No.

IN THE

Supreme Court of the United States

KRISTEN BEHRENS, ET AL.,

Petitioners,

v.

ARCONIC, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MARK A. DICELLO
Counsel of Record
DICELLO LEVITT LLC
Western Reserve Law Building
7556 Mentor Avenue
Mentor, Ohio 44060
Phone: 440-953-8888
madicello@dicellolevitt.com

JEFFREY P. GOODMAN
SALTZ MONGELUZZI & BENDESKY P.C.
1650 Market Street, 52nd Floor
Philadelphia, Pennsylvania 19103

ADAM J. LEVITT
JOHN E. TANGREN
DICELLO LEVITT LLC
Ten North Dearborn Street
Sixth Floor
Chicago, Illinois 60602

Counsel for Petitioners

QUESTIONS PRESENTED

(1) Should this Court extend its holding in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) and hold that where a foreign plaintiff has made a well-supported claim for punitive damages against an American corporation for American-based punitive conduct which caused harm abroad, the unavailability of a punitive remedy in an alternative forum shall weigh against dismissal of the case for *forum non conveniens*?

(2) If a district court finds that there is a well-supported claim for punitive damages arising out of American-based punitive conduct but determines that the case should be dismissed for *forum non conveniens*, is the court permitted to implement a return-jurisdiction condition on its dismissal allowing for the punitive damages claim to ultimately be tried in the United States?

PARTIES

Petitioners are the estates of sixty-nine men, women, and children who perished in the 2017 Grenfell Tower fire tragedy in London, England, through the appointed Administratix, Kristen Behrens, as well as 176 survivors who were injured during the tragedy.

The respondents are Arconic, Inc. and Arconic Architectural Products, LLP (collectively "Arconic"), and Whirlpool Corporation ("Whirlpool"). Arconic is an American corporation that has called Pennsylvania home for over a century. Arconic has designed, manufactured, and sold products on a worldwide scale from its home in Pennsylvania since 1888. Arconic exerted direct and total control over its France-based subsidiary, non-party Arconic Architectural Products SAS ("AAP SAS"), which manufactured and sold Reynobond, the specific exterior cladding product that caused the immense harm suffered by petitioners in this case.

Respondent Whirlpool is a Delaware corporation with its headquarters located in Benton Harbor, Michigan. Whirlpool is the successor to the manufacturer of the fridge-freezer that started the Grenfell Tower fire.

DIRECTLY RELATED CASES

Behrens v. Arconic, Inc., et al., No. 20-3606, Third Circuit Court of Appeals, judgment entered October 7, 2022.

Behrens v. Arconic, Inc., et al., No. 2:19-cv-02664-MMB, Eastern District of Pennsylvania, judgment entered November 23, 2020.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Petitioners Kristen Behrens, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on July 8, 2022.

OPINIONS BELOW

The July 8, 2022 opinion of the court of appeals, which is published at 2022 WL 2593520, is set out at App. 1 of the Appendix. The September 16, 2020 opinion of the district court, which is reported at 487 F. Supp. 3d 283, is set out at App. 24 of the Appendix. The November 23, 2020 decision of the district court, which is reported at 502 F. Supp. 3d 931, is set out at App. 165 of the Appendix. The October 7, 2022 order denying rehearing *en banc* is set out at App. 185 of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on July 8, 2022. A timely petition for rehearing *en banc* was denied on October 7, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1332(a) and (d).

STATEMENT OF THE CASE

Petitioners seek punitive damages, which are unavailable in the United Kingdom. Although the district court found that petitioners' punitive damages claim was well-supported by substantial evidence, it erroneously held that this Court's holding in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) foreclosed it

from considering and weighing the availability of punitive damages in the *forum non conveniens* analysis. The district court acknowledged that had it been permitted to consider this, "the decision very well may have been a denial of Defendants' Motion to Dismiss."

I. Factual Background

Grenfell Tower was a twenty-five-story, 220-foot-tall high-rise apartment building in West London containing over 100 flats. In the early morning hours of June 14, 2017, a fire broke out in Flat 16 when a defective Whirlpool Fridge-Freezer, model FF175BP, malfunctioned and ignited. The fire spread through the kitchen and exited the kitchen window where it reached the Tower's exterior façade. This façade, from Floors 4-23, was constructed with Reynobond 55 PE 4mm Smoke Silver Metallic E9107S DG 5000 Washcoat ("Reynobond PE"). Reynobond PE is an exterior cladding material that consists of two aluminum composite panels with a highly flammable polyethylene (plastic) core and was designed and manufactured by Arconic. The initial fire would have been readily containable within Flat 16 had the entire building not been encased in Arconic's ultra-flammable Reynobond PE.

The fire first ignited the Reynobond PE cladding at approximately 1:14 a.m. The cladding acted as fuel for the fire and exacerbated the spread of the fire to such a dramatic extent that by 1:26 a.m., a mere twelve minutes later, the fire had raced up nineteen floors to Level 23. By 4:03 a.m., the North, South, East, and West facades of Grenfell Tower were engulfed in flames and nearly all of the Flats had internal fires.

Ultimately, the fire raged for more than sixty hours, claimed seventy-two innocent lives, and devastated the lives of hundreds more.

In 2019, Petitioners brought suit in the United States in Arconic, Inc.'s home forum—Pennsylvania—seeking to hold Arconic, Inc. responsible for the immense harm inflicted by its dangerous and defective Reynobond PE product. Petitioners brought only strict products liability and punitive damages claims. Petitioners did not bring any claims for negligence.

The Reynobond PE at the center of Petitioner's product liability claims was designed and patented in the United States, and all decisions related to its continued existence on the marketplace originated from the United States. Under the supervision and direction of the United States-based Arconic entities, their foreign subsidiary AAP SAS manufactured and sold the particular Reynobond PE that was installed on Grenfell Tower.

During the course of discovery ordered by the district court related to respondents' motion to dismiss for *forum non conveniens*, egregious conduct of the United States-based Arconic entities (*i.e.*, the named defendants in the litigation) was uncovered.

Arconic, Inc.'s internal documents demonstrated that Arconic, Inc. was aware of the dangerous and flammable nature of its Reynobond PE product and that the product could not be used on high-rise buildings, and specifically could not be used on Grenfell Tower. Recognizing that Reynobond PE was unfit and dangerous for use on exterior facades,

Arconic, Inc. knew that a less flammable alternative design needed to be developed and implemented. In 2015, AAP SAS whistleblower Claude Wehrle emphatically wrote in an email to his superiors that "PE is dangerous in facades, and everything should be transferred to FR [(Fire Resistant)] as a matter of urgency[,]" and that Reynobond PE "should have been discontinued over 10 years ago!" [*Behrens v. Arconic, Inc., et al.*, No. 20-3606, Third Circuit Court of Appeals, Doc 24 at p. 4-5]. Mr. Wehrle also gave insight into his belief as to why Reynobond PE had not been discontinued despite the extreme fire risk when he wrote that, "[t]his Opinion is technical and anti-commercial, it seems…." Mr. Wehrle had provided similar warnings four years earlier. *Id.*

Arconic elected to make the commercial decision rather than the safe one, kept a product on the market that it knew had a propensity to dramatically exacerbate high-rise fires, and continued to market this product for high-rise use. This led to AAP SAS supplying Reynobond PE for use on the façade of the high-rise Grenfell Tower—the precise use that Mr. Wehrle warned them was too dangerous.

Discovery further revealed that Arconic, Inc. refused repeated requests to develop a safer, less flammable version of Reynobond, called Reynobond A2, for purely financial reasons. Arconic delayed and pushed off repeated requests for authorization to develop Reynobond A2 despite knowing that the market needed to move away from Reynobond PE to the safer Reynobond A2. *Id at* p. 5. As early as 2012, AAP SAS submitted Requests for Authorization to Arconic, Inc. noting the need for development of a safer alternative product because fire safety laws

were changing and Reynobond PE was not fit for high rise installation, whereas an alternative design, *i.e.*, Reynobond A2, was appropriate, code compliant, and safe. Arconic, Inc. declined to approve the request to undertake development of Reynobond A2 until November 2015, after all the Reynobond PE had been sold to Grenfell Tower. *Id.*; *see also* App. 80-82

Tragically, Arconic, Inc.'s profit-driven delay in allowing the development of a safer, less flammable alternative product to Reynobond PE resulted in Grenfell Tower being encased in highly flammable plastic, the ignition of which "produces a flaming reaction more quickly than dropping a match into a barrel of petrol[.]"[1] Arconic, Inc.'s United States-based decisions and conduct resulted in the immeasurable suffering of seventy-two decedents and their families and hundreds of survivors.

The control exercised by the United States-based Arconic entities over all decision making related to the sale and supply of Reynobond PE was supported by the testimony of Professor Kenneth Lehn, Ph.D., former Chief Economist of the Securities and Exchange Commission, who concluded that, as a matter of economics, Arconic's French subsidiary, AAP SAS, and its sale and supply of Reynobond PE, was controlled by United States-based Arconic. App. 66-67. Arconic's control over the manufacture and sale of Reynobond PE was also supported by Manny D. Pokotilow, Esq., an intellectual property expert. Mr.

---

[1] Estelle Shirbon, London's Grenfell Tower was a death trap wrapped in 'petrol', inquiry hears, June 5, 2018, https://www.reuters.com/article/uk-britain-fire-cladding/londons-grenfell-tower-was-a-death-trap-wrapped-in-petrol-inquiry-hears-idUKKCN1J123V.

Pokotilow explained that because Arconic, Inc. owned the trademark for Reynobond, federal law required Arconic, Inc. to control the manufacturing operations of AAP SAS. *Id.* at 64-66.

The district court found the evidence produced related to United States-based punitive conduct so overwhelming that the court stated:

> Plaintiffs have justifiably emphasized that if Arconic (and, possibly, Whirlpool) are liable, then under well-established Pennsylvania law this may be an appropriate case for punitive damages. The factual foundation for Plaintiffs' position is the fairly substantial evidence that has been uncovered demonstrating that Arconic's managers in Pennsylvania and elsewhere in the United States delayed approving a request from Arconic's French subsidiary AAP SAS to develop, manufacture, and sell a more fire-retardant version of Reynobond, specifically Reynobond A2, on grounds that its development was too expensive. If the factfinder were to adopt Plaintiffs' contentions in this regard, and further find that the more fire-retardant cladding had been made available for the Grenfell Tower and if purchased and installed, would have prevented all or even a considerable part of the deaths and injuries, Arconic would be liable for punitive damages under Pennsylvania law.

App.80.

II. Proceedings in the District Court

On June 6, 2019, petitioners filed an action against Arconic, Inc., AAP LLC, Whirlpool, and Saint-Gobain Corporation[2] in the Pennsylvania Court of Common Pleas, Philadelphia County, asserting strict product liability, wrongful death, and punitive damages claims. No claims for negligence were advanced.

Respondents removed the case to the Eastern District of Pennsylvania on June 19, 2019 under 28 U.S.C. § 1332(d)(11). On August 29, 2019, respondents filed two motions to dismiss: one pursuant to Fed. R. Civ. P. 12(b)(6), and the other for *forum non conveniens* arguing that the case should be dismissed in favor of conducting the litigation in the United Kingdom ("UK"). The district court denied respondents' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on December 20, 2019 (*Behrens v. Arconic, Inc.,* 429 F. Supp. 3d 43 (E.D. Pa. 2019)) and permitted substantial discovery on issues related to *forum non conveniens* and Arconic, Inc.'s corporate control over its French subsidiary, AAP SAS.

Over the course of more than a year, the parties conducted extensive *forum non conveniens* discovery, which went, as Arconic pointed out "beyond what any other court…has ever allowed for *forum non conveniens* discovery[.]" *Behrens v. Arconic, Inc., et al.*, No. 20-3606, Third Circuit Court of Appeals, Doc 24 at p. 20. This robust discovery resulted in the production of numerous expert reports and declarations, including three expert reports on substantive liability

[2] Saint-Gobain Corporation was dismissed in the lower court via stipulation on March 6, 2020.

issues. App.64-68. Virtually all of the discovery was directed at Arconic, Inc. with minimal discovery taking place as to Whirlpool. As discussed above, this discovery revealed substantial evidence of Arconic's United States-based punitive conduct.

After the significant *forum non conveniens* discovery concluded, the district court rendered an opinion on respondents' motion to dismiss on September 19, 2020. A threshold analysis the district court was required to undertake was whether the UK was an adequate alternative forum. App.71-72 (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22 ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.")). In so doing, the district court found that petitioners' products liability and wrongful death claims were cognizable in the UK, but the punitive damages claims were not. App 71-86. The district court characterized the unavailability of punitive damages in the UK as merely a difference in damages, but found that "[t]he difference in available damages is challenging given the evidence that has been discovered in this case." App. 83. The evidence petitioners unearthed concerning the US-based punitive conduct of Arconic, Inc. was so compelling that the district court concluded, "*[i]f this Court were free to consider, as an important FNC factor, that punitive damages as understood in Pennsylvania law are likely unavailable in England, the decision very well may have been a denial of Defendants' Motion to Dismiss.*" App. 84. (emphasis added). The district court concluded that "[h]owever tempting" this might be, "*Piper* expressly forecloses reliance on differences in the availability of damages in the [*forum non conveniens*] analysis." App. 84. Ultimately, the district

court concluded that the UK was an adequate alternative forum.

The second threshold determination required of the district court was the level of deference afforded to petitioners' choice of forum. On the basis of petitioners' foreign citizenship and domicile, the district court held that petitioners' choice of forum would be accorded only moderate deference (less than what would be due to a domestic plaintiff). The district court then engaged in an analysis involving the balancing of private and public interest factors as defined by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The district court concluded that dismissal was warranted because the balance of conveniences favored trial in the UK. App. 160-161. The district court did *not* view the unavailability of a punitive damages remedy as an important consideration because it felt *Piper* foreclosed affording any weight to such a consideration.

While the district court granted respondents' motion to dismiss for *forum non conveniens*, without prejudice, it placed numerous conditions on the dismissal. Relevant here is dismissal condition 2(h), which provides that the litigation could be reinstated in the United States after a more comprehensive liability finding in the UK; specifically:

> If the UK court determines that Pennsylvania law (or the law of another state in the United States) applies to damages and that one or both Defendants may be liable for punitive damages, but decides to grant dismissal of the damages phase without prejudice in the UK for

> determination in the US, Plaintiffs may reinstate this action in this Court.

App. 163. Dismissal condition 2(h) represented the district court's effort to balance the grievous injustice that would ensue by not subjecting the United States-based Arconic to punitive damages for its United States-based conduct which killed 72 people with the court's view that *Piper* foreclosed consideration of this conduct in the *forum non conveniens* inquiry. Condition 2(h) also sought to protect the important interests and policy goals underlying punitive damages. Both petitioners and respondents moved the district court to alter or amend its judgment concerning punitive damages and dismissal condition 2(h). The district court denied the parties' respective motions on November 23, 2020. App. 165.

III. Proceedings in the Court of Appeals

The court of appeals affirmed the vast majority of the district court's judgment and reversed only as to its imposition of dismissal condition 2(h), the return-jurisdiction provision for damages. A majority opinion was authored by Judge Ambro. One judge, Judge Rendell, differed only on the issue of whether the return-jurisdiction dismissal condition was an abuse of discretion. Judge Rendell "conclud[ed] that condition 2(h) is a permissible, albeit unusual, return-jurisdiction provision" and that the district court did not abuse its discretion in imposing it. App. 18.

The court of appeals rejected petitioners' arguments concerning the district court's balancing of the private and public interest factors and also dismissed petitioners' argument that the significant

amount of discovery conducted prior to the district court's ruling on *forum non conveniens* weighed against dismissal under *Lony v. E.I. Du Pont de Nemours & Co.*, 935 F.2d 604 (3d Cir. 1991).

Petitioners argued to the court of appeals, as they did the district court, that the punitive damages claim should either be considered in the *forum non conveniens* analysis or bifurcated and permitted to proceed through discovery and trial in the US. Alternatively, petitioners opposed respondents' request to reverse the district court's imposition of dismissal condition 2(h) as it was necessary to protect the US's and Pennsylvania's strong interests in punishing domestic conduct of US-based corporations.

The court of appeals rejected petitioners' arguments and found that dismissal condition 2(h) was "problematic, because returning the damages proceeding to this forum would entail many of the same inconveniences and inefficiencies prompting the Court to order *forum non conveniens* dismissal in the first place," and the only discernable benefit was than an American jury—rather than a UK court—would get to decide on a damages award. App. 16. The court of appeals likewise dismissed the notion that retaining the punitive damages claim was necessary to protect the strong interests held by the US and Pennsylvania specifically:

> Plaintiffs submit that condition 2(h) is necessary to protect both their punitive damages case and the United States' interest in punishing US-based corporations that engage in punitive conduct. But that condition can only go into effect if the UK court first determines

> that Pennsylvania (or some other state) law applies to damages and that Defendants may be liable for punitive damages (which are not available under English law). And if that court, applying US state law, decides that punitive damages may be available, there is no reason to think it could not determine an appropriate award itself, thereby preserving any interest Plaintiffs and this country may have in ensuring Defendants are punished for their conduct.

App. 17. Ultimately, the court of appeals refused to "endorse a dismissal condition that expressly opens an avenue for the action to return to the United States when the inconvenience and efficiency costs of that return outweigh any potential benefit to the parties." App. 18. The court of appeals issued judgment and an opinion affirming the district court's dismissal for *forum non conveniens* but reversing the imposition of dismissal condition 2(h) on July 8, 2022. Petitioners filed a timely motion for rehearing *en banc* and on October 7, 2022, the court of appeals denied petitioners' motion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve How Punitive Damages Claims Are Treated in a *Forum Non Conveniens* Context.

Rule 10(c) provides that certiorari is appropriate if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with

relevant decisions of this Court." S. Ct. Rule 10(c). This case presents the circumstances that warrant review on this basis.

The district court relied heavily on *Piper* in its *forum non conveniens* analysis, and specifically held that *Piper* precluded the district court from considering the unavailability of punitive damages in the UK as a significant factor in the analysis. The district court held, "[i]f this Court were free to consider, as an important [*forum non conveniens*] factor, that punitive damages as understood in Pennsylvania law are likely unavailable in England, ***the decision very well may have been a denial of Defendants' Motion to Dismiss[,***]" but "[h]owever tempting" this might be, "*Piper* expressly forecloses reliance on differences in the availability of damages in the [*forum non conveniens*] analysis." App. 83-84.

The district court was incorrect on two fronts: (1) the unavailability of punitive damages is not simply a "difference[] in the availability of damages" but instead is a deprivation of a fundamentally distinct remedy designed to punish corporations and deter future punitive conduct; and (2) even if the loss of a punitive damages claim is characterized as simply a "difference[] in the availability of damages[,]" *Piper* does not preclude consideration of this in the *forum non conveniens* analysis. Respectfully, this Court should not allow *Piper* to be contorted into allowing United States-based defendants to escape punitive retribution for their United States-based punitive conduct merely by exporting their deadly products and causing harm abroad. In other words, *Piper* should not so rigidly foreclose a district court from heavily weighing the fact that punitive damages are

unavailable in an alternative forum when those punitive damages are necessary to deter the wrongful conduct of United States-based defendants. Indeed, interpreting *Piper* as the courts below did would allow United States-based defendants to escape punitive damages for United States-based conduct merely by exporting their dangerous products abroad.

Nothing in this Court's *Piper* decision itself requires the inflexibility with which it has been applied in this litigation. The *Piper* plaintiffs were the estates of several Scottish citizens who were killed in a plane crash that occurred in Scotland. 454 U.S. at 239. At the time of the crash, the plane, which had been manufactured in Pennsylvania, was owned by a British company and operated by a Scottish air taxi service. *Id.* The administratrix for the estates of the five deceased passengers brought products liability and negligence claims in the United States and the case was transferred to the Middle District of Pennsylvania. *Id.* at 240. No claims for punitive damages were brought. *Id.* at 240.

The district court in *Piper* engaged in a thorough analysis of the public and private interest factors espoused by this Court in *Gilbert*, 330 U.S. 501, and dismissed for *forum non conveniens*. *Piper*, 454 U.S. at 242–44. The plaintiffs contended that the district court should retain the case because dismissal would lead to an unfavorable change in the law, including damages law. *Id.* at 244. The district court rejected this and held that an unfavorable change in the law did not deserve significant weight. *Id.* at 244. The Third Circuit disagreed and reversed, holding, in part, that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.

Id. at 244. The plaintiffs never brought a claim for punitive damages, so neither the district court nor the Third Circuit addressed how such a claim should be treated in the *forum non conveniens* inquiry.

This Court reversed, finding that the Third Circuit erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. *Id.* at 247. This Court ultimately held that, "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.*

This Court also found that the court of appeals' decision was inconsistent with earlier *forum non conveniens* decisions in that the prior decisions "have repeatedly emphasized the need to retain flexibility." *Id.* at 248. Flexibility is the hallmark of the *forum non conveniens* doctrine. The *Piper* Court stated that "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." 454 U.S. at 249–50.

Importantly, this Court was clear that it was *not* holding that an unfavorable change in law could never be considered and, in fact, there are circumstances in which an unfavorable change in law could properly be given substantial weight:

> We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non*

> *conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that the dismissal would not be in the interests of justice.

Id. at 254. In *Piper*, this Court found that the inability to rely on a strict liability theory and the potential reduction of plaintiff's *compensatory* damages awards did not fall into this category because "there is no danger that [plaintiffs] will be deprived of any remedy or treated unfairly." *Id.* at 255. However, the *Piper* Court did not address the situation in which facts supporting a punitive damages claim were clearly developed and such a claim was indisputably unavailable in the alternate forum. As a result, this Court should hold that in cases where United States-based corporations have engaged in punitive conduct within the United States resulting in harm abroad, a district court must consider the unavailability of punitive damages in a foreign forum as a weighty factor when engaging in the *forum non conveniens* inquiry.

Petitioners respectfully submit that the flexibility engrained in the *forum non conveniens* doctrine is the primary reason *Piper* has not been disturbed. When this Court decided *Piper* in 1981, transatlantic discovery involved the enormous inconvenience of shipping crates of physical documents, and remote depositions were decades away. However, modern technological advances have rendered cross-border discovery far more efficient and convenient than anyone could have imagined in 1981. To wit, during

the *forum non conveniens* discovery in the district court in the instant case, over 100,000 pages of documents and a massive amount of associated metadata was electronically transferred from France to Petitioners' counsel's United States offices in a matter of minutes. In 1981, these documents would have been physically printed, packed into boxes, and shipped across the Atlantic. This Court's convenience-based considerations underlying *Piper* are, for the most part, inapplicable or largely outdated under modern technology.

The modern product market is more globalized than ever, and United States-based manufacturers are exporting significantly more products abroad today than in 1981.[3] With the monumental increase in efficiency and convenience of cross-border litigation brought about by modern technology, United States-based product designers and manufacturers who ship dangerous and defective products abroad should not be permitted to use *Piper* as a shield against claims premised on their United States-based conduct. Petitioners respectfully submit that if *Piper* were decided today, the Court's discussion of the inconveniences associated with cross-border litigation would look far different.

In *Piper*, this Court was clear that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given

---

[3] *See* U.S. Exports 1970-2022, macrotrends, available at https://www.macrotrends.net/countries/USA/united-states/exports (showing just over $300 billion in United States exports in 1981, versus over $2 trillion in United States exports in 2020).

substantial weight[]" and that in such circumstances, "the district court may conclude that dismissal would not be in the interests of justice." 454 U.S. at 254. Despite the district court below finding that "if dismissal is granted and this case is refiled in England, Plaintiffs will be unable to pursue a punitive remedy[,]" the district court felt that *Piper* expressly foreclosed its ability to assign substantial weight to, or even so much as consider, this deprivation of a remedy in its analysis. App. 83-84 ("If this Court were free to consider…that punitive damages as understood in Pennsylvania law are likely unavailable in England, the decision very well may have been a denial of Defendants' Motion to Dismiss[]" but "[h]owever tempting, *Piper* expressly forecloses reliance on differences in the availability of damages in the [*forum non conveniens*] analysis.")].

By affirming the vast majority of the district court's judgment, the court of appeals reinforced the district court's improper reading of *Piper* and declined to squarely address the impact of punitive damages in the *forum non conveniens* context. The court of appeals further exacerbated the district court's error by reversing dismissal condition 2(h), which the district court implemented to protect the United States' and Pennsylvania's strong interests in punishing US-based punitive conduct. It is apparent that both the district court and the court of appeals concluded that the unavailability of punitive damages in the UK was not a consideration that could be afforded *any* weight in the *forum non conveniens* analysis, based on an erroneous belief that *Piper* foreclosed such a consideration. Confirming the controlling law around this topic is a critical issue of federal law. Given the extent to which United States

products are sold abroad in modern society, ensuring that United States-based producers are not able to use *Piper* to shield themselves from punitive liability is more important now than ever.

The lower courts in this case are not alone in their misunderstanding that *Piper* forecloses assigning significant weight to the deprivation of a punitive damages claim in the *forum non conveniens* analysis. *See de Melo v. Lederle Laboratories, Div. of American Cyanamid Corp.*, 801 F.2d 1058, 1061 (8th Cir. 1986) (holding that the district court did not abuse its discretion in assigning no weight to the fact that dismissal would result in depriving the plaintiff of her punitive damages claim); *Prevent USA Corporation v. Volkswagen AG*, 17 F.4th 653, 664 (6th Cir. 2021) (holding that even when the alternative forum does not allow for punitive damages, "as long as the forum provides some remedy" it is adequate); *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1310 (11th Cir. 2001) (holding that the unavailability of punitive damages in Ecuador "was of no moment" because the potential for a smaller damage award could not be a basis for denial of a *forum non conveniens* motion). Like these other courts, the district court and court of appeals here viewed punitive damages as merely an additional category of damages available in the US but not in other jurisdictions. Therefore, according to these courts, the inability to proceed with a punitive damages claim in a foreign jurisdiction is the very type of unfavorable change in the law which *Piper* holds cannot be assigned significant weight. This type of consistent misapplication of *Piper* endangers lives by eliminating the deterrence value of punitive damages for United States-based companies in circumstances where they export their dangerous

products abroad. This cannot possibly be the intention of the Court in *Piper*.

Treating punitive damages as simply an additional category of available damages—like different categories of compensatory damages—ignores the unique nature and underlying fundamental public policy goals of punitive damages. In Pennsylvania, like in most states, punitive damages may be awarded "if the defendant has acted in an outrageous fashion due to either the defendant's evil motive or his reckless indifference to the rights of others." *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005). Punitive damages "heap an additional punishment on a defendant who is found to have acted in a fashion which is particularly egregious." *Id.* at 446. The goal of punitive damages is "to punish the tortfeasor for outrageous conduct and to deter him or others like him from similar conduct." *Hutchison ex rel. Hutchison v. Luddy*, 870 A.2d 766, 770 (Pa. 2005).

The paramount interests at play when considering compensatory damages are those of the plaintiff, *i.e.*, what is required to make the plaintiff whole? Yet the paramount interests at play when considering punitive damages are those of a particular state or, in some cases, the United States. Of course, the United States and each state have legitimate and strong interests in punishing unlawful and punitive conduct of its domestic corporations, especially when such unlawful or punitive conduct occurs on home soil. Punitive damages are an important mechanism through which the conduct of domestic corporations is regulated. Indeed, this Court has explicitly held that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing

unlawful conduct and deterring its repetition." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)).

Although *Piper* states that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry," 454 U.S. at 247, this Court explicitly left open an avenue through which an unfavorable change in law could be (and should be) considered and even assigned significant weight—when the change in law amounts to the deprivation of a remedy:

> We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice.

Id. at 254 (emphasis in original). When dismissal for *forum non conveniens* results in the inability to pursue a punitive damages claim, as is the case here, the result is not simply a smaller damages award; the result is the complete frustration of Pennsylvania's interest in regulating its domestic corporations by punishing unlawful and punitive conduct which occurred domestically. The "remedy" sought through

punitive damages is punishment and deterrence. Here, it is indisputable that the UK forum does not permit a punitive damages claim App. 81-82. Thus, the remedy provided by the UK forum, as to punitive damages, "is so clearly inadequate or unsatisfactory that it is no remedy at all," and under *Piper*, the district court could have (and should have) assigned "substantial weight" to petitioners' punitive damages claim. 454 U.S. at 254.

With near unanimity, courts have ignored discussion of the "legitimate interests in punishing unlawful conduct and deterring its repetition[]" held by a particular state or by the United States as a whole in the *forum non conveniens* context. *Gore*, 517 U.S. at 568. Instead of treating punitive damages as the unique regulatory hammer they are, courts have lumped punitive damages together with other categories of compensatory damages when analyzing *forum non conveniens*. When a particular state's law provides a certain framework for how a plaintiff will be compensated in order to make the plaintiff whole (*i.e.*, how compensatory damages are provided), but a foreign alternative forum has chosen to provide compensatory damages differently, *Piper* is properly applied to foreclose assigning significant weight to this change in the law. As long as the fundamental goal of compensatory damages (making the plaintiff whole) is achieved, the plaintiff is not denied a remedy and the change in law, albeit unfavorable, deserves no weight in deciding *forum non conveniens*.

The same cannot be said when dismissal for *forum non conveniens* would result in the deprivation of a punitive damages claim. There can be no dispute that a state (and the United States as a whole) has a

legitimate and strong interest in punishing unlawful and punitive conduct of its domestic corporations. This is especially true when the unlawful or punitive conduct occurs domestically – as it did in this case. Yet, if a district court dismisses a case for *forum non conveniens* and the alternative forum does not permit punitive damages, the unlawful or punitive conduct of a domestic corporation will go unpunished, future similar conduct will be undeterred, and the state's interests will be thwarted.

When dismissing for *forum non conveniens* would destroy the United States' ability to punish US-based punitive conduct of US-based corporations, district courts should be permitted (in fact, required) to assign significant weight to this deprivation in the analysis. However, district courts and courts of appeals have routinely interpreted *Piper* as precluding their ability to do this. Punitive damages serve a unique and important purpose and such claims—especially where they are well supported and concern domestic punitive conduct—should be given unique treatment in the *forum non conveniens* analysis. Petitioners respectfully submit that this Court should grant the writ to resolve whether a district court may assign significant weight to a punitive damages claim in the *forum non conveniens* context.

II. The Court of Appeals Erred in Striking the District Court's Return-Jurisdiction Dismissal Condition.

The district court struggled greatly with its perceived inability to assign significant weight to petitioners' punitive damages claim in its *forum non conveniens* analysis. The court stated that, "[t]he

difference in available damages is challenging given the evidence that has been discovered in this case." App. 83. While the district court erred in failing to directly weigh petitioners' punitive damages claim for the reasons stated, it sought to protect Pennsylvania's, the United States', and petitioners' punitive interests by instituting novel dismissal condition 2(h). Regardless of how this Court rules on whether the district court is permitted or even required to directly weigh petitioners' punitive damages claim in the *forum non conveniens* inquiry, it is clear that the court of appeals erred in reversing the district court's dismissal condition 2(h). Although dismissal condition 2(h) was novel, the district court did not abuse its discretion in implementing it.

Dismissal conditions imposed by a district court are reviewed for abuse of discretion. *See, e.g.*, *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1234–35 (9th Cir. 2011). "[T]he district court is accorded substantial flexibility in evaluating a forum non conveniens motion, and '[e]ach case turns on its facts.'" *Delta Air Lines, Inc. v. Chimet, S.p.A.*, 619 F.3d 288, 294 (3d Cir. 2010) (quoting *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988)). A court may attach conditions to its dismissal, among other reasons, where needed "to preclude the possibility that defendants in a *forum non conveniens* dismissal are not insulated from the plaintiff's claims in the foreign forum." *Oxley v. Wyeth Labs., Inc.*, No. 91-1285, 1992 WL 185590, at *2 (E.D. Pa. July 23, 1992). Indeed, district courts within the Third Circuit have long exercised authority to require key conditions to protect plaintiffs' claims when granting *forum non conveniens* dismissal—this practice is not novel. *Acuna-Atalaya v. Newmont Mining Corp.*, 308 F.

Supp. 3d 812, 827 (D. Del. 2018); *Winex, Ltd. v. Paine*, No. 89-2083, 1990 WL 121483, at *9 (E.D. Pa. Aug. 15, 1990) (Shapiro, J.); *Bastas v. Atl. Maritime Enters. Corp.*, No. 86-6962, 1988 WL 48547, at *3 (E.D. Pa. May 13, 1988) (Shapiro, J.); *Abiaad v. Gen. Motors Corp.*, 538 F. Supp. 537, 544 (E.D. Pa. 1982) (Weiner, J.)).

Pennsylvania law also supports the district court's ability to impose dismissal conditions it deemed just and necessary to protect petitioners' claims.[4] Under Pennsylvania law, courts are statutorily authorized to "stay or dismiss [a] matter in whole or in part on any conditions that may be just" "when [it] finds that in the interest of substantial justice the matter should be heard in another forum." 42 Pa. C.S. § 5322(e). Indeed, many Pennsylvania trial courts have placed conditions on dismissals without prejudice. *L.M. v. MacBello*, No. 985 EDA 2012, 2013 WL 11266921, at *1 (Pa. Super. Dec. 22, 2014); *Shears v. Rigley*, 623 A.2d 821, 826 (Pa. Super. 1993).

The district court's imposition of return-jurisdiction dismissal condition 2(h) was novel, but the district court viewed it as necessary to protect petitioners' claims and the legitimate state interest in punishing punitive conduct because the district court believed it could not directly account for the punitive damages claim in the balancing of *forum non conveniens* factors. The court of appeals noted the novelty of dismissal condition 2(h) and concluded that,

---

[4] Pennsylvania substantive law is relevant here as petitioners' claims were brought exclusively under Pennsylvania common law and the case was removed to the district court solely by virtue of the Class Action Fairness Act.

because "condition 2(h) does not operate like any other dismissal condition currently authorized by the case law[,]" the district court abused its discretion in imposing it. App. 15.

Instead of constraining its review to whether there was an abuse of discretion, the court of appeals substituted its own discretion for that of the district court. The court of appeals stated that it would not "endorse a dismissal condition that expressly opens an avenue for the action to return to the United States when the inconvenience and efficiency costs of that return outweigh any potential benefit to the parties." App. 18. The district court, not the court of appeals, was in the position to consider and evaluate the balance of conveniences associated with its own dismissal condition under the facts of the case. It is well-settled that district courts are "accorded substantial flexibility in evaluating a forum non conveniens motion, *Van Cauwenberghe*, 486 U.S. at 529, and the hallmark of the *forum non conveniens* doctrine is flexibility. The court of appeals stripped the district court of its flexibility by holding that, just because a dismissal condition like 2(h) had never been implemented before, it was an abuse of discretion.

Importantly, the court of appeals was divided on this issue. The court of appeals opinion notes that, "Judge Rendell would conclude that condition 2(h) is a permissible, albeit unusual, return-jurisdiction provision, and that, in any event, the District Court…did not abuse its discretion in imposing it." App. 18. Petitioners respectfully submit that Judge Rendell is correct.

The court of appeals further posited that a UK court could, if it chose, apply US punitive damages law and determine an appropriate award itself. App. 17. The scenario discussed by the court of appeals still leaves open the likely possibility that a UK court will not decide to delve into the US punitive damages law and will not determine if the defendant's conduct warrants punitive damages. Under such a treatment of punitive damages in a *forum non conveniens* analysis, US-based unlawful or punitive actions by US-based corporations would go unpunished and undeterred. US corporations would be incentivized to engage in profit-driven punitive conduct as long as the harm inflicted by such conduct occurs abroad. When US-based corporations engage in US-based punitive conduct that causes devastation and suffering abroad, those harmed should be able to rely on the US justice system to inflict punishment on the defendant's home soil. Relying on other jurisdictions to potentially satisfy the strong US interest in punishing and deterring unlawful or punitive conduct will inevitably result in such conduct going unpunished and undeterred.

The court of appeals stripped the district court of the flexibility it is ordinarily afforded in the *forum non conveniens* analysis by striking dismissal condition 2(h). Although dismissal condition 2(h) is novel, the district court did not abuse its discretion in implementing it.

III. This Case Presents an Excellent Vehicle for Resolving the Questions Presented.

This case presents an excellent vehicle for deciding the questions presented. The treatment of punitive

damages in the *forum non conveniens* inquiry under *Piper* was addressed squarely by the district court below and affirmed by the court of appeals. The punitive damages claim in this case is well supported. The district court found:

> The factual foundation for Plaintiffs' position is the fairly substantial evidence that has been uncovered demonstrating that Arconic's managers in Pennsylvania and elsewhere in the United States delayed approving a request from Arconic's French subsidiary AAP SAS to develop, manufacture, and sell a more fire-retardant version of Reynobond, specifically Reynobond A2, on grounds that its development was too expensive. If the factfinder were to adopt Plaintiffs' contentions in this regard, and further find that the more fire-retardant cladding had been made available for the Grenfell Tower and if purchased and installed, would have prevented all or even a considerable part of the deaths and injuries, Arconic would be liable for punitive damages under Pennsylvania law.

App. 80.

The perceived inability to consider punitive damages had a determinative impact here. The district court took the unusual step of being explicit in this regard stating that if it were permitted to consider the punitive damages claim under *Piper*, "the decision very well may have been a denial of Defendants' Motion to Dismiss." App. 84.

One concern voiced by this Court in *Piper* is that allowing a change in substantive law to weigh heavily in the analysis would result in American courts, which are already extremely attractive to foreign plaintiffs, becoming even more attractive and further congesting the already crowded courts. The facts of this case allow this Court to delineate the type of case and punitive damages claim that may be given substantial weight in the *forum non conveniens* analysis and thus limit those that are inappropriate. This case involves a US-based corporate defendant that has been shown to have committed punitive US-based conduct that caused unfathomable devastation and suffering abroad. The district court recognized that the punitive damages claims are factually supported. Given the flexibility of the *forum non conveniens* doctrine and the substantial discretion afforded to district courts in the inquiry, the facts of this case will provide a good guidepost for district courts to determine whether a punitive damages claim in future cases should be considered.

This case also presents an excellent vehicle for this Court to confirm that novel dismissal conditions, like the district court's dismissal condition 2(h), are permissible and an appropriate exercise of a district court's discretion where the facts and the interests of justice so support. Granting this writ will allow this Court to reemphasize that the hallmark of the *forum non conveniens* doctrine is flexibility, and if district courts are precluded from crafting novel dismissal conditions that flexibility is reduced.

Petitioners will urge the Court to clarify that under the factual circumstances of this case and the unique nature and interests underlying punitive

damages in the US, punitive damages claims may be considered and even assigned substantial weight in the *forum non conveniens* analysis under *Piper*. Petitioners also respectfully request the Court reinforce the flexibility afforded to district courts in the *forum non conveniens* analysis by finding that the district court here did not abuse its discretion in imposing dismissal condition 2(h).

CONCLUSION

Petitioners urge the Court to take this opportunity to extend its holding in *Piper* to make the unavailability of a punitive remedy in an alternative forum weigh against dismissal of the case for *forum non conveniens*. As well as permit a district court to implement a return-jurisdiction condition on its *forum non conveniens* dismissal allowing for the punitive damages claim to ultimately be tried in the United States.

Petitioners Kristen Behrens, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on July 8, 2022.

January 5, 2023 Respectfully submitted,

MARK A. DICELLO
Counsel of Record
DICELLO LEVITT LLC
Western Reserve Law Building
7556 Mentor Avenue
Mentor, Ohio 44060
Phone: 440-953-8888
madicello@dicellolevitt.com

ADAM J. LEVITT
JOHN E. TANGREN
DICELLO LEVITT LLC
Ten North Dearborn Street
Sixth Floor
Chicago, Illinois 60602

JEFFREY P. GOODMAN
SALTZ MONGELUZZI &
BENDESKY P.C.
1650 Market Street, 52nd Floor
Philadelphia, Pennsylvania
19103