No. 23-183

IN THE
Supreme Court of the United States

EASTERN PACIFIC SHIPPING PTE, LIMITED, D/B/A EPS,
Petitioner,

v.

KHOLKAR VISHVESHWAR GANPAT,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate-disclosure statement in the petition for a writ of certiorari remains accurate.

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Nine circuits disagree over the legal standard governing foreign anti-suit injunctions. Here, the Fifth Circuit reaffirmed that it follows the minority rule permitting a federal court to enjoin foreign litigation so long as the foreign case causes "hardship" and will "frustrat[e]" domestic litigation involving similar issues. Pet. App. 6a-7a. Applying its "permissive approach," *id.* at 12a, the Fifth Circuit upheld an injunction barring a foreign company from litigating against a foreign individual in a court in his home jurisdiction. This Court should grant review to resolve that conflict and reject the Fifth Circuit's misguided approach.

Respondent stands alone in denying that deep conflict. The split has been acknowledged in every quarter—by multiple circuits, every judge below, and numerous commentators. Respondent's fallback contention that the split is not implicated here is equally untenable. The injunction the Fifth Circuit affirmed fails the prevailing, more stringent standard at every turn. Even the district court recognized that a more demanding standard would doom the injunction.

None of respondent's reasons for leaving that well-established conflict unresolved holds water. He does not attempt to justify the Fifth Circuit's approach, which minimizes comity and breaks with traditional equitable principles. Respondent's contention that this recurring issue lacks importance is refuted by the 6-3 split, cases vividly illustrating the division, and commentary confirming its significance. His assertion that foreign anti-suit injunctions are uncommon reflects that most circuits (unlike the Fifth) apply an appropriately stringent test. And his vehicle objections are insubstantial.

The circuit conflict on this important legal question amply warrants this Court's review. The Fifth Circuit's answer to that question is wrong, and its ruling provides an ideal opportunity for this Court to settle the issue. The petition should be granted.

I. THE DECISION BELOW DIRECTLY IMPLICATES AN ENTRENCHED CIRCUIT CONFLICT

A. The deep conflict on the question presented is beyond serious dispute. Pet. 15-24. Respondent denies the divide (Br. in Opp. 8-10) without confronting the overwhelming contrary evidence.

1. Respondent never addresses multiple circuits' express acknowledgments of the conflict. Pet. 22-23; *e.g.*, *Goss International Corp.* v. *Man Roland Druckmaschinen Aktiengesellschaft*, 491 F.3d 355, 359 (8th Cir. 2007) ("The circuits are split[.]"); *Quaak* v. *Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren*, 361 F.3d 11, 17 (1st Cir. 2004) ("The courts of appeals have differed as to the legal standards[.]"); *General Electric Co.* v. *Deutz AG*, 270 F.3d 144, 157 (3d Cir. 2001) ("[A]n intercircuit split has developed[.]"). He likewise ignores explicit recognition of the split by a bevy of commentators, Pet. 23-24, and by every judge in *this case*, Pet. App. 12a (majority opinion); *id.* at 15a & n.1 (Jones, J., dissenting); *id.* at 50a (district court).

Respondent also offers no plausible way to reconcile the circuits' conflicting standards. He downplays the divergence as merely different "labels," Br. in Opp. 8, but the cases disprove that description. Courts following the "restrictive" approach apply a "rebuttable presumption *against* issuing international antisuit injunctions," while courts following the "permissive" approach do the opposite, presuming an anti-suit injunction is *available* if duplicative litigation causes inconvenience. *Quaak*, 361 F.3d at 17-18 (emphasis added); accord *Gau Shan Co.* v. *Bankers Trust Co.*, 956 F.2d 1349, 1353-1354 (6th Cir. 1992).

Respondent's claim that courts all "consider the same basic factors" (Br. in Opp. 8) is equally incorrect. Courts take starkly different views of which considerations count. The Sixth Circuit has expressly held that findings of "duplication" and "vexatiousness" alone are categorically insufficient to enjoin foreign litigation, and it reversed an injunction premised on those factors. *Gau Shan*, 956 F.2d at 1354-1355. The

Third Circuit has twice reversed injunctions predicated on findings that foreign litigation was "harassing and vexatious," which are "not enough to justify an injunction." *General Electric*, 270 F.3d at 161; accord *Compagnie des Bauxites de Guinea* v. *Insurance Co. of North America*, 651 F.2d 877, 887 (3d Cir. 1981). The Fifth Circuit, in contrast, upholds injunctions premised on such findings. Pet. App. 6a-7a. And the restrictive approach deems "concurrent parallel proceedings" presumptively permissible, *Quaak*, 361 F.3d at 17, while the Fifth Circuit deems parallel proceedings proof of hardship, Pet. App. 6a.

But even if the circuits' tests started with the same raw material, what matters is what they make from it. It is commonplace for conflicting legal rules to incorporate the same inputs, yet produce very different outcomes. Compare, *e.g.*, *Andy Warhol Foundation for the Visual Arts, Inc.* v. *Goldsmith*, 598 U.S. 508, 525-551 (2023) (articulating one view of statutory copyright fair-use factors), with *id.* at 558-593 (Kagan, J., dissenting) (positing another). And respondent is forced to concede (Br. in Opp. 9) that the circuits "place different emphases on the various factors" here.

Respondent's mere-labels and same-factors mischaracterizations also cannot explain the Fifth Circuit's abandonment of traditional equitable principles in this context. The court clarified that its test does *not* require movants to meet the "traditional four-part" test applicable to ordinary injunctions, "including the requirement of irreparable injury." Pet. App. 11a. At least one circuit following the restrictive approach *does* require satisfying that "ordinary test." *In re Millenium Seacarriers, Inc.*, 458 F.3d 92, 98 (2d Cir. 2006) (per curiam) (remanding for issuing court to

consider traditional four-part test plus criteria specific to foreign anti-suit injunctions). Although other circuits have not described the restrictive approach in those terms, their decisions make clear that the restrictive approach either translates the traditional equitable standard to this context—*e.g.*, requiring a movant to show "an irreparable miscarriage of justice," *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984)—or sets an even higher bar than the test for mine-run injunctive relief. Pet. 30-31. Case law thus confirms what commentators have long recognized: whether an anti-suit injunction will issue "depends on the jurisdiction in which [a litigant] chooses to bring suit." Taryn M. Fry, Comment, *Injunction Junction, What's Your Function? Resolving the Split Over Antisuit Injunction Deference in Favor of International Comity*, 58 Cath. U. L. Rev. 1071, 1071 (2009).

2. Respondent's evidence of supposed consensus is illusory. He cites Seventh and Ninth Circuit decisions (Br. in Opp. 9-10) stating that the choice between tests would not alter *those* two cases' outcomes. Even if true, that proves nothing. Respondent does not dispute that both circuits follow the Fifth Circuit's framework. Cf. Pet. 21-22. Even if the Fifth Circuit were a lone outlier, that would only amplify the need for review here.

Respondent's invocation (Br. in Opp. 7) of two 15-year-old invitation briefs in which the Solicitor General recommended against review is equally unavailing. Both briefs acknowledged that the circuits apply different standards but explained that each case was an unsuitable vehicle for idiosyncratic reasons inapplicable here. U.S. Br. at 19, *Goss International Corp.* v. *Tokyo Kikai Seisakusho*, 554 U.S. 917 (2008)

(No. 07-618) (case involved "unusual procedural and factual background" that "present[ed] issues * * * unlikely ever to recur"); U.S. Br. at 1-5, 19, 21, *PT Pertamina (Persero)* v. *Karaha Bodas Co.*, 554 U.S. 929 (2008) (No. 07-619) (case "ar[ose] in an unusually complex and multifaceted procedural setting" that could obscure question presented). Respondent seizes on the government's assertion that it "[wa]s not clear" in 2008 whether those differing tests had "produced different results" and that each "appear[ed]" to "give weight to comity." Br. in Opp. 9 (citation omitted). But it is evident *today* that the conflicting tests do yield different outcomes, as the Fifth Circuit's decision in this case demonstrates.

B. Respondent's contention that the conflict had no effect here (Br. in Opp. 10-14) disregards the stark differences between the circuits' conflicting tests.

1. The Fifth Circuit did not apply the restrictive approach and thus never determined (or even suggested) that its requirements are satisfied. Nor could it have so concluded. The restrictive approach permits foreign anti-suit injunctions "only in the rarest of cases"; they are presumptively unavailable unless (i) foreign litigation threatens either a vital U.S. interest or validly invoked U.S. jurisdiction, and (ii) those domestic concerns outweigh the corresponding affront to international comity. *Goss International*, 491 F.3d at 359-360 (citation omitted). None of those criteria is satisfied here.

Eastern Pacific's Indian suit threatened neither any vital U.S. policy interests nor any U.S. court's jurisdiction. Pet. 26-27, 34. Respondent's case has virtually no U.S. ties. Nor did the pendency of the Indian

suit "thwart American jurisdiction." Br. in Opp. 11 (citation omitted). Respondent invokes (*id.* at 10) the Fifth Circuit's view that the cases concerned the same parties and issues, but under the restrictive approach, such mere "duplication" is "not sufficient." *Gau Shan*, 956 F.2d at 1354.

Respondent retreats to the Fifth Circuit's erroneous assertion (Br. in Opp. 11, 22) that the Indian injunction threatened federal jurisdiction, but he cannot overcome the multiple problems with that position. Pet. 27-28. When that injunction was issued, the district court's jurisdiction had not been "validly invoked," *Laker Airways*, 731 F.2d at 930, because respondent admittedly had not validly served process. Br. in Opp. 22. Invoking federal jurisdiction requires proper service, see *Murphy Bros., Inc.* v. *Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999), not a magic number of "docket entries" (which here largely concerned or stemmed from the lack of service), Br. in Opp. 22. Respondent's claim that Eastern Pacific "evaded service," *ibid.* (brackets and citation omitted), overlooks that he always could have served the company at its headquarters—as he ultimately did. Pet. App. 33a-34a. And even if the Indian injunction did threaten U.S. jurisdiction, the injunction the Fifth Circuit affirmed—enjoining the entire Indian case, long after the Indian court validly exercised jurisdiction—is improper *a fortiori* and certainly would not survive the restrictive approach.

Comity concerns independently foreclose the injunction here under the restrictive approach, which "afford[s]" a much higher "level of deference * * * to international comity" than the permissive approach. *Goss International*, 491 F.3d at 359; see Pet. 28-30.

The Fifth Circuit accorded *no* weight to comity, holding that "comity concerns are at a minimum" if a U.S. case does not concern public international law and is "ensconced" in U.S. court first. Pet. App. 8a-9a (citation omitted). It thus upheld an injunction barring an Indian court from adjudicating the rights of an Indian sailor against another foreign party, rewarding respondent for "defiance of the Indian court's order." *Id.* at 27a n.21 (Jones, J., dissenting). Its attempt to rationalize that result based on perceived defects in Indian procedure turns comity upside-down. *Id.* at 16a.

2. The district court itself openly recognized that respondent's request would fail under a more rigorous test. 3/28/22 Tr. 92; Pet. 34. Respondent dismisses that statement (Br. in Opp. 13-14) because the court was explaining why he could not meet the traditional, four-factor injunctive-relief test. But the Fifth Circuit's rejection of that traditional test (Pet. App. 11a) is more reason why the injunction would be reversed elsewhere.

The restrictive approach is no less rigorous, and perhaps more stringent, than the traditional injunctive-relief standard. Pet. 30-31. At least one restrictive-approach circuit expressly incorporates the traditional test. See pp. 5-6, *supra*. Eastern Pacific and the dissent argued below that the traditional test should apply as part of the restrictive approach. Pet. C.A. Br. 23, 27-28; Pet. App. 18a-19a. Eastern Pacific's position remains that a standard at least as demanding as the traditional four-factor test governs foreign anti-suit injunctions. The restrictive approach, correctly understood, fits that bill. By recognizing that respondent could not satisfy the traditional four-factor inquiry, the district court necessarily concluded that he could not meet the restrictive approach either.

That conclusion is correct. The injunction fails the four-factor injunction test—and so fails the restrictive approach perforce—because (*inter alia*) it sweeps far beyond remedying any irreparable harm. The pendency of the Indian *case* caused respondent no irreparable injury—certainly none cognizable under the restrictive approach, which presumptively permits "concurrent parallel proceedings." *Quaak*, 361 F.3d at 17. Whatever harm respondent might assert from the Indian-court *injunction* could not plausibly justify the remedy the Fifth Circuit affirmed—enjoining the entire Indian litigation, not merely directing Eastern Pacific to seek dissolution of the Indian-court order. Pet. App. 29a-30a (Jones, J., dissenting).

The Fifth Circuit majority never addressed the mismatch between its rationale and the remedy, and respondent has no persuasive answer either. Instead, he mistakenly contends (Br. in Opp. 26-27) that the injunction's overbreadth is not presented. But the disconnect demonstrates that the injunction cannot stand even on the Fifth Circuit's own theory and so is further reason this Court should reverse that remedy. As Eastern Pacific explained below, whatever harm might be perceived from the Indian court's order cannot justify precluding that litigation altogether, given "the strong presumption [of] concurrent jurisdiction between domestic and foreign courts." Pet. C.A. Reply 22-23. That the Fifth Circuit upheld the injunction anyway is a sure sign that its test is broken and out of sync with other circuits. Whether the facts might hypothetically support a narrower injunction is not presented, but the validity of the sweeping injunction it affirmed assuredly is.

3. Respondent offers nothing showing that circuits following the restrictive approach would uphold this injunction. The decisions of the D.C. and First Circuits he cites (Br. in Opp. 11-12) that upheld other anti-suit injunctions in different circumstances—*Laker Airways* and *Quaak*, respectively—simply confirm that the restrictive approach is not insurmountable. Eastern Pacific already distinguished *Laker Airways* (Pet. 18); respondent offers no rejoinder. *Quaak* upheld an injunction against a foreign suit that was a "blatant attempt to evade the rightful authority of the forum"—and only after the issuing court "gave heavy weight" to comity and found it outweighed by the United States' interest in adjudicating securities-fraud claims and strong "public policy favoring the safeguarding of investors." 361 F.3d at 20. In contrast, Eastern Pacific's Indian suit did not "evade" (*ibid.*) any pending U.S. proceeding, and the Fifth Circuit refused to give comity meaningful weight.

Respondent is left to argue (Br. in Opp. 12-13) that no other circuit has confronted this case's facts. But he offers no basis to believe that every restrictive-approach circuit would take his view of them. In any event, the absence of a precise factual twin is no reason to leave a split on the legal standard unresolved.

II. THE DECISION BELOW IS WRONG

Respondent does not deny that the Fifth Circuit's permissive approach allows foreign anti-suit injunctions so long as foreign litigation causes hardship and frustrates related U.S. litigation. Cf. Pet. 18-21, 25-28. Yet he does not attempt to justify that test as the correct legal rule.

Instead, respondent defends only the Fifth Circuit's *application* of its misguided test, Br. in Opp. 21-27, and adds nothing to the court's erroneous reasoning. His assertion (*id.* at 21-23) that the injunction protected U.S. jurisdiction is wrong as explained above. See pp. 6-7, *supra*. And respondent's comity arguments (Br. in Opp. 23-24) repeat the Fifth Circuit's analysis, which effectively zeroed comity out of the equation. Contrary to their shared premise (*ibid.*), private disputes can and do raise comity concerns, especially when they entail parallel proceedings in multiple countries' tribunals. Cf., *e.g.*, *Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931, 1936-1940 (2021) (extraterritorial "private right of action * * * 'inherent[ly]' affect[s] foreign policy" (citation omitted)). Foreign anti-suit injunctions in particular risk transforming private disputes into intractable international conflicts. Pet. 32-33; see *Gau Shan*, 956 F.2d at 1355. Like the Fifth Circuit, respondent pays only lip service to those concerns.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT QUESTION

A. Respondent's attempts to disprove the issue's importance are self-defeating. He notes (Br. in Opp. 19-20) that this Court has not previously decided the question presented. But that is more reason for review: The split has persisted because this Court has not yet intervened. *Quaak*, 361 F.3d at 16; *Goss International*, 491 F.3d at 361. Respondent also asserts (Br. in Opp. 20) that few foreign anti-suit injunctions are granted. But most courts have long followed a much more stringent standard than the Fifth Circuit applied here. His related contention (*ibid.*) that even circuits applying the permissive approach "routinely re-

verse anti-suit injunctions" only underscores the new extreme to which the Fifth Circuit has taken its test.

B. Respondent's vehicle objections are makeweights. He suggests (Br. in Opp. 15-17) that Eastern Pacific's Indian suit could fail if revived, but he selectively omits portions of Indian law that undermine his predictions. Respondent asserts that Eastern Pacific's dismissal of its suit (required by the district court's injunction) bars it from refiling. But the very Indian-law provision he cites authorizes setting aside dismissals for good cause. See Code of Civil Procedure, 1908, 1st sched., Order IX, r. 9 (India), https://tinyurl.com/2ssr5j3c. Likewise, respondent's statute-of-limitations argument disregards India's express tolling rules for enjoined lawsuits. See, *e.g.*, Limitation Act, 1963, § 15(1) (India), https://tinyurl.com/2ep7yuwr. His self-serving analysis of foreign law certainly does not "moot" (Br. in Opp. 16) Eastern Pacific's appeal of a live injunction.

More fundamentally, the proper forum to decide those Indian-law issues is the Indian court. But the injunction here bars Eastern Pacific from having those issues adjudicated at all. It is the antithesis of respect for comity for a federal court to enjoin foreign litigation based on the U.S. court's belief about how the foreign dispute should be resolved or distrust of the foreign court itself.

Respondent perplexingly claims (Br. in Opp. 17-19) that the petition is a poor vehicle because it does not raise *other*, independent grounds on which Eastern Pacific might ultimately prevail in the U.S. case but on which it lost in district court—*e.g.*, *forum non conveniens* and choice of law. But the absence of

such additional issues is a feature, not a bug. The petition's focused scope makes this case a clean vehicle for the Court to decide the question presented concerning the standards for foreign anti-suit injunctions. The lower courts' resolution of other issues will have no bearing on that question. In contrast, a decision from this Court rejecting the Fifth Circuit's permissive test for anti-suit injunctions could render any further federal litigation unnecessary.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 20, 2023