that party. In

fact, many of the circuits establish neither a clear burden of proof nor a clear standard of proof, leaving district courts to make a "subjective determination of whether another nation's legal system is 'adequate.' Adequate by what standards?" *de Melo v. Lederle Labs., Div. of Am. Cyanamid Corp.*, 801 F.2d 1058, 1065 (8th Cir. 1986) (Swygert, J., dissenting). The lack of guideposts from this Court, and the circuits' inability to set forth clear and consistent standards, has given district courts unchained discretion to address the adequacy of foreign forums and has led to unfair and inconsistent outcomes that often fail to guarantee an adequate forum – including dismissals, like the one below, where the foreign forum's adequacy is in doubt.[2]

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[2] *Compare, e.g., Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 528 F. Supp. 1337, 1342-43 (S.D.N.Y. 1982) (finding Chile inadequate because of "serious questions about the independence of the Chilean judiciary") *and Sablic v. Armada Shipping Aps*, 973 F. Supp. 745, 748 (S.D. Tex. 1997) (finding Croatia inadequate because of "political and military instability") *with Jones v. IPX Int'l Eq. Guinea, S.A.*, 920 F.3d 1085, 1091 (6th Cir. 2019) (finding Equatorial Guinea adequate despite particularized allegations and "understandable" "fear of corruption and persecution"), *Rustal Trading US, Inc. v. Makki*, 17 F. App'x 331, 337 (6th Cir. 2001) (finding Sierra Leone adequate despite the social and political upheaval from Sierra Leone's ten-year civil war), *and Stalinski v. Bakoczy*, 41 F. Supp. 2d 755, 762 (S.D. Ohio 1998) (finding Honduras adequate, despite affidavit of judge in related matter that defendant tried to bribe her and when she refused, she was fired and charged with a crime).

The First, Fourth, Fifth, Seventh, and D.C. Circuits require what amounts to a clear and convincing standard of proof for defendants to meet their burden of showing the alternative forum is adequate. By contrast, in the Sixth, Ninth, and Tenth Circuits, defendants have a very minimal initial burden before plaintiffs must demonstrate the inadequacy of the foreign forum. And the decision below exacerbated this circuit split by joining the Second and Eleventh Circuits in combining a burden-shifting framework with a lower standard of proof.

1. Five circuits took to heart this Court's guidance that defendants have a "heavy burden" because dismissal is a "harsh result." *Atl. Marine Constr. Co.*, 571 U.S. at 66 n.8 (internal quotations omitted). Three of these circuits specifically require the defendant to meet a heavy burden when showing the adequacy of the alternative forum. *Adelson v. Hananel*, 510 F.3d 43, 52 (1st Cir. 2007); *Deb v. Sirva, Inc.*, 832 F.3d 800, 806 (7th Cir. 2016); *Simon v. Republic of Hungary*, 911 F.3d 1172, 1184-85 (D.C. Cir. 2018). In other contexts, this Court has recognized that a "heavy burden" approximates a clear and convincing standard. *See generally, e.g., Schneiderman v. U.S.*, 320 U.S. 118, 135 (1943), *State of Florida v. State of Georgia,* 141 S. Ct. 1175, 1180 (2021).

The Fourth, Fifth, and D.C. Circuits apply slightly different formulations that also approximate a clear and convincing standard. The Fourth Circuit requires that defendants "convincingly meet their burden" and provide "substantial evidence," *Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 250-51 (4th Cir. 2011), such that there are no "serious questions" about the

adequacy of the alternative forum. *Galustian v. Peter*, 591 F.3d 724, 732 (4th Cir. 2010). The Fifth Circuit similarly requires the "defendant to put forth unequivocal, substantiated evidence." *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1550 n.14 (5th Cir. 1991). And the D.C. Circuit requires the district court to make a "sound determination" about the existence of the adequate alternative forum, *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 677 (D.C. Cir. 1996), which means that defendants must "show convincingly" and "affirmatively prove" its adequacy, *Simon*, 911 F.3d at 1184-85. These formulations match those that courts have developed in defining the clear and convincing standard in other contexts. 21B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 5122 nn. 96, 97 (2d ed. 2021 update) (collecting cases).

2. The Second Circuit charts a middle path where "precisely how certain the court must be regarding the existence of an adequate alternative foreign forum will necessarily depend on how protective of the non-moving party the conditional dismissal will be." *Bank of Credit & Commerce Int'l (Overseas)*, 273 F.3d at 248. Thus, the Second Circuit finds a "justifiable belief" sufficient where plaintiffs would be "fairly well protected" by court-imposed conditions on dismissal. *Id.* But where conditions are insufficient to protect plaintiffs, the Second Circuit joins the five circuits that require at least clear and convincing evidence, requiring a "definitive finding" that the forum is adequate. *Id.* at 247-48.

3. Three other circuits require plaintiffs to bear the ultimate burden. The Ninth Circuit requires the

defendant to meet a low initial burden of showing adequacy, which is "easy to pass," and then the plaintiff "asserting inadequacy or delay must make a powerful showing." *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178-79 (9th Cir. 2006). The Sixth Circuit appears to take a similar approach. *Jones, S.A.*, 920 F.3d at 1091 (affirming dismissal despite "legitimate cause for concern" about corruption). In practice, the Tenth Circuit applied the same test in *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606-07 (10th Cir. 1998), where defendants provided no initial evidence of adequacy and plaintiffs had the burden of proving inadequacy. These circuits essentially flip the burden to plaintiffs. But in cases like this one, where plaintiffs meet that high, misplaced burden, they are better off than Petitioners, because the inquiry ends. Thus, where a powerful showing of inadequacy has been made, the result approximates that in clear and convincing evidence circuits: defendants' motions fail because it is impossible to demonstrate conclusively that the forum is adequate.

4. The Third Circuit below adopted the Eleventh Circuit's burden-shifting framework with a lower standard of proof, thus deepening the circuit split by adopting yet another approach: a burden-shifting framework where the defendant has an initial burden and then "where the plaintiff produces significant evidence documenting the partiality or delay . . . and these conditions are so severe as to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the District Court that the facts are otherwise." *Leon*, 251 F.3d at 1312; App. 61a. The Third Circuit below explicitly rejected the high

standard of proof the majority of circuits require. App. 7a-8a.

Instead, these circuits only require defendants to meet essentially a preponderance of the evidence standard. To the extent that the Third Circuit's holding that "a defendant is required only to 'persuade' the court," of a "justifiable belief" in adequacy, *id*. at 7a-8a, requires *any* particular standard of proof, it likely amounts to a preponderance of the evidence standard. *See* 21B Wright & Miller, *supra* § 5122. The same is true of the Eleventh Circuit, which requires that defendants provide only "adequate support" to establish the adequacy of the foreign forum. *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1283 (11th Cir. 2001). In these circuits, dismissal can be granted despite plaintiffs' strong showing of inadequacy.

5. As this case shows, the differences between the circuits can be outcome-determinative. The district court here found that "Plaintiffs' submission of evidence of general and specific corruption, plus the supervening instances of significant corruption, is enough to satisfy Plaintiffs' burden to produce 'significant evidence' that the alternative forum is 'clearly unsatisfactory.'" App. 39a (internal citations omitted). This most likely would have precluded dismissal in the Ninth Circuit, where the inquiry ends once plaintiffs make a "powerful showing" of inadequacy, and in the Sixth and Tenth Circuits where the burden of proving corruption ends with plaintiffs.

Additionally, Respondents would not have met the clear and convincing standard required in the First, Fourth, Fifth, Seventh, and D.C. Circuits. Nor would

they have met the Second Circuit's like standard, since conditions on dismissal would not solve the problem. These circuits require defendants to "convincingly meet their burden" or "affirmatively prove" the inadequacy of the alternative forum. Here, the district court equivocated repeatedly about the adequacy of Peru in the middle of a massive corruption scandal, recognizing that the evidence of corruption was "troubling" and the court "remain[ed] concerned that Plaintiffs' ability to be fairly heard in Peru is compromised." App. 18a, 23a. The district court's doubts, and this record, would have led to a different result in other circuits.

II. This Court Should Grant Certiorari To Resolve The Circuit Conflicts.

The question presented is of undeniable recurring importance to litigants and the proper functioning of our judicial system. The adequacy of an alternative forum is a threshold issue that is central to the *forum non conveniens* doctrine. *E.g. Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1174 (10th Cir. 2009); *Stroitelstvo Bulg. Ltd. v. Bulgarian-American Enter. Fund*, 589 F.3d 417, 421 (7th Cir. 2009).[3]

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[3] The fact that the Third Circuit's decision is unpublished "carries no weight in [this Court's] decision to review the case." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987). The standard of proof necessary to safeguard plaintiffs' ability to get a fair hearing is an important and recurring issue, about which the circuits are divided, regardless of whether it was addressed here in an unpublished opinion.

A. The Petition Presents A Frequently Recurring And Important Issue.

1. The proper standard for determining whether an alternative forum is adequate arises frequently. One study found that from 1982 after *Piper* was decided through 2006, 692 FNC cases addressed the adequacy of the foreign forum. Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 Rich. J. Global L. & Bus. 513, 522 (2009). Of these cases, the foreign forum was found adequate 82% of the time. *Id.* at 526. However, the likelihood a forum was found adequate varied notably between circuits (between 61-90% found adequate), such that "one would suspect the difference is caused by the differences in law" between the circuits. *Id.* at 528.

Review is particularly important given the increasing frequency of FNC decisions. While the 14 years after *Piper* produced only 692 cases, the same search methodology applied to the past 14 years reveals 2131 *forum non conveniens* decisions.

2. The adequacy of the alternative forum is frequently and vigorously litigated because FNC dismissals often amount to a dismissal on the merits. Dismissed plaintiffs rarely refile their claims in the defendant's chosen forum or successfully litigate in that forum.

The "judge's whim" of an FNC decision often sends claims to "a certain death." Kevin M. Clermont, *Venue – The Story of Piper: Forum Matters, in* Civil Procedure Stories 199, 222 (Kevin M. Clermont ed., 2d ed. 2008). In a survey of transnational cases dismissed on this basis from 1947-1984, not one of the 85

reported cases resulted in a plaintiff's win in the foreign court. *Id*; *see also Leon*, 251 F.3d at 1313, n.2; Martin Davies, *Time to Change the Federal* Forum Non Conveniens *Analysis*, 77 Tul. L. Rev. 309, 319 & n.35, 351 (2002). Indeed, this is often why defendants (even those with no real complaint about fairness or convenience) invoke the doctrine.

This is particularly true in Latin America, as there is little prospect of the claims being litigated in the alternative forum. As one study found, "the current application of FNC by U.S. courts, before which Latin American plaintiffs have asserted their claims, frequently serves only one end: dismissal of those plaintiffs' claims." E.E. Daschbach, *Where There's a Will, There's a Way: The Cause for a Cure and Remedial Prescriptions for Forum Non Conveniens as Applied in Latin American Plaintiffs' Actions Against U.S. Multinationals*, 13 Law & Bus. Rev. Am. 11, 25 (2007) (noting that only one of more than fifty personal injury actions dismissed under FNC was actually tried in the foreign forum) (internal citations omitted).

B. The Circuit Split Is Intolerable And Requires Action By The Court.

1. The current situation, with interlocking circuit splits regarding both the allocation and the content of the burden of proving the adequacy of the alternative forum, is untenable. The disparate treatment of similarly situated parties, based on nothing more than the location of their lawsuit, is intolerable in a system intended to be governed by uniform rules.

Indeed, a single defendant can be treated differently depending where it is sued even when it is sued at home. A corporate defendant is typically at home in both its principal place of business and its place of incorporation. *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014). And those two homes are often in different circuits. Here, for example, the alternative forum was deemed adequate in the Third Circuit, Defendants' place of incorporation, but would have been deemed inadequate in the Tenth, Respondents' principal place of business.

Such random differences among the circuits encourage parties to sue in circuits that fully enforce the adequate alternative forum requirement, if they can find one that has jurisdiction.

2. The current inconsistent and incomplete burden of proof standards have exacerbated the hesitancy of district courts to properly address the adequacy inquiry and exacerbated the inconsistency between circuits. Megan Waples, Note: *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 Conn. L. Rev. 1475, 1476, 1503 (2004) ("Without guidance on the question, lower courts have applied a wide variety of standards and methods in evaluating the question of the adequate alternative forum. This inconsistency creates a difficult and uncertain challenge for a plaintiff to present the evidence that a particular court would find relevant"); Alexander R. Moss, Note: *Bridging the Gap: Addressing the Doctrinal Disparity Between Forum Non Conveniens and Judgment Recognition and Enforcement in Transnational Litigation*, 106 Geo. L. J. 209, 217 (2017) ("[T]he Court

has provided essentially no guidance as to what factors a reviewing court should consider when deciding whether a foreign forum is 'adequate,' which has engendered considerable confusion . . . ."); Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. Det. Mercy L. Rev. 369, 384 (2006) ("Because of this gaping hole, lower courts were left to develop their own analysis of adequacy, which resulted in inconsistent views . . . .").

These same contradictory and vague standards have left plaintiffs in this case and others without an actual adequate alternative forum, despite the doctrine's original guarantee to the contrary. As leading civil procedure commentators have noted: "by categorically rejecting generalized accusations of corruption, delay, and other inadequacies in foreign judicial systems, or imposing too high a level of proof on these points, federal courts ignore the realities of the nature of the justice systems of many nations." 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3828.3 (4th ed. 2021 update). Commentators agree that the "bar is currently set far too high" for plaintiffs trying to oppose an FNC dismissal to corrupt foreign courts. Virginia A. Fitt, *Note: The Tragedy of Comity: Questioning the American Treatment of Inadequate Foreign Courts*, 50 Va. J. Int'l L. 1021, 1044 (2010); *see also* Moss, *Bridging the Gap*, *supra* at 228. The current doctrine as applied often leaves plaintiffs with a convenient but inadequate forum where there is little actual chance of redress.

4. The lack of guidance from this Court is particularly problematic given that the circuits review

FNC dismissals, including adequacy findings, under an abuse of discretion standard. *Piper*, 454 U.S. at 257. Accordingly, district courts not only have very little guidance that conflicts between circuits, they also have very little case-by-case oversight. That has produced a confusing body of cases applying inconsistent standards and reaching inconsistent results.

5. The circuit split is unlikely to be resolved without action by this Court. Indeed, courts of appeals have expressly acknowledged the lack of guidance. *Lacey*, 862 F.2d at 43 ("[I]t is unclear from *Piper* how much detail by a moving party is required."); *Fid. Bank PLC v. M/T Tabora*, 333 F. App'x 735, 738 (4th Cir. 2009) ("[T]here is a question of whether a *forum non conveniens* dismissal may be based on only a possibility that an alternative forum is available.") (internal citations omitted). And Congress is unlikely to settle the issue; *forum non conveniens* is a judicially-created doctrine.

III. This Court Should Grant Certiorari Because The Third Circuit's Decision Is Wrong And Would Deny Petitioners Their Day in Court.

Certiorari is further warranted because the Third Circuit's ruling is wrong. Allowing *forum non conveniens* dismissal where the defendant has not conclusively established that the alternative forum is adequate or fair is contrary to the history and purpose of the FNC doctrine and this Court's personal jurisdiction jurisprudence.

A. The Third Circuit Did Not, and Its Rule Does Not, Ensure Defendant's Chosen Forum is Fair.

The Third Circuit's decision provides a stark example of the problems described above and conflicts with this Court's limited precedent. In breaking with its sister circuits and not requiring a conclusive judgment of adequacy, App. 7a-8a, the Third Circuit adopted a standard that neither requires defendants to meet their "heavy burden" nor guarantees Petitioners a "fair" forum.

No one could look at Peru right now and say it assures anyone a fair forum. The lower courts certainly did not; the district court dismissed and the Third Circuit affirmed despite noting reservations about the forum's fairness. App. 9a.

Indeed, the judicial corruption in Peru, and the political crises it spawned, combined with Respondents' participation in corruption, is so extraordinary that it provides a perfect test of whether the doctrine in the Third Circuit and others that apply similar rules is actually working. It is not. If this dismissal is permissible, it is hard to see what dismissal would not be.

B. The Third Circuit's Rule Conflicts With The Doctrine's History And This Court's General Personal Jurisdiction Caselaw, Which Guarantees Parties At Least One Fair Forum: Where The Defendant Is At Home.

Dismissal to a foreign forum whose adequacy is uncertain is particularly problematic where, as here, defendants are sued in their *home* forum. As the

Second Circuit has warned, it would be "a perversion of the *forum non conveniens* doctrine to remit a plaintiff, in the name of expediency, to a forum in which, realistically, it will be unable to bring suit when the defendant would not be genuinely prejudiced by having to defend at home in the plaintiff's chosen forum." *Manu Int'l, S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 67 (2d Cir. 1981). Such dismissals are at odds with the doctrine's history and purpose, and with this Court's recent personal jurisdiction jurisprudence guaranteeing that plaintiffs will have at least one unquestionably fair forum.

1. Historically, the FNC doctrine was about policing jurisdiction, and did not allow dismissals from a defendant's home forum. When the doctrine was developed, lax personal jurisdiction rules allowed general jurisdiction over corporate defendants where the convenience of suit was not assured. *See, e.g., Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437 (1952).

Gulf Oil v. Gilbert, 330 U.S. 501 (1947), and its progeny were a response to expansive personal jurisdiction, including "excessive assertions of jurisdiction" over foreign companies. Rutledge, *supra*, at 1067, 1068-69. FNC thus became the vehicle by which courts could trim back exorbitant assertions of jurisdiction. *Id.; see also* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U.L. Rev. 390, 431-32 (2017).

Because the doctrine was concerned with excessive jurisdiction, it originally presumed that the defendant was a nonresident. Gardner, *supra*, at 401. Indeed, the Scottish, English, and New York *forum*

non conveniens practices adopted by the Supreme Court in *Gulf Oil* all *disallowed* invocation of the doctrine by defendants sued at home. *See* Simona Grossi, *Forum Non Conveniens as a Jurisdictional Doctrine*, 75 U. Pitt. L. Rev. 1, 3, 10-15 (2013).

Since then, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011), and *Daimler*, 571 U.S. at 136-137, 139 n.19, significantly narrowed general jurisdiction largely to where a corporation is "at home": its place of incorporation and its principal place of business. This made the FNC doctrine's function as a check on exorbitant jurisdiction redundant, *see* Gardner, *supra* at 431; Pamela K. Bookman, *Litigation Isolationism*, 67 Stan. L. Rev. 1081, 1093, 1106-07, 1122-23, 1132 (2015), and rendered it "ripe for radical reexamination." Rutledge, *supra*, at 1067, 1069-70.

2. *Forum non conveniens* dismissals away from a defendant's home forum to one whose adequacy is questioned undermine the central tenets of *Goodyear* and *Daimler* and work an injustice against plaintiffs who were guaranteed one fair forum to hear their claims. *Daimler*, 571 U.S. at 137.

One of the foundational principles of general jurisdiction is the traditional assumption that a defendant's home forum is the most fair and convenient place to sue them. *See Int'l Shoe Co. v.Wash.*, 326 U.S. 310, 316-17 (1945).

A defendant's home forum is arguably even more convenient today, given modern technological advances that make distance in many ways irrelevant. *See* Bookman, *supra*, at 1094. Thus, the burden on defendants has been "lightened at the same time that

the primary source of injustice – the infeasibility of securing foreign evidence and testimony for use at trial – has all but disappeared." Gardner, *supra*, at 415.

A defendant's home forum is also assumed to have an interest in resolving disputes involving its citizens. Indeed, where a defendant is sued at home, even by a foreign plaintiff, the forum has a strong public interest in hearing the matter. *Carijano v. Occidental Petroleum Corp.,* 643 F.3d 1216, 1232 (9th Cir. 2011); *see also McLellan v. Am. Eurocopter, Inc.*, 26 F. Supp. 2d 947, 952 (S.D. Tex. 1998); *Sydow v. Acheson & Co.,* 81 F. Supp. 2d 758, 770 (S.D. Tex. 2000).

3. Since *Daimler*, it has been "incredibly difficult to establish general jurisdiction [over a corporation] in a forum other than the place of incorporation or principal place of business." *Chavez v. Dole Food Co.*, 836 F.3d 205, 223 (3d Cir. 2016) (en banc) (citations omitted). In "exchange" for this restriction on general jurisdiction, Plaintiffs were to be afforded "'recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.'" Gardner, *supra*, at 433 (quoting *Daimler*, 571 U.S. at 760).

Yet defendants, such as Respondents, routinely secure FNC dismissals away from their home forum, despite real concerns about the fairness of the foreign forum. *See* Bookman, *supra*, at 1123-27. Thus, "what *Daimler* establishes – personal jurisdiction over defendants sued at home – forum non conveniens takes away, at the court's discretion." *Id.* at 1123.

This is precisely what the Second Circuit cautioned against 40 years ago: unless dismissals from

a defendant's home forum are discouraged under the doctrine, "forum non conveniens bids fair to become a procedural ploy designed to discomfit rather than an instrument for the furtherance of justice." *Manu Int'l*, 641 F.2d at 68. And yet that is precisely what the opinion below has done.

As Justice Gorsuch recently noted with respect to specific jurisdiction: "No one seriously questions that the company, seeking to do business, entered those jurisdictions through the front door. And I cannot see why, when faced with the process server, it should be allowed to escape out the back." *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1039 (2021) (Gorsuch, J. concurring) (internal citations omitted). And yet, "corporations continue to receive special jurisdictional protections . . . . Less clear is why." *Id.*

Daimler's effect would be perverse if plaintiffs were not able to sue in the one clear and certain forum where defendants are "at home." The Third Circuit's decision permitting dismissal to a forum whose adequacy is uncertain conflicts with this Court's personal jurisdiction caselaw by leaving plaintiffs like the Chaupes without recourse to the one fair forum they were told would hear their claims. The high burden of proof many circuits apply vindicates that promise. The Third Circuit's rule does not.

C. Dismissals Threaten To Disrupt Comity Between The United States And Other Nations.

Forum non conveniens dismissals, especially dismissals away from a U.S. corporate defendant's

home forum, have created considerable discord between the United States and other countries, as evidenced by the enactment of so-called "retaliatory blocking" statutes by foreign nations who object to the frequency and volume of *forum non conveniens* dismissals. Bookman, *supra*, at 1101, 1103-04; Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. Rev. 1081, 1092 (2010). These statutes seek to prevent FNC dismissal either by foreclosing jurisdiction in the country's courts after plaintiffs have filed suit in a foreign jurisdiction such as the U.S., or by allowing jurisdiction but imposing "disadvantages on defendants that 'tilt the scales of justice in the plaintiffs' favor.'" Robertson, *supra*, at 1093 (quoting *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1324 (S.D. Fla. 2009)).

Many of these blocking statutes have been adopted in Latin American countries who view FNC dismissals "not as an expression of comity, but rather as an expression of protectionism." Gardner, *supra*, at 394; *accord* Robertson, *supra*, at 1093; Ronald A. Brand, *Challenges to Forum Non Conveniens*, 45 N.Y.U. J. Int'l L. & Pol. 1003, 1019-20 (2013).

Despite this, FNC dismissal is common rather than rare, in part because courts are reluctant to declare another forum "inadequate." *See* Daschbach, supra at 30-32; Thomas Orin Main, *Toward a Law of "Lovely Parting Gifts": Conditioning Forum Non Conveniens Dismissals*, 18 Sw. J. Int'l L. 475, 480-84, 480 nn.22-23 (2012). But denying an FNC motion because the adequacy requirement has not been met does not raise substantial comity concerns. It is not a

finding that a foreign forum is inadequate. It is just a holding that *defendants* have not *proven* plaintiffs will have an adequate forum based on the record at bar. *Bhatnagar by Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1230 (3d Cir. 1995); *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1087 (S.D. Fla. 1997); *Canadian Overseas Ores*, 528 F. Supp. at 1343. And in cases like this one, where governments themselves recognize the forum's inadequacies, denying a motion could not raise comity concerns. *See Eastman Kodak*, 978 F. Supp. at 1085.

D. Dismissal From a Defendant's Home Forum To A Forum Rife With Corruption Will Encourage Boomerang Litigation In U.S. Courts.

The Third Circuit's approach will predictably lead to avoidable enforcement disputes in U.S. courts. Often, when a defendant's home forum is in the United States, it lacks substantial assets in the alternative forum. So even if a dismissed plaintiff secures a judgment in the alternative forum, she would still have to enforce it here. And such plaintiffs may face considerable difficulties enforcing a judgment here, where there are questions about the foreign forum's adequacy; after all, defendants could use the same arguments that *plaintiffs* raise in opposing dismissal, including that the foreign forum has inadequate tribunals. This risk that plaintiffs might have to revisit a judgment in a hotly-contested enforcement action, most likely *in the U.S.*, is one no plaintiff should be forced to bear, and that does not arise in defendants' home fora in the United States.

The Ninth Circuit recognized this problem with dismissals for at-home defendants and refused to dismiss to Peru, in part based on these concerns. *Carijano,* 643 F.3d 1216. It noted – *before* the recent scandals − that there was "compelling evidence of disorder in the Peruvian judiciary," and that this would provide defendant grounds to attack any Peruvian judgment under California's foreign judgments enforcement statute. *Id.*, at 1231-32; *see also* M. Ryan Casey & Barrett Ristroph, *Boomerang Litigation: How Conveniens is Forum Non Conveniens in Transnational Litigation?*, 4 B.Y.U. Int'l L. & Mgmt. Rev. 21, 29 (2007)); *c.f. Osorio*, 665 F. Supp. 2d at 1312 (finding that a foreign judgment could be challenged if it was rendered under system that does not provide procedures compatible with due process and "that lacks impartial tribunals.").

Indeed, the Third Circuit's rule invites replays of the Chevron/Ecuador fiasco. There, the defendant obtained a dismissal from its home forum over the plaintiffs' protest that Ecuadorian courts were not impartial. *See Aguinda v. Texaco, Inc.*, 303 F. 3d 470 (2d Cir. 2002). An Ecuadorian court returned a multi-billion dollar judgment in plaintiffs' favor. Ecuador's Supreme Court rejected defendant's claim that judgment was corrupt. Sentencia de la Corte Nacional de Justicia de Ecuador, Juicio No. 174-2012, 12 November 2013 (Ecuador). The defendant then collaterally attacked the judgment in New York, and a federal court held that it was fraudulent, and that the entire Ecuadorian court system was not impartial. *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), *aff'd* 833 F.3d 74 (2d Cir. 2016). None

of this would have happened if the litigation had proceeded where it started, in defendant's home forum.

E. The Third Circuit Applied a Lesser Standard Than That Required For Venue Transfer, Contrary To This Court's Precedent.

This Court has made clear that it should be easier to transfer a case domestically under 28 U.S.C. § 1404 than to dismiss on *forum non conveniens* grounds, because venue transfer does not involve dismissal. *Norwood v. Kirkpatrick*, 349 U.S. 29, 30-32 (1955); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 313-14 (5th Cir. 2008); *Headrick v. Atchison, T. & S.F.R. Co.*, 182 F.2d 305, 310 (10th Cir. 1950).

Courts apply a "clear and convincing" evidence standard to venue transfer. *E.g., Headrick*, 182 F.2d at 310; *Vassallo v. Niedermeyer*, 495 F. Supp. 757, 759 (S.D.N.Y. 1980). The "conclusive judgment" or "definitive finding" standard many circuits apply to the question of whether the forum is adequate for FNC purposes approximates that standard. *Supra* § I. In rejecting that standard in favor of a lower one, the Third Circuit made it easier to dismiss on FNC grounds than to transfer. That makes no sense.

* * *

The Third Circuit's rule will harm the Chaupes – who were sent away from their chosen forum, defendant's home, and told to start over in a wildly corrupt jurisdiction after four years of litigation. And it will harm anyone who sues a defendant in its home forum for claims that are arguably heard more

conveniently in a forum where corruption is rampant or that is otherwise inadequate. It should not stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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