No. 23-184

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**

## BRIEF IN OPPOSITION

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## CORPORATE DISCLOSURE STATEMENT

Respondents VVP Services, LLC, Vision Venture Partners, LLC, Eleven Stones, LP, and Prometheus Ventures, LLC have no parent corporations, and no publicly traded corporation owns 10% of more of their member or partner interests.

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## INTRODUCTION

The Second Circuit's unpublished summary order is a simple and straightforward application of the New York Long-Arm Statute, N.Y. C.P.L.R. §302(a), and a proper exercise of its broad discretion to dismiss this case for lack of personal jurisdiction rather than transfer to the Central District of California pursuant to 28 U.S.C. §1631. These were strictly fact-based determinations that are unique to the facts of this case, have no precedential value, and do not present important questions of federal law that merit the grant of certiorari, particularly for the relief Petitioner seeks in her questions presented.

Petitioner argues that each lower court's independent interpretation and application of the New York Long-Arm Statute violates the Due Process Clauses of both the Fifth and Fourteenth Amendments to the United States Constitution. Questions of personal jurisdiction in cases where Congress has not authorized nationwide service of process generally implicate the Due Process Clause of the Fourteenth Amendment. *See Daimler AG v. Bauman*, 571 U.S. 117, 125 (2014) (citing Fed.R.Civ.P. 4(k)(1)(A)). Regardless, the standards under the Fifth and Fourteenth Amendment are the same. Accordingly, Respondents refer to those clauses collectively as the "Due Process Clause."

Petitioner asks this Court to grant certiorari to (1) force New York (and presumably other states) to amend its long-arm statute to be co-extensive with the Due Process Clause, (2) mandate a uniform definition of the phrase "arising from" in the New York Long-

Arm Statute, (3) take away the broad discretion afforded courts to determine whether the "interest of justice" requires transfer under 28 U.S.C. §1631, and (4) force all Circuits to adopt the Ninth Circuit's standards, even though such standards are generally uniform among the Circuits, and the transfer requested here would not have been warranted under those standards in any event.

Respondents respectfully submit that the relief Petitioner seeks cannot and should not be afforded by this Court, and the Second Circuit's unpublished summary opinion is not an appropriate vehicle for addressing any of Petitioner's questions presented. Indeed, this case is a remarkably poor vehicle because Petitioner never raised, and the lower courts never addressed, the due process challenges that Petitioner now makes to the New York Long-Arm Statute and to 28 U.S.C. §1631.

This Court has long recognized the sovereignty of each state to prescribe the standards that must be met before a non-resident defendant can be hauled into a court located within its borders. New York, along with many other states, enacted a long-arm statute that is not co-extensive with the Due Process Clause. In those states, the exercise of personal jurisdiction requires a two-step analysis: (1) a non-resident defendant's conduct must fall within the long-arm statute; and (2) if the long-arm statute is satisfied, then the exercise of personal jurisdiction must comport with due process. These statutes do not violate the Due Process Clause, and this Court should reject Petitioner's invitation to force all states to make

their long-arm statutes co-extensive with the Due Process Clause.

Contrary to Petitioner's arguments, courts within New York have interpreted and applied the New York Long-Arm Statute for sixty years, developing well-defined standards for determining whether a plaintiff's claims "arise from" a non-resident defendant's form-related conduct. Petitioner's "spectrum" of sufficient relatedness is a misnomer, as the various phrases used by the courts are essentially synonymous and ensure that, consistent with this Court's instructions, there is a strong relationship between forum-related activity and the plaintiff's claims. The New York Court of Appeals previously clarified what "arise from" means. To the extent any further clarification of this standard is needed, that is a task for the New York Court of Appeals—not this Court.

Finally, there is no split of an important issue of federal law among the Circuits regarding application of 28 U.S.C. §1631 that merits granting certiorari here. Every Circuit agrees that the determination of whether transfer is in the interest of justice under 28 U.S.C. §1631 is within the broad discretion of the court. Every Circuit applies similar standards or tests in making that determination. That those standards are not identical, or are articulated slightly differently, is not a sufficient split—at best it is a splinter that can be reconciled based on relevant factual differences between the cases and/or common principles upon which the Circuits agree. Nor should this Court force all Circuits to adopt the Ninth

Circuit's standards for applying 28 U.S.C. §1631, which Petitioner urges despite its uniformity.

For these reasons, the Petition should be denied.

## STATEMENT OF THE CASE

### A. Factual Background

Petitioner is an attorney who was briefly employed as in-house counsel by VVP Services, LLC ("VVP Services") in Beverly Hills, California. A.19. In the summer of 2017, while Petitioner was living in New York, she was contacted by a recruiting firm regarding a job at VVP Services. Following a telephone interview, Petitioner travelled to California twice for in-person interviews. A.17-18. Petitioner alleges that during those interviews, Amit Raizada ("Raizada") and other representatives of VVP Services made misrepresentations that induced her to accept employment with VVP Services and move to California in September 2017. A.18-19.

Petitioner alleges that during her short-lived employment in California, Raizada and Stratton Sclavos ("Sclavos"), personally or through agents, helped solicit investments for non-party Vision Esports, LP ("Vision Esports") from persons in New York, and that she drafted some transactional documents for those investments. A.19-20. Petitioner also alleges that between October 2017 and January 2018, she became aware of "questionable conduct" that caused her to worry about the nature of her work and discovered that some representations made to her during her job interviews were false. A.20. Petitioner

further alleges that she was subjected to discriminatory treatment at VVP Services due to race. A.20-21. Petitioner voluntarily resigned from VVP Services on January 22, 2018. A.21. Petitioner claims that in April 2019, Sclavos told others that she was terminated for cause. A.21.

On October 2, 2020, more than two and a half years after Petitioner resigned, she sued VVP Services, Raizada, Sclavos, Vision Venture Partners, LLC, Eleven Stones, LP, and Prometheus Ventures, LLC in the Southern District of New York. Petitioner asserted sixteen causes of action against all Respondents for various kinds of fraud, promissory estoppel, negligent misrepresentation, breach of contract, California Labor Code violations, wrongful termination, defamation, civil conspiracy, unfair business practices, and race discrimination, all arising out of her employment by VVP Services in California. A.21. Following multiple motions to dismiss under Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure, Petitioner twice amended her complaint. A.21.

All Respondents moved to dismiss Petitioner's Second Amended Complaint ("SAC") for lack of personal jurisdiction because none of them were at home in New York, they did not transact business in New York, all of the conduct about which Petitioner complained occurred in California, Petitioner was harmed, if at all, in California, and, importantly, none of Petitioner's claims arose from Respondent's forum-related contacts. A.21.

### B. The District Court's Analysis and Findings

The district court dismissed the SAC as to all Respondents for lack of personal jurisdiction on September 27, 2021. A.22-39. The district court analyzed the two potential contacts that Petitioner alleged Respondents had with New York: (1) VVP Services' alleged recruitment of Petitioner in New York; and (2) Sclavos and Raizada's alleged solicitation of investments for Vision Esports in New York, and concluded that neither of these alleged activities fell within the purview of §§302(a)(2) or (3) of the New York Long-Arm Statute. *Id.*

With respect to §302(a)(1) of the New York Long-Arm Statute, the district court determined that VVP Services' recruiting activities did not constitute the transaction of business under New York law. A.25-27. However, the district court found that the alleged solicitation of investments for Vision Esports did constitute transaction of business in New York for purposes of §302(a)(1), but solely as to Sclavos and Raizada. A.27-31. The district court rejected Petitioner's theories of conspiracy jurisdiction over the remaining Respondents, finding that such theory is not available under §302(a)(1), and that Petitioner had not plausibly alleged the existence of a conspiracy. A.29-31.

Moreover, the district court declined to exercise personal jurisdiction over Sclavos and Raizada because Petitioner's claims did not "arise from" their forum-related contacts. A.31-34. The district court applied New York law, which requires "some articulable nexus between the business transacted

and the cause of action sued upon, or when there is a substantial relationship between the transaction and the claim asserted." A.32. (quoting *Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC*, 450 F.3d 100, 103 (2d Cir. 2006). The district court reasoned that the conduct underlying Petitioner's fraud claims occurred prior to the alleged investment activities in New York and therefore, are unrelated; the promissory estoppel, breach of contract, defamation and discrimination claims are also completely unrelated to the alleged investment activities; and the only claim even remotely related to those activities is Petitioner's claim for wrongful termination. A.32-34. Under California law, however, that claim may only be brought against Petitioner's employer, which was VVP Services, and Petitioner failed to plausibly allege that VVP Services transacted any business in New York out of which the wrongful termination claim arose. A.34.

Because the district court found that Respondents' alleged contacts with New York were insufficient to confer specific jurisdiction under the long-arm statute for any of Petitioners' claims, the district court did not address the Due Process Clause. A.23.

### C. Plaintiff's Late Request for Transfer

On October 7, 2021, following dismissal of the SAC, Petitioner filed a motion for reconsideration before the district court, seeking—among other things—transfer of the case to the Central District of California pursuant to 28 U.S.C. §1631. A.15 n.4; D.C.ECF. 145. Petitioner argued reconsideration was

required to prevent "manifest injustice" because if she had to re-file the case in the Central District of California, then she ***may*** have to invoke equitable doctrines to preserve her claims and ***may*** have to re-serve Respondents with process. D.C.ECF. 145 & 150. The district court denied the motion on June 9, 2022, and Petitioner did not appeal that order. A.15 n.4. The district court reasoned that Petitioner had ample opportunity to seek transfer during the year in which the case was pending, especially given the multiple motions challenging personal jurisdiction in New York. D.C.ECF.153. The district court also concluded that Petitioner failed to establish how transfer is necessary to prevent manifest injustice or, in other words, is in the interest of justice. *Id.*

### D. The Second Circuit's Analysis and Opinion

Petitioner filed her Notice of Appeal on October 20, 2021, arguing that the New York Long-Arm Statute affords personal jurisdiction over all Respondents, but if the Second Circuit did not find personal jurisdiction over them, it should remand with instructions to transfer the case to the Central District of California. A.7. The Second Circuit independently analyzed Petitioner's allegations and arguments and agreed with the district court that VVP Services' recruitment of Petitioner to work in California did not constitute the transaction of business under the New York Long-Arm Statute. A.8-9. The Second Circuit also agreed that none of Petitioner's claims arose from Raizada's and Sclavos' alleged solicitation of investments for Vision Esports in New York. A.9-11.

The Second Circuit applied well-established New York law, which "requires 'an articulable nexus or substantial relationship between the business transaction and the claim asserted'—in other words, that there is 'at a minimum, a relatedness between the transaction and the legal claim such that the latter is not completely unmoored from the former.' " A.10 (quoting *Licci v. Lebanese Canadian Bank*, 20 N.Y.3d 327, 339 (2012)("*Licci II*") (internal citation and quotation marks omitted)). The Second Circuit determined that Petitioner did not show a substantial relationship between the alleged solicitation of investors in New York and Petitioner's claims arising from her employment by VVP Services. In particular, the representations and promises that Petitioner claimed induced her to take the job at VVP Services predated the alleged solicitation activities and had nothing to do with those activities. As the Second Circuit reasoned: "by the time of Suber's (minimal) involvement with the New York investment solicitation activities, the alleged damage had already been done. She had already been lied to; she had already relied upon those lies to her detriment; and to the extent there was still other unrelated damage to come in the form of unpaid compensation, race-based discrimination, or lies regarding the circumstances of her departure from VVP, those harms, and the legal claims they provoked, likewise have no connection to the New York investment solicitation activity." A.10. Accordingly, the Second Circuit affirmed the district court's dismissal of all Respondents for lack of personal jurisdiction. *Id.*

The Second Circuit declined to exercise its discretion to transfer this case to the Central District

of California under 28 U.S.C. §1631, finding that Petitioner's delay in seeking transfer, and her lack of specificity as to the hardship she would face if transfer was not ordered, did not establish transfer was in the interest of justice. A.15.

Petitioner filed a petition for panel rehearing and rehearing *en banc* before the Second Circuit, where, for the first time, Petitioner argued that there is inconsistency across the Circuits in the criteria analyzed in applying the interest of justice provision of 28 U.S.C. §1631. CA.ECF.134-1. The Second Circuit denied that Petition. A.43-44.

## REASONS FOR DENYING THE PETITION

### I. Petitioner's First Question Presented Does Not Merit Review

Petitioner's first question presented asks whether courts sitting in New York have inconsistently interpreted and applied the standard for the "arising from" prong of the New York Long-Arm Statute in violation of the Due Process Clause. Petitioner asks this Court to clarify New York law and mandate a single standard that all courts sitting in New York must use in analyzing whether a plaintiff's claims arise from a defendant's forum-related conduct. For numerous reasons, this question does not warrant the Court's review.

### A. New York's Standard for Applying the "Arising From" Prong of the New York Long-Arm Statute is Sufficiently Clear

Petitioner's self-authored "Relatedness Spectrum" attempts to create non-existent inconsistencies or confusion about the New York Long Arm Statute's phrase "arising from" out of whole cloth. Petitioner's arguments themselves are confusing at best and ignore that the New York Court of Appeals has already clarified that standard.

As Petitioner concedes, the New York Court of Appeals clarified years ago in *Licci II* what connection must be shown between a defendant's New York activities and a plaintiff's "claim" under the New York Long-Arm Statute's "arising from" requirement: "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" or "substantial relationship" between the business transaction and the claim asserted. *Licci,* 20 N.Y.3d at 339 (internal citations omitted). The New York Court of Appeals did so in direct response to a question certified by the Second Circuit in *Licci ex rel. Licci*, 673 F.3d 50, 70-71 (2d Cir. 2012) ("*Licci I*"). The Second Circuit, in certifying the question, noted that some courts had treated the nexus requirement as stricter than its "constitutional analog," essentially requiring a causal connection, while others had suggested the nexus requirement was much more permissive. *Id*.

Notably, all the Second Circuit opinions upon which Petitioner relies to identify other phrases that courts have used to describe the "arising from" prong as purportedly creating inconsistencies or confusion predate the New York Court of Appeals' decision in *Licci II*. And, most of those opinions were identified by the Second Circuit in *Licci I* as the reason the question was certified in the first place. *Licci II* answered that question and put to rest any confusion as to what the "arising from" prong of the New York Long-Arm Statute requires. Since then, the Second Circuit has consistently required an "articulable nexus" or "substantial relationship" between a plaintiff's claims and a defendant's forum-related conduct to satisfy the New York Long Arm Statute. Petitioner's argument, much of which hinges on outdated and stale opinions, does not demonstrate that any inconsistency exists, let alone one rising to *constitutional* concerns that might even possibly warrant this Court's review.

### B. Any Further Clarification of New York Law should be Left to the New York Court of Appeals

As discussed above, the New York Long Arm Statute is not unconstitutionally vague, nor are the standards espoused under New York law for interpreting that statute confusing or inconsistent. The Second Circuit certified this very question to the New York Court of Appeals almost 10 years ago. If, however, the Court believes that any further guidance or clarification regarding the interpretation of the "arising from" prong of the statute is necessary, then Respondents respectfully submit that such

clarification should come from the New York Court of Appeals.

This Court has repeatedly held that state courts are the ultimate expositors of state law, *see*, *e.g., Murdock v. City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *Winters v. New York*, 333 U.S. 507 (1948), and that federal courts are bound by their constructions except in extreme circumstances. In a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. As such, concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law, or to seek guidance from the state court as to such interpretation.

In *Railroad Comm'n v. Pullman Co.,* the Court held that where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions. 312 U.S. 496, 501 (1941); *see also Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 236–237 (1984). That stance, as this Court has long understood, respects the "rightful independence of the state governments," "avoid[s] needless friction with state policies," and promotes "harmonious relation[s] between state and federal authority." *Railroad Comm'n of Tex.,* 312 U.S. at 500–501.

Accordingly, the Court should reject Petitioner's invitation to restate, modify, or otherwise mandate the standards that courts sitting within New York must apply in interpreting the New York Long Arm Statute.

### C. The Lower Courts Applied the Correct Standard

Contrary to Petitioner's arguments, both the district court and the Second Circuit used the proper standards in analyzing whether any of Petitioner's claims arose from any Respondent's forum-related activities as required by the New York Long Arm Statute. Consistent with and as required by *Licci II*, the lower courts looked for an "articulable nexus" or "substantial relationship" between any of Petitioner's causes of action and the alleged New York investment activities of Sclavos and Raizada, which were the only contacts any Respondent had with New York. Both courts found such relationship lacking.

The district court expressly addressed, and rejected, Petitioner's argument that her wrongful termination claim was substantially related to Sclavos' and Raizada's New York solicitation activities, because neither Sclavos nor Raizada were Petitioner's employer, and Petitioner could not bring a wrongful termination claim against them under California law. A.33-34 (quoting *Miklosy v. Regents of Univ. of California*, 188 P.3d 629, 644 (Cal. 2008). That claim could only be asserted against VVP Services, and Petitioner had not plausibly shown that VVP Services transacted any business in New York from which her wrongful termination claim arose. *Id.*

The Second Circuit conducted an independent review and likewise found no connection between Petitioner's claims and the alleged solicitation of investments in New York. A.31-34. The lower courts properly applied New York law based on the facts alleged in Petitioner's Second Amended Complaint, and there is no basis for this Court to review those decisions.

## II. Petitioner's Second Question Presented Does Not Merit Review

Petitioner's second question presented asks whether the New York Long-Arm Statute must be amended to be co-extensive with the Due Process Clause. Petitioner asks this Court to force New York (and presumably numerous other states) to amend its long-arm statute. For numerous reasons, this question does not warrant the Court's review.

### A. This Issue Was Not Raised or Addressed Below

This Court should not grant certiorari to review the second question presented because Petitioner never raised this issue below, and the Second Circuit did not opine on this issue. First, because Petitioner's question "was not raised below," it is forfeited. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). This defect alone warrants denial. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) ("The Department failed to raise this argument … below, and we normally decline to entertain such forfeited arguments."); *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 38 (2015) ("Absent unusual circumstances— none of which is

present here—we will not entertain arguments not made below."); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 75-76 (2010) (argument "not mentioned below" is "too late, and we will not consider it").

Second, because Petitioner did not present this argument below, no lower court passed on that issue. As the Court has explained, because it is "a court of review, not of first view," it does not "generally… consider arguments" that the lower courts "did not have occasion to address." *Byrd v. United States*, 138 S.Ct. 1518, 1527 (2018); *see also*, *Town of Chester, N.Y., v. Laroe Ests., Inc.,* 581 U.S. 433, 441 n.4 (2017)("[I]n light of … the lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance."); *City & Cnty. of San Francisco, Calif., v. Sheehan*, 575 U.S. 600, 609 (2015) ("The Court does not ordinarily decide questions that were not passed on below."); *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (refusing to resolve issue "without the benefit of thorough lower court opinions").

Petitioner does not acknowledge these flaws, much less explain why the Court should abandon its longstanding practice of denying petitions that raise issues "not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992).

### B. The New York Long-Arm Statute Comports with Due Process

Petitioner does not explain how the New York Long Arm Statute itself, or the application of that

statute by courts sitting within New York, violates the Due Process Clause. To the contrary, even though not co-extensive with the Due Process Clause, the New York Long Arm Statute is concordant with the due process protections put in place by this Court to protect a non-resident defendant's "liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

The Court recently reaffirmed the standards required to satisfy due process in exercising personal jurisdiction over a non-resident defendant. A plaintiff must plausibly allege that (1) the defendant took "some act by which it purposefully avail[ed] itself of the privilege of conducting activities within the forum," and (2) the plaintiff's claim "arise[s] out of or relates to the defendant's contacts with the forum." *Ford Motor Co. v. Mont. 8th Jud. Dist.*, 141 S. Ct. 1017, 1025 (2021). The plaintiff must show contacts such that suit in the forum is "reasonable and just according to our traditional conception of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 320. The Court confirmed that while "but for causation" is not required, the "arise out of or relate to" element speaks to the "essential foundation of specific jurisdiction" that there be a "strong relationship between the defendant, the forum, and the litigation." *Ford*, 141 S. Ct. at 1028 (quoting *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 414, 104 (1984)). "That relationship must arise out of contacts that the defendant *himself*

creates with the forum." *Walden v. Fiore*, 571 U.S. 277, 284 (2014).

Section 302(a) of the New York Long Arm Statute, which allows a court to exercise personal jurisdiction over a non-domiciliary as to a cause of action "arising from" any of the enumerated acts, is entirely consistent with the Due Process Clause. Section 302(a)(1) provides in relevant part that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state." N.Y. C.P.L.R. §302(a)(1). "To establish personal jurisdiction under section 302(a)(1), two requirements must be met: (1) The defendant must have transacted business within the state; and (2) the claim asserted must arise from that business activity." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 168 (2d Cir. 2013) ("*Licci III*").

New York law, like the Due Process Clause, provides that transacting business means "purposeful activity—some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 246 (2d Cir. 2007). Additionally, New York law, like the Due Process Clause, requires that, "in light of all the circumstances, there must be an 'articulable nexus' or 'substantial relationship' between the business transaction and the claim asserted." *Daou v. BLC Bank, S.A.L.*, 42 F.4th 120, 130 (2d Cir. 2022). Moreover, consistent with *Ford Motor Co.*, the "arising

from" prong of §302(a)(1) does not require a causal link between the defendant's New York business activity and a plaintiff's injury. Instead, it requires "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 III,* 732 F.3d at 168-69 (quoting *Licci II,* 20 N.Y.3d at 339).

Because New York law requires an application of the "arising from" prong of the New York Long Arm Statute that is in harmony with the Due Process Clause, Petitioner cannot establish that the New York Long Arm Statute is unconstitutional, and review by this Court is unwarranted.

## III. Petitioner's Third Question Presented Does Not Merit Review

Petitioner's third question presented asks whether the standard for the "interest-of-justice" inquiry required by 28 U.S.C. §1631 is inconsistently applied across the Circuits, leading to inconsistent outcomes in violation of due process. Petitioner asks this Court to mandate a formulaic standard that all federal courts must use in analyzing 28 U.S.C. §1631. For numerous reasons, this question does not warrant the Court's review.

### A. <u>This Issue Was Not Raised or Addressed Below</u>

This Court should not grant certiorari to review the third question presented because, once again, Petitioner brings before the Court an issue that was

not raised or addressed below. As noted above, because this Court is "a court of review, not of first view," it does not generally consider issues the lower courts did not address, *Byrd*, 138 S.Ct. at 1527, and it prefers to review issues with "the benefit of thorough lower court opinions," *Zivotofsky*, 566 U.S. at 201.

The Second Circuit's unpublished summary order here contains no discussion of Petitioner's third question presented, which is unsurprising because Petitioner never raised that issue before the panel. C.A.ECF.36 at 40-44; C.A.ECF.65 at 17-18. Instead, Petitioner asked the Second Circuit to transfer the case based only on the standards applied by legal precedent in the Second Circuit. *Id.* Petitioner never even cited a Ninth Circuit opinion, let alone argued that the standards for determining whether a transfer is in the interest of justice under 28 U.S.C. §1631 are inconsistently applied across the Circuits. *Id.*

Only in her petition for rehearing *en banc* did Petitioner switch tacks and argue, for the first time, that because not all Circuits use the same criteria for analyzing the interest of justice factor, there are inconsistent and unpredictable outcomes for litigants. C.A.ECF.134-1 at 14-16. Even then, Petitioner never asked the Second Circuit to apply Ninth Circuit law, or argued that the Second Circuit was required to do so in order to comport with due process. *Id.* Moreover, the Second Circuit did not grant rehearing; indeed, no judge wrote any opinion that might provide this Court with something other than a blank slate upon which to write. In the absence of a reasoned conclusion on this question from the Second Circuit, this Court should

decline review. *Town of Chester, N.Y.,* 581 U.S. at 441 n.4.

### B. There is No Split Among the Circuits of an Important Issue of Federal Law

Contrary to Petitioner's arguments, there is no split among the Circuits of an important issue of federal law that merits grant of certiorari in this case. Petitioner complains that there is no single, formulaic test that all courts must utilize in determining whether a transfer under 28 U.S.C. §1631 is in the interest of justice. Given the broad discretion that courts are afforded in making that determination, it is no surprise that the tests adopted by each Circuit, as well as the application of those tests by courts within those Circuits, may vary. The interests of justice analysis is fact specific, and must be made on a case-by-case basis. That different courts apply slightly different standards, presumptions, or procedures in making that determination, however, does not amount to a split as to an important issue of law, and in many instances the differences in outcomes can be reconciled by the particular facts of each case. Indeed, a comparison of how the Circuits approach the interest of justice analysis reveals that there is a great deal of uniformity.

First, every Circuit agrees that the determination of whether a transfer is in the interest of justice under 28 U.S.C. §1631 lies within the broad discretion of the court. *See e.g., Cimon v. Gaffney*, 401 F.3d 1 (1st Cir. 2005); *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 435 (2d Cir. 2005); *Roberts v.*

*United States*, 710 F. App'x 512, 514 (3d Cir. 2017) (per curiam); *Jones v. Braxton,* 392 F.3d 683, 691 (4th Cir. 2004); *Caldwell v. Palmetto St. Sav. Bank of S.C.*, 811 F.2d 916, 919 (5th Cir. 1987) (per curiam); *Stanifer v. Brannan*, 564 F.3d 455, 457 (6th Cir. 2009); *Phillips v. Seiter,* 173 F.3d 609, 610 (7th Cir. 1999); *Gunn v. U.S. Dep't of Agric.*, 118 F.3d 1233, 1240 (8th Cir. 1997); *Miller v. Hambrick,* 905 F.2d 259, 262 (9th Cir. 1990); *Pierce v. Shorty Small's of Branson*, 137 F.3d 1190, 1191 (10th Cir. 1998); *Dobard v. Johnson*, 749 F.2d 1503, 1507 n.8 (11th Cir. 1985); *Hill v. U.S. Air Force,* 795 F.2d 1067, 1070 (D.C. Cir. 1986); *Spencer v. United States*, 98 Fed. Cl. 349, 359 (2011).

Second, every Circuit provides that a court may consider a transfer pursuant to 28 U.S.C. §1631 *sua sponte* when it is in the interests of justice. *See e.g., Narragansett Elec. Co.* v. *EPA*, 407 F.3d 1, 8 (1st Cir. 2005); Ruiz *v. Mukasey,* 552 F.3d 269, 273 (2d Cir. 2009); *Amica Mut. Ins. Co. v. Fogel*, 656 F.3d 167, 171 (3d Cir. 2011); *Feller v. Brock*, 802 F.2d 722, 729 n. 7 (4th Cir. 1986); *Caldwell v. Palmetto State Sav. Bank*, 811 F.2d 916 (5th Cir. 1987); *Flynn v. Greg Anthony Constr. Co.*, 95 F. App'x 726, 738 (6th Cir. 2003); *Phillips v. Seiter,* 173 F.3d 609, 610 (7th Cir. 1999); *Gunn v. U.S. Dep't of Agric.*, 118 F.3d 1233, 1240 (8th Cir. 1997); *In re McCauley*, 814 F.2d 1350, 1352 (9th Cir. 1987); *Trujillo v. Williams*, 465 F.3d 1210, 1217, 1222 (10th Cir. 2006); *Johnson v. Social Security Administration*, *Commissioner*, No. 21-11969-D, 2021 WL 6102101 *1 (11th Cir. Sep. 28, 2021); *Jovanovic v. US–Algeria Business Council*, 561 F.Supp.2d 103, 112 (D.D.C. 2008); *Mendes v. U.S.*, 88 Fed. Cl. 759, 762–63 n.3 (2009).

Third, every Circuit permits a court, as part of its determination of whether transfer is in the interest of justice, to consider the merits of the plaintiff's claims and/or the plaintiff's good or bad faith in choosing the forum. *See, e.g., Britell v. U.S.*, 318 F.3d 70, 73-75 (1st Cir. 2003); *Spar, Inc. v. Info. Res., Inc.,* 956 F.2d 392, 394 (2d Cir. 1992); *United States v. Foy*, 803 F.3d 128, 137–38 (3d Cir. 2015) *Nichols v. G.D. Searle & Co.,* 991 F.2d 1195, 1201-1202 (4th Cir. 1993); *Seville v. Maersk Line, Limited*, 53 F.4th 890, 984-95 (5th Cir. 2022); *Stanifer v. Brannan*, 564 F.3d 455, 457 (6th Cir. 2009); *Coté v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986); *Bernard v. U.S. Dept. of Interior*, 674 F.3d 904, 908-09 (8th Cir. 2012); *Wood v. Santa Barbara Chamber of Com., Inc.*, 705 F.2d 1515, 1523 (9th Cir. 1983); *Coleman v. United States,* 106 F.3d 339, 341 (10th Cir. 1997); *Figueroa v. U.S.*, No. 2:15–CV–404–WKW. 2015 WL 4426690 *3 (M.D. Ala. July 17, 2015); *Morton v. United States Parole Comm'n*, 318 F. Supp. 3d 40, 55 (D.D.C. 2018); *In re Bey*, 767 Fed.Appx. 928 (Fed. Cir. 2019) (unpublished).

Finally, analysis of the cases cited above reveals that courts in any given Circuit regularly cite to and rely on the analysis of and decisions made by courts in other Circuits in conducting the interest of justice analysis. Such routine cross references underscore that the Circuits are not truly divided, and the differences between how they approach the interest of justice analysis are not the chasm that Petitioner paints in her Petition. Because there is no true split in the Circuits, this Court should decline review.

### C. The Lower Courts Properly Analyzed Whether Transfer was in the Interests of Justice under 28 U.S.C. §1631 and Exercised their Discretion to Decline Transfer

Petitioner's lengthy discussion of the "mandatory cast" of 28 U.S.C. §1631 is superfluous under the facts of this case. Petitioner ignores that both the district court and the Second Circuit actually engaged in an analysis of whether transfer to the Central District of California was in the interest of justice under 28 U.S.C. §1631, and both courts, in exercise of their broad discretion, answered that question with a "no." The inquiry should end there.

Petitioner wants to have it both ways. On the one hand, she argues that the district court abused its discretion by failing to conduct an analysis as to whether transfer was in the interest of justice before dismissing for lack of personal jurisdiction. On the other hand, in order to avoid the adverse conclusion the district court reached when it performed that analysis in considering and denying Petitioner's Motion for Reconsideration, Petitioner argues that the district court's conclusions must be disregarded because it lacked jurisdiction to conduct that analysis after Petitioner filed her Notice of Appeal.

Petitioner also misrepresents the Second Circuit's opinion as to her request for transfer. Contrary to Petitioner's assertion, the Second Circuit did not affirm the district court's denial of Petitioner's Motion for Reconsideration. Just the opposite—the Second Circuit noted that the district court denied

Petitioner's motion after the case on appeal was briefed, and Petitioner did not appeal that decision. A.15 n. 4. Instead, the Second Circuit conducted its own, independent interest of justice inquiry based upon Petitioner's request for transfer in her appellate brief, and concluded, in its broad discretion: "Given her delay in seeking transfer, and lack of specificity as to the hardship she would face if we declined transfer, we conclude that she has not shown that the interest of justice require a transfer." A.15.

Petitioner characterizes that delay as minor, calculating it as the span of time between the district court's dismissal of the case and the filing of Petitioner's Motion for Reconsideration. As both the district court and the Second Circuit determined, however, Petitioner failed to seek a transfer during the entire year her case was pending, and did so only after dismissal. Petitioner's assertion that she had no reason to believe that personal jurisdiction over Respondents was lacking in New York until the district court's dismissal order is equally flawed.

Petitioner and her lead counsel are Harvard law graduates. Petitioner has been practicing law for more than twenty years. Petitioner and her counsel were or should have been aware of New York's requirements for personal jurisdiction over non-resident defendants. Petitioner knew when she filed suit that none of the Respondents were at home in New York or regularly transacted business there. Petitioner also knew that her employment by VVP Services was in California, all the alleged acts or omissions upon which her claims are based took place in California, and the situs of her harm, if any, was

California. Thus, the potential for successfully asserting personal jurisdiction over Respondents in New York was slim to none. Yet, Petitioner chose to file suit in that improper forum, assuming the risk that her case would be dismissed. Petitioner did so, knowing that many of her claims were already time barred under California law, or might become time barred during the pendency of this case.[1]

At the very least, Petitioner knew that this case was on shaky jurisdictional legs by virtue of Respondents' three separate sets of motions to dismiss each version of Petitioner's complaint for lack of personal jurisdiction, the first of which was filed on November 13, 2020. Petitioner engaged in multiple rounds of briefing on these jurisdictional challenges. At no time between November 13, 2020, and the district court's dismissal on September 27, 2021, did Petitioner ever mention, let alone request, a transfer of this case.

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[1] According to the allegations in the Second Amended Complaint, Petitioner's claims for defamation, promissory estoppel, California Labor Code violations, and wrongful discharge were already barred by the applicable statute of limitations when she filed suit on October 2, 2020. *See* Cal. C.C.P. §340(c) (statute of limitations for defamation is one year); *Aguilera v. Pirelli Armstrong Tire Corp.,* 223 F.3d 1010, 1018 (9th Cir. 2000) (statute of limitations for Labor Code violations is one year); *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 6 Cal. App. 5th 1207, 1224 (2016) (statute of limitations for promissory estoppel is two years); *Mathieu v. Norrell Corp.*, 115 Cal. App. 4th 1174, 1189 & n.14 (2004) (statute of limitations for wrongful termination in violation of public policy is two years).

The lower courts, in the exercise of their broad discretion, properly considered this delay, along with Petitioner's choice to file suit in New York, and her failure to specify the harm she would suffer if the case were not transferred, in concluding a transfer was not in the interest of justice. Denial of transfer is consistent with the Second Circuit's decisions in other cases involving similar facts. *See, Spar, Inc. v. Info. Res., Inc.,* 956 F.2d 392, 394 (2d Cir.1992) ("[A] transfer in this case would reward plaintiffs for their lack of diligence in choosing a proper forum and thus would not be in the interest of justice.").

Denial of transfer is also consistent with rulings of courts in other Circuits based on similar facts. *See, e.g*, *Nichols v. G.D. Searle & Co.,* 991 F.2d 1195, 1201-1202 (4th Cir.1993) (affirming denial of transfer where plaintiff's attorney could reasonably have foreseen that the forum in which he filed was improper); *Seville v. Maersk Line, Limited*, 53 F.4th 890, 984-95 (5th Cir. 2022) (affirming dismissal where transfer would reward the plaintiff's lack of diligence—even if the dismissal means the plaintiff will be time-barred from filing again in a proper forum); *Stanifer v. Brannan*, 564 F.3d 455, 457 (6th Cir. 2009) (holding denial of motion to transfer was in the interest of justice, even though the statute of limitations had expired, because plaintiff had no colorable basis for filing action in Kentucky, since defendants resided in Alabama, the accident occurred in Alabama, and personal jurisdiction over defendants was lacking in Kentucky); *Coté v. Wadel*, 796 F.2d 981, 985 (7th Cir. 1986) (denying transfer where limitations period had run and "[e]lementary prudence would have indicated to [plaintiff's] lawyer that he must file a protective suit"

in the forum "where the plaintiff can get personal jurisdiction over the defendant before, not after, the statute of limitations runs"); *Kelso v. Luna,* 317 Fed.Appx. 846, 848 (10th Cir. 2009) (holding that transfer was inappropriate because plaintiff's original action was not filed in good faith where plaintiff "should have realized" that the district in which he filed was an improper forum because an action he had previously filed was dismissed for lack of jurisdiction).

Petitioner does not provide any basis that merits this Court's review of the lower court's fact-based conclusions.

### D. The Result Would be the Same Under Ninth Circuit Jurisprudence

Petitioner claims the Second Circuit should have been required to use the standards adopted by the Ninth Circuit for determining whether the interest of justice required transfer rather than dismissal. As discussed above, those standards do not materially differ from those used by the Second Circuit. Moreover, review is not warranted here, because even if this Court were to remand with instructions for either the district court or the Second Circuit to analyze the interest of justice inquiry under Ninth Circuit jurisprudence, the result would be the same.

The Ninth Circuit cases upon which Petitioner relies make clear that transfer is not mandatory, and in fact there are circumstances or factual scenarios in which transfer would not be in the interest of justice. To be clear, the Ninth Circuit has stated: "***[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) (quoting *Miller v. Hambrick,* 905 F.2d 259, 262 (9th Cir.1990) (quoting *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467 (1962) (emphasis added)). Notably, *Amity Rubberized Pen Co.* involved the appeal of a patent case, in which the Ninth Circuit expressly found that "Amity had nothing to gain by filing its appeal with this court rather than the Federal Circuit, and nothing before us indicates that its misfiling was anything other than an honest mistake." *Id.* at 997. Unlike *Amity Rubberized Pen Co.*, this is not the normal case because Petitioner did not make an honest mistake—she forum shopped for favorable statutes of limitation fully aware that her chances of obtaining personal jurisdiction in New York over Respondents was tenable at best.

The Ninth Circuit has affirmed dismissal rather than transfer under similar facts in the context of the analogous interest of justice test applied to transfers under 28 U.S.C. §1406(a). In *Wood v. Santa Barbara Chamber of Com., Inc.*, 507 F.Supp. 1128 (D. Nev. 1980), *aff'd* 705 F.2d 1515 (9th Cir. 1983), a California resident sued non-resident defendants in Nevada for copyright infringement, antitrust violations, fraud, and conspiracy, all arising out of photographs the plaintiff claimed were used without his permission. *Id.* at 1133. The plaintiff had previously sent those photographs to a California advertising agency for an advertising promotion for the Santa Barbara Chamber of Commerce. *Id.* at 1132.

The defendants moved to dismiss, for, among other things, lack of personal jurisdiction, presenting evidence that they were not Nevada residents and did not transact business in Nevada. The plaintiff did not refute that evidence, but presented a conglomeration of tort, conspiracy, and agency theories, which the plaintiff believed created sufficient minimum contacts with Nevada. *Id.* at 1137.

The district court rejected the "slim thread of facts which connect (all the nonresident defendants) with the forum state which (plaintiff) has chosen" and granted dismissal, noting:

> All that happened in Nevada in this case with respect to any of the nonresident defendants was the circulation of insignificant numbers of out-of-state papers within the state. The sources of proof as to the alleged infringements by all the nonresident defendants are located outside Nevada, primarily in California. So, too, virtually all of the potential witnesses are located in California. In addition, substantial California state law claims are included in the complaint.

*Id.* at 1138. Recognizing that dismissal could mean that the plaintiff's claims would be time barred, the district court considered whether to transfer the case to the Central District of California. The district court declined to exercise its discretion to transfer, reasoning:

> The history of this case clearly demonstrates that the plaintiff, in bringing this action in this district, is guilty of blatant forum-shopping. Plaintiff knew where The Times-Weekend of San Mateo and the Goleta Valley Chamber of Commerce should have been sued, and there was no good reason for him not to sue them in California. Thus, the reason for the rule allowing transfer without personal jurisdiction is not present in this case. In this situation, the interests of justice do not require this Court to transfer Claims 1-8 as to The Times-Weekend and the Goleta Valley Chamber of Commerce to the Central District of California. Plaintiff assumed the risk of such a result when he deliberately chose not to sue in the proper forum.

*Id.* The Ninth Circuit affirmed. 705 F.2d at 1523. *See also*, *Cirafici v. City of Ithaca*, 968 F.2d 1220 (unpublished table decision), 1992 WL 149862, at *2 (9th Cir. 1992) (holding transfer not in the interest of justice where plaintiff "was not diligent in prosecuting his action," even though plaintiff's "action may be time-barred"); *Fairchild v. Los Angeles County*, No. 21-cv-00496-GPC-KSC, 2021 WL 2350928 *3-4 (S.D.Cal. June 8, 2021) (refusing to transfer venue even though some of the plaintiff's claims might be barred by the statute of limitations because the plaintiff was a seasoned litigant, was on notice of the federal venue requirements, and had engaged in forum shopping: "Plaintiff brought the statute of

limitations issue upon herself when she decided to file the Complaint in a venue that is clearly improper.") Notably, in making this determination, the *Fairchild* court relied upon Second Circuit authority, including *Paul v. I.N.S.*, 348 F.3d 43, 47 (2d Cir. 2003) (noting that whether a newly filed action would be untimely is one factor to consider in determining whether it is in the interests of justice to transfer case, but suggesting that bad faith could weigh in favor of dismissal even if statute of limitations would bar subsequent action).

## CONCLUSION

For these reasons, Respondents respectfully submit that the Court should deny the Petition.

Respectfully submitted,

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