No. 21-33

In the
Supreme Court of the United States

MAXIMA ACUÑA-ATALAYA, DANIEL CHAUPEACUÑA, JILDA CHAUPE-ACUÑA, CARLOS CHAUPE-ACUÑA, YSIDORA CHAUPE-ACUÑA, ELIAS CHAVEZ-RODRIGUEZ, AND 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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Third Circuit correctly held, in an unpublished decision, that the district court did not abuse its discretion in concluding that defendants satisfied their burden to show that the Peruvian court system is an adequate alternative forum to adjudicate a Peruvian land dispute, despite recent allegations of corruption.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Newmont Corporation (f/k/a Newmont Mining Corp.), Newmont Second Capital Corporation, Newmont USA Limited, and Newmont Peru Limited make the following disclosure:

1) BlackRock, Inc. holds 10% or more of Newmont Corporation's stock.

2) Newmont Corporation is the parent corporation of Newmont USA Limited and holds 10% or more of Newmont USA Limited's stock.

3) Newmont USA Limited is the parent corporation of Newmont Peru Limited and Newmont Second Capital Corporation, and holds 10% or more of Newmont Peru Limited and Newmont Second Capital Corporation's stock.

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INTRODUCTION

This lawsuit was brought by Peruvian plaintiffs based on torts allegedly committed by defendants' Peruvian subsidiary and security forces in Peru concerning a dispute over land in Peru that will be governed by Peruvian law and for which parallel proceedings are currently pending in Peruvian courts. After examining an extensive record, and after two rounds of briefing and argument, the district court issued a detailed decision granting defendants' motion to dismiss on forum non conveniens (FNC) grounds—without prejudice and with several conditions. Petitioners appealed a single issue: whether the Peruvian courts are an adequate forum for this case, despite petitioners' allegations of recent corruption. In an unpublished decision, the Third Circuit held they are, and affirmed under an abuse of discretion standard that all agreed governed.

In asking this Court to review that factbound, non-precedential decision, petitioners focus on two legal questions they say the Third Circuit got wrong: (i) the appropriate standard of proof for an adequacy determination, and (ii) the propriety of FNC dismissals from a defendant's home forum. Neither question implicates any circuit conflict. Neither has merit. And neither was properly presented to the Third Circuit. This Court should deny review.

STATEMENT OF THE CASE

A. Factual Background

1. This case arises out of a property dispute in the Northern Andes of Peru. Pet. App. 18a. In 2001, Minera Yanacocha S.R.L. (Yanacocha), a Peruvian mining company, acquired ownership and possessory rights to a plot of land in Cajamarca. Pet. App. 18a-

19a; JA166 ¶ 5.[1] Ten years later, petitioners began living on part of that land, claiming rights of possession purportedly obtained in the early 1990s and allegedly never transferred to Yanacocha. Pet. App. 19a; JA167 ¶ 8.

Defendants have long maintained that this is an illegal possession. As such, Peruvian law requires them to exercise a remedy for trespass, known as a "possessory defense." Pet. App. 72a-73a. This defense authorizes the owner to take reasonable, proportionate action to remove the trespasser from the property, including removing any crops or structures. *Id.* at 73a. Failure to do so in a timely manner gives the trespasser the right to remain on the property until there is a judicial resolution of property rights. JA601-03.

Defendants have exercised this possessory defense as needed. JA483-85. "[S]ecurity personnel" were "instructed to exercise the utmost restraint." Pet. App. 73a. And "nothing in the video evidence . . . shows the type of abuse asserted by [petitioners]." *Id.* The videos instead show petitioners and their family members wielding machetes and attacking Yanacocha representatives with rocks. *See* Pet. App. 88a n.11.

2. The dispute between the parties has spawned multiple lawsuits in the Peruvian courts, two of which remain pending. In those lawsuits, petitioners have received favorable decisions at every level of the Peruvian judiciary.

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[1] JA refers to the Joint Appendix submitted by the parties in the second appeal to the Third Circuit, No. 20-1765. *See* ECF Nos. 18 (Volume I), 16 (Volumes II-IX).

In 2017, petitioners prevailed in the Peruvian Supreme Court. JA432-55. Years earlier, a Cajamarca trial court had found some of the petitioners guilty of aggravated usurpation (*i.e.*, violent trespass), but the appellate court reversed and granted a new trial. *See* JA180-90. In 2014, a new trial was held and petitioners were again found guilty, but the appellate court reversed a second time. JA168 ¶ 17. That decision was affirmed by the Supreme Court of Peru, which found the evidence insufficient to determine which individual had engaged in the required violent act. JA432-55.

Also, in 2020, petitioners had success in the Peruvian Constitutional Court—having previously prevailed in a trial court in Cajamarca. Judicial Notice Ex. 1 (3d Cir.), ECF No. 44-2 at 14-15. In 2015 and 2016, petitioners filed two habeas corpus lawsuits challenging some of the same actions at issue in this case. *Id.* at 2-4; JA488 ¶ 25. In one, petitioners prevailed before the Cajamarca trial court and, while the appellate court initially reversed, the Constitutional Court later affirmed. ECF No. 44-2 at 14-15; JA488 ¶ 26; JA563-69. In the other, petitioners lost before the trial court and that decision was affirmed. ECF No. 44-2 at 15; JA571-82.

Other lawsuits between the parties remain pending. Yanacocha filed two civil lawsuits to recover possession and ownership of the disputed land. JA192-205; JA207-53. Yanacocha initially sought and obtained a preliminary injunction against petitioners' trespass, but the trial court later withdrew the injunction and the appellate court affirmed. JA457-67. There have been extensive proceedings in the ensuing years, and the parties are

now awaiting final decisions from the Peruvian court. JA169 ¶ 18.

3. The Peruvian government has also taken steps to assist petitioners. In November 2011, in response to community opposition, the Peruvian government suspended work on the Conga project—the planned mining operation near the disputed land. And since April 2016, the Peruvian government has "travel[ed] to [the disputed parcels] twice a month . . . to verify [petitioners'] safety," "pa[id] for [their] phone bills," and "coordinat[ed] with the police on a protection plan." Pet. App. 48a (third and sixth alterations in original) (citations omitted).

4. Defendants have taken steps to investigate petitioners' claims as well. In 2015, Newmont funded an independent factfinding mission to examine the "allegations of human rights violations perpetrated against the Chaupe family." JA365. After reviewing reports by key actors (including petitioners), videos, and photographic records, the mission team recommended a "precautionary approach" based on the "risk" of human rights violations, but "did not discover conclusive evidence that [Yanacocha] violated the human rights of members of the Chaupe family. Specifically, [it found] no conclusive evidence relating to [the] use of force." JA406, 403.

B. Procedural History

1. In September 2017, petitioners filed suit in federal court in Delaware asserting a variety of state law tort claims against defendants. Pet. App. 69a; JA71-163. Petitioners alleged that defendants directed their subsidiary Yanacocha to engage in a campaign of harassment and violence against them. Pet. App. 5a.

2. On April 11, 2018, after extensive briefing and argument and in a detailed 28-page decision, the district court granted defendants' motion to dismiss on FNC grounds. Pet. App. 65a-100a. The court made clear at the outset that defendants "bear the burden of persuasion at every stage of this analysis, against the backdrop of a generally 'strong presumption' in favor of the plaintiff's choice of forum." *Id.* at 75a (citations omitted).

The district court first considered petitioners' argument that defendants' "improper influence over the Peruvian judiciary renders the forum inadequate." *Id.* at 78a. "That contention," the court explained, "can be broken down into two theories, one alleging widespread corruption rendering the entire Peruvian judicial system inadequate, and another more narrow theory arguing that Peru is inadequate only as to these parties based upon specific evidence of judicial corruption pertaining to them." *Id.* at 81a.

The district court noted that theories of "generalized corruption" that would result in a foreign sovereign's courts being deemed categorically inadequate have "'not enjoyed a particularly impressive track record.'" *Id.* (citation omitted). And the court stressed that "every federal court to consider the issue ha[d] found Peru to be an adequate forum." *Id.* at 84a (citing cases). The court nonetheless "consider[ed] the general evidence [petitioners] submitted," as "background for the more particularized allegations . . . to support the second theory." *Id.* at 81a-82a.

As to those more particularized allegations, the district court addressed "three discrete episodes." *Id.* at 83a. The court explained that the first allegedly occurred "some 18 years ago," around the time the

regime of former president Alberto Fujimori "imploded," and that there had been "interim regime change and noted improvements since." *Id.* at 84a. The second was documented only in a declaration from petitioners' own Peruvian attorney, who claimed the "Peruvian legal system has been unresponsive to [petitioners'] claims, but solicitous of Yanacocha's claims." *Id.* at 85a. The court explained that such "concern[s]" were "mitigated by the fact that [judgments against petitioners were] overturned by the court of appeals on two occasions and the Peruvian Supreme Court subsequently upheld that ruling." *Id.* "Plaintiffs were [thus] ultimately protected by the very judicial system they ask [the court] to deem inadequate." *Id.*

And the third was based entirely on an account of one of the petitioners who said that, during a criminal trial, the judge "apologized" and told her that "'the company gave an "economic benefit" to the prosecutor.'" *Id.* at 85a-86a (citation omitted). "Even taking these facts at face value," the court found it "noteworthy that it was the court that brought this instance of apparent corruption to [petitioners'] attention." *Id.* at 86a. The court found this evidence insufficient to support a finding that "Peru is an inadequate forum for [petitioners], particularly in light of the success [petitioners] experienced in the appellate courts." *Id.*

The district court also found ample reason to "question whether Yanacocha's influence over the Peruvian government is as strong as [petitioners] assert," *id.*, including the Peruvian government's "responsiveness to local opposition" to the mining operation, which directly contravened the "core premise of [petitioners'] argument." *Id.* at 86a-87a.

The court accordingly held that the record did not support a finding that the Peruvian courts were not an adequate forum for petitioners' claims.

The district court next turned to the question whether defendants had "met their burden of showing that the private and public interest factors weigh heavily in favor of th[e] case being tried in Peru." *Id.* at 99a. The court noted that the case was "focus[ed] on multiple discrete encounters replete with complex factual disputes, many of which involve third parties, including local authorities." *Id.* at 76a. Because "an overwhelming majority of the evidence and relevant witnesses appear to be in Peru, along with potential parties," and because "the parties' factual disputes have centered on events in Peru," the court concluded that the private interest factors "tilt decidedly in favor of Peru." *Id.* at 93a-94a.

On the public interest factors, the court "agree[d]" that the fact that the "alleged torts occur[ed] in Peru, the Peruvian government's efforts to address th[e] dispute thus far, and the [ongoing] case before the Peruvian judiciary concerning the underlying land dispute," meant "that Peru ha[d] an overwhelming interest in th[e] matter." *Id.* at 96a. The court also noted that it was "readily apparent that there w[ould] be multiple contested issues of Peruvian law"—including the validity of defendants' possessory defense—that would be more fit for resolution in the Peruvian courts. *Id.* at 99a. The court thus found that the public interest factors likewise "weigh[ed] heavily in favor of trial in Peru." *Id.* at 95a.

In the end, the district court granted the motion without prejudice and subject to three conditions: (i) defendants "submit to the jurisdiction of the appropriate court in Peru, and that [the] Court . . .

accept jurisdiction"; (ii) defendants "stipulate that any judgment entered in Peru qualifies as legally adequate under Delaware law, including 10 Del. Code. § 4803(b)"; and (iii) defendants "not directly, or indirectly through their subsidiaries and affiliates in Peru, raise objection to any of [d]efendants' officers or employees testifying or providing evidence relevant to the claims asserted by [petitioners], whether such evidence is sought here or in Peru." Pet. App. 63a-64a.

3. Petitioners appealed to the Third Circuit. Petitioners did not challenge the district court's weighing of the public and private interest factors. They argued only that the Peruvian forum was purportedly too corrupt to be adequate and that the district court had erred in holding otherwise.

On March 20, 2019, in an unpublished decision, the Third Circuit remanded to the district court based on "changed factual circumstances." *Id.* at 54a-62a. Specifically, while the case was pending on appeal, a "supervening corruption scandal . . . ha[d] prompted the Peruvian judiciary and Peru's Congress to declare a state of emergency." *Id.* at 55a-56a. The panel noted that the district court had "meticulously reviewed the then-existing record," "engaged in a rigorous analysis," and set forth "its reasoning in a thorough and thoughtful opinion." *Id.* at 57a, 62a. But the panel remanded for the district court "to reevaluate whether Peru is an adequate alternative forum in light of" the then-recent scandal. *Id.* at 55a-56a. And it instructed the district court, on remand, to apply the burden framework set forth by the Eleventh Circuit in *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001). Pet. App. 61a-62a.

4. On remand, the parties submitted dozens of additional declarations and exhibits. *See* JA68-70. The new evidence focused primarily on the recent developments in Peru—which did not involve defendants—including a corruption scandal known as the "White Collars of the Port." Pet. App. 28a-31a.

On March 10, 2020, after considering this voluminous record as supplemented and holding a second hearing, the district court dismissed again—in another detailed 25-page decision. *Id.* at 16a-51a. The court found that defendants had "satisfied [their] ultimate burden to show that Peru is an adequate alternative forum." *Id.* at 37a-39a.

The district court explained that "the Peruvian government swiftly prosecuted the main actors of the White Collars of the Port case and instigated further reforms in the wake of the scandal, demonstrating commitment to ensuring that such corruption does not repeat." *Id.* at 40a. The court further noted that "the White Collars of the Port case did not involve Cajamarca or the types of claims raised by [petitioners], and is geographically distant, thus discounting the probability that the scandals" would result in petitioners receiving an unfair hearing. *Id.* The court explained that the "Peruvian government appears to have taken appropriate steps to address the scandals," and "the political instability resulting from [them] seems to have calmed." *Id.* at 43a. And, finally, the court found it significant that petitioners had "received favorable decisions from every level of the Peruvian court system, including during the pendency of the White Collars of the Port scandal." *Id.* at 46a.

Because defendants had "carried [their] burden to demonstrate that Peru is an adequate alternative

judicial forum," and "the other *forum non conveniens* [factors] remain[ed] in favor of dismissing this case," the district court granted the motion to dismiss, "subject to the various conditions attached to the [initial] Order." *Id.* at 18a, 50a.

5. A new panel of the Third Circuit affirmed in another unpublished decision. The court of appeals rejected petitioners' argument that defendants "must 'conclusively' demonstrate Peru is an adequate alternative forum." *Id.* at 7a. "[A] defendant," the court explained, "is required only to 'persuade' the court that the alternative forum is adequate." *Id.* at 7a-8a (citation omitted). The court also rejected petitioners' contention that a "district court [must] construe all disputed facts in a plaintiff's favor." *Id.* at 8a. To do so, the court reasoned, "would . . . effectively make it impossible for a defendant to ever 'persuade the District Court that the facts are other[]'" than what a plaintiff says they are. *Id.* at 8a-9a (citation omitted).

Turning to the facts, the court of appeals explained that while petitioners had identified "serious allegations of corruption," those allegations "did not involve the judiciary in Cajamarca, and the alleged corruption was associated with claims far different from [petitioners']." *Id.* at 9a. Echoing the district court, the court of appeals added that Peru had "enacted several reforms, . . . political instability ha[d] calmed, and many wrongdoers [were] being prosecuted." *Id.* The court further explained that the "Peruvian government" had "responded to [petitioners'] concerns with Newmont's Conga Mining Project," and that petitioners had "prevailed in Peruvian courts against Newmont and Yanacocha,"

"undercut[ing] the argument that Peru's judiciary cannot fairly adjudicate [their] case." *Id.*

The Third Circuit ultimately held that the district court had "provided a thoughtful and comprehensive analysis of the evidence before it," and "acted within its discretion by giving more weight to [defendants'] evidence." *Id.* at 10a.

6. Petitioners filed a petition for rehearing en banc. The court of appeals denied rehearing without dissent and without calling for a response. Pet. App. 102a-103a.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to grant review of two legal questions: (i) whether the standard of proof for adequacy disputes should be "clear and convincing" evidence, and (ii) whether FNC dismissal should be precluded when the suit is in the defendant's "home forum." There is no circuit split on either question. The court of appeals' unpublished decision is intensely factbound and correct. And this case is a terrible vehicle for the Court's review regardless. Petitioners did not press and the court of appeals did not rule on either question. Nor does this case provide any opportunity for the Court to clarify the asserted confusion surrounding the FNC doctrine more generally. Further review is not warranted.

I. REVIEW IS NOT WARRANTED ON THE STANDARD OF PROOF QUESTION

A. There Is No Circuit Conflict

Petitioners assert that there is "at least a three-way circuit conflict on how to address a forum's adequacy." Pet. i. Specifically, petitioners contend that some courts of appeals require a defendant to

show adequacy by "clear and convincing evidence," while others apply a "preponderance of the evidence" standard or place the burden on plaintiffs to show inadequacy. Pet. 19, 21. Petitioners are wrong.

Far from a deeply entrenched split, the circuits are aligned on the general standards that apply to an FNC adequacy inquiry. The courts of appeals agree that the defendant bears the burden of proving adequacy; that establishing inadequacy on grounds of corruption should be rare; and that deference is due to the district court's assessment of the facts. In all three respects, the decision below is consistent with every other court of appeals. And this petition presents no opportunity to resolve purported confusion about other areas of FNC law. There is no circuit conflict warranting this Court's review.

1. The purported circuit conflict between a "clear and convincing" and "preponderance" standard is one of petitioners' own making. Petitioners largely rely on cases that have nothing to do with corruption. And they take words and phrases from those decisions out of context. No court has expressly considered, let alone adopted, a "clear and convincing" standard.

a. Petitioners first assert that the First, Seventh, and D.C. Circuits have adopted a "clear and convincing standard" by using the phrase "heavy burden" in the context of discussing what a defendant must show to obtain an FNC dismissal. Pet. 18 (citing *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)). To equate "heavy burden" with a "clear and convincing" standard, petitioners rely on two of this Court's cases. But those decisions simply note that a "clear and convincing" standard *is* a

"heavy burden." *See id.* (citing *Schneiderman v. United States*, 320 U.S. 118, 135 (1943); *Florida v. Georgia*, 141 S. Ct. 1175, 1180 (2021)). The fact that a "clear and convincing" standard is itself a heavy burden does not mean that every time a court uses the words "heavy burden," it tacitly adopts a "clear and convincing" standard.

Nor could a "heavy burden" standard create any conflict with the decision below. For one thing, the Third Circuit also requires defendants to meet a "heavy burden" when opposing a plaintiff's choice of forum. *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991). As this Court has explained, the reason for that "heavy burden" is the deference normally due to a plaintiff's choice of forum. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007). That deference, however, applies with considerably "less force" when (as here) the plaintiff sues in a foreign forum. *Id.* (citation omitted). And it has little to do with whether the foreign forum is not adequate due to alleged corruption, the only matter at issue here.

Which is perhaps why none of petitioners' cases apply the "heavy burden" standard in the context of alleged corruption. In *Deb*, the defendants failed to "offer *any* evidence that they would be subject to jurisdiction in India, but rather simply conclude[d] without reasoning, law, or concessions that India is an adequate alternative." 832 F.3d at 811. *Adelson* had nothing to do with adequacy at all; the First Circuit reversed based on a balancing of public and private interest factors and the deference due to a *United States citizen's* choice of forum. 510 F.3d at 53-54. And in *Simon*, the D.C. Circuit held that the district court "misallocated the burden of proof" by

"task[ing] the [plaintiffs] with proving that Hungary was not a proper forum" without actually analyzing the available remedies. 911 F.3d at 1184-85.

b. Petitioners next argue that the Fourth, Fifth, and (again) D.C. Circuits "apply slightly different formulations that also approximate a clear and convincing standard." Pet. 18. That too is incorrect.

Petitioners claim that "[t]he 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)." Pet. 18-19. Neither case so held.

In *Jiali Tang*, the Fourth Circuit affirmed a decision holding that China *was* an adequate forum. The "convincingly meet their burden" language is a (mis)quote from the district court decision, about the public and private interest factors (not adequacy); it describes the conclusion that the defendants "convincingly met their burden of demonstrating that the private and public interest factors at issue favor the Chinese forum and disfavor litigation in the District of Maryland." *Jaili Tang*, 656 F.3d at 250 (citation omitted). The "substantial evidence" language at least relates to adequacy. But the court only used that phrase to describe (i) the evidence submitted (*i.e.*, it was in fact "substantial"), and (ii) the standard of *review* (*i.e.*, "substantial evidence supports the district court's finding"). *Id.* at 251.

Galustian did not adopt an elevated burden for adequacy either. Rather, in providing "guidance" to the district court, the Fourth Circuit stated that a

defendant "has the burden to 'provide enough information to the District Court' to demonstrate that the alternative forum is both available and adequate." *Galustian*, 591 F.3d at 731 (citation omitted). And the "serious questions" language was descriptive: there were "serious questions" as to whether the Iraqi forum offered a remedy for the plaintiff's claim and the defendants' evidence "fell short" of establishing that it did. *Id.* at 732.

As to the Fifth Circuit, petitioners cite a footnote in *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540 (5th Cir. 1991), for the proposition that "[t]he Fifth Circuit similarly requires the 'defendant to put forth unequivocal, substantiated evidence.'" Pet. 19. But that was in the context of a defendant who had "presented no affidavits and provided only unsworn allegations." *Baris*, 932 F.2d at 1549. The sentence accompanying the cited footnote explains that while "'a moving defendant need not submit overly detailed affidavits to carry its burden, . . . it "must provide enough information to enable the district court to balance the parties[] interests."'" *Id.* at 1550 (citations omitted). And the remainder of the *Baris* opinion makes clear that the Fifth Circuit merely requires a defendant to submit affirmative *evidence*. *Id.* at 1549-50.

Even petitioners seem unclear about where the D.C. Circuit falls in their manufactured split—counting them twice. But *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (D.C. Cir. 1996), adds nothing to *Simon*. In *El-Fadl*, the court explained that the defendant's evidence needed to be sufficient for the district court to make a "sound determination." *Id.* at 677 (citation omitted). The evidence was insufficient because it did not address Jordanian law suggesting

the courts would not be open to the plaintiff's claim. *Id.* at 677-78. And the court remanded so the defendant could supplement its evidence to respond to that concern. *Id.* Notably, the court also emphasized that "general allegations of corruption in the judicial system," and the plaintiff's "repeated reliance on a State Department report expressing 'concern about the impartiality' of the Jordanian court system," was "unavailing." *Id.* at 678.[2]

c. Petitioners next contend that the Second Circuit "charts a middle path." Pet. 19. But contrary to petitioners' contention, *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan* (*BCCI*), does not require a "definitive finding" that a forum is adequate. 273 F.3d 241, 247-48 (2d Cir. 2001). The question was whether a district court could condition dismissal on a foreign court exercising jurisdiction without first examining whether jurisdiction might be an issue. *Id.* And the Second Circuit held that a district court need only have a "justifiable belief" that there will not be a jurisdictional issue before granting a conditional dismissal. *Id.* at 248. The word "definitive" appears once: "the district court may dismiss on [FNC] grounds, despite its inability to make a definitive finding as to the adequacy of the foreign forum, if the court can protect the non-moving

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[2] Petitioners also quote *Simon* for the notion that defendants must "'show convincingly' and 'affirmatively prove'" adequacy. Pet. 19 (citation omitted). The "show convincingly" language is part of a critique of the district court for *misplacing* the burden on the plaintiff, and a defendant *does* have to "affirmatively prove" (*i.e.*, prove with evidence) that "an adequate remedy exists." *Simon*, 911 F.3d at 1184-85 (citation omitted).

party by making the dismissal conditional." *Id.* at 247-48.

d. Petitioners also argue that the Ninth, Sixth, and Tenth Circuits "require plaintiffs to bear the ultimate burden." Pet. 19-20. But every case cited actually placed the "ultimate burden" on defendants.

The Ninth Circuit in *Tuazon v. R.J. Reynolds Tobacco Co.*, made clear that it was the *defendant* who "b[ore] [the] burden in establishing the Philippines as an adequate forum." 433 F.3d 1163, 1178 (9th Cir.), *cert. denied*, 549 U.S. 1076 (2006). And the court held that "the paltry evidence offered by [plaintiff did] not defeat *[the defendant's] showing* of adequacy." *Id.* at 1179 (emphasis added).

Petitioners say that the Sixth Circuit "appears to take a similar approach." Pet. 20 (citing *Jones v. IPX Int'l Equatorial Guinea, S.A.*, 920 F.3d 1085, 1091 (6th Cir. 2019)). But *Jones* contains no discussion of the burden allocation or the standard of proof. It holds only that, on the facts of the case, "the district court did not abuse its discretion when concluding that Equatorial Guinea is an adequate forum." 920 F.3d at 1091. And the Sixth Circuit has made clear that it is "the defendant [who] carries the burden of establishing an adequate alternative forum." *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 492 (6th Cir. 2016).

The Tenth Circuit in *Gschwind v. Cessna Aircraft Co.*, likewise affirmed that "the defendant bears the burden of proving that an adequate alternative forum exists." 161 F.3d 602, 606 (10th Cir. 1998), *cert. denied*, 526 U.S. 1112 (1999). The court simply held that the defendant had shown—on the specific facts

of the case—that a remedy in France was available and adequate.

e. Petitioners finally place the Third and Eleventh Circuits in a category all their own, having adopted a "burden-shifting" approach that imports a "preponderance of the evidence" standard. Pet. 21. This description at least has the virtue of being partially accurate. Unlike the other courts of appeals, the Eleventh Circuit did consider the appropriate approach to relative burdens—in the context of corruption allegations—and adopted a framework whereby the burden of production (but not persuasion) shifts depending on whether the plaintiff comes forward with "significant evidence" of corruption, "so severe as to call the adequacy of the forum into doubt." *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001). The Third Circuit, in the unpublished decision below, adopted the same framework. *See* Pet. App. 6a-7a, 61a. But neither court specifically discussed the appropriate "standard of proof" in terms of "clear and convincing" or "preponderance of the evidence."

2. The reality is that the circuits are aligned on the general adequacy framework. They place the ultimate burden on defendants to establish that an alternative forum is adequate. *See, e.g.*, *Leon*, 251 F.3d at 1312 ("[D]efendants have the ultimate burden of persuasion . . . ."); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 189 (2d Cir. 2009) ("[T]he defendant bears the ultimate burden of persuasion as to the adequacy of the forum."). They recognize that it will be rare for a district court to find that another sovereign's judicial system is so corrupt that there is essentially no remedy for the plaintiff at all. *See, e.g.*, *Tuazon*, 433 F.3d at 1179 ("We are aware of only one other

federal case to hold that an alternative forum was inadequate because of corruption."); *El-Fadl*, 75 F.3d at 678 ("A foreign forum is not inadequate merely . . . because of general allegations of corruption . . . ."); *Blanco v. Banco Indus. de Venezuela, S.A.,* 997 F.2d 974, 981 (2d Cir. 1993) (rejecting argument that Venezuelan courts are "so endemically . . . corrupt as not to provide an adequate forum"). And they vest substantial discretion in the district court to resolve the highly individualized, fact-intensive questions that arise in the adequacy inquiry. *See, e.g.*, *Jiali Tang*, 656 F.3d at 248 (district court's decision deserves substantial deference); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1236 (9th Cir. 2011) (same), *cert. denied*, 569 U.S. 946 (2013).

The decision below fully comports with these general principles. And petitioners fail to identify a *single* case where a court of appeals has reversed a district court in comparable circumstances. They cite a handful of cases in which an appellate court reversed on adequacy grounds; in every one, the defendant submitted no or virtually no affirmative evidence or the district court wrongly placed the burden on the plaintiff to prove inadequacy. No such error occurred here. And notably too: none of petitioners' cases involved a finding that the foreign forum was not adequate because of corruption. The district court's decision would have been affirmed in *any* circuit in which it was brought.

3. Without any cognizable circuit conflict on the limited question presented, petitioners resort to highlighting purported confusion about FNC law more generally. Tellingly, petitioners' own amici identify four areas of confusion in FNC doctrine—but *none* involves either adequacy or corruption. *See*

Legal Scholars Amicus Br. at 4-12.[3] And many of the law review articles on which petitioners rely similarly have nothing to do with the question presented here.[4] This petition presents the Court with no opportunity to resolve whatever confusion may exist in other areas of FNC law or to otherwise revisit FNC doctrine.

B. The Factbound Decision Below Is Correct

This Court does not grant review to correct factbound errors in lower court decisions. But there is not even error here. The Third Circuit correctly affirmed the district court's conclusion that the Peruvian courts are adequate to adjudicate petitioners' claims in this case, despite petitioners' allegations of corruption.

The question before the Third Circuit was a narrow one. Petitioners did not appeal the district court's determination that the private and public

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[3] The amicus brief also seems to think that petitioners are United States citizens, rather than foreign plaintiffs. Legal Scholars Amicus Br. at 16-17 (arguing that in "a case like this one, *where both the plaintiff and defendant are domestic*, the only relevant considerations to decide the defendant's motion [should] be the choice of law and enforceability of judgment factors" (emphasis added)).

[4] *See, e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 826 (2008); Peter B. Rutledge, *With Apologies to Paxton Blair*, 45 N.Y.U. J. Int'l L. & Pol. 1063, 1075 (2013). As for the articles that do address adequacy, none suggest any confusion or meaningful divergence between the courts of appeals on the corruption issue. *See, e.g.*, 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, 542 (2009) (noting that the "evidence" suggests "that district courts are less likely to find foreign forums adequate in countries with ineffective and corrupt governments").

interest factors "weigh heavily in favor of trying this case in Peru." Pet. App. 94a-95a. For good reason: the gravamen of this action is a Peruvian land dispute "focuse[d] on multiple discrete encounters replete with complex factual disputes," that would require application of Peruvian law, and that implicate parallel proceedings in Peru about the same issues. *Id.* at 76a.

The only issue on appeal was whether the district court abused its discretion in dismissing the case on FNC grounds because the Peruvian courts are allegedly too corrupt to adjudicate the case fairly. The Third Circuit correctly rejected that argument. As the court of appeals explained, "the District Court provided a thoughtful and comprehensive analysis of the evidence before it, including [petitioners'] expert declarations," and "acted within its discretion by giving more weight to [defendants'] evidence and concluding that Peru currently provides an adequate alternative forum." *Id.* at 9a-10a.

Petitioners state without elaboration (at 28) that "[n]o one could look at Peru right now and say it assures anyone a fair forum" and that "the judicial corruption in Peru, and the political crises it spawned, combined with [defendants'] participation in corruption, is . . . extraordinary." But those conclusory assertions just ignore the district court's careful fact-finding. For example, as the Third Circuit explained, the district court considered the facts that (i) "Peru has enacted several reforms . . . [and] political instability has calmed"; (ii) "the White Collars of the Port case did not involve the judiciary in Cajamarca, and the alleged corruption was associated with claims far different from [petitioners]"; and (iii) petitioners "have prevailed in

Peruvian courts against Newmont and Yanacocha," "undercut[ting] the argument that Peru's judiciary cannot fairly adjudicate [petitioners'] case." *Id.* at 9a. Indeed, while this case was pending on appeal, petitioners again prevailed in a Peruvian court against Yanacocha in a case involving some of the very same claims. ECF No. 44-2 at 14-15. Petitioners have never been able to explain how a court system that has repeatedly ruled in their favor—at every level of the judiciary—can be so egregiously corrupt *against* them as to warrant a finding that it is not adequate on corruption grounds.

Nor do petitioners persuasively counter the very serious comity concerns such a finding would raise. Petitioners seek, in essence, a judicial declaration that the courts of Peru are so corrupt that they are incapable of providing a remedy in this case. That would be a remarkable condemnation of the Peruvian judicial system. And it would have significant ramifications for international comity. United States courts should not be in the business of declaring a foreign forum corrupt absent truly extenuating circumstances not present here. And the Third Circuit rightly refused to declare the Peruvian courts endemically corrupt based on the extensive evidence in the record proving otherwise.[5]

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[5] Petitioners point to "so-called 'retaliatory blocking' statutes" as evidence that FNC dismissals themselves raise comity concerns. Pet. 33 (citation omitted). But those statutes have no relevance here. While certain smaller Latin American nations—such as Nicaragua, Ecuador and Guatemala—have codified that their courts cannot accept jurisdiction following an FNC dismissal, Peru has *not*. *See* Jena A. Sold, *Inappropriate Forum or Inappropriate Law? A Choice-of-Law Solution to the*

Petitioners do not meaningfully engage with the Third Circuit's (or the district court's) assessment. And they do not come close to identifying any error—let alone one serious enough to warrant the Court's intervention.

C. This Case Is A Poor Vehicle

This case is also an exceedingly poor vehicle for several reasons.

First, the decision below is unpublished and non-precedential. The panel's decision accordingly creates no new law, much less law that conflicts with that of another circuit.

Second, petitioners' arguments in this Court materially depart from those pressed and passed on below. In the first appeal, petitioners agreed that a burden-shifting framework akin to the Eleventh Circuit's approach in *Leon*, 251 F.3d at 1312, was appropriate. *See* Pet'rs' Br. 26 n.3 (CA3 No. 18-2042 filed Aug. 15, 2018); *see also* Pet'rs' Reply 4 (CA3 No. 18-2042 filed Oct. 12, 2018). And in the second appeal, petitioners never argued the Third Circuit had erred in embracing *Leon*. CA3 Br. 26-28, ECF No.

Jurisdictional Standoff Between the United States and Latin America, 60 Emory L. Rev. 1437, 1455 n.123 (2010) (noting that "many larger, more developed countries, including Argentina, Brazil, Chile, and Mexico, do not have blocking statutes in place and have not construed their national codes to conflict with the FNC doctrine in the United States"). The existence of "blocking statutes" in certain *other* Latin American countries is no indication that Peru would prefer the United States to exercise jurisdiction in this case. Nor does it diminish the obvious comity concerns that would arise from a United States court (especially this Court) expressing broad condemnation of the entire Peruvian judicial system.

18. Petitioners cannot now say the Third Circuit got it wrong by adopting that framework.

And while petitioners also argued that the district court had to reach a "'conclusive'" or "'definitive'" judgment, before the panel, petitioners only briefly equated that with a "clear and convincing" standard of proof in one sentence in their reply brief. *See* Pet'rs' CA3 Br. 26-27 (citation omitted); Pet'rs' CA3 Reply Br. 4, ECF No. 27-1. And petitioners never suggested that other courts of appeals had adopted such a heightened standard for adequacy. The closest petitioners came was to rely on the Second Circuit's "definitive finding" language in *BCCI*. Pet'rs' CA3 Br. 28 (citation omitted). The only support they offered for a "conclusive" judgment standard was a district court decision. *Id.* (citation omitted). In rejecting *that* argument, the Third Circuit had no opportunity to address any of the dozen or so cases petitioners now say (incorrectly) establish an entrenched, three-way split.

As this Court has said time and again, it is a court of review, not first view. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). If review of the standard of proof were warranted at all, this would not be the right vehicle. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence" dictates "awaiting . . . the benefit of . . . lower court opinions squarely addressing the question."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (absent "exceptional" circumstances, this Court does not review "questions not pressed or passed upon below" (citation omitted)).

Third, this case is exceptionally fact-bound. Review would turn on this Court's assessment of thousands of pages of documents and testimony, developed over the course of several years, and

regularly supplemented as circumstances in Peru changed. Where, as here, "[b]oth courts below hav[e] agreed on the facts," this Court does not "examine the record for [itself] absent some extraordinary reason for undertaking this task." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *see also Glossip v. Gross*, 576 U.S. 863, 882 (2015). This petition calls for precisely the kind of second-guessing of considered factual findings that this Court has traditionally refrained from undertaking.

And, *finally*, many of petitioners' policy and doctrinal arguments are misplaced. For example, petitioners raise concerns about "[b]oomerang [l]itigation," where a defendant contests enforcement of an adverse foreign judgment after an FNC dismissal. Pet. 34-35. But the district court here imposed conditions on dismissal—including that defendants "submit to the jurisdiction" of the Peruvian courts and "stipulate that any judgment entered in Peru qualifies as legally adequate under Delaware law." Pet. App. 15a. And as noted above, this petition provides no opportunity for the Court to resolve any broader issues about FNC doctrine. *See supra* at 20.

II. PETITIONERS' OTHER QUESTION PRESENTED IS SPLITLESS, UNPRECEDENTED, AND WAIVED

Petitioners separately request review of whether "the *forum non conveniens* doctrine permit[s] dismissal from a defendant's presumptively fair and convenient home forum when the adequacy of the foreign forum preferred by defendant is in question." Pet i. In other words, petitioners appear to advocate for a rule that the FNC doctrine does not permit

dismissal of claims filed in a defendant's home forum—even where all the public and private interest factors favor trial in the alternative forum—if there is an adequacy dispute.

Petitioners do not appear to contest that *no* court has ever adopted such a rule. Nor would such a rule make sense. The FNC doctrine calls for a careful weighing of the public and private interest factors to determine whether a case should be tried in the plaintiff's chosen forum or in an available and adequate alternative forum. But, under petitioners' rule, even when there is an alternative forum where trial would be more appropriate on every public and private interest factor, a district court is disabled from dismissing the case if adequacy is disputed (as it often is). That approach would conflict with this Court's precedents, which have long permitted FNC dismissals where a defendant is sued in its home forum. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (Pennsylvania corporation sued in Pennsylvania court). And there is no reason for this Court to grant review to consider a rule that no court has adopted—or even considered.

Petitioners attempt to locate this novel requirement in *Daimler AG v. Bauman,* 571 U.S. 117, 137 (2014). They argue that, "[s]ince *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,'" Pet. 31 (alteration in original) (quoting *Chavez v. Dole Food Co.*, 836 F.3d 205, 223 (3d Cir. 2016)), and that, "[i]n 'exchange,'" petitioners should be "afforded '"recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims,"'" *id.* (quoting Maggie Gardner,

Retiring Forum Non Conveniens, 92 N.Y.U. L. Rev. 390, 433 (2017)). That free-wheeling policy argument has no home in this Court's personal jurisdiction or FNC precedents.

If petitioners are arguing that the defendants' home forum should have some bearing on the FNC analysis, it already does. The public and private interest factors account for any conveniences associated with the defendant's "home." But petitioners did not appeal the district court's balancing determination and they would be hard-pressed to argue that defendants' place of incorporation should be dispositive on the Peru-centric facts of this case.

If petitioners are instead asking this Court to chart a new path and preclude application of the FNC doctrine so long as general personal jurisdiction exists, that is a big ask—and one they are in no position to make. Petitioners did not make this argument before the Third Circuit panel. It is clearly waived. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992). And it was not passed on below. *See Yee*, 503 U.S. at 538.

CONCLUSION

The petition for a writ of certiorari should be denied.

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