No. 21-33

IN THE

Supreme Court of the United States

MÁXIMA ACUÑA-ATALAYA; DANIEL CHAUPE-ACUÑA; JILDA CHAUPE-ACUÑA; CARLOS CHAUPE-ACUÑA; YSIDORA CHAUPE-ACUÑA, PERSONALLY AND ON BEHALF OF HER MINOR CHILD M.S.C.C.; ELIAS CHAVEZ-RODRIGUEZ, PERSONALLY AND ON BEHALF OF HIS MINOR CHILD; AND MARIBEL HIL-BRIONES,

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

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

Matthew C. Powers
Counsel of Record
Christopher C. Cyrus
GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Ave., Suite 2700
Austin, Texas 78701
(512) 480-5600
mpowers@gdhm.com
ccyrus@gdhm.com
Counsel for Amici Curiae Legal Scholars

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

TABLE OF CONTENTS

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 1

Argument 4

I. The Doctrine of *Forum Non Conveniens*, in its Application by Federal Courts, is Marred by Inconsistency 4

A. The appellate courts disagree over the deference due a plaintiff's forum choice 4

B. The defendant's burden has not been consistently articulated or applied by the appellate and district courts 8

C. The lower courts disagree in their weighing of public and private factors and on the imposition of dismissal conditions 9

D. Courts are divided with respect to the choice of law analysis. 10

II. The Court Should Take this Opportunity to Revisit the Doctrine 12

A. Proposals for reform 13

B. Proposals and grounds for abandonment 17

Conclusion 20

APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abad v. Bayer Corp.,
563 F.3d 663 (7th Cir. 2009) 7

Acuña-Atalaya v. Newmont Mining Corp.,
308 F. Supp. 3d 812 (D. Del. 2018) 3

American Dredging Co. v. Miller,
510 U.S. 443 (1994).....2

Archangel Diamond Corp. Liquidating Trust v. Lukoil, 812 F.3d 799 (10th Cir. 2016).....11

Ayco Farms, Inc. v. Ochoa,
862 F.3d 945 (9th Cir. 2017) 6

Burt v. Isthmus Development Co.,
218 F.2d 353 (5th Cir. 1955) 5

Capital Currency Exchange, N.V. v. National Westminster Bank PLC,
155 F.3d 603 (2d Cir. 1998).....11

Carijano v. Occidental Petroleum Corp.,
643 F.3d 1216 (9th Cir. 2011).....6

Delta Air Lines, Inc. v. Chimet, S.p.A.,
619 F.3d 288 (3d Cir. 2010).....8

DiFederico v. Marriott International Inc.,
714 F.3d 796 (4th Cir. 2013) 5

Gschwind v. Cessna Aircraft Co.,
161 F.3d 602 (10th Cir. 1998).....8, 11

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947).....2, 4, 9

Hefferan v. Ethicon Endo-Surgery Inc.,
828 F.3d 488 (6th Cir. 2016) 6, 7

Howe v. Goldcorp Investments, Ltd.,
946 F.2d 944 (1st Cir. 1991) 11

In re Air Crash Over S. Indian Ocean,
352 F. Supp. 3d 19 (D.D.C. 2018).....3

Interface Partners International Ltd. v. Hananel,
575 F.3d 97 (1st Cir. 2009) 6, 8

Iragorri v. United Technologies Corp.,
274 F.3d 65 (2d Cir. 2001) 5

Kedy v. A.W. Chesterton Co.,
946 A.2d 1171 (R.I. 2008) 3

Kisano Trade & Invest Ltd. v. Lemster,
737 F.3d 869 (3d Cir. 2013) 6

Lehman v. Humphrey Cayman, Ltd.,
713 F.2d 339 (8th Cir. 1983) 5

Lueck v. Sundstrand Corp.,
236 F.3d 1137 (9th Cir. 2001).....11

Otto Candies, LLC v. Citigroup, Inc.,
963 F.3d 1331 (11th Cir. 2020).....5, 6, 8

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981).....3, 4, 9

Simon v. Republic of Hungary,
911 F.3d 1172 (D.C. Cir. 2018).....6

Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.,
549 U.S. 422 (2007).....2, 4, 8, 12

Szumlicz v. Norwegian Am. Line, Inc.,
698 F.2d 1192 (11th Cir. 1983).....11

Trotter v. 7R Holdings LLC,
873 F.3d 435 (3d Cir. 2017).....12

Wiwa v. Royal Dutch Petroleum Co.,
226 F.3d 88 (2d Cir. 2000).....7

Zipfel v. Halliburton Co.,
832 F.2d 1477 (9th Cir. 1987).....11

Scholarly Authorities

Amy Coney Barrett, *Procedural Common Law*,
94 Va. L. Rev. (2008).....1, 3

Pamela K. Bookman, *Litigation Isolationism*,
67 Stan. L. Rev. 1081 (2015).....8, 13. 14

Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media*, 26 Houston J. Int'l Law 385 (2004) 10

Donald Earl Childress, III, *Forum Non Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 Va. J. Int'l L. 157 (2012) 16

Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 Tul. L. Rev. 309 (2002) 9–10, 15

Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982) 2, 12–13

Maggie Gardner, *Parochial Procedure*, 69 Stan. L. Rev. 941 (2017) 6–7

Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390 (2017) 18–19

Tarik R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 Iowa L. Rev. 923 (2016) 15

Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023 (2004) 10

Lonny Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 Emory L.J. 1137 (2000) 10–12

Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 Iowa L. Rev. 1147 (2006) 19

Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. Davis L. Rev. 559 (2007) 17–19

David W. Robertson, *Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction,'* 103 L.Q. Rev. 398 (1987) 16

David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 Tex. Int'l L.J. 353 (1994) 19

Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781 (1985) 19

Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259 (1986) 19

Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 Colum. L. Rev. 1444 (2011).....10

Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. Rev. 2033 (2013).....14

INTEREST OF *AMICI CURIAE*[1]

Amici Curiae, named in alphabetical order in the attached Appendix, are legal scholars who study and teach civil procedure, federal courts, and conflict of laws. They share a common interest in the doctrine of *forum non conveniens*, as applied by federal and state courts in the United States.

Amici are dedicated to the development of the law on this subject and are united in promoting its clear and consistent application.

SUMMARY OF ARGUMENT

Motions to dismiss based on *forum non conveniens* have become routine in federal cases involving a foreign or transnational element. But the doctrine has long been criticized for its vague guidelines, inconsistent application, and excessive appellate deference. As many commentators have noted, the doctrine's only consistency is its inconsistency. Moreover, questions persist as to the legitimacy of a doctrine that exists apart from, and arguably in conflict with, enacted law instructing federal courts to exercise jurisdiction. *See* 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 it: forum non conveniens exists in spite of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief pursuant to Supreme Court Rule 37.2. *Amici* submit this brief on behalf of themselves alone. This brief does not purport to represent the view or position of any of their respective universities, nor of any person or institution other than *Amici*.

jurisdiction and venue statutes that arguably instruct a district court to adjudicate."). These issues have taken on additional salience in light of this Court's determination that federal courts may adjudicate *forum non conveniens* at the outset of a case, even before personal or subject matter jurisdiction. *Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007).

Judge Henry Friendly was an early critic, complaining in 1982 of the doctrine's excessively discretionary standard and its correspondingly inconsistent application. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 748–53, 769–70 (1982). Later, this Court itself remarked on the doctrine's inconsistency:

> [T]o tell the truth, *forum non conveniens* cannot really be *relied* upon in making decisions about secondary conduct—in deciding, for example, where to sue or where one is subject to being sued. The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, see the quotation from *Gilbert, supra*, at 985–986 [quoting the list of private and public factors from *Gulf Oil Corp. v. Gilbert*, 330 U.S. 508–09 (1947)], make uniformity and predictability of outcome almost impossible.

Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (Scalia, J.). Because state law, rather than federal common law, controlled the *forum non conveniens* decision in *American Dredging*, *id.* at 457, the case—while flagging the more troublesome aspects of the doctrine—did not present the Court with the

opportunity to reassess its own *forum non conveniens* jurisprudence.

And although *American Dredging* accepted that some variability will follow from the lack of a single federal rule to be applied across jurisdictions, this Court need not resign itself to the view that inconsistent and aberrational results are unavoidable in cases decided under federal law.[2]

Instead, this Court can and should provide the federal district and appellate courts the guidance and clarity that they need to alleviate the inconsistency that afflicts their decision-making. State courts too will look to this Court for leadership on the doctrine, as they have always done. *See Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1180 & n.9 (R.I. 2008) (cataloging state *forum non conveniens* doctrines).

The Petition now before the Court alludes to this case's potential to be a vehicle for a fundamental reassessment of the law of *forum non conveniens*.

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[2] This Court has never answered whether uniform federal common law or state law should furnish the basis for *forum non conveniens* decisions in diversity cases. *See Piper Aircraft v. Reyno*, 454 U.S. 235, 248 n.13 (1981); Barrett, *supra*, at 885 ("While the courts have made clear that forum non conveniens is a common law doctrine, they have not made clear the source of their authority to develop it."). Nonetheless, like most lower federal courts deciding such motions, the district court below applied federal common law in resolving the *forum non conveniens* motion here. *See Acuña-Atalaya v. Newmont Mining Corp.*, 308 F. Supp. 3d 812, 820 n.5 (D. Del. 2018) ("Plaintiffs argue that, under *Erie R. Co. v. Tompkins*, . . . Delaware FNC law, which describes Defendants' burden as 'heavy,' should govern, as opposed to the federal standard I am applying."); *see also In re Air Crash Over S. Indian Ocean*, 352 F. Supp. 3d 19, 36 (D.D.C. 2018) ("Because *forum non conveniens* is a procedural question, this Court applies D.C. Circuit law in deciding *forum non conveniens* motions.").

Amici agree with Petitioner and believe that such an exercise is long overdue. *Amici* here seek to summarize some of the ways in which the doctrine has failed and to highlight various approaches that scholars and commentators have put forward for improvement. In its endorsement of a grant of certiorari in *Acuña-Atalaya v. Newmont Mining*, this *Amicus* Brief does not propose a policy other than clarity.

ARGUMENT

I. The Doctrine of *Forum Non Conveniens*, in its Application by Federal Courts, is Marred by Inconsistency.

Since *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) was first decided—and notwithstanding this Court's return to the doctrine in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and in *Sinochem*—federal district and appellate courts have struggled to develop a consistent and coherent body of *forum non conveniens* law. The discord among the lower courts covers virtually every aspect of the doctrine's application: from the amount of deference to be afforded a plaintiff's choice of forum, to the burden the defendant must meet before a district court may exercise its discretion to dismiss on *forum non conveniens* grounds, to the weight to be applied to the private and public interest factors that inform the analysis, and finally to the role for choice of law considerations.

A. The appellate courts disagree over the deference due a plaintiff's forum choice.

Notwithstanding its purported significance to the *forum non conveniens* inquiry, courts of appeals have

failed to develop a consistent and coherent standard for the deference due a plaintiff's choice of forum.

Three distinct approaches predominate. First, several courts have required that the defendant meet a high, "manifest injustice" bar in their recitation of the governing standard:

> The 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."

Otto Candies, LLC v. Citigroup, Inc., 963 F.3d 1331, 1339 (11th Cir. 2020) (quoting *Burt v. Isthmus Dev. Co.*, 218 F.2d 353, 357 (5th Cir. 1955)); *see also 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).

In a second approach, several courts apply a sliding scale informed by whether the case involves a domestic or foreign plaintiff and on whether improper forum-shopping considerations are apparent in the plaintiff's choice of forum. The Second Circuit's *en banc* opinion in *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001) epitomizes this approach:

> Based on the Supreme Court's guidance, our understanding of how courts should address the degree of deference to be given to a plaintiff's choice of a U.S. forum is essentially as follows: The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference

> that will be given to the plaintiff's forum choice. . . . On the other hand, the more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons . . . the less deference the plaintiff's choice commands and, consequently, the easier it becomes for the defendant to succeed on a *forum non conveniens* motion . . . .

Id. at 71–72; *see also 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).

In yet a third approach, the First Circuit Court of Appeals questions whether a plaintiff's choice of forum is due any meaningful deference at all. *Interface Partners Int'l Ltd. v. Hananel*, 575 F.3d 97, 101–02 (1st Cir. 2009). Though that court acknowledges the general principle that "a plaintiff enjoys some degree of deference," *id.* at 101, it has done little to show how the presumption should affect outcomes, particularly with respect to domestic plaintiffs, whom it suggests may be entitled to no higher deference than foreign plaintiffs. *Id.* at 101–02.

Courts have likewise struggled to bring consistency to other aspects of the doctrine. For example, in circumstances in which United States plaintiffs and foreign plaintiffs have joined together in the same suit, no consistent standard has emerged for the impact of each plaintiff group's presence in the suit. *See*, *e.g.*, *Otto Candies*, 963 F.3d at 1344; *Simon v. Republic of Hungary*, 911 F.3d 1172, 1183 (D.C. Cir. 2018), *rev'd on other grounds*, 141 S. Ct. 691 (2021); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011).

Indeed, the cases lack uniformity even as to what constitutes a "United States plaintiff," with courts taking inconsistent positions on what weight to give citizenship versus residency in the analysis. *See Hefferan*, 828 F.3d at 493–94; *Abad v. Bayer Corp.*, 563 F.3d 663, 666–67 (7th Cir. 2009); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101–03 (2d Cir. 2000).

Here, the devil is in the details, and as Professor Gardner has persuasively argued, any clarity that this Court's prior formulations sought to provide has given way to inconsistency born of the questions they left unanswered:

> Though the concept seems simple—U.S. plaintiffs get more deference, foreign plaintiffs get less—that binary clarity falls away on closer examination. What exactly does "less deference" or "somewhat more deference" mean, and what is the baseline from which deference is measured? Should courts similarly assume that a local defendant is *not* inconvenienced by suit in its home forum? And if so, what counts as a "local" defendant? Is a U.S. plaintiff doing significant business in a foreign country really inconvenienced if forced to litigate there? What about a corporation that is only nominally incorporated in the United States but is in all other respects foreign? Or a U.S. plaintiff who initially brought suit in the foreign forum? And in transnational cases with multiple parties, is one U.S. plaintiff enough? Should courts count the number of foreign versus domestic plaintiffs in deciding whether to invoke the lightened presumption,

> or should they instead assess the legitimacy of the U.S. plaintiff's interest in the case?

Maggie Gardner, *Parochial Procedure*, 69 Stan. L. Rev. 941, 991–92 (2017).

B. The defendant's burden has not been consistently articulated or applied by the appellate and district courts.

This Court has clearly placed on the defendant the burden of demonstrating that a *forum non conveniens* motion should be granted. *Sinochem*, 549 U.S. at 430.

Beyond generalized statements, what this entails in practice is far less clear. Though the Court has repeatedly identified the presence of "oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience" as the ultimate basis for a *forum non conveniens* dismissal, courts have placed little reliance on this standard in their decisions. Frequently, courts appear to rely far more on the mere location of evidence and witnesses and fail to tie their conclusions on such matters back to the ultimate inquiry that this Court has suggested is foundational. *E.g.*, *Delta Air Lines, Inc. v. Chimet, S.p.A.*, 619 F.3d 288, 300 (3d Cir. 2010); *Interface Partners Int'l*, 575 F.3d at 105; *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 608 (10th Cir. 1998).

Also unclear in the caselaw is whether the defendant's burden varies depending on the facts of the case. While for some courts, the burden on the defendant is elevated when it is a domestic party sued here in its home country, *see, e.g.*, *Otto*, 963 F.2d at 1342–43, this Court has not yet articulated the weight to be accorded this salient fact in the analysis. *See* Pamela K. Bookman, *Litigation Isolationism*, 67 Stan. L. Rev. 1081, 1106 (2015) (critiquing the result in

Piper—where this Court approved a *forum non conveniens* dismissal of a defendant sued in its home state—as "go[ing] against traditional assumptions that the most fair and convenient place to sue a defendant is in his home forum and that home fora are most likely to afford preferential or at least nonprejudicial treatment").

C. The lower courts disagree in their weighing of public and private factors and on the imposition of dismissal conditions.

Since this Court's first introduction in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) of the public and private interest factors that inform the *forum non conveniens* inquiry, the law has been unsettled in assessing the factors' interplay and the relative weight to be accorded to each. As Professor Davies has summarized:

> There is a considerable body of authority in the Fifth Circuit for the proposition that it is unnecessary to consider the public interest factors at all if the private interest factors indicate that the case should be dismissed. The Eleventh Circuit and District of Columbia Circuit have both taken a similar position, holding that consideration of the public interest factors is only necessary when the private interest factors are "in equipoise or near equipoise." However, in all three circuits, there are examples of courts acting inconsistently with the prevailing view, either by considering the public interest factors after concluding that the private interest factors favored dismissal, or simply by considering the public and private interest factors

> together. There is no discrimination between public and private factors in the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, which all give the same weight to both kinds of factor.

Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 Tul. L. Rev. 309, 352 (2002).

Courts likewise diverge in the details of the application of specific factors, including with respect to enforceability of a judgment that may arise in the case and the relevance of docket congestion, as well as with regard to the need for a return-jurisdiction clause in orders of dismissal. *Id.* at 318, 348–49 & nn.185–87, 356–60, 363–64 & nn.257–62; *see also* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 Colum. L. Rev. 1444, 1499 & n.279 (2011).

D. Courts are divided with respect to the choice of law analysis.

Disagreements over the proper role of choice of law in *forum non conveniens* analysis have sown further confusion. As Professor Hoffman has explained, the courts are badly splintered on what weight to give domestic regulatory interests in their decision-making. *See generally* Lonny Hoffman & Keith A. Rowley, *Forum Non Conveniens in Federal Statutory Cases*, 49 Emory L.J. 1137 (2000); Lonny Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1093 (2004); *see also* Stephen B. Burbank, *Jurisdictional Conflict and Jurisdictional Equilibration: Paths to a Via Media,* 26 Hous. J. Int'l L. 385, 399–400 (2004).

In some circuits, a *forum non conveniens* dismissal is either entirely or largely unavailable if the district court's choice of law analysis leads it to conclude that domestic law must be applied to the dispute. *See, e.g.*, *Archangel Diamond Corp. Liquidating Trust v. Lukoil*, 812 F.3d 799, 804 (10th Cir. 2016) (citing, *inter alia*, *Gschwind*, 161 F.3d at 605–06) (noting that one of two "threshold requirements" for dismissal is confirming that foreign law is applicable "because forum non conveniens is improper if foreign law is not applicable and domestic law controls"); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1148 (9th Cir. 2001) (explaining that "[b]efore dismissing a case for forum non conveniens, a district court must first make a choice of law determination" and that "the choice of law analysis is only determinative when the case involves a United States statute requiring venue in the United States, such as the Jones Act or the Federal Employers' Liability Act" (internal citations omitted)); *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1483 (9th Cir. 1987) (finding that the then-extant version of the Jones Act barred application of *forum non conveniens*); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983).

By contrast, other circuits have held that a case may be dismissed on *forum non conveniens* grounds even after recognizing that U.S. law would govern the dispute. *See, e.g., Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 609 (2d Cir. 1998); *Howe v. Goldcorp Inv., Ltd.*, 946 F.2d 944, 949 (1st Cir. 1991) (Breyer, C.J.), *cert. denied*, 502 U.S. 1095 (1992) ("We can find no good policy reason for reading the special venue provisions as if someone in Congress really intended them to remove the courts'

legal power to invoke the doctrine of forum non conveniens in an otherwise appropriate case."); *Trotter v. 7R Holdings LLC*, 873 F.3d 435, 441–42 (3d Cir. 2017) (noting, after Congress's removal of the special venue provision in the Jones Act, that the amended statute "demonstrates that there is no special-venue exception to the normal forum non conveniens approach and therefore no choice of law inquiry is required").

In sum, the degree to which the choice of law analysis influences the *forum non conveniens* determination varies widely. As Professor Hoffman has observed, the outcome of a *forum non conveniens* motion in "a case involving federal statutory claims may depend as much on the circuit in which the forum court is located as on the merits of the motion." Hoffman & Rowley, *supra*, at 1161.

II. The Court Should Take this Opportunity to Revisit the Doctrine.

Though approaches vary, the emerging scholarly consensus is that *forum non conveniens* jurisprudence has become untethered from its foundational underpinnings and is ripe for reassessment and reform. *Sinochem*'s conclusion that courts may reach *forum non conveniens* issues before deciding jurisdictional issues gives new urgency to the calls for clarification and improvement.

Below, *Amici* outline some of the proposals that legal scholars have made. Though this brief does not urge any one approach, *Amici* are unanimous in their assessment that the law of *forum non conveniens* can and should be improved, and the Court will benefit from having familiarity with the scholarship described here in doing so.

A. Proposals for reform.

Despite this Court's acknowledgement in *American Dredging* that the doctrine of *forum non conveniens* as presently conceived and applied "make[s] uniformity and predictability of outcome almost impossible," *Am. Dredging*, 510 U.S. at 455, this Court has not yet taken an opportunity to address the doctrine's shortcomings. *Amici* urge the Court to do so without delay.

Legal scholars' proposals for reform run a broad spectrum. At the modest end, Judge Friendly—in his piece, "Indiscretion About Discretion"—called simply for more searching appellate review, finding that the level of appellate deference accorded trial judges on *forum non conveniens* grounds has been far too great. Friendly, *supra*, at 747.

Other calls for change have gone further, looking to the substance of the inquiry that the district court performs in deciding motions to dismiss. For example, Professor Bookman has forcefully argued for a presumption (if not a bright-line rule) that a *forum non conveniens* dismissal should be unavailable to a United States defendant sued in the United States. As she points out:

> The presumption that defendants may be sued in their home fora is widely recognized internationally and also creates a simple and logical starting point for plaintiffs' forum selection choices. Indeed, the Court may have adopted the "at home" rule for general jurisdiction in *Goodyear* and *Daimler* in part for these reasons. Defendants' home fora also often have a significant sovereign interest over a suit, even if the underlying conduct occurred elsewhere, because of the sovereign's

> interest in regulating the conduct of its own nationals and residents.

Bookman, *supra*, at 1106–07. This recommendation is also in accord with the reality that "few other nations recognize forum non conveniens, and those that do tend to permit it more sparingly." *Id.* at 1096 & n.90; *see also* Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. Rev. 2033, 2052 n.111 (2013) (listing the few nations that recognize *forum non conveniens*).

Professor Davies has called for revisiting the entire public and private interest factor framework, noting that changes in law and technology affecting transportation and evidence have rendered much of the original formulation obsolete:

> For example, it should no longer be possible for a defendant seeking a forum non conveniens dismissal simply to argue that it would be expensive and inconvenient to transport willing witnesses from some distant country to a courthouse in the United States. In order to discharge its onus of persuading the court to dismiss the plaintiff's complaint, the defendant should be required to show why the taking of evidence from those witnesses by video link or videotaped deposition would be impermissible under the Federal Rules of Civil Procedure and, or in the alternative, technically or legally impossible under the conditions prevailing in the foreign country. If it is both permissible and possible to take the evidence by video link or videotaped deposition, this factor should, if anything, militate in favor of retention, particularly if such techniques are not available in the

> alternative foreign forum. Although there are signs that some courts are already modifying their use of the factors in this way, a modernizing Supreme Court should mandate the practice.

Davies, *supra*, at 383–84. Professor Davies suggests that the Court restate the test in its entirety "as well as the factors, spelling out clearly and unambiguously how much deference the court should give to the plaintiff's choice of forum." *Id.* at 384. As it stands, "many federal courts simply list the *Gilbert* factors, state the vague *Gilbert* 'strongly favors' standard, and then arrive at a conclusion." *Id.* That is a recipe for unpredictability. A more "highly articulated test" has the potential for substantially improving the predictability of outcomes. *Id.* at 384–85.

Others, including Professor Whytock, have called for a reformulation of the *forum non conveniens* test, to place greater emphasis on the enforceability of the judgment factor in *forum non conveniens* decisions. As these commentators have pointed out, judgment enforceability matters for both justice and efficiency. However, this factor "is often neglected," and even when not neglected, "it tends to be applied inconsistently" by district courts or "in a conclusory manner." Tarik R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 Iowa L. Rev. 923, 927 (2016). Their proposal thus suggests a pragmatic approach to *forum non conveniens* decision-making that focuses not simply on a balance of miscellaneous convenience factors at the trial phase but instead asks the courts to confront, on the front end of the case, the reality that its ultimate outcome will be driven in part

by whether (and where) the judgment can be enforced and collected. *Id.* at 953–54.

Professor Childress advocates a reformulation of the *forum non conveniens* doctrine that would combine aspects of each of these approaches. His calls for reform begin with an acknowledgement of the reality that *forum non conveniens* dismissals—despite their theoretical status as vehicles for determining venue only—all too frequently dictate ultimate merits outcomes:

> A successful forum non conveniens motion means that the case will not be heard in the United States and may not be heard elsewhere. As empirically documented in the late-1980s, the result of a successful forum non conveniens motion was that "plaintiffs generally did not refile their suits in foreign courts following forum non conveniens dismissals; instead, they tended to settle on terms favorable to the defendants or abandon their suits altogether." A forum non conveniens motion, therefore, does not merely delay a case; it can end it.

Donald Earl Childress, III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 Va. J. Int'l L. 157, 161 (2012) (quoting David W. Robertson, *Forum Non Conveniens in America and England: 'A Rather Fantastic Fiction,'* 103 L.Q. Rev. 398, 418–20 (1987)).

Professor Childress calls for a set of clearly delineated venue selection rules as a means for avoiding the unpredictability of the private and public interest factor analysis. Under his favored analysis, in a case like this one, where both the plaintiff and defendant are domestic, the only relevant

considerations to decide the defendant's motion would be the choice of law and enforceability of judgment factors. *Id.*

Like Professor Whytock, Professor Childress's approach focuses on the pragmatic significance of the place where a judgment could be enforced once the case is concluded.

But all those who have called for reform agree that the present formulation of the doctrine is unsatisfactory both in its application and the results it generates.

B. Proposals and grounds for abandonment.

In addition to those calling for reform, many scholars believe the Court should eschew reformulations or amendments to the doctrine and instead simply abandon the *forum non conveniens* doctrine altogether. The Court should give due consideration to these proposals and their underlying bases as well.

Those calling for abandonment have focused their criticism on access to justice considerations that the doctrine neglects, the doctrine's inconsistent application by courts, the impracticability of the doctrine's multi-factor test, and constitutional considerations affecting the doctrine's application.

Professor Lear has identified the many occasions that U.S. residents have found "their foreign injury claims relegated to foreign court systems" as among the "shocking aspects of federal forum non conveniens jurisprudence." Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. Davis L. Rev. 559, 570 (2007). She argues for

reassessment of the assumptions that inform such dismissals and the policy considerations they neglect:

> Our national interest does not diminish when an American resident is injured abroad; it is equivalent to the national interest implicated in cases in which American residents are injured in domestic accidents. Our interest in providing a domestic forum, however, increases palpably when the accident moves offshore. "Adequate" compensation can only be defined in American terms if the injured American resident will live in the United States. The U.S. judicial system is uniquely designed to assess the proper level of compensation for the resident plaintiff: American juries provide a community measure of appropriate damages; the American contingency fee mechanism ensures critical access to private compensation; and American civil procedure facilitates recovery envisioned by the system we embrace. The American resident relegated to a foreign forum runs the risk of being significantly under-compensated in the best of circumstances.

Id. at 572.

While Professors Whytock and Childress look to access to justice considerations as a jumping-off point for reform, Professor Lear favors the doctrine's abandonment: "It is time to give up the experiment." *Id.* at 603. Professor Gardner concurs in that assessment: "[R]eform will not be enough: The problems in the structure and history of the doctrine run too deep." Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 398 (2017); *see also*

David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 Tex. Int'l L.J. 353, 353–65 (1994).

Alongside the access to justice considerations, these scholars have also faulted the idiosynchratic nature of the lower courts' decision-making in *forum non conveniens* cases. *E.g.*, Lear, *supra*, at 603 ("[F]orum non conveniens decisions appear to depend more on the individual biases of district court judges than any identifiable legal standard. . . . Circuit splits running the gamut from the petty to the fundamental infect the federal system.").

Professor Gardner traces these defects in part to the fact that the lower courts are attempting to apply virtually without modification a test first adopted to decide a domestic venue dispute in 1947. Gardner, *supra*, at 401. She concludes: "[T]hat 1947 test is the wrong test for transnational litigation today." *Id.*

Both of these scholars are in agreement that the Court should take seriously the criticism that the *forum non conveniens* doctrine presents separation-of-powers concerns, to which the Court has not yet attended. *See* Elizabeth T. Lear, Congress, *The Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 Iowa L. Rev. 1147, 1152 (2006); Gardner, *supra*, at 397; *see also* Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259 (1986); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781 (1985).

CONCLUSION

Assessments of the *forum non conveniens* doctrine vary. But all agree or at least concede that the analytical formula is vague and the outcomes are inconsistent. It is time to reconsider the doctrine's vague formula, the unfettered discretion it affords trial courts, and its resistance to more searching review by appellate courts. This case offers an optimal factual and legal setting to accomplish this, and *Amici* urge the granting of the petition for certiorari here.

Respectfully submitted,

Matthew C. Powers
Counsel of Record
Christopher C. Cyrus
GRAVES, DOUGHERTY,
HEARON & MOODY, P.C.
401 Congress Ave.
Suite 2700
Austin, Texas 78701
(512) 480-5600
mpowers@gdhm.com
ccyrus@gdhm.com

Counsel for Amici
Curiae Legal Scholars

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APPENDIX

Amici Curiae, listed in alphabetical order below, are legal scholars who study and teach civil procedure, federal courts, and conflict of laws. Their professional affiliations are provided for identification purposes only and are not intended to reflect any sponsorship, endorsement, or participation by any institution or organization with respect to this brief.

Martin Davies. Professor Davies is the Admiralty Law Institute Professor of Maritime Law at the Tulane Law School, where he studies, teaches, and writes in conflict of law and transnational litigation.

James P. George. Professor George teaches civil procedure and international litigation at Texas A&M Law School. He has written extensively on private international law, and dealt specifically with *forum non conveniens* in practice, teaching, and scholarship. He serves in the members consultative group for the American Law Institute's project on Transnational Civil Procedure.

Lonny Hoffman. Professor Hoffman is the Law Foundation Professor at the University of Houston Law Center, where he studies, teaches, and writes in civil procedure in federal and state courts. He is a member of the American Law Institute and has served as Chair of the Civil Procedure Section of the American Association of Law Schools.

Stephen I. Vladeck. Professor Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law and is a nationally recognized expert on the federal courts, constitutional law, national security law, and military justice. He is a member of the American Law Institute and a Distinguished Scholar at the Robert S. Strauss Center for International Security and Law.

Christopher Whytock. Professor Whytock is the Vice Dean and Professor of Law and Political Science at the University of California, Irvine, where he studies, teaches, and writes in transnational litigation and conflict of laws. He has served as adviser on the new Restatement (Fourth) of the Foreign Relations Law of the United States and as associate reporter for the new Restatement (Third) of Conflict of Laws.

Patrick Woolley. Professor Woolley is the A.W. Walker Centennial Chair in Law at the University of Texas School of Law. He studies, teaches, and writes in civil procedure, conflict of laws, and federal courts. He is a member of the American Law Institute and serves in the members consultative group for the Third Restatement of Conflicts.