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, 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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondents' own argument provides a compelling case for this Court's intervention. They deny the circuits are divided on the standard for assessing the adequacy of a foreign forum by noting that all circuits agree defendants bear the burden of proof. The circuits, however, conflict on the question presented: what *standard* of proof must courts apply? Indeed, the court below specifically rejected the Second Circuit's demanding standard in favor of a lenient one. And those conflicts are outcome-determinative, as this case highlights. But even if Respondents were right that there is unanimity, the "standard" they say governs everywhere is so general as to grant district courts virtually unfettered discretion. Whether there are diverging standards or no standard, the lower courts desperately need this Court's guidance.

A clear and specific adequacy standard is particularly necessary since the *forum non conveniens* ("FNC") doctrine gives district courts the unusual authority to decline cases over which Congress provided venue and jurisdiction. This is especially so where the defendant is sued at home, since declining jurisdiction in such cases extends FNC beyond its historical reach. District courts wielding such extraordinary and ahistorical common law power should be constrained by well-defined rules.

The questions presented are important and recurring. They arise whenever courts are asked to dismiss to a forum that is potentially inadequate for any reason. Respondents' argument that this case is a poor vehicle are meritless. The questions presented

are purely legal, and Respondents' refrain that the Third Circuit issued a fact-bound decision ignores that it decreed a legal standard. Indeed, *every* FNC determination is fact-bound, *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988); if that precluded review, this Court could never address the legal standards that govern FNC.

Given the undisputed and extreme problems in the alternative forum, as Peru has recognized, this is an ideal vehicle for resolving the legal questions presented. This Court should grant *certiorari* to bring much-needed order to the adequacy inquiry.

I. The circuits are split regarding the adequacy standard.

To argue that the circuits apply a uniform standard for assessing a forum's adequacy, Respondents latch on to the lowest common denominator, oversimplifying the conflicting case law to mask genuine and important disagreements.

The purportedly uniform standard they identify – that defendants bear the burden of proof, BIO 12 – is so vague as to be meaningless. Respondents argue there is also agreement that the circuits afford district courts deference in assessing the facts, and that defendants should only "rare[ly]" fail to meet their burden when it comes to corruption concerns, *id.*, but that makes matters worse. Together, those principles provide district courts little guidance and maximum discretion to abdicate their jurisdiction. If this is really the "standard," that is a reason to grant review, not deny it.

Merely saying that defendants bear the burden of proof elides the real question; it says nothing about what defendant's burden actually requires.[1] Judges and scholars have struggled with the lack of clarity inherent in "burden of proof" for centuries. 21B Charles Alan Wright & Arthur Miller, *Fed. Prac. & Proc.* § 5122 (2d ed.); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) ("The term 'burden of proof' is one of the slipperiest . . . of legal terms") (cleaned up). Within this broad concept, courts have distinguished burden of production from burden of persuasion and established a hierarchy of standards for what the burden entails. 21B Wright & Miller, *supra* § 5122. These are the very issues this petition presents, and about which circuits are split.

Contrary to Respondents' argument, some circuits have tried to provide guideposts, leading to divergent approaches as to how defendant's burden is applied and what it requires. *See* Pet. 18. Respondents discount the specific standards circuits have announced. *See* BIO 12-16 (arguing that circuits were equivocal when using language such as "definitive,"

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[1] The *Amici* Legal Scholars emphasize that lack of clarity on defendants' burden contributes to inconsistency and incoherency in FNC jurisprudence. *Brief of* Amici Curiae *Legal Scholars in Support of Petitioners*, No. 21-33, at 8-9.

"convincingly," "unequivocal," or "sound determination").[2] But noting, for example, that the Second Circuit only used the word "definitive" once, BIO 17, does not change that it required district courts to make a "definitive finding" of adequacy. *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. State Bank of Pak. ("BCCI"),* 273 F.3d 241, 247-248 (2d Cir. 2001).

Similarly, Respondents fail to explain away the Fifth Circuit's "require[ment]" that a defendant present "unequivocal" evidence. *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1550 n.14 (5th Cir. 1991); BIO 15. That case's facts do not alter the court's standard, and the suggestion that *Baris* just requires defendants to submit affirmative evidence reads the "unequivocal" requirement out of the decision.

While Respondents overlook the standards these circuits apply, Respondents' standardless standard is not an unfair description of the Third Circuit's approach below, nor that of the Ninth, Sixth, and Tenth Circuits. As Respondents admit, some of these cases "contain[] no discussion of the burden allocation or the standard of proof." BIO 17 (discussing *Jones v. IPX Int'l Equatorial Guinea, S.A.*, 920 F.3d 1085, 1091 (6th Cir. 2019)). That's exactly the problem. In these circuits, the standard of proof is so low and ill-defined, that the burden essentially flips to plaintiffs. Pet. 19-20.

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[2] Respondents' argument that the Third Circuit has previously placed a "heavy burden" on defendants, *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 613 (3d Cir. 1991), BIO 13, only further highlights the confusion.

To be sure, the circuits have not been a model of clarity in articulating their standards – that itself warrants intervention. But to the extent these standards are discernable, they sharply diverge. Pet. 16-21. Indeed, the Panel below expressly held that it would *not* require the Second Circuit's "definitive finding," but "only" a lesser showing that merely "persuades" the court. App. 7a. The different standards lead to different outcomes in different places. If the Third Circuit had required Respondents to "definitively" or "unequivocally" meet their burden, as the Second and Fifth Circuits would have, FNC dismissal would have been denied. *Infra* 11-12.[3]

The divergence in standards – and failure of certain circuits to apply any cognizable standard – is intolerable. Courts may only rarely decline their jurisdiction, *infra* 7-8, and cannot dismiss to a foreign forum unless that forum is adequate. The discretionary, "highly individualized, fact-intensive," BIO 19, nature of an FNC analysis requires clear standards to guide decision-making.

II. This case is an excellent vehicle for resolving the split.

Given the undisputed facts regarding the judicial corruption crisis in Peru (including Cajamarca), the extreme nature of that crisis as recognized by the Peruvian government, and Petitioners' showing that

[3] Although the Ninth, Sixth, and Tenth Circuits effectively reverse the burden, Petitioners likely would have prevailed in those circuits too, because the district court found plaintiffs met their burden. Pet. 19-20; App. 39a.

they would have prevailed under these facts in other circuits, this case presents an ideal vehicle. Respondents' contrary arguments, BIO 23-25, are unpersuasive.

First, that the decision below was unpublished "carries no weight in [this Court's] decision to review." *C.I.R. v. McCoy*, 484 U.S. 3, 7 (1987); *see*, *e.g.*, *Dunn v. Reeves,* 141 S. Ct. 2405, 2407 (2021) (reviewing unpublished decision). If anything, because the decision *should* have been published – it established a Circuit rule, "involve[d] a legal issue of continuing public interest," and conflicted with other circuits – the fact that it was not is "another reason to grant review." *Plumley v. Austin*, 574 U.S. 1127, 1131-32 (2015) (Thomas, J., dissenting from denial of certiorari).

Second, Respondents' claim that Petitioners' legal standard argument was not adequately presented or squarely addressed, BIO 23-24, would be news to the Third Circuit. The appropriate standard was the first question presented and was fully briefed by both parties. Pet'rs' CA3 Br. 22-23, 26-31 (CA3 No. 20-1765, ECF No. 18); Resp's' CA3 Opp. 18-23 & n.1, 25-27 (ECF No. 22); Pet'rs' CA3 Reply Br. 2-4, 8-9 (ECF No. 27-1). The Third Circuit recognized that Plaintiffs, citing *BCCI*, "assert that Newmont must 'conclusively' demonstrate Peru is an adequate alternative forum," and held that "Plaintiffs are incorrect." App. 7a-8a.

Respondents concede this, but complain that Petitioners did not cite *all* of the cases establishing the circuit split. BIO 24. That would often be true; in the circuits, litigants do not focus on detailing the breadth of a circuit split. This is not a serious objection.

Third, review does not require this Court to examine the record. BIO 24-25. The questions presented address the *legal standard* for assessing a forum's adequacy, not its application to the facts. This Court regularly determines the proper legal standard, and then remands so that lower courts can apply it. *E.g.*, *Lange v. California,* 141 S. Ct. 2011, 2024-25 (2021); *Caniglia v. Strom*, 141 S. Ct. 1596 (2021).

III. Petitioners' first Question Presented highlights the need for this Court's intervention.

The first question asks whether the fact that a defendant is sued at home affects a court's ability to dismiss to a questionable forum. Pet. i. Respondents argue this has "no home" in this Court's personal jurisdiction or FNC jurisprudence. BIO 27. They are wrong, and without action by this Court, the FNC doctrine will continue to spiral off course.

Respondents do not refute that under *Daimler* and *Goodyear*, a defendant's home forum is presumptively convenient and an appropriate place for it to defend "any and all claims." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). Yet Respondents urge that district courts should be free to reconsider this determination at their discretion – even when the adequacy of the alternative forum is in question. This makes little sense.

Permitting courts to dismiss from a defendant's home without strict guidance is extremely problematic. FNC is an unusual, if not radical, doctrine that grants district courts authority to abdicate jurisdiction (and venue, *see* 28 U.S.C. § 1391) Congress has specifically provided. That is the last

circumstance in which this Court should tolerate a discretionary test lacking clear standards.

Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction Congress created. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see Cohens v. Virginia*, 19 U.S. 264, 404 (U.S. 1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. [Both] would be treason to the constitution."); *Zivotofsky v. Clinton*, 566 U.S. 189, 194, (2012) ("[T]he Judiciary has a responsibility to decide cases properly before it, even those it would gladly avoid.") (cleaned up). Courts may only abandon their jurisdiction in "exceptional circumstances." *Colo. River*, 424 U.S. at 813. Thus, *Piper* instructed that FNC dismissals must be rare, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981), although as an empirical matter, they are now anything but. Dismissal from a defendant's home forum when the foreign forum has serious adequacy issues contravenes this Court's instruction that abdicating jurisdiction requires exceptional circumstances.

Such dismissals are also inconsistent with this country's historical approach to transitory torts, *see McKenna v. Fisk*, 42 U.S. 241, 248-49 (1843) (holding tortfeasor may be sued wherever found), and the FNC doctrine's original scope. Pet. 28-30. Moreover, forcing parties to re-litigate the convenience of defendant's home forum – often, as here, for years – undermines the efficiency and convenience that the FNC doctrine and this Court's recent personal jurisdiction jurisprudence promotes. Indeed, when the forum's

adequacy is doubtful, both sides wage this fight as if the ultimate outcome depends on it, because it does. Pet. 23-24.

Petitioners are aware of no doctrine that affords district courts as much discretion to decline jurisdiction as FNC, to vindicate an interest as slight as convenience. This Court should set ground rules about whether or when defendants may escape suit at home in favor of a questionable alternative, rather than leaving the issue to the circuits' vague and conflicting approaches.

Respondents' assertion that Petitioners' position is unprecedented ignores cases rejecting dismissal from a defendant's home to a forum that is "no forum at all." *E.g.*, *Manu Int'l, S.A. v. Avon Prods., Inc.,* 641 F.2d 62, 67 (2d Cir. 1981). And concerns about courts' free-wheeling discretion to usurp statutorily vested jurisdiction are as old as this Court's recognition of the doctrine. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 516-517 (1947) (Black, J., dissenting); *see also* Legal Scholars Amicus Br. 1-3, 13. Respondents also miss the point: this Court's clarifications of general personal jurisdiction law are recent, and it should consider their effect on the FNC doctrine.

That *Piper* permitted FNC dismissal for an at-home defendant does not mean that the practice makes sense today, or is permissible to a flagrantly corrupt forum. "[T]he central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient." *Piper*, 454 U.S. at 256. *Daimler* and *Goodyear* resolved this question for at home defendants. And *Piper* did not address the issue at bar: the appropriate *standard* for determining a foreign

forum's adequacy, when suit is brought in the defendant's home or otherwise. Nor has this Court done so in the 40 years since.

Respondents are also incorrect that Petitioners never raised this issue below. *See* Pet'rs' CA3 Pet. for Reh'g at 16-17 (App. ECF 52) (arguing dismissal from Respondents' home forum is inconsistent with *Daimler*); Pet'rs' Opp. to Resp's' *Forum Non Conveniens* Mot. at 10 (D. Del. No. 17-1315, ECF 43) (same). Unlike in *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992), the issue was presented in the Petition for Certiorari. Regardless, the issue is properly presented because it is simply an additional argument for the position Petitioners have always maintained: dismissal is impermissible because the foreign forum is inadequate. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

IV. The Third Circuit's decision is wrong.

This is the rare case in which the foreign forum acknowledged rampant corruption in its courts, essentially declaring itself to be inadequate. Pet. 10, 13. In dismissing anyway, the Third Circuit reached the wrong result because it applied the wrong standard. Departing from circuits that require a high standard of proof, including a "definitive" adequacy finding, the Third Circuit erroneously held that a district court may dismiss if it is merely "persuade[d]" that the foreign forum is adequate. App. 7a.

Petitioners do not challenge "factbound errors." BIO 20. Indeed, "[e]ven Newmont, 'for the most part, do[es] not take issue with [Plaintiffs'] general descriptions' of [this] corruption." App. 39a (quoting

ECF 107 at 6). The Panel acknowledged that judicial corruption remains ongoing. App. 11a; Pet. 13-15.

Petitioners would have prevailed in other circuits based on undisputed facts or those the lower courts found. As the district court recognized, "Peruvian governmental entities declared five times that various other Peruvian governmental entities were in states of emergency" based on "an expansive network of corruption involving high-level Peruvian judges and judicial officials." App. 29a-31a.[4] This unprecedented judicial corruption crisis, confirmed by Peruvian authorities, precludes a definitive finding of adequacy. Yet the Third Circuit's permissive standard allowed dismissal despite the district court "remain[ing] concerned" about Petitioners' ability to get a fair hearing in Peru. App. 18a.

Petitioners also presented largely uncontested evidence of corruption in Cajamarca courts. Indeed, the Panel noted the fact that there were eight judicial corruption cases in Cajamarca. App. 11a. Moreover, the district court recognized as "concerning" and "troubling" sworn statements detailing "multiple examples of suspicious behavior in criminal proceedings involving Plaintiffs," App. 22a, including that Respondents gave an "'economic benefit' to the prosecutor to bring the case against Plaintiffs." App. 23a.

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[4] Following the district court's decision, the president Respondents credited with championing reform was overthrown in what Respondents called a "coup d'état." Resp's' CA3 Mot. for Judicial Notice at 7 (App. ECF 44); Resp's' CA3 Opp. at 60 (App. ECF 22).

This precluded a definitive finding of adequacy. While the district court's concerns "were mitigated in part" by Plaintiffs' "success . . . in appellate courts in . . . criminal proceedings," App. 23a; App. 45a; *see also* BIO 2-3, 22, mitigating such troubling concerns "in part" does not allow a definitive adequacy finding. Pet'r's CA3 Br. 16-18 (ECF No. 18).

At bottom, the courts below accepted that Peru was adequate based on the *possibility* of Plaintiffs prevailing. But under the proper standard, it need not be the case that plaintiffs can *never* win. Respondents needed to show that the forum is *fair*; *i.e.* that the case *will* be decided on the merits – despite undisputed evidence of extraordinary corruption.

Respondents' suggestion that finding inadequacy would raise unspecified "ramifications for international comity" conflicts with *Piper*'s requirement that the forum be adequate. BIO 22; 454 U.S. at 254-55 and n.22. Regardless, comity concerns are absent where, as here, the foreign government acknowledges the problem. Pet. 10, 12-13, 34; *Amicus* Brief of Antonio Maldonado Paredes, at 3-4, 6-10, 17. And courts reject FNC dismissal on adequacy grounds, albeit rarely, *e.g.*, *Eastman Kodak Co. v. Kavlin*, 978 F. Supp. 1078, 1085-86 (S.D. Fla. 1997), without comity effects. Similarly, courts refuse to recognize foreign judgments "rendered under a judicial system that does not provide impartial tribunals," Restatement (Third) of The Foreign Relations Law of the United States § 482(1)(a) (1987), without "ramifications." Comity concerns do not justify distorting the proper analysis. Indeed, when another government admits its courts are in crisis, our courts should take them at their word.

If Peru's courts are adequate despite its government acknowledging runaway corruption, it is hard to see what system could ever be deemed inadequate. This Court should grant review to ensure the circuits apply a uniform standard that guarantees a hearing in a fair court.

CONCLUSION

The FNC doctrine affords district courts roving discretion to renounce their jurisdiction. But district courts lack clarity regarding when they may dismiss to a foreign forum that may provide no forum at all.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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