No. 23-197

In the Supreme Court of the United States

JAMES OWENS, ET AL., PETITIONERS,

v.

TÜRKIYE HALK BANKASI A.Ş.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A group of mostly foreign plaintiffs came to New York to sue a Turkish bank for fraudulent conveyances that allegedly occurred in Türkiye and to seek turnover of assets held in Türkiye. The district court found that the Plaintiffs will need evidence located in Türkiye and written in Turkish, and testimony from witnesses in Türkiye who speak Turkish. The district court also found that the litigation has little to no connection with the New York forum.

The question presented is whether the district court abused its discretion when it found, pursuant to the *forum non conveniens* doctrine, that this case should be litigated in Türkiye, notwithstanding that a minority of Plaintiffs reside in the United States.

CORPORATE DISCLOSURE STATEMENT

Respondent Türkiye Halk Bankasi A.Ş. is 91.49% owned by the Republic of Türkiye, using the name Turkish Wealth Fund, which is not a legal entity or corporation under Turkish law.

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INTRODUCTION

This case does not warrant this Court's review. The petition mischaracterizes Second Circuit law and the decision below in an attempt to manufacture a circuit split that does not exist. The Second Circuit has never adopted a "nose-counting approach" to *forum non conveniens* that necessarily reduces deference to the plaintiffs' choice of forum whenever foreign plaintiffs outnumber domestic plaintiffs—in fact, the Second Circuit has expressly rejected that rule. *Contra* Pet. 3, 12, 20, 23. Like its sister circuits, the Second Circuit considers all relevant factors supporting and opposing a plaintiff's choice of forum, as is appropriate in applying a discretionary doctrine such as

forum non conveniens. One of those factors—in all circuits—is the plaintiffs' various residences.

The Second Circuit's approach is also wholly consistent with this Court's jurisprudence. This Court has explained that the degree of deference a plaintiff's choice of forum deserves turns on whether "it is reasonable to assume that this choice is convenient." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981). That is why this Court has held that foreign plaintiffs generally receive less deference than U.S. plaintiffs. *Id.* The predominance of foreign plaintiffs in a mixed-residency plaintiff group is one factor that, depending on the other circumstances of the case, can inform the assumption of convenience. If the overwhelming majority of plaintiffs live overseas, it *may* be less reasonable to assume that a U.S. forum is a convenient one in which to litigate the case. That should not be controversial. The precise manner of balancing that factor with all the other facts and circumstances of any particular case cannot be dictated by any categorical rule of law, especially since this Court's *forum non conveniens* decisions have "repeatedly emphasized the need to retain flexibility." *Id.* at 249. There is no reason for this Court to delve into the details of precisely how the lower courts conducted that balancing in this case.

In any event, the court of appeals correctly affirmed the district court's decision. The district court—after considering the location and language of the witnesses and evidence, the lack of a factual connection with the United States, Halkbank's disputed amenability to suit in the United States, *and* the Plaintiffs' residences—did not abuse its discretion in granting Plaintiffs' choice of forum "some, albeit minimal, deference." Pet.App.57a.

Even if the question presented were worthy of review, this petition would be an especially unsuitable

vehicle for addressing the question. The question presented is not outcome determinative for two reasons: First, Plaintiffs waived the issue by failing to argue it in the district court. That court therefore did not abuse its discretion in failing to consider an argument that was never made. And second, this case is such an obvious candidate for a *forum non conveniens* dismissal that the same result would almost certainly occur on remand, even if the lower courts forgave the waiver. Moreover, this case is a poor vehicle for considering Plaintiffs' proposed categorical rule that the presence of *any* U.S. plaintiff requires strong deference given that Plaintiffs have conceded that on the facts of this case, their residences are particularly irrelevant to a convenience analysis. And finally, Plaintiffs' reliance on their Terrorism Risk Insurance Act (TRIA) claim to demonstrate the importance of the question presented overlooks that Plaintiffs' TRIA claim is facially meritless.

The Court should deny the petition.

STATEMENT

A. Factual Background

Plaintiffs are 876 judgment creditors of the Islamic Republic of Iran. Pet.App.49a. Each plaintiff previously sued Iran for damages to themselves or their decedent resulting from overseas terrorist attacks linked to Iran. Pet.App.50a. Through these suits, Plaintiffs collectively obtained more than $10 billion in default judgments against Iran. Pet.App.50a. Iran has frustrated Plaintiffs' collection efforts. *See* Pet.App.50a.

"Most of the plaintiffs do not reside in the United States: of the 670 plaintiffs for whom residency information is known, 468 reside in a foreign country. Of the

202 plaintiffs known to reside in the United States, only nine are known to reside in New York." Pet.App.49a.

Respondent Türkiye Halk Bankasi A.Ş. ("Halkbank") is a state bank majority-owned by the Republic of Türkiye. Plaintiffs allege that beginning in 2011, Halkbank helped Iran-owned corporations, such as the National Iranian Oil Company, circumvent U.S. sanctions by disguising unapproved financial transactions as permitted Iranian purchases of gold and food. Pet.App.51a-52a. Plaintiffs allege that after Halkbank helped these Iranian corporations gain access to these funds through false pretenses, some of the funds ultimately passed through bank accounts in the United States and in New York. Pet.App.51a-52a.[1] Halkbank denies those allegations in the strongest terms.

B. Proceedings Below

1. On March 27, 2020, Plaintiffs sued Halkbank, seeking to collect their default judgments against Iran from a Turkish state bank. Pet.App.53a. Plaintiffs assert four causes of action: intentional fraudulent conveyance under New York law; constructive fraudulent conveyance under New York law; turnover of debtor assets under New York law; and turnover of blocked assets pursuant to the federal Terrorism Risk Insurance Act (TRIA), § 201(a), 28 U.S.C. § 1610(f)(1)(A). Pet.App.53a.

Plaintiffs moved to attach Halkbank's correspondent banking accounts in New York. On September 10, 2020, the district court denied that motion. Pet.App.54a.

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[1] In 2019, prior to Plaintiffs' lawsuit, Halkbank was indicted on sanctions-related charges arising from some of the same allegations that are the basis of Plaintiffs' complaint. Pet.App.52a.

2. On September 25, 2020, Halkbank moved to dismiss Plaintiffs' complaint. Pet.App.54a. Halkbank identified numerous threshold and merits problems with Plaintiffs' lawsuit, including that Halkbank, as an agency or instrumentality of the Republic of Türkiye, is immune from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611,[2] and that Halkbank is not subject to personal jurisdiction in the district court. D. Ct. ECF No. 60, at 4-15.

As most relevant here, Halkbank also moved to dismiss for *forum non conveniens*. *Id.* at 15-19. Halkbank argued that Plaintiffs' choice of forum deserved reduced deference for various reasons, including the high proportion of foreign plaintiffs, the lack of a connection between the underlying allegations and the United States, the location of witnesses in Türkiye, the location of documentary evidence in Türkiye and written in Turkish, and Plaintiffs' apparent forum shopping. *Id.* at 15-16. Halkbank also argued that Türkiye was an adequate alternative forum for the parties' dispute, *id.* at 16-17, and that the balance of private and public interests strongly supported litigating Plaintiffs' claims in Türkiye, *id.* at 17-19.

Finally, Halkbank moved to dismiss Plaintiffs' complaint because, putting aside the threshold problems with Plaintiffs' lawsuit, each claim failed on the merits under black-letter legal principles. *Id.* at 20-35. As made relevant here by Plaintiffs' petition, Plaintiffs' TRIA turnover

[2] In Halkbank's ongoing criminal litigation, the Supreme Court did not reach the question whether Halkbank is immune under the FSIA because it held that the FSIA applies only in civil matters. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 280 (2023). The Court remanded for the Second Circuit to consider whether Halkbank is immune under common law. *Id.* at 280-81.

claim failed for the fundamental reason that the statute allows turnover only of "blocked" assets, and Plaintiffs themselves had alleged that no such assets exist. *Id.* at 34-35.

3. On February 16, 2021, the district court granted Halkbank's motion to dismiss. The court acknowledged Halkbank's many arguments for dismissal, but reached only one: *forum non conveniens*. Pet.App.54a. The court laid out that doctrine's three-part test: First, the court determines "the degree of deference properly accorded the plaintiff's choice of forum." Pet.App.55a (citation omitted). Second, the court considers "whether the alternative forum proposed by the defendants is adequate to adjudicate the parties' dispute." Pet.App55a (citation omitted). Third, the "court balances the private and public interests implicated in the choice of forum" and determines whether to dismiss the complaint in favor of litigation in the alternative forum. Pet.App55a (citation omitted). "District courts have 'broad discretion' in evaluating and weighing these factors." Pet.App.55a (citation omitted). The experienced district court then considered each element in turn.

First, the district court acknowledged that "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum." Pet.App.55a (cleaned up). The district court observed, however, that the strength of that presumption "can vary with the circumstances" "depending on the degree of convenience reflected by the choice in a given case." Pet.App.55a (cleaned up).

The district court expressly considered numerous factors for and against deference. The court pointed to four factors that suggested reducing deference. First, although the court acknowledged that "some of the plaintiffs are U.S. residents," the court noted that "[m]ost of the

plaintiffs in this action are foreign." Pet.App.56a. Because "[t]here is little reason to assume that a U.S. forum is convenient for a foreign plaintiff," this factor suggested granting "less deference" than when foreign plaintiffs are in the minority. Pet.App.56a (cleaned up). Second, "the underlying facts … involve terrorist attacks in foreign countries and an alleged fraudulent scheme orchestrated primarily in Turkey." Pet.App.56a. "In sum, there is little, if any, connection between this action and this forum," a conclusion that "weighs against deferring to plaintiffs' choice of forum." Pet.App.57a. Third, "almost all of the relevant evidence is located in Turkey" and "written in Turkish," and "many of the potentially relevant witnesses are Halkbank employees" located "in Turkey" and "outside the subpoena power of this Court." Pet.App.57a. "The difficulty of conducting discovery in this litigation if it continues in the United States weighs against deference to the plaintiffs' choice." Pet.App.57a. Finally, "[i]t is unclear if Halkbank is even amenable to suit in the United States," which militates for reduced deference. Pet.App.57a.

The court also expressly considered factors supporting deference. In addition to the presence of "some" U.S. plaintiffs, Pet.App.56a, the court acknowledged Plaintiffs' allegations "that the Halkbank scheme permitted the funds to move through New York financial institutions without seizure," as well as allegations "that Halkbank representatives repeatedly lied to U.S. bank and government officials to effect transfers of funds through New York." Pet.App.57a.

"Balancing all of the relevant factors" for and against deference, the court determined that "plaintiffs' choice of forum is not entitled to substantial deference, but is entitled to some, albeit minimal, deference." Pet.App.57a.

Turning to the doctrine's second part, the district court held that Türkiye is an adequate forum for the parties' dispute. The court considered both parties' expert submissions and concluded that Halkbank had "persuasively demonstrated several means by which the plaintiffs may recover from Halkbank under Turkish law for the conduct alleged in the complaint." Pet.App.59a. The court found Halkbank's experts "far more persuasive" than the Plaintiffs' expert on this point. Pet.App.59a n.4. The court also rejected Plaintiffs' argument that Turkish courts are inappropriate to hear Plaintiffs' claims, noting Plaintiffs' failure to adduce evidence that Türkiye's civil court system is unfair or corrupt. Pet.App.60a-61a.

Finally, the court considered the balance of private and public interest factors. The court found that "the private interest factors weigh strongly in favor of litigating this case in Turkey." Pet.App.61a. The court pointed to the underlying facts, which occurred in Türkiye and involved Turkish employees at a Turkish bank located in Türkiye, as well as evidence located in Türkiye and written in Turkish. Pet.App.61a-62a. The court concluded that "[t]rying this case in the United States would not be easy, expeditious, or inexpensive." Pet.App.62a. The court noted that Plaintiffs disputed very few of these points, and the court rejected Plaintiffs' arguments on the private interest factors. Pet.App.61a-62a.

The court then concluded that "[t]he public interest factors also weigh heavily in favor of litigating in Turkey." Pet.App.62a. "There is almost no connection between this case and New York," meaning it "would make little sense to burden a New York court and jury with litigation of this action." Pet.App.62a. "By contrast, Turkey has a more significant interest in hearing this action, which involves a significant Turkish financial institution." Pet.App.62a.

Finally, the court observed that Halkbank and the Plaintiffs had raised a choice of law dispute over whether the fraudulent-conveyance claims should be governed by New York or Turkish law. Pet.App.62a-63a. That dispute "is a further basis for dismissal, since 'the public interest factors point toward dismissal where the court would be required to untangle problems in conflict of laws, and in law foreign to itself.'" Pet.App.63a (quoting *Piper*, 454 U.S. at 251) (citation omitted).[3]

Considering all three parts of the *forum non conveniens* test, the court exercised its broad discretion to dismiss Plaintiffs' claims in favor of litigation in Türkiye. Pet.App.63a. The court conditioned that dismissal on Halkbank's agreement to accept service in Türkiye and to waive any statute of limitations defenses that may have arisen since the filing of Plaintiffs' complaint. Pet.App.63a. Halkbank agreed to those conditions, and on March 3, 2021, the court entered judgment for Halkbank. D. Ct. ECF No. 79.

4. On May 2, 2023, the U.S. Court of Appeals for the Second Circuit affirmed in a non-precedential, summary order. Pet.App.1a-28a.

Carefully reviewing the district court's consideration of each element, the court of appeals held that "the district

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[3] Plaintiffs criticize the district court's evaluation of public interest factors for not "address[ing] the U.S. policies supporting redress for terrorism victims underlying TRIA." Pet. 7; *see also* Pet. 8. But—as the Second Circuit noted, Pet.App.28a, and Plaintiffs conveniently omit—Plaintiffs *failed to argue* these policies before the district court. Indeed, as Halkbank explained before the Second Circuit, most of Plaintiffs' arguments on appeal were never adequately raised before the district court, including the very argument underlying Plaintiffs' petition for certiorari. Halkbank C.A. Br. 1-2, 16, 20-21, 21-22, 24, 36-41, 48.

court properly applied the requisite three-part test and acted within its discretion in concluding that the action should be conditionally dismissed on the ground of *forum non conveniens*." Pet.App.18a.

First, the court of appeals reviewed the district court's evaluation of deference. Pet.App.18a-20a. The court of appeals, like the district court, acknowledged that "there is generally a 'strong presumption in favor of the plaintiff's choice of forum.'" Pet.App.19a (quoting *Piper*, 454 U.S. at 255). And like the district court, the court of appeals noted that the ultimate degree of deference depended on various factors that spoke to "the convenience" reflected in the Plaintiffs' choice. Pet.App.19a. The court reviewed each of the four factors the district court considered. Pet.App.19a-20a & n.2. The court of appeals then concluded that "after weighing these considerations," the district court's decision to grant some, albeit minimal deference "was within its broad discretion." Pet.App.19a-20a.

The court of appeals also carefully reviewed and affirmed the district court's conclusion that Türkiye is an adequate alternative forum for the parties' dispute, Pet.App.21a-26a, and that the private and public interest factors weigh strongly in favor of dismissal, Pet.App.26a-28a.

4. On August 30, 2023, Plaintiffs filed the instant petition for certiorari.

REASONS FOR DENYING THE PETITION

There is no reason for this Court to hear this case. Plaintiffs' suggested circuit split does not exist. The Second Circuit's supposed "nose-counting approach," *see* Pet. 3, 12, 20, is a fiction invented by Plaintiffs that is irreconcilable with Second Circuit caselaw, including both the

district court's and the Second Circuit's actual reasoning below. In reality, the Second Circuit's multifactor approach to *forum non conveniens* in mixed-residency cases is wholly consistent with that of its sister circuits, and with this Court's jurisprudence. *Forum non conveniens* is a discretionary doctrine that balances the specific facts of each case. How the lower courts carried out that balancing here is hardly a topic worthy of this Court's review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). But, in any event, the Second Circuit correctly affirmed the district court's discretionary decision to dismiss on *forum non conveniens* grounds.

Even if there were a circuit split, this case would be a terrible vehicle to consider it for three principal reasons. *First*, the question presented is not outcome-determinative in this case. Plaintiffs waived their current argument before the district court. Despite Halkbank arguing that the predominance of foreign plaintiffs was one factor suggesting reduced deference, Plaintiffs never argued either that the predominance of foreign plaintiffs was an improper consideration for reducing deference or that the mere presence of *some* U.S. plaintiffs required strong deference. The district court cannot abuse its discretion by failing to consider an argument that was never made. Because Plaintiffs waived this issue, the result in the Second Circuit would be the same regardless of the result of this Court's review. In addition, this is such a clear case for a *forum non conveniens* dismissal that even absent waiver, the outcome is likely to be the same on remand. *Second*, Plaintiffs repeatedly conceded below that because of the nature of the action as a judgment enforcement matter, Plaintiffs' residences are largely irrelevant to the convenience analysis of the case. Therefore, even if U.S. resident

plaintiffs were *generally* entitled to a strong presumption of deference notwithstanding the presence of an overwhelming number of foreign plaintiffs, that presumption would not apply on the facts of this case. *Third*, Plaintiffs' TRIA claim is facially meritless, which makes this a poor vehicle to consider the TRIA-specific policy considerations that underlie Plaintiffs' policy arguments.

The experienced district court properly exercised its broad discretion to dismiss this case in favor of litigation in Türkiye, and the Second Circuit affirmed based on noncontroversial principles of law. This Court should deny the petition for certiorari.

I. There Is No Circuit Split

The petition rests on a mischaracterization of Second Circuit law and the decisions below. Plaintiffs (at 3, 10, 12, 20, 23) repeatedly assert that the Second Circuit has adopted a "nose-counting approach" that automatically reduces deference to U.S. plaintiffs' choice of forum "merely because the U.S. plaintiffs are joined in a suit by a larger number of foreign co-plaintiffs." Pet. 10. And Plaintiffs assert that this nose-counting approach puts the Second Circuit at odds with other courts of appeals. None of that is true.

"The *forum non conveniens* determination is committed to the sound discretion of the trial court." *Piper*, 454 U.S. at 257. This Court has "repeatedly emphasized the need to retain flexibility" in the *forum non conveniens* doctrine, and "refused to identify" categorical rules. *Id.* at 249. Indeed, "[i]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." *Id.* at 249-50; *see also Am. Dredging Co. v. Miller*, 510 U.S.

443, 455 (1994) (explaining that the Court "ha[s] repeatedly rejected the use of *per se* rules in applying the doctrine").

The first part of the *forum non conveniens* inquiry is determining "the deference due plaintiff's choice of forum." *Piper*, 454 U.S. at 255. Although "there is ordinarily a strong presumption in favor of the plaintiff's choice of forum," that presumption varies with the circumstances based on whether "it is reasonable to assume that [the plaintiff's] choice is convenient." *Id.* at 255-56. A "plaintiff's choice of [its home] forum is entitled to greater deference" *specifically because* "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." *Id.* In contrast, a foreign plaintiff's choice of a U.S. forum receives less deference because the assumption of convenience for such plaintiffs "is much less reasonable." *Id.* at 256.

Contrary to Plaintiffs' argument, the Second, D.C., Ninth, and Eleventh Circuits all consider a variety of factors in determining the proper level of deference. None grants conclusive weight—one way or another—to a plaintiff's place of residence.

1. The Second Circuit's approach is patently *not* a nose-counting test. Instead, the court weighs multiple factors in deciding whether plaintiffs' choice of forum is supported by "genuine considerations of convenience." Pet.App.55a. Pursuant to this standard, the Second Circuit has sometimes granted *heightened* deference and at other times *reduced* deference when foreign plaintiffs are involved, depending on the circumstances.

The Second Circuit articulated its multifactor test in its en banc decision in *Iragorri v. United Technologies*

Corp., 274 F.3d 65 (2d Cir. 2001) (en banc) (reversing dismissal). There, the court, reviewing this Court's case law, concluded that "the degree of deference given to a plaintiff's forum choice varies with the circumstances." *Id.* at 71. "[T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*." *Id.* at 72 (footnote omitted). Various factors inform the analysis: the plaintiffs' residences, certainly, but also "the availability of witnesses or evidence [in] the forum district, the defendant's amenability to suit in the forum district, the availability of appropriate legal assistance, and other reasons relating to convenience or expense," as well as whether the plaintiff appears to be "forum[ ] shopping." *Id.* In other words, district courts determine the degree of deference by "consider[ing] the totality of circumstances supporting a plaintiff's choice of forum." *Norex Petrol. Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005).

The Second Circuit has *never* approved an approach that gives "minimal deference, merely because most of the plaintiffs do not reside in the United States." *Contra* Pet. 23. In fact, the Second Circuit has expressly rejected that very rule. In *Norex*, a Cypriot corporation principally operating overseas sued a mix of U.S. and foreign defendants. 416 F.3d at 150-51. The district court dismissed for *forum non conveniens*, and the Second Circuit reversed. The Second Circuit criticized the district court for "relying almost exclusively on the presumption that a foreign plaintiff's choice of a non-home forum is inconvenient to afford [the foreign plaintiff] little deference." *Id.* at 157. Even though *the only* plaintiff was foreign and

may have been motivated by the availability of treble damages in the United States, the Second Circuit reversed the finding of "little deference," holding that the district court failed properly to consider "a number of circumstances demonstrating that genuine convenience did inform [the plaintiff]'s choice of a New York forum." *Id.* at 155, 157. Thus, under Second Circuit law, even foreign plaintiffs' choice of a U.S. forum "warrant[s] substantial deference" when other convenience factors support that choice. *Id.* at 156.

The Second Circuit also has granted heightened deference to "Canadian citizens" and "Egyptian entities" suing in the United States, reversing the district court's *forum non conveniens* dismissal because the court "overlooked the legitimate and substantial reasons for [foreign] plaintiffs choosing to bring this suit." *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178-80 & n.1 (2d Cir. 2006). In that case, the Second Circuit held that the entirely foreign group of plaintiffs' choice of forum "was eminently reasonable and entitled to considerable deference," rejecting the district court's reliance on the mere foreign residency of the plaintiffs to reduce deference. *Id.* at 179. These decisions refute Plaintiffs' characterization of Second Circuit law.

Plaintiffs point to several non-precedential summary decisions, including the decision below, in which the Second Circuit affirmed district courts granting reduced deference to majority-foreign plaintiff groups, Pet. 14-16, but it is not surprising that a multifactor approach would produce cases on that end of the spectrum, too. None of those cases evinced a "nose-counting approach" based on the presence of foreign plaintiffs. In each, the district court weighed numerous factors besides the majority of plaintiffs' foreign residences when determining that their choice of forum deserved reduced deference.

The decisions in this case are a perfect example. The district court identified four distinct factors supporting reduced deference, and several factors supporting Plaintiffs' choice of forum, and "*[b]alancing all of the relevant factors*" concluded that "the plaintiffs' choice of forum is not entitled to substantial deference, but it is entitled to some, albeit minimal, deference." Pet.App.57 (emphasis added). The Second Circuit affirmed that decision, reviewing all the factors and holding that "*after weighing these considerations*" the district court's deference determination "was within its broad discretion." Pet.App.19a-20a & nn.1-2 (emphasis added). The Second Circuit has followed that approach in every mixed-residency case the Plaintiffs cite, none of which turned "merely" on the Plaintiffs' majority-foreign residences. *Contra* Pet. 3, 10, 23.[4]

Plaintiffs point to a footnote in the decision below in which the Second Circuit rejected Plaintiffs' argument "that the presence of U.S. citizen plaintiffs *precludes* a district court from giving less deference to the choice of

[4] *Wamai v. Indus. Bank of Korea*, 2023 WL 2395675, at *2-3 (2d Cir. Mar. 8, 2023) (deference reduced because "convenience factors" "such as the locus of events underlying the lawsuit, the location of evidence, as well as jurisdictional considerations" supporting the district court's "carefully weighing the relevant factors"); *Bahgat v. Arab Republic of Egypt*, 631 F. App'x 69, 70 (2d Cir. 2016) (deference reduced because "the plaintiffs' selection of forum was motivated, at least in part, by forum shopping"); *Wilson v. Eckhaus*, 349 F. App'x 649, 651 (2d Cir. 2009) (deference reduced because plaintiffs chose forum to "be less convenient and more expensive for defendants," and "most pertinent documentary and testimonial evidence" was abroad); *Overseas Media, Inc. v. Skvortsov*, 277 F. App'x 92, 96-97 (2d Cir. 2008) (deference reduced because the disputes "turn on Russian contracts based on Russian law, the witnesses and evidence are in Russia, and the relevant documents will have to be translated from Russian," making the "inconvenience of the forum … quite clear").

forum even when the overwhelming majority of the plaintiffs reside abroad." Pet.App.19a-20a n.1 (emphasis added). But that footnote did not establish a nose-counting test—it rejected one. The court refused to accept Plaintiffs' simplistic view that the presence of even one American nose "precludes" consideration of the Plaintiffs' foreign residences in determining the degree of deference. Nothing in that footnote's reasoning suggests that the presence of a majority of foreign plaintiffs *necessarily* requires reducing deference. Plaintiffs' residence is one, non-dispositive factor.

2. Like the Second Circuit, the D.C., Ninth, and Eleventh Circuits follow a multifactor approach to determining whether the presumption of convenience of the plaintiffs' choice of forum should be affirmed or reduced. Each of those circuits considers the plaintiffs' place of residence in conducting its analysis.

a. The D.C. Circuit has gone out of its way to signal agreement with the Second Circuit's approach. In *Shi v. New Mighty U.S. Trust*, 918 F.3d 944 (D.C. Cir. 2019), the D.C. Circuit endorsed both *Iragorri* and *Norex*, rejecting the district court's refusal to follow those cases. *Id.* at 949-50. And no D.C. Circuit case has held either that the presence of foreign plaintiffs is an improper consideration for reducing deference or that the presence of any U.S. plaintiffs requires strong deference. On the contrary, the D.C. Circuit has held that a mixed-residency group of plaintiffs "cannot expect the court to defer automatically to their forum choice merely because one of their number is an American resident." *Pain v. United Techs. Corp.*, 637 F.2d 775, 798 (D.C. Cir. 1980), *overruled in part on other grounds by Piper*, 454 U.S. 235. Instead, notwithstanding the presence of a minority of U.S. residents, the D.C. Circuit held that "plaintiffs' choice of forum deserved little

deference from the trial court" specifically because "the connection between these plaintiffs, the controversy, and the chosen forum was so attenuated." *Id.* at 786. That reasoning, which remains binding law in the D.C. Circuit, is indistinguishable from the Second Circuit's approach.

Plaintiffs rely on *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018), *vacated and remanded on other grounds*, 141 S. Ct. 691 (2021). But that case expressly quotes the Second Circuit's opinion in *Iragorri* for the proposition that "the degree of deference given to a plaintiff's forum choice varies with the circumstances." *Id.* at 1183 (alteration omitted) (quoting *Iragorri*, 274 F.3d at 71). Consistent with the Second Circuit's approach, as well as *Pain*'s, the *Simon* court considered *multiple* factors in determining the degree of deference to afford: the plaintiffs' residences, the need for plaintiffs to travel from those residences to various proposed forums, the length of the litigation, and the plaintiffs' ages. *Id.* at 1183-84. And the court pointed to the defendant's total failure to carry its burden "to show how—as a matter of geographic proximity, available transportation options, cost of travel, ease of travel access, or any other relevant consideration—the United States is a less convenient forum than Hungary" for the various parties. *Id.* at 1183.

Based on the factors it considered, and the defendant's failure to carry the burden of rebutting the presumption of convenience, the court reversed the district court's granting of only "minimal" deference. *Id.* at 1183-84. While the *Simon* court observed that "the addition of foreign plaintiffs does not *render for naught* the weighty interest of Americans seeking justice in their own courts," *id.* at 1183 (emphasis added), that statement is just the flip side of the Second Circuit's similar rejection of the notion "that the presence of U.S. citizen plaintiffs

precludes a district court from giving less deference to the choice of forum even when the overwhelming majority of the plaintiffs reside abroad," Pet.App.19a-20a n.1 (emphasis added). That both courts reject absolutes hardly indicates a deep division among the circuits.

b. The Ninth Circuit follows a multifactor approach as well, and has also granted both heightened and reduced deference to U.S. and foreign plaintiffs, depending on the circumstances. Like the Second Circuit, the Ninth Circuit has repeatedly afforded U.S. residents and citizens reduced deference when the facts of the case refute the presumption that a domestic plaintiff's choice of forum is convenient. In a recent case, for example, the Ninth Circuit granted "very little deference" to plaintiffs' choice of a U.S. forum, notwithstanding that the plaintiffs included a U.S. citizen and a U.S. resident corporation, "because the case lacked ties to the forum and Plaintiffs participated in forum-shopping." *de Borja v. Razon*, 835 F. App'x 184, 187 (9th Cir. 2020). The Ninth Circuit has also repeatedly granted "less deference" to U.S. residents and citizens who sue in domestic forums other than their home districts—for example, a New Hampshire resident suing in Hawaii. *Bos. Telecomms. Grp. v. Wood*, 588 F.3d 1201, 1207 (9th Cir. 2009) (collecting cases); *see also Copitas v. Fishing Vessel Alexandros*, 20 F. App'x 744, 747 (9th Cir. 2001) (same). And the Ninth Circuit—relying on the Second Circuit's decision in *Iragorri*—has concluded that a U.S. citizen residing abroad "is entitled to less deference because 'it would be less reasonable to assume the choice of forum is based on convenience.'" *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076-77 (9th Cir. 2015) (quoting *Iragorri*, 274 F.3d at 73 n.5).

In each of these cases, the Ninth Circuit determined the degree of deference for U.S. residents and citizens

based on whether the totality of the circumstances justified the presumption that a domestic plaintiff's choice of forum is actually convenient. That is *exactly* the approach the Second Circuit follows. *See, e.g.*, *Wamai*, 2023 WL 2395675, at *2-3.

Plaintiffs cite *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216 (9th Cir. 2011), in which the Ninth Circuit rejected the district court's grant of "only some deference" for a group of 25 foreign individual plaintiffs and one domestic organizational plaintiff. *Id.* at 1228. Yet while the Ninth Circuit disagreed with the district court's conclusion that the presence of foreign plaintiffs necessarily reduces deference, it went on to consider multiple factors in making its deference determination. *Id.* at 1228-29. In particular, the court noted that the U.S. plaintiff was not merely another individual, but an "organizational plaintiff representing numerous individual members," which had been "involve[d] in the subject matter of this litigation" for many years, a "status" that increased the weight of deference it was afforded as a U.S. resident. *Id.* The Ninth Circuit further observed that the plaintiffs had not, as here, chosen a "tangentially relevant forum"—they chose a forum that was both "*the defendant's* home jurisdiction, and a forum with a strong connection to the subject matter of the case" because the claims arose in part from decisions made and actions taken within that jurisdiction. *Id.* at 1229 (emphasis added).

Because the jurisdiction was the home of a key plaintiff, the home of the defendant, and the location where some of plaintiffs' claims arose—none of which apply in this case—*Carijano* was an easy case, similar in outcome to *Norex* and *Bigio*. *See supra* pp.14-15. And the Ninth

Circuit nowhere suggested that the presence of an overwhelming number of foreign plaintiffs *could never* factor into a reduction of deference.

c. The Eleventh Circuit likewise follows a multifactor approach. Plaintiffs rely on *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331 (11th Cir. 2020), but there, too, the court acknowledged that *many* factors inform the degree of deference owed to plaintiffs' choice of forum. The court acknowledged an "*initial* presumption" that the plaintiff's choice of forum was convenient, but acknowledged that the presumption of convenience can be "overcome." *Id.* at 1346. The court therefore discussed factors including where "the most significant events giving rise to the plaintiff's claims took place"; where "most of the relevant documents or witnesses would be located"; where the defendant "is based" and where it took its allegedly wrongful actions; the "locus of events"; whether the location of the plaintiffs has a bearing on the defendant's convenience; and whether plaintiffs engaged in "blatant gamesmanship" in selecting their forum. *Id.* at 1340-41, 1343-45. Each of these factors could support or refute deference.

Finally, the Eleventh Circuit's decision in *Otto Candies* expressly *holds open* the possibility that the predominance of foreign plaintiffs' residences could affect the deference analysis, thus rejecting Plaintiffs' supposed rule that the presence of any U.S. plaintiffs requires strong deference. In dicta, the court expressed skepticism of the defendant's argument that the presence of foreign plaintiffs reduces the deference owed to the U.S. plaintiffs' choice of forum. 963 F.3d at 1343-44. But the court stated only that "the ratio of domestic to foreign plaintiffs *does not necessarily* have a bearing on [the defendant's] convenience," thus rejecting the need to

automatically reduce deference. *Id.* at 1344-45 (emphasis added). The court emphasized, however, that it "say[s] 'necessarily' because at this point [the defendant] has not put forward any evidence to the contrary." *Id.* at 1345 n.5. In other words, plaintiffs' residences could affect the deference owed, depending on the totality of the circumstances. In that case—where plaintiffs had "travel[ed] to the United States to sue [the defendant] in its country of citizenship" for "conduct in the United States," *id.* at 1341, 1345—plaintiffs were presumably due to receive heightened deference notwithstanding the presence of foreign plaintiffs, just as in *Norex* and *Bigio*.[5]

* * *

There is little doubt that *Simon*, *Carijano*, and *Otto Candies* would have come out the same way in the Second Circuit, which has likewise sometimes granted heightened deference even to foreign plaintiffs when appropriate. None of these cases reject the Second Circuit's totality-of-the-circumstances approach or hold that the predominance of foreign plaintiffs is never relevant to the deference analysis. Instead, the court in each case, based on the highly distinguishable facts at issue, held that the totality of circumstances in that particular case required strong deference *notwithstanding* the presence

[5] The Eleventh Circuit plainly did not think it was in a circuit split with the Second Circuit. Despite extensively citing Second Circuit authority on *forum non conveniens* issues—including citing *Iragorri*—the Eleventh Circuit stated that it had "not found any cases holding that reduced deference to American plaintiffs is warranted when they sue alongside foreigners." *Id.* at 1344. That is unsurprising, since none of the Second Circuit's decisions stands for the proposition that the presence of foreign plaintiffs necessarily requires reducing deference.

of foreign plaintiffs. Nothing in those conclusions conflicts with Second Circuit case law.

II. The Decision Below Was Correct

1. The Second Circuit correctly held that the district court acted within its broad discretion in deciding to grant "some, albeit minimal, deference" to Plaintiffs' choice of forum. Pet.App.19a. That determination fits comfortably within this Court's jurisprudence. *See supra* pp.12-13.

First, the district court was plainly correct that there was little reason to presume the convenience of a U.S. forum at least for the majority of Plaintiffs who reside abroad. Pet.App.56a. Although a U.S. forum may be convenient for some of the Plaintiffs, there was no reason to presume that the U.S. forum was convenient for the group of Plaintiffs as a whole. Pet.App.56a. Indeed, this Court has already observed that "where there are hundreds of potential plaintiffs … all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened." *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947). Although *Koster* arose in the context of a derivative suit, its reasoning applies just as well to a purported judgment enforcement action like this one. Plaintiffs seek to force a defendant located outside the United States to rescind transactions that occurred outside the United States and to turn over assets held outside the United States. A suit like that could be brought almost anywhere. The large majority of Plaintiffs appear to reside abroad—and a much greater number reside in Kenya than in the United States, D. Ct. ECF No. 61, at 2. In that context, the presumption that Plaintiffs sued in the United States *for their own convenience* as opposed to some other reasons certainly is less reasonable.

Second, the "little, if any, connection between this action and this forum" also supported a reduction in deference. Pet.App.57a. Given that the underlying allegations of the action overwhelmingly took place in Türkiye, the lack of a subject-matter connection "weighs against deferring to plaintiffs' choice of forum" because litigating a case far from the location where it arose is presumably less convenient. Pet.App.56a-57a.

Third, the court considered the fact that "almost all of the relevant evidence is located in Turkey" and "written in Turkish," and that many of the relevant witnesses are in Türkiye and outside the court's subpoena power. Pet.App.57a. The district court reasonably concluded that the "difficulty" of litigating the case in the United States suggested that Plaintiffs' choice was not dictated by convenience. Pet.App.57a.

Finally, Plaintiffs' choice to sue Halkbank in the United States—where it could raise foreign sovereign immunity and personal jurisdiction defenses that would be unavailable in Türkiye—likewise supported an inference that Plaintiffs' choice of forum was not dictated by considerations of convenience. Pet.App.57a.

2. Plaintiffs seek a trump card that could defeat the many factors supporting the district court's decision to reduce deference. But Plaintiffs' argument (at 15) that the presence of *any* U.S. plaintiff "precludes" reducing deference unless the plaintiffs are engaged in rank forum shopping has no support. As explained above, nothing in *Piper* stands for the proposition that a U.S. resident's choice of a U.S. forum *inalterably* deserves strong deference. To the contrary, this Court explained that presumption of deference was justified because "it is reasonable to assume that [the choice of a home forum] is

convenient." 454 U.S. at 256. Similarly, the Court reasoned, "[b]ecause the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference." *Id.* Most importantly, *Piper* directed lower courts to retain "flexibility" in applying *forum non conveniens*, abhorring "rigid rule[s] to govern discretion." *Id.* at 249-50. Nothing in *Piper* or any other decision of this Court precludes a district court from concluding that this assumption is not "reasonable" based on the facts and circumstances of the particular case.

That is precisely what the district court did in this case, and the Second Circuit properly concluded that the district court's judgment "was within its broad discretion." Pet.App.20a.

III. This Case Is a Poor Vehicle for Addressing the Question Presented

Even if the question presented were worthy of this Court's review, this case is a poor vehicle for addressing that question. First, this Court's review would not be outcome determinative because Plaintiffs waived the question presented by failing to raise it before the district court, and because even a remand to the district court would likely produce the same result. Second, the facts of this case present a particularly weak argument for deference to a U.S. plaintiff's choice of forum. Indeed, Plaintiffs conceded below that due to the nature of this case, Plaintiffs' residences are essentially irrelevant to the convenience analysis in this case. Finally, Plaintiffs' invocation of federal policies related to TRIA as justifying review overlooks that Plaintiffs' TRIA claim is utterly frivolous.

1. Review in this case would not be outcome determinative for two reasons.

a. First, Plaintiffs waived the question presented before the district court. Plaintiffs now argue that absent blatant forum shopping, the mere presence of U.S. resident plaintiffs forbade reducing deference notwithstanding the overwhelming number of foreign plaintiffs (and other factors the district court considered). Pet. 16-23. Plaintiffs claim that this case "provides the perfect opportunity" to decide this question because "[t]he question presented was fully briefed … in the district court." Pet. 27.

That is false. Plaintiffs failed to make this argument before the district court—at the moment the court could have exercised its discretion—and thus waived it. Plaintiffs never argued either that the presence of an overwhelming majority of foreign plaintiffs was an improper factor to reduce deference, or that the presence of any U.S. plaintiffs required strong deference. The result of this case will therefore be the same whether or not the Court grants review.

In its opening memorandum in support of the motion to dismiss, Halkbank identified "four reasons" why Plaintiffs' choice of forum was entitled to reduced deference. D. Ct. ECF No. 60, at 15. The very first was that "a majority of Plaintiffs are not United States residents." *Id.* Halkbank quoted from *Wilson*, 349 F. App'x 649, which upheld a reduction of deference based in part on predominance of foreign residents in the plaintiff group. *Id.* at 651; *see* D. Ct. ECF No. 60, at 15. Plaintiffs totally failed to dispute that argument. Plaintiffs' opposition memorandum nowhere discussed *Wilson*, much less argued *at all* that the presence of U.S. resident plaintiffs required strong deference notwithstanding the predominance of foreign plaintiffs. *See* D. Ct. ECF No. 67, at 1-35.

Plaintiffs only arguably mentioned their places of residence in the district court in the last sentence of a footnote, and then only in an attempt to distinguish a forum-shopping case on the grounds that the plaintiff group in this case includes some "U.S. nationals." D. Ct. ECF No. 67, at 17 n.9. Plaintiffs' presentation nowhere suggested that Plaintiffs disputed Halkbank's argument that the predominance of foreign plaintiffs was a factor reducing deference. This Court does not entertain arguments waived below. *E.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). And because Plaintiffs waived this argument, the outcome would be the same on remand even if this Court resolves the question presented in Plaintiffs' favor.

b. Second, even if this Court or the Second Circuit remanded to the district court for a do-over, thus letting Plaintiffs out of their waiver years into the litigation, the result would still be the same. *Contra* Pet. 28. Putting aside the many other arguments for dismissal, *see supra* pp.5-6, there is no reason to think the district court would change its mind on *forum non conveniens*.

"The degree of deference given to [plaintiff's] choice of forum" does not "necessarily control[] the outcome" of a *forum non conveniens* motion. *Iragorri*, 274 F.3d at 74. A plaintiff's residence has no "talismanic significance," and "there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for *forum non conveniens*." *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73 (2d Cir. 2003) (citation omitted). Although it is unquestionably harder to gain a *forum non conveniens* dismissal in the context of strong deference, "the cases demonstrate that defendants frequently rise to the challenge." *Otto Candies*, 963 F.3d at

1346 (quoting *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990)). And this was not a close case. The district court found Halkbank's presentation on the adequacy of Türkiye as an alternative forum "far more persuasive" than the Plaintiffs'. Pet.App.59a n.4. And the district court found that both the private and public interest factors "weigh strongly in favor of litigating this case in Turkey." Pet.App.61a; *see* Pet.App.62a. It would still be true on remand that "[t]here is almost no connection between this case and New York," Pet.App.62a, and that "[t]he relevant evidence is largely in Turkey" and in Turkish. Pet.App.61a-62a. The district court has already rejected Plaintiffs' contrary arguments. Pet.App.57a-63a. Indeed, as explained *infra*, Plaintiffs' position has only gotten weaker on appeal. There is no reason to think this Court's review would affect the outcome of this case.

2. Moreover, Plaintiffs' deference argument is particularly weak given the concessions they have already made in this case. As already discussed, the touchstone of *forum non conveniens* analysis is convenience, and the degree of deference turns on whether Plaintiffs' choice of forum is supported by genuine considerations of convenience. *Supra* pp.12-13.

Plaintiffs have conceded that their residences are essentially irrelevant to the convenience of litigating discovery or trial in this action. In their opening brief before the Second Circuit, Plaintiffs argued that "this judgment enforcement action will not involve discovery from, or testimony by, Plaintiffs except to establish the existence of their valid and unpaid federal judgments." Pet'rs' C.A. Br. 22-23. And Plaintiffs doubled down in reply, arguing that Plaintiffs' "conduct is not at issue" in the case. Pet'rs' C.A. Reply Br. 5.

The fact that Plaintiffs' conduct is not at issue and that Plaintiffs will not meaningfully participate in discovery or trial suggests that Plaintiffs' convenience is substantially the same regardless where the litigation takes place. Based on those concessions, Plaintiffs' choice to sue in the United States deserves particularly little deference. Even if the presence of U.S. resident plaintiffs *sometimes* justifies strong deference when the vast majority of plaintiffs live abroad, that deference would not be justified in this case. This Court should not hear a case where the Plaintiffs have already so undermined their arguments.

3. Lastly, Plaintiffs' main argument that this case presents an important question is that TRIA requires "collective action," and that the Second Circuit's rule will require plaintiffs to seek "piecemeal litigation in venues across the globe." Pet. 24-25. But if that is so, this case presents a particularly poor vehicle because Plaintiffs' TRIA claim is utterly baseless.

In the district court, Halkbank explained that TRIA allows execution only against "blocked assets," which are those assets "seized or frozen by the United States." TRIA §§ 201(a), (d)(2); *see Wyatt v. Syrian Arab Republic*, 83 F. Supp. 3d 192, 195 (D.D.C. 2015). Here, it is undisputed that the United States, acting through Executive Order 13,599, "blocked" only Iranian assets "within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch." Blocking Property of the Gov't of Iran & Iranian Fin. Insts., 77 Fed. Reg. 6,659 (Feb. 5, 2012).

Plaintiffs themselves acknowledge *that there are no blocked assets meeting that definition.* Plaintiffs' complaint alleges that, "[h]ad Halkbank not concealed the

Iranian assets that traveled through the U.S. financial system, those assets *would have been blocked*." D. Ct. ECF No. 46, ¶ 181 (emphasis added). And in the motion-to-dismiss proceedings, Plaintiffs acknowledged that Iran "avoided having [its] assets 'blocked.'" D. Ct. ECF No. 67, at 33 n.16. Indeed, the short footnote just cited was Plaintiffs' *only* defense of their TRIA claim in the district court. *See id.*

The nonexistence of any blocked assets is fatal to Plaintiffs' TRIA claim. *See, e.g.*, *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 58 (1st Cir. 2013) (concluding at-issue assets were not "blocked assets" subject to TRIA); *Bank of N.Y. v. Rubin*, 484 F.3d 149, 150 (2d Cir. 2007) (per curiam) (same). Plaintiffs' bizarre reliance on this frivolous TRIA claim in their petition confirms that this case is a poor vehicle for the question presented.

* * *

The district court in this case thoughtfully considered all the parties' arguments and arrived at the commonsense conclusion that Plaintiffs should litigate these claims in Türkiye—where all the evidence and witnesses are located and where Plaintiffs' claims arose. The Second Circuit affirmed that decision on abuse-of-discretion review based on noncontroversial legal principles articulated by this Court and followed by federal courts of appeals throughout the country. Plaintiffs' arguments to the contrary require mischaracterizing case law and ineffectively papering over the vehicle problems in their own case. The Court should deny review.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

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