

No. _____

In the
Supreme Court of the United States

KAREN M. SUBER,
Petitioner,

v.

VVP SERVICES, LLC, ET AL.,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

Whether the courts sitting in New York have inconsistently interpreted and applied the standard for the “arising from” prong of the New York Long-Arm Statute by (i) in some circumstances, applying a standard based on a graduated spectrum marked by degrees of relatedness, defined by an “articulable nexus,” on one end of the spectrum, and by a “substantial relationship” toward the other end of the spectrum, (ii) in other circumstances, collapsing those two phrases — “articulable nexus” and “substantially related” — into one standard, thereby making the phrases synonymous when, by their plain meanings, they are not synonymous, and (iii) in still other circumstances, using a wide variety of other non-synonymous phrases to define the relatedness standard required for the “arising from” prong of the New York Long Arm Statute, yielding an indefinite and imprecise set of standards in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. CONSTITUTION.

Whether the New York Long-Arm Statute necessarily must be coextensive with the Due Process Clause of the Fourteenth Amendment of the U.S. CONSTITUTION to guarantee the same due process rights to New York citizens as those due process rights afforded to citizens of other co-equal States within the United States.

Whether the standard for the “interest-of-justice” inquiry required by 28 U.S.C. §1631, as now conducted, is inconsistently interpreted and applied across the Circuits, yielding inconsistent and unpredictable results and leading to justice-defeating technicalities that undermine (i) precedent of the Supreme Court of the United States, including *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962), and its progeny and (ii) the legislative intent of 28 U.S.C. §1631.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Karen M. Suber was the Plaintiff-Appellant below.

Respondents VVP Services, LLC, Vision Venture Partners, LLC, Amit Raizada, Eleven Stones, LP, Stratton Slavos and Prometheus Ventures, LLC were the Defendants-Appellees below.

STATEMENT OF RELATED CASES

United States Court of Appeals for the Second Circuit:

Suber v. VVP Servs., No. 21-2649 (2d Cir. Jan. 10, 2023) (affirming, in part, and reversing and remanding, in part), *reh’g denied*, Order at 1 (2d Cir. Mar. 27, 2023).

United States District Court for the Southern District of New York:

Suber v. VVP Servs., 1:20-cv-08177 (AJN – SN) (S.D.N.Y. Sep. 27, 2021) (affirmed, in part, and reversed and remanded, in part).

United States District Court for the Central District of California:

Suber v. VVP Servs., 2:23-cv-02932 (SPG – AFMx) (currently pending)

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PETITION FOR A WRIT OF CERTIORARI

Plaintiff-Petitioner respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Amended Summary Order of the U.S. Court of Appeals is available at 2023 WL 115631 and is not published. *Suber v. VVP Servs.*, No. 21-2649 (2d Cir. Jan. 10, 2023).

The Memorandum Opinion and Order of the U.S. District Court is available at 2021 WL 4429237 and is not published. *Suber v. VVP Servs.*, 20-cv-08177 (AJN) (S.D.N.Y. Sep. 27, 2021).

JURISDICTION

The judgment of the U.S. Court of Appeals was entered on January 10, 2023. On March 27, 2023, the Court of Appeals denied a timely-filed Petition for Panel Rehearing and Rehearing En Banc. On June 8, 2023, Justice Sotomayor granted an application to extend the deadline for the petition to August 24, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of U.S. Const. amend. V, and the Due Process Clause of U.S. Const. amend. XIV (U.S. Const. amend. XIV, § 1) are reproduced at App. 45. The relevant portion of the New York State Long-Arm Statute, N.Y. C.P.L.R. §302(a) is reproduced at App. 45-46. 28 U.S.C. §1631 is reproduced at App. 47.

STATEMENT OF THE CASE

I. Factual Background

A. The Fraudulent Enterprise

Defendants-Respondents Amit Raizada and Stratton Sclavos themselves and through four entity Defendants-Respondents, Eleven Stones, LP (alter ego of Raizada) (“**Eleven**”), Prometheus Ventures, LLC (alter ego of Sclavos) (“**Prometheus**”), Vision Venture Partners, LLC (“**VVP**”), its wholly-owned subsidiary, VVP Services, LLC (“**VVPS**”), and their sophisticated, professional agents within New York (the “**New York Agents**”) conspired to construct, and actually constructed, through their intentional and purposeful conduct, including within New York, an expansively scoped and multi-jurisdictional fraudulent scheme and enterprise to defraud investors throughout the U.S. and Canada, including investors within New York (the “**Fraudulent Enterprise**”). App. 5, 19-20, 21. Raizada and Sclavos operated the Fraudulent Enterprise for the ultimate pecuniary benefit of themselves and their respective

alter egos. In furtherance of the Fraudulent Enterprise, Raizada and Sclavos wore several hats: Raizada was principal and co-founder of VVP, a highly compensated officer and employee of VVP and VVPS, and the *de facto* principal of Eleven. Sclavos was principal and co-founder of VVP, a highly compensated officer and employee of VVP and VVPS, and the sole member of Prometheus. App. 17.

B. The New York Activities: Violations of the New York BlueSky Laws

As part of the Fraudulent Enterprise, Defendants-Respondents and their New York Agents marketed, offered, sold, and distributed securities to investors in New York (“**New York Activities**”). App. 9-10, 19-20. By engaging in the New York Activities, Defendants-Respondents purposefully availed themselves of the market for the sale of securities and the regulatory framework established in support thereof, i.e., THE MARTIN ACT, N.Y. GEN. BUS. LAW, Article 23-A, §§352 – 353 (“**New York BlueSky Laws**”). In the course of the New York Activities, Defendants-Respondents and the New York Agents made intentional, material misstatements and omissions of material facts to investors, including New York investors, in contravention of New York BlueSky Laws, which violations gave rise to, among other liabilities, liabilities under causes of action grounded in the tort of common-law fraud. *See, e.g., People v. Credit Suisse Sec. (USA) LLC*, 31 N.Y.3d 622, 646 (2018). Two examples of Defendants-Respondents’ contravention follow.

Raizada and Sclavos, together with their New York Agents, omitted to tell investors, including New York investors, the investments of certain investors were guaranteed from principal loss by one of Defendants-Respondents' New York Agents, all-the-while the investments of other investors, including New York investors, investing in the same security were not guaranteed from principal loss. Plaintiff-Petitioner's Second Amended Complaint, ¶68.b. Defendants-Respondents and their New York Agents concealed the disparate treatment of investors in violation of New York BlueSky Laws, giving rise to causes of action grounded in the tort of common-law fraud against Defendants-Respondents and their New York Agents (the foregoing and other fraudulent conduct, the "**New York Torts**"). App. 12.

As a second example of the New York Torts, Defendants-Respondents and their New York Agents failed to disclose to investors, including New York investors, that \$2,000,000 of \$38,000,000, or over 5%, of the proceeds from the sale of securities, including securities sold to New York investors through the New York Activities, would be loaned to Sclavos through a "concealed loan" – concealed because on the books of one portfolio company was a loan to the then-COO of VVPS, even though the proceeds were, from the onset, intended to benefit Sclavos, and the then-COO did, in fact, promptly after receiving the loan proceeds, wire those proceeds to Sclavos. App. 4, 20.

C. Use of the Work Product of a New York Lawyer

Defendants-Respondents used Plaintiff-Petitioner's legal work product, which she created as a lawyer barred under the laws of New York State and *at Defendants-Respondents' direction*, in the course of the New York Activities and the New York Torts, all in furtherance of the Fraudulent Enterprise and to the detriment of investors, including investors within New York. Plaintiff-Petitioner's Second Amended Complaint, ¶¶46-69, 119. Ultimately, during her six-month employment with Defendant-Respondent VVP, Plaintiff-Petitioner learned Defendants-Respondents had no intention of operating a legitimate enterprise; rather, Defendants-Respondents themselves and through their New York Agents were acting in furtherance of the Fraudulent Enterprise. On January 22, 2018, upon the advice of counsel, Plaintiff-Petitioner was compelled to resign as an employee of VVPS due to ethical considerations, including those arising under RULE 1.16 of the NEW YORK RULES OF PROFESSIONAL CONDUCT, as a result of Defendants-Respondents' deliberate use of Plaintiff-Petitioner's legal work product in furtherance of the Fraudulent Enterprise and commission of the New York Torts. App. 5, 21.

D. The Discriminatory Conduct of Defendants-Respondents

Plaintiff-Petitioner was also subject to discriminatory and abusive behavior by Raizada, including verbal threats, exclusion from meetings,

and prohibition from direct contact with important clients of color because of Raizada's racially-biased belief that Plaintiff-Petitioner's allegiances were to those clients rather than to him, all in violation of 28 U.S.C. §1981. App. 5-6, App. 20-21. Raizada would eventually face calls from a prominent esports company to resign as (1) his schemes came to light amidst his documented, targeted, written usage of a racial epithet against African-American people and captured in national headlines and (2) subsequent litigation against Raizada by others confirmed that Plaintiff-Petitioner's experience was part of a pattern. Raizada, in a written communication, specifically told one African-American professional who had challenged Raizada's misconduct, that the African-American professional had behaved in a purportedly deleterious manner "because you're a nigger." App. 21. Plaintiff-Petitioner's Second Amended Complaint, p. 2.

II. Procedural Background

The District Court dismissed the underlying action, *Suber v. VVP Servs.*, 20-cv-08177 (S.D.N.Y. Sep. 27, 2021), without prejudice for lack of personal jurisdiction almost a year after commencement on October 2, 2020 (the "**District Court Decision**"). On October 7, 2021, Appellant filed a Motion Pursuant to Fed. R. Civ. P. 59(e) ("**Transfer Motion**") requesting transfer from the Southern District of New York to the Central District of California ("**Transfer**"). On October 20, 2021, Appellant filed a timely Notice of Appeal with the U.S. Court of Appeals for the Second Circuit ("**Circuit Appeal**"). On November 18, 2021,

Appellant filed a Motion Pursuant to Fed. R. Civ. P. 60(b)(6) (“**Rule 60(b) Motion**” together with the Transfer Motion, the “**Motions**”) requesting the District Court address errors in its opinion, including errors that ultimately led the Second Circuit to reverse in part and remand the District Court Decision. On June 9, 2022, during the pendency of the Circuit Appeal, the District Court issued a ruling in respect of the Motions, denying both. Yet, the District Court did so *without jurisdiction* to decide the issues then on-appeal (including the issue of Transfer). *But see New York v. U.S. Dep’t of Homeland Sec.*, 974 F.3d 210, 215 (2d Cir. 2020) (proscribing the exercise of jurisdiction by a U.S. district court once a notice of appeal has been filed).

On October 28, 2022, Oral Argument occurred. On January 6, 2023, the Panel issued an error-laden Summary Order affirming, in part, and reversing and remanding, in part, the District Court Decision. On the same day, Plaintiff-Appellant filed a letter requesting the Panel correct the errors. On January 10, 2023, the Panel issued the Amended Summary Order correcting those errors (“**Amended Order**”). On February 8, 2023, Plaintiff-Appellant filed a Petition for Panel Rehearing and Rehearing *En Banc*. On March 27, 2023, the Second Circuit denied the Petition. It is from the Amended Order that Plaintiff-Petitioner respectfully submits this Petition.

On April 18, 2023, Plaintiff-Petitioner commenced a proceeding in the U.S. District Court for the Central District of California that is substantively similar to the proceeding underlying

this appeal (“**CACD Matter**”), because the courts below dismissed the underlying proceeding rather than transfer it to the Central District of California.

REASONS FOR GRANTING THE WRIT

THE NEW YORK LONG-ARM STATUTE

I. The Standards Used to Define the “Arising From” Prong of the New York Long-Arm Statute Are Violative of the Due Process Clauses of the Fifth and Fourteenth Amendments

The New York Long-Arm Statute, N.Y. C.P.L.R. §302(a), and related jurisprudence provide the framework pursuant to which courts sitting in New York may exercise personal jurisdiction over non-domiciliary defendants. The New York Long-Arm Statute requires courts to analyze the forum-related conduct of defendants to determine:

first, whether that forum-related conduct falls within one of the categories in N.Y. C.P.L.R. §302(a)(1)-(4); and

second, whether the cause(s) of action alleged “arise from” that forum-related conduct.

If defendants’ forum-related conduct does not fall within N.Y. C.P.L.R. §302(a)(1)-(4), or if the alleged cause(s) of action do not “arise from” defendants’ forum-related conduct, a New York court cannot exercise personal jurisdiction. If, however,

defendants' forum-related conduct meets the two-pronged test, a constitutional-level inquiry mandated by the Due Process Clause of the Fourteenth Amendment ensues. *See Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017 (2021). *Accord Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

In the proceedings below, the courts found Defendants-Respondents engaged in conduct falling within N.Y. C.P.L.R. §302(a)(1) and, specifically, that at least some of Defendants-Respondents transacted business within New York. App. 9-10, 24-25. However, neither court found that any of Plaintiff-Petitioner's causes of action "arose from" Defendants-Respondents' New York conduct, because the courts did not find a "substantial relationship" between any of Plaintiff-Petitioner's causes of action, *not even "wrongful termination via constructive discharge,"* and Defendants-Respondents' forum-related conduct. App. 10, 24. Ultimately, in applying the "arising from" prong of the New York Long-Arm Statute, the courts below analyzed the required relatedness between Plaintiff-Petitioner's causes of action and Defendants-Respondents' forum-related conduct using an inappropriately stringent and, therefore, unconstitutional, standard – that of strictly a "substantial relationship" when, in fact, personal jurisdiction under the New York Long-Arm Statute has been found with lesser degrees of relatedness.

**A. Inconsistency Exists Among the
Standards for Defining the “Arising
From” Prong**

The New York Court of Appeals and other state and federal courts in New York have used many phrases to define the “arising from” prong of the New York Long-Arm Statute. The phrase, “substantial relationship,” is one. *See infra*, Section I.A.1. Other phrases include, for example, “articulable nexus,” “strong nexus,” “some connection,” and “bear some relationship to,” among other non-synonymous phrases. *See infra*, Section I.A.1, I.A.2. These phrases, by their plain meanings, are non-synonymous. This multiplicity of phrases used by courts to describe the “arising from” prong has led to imprecision in the standard for that prong and, consequently, inconsistent outcomes in the determination of whether New York courts possess personal jurisdiction over defendants. This disparity of constitutional proportions, *see infra*, stems from New York courts’ requirement, in some instances, of the existence of nothing less than a “substantial relationship” between defendants’ forum-related conduct and a plaintiff’s cause(s) of action, and in other instances, the existence of a relatedness that is less than a “substantial relationship.” This inconsistency violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. CONSTITUTION, in that it creates and perpetuates imprecision and “vagueness,” preventing the clarity required by the constitution, according to Supreme Court precedents, in state and federal courts. *See, e.g., Fed. Comm’n Comm’n v. Fox Television*

Stations, Inc., 567 U.S. 239, 253 (2012) (“As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.”); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (“Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.”); and *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (“[L]aws must provide explicit standards for those who apply them.”).

Clarity in legal standards is essential. *Fed. Commc’ns Comm’n*, 567 U.S. at 253. Yet, the standard for applying the “arising from” prong lacks a sufficiently clear description and thwarts procedural and substantive due process mandated by the Fifth and Fourteenth Amendments. *Cf. Johnson v. United States*, 576 U.S. 591 (2015) (holding the residual clause of Armed Career Criminal Act, 18 U.S.C. §924(e)(B) to be unconstitutionally vague in violation of the Fifth Amendment) and *Kolender v. Lawson*, 461 U.S. 352 (1983) (holding state statute unconstitutionally vague within the meaning of the Due Process Clause of the Fourteenth Amendment).

1. The “Arising From” Prong: “Substantial Relationship” and “Articulable Nexus”

In one of the most-cited personal jurisdiction cases, *Licci v. Lebanese Canadian Bank, SAL*, 20

N.Y.3d 327 (N.Y. 2012), the New York Court of Appeals defined the “arising from” prong using the phrases “articulable nexus” and “substantial relationship” as follows:

We have interpreted the second prong of the jurisdictional inquiry to require that, in light of all the circumstances, there must be an **“articulable nexus”** (*McGowan v. Smith*,⁵² N.Y.2d 268, 437 N.Y.S.2d 643, 419 N.E.2d 321 [1981]) or **“substantial relationship”** (*Kreutter v. McFadden Oil Corp.*,⁷¹ N.Y.2d 460, 527 N.Y.S.2d 195, 522 N.E.2d 40 [1988]) between the business transaction and the claim asserted.

Id. at 339. (Emphasis supplied.)

The use by the New York Court of Appeals and other New York courts of the phrase “substantial relationship” to define the “arising from” prong of the New York Long-Arm Statute is evident. *See, e.g., Paterno v. Institution*, 23 N.E.3d 988, 992 (N.Y. 2014) (finding no personal jurisdiction, because there was no substantial relationship between New York-to-Florida post-surgical communications and the New York patient’s medical malpractice claims related to Florida surgeries). *Accord Eades v. Kennedy, PC Law Offices*, 799 F.3d 161, 168 (2d Cir. 2015) (finding a substantial relationship between mailing one debt collection notice, engaging in one debt collection phone call, and mailing a summons and complaint, on the one hand, and violations of the Fair Debt

Collection Practices Act, on the other). Also evident within those same courts is the use of the phrase “articulable nexus” to define the “arising from” prong. *E.g.*, *Credit Lyonnais Securities (USA), Inc. v. Alcantara*, 183 F.3d 151, 153 (2d Cir. 1999), and *Cutco Industries v. Naughton*, 806 F.2d 361 (2d Cir. 1986). Meanwhile and by contrast, there are instances in which “articulable nexus” and “substantial relationship” are treated as synonymous. *E.g.*, *SPCA of Upstate New York, Inc. v. American Working Collie Ass’n*, 18 N.Y.3d 400, 404 (N.Y. 2012) (“Moreover, there must be ‘some articulable nexus between the business transacted and the cause of action sued upon’ (*McGowan*, 52 N.Y.2d at 272, 437 N.Y.S.2d 643, 419 N.E.2d 321). Phrased differently, there must be ‘a ‘substantial relationship’ between [the purposeful] activities and the transaction out of which the cause of action arose’ (*Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829, 527 N.Y.S.2d 729, 522 N.E.2d 1027 [1988]; *see also Johnson v. Ward*, 4 N.Y.3d 516, 519, 797 N.Y.S.2d 33, 829 N.E.2d 1201 [2005]).”).

2. Various Other Phrases Used by Courts to Define the “Arising From” Prong

There are also other descriptive phrases indicating a relationship lesser in degree than a “substantial relationship” used by New York courts to define the “arising from” prong of the New York Long-Arm Statute. *See, e.g.*, *Al Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 329 (N.Y. 2016) (“This inquiry is “relatively permissive” (*id.* at 339, 960 N.Y.S.2d 695,

984 N.E.2d 893, citing *McGowan v. Smith*, 52 N.Y.2d 268, 437 N.Y.S.2d 643, 419 N.E.2d 321 [1981], and *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460, 527 N.Y.S.2d 195, 522 N.E.2d 40 [1988]), and does not require causation, but merely “a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim” (*Licci*, 20 N.Y.3d at 339, 960 N.Y.S.2d 695, 984 N.E.2d 893). The claim need only be “in some way arguably connected to the transaction” (*id.* at 340, 960 N.Y.S.2d 695, 984 N.E.2d 893).”). *Accord Spetner v. Palestine Inv. Bank*, 20-3849-cv, at *17-18 (2d Cir. June 16, 2023).

Additionally, the Second Circuit has used the following phrases to describe the “arise from” prong: “strong nexus,” “substantial nexus,” “sufficient nexus,” “sufficiently related,” “some connection,” and “bear some relationship to.” *See, e.g., Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 764 (2d Cir. 1983) (“This requirement of a strong nexus applies with equal force to the more recently added clause of [N.Y. C.P.L.R.] §302(a)(1) permitting exercise of jurisdiction over a defendant who “contracts anywhere to supply goods or services in the state.””) (Internal citations and quotations omitted.); *Agency Rent a Car System v. Grand Rent a Car*, 98 F.3d 25, 31 (2d Cir. 1996) (“A claim ‘arises out of’ a defendant’s transaction of business in New York ‘when there exists “a substantial nexus” between the business transacted and the cause of action sued upon.’”) (Internal citations and quotations omitted.); *Hoffritz for Cutlery, Inc. v.*

Amajac, Ltd., 763 F.2d 55, 59 (2d Cir. 1985) (“Rather, having established that defendants transacted business in New York, plaintiffs need show only that the cause of action is sufficiently related to the business transacted that it would not be unfair to deem it to arise out of the transacted business, and to subject the defendants to suit in New York.”); *PDK Labs, Inc. v. Friedlander*, 103 F.3d 1105, 1109 (2d Cir. 1997) (“To determine whether a sufficient nexus exists, a court must evaluate the “totality of the circumstances surrounding defendants' activities in New York in connection with the matter giving rise to the lawsuit.”“); *Chloé v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 166 (2d Cir. 2010) (“In this regard, we note that both New York’s long-arm statute and the Due Process Clause require that Queen Bee’s contacts with New York have some connection to Chloe’s trademark infringement claim.”); *Kronisch v. U.S.*, 150 F.3d 112, 131 (2d Cir. 1998) (“Apart from Gottlieb’s contacts with Dr. Abramson, and his self-administration of LSD with other TSD officials — both of which bear some relationship to the development of the CIA’s LSD testing program, and hence to Glickman’s allegation that he was a victim of this program — Gottlieb’s New York contacts with George White are particularly significant.”).

B. The “Arising From” Prong: A Relatedness Spectrum

In *Licci*, the court refers to “articulable nexus” and “substantial relationship” as “these standards” — implying that they are two different standards, and

they are not, by their plain meanings, synonymous. The *Licci* court framed the “arising from” prong in terms of “at a minimum, a relatedness:”

But these standards connote, at a minimum, a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former, regardless of the ultimate merits of the claim.

Licci, 20 N.Y.3d at 339.

The *Licci* Court also framed the “arising from” prong in terms of connectedness:

In effect, the “arise-from” prong limits the broader “transaction-of-business” prong to confer jurisdiction only over those claims in some way arguably connected to the transaction. Where this necessary relatedness is lacking, we have characterized the claim as “too attenuated” from the transaction, or “merely coincidental” with it (*see Johnson v. Ward*, 4 N.Y.3d 516, 520, 797 N.Y.S.2d 33, 829 N.E.2d 1201 [2005]).

Id. at 339-40.

Furthermore, the *Licci* Court held that causation is not required. *Id.* at 339.

Thus, based on the reasoning and exposition in *Licci*, the “arising from” prong is, in fact, a graduated spectrum of relatedness (“**Relatedness Spectrum**”) between the defendants’ forum-related conduct and a plaintiff’s causes of action, with the Relatedness Spectrum ranging from “completely unmoored,” at one end, resulting in no personal jurisdiction over the subject defendants, to “arguably connected” to an “articulable nexus” to a “substantial relationship” and, finally, to “causal,” at the other end, with each resulting in personal jurisdiction over the defendants. *See* App. 48.

That there is a Relatedness Spectrum along a “line” was underscored by the Second Circuit in *Sole Resort, S.A. de C.V. v. Allure Resorts Management, LLC*, 450 F.3d 100 (2d Cir. 2006):

This inquiry [into the “arising from” prong] is a fact-specific one, and when the connection between the parties’ activities in New York and the claim crosses the line from “substantially related” to “mere coincidence” is not always self-evident.

Id. at 103.

Interestingly, in *Kronisch*, while the Second Circuit referenced both “articulable nexus” and a “substantial relationship” as hallmarks of the “arising from” prong, the court ultimately found personal jurisdiction on the basis of “some relationship” between the forum-related conduct and

the causes of action, suggesting “some relationship” is a standard lying on the Relatedness Spectrum between “articulable nexus” and a “substantial relationship,” and the foregoing phrases are not synonymous. 150 F.3d at 131.

C. The Courts Below Misinterpreted and Misapplied the “Arising From” Prong

Even though courts sitting in New York, including the Second Circuit, have characterized the “arising from” prong in a manner similar to what Plaintiff-Petitioner calls a “Relatedness Spectrum” and not just as mandating only a “substantial relationship,” the courts below, in Plaintiff-Petitioner’s case, used too stringent of a standard in applying the New York Long-Arm Statute when they found personal jurisdiction lacking over the Defendants-Respondents, because there was purportedly no “substantial relationship” between any of Plaintiff-Petitioner’s causes of action, *including “wrongful termination via constructive discharge,”* and the forum-related conduct of the Defendants-Respondents. App. 10, 31-32. In so doing, the courts used “substantial relationship” and “articulable nexus” as synonymous phrases, when, in fact, they are not. App. 10, 31-32. That fallacy, of course, meant that the Second Circuit, in this case, did not even consider whether there was a lesser degree of relatedness between Plaintiff-Petitioner’s causes of action and Defendants-Respondents’ forum-related conduct, notwithstanding precedent supporting jurisdiction with lesser degrees of relatedness. App. 10-11, 31-34.

Consider one example, among others, of how there is an “articulable nexus” – which, by its plain meaning suggests “*a connection capable of being explained*,” between one of Plaintiff-Petitioner’s cause of action and the Defendants-Respondents: Plaintiff-Petitioner, a lawyer barred under the laws of New York, was required to resign pursuant to RULE 1.16 of the NEW YORK RULES OF PROFESSIONAL CONDUCT when Plaintiff-Petitioner learned that (1) Defendants-Respondents were engaging, and intended to continue engaging, in fraudulent conduct in the course of their New York Activities, and (2) Defendants-Respondents were intentionally using, and continuing to use, Petitioner’s legal work product in furtherance of their fraudulent conduct in New York State.

During oral argument, however, the Second Circuit engaged in questioning that suggested a lawyer licensed in one state may be effectively the same as a lawyer licensed in another state. *See, e.g.*, Oral Argument, 1:59 to 2:48. However, the Second Circuit’s view that lawyers may be fungible is patently inconsistent with the state-by-state-based attorney licensure requirements and the attorney regulatory regimes. For example, there are ABA MODEL RULES OF PROFESSIONAL CONDUCT (the “**ABA RULES**”), advisory in nature and functionally a restatement of states’ ethic rules, but they are also the absolutely binding state rules of professional conduct, which differ from the ABA RULES. *See generally* Patrick J. Somers, Kendall Brill & Kelly LLP, *California v. New York: Which State is Better for Your Client’s Objectives?* Somers suggests even

the knowledge base of an attorney licensed in one state is different from that of an attorney licensed in another state. In that respect, the variances among the state-by-state rules of professional conduct (and, therefore, the benefits and protections of clients arising therefrom) are no less significant than the variances among the state-by-state uniform commercial codes, and as a result, our federalist system necessitates that the state-by-state variances among legal frameworks applicable to lawyers be respected, preserved and implemented, including the laws, rules and regulations of New York that frame an attorney-client relationship. *That Plaintiff-Petitioner is a New York State-barred attorney and that Plaintiff-Petitioner was compelled to resign pursuant to the Rule 1.16 of the New York Rules of Professional Conduct go directly to the heart of the analysis of whether a New York court possesses personal jurisdiction over Defendants-Appellees.* The courts below entirely disregarded this aspect of Plaintiff-Petitioner's case and its relevancy in a proper, constitutionally-consonant application of the "arising from" prong.

II. This Case Is an Ideal Vehicle to Address the Inconsistency Among the Standards Used to Define the "Arising From" Prong

The Relatedness Spectrum provides one way to tie together the various phrases used by the New York Court of Appeals and other courts to define the "arising from" prong. However, the number of, and substantive variances in meaning among the phrases discussed *supra* demonstrate the degree of

inconsistency and imprecision in the interpretation and application of the New York Long-Arm Statute in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments. The degree of inconsistency and imprecision that due process may tolerate varies with the nature of the statute, the applicable legal standard(s), and the correlative needs for notice and consistent application. *See Hoffman Estates*, 455 U.S. at 498. Clarification of, and eliminating the inconsistency and imprecision in, the standard for interpreting and applying the “arising from” prong of the New York Long-Arm Statute is essential to ensure coherence of the doctrine of specific personal jurisdiction within New York and to ensure its consistency with constitutional due process standards of the Fifth and Fourteenth Amendments. This case provides an ideal and compelling vehicle to build and articulate such coherence and consistency.

III. The New York Long-Arm Statute Must be Coextensive with the Due Process Clause of the Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment is both a shield and a sword. *See, e.g., Ford Motor Co.*, 141 S. Ct. at 1030 (“Those States have significant interests at stake — “providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,” as well as enforcing their own safety regulations.”), *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) (“The concept of minimum contacts, in turn, can be seen to perform two related,

but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.”). Just as the Due Process Clause protects out-of-state defendants from over-reaching courts, so too does the Due Process Clause protect the rights of forum plaintiffs to redress grievances and injuries suffered at the hands of out-of-state actors.

Under the Due Process Clause, all citizens are guaranteed the same extent of due process, regardless of which side of the “v” on which their captioned names may rest. That is why the New York Long-Arm Statute (and each long-arm statute of every other state and territory) necessarily must be coextensive with the Due Process Clause as defined in *Ford Motor Co.* To fail to require such clarity limits the due process rights of some citizens relative to other citizens, in their roles as plaintiffs, depending upon the state in which such plaintiffs reside.

A. The Long-Arm Statutes of Most U.S. States Are Coextensive with the Due Process Clause of the Fourteenth Amendment

In at least 26 of the states, the long-arm statutes are coextensive with the Due Process Clause of the Fourteenth Amendment. *See* Vedder, Price, Kaugman & Kammholz, P.C., *Long-Arm Statutes: A*

Fifty-State Survey (2003) (cited recently in, *inter alia*, Yelmini, Gretchen, *Internet Jurisdiction and the 21st Century: Zippo, Calder, and the Metaverse* (2023 CONN. L. REV. 578) and Robert E. Pfeffer, *A 21st Century Approach to Personal Jurisdiction*, 13 U.N.H. L. REV. 65 (2015)). Thus, in at least 26 States, the standard for the degree of relatedness between a defendant's forum-related conduct and the causes of action that supports personal jurisdiction is the same as that articulated in *Ford Motor Co.* For example, the California Long-Arm Statute, Cal. Code Civ. Proc. §410.10, is unequivocally coextensive with the Due Process Clause:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

Co-equal states, as all fifty states are, necessarily must have equal, co-extensive long-arm statutes. See *Mallory v. Norfolk Southern Ry. Co.*, No. 21-1168, at *38-39 (June 27, 2023). However, the capacity of those individuals in the States whose long-arm statutes are **not coextensive** with the Due Process Clause to have a convenient forum for redressing injuries inflicted by out-of-state actors is compromised, and as a result, the constitutional rights of those individuals are necessarily violated. See *Ford Motor Co.*, 141 S. Ct. at 1030 (“Those States have significant interests at stake — “providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,” as well as enforcing their own safety regulations.”).

This constitutional malady will continue until the long-arm statutes of all states are co-extensive.

IV. This Case Embodies an Ideal Vehicle to Close the Gap Between the Due Process Clause of the Fourteenth Amendment and the New York Long-Arm Statute

The New York Long-Arm Statute does not go as far as the Due Process Clause of the Fourteenth Amendment. *Licci ex rel. Licci*, 673 F.3d at 60-61, *D.H. v. Gottdiener*, 462 F.3d 95, 105 (2d Cir. 2006), *Beacon Enterprises, Inc. v. Menzies*, 715 F.2d 757, 764 n.6 (2d Cir. 1983); *Banco Ambrosiano v. Artoc Bank*, 62 N.Y.2d 65, 71 (N.Y. 1984). Yet, there is no rationale that could pass constitutional muster that exempts the New York Long-Arm Statute from being coextensive with the Due Process Clause. In fact, as the Supreme Court has articulated in a number of controversies going back decades, with the advent of game-changing technological advancements, each day it becomes easier and easier for a party sued to defend themselves in any forum within a state of the United States. *See, e.g., Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985), *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).

This action is an ideal vehicle for the Supreme Court to close the gap between the Due Process Clause of the Fourteenth Amendment and the New York Long-Arm Statute so that New Yorkers are afforded the opportunity to redress their grievances and injuries by accessing a forum, a federal or state court, within New York, which can secure personal

jurisdiction over out-of-state actors consistently and to the fullest extent that is constitutionally permissible. In 2021, in *Ford Motor Co.*, the Supreme Court expanded the scope of specific jurisdiction permissible under the Due Process Clause of the Fourteenth Amendment. *See* 141 S. Ct. at 1026. However, the only plaintiffs who can fully avail themselves of the benefits of this expanded scope of specific personal jurisdiction, and therefore fully avail themselves of the ability to redress their grievances and injuries in their home states, are those citizens of States in which the long-arm statutes are coextensive with the Due Process Clause. To be clear, then, so long as there is a “gap” between the New York Long-Arm Statute and the Due Process Clause, Plaintiff-Petitioner and every other New Yorker, when compared with a citizen of a State with a long-arm statute that is coextensive with the Due Process Clause, such as Louisiana, will have narrower access to the courts in their home State of New York to seek redress of their grievances and injuries than do other citizens, and potentially against the same defendants for the same conduct alleged by a plaintiff, who may be left devoid of a home-court forum. *Petroleum Helicopters, Inc. v. Avco Corp.*, 513 So. 2d 1188, 1192 (La. 1987) (“The limits of the Louisiana Long-arm Statute and the limits of constitutional due process are now coextensive.”). This narrower access is patently inconsistent with the Due Process Clause.

TRANSFER PURSUANT TO 28 U.S.C. §1631**I. A Federal Court has an Obligation under 28 U.S.C. §1631 to Transfer an Action to Another Federal Court When Jurisdiction is Lacking, When the Transferee Court Would Have Possessed Jurisdiction Over the Action, and When Doing So is in the Interest of Justice**

Under 28 U.S.C. §1631, enacted as part of the Federal Courts Improvement Act of 1982, Pub. L. 97-164, 96 Stat. 25, a federal court is required to transfer an action to another federal court when: (1) that court lacks jurisdiction over the action; (2) the transferee court would have possessed jurisdiction over the action at the time it was originally filed or noticed; and (3) transfer would be in the interest of justice. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). Specifically, 28 U.S.C. §1631 requires a federal court “to make a single decision — whether to dismiss the case or, “in the interest of justice,” to transfer it to a court of appeals that has jurisdiction.” *Id.* at 803. There is no one formula or framework prescribed by the Supreme Court, Courts of Appeals, District Courts, or other federal courts to make that “single decision,” or to determine what set of circumstances must exist for it to be “in the interest of justice” for an action to be transferred by a transferring court lacking jurisdiction to a transferee court. Rather, over the last 40-plus years since the enactment of 28 U.S.C. §1631, there have been a multitude of ways in which courts have made that “single decision,” all of

which have led to inconsistent outcomes in the interpretation and application of 28 U.S.C. §1631 in violation of the Due Process of the Fifth and Fourteenth Amendments. *Fed. Commc'ns Comm'n*, 567 U.S. at 253 (2012). This action offers the Supreme Court an ideal vehicle in which to provide a formulaic approach to applying 28 U.S.C. §1631 that is uniform across all federal courts, is aimed at thwarting “time-consuming and justice-defeating technicalities” of litigation, and exemplifies the legislative intent of 28 U.S.C. §1631. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962).

A. The Judicial-Congressional Collaboration that Led to 28 U.S.C. §1631

Section 1631 has been called “a short statute of monumental importance.”¹ This monumental importance stems from its origins in enhancing the efficiency of the federal court system and lessening the financial and other burdens on litigants. The Senate Report on the proposed legislation that became 28 U.S.C. §1631 noted, among other things:

At present, the litigant’s main protective device, absent an adequate transfer statute, is the wasteful and costly one of filing in two or more courts at the same

¹ Jeffrey W. Tayon, *The Federal Transfer Statute: 28 U.S.C. §1631*, 29 S. Tex. L. Rev. 189 (1987).

time. This puts increased burdens on the courts as well as on the parties.²

The Congressional action that led to 28 U.S.C. §1631 arose directly from the insights of a practicing, experienced appellate jurist – Judge Harold Leventhal – in his concurrence in *Inv. Co. Inst. v. Bd. of Gov. Of. Fed.*, 551 F.2d 1270, 1283 (D.C. Cir. 1977).

After a series of correspondence between [Judge Leventhal and Congressman Kastenmeier], a transfer statute was proposed to Congress that was substantially the same as that which was later enacted as section 1631.

[...]

As a matter of practice, one of the purposes underlying enactment of section 1631 is to save time, effort and the expense of multiple filings. In order to refile, plaintiff must duplicate his efforts to obtain service and pay additional filing fees. Congress intended to avoid this duplication.

Id.

² S. REP. No. 275, 97th Cong., 2d Sess., 1982 U.S. CODE CONG. & ADMIN. NEWS (96 Stat.) 11, 21 as cited in Jeffrey W. Tayon, *The Federal Transfer Statute: 28 U.S.C. §1631*, 29 S. Tex. L. Rev. 189 (1987).

See also Britell v. U.S., 318 F.3d 70, 74 (1st Cir. 2003) (“In response to the concerns raised by Judge Leventhal, Congress enacted section 1631.”).

At its enactment, 28 U.S.C. §1631 served as a recognition that the “courts of the United States comprise one great system for the administration of justice.” *Internatio-Rotterdam, Inc. v. Thomsen*, 218 F.2d 514, 517 (4th Cir. 1955). Yet, by failing to transfer the proceeding underlying this appeal, the courts below acted in direct contravention to the intent of 28 U.S.C. §1631. Rather than save time and effort and obviate the need for multiple filings, the courts below generated a multiplicity of court actions, including:

- (1) a newly-commenced action in the U.S. District Court for the Central District of California in which Defendants-Respondents have asserted the affirmative defense that all causes of action are barred by applicable statutes of limitations;
- (2) an action remanded by the Second Circuit and currently before the U.S. District Court for the Southern District of New York; and
- (3) this instant appeal.

This multiplicity of actions has increased burdens on the courts and litigants, and the refusal of the courts below to order transfer has birthed serial

time-consuming and justice-defeating technicalities of precisely the kind that 28 U.S.C. §1631 was intended to obviate.

II. The “Interest of Justice” Standard Leads to Inconsistent Outcomes Across U.S. District Courts and Circuits

Notwithstanding the roots of judicial- and litigation-based efficiencies in the enactment of 28 U.S.C. §1631, its application has become less about the efficient transfer of an action from one court lacking jurisdiction to another court possessing jurisdiction and more about increasing levels of judicial discretion in how the benefits of a 28 U.S.C. §1631 transfer are meted out to litigants who, in good faith, commence their actions in a forum that is ultimately found to lack jurisdiction over defendants. With increasing levels of discretion in application of the 28 U.S.C. §1631, fewer efficiency gains accrue to our one great system for the administration of justice. See, e.g., *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 435 (2d Cir. 2005) (“Courts enjoy considerable discretion in deciding whether to transfer a case in the interest of justice.”). Introducing a formulaic approach to applying 28 U.S.C. §1631 that is uniform across all federal courts is essential to realizing the full promise of all of the efficiencies that accrue from uniformity in our federal court system in a manner that is consistent with the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Ninth Circuit is the court that has expounded upon 28 U.S.C. §1631 jurisprudence in the most extensive manner, measured in terms of what could be called a “28 U.S.C. §1631 formula” and the number of decisions rendered with respect thereto. This “formula” is espoused within the Ninth Circuit’s precedent dating back to 1983, approximately one year after the statute was enacted. The Ninth Circuit has explained, “...this circuit has taken a broad view of when transfer is appropriate, recognizing that [n]ormally transfer will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time-consuming and justice-defeating.” *Amity Rubberized Pen Co. v. Mkt. Quest Grp. Inc.*, 793 F.3d 991, 996 (9th Cir. 2015) (internal quotations and citations omitted). *Accord Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (explaining that transfer is more appropriate than dismissal and quoting *Goldlawr*, 369 U.S. at 467). The Ninth Circuit has made clear that 28 U.S.C. §1631 was intended to “aid litigants confused about the proper forum for review.” *Baeta v. Sonchik*, 273 F.3d 1261 (9th Cir. 2001), *Miller*, 905 F.2d at 262. And in fact, the Ninth Circuit has “rarely found that transfer would not serve the interest of justice.” *Amity Rubberized Pen Co.*, 793 F.3d at 996.

A. The “Mandatory Cast” of 28 U.S.C. §1631

From the Ninth Circuit’s jurisprudence, the following “28 U.S.C. §1631 formula” or “steps” are discernible once a federal court determines that it

lacks jurisdiction (whether personal or subject matter jurisdiction).

First, with or without a motion to transfer pursuant to 28 U.S.C. §1631 filed by a plaintiff in an action, a District Court must conduct an inquiry into whether it is in the “interest of justice” to transfer the action. That is:

- (a) **A plaintiff is not required to file a motion to transfer.** *In re McCauley*, 814 F.2d 1350, 1352 (9th Cir. 1987) (“A motion to transfer is unnecessary because of the mandatory cast of section 1631’s instructions.”); and
- (b) **A District Court is required to conduct an “interest-of-justice” inquiry.** *Taylor v. Social Sec. Admin.*, 842 F.2d 232, 233 (9th Cir. 1988).

Second, if a court fails to conduct an “interest-of-justice” inquiry, it is an abuse of discretion. *Harrell v. Kepreos*, 175 F. App’x 793, 793 (9th Cir. 2006) (“Here, the district court abused its discretion in failing to determine whether the action could have been brought in the Eastern District of California and whether such transfer would be in the interest of justice.”). *Miller*, 905 F.2d at 262, *Taylor*, 842 F.2d at 233.

Third, if a court fails to conduct an “interest-of-justice” inquiry, and, therefore, abused its discretion, remand for an “interest-of-justice” inquiry

is appropriate unless it appears from the record in the action that all considerations relevant to the inquiry are in plain view. *Ramirez v. Van Buren*, 206 F. Appx. 712, 713 (9th Cir. 2006); *Hays v. Postmaster Gen. of U.S.*, 868 F.2d 328, 331 (9th Cir. 1989).

Fourth, a transfer pursuant to 28 U.S.C. §1631 is in the “interest of justice” if the plaintiff,

- (a) **Commenced the action within the applicable statute of limitations.** *Taylor*, 842 F.2d at 233 (“In determining whether to grant or deny a motion to transfer an action pursuant to section 1631, the district court must consider whether the action would have been timely if it had been filed in the proper forum on the date filed, and if so, whether a transfer would be “in the interest of justice.” *Hill*, 795 F.2d at 1070; *Hempstead County and Nevada County Project v. EPA*, 700 F.2d 459, 462 (8th Cir. 1983).”).

and

- (b) **Pleaded the action with a “colorable claim.”** *Amity Rubberized Pen Co.*, 793 F.3d at 996 (“So long as an appellant has made a colorable claim, however, even if its support is ‘quite spare,’ we have found it best to transfer and ‘leave such issues to the court with jurisdiction over the claims.’” *Munns*, 782 F.3d at 415 n. 9.”)

and

- (c) **Filed the action, in good faith, in the “wrong” forum, i.e., a forum in which there is a lack of jurisdiction.** *Amity Rubberized Pen Co.*, 793 F.3d at 996-97:

“Drawing from these cases, we conclude that transfer will generally be in the interest of justice, unless it is apparent that the matter to be transferred is frivolous or was filed in bad faith. This is a low bar and, as prior cases illustrate, it will usually involve a very limited inquiry by the transferring court. But this narrow scope is by design, as the interest of justice will rarely be served by one court engaging in a lengthy pre-transfer analysis, only ultimately to send the case to a new court that must start afresh. Imposing such unnecessary procedure and delay before the right court can address the case on its merits is just the sort of “time-consuming and justice-defeating” impediment transfer is meant to avoid. *Miller*, 905 F.2d at 262 (quoting *Goldlawr*, 369 U.S. at 467, 82 S.Ct. 913). The sooner a case is transferred, the sooner it can be

resolved by the court Congress has designated to hear it.”

Thus, once a federal court determines it does not possess jurisdiction, transfer should be effected absent a constitutionally-compelling reason to the contrary.

B. Circuit Splits: The Various Approaches of Appellate Courts to 28 U.S.C. §1631 Jurisprudence

There are different formulations of the “interest-of-justice” inquiry among the Circuits, none of which are as lucid and transparent as those of the Ninth Circuit. In fact, the Ninth Circuit has recognized these differences, which are discussed below. *Amity Rubberized Pen Co.*, 793 F.3d at 997.

The First Circuit employs a burden-shifting framework that commences with a “presumption — albeit a rebuttable one — in favor of transfer,” which framework also involves consideration of the “totality of the circumstances.” *Britell v. U.S.*, 318 F.3d 70, 73-75 (1st Cir. 2003) (“Among other things, this responsibility obligates the court to engage in whole-record review. This obligation flows naturally from the language of section 1631, which directs the putative transferor court to determine if “the action or appeal could have been brought at the time it was filed or noticed” in any other federal court. 28 U.S.C. §1631. Common sense suggests that, in order to comply with this directive, the court must examine the complete record. This intuition is reinforced by

the fact that the interest of justice analysis necessarily involves considerations of judicial administration (and, therefore, requires at least a preliminary evaluation of the parties' positions). In addition, the First Circuit requires that a litigant make a request for transfer. *Albion v. YMCA Camp Letts*, 171 F.3d 1, 3 n.3 (1st Cir. 1999) ("However, plaintiff has not requested transfer pursuant to §1631 in either his opposition to defendant's motion to dismiss or in his appellate brief. Therefore, we do not address the applicability of this third transfer provision.")

The Second, Third, Seventh, and Tenth Circuits have adopted a "peek at the merits" approach to determine whether the underlying case is sufficiently meritorious to justify transfer. *See, e.g., Daniel*, 428 F.3d at 436, *United States v. Foy*, 803 F.3d 128, 137-38 (3d Cir. 2015), *Phillips v. Seiter*, 173 F.3d 609, 610-11 (7th Cir. 1999), and *Haugh v. Booker*, 210 F.3d 1147, 1150 (10th Cir. 2000). The Ninth Circuit, however, has rejected the "peek at the merits" approach as inconsistent with its case law and the legislative intent of 28 U.S.C. §1631. *Amity Rubberized Pen Co.*, 793 F.3d at 997.

The Second Circuit, along with the Fifth Circuit, also employs an "interest-of-justice" inquiry that calls for a weighing of the equities. *E.g., Ruiz v. Mukasey*, 552 F.3d 269, 276 (2d Cir. 2009), *Paul v. I.N.S.*, 348 F.3d 43, 47 (2d Cir. 2003), *Liriano v. U.S.*, 95 F.3d 119, 122 (2d Cir. 1996), *Uspps, Ltd. v. Avery Dennison Corp.*, 647 F.3d 274, 277 (5th Cir. 2011), and *Scherbatskoy v. Halliburton Company*, 125 F.3d

288, 292 (5th Cir. 1997). However, the Fifth Circuit makes clear that a request for transfer is not mandatory. *Franco v. Mabe Trucking Co.*, 3 F.4th at 796 (“In light of §1631’s mandatory language, our sister circuits have applied the statute to transfers even when the parties did not move under §1631 and where, as here, the transferring court did not mention §1631 in its transfer orders.”)

The Eleventh Circuit has forthrightly explained that it has “not defined precisely what the ‘interest of justice’ means in the context of a §1631 transfer...” *U.S. v. Kinsey*, 428 F. App’x 965 (11th Cir. 2011).

The Fourth, Sixth, Eighth, D.C., and Federal Circuits seem to engage in a case-by-case review with no particular methodologies employed to conduct an “interest-of-justice” inquiry. *See, e.g., Kopp v. Director, Office of Workers’ Compensation Programs, United States Department of Labor*, 877 F.2d 307, 309 (4th Cir. 1989); *Stanifer v. Brannan*, 564 F.3d 455, 457-460 (6th Cir. 2009); *Hempstead, Nevada Cty. Project v. U.S.E.P.A.*, 700 F.2d 459 (8th Cir. 1983); *Ingersoll-Rand Co. v. United States*, 780 F.2d 74 (D.C. Cir. 1985); and *Texas Peanut Farmers v. U.S.*, 409 F.3d 1370 (Fed. Cir. 2005). Additionally, the Federal Circuit does, in fact, recognize a statutory requirement that transfer be considered to cure jurisdictional defects. *Id.* at 1375 (“That fact, combined with the statutory requirement that transfer be considered to cure jurisdictional defects, raises the question of why the court did not in the

first instance address the issue in the Dismissal Order.”)

Plaintiff-Petitioner requested Transfer of the underlying proceeding on October 7, 2021 – *a mere 10 days* after the District Court, on September 27, 2021, decided it lacked personal jurisdiction over Defendants-Respondents. *See supra* Section II. Until that time, Plaintiff-Petitioner had no reason to believe that personal jurisdiction in the Southern District of New York would be lacking. Nor did the District Court, in its more than six months of deliberations on Plaintiff-Petitioner’s Second Amended Complaint, provide Plaintiff-Petitioner with any indication that personal jurisdiction would be lacking. On June 9, 2022, when the Second Circuit actually possessed jurisdiction over the issue of Transfer, the U.S. District Court, among other things, denied Plaintiff-Petitioner’s Transfer Motion. *Suber v. VVP Servs.*, 20-cv-8177 (AJN), at *4 (S.D.N.Y. June 9, 2022).

Interestingly, in its holding, the District Court viewed the Plaintiff-Petitioner’s request for Transfer as “a new theory that she previously had available but did not raise.” *Id.* The District Court’s view is inconsistent with the jurisprudence of 28 U.S.C. §1631 across the Circuits as illustrated by the discussion *supra*. The “mandatory cast” or “mandatory language” of 28 U.S.C. §1631 makes clear the issue of transfer is ever-present in a federal court proceeding. Once the District Court determined that it did not have personal jurisdiction over the Defendants-Respondents, the Court had the

statutory obligation to conduct an “interest-of-justice” inquiry, which the Court did not conduct either before dismissing Plaintiff-Petitioner’s proceeding or before issuing its June 9, 2022, order denying Plaintiff-Petitioner’s Transfer Motion. The District Court’s failure to conduct an “interest-of-justice” inquiry is violative of 28 U.S.C. §1631, and the Second Circuit’s affirmance of the District Court’s denial of the Transfer Motion is inconsistent with its own precedent. In addition, the failure by the District Court and the Second Circuit to transfer Plaintiff-Petitioner’s case is inconsistent with the way other Circuits have treated cases with circumstances like those of Plaintiff-Petitioner.

On January 10, 2023, the Second Circuit concluded that Plaintiff-Petitioner had “not shown that the interests of justice require a transfer.” App. 15. In so concluding, the Second Circuit cited Plaintiff-Petitioner’s purported “delay in seeking transfer” and “lack of specificity as to the hardship she would face if we declined to transfer”. *Id.* Yet, again, only a mere 10 days lapsed between Plaintiff-Petitioner’s learning of the U.S. District’s ruling regarding personal jurisdiction and Plaintiff-Petitioner’s filing of the Transfer Motion, and the Second Circuit itself has granted requests for transfer when no request was made. *E.g.*, *Thackurdeen v. Duke Univ.*, 660 F. App’x 43, 5 (2d Cir. 2016) (“Plaintiffs did not seek this relief from the District Court. Nonetheless, we have ‘statutory and inherent authority to transfer this case’ directly to an appropriate district court if doing so would be in the interest of justice.”). Moreover, Plaintiff-Petitioner, in

her opening appellate brief submitted to the Second Circuit on February 2, 2022, made clear that some of her causes of action may be time-barred and that she would have to rely on the Doctrine of Equitable Tolling, specifying that causes of action 2, 3, 4, 5, 6, 8, 11 and 15 of the Second Amended Complaint could be time-barred due to the applicable statutes of limitations. Plaintiff-Petitioner's Appellate Brief, pp. 42-43, Section II.C. Furthermore, Defendants-Respondents, in their Motion to Dismiss filed in the CACD Matter, have, in fact, asserted the affirmative defense that all Plaintiff-Petitioner's causes of action are barred by the applicable statutes of limitations. *See* 2:23-cv-02932-SPG (AFMx) filed on April 18, 2023.

Thus, even though Plaintiff-Petitioner commenced the underlying action within the applicable statute of limitations, even though Plaintiff-Petitioner pleaded the action with multiple colorable claims, even though Plaintiff-Petitioner filed the action, in good faith, in the Southern District of New York, and even though some or all of Plaintiff-Petitioner's claims may be barred by the statute of limitations, the Second Circuit still held, contrary to its own precedent and across multiple Circuits, including the Ninth Circuit, that it was not in the interest of justice to transfer Plaintiff-Petitioner's action to the Central District of California. In fact, Plaintiff-Petitioner will be asking the U.S. District Court in the CACD Matter to apply the Doctrine of Equitable Tolling. In so doing, the courts below acted in a manner that thwarts the judicial efficiencies that Congress intended would

accrue to the federal judicial system when Congress, on the recommendation of Judge Leventhal, enacted 28 U.S.C. §1631 in a paramount illustration of judicial-legislative collaboration.

III. This Case is an Ideal Vehicle to Standardize the Framework for Applying 28 U.S.C. §1631 Such that Application is Constitutional across Circuits

The case law that comprises the 28 U.S.C. §1631 jurisprudence, a subset of which is discussed *supra*, makes abundantly clear that the framework for conducting “interest of justice” inquiries and transferring actions pursuant to 28 U.S.C. §1631 is not consistent across the Circuits. As a result, there are inconsistent outcomes realized by litigants in courts throughout the United States. This inconsistency is not only violative of the Due Process Clauses of the Fifth and Fourteenth Amendments; it is anathema to the legislative intent of 28 U.S.C. §1631. This case offers an ideal vehicle for the Supreme Court to provide a well-defined framework and a formulaic approach for applying 28 U.S.C. §1631 that are uniform across all federal courts. In so doing, the Supreme Court will be providing much-needed guidance to courts and litigants regarding the application of 28 U.S.C. §1631.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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