No. 23-197

IN THE
Supreme Court of the United States

JAMES OWENS, ET AL.,

Petitioners,

v.

TURKIYE HALK BANKASI A.S.,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Second Circuit stands alone in withholding the strong deference ordinarily accorded to U.S. plaintiffs' choice of a U.S. forum, merely because they are joined by a greater number of foreign co-plaintiffs. Halkbank does not defend such a nose-counting approach. It cannot refute that three circuits have expressly rejected it. And it identifies no case outside the Second Circuit embracing it.

Halkbank instead principally contends that the Second Circuit also eschews that misguided approach. But that cannot be squared with what the Second Cir-

cuit has said and done. In five decisions over 15 years—two currently pending before this Court—the Second Circuit has, in its own words, "repeatedly affirmed" the "application of less deference * * * where the U.S. resident plaintiff[s] * * * are outnumbered by non-resident plaintiffs." *Wamai* v. *Industrial Bank of Korea*, No. 21-1956-CV, 2023 WL 2395675, at *2 n.1 (2d Cir. Mar. 8, 2023), petition for cert. pending, No. 23-237 (filed Sept. 8, 2023); see Pet. App. 19a-20a. Halkbank's account is also belied by its position below, where it successfully urged the Second Circuit to continue applying its minimal-deference test.

The Second Circuit has given every indication that it will continue down that aberrant path absent this Court's intervention. Down that path lie dire consequences for terrorism victims—including the hundreds of U.S. servicemen, employees, contractors, and family members in this case whom the Second Circuit shunted to foreign court. This Court should grant review to resolve the split and ensure that U.S. terrorism victims are not forced to forgo their rights to enforce U.S. judgments in U.S. courts under U.S. law.

I. THERE IS AN ENTRENCHED SPLIT

Three courts of appeals reject the approach followed by the Second Circuit that accords minimal deference when U.S. plaintiffs are outnumbered by co-plaintiffs residing abroad. Halkbank's efforts to obscure that conflict fail.

A. Halkbank cannot refute the D.C., Ninth, and Eleventh Circuits' express rejection of an approach that bases the degree of deference on the ratio of U.S. to foreign co-plaintiffs. Those courts correctly recognize that *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), "does not in any way stand for the proposition

that when both domestic and foreign plaintiffs are present, the strong presumption in favor of the domestic plaintiff's choice of forum is somehow lessened." *Carijano* v. *Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011). And they have repudiated the minimal-deference approach as "legal error" that lacks "any practical or doctrinal basis." *Simon* v. *Republic of Hungary*, 911 F.3d 1172, 1183 (D.C. Cir. 2018), vacated and remanded on other grounds, 141 S. Ct. 691 (2021) (per curiam); see *Otto Candies, LLC* v. *Citigroup, Inc.*, 963 F.3d 1331, 1344 (11th Cir. 2020); Pet. 10-13.

Halkbank speculates that, contrary to those decisions' emphatic language, they do not foreclose the possibility that the U.S.-to-foreign-plaintiffs ratio might reduce the deference due in future cases. Br. in Opp. 18-21. But none of the decisions says that. And Halkbank cites no case in those circuits, or anywhere outside the Second Circuit, that actually reduced deference for U.S. plaintiffs based on the presence or proportion of foreign co-plaintiffs. Halkbank points (*id.* at 17-18) to *Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), but that case simply recited the undisputed proposition that even a U.S. plaintiff has no "indefeasible right" to maintain a suit in a U.S. forum if "all other private and public factors clearly favor dismissal." *Id.* at 798-799. Halkbank's hypothesis that other courts might someday start counting noses is unsupported conjecture.

Unable to disprove those circuits' position, Halkbank tries misdirection. Jumping several levels of generality, it contends (Br. in Opp. 17-22) that the D.C., Ninth, and Eleventh Circuits join the Second Circuit in applying *some* form of multi-factor, sliding-scale approach to deference. But even if agreement at

that high level of abstraction existed, it would not undermine the conflict on the subsidiary question petitioners raise: whether the presence of a majority of foreign plaintiffs effectively replaces *Piper*'s strong presumption with minimal deference. Other circuits' answer to that question is unambiguous: "[T]he addition of foreign plaintiffs does *not* render for naught the weighty interest of Americans seeking justice in their own courts." *Simon*, 911 F.3d at 1183 (emphasis added). That some decisions of those three circuits have cited Second Circuit cases for uncontroversial tenets is immaterial. No quantum of cross-references can erase those circuits' rejection of an arbitrary exception to *Piper*'s rule.

Regardless, Halkbank cannot prove even high-level consensus. As the Eleventh Circuit has noted, the Ninth Circuit has "reject[ed]" the Second Circuit's "sliding scale." *Otto Candies*, 963 F.3d at 1341 (contrasting *Carijano* with *Iragorri* v. *United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc)). And neither the reasoning nor results of the decisions Halkbank cites show that other courts apply a freewheeling, multi-factor standard. For example, Halkbank's cases (Br. in Opp. 19) that accorded diminished deference based on blatant "forum-shopping," *de Borja* v. *Razon*, 835 F. App'x 184, 187 (9th Cir. 2020), or because the U.S.-citizen plaintiff "resid[ed] permanently abroad," *Ranza* v. *Nike, Inc.*, 793 F.3d 1059, 1076 (9th Cir. 2015), simply applied *Piper*'s teachings that token plaintiffs and foreign residents do not get the same strong deference as genuine U.S. plaintiffs. And the decision Halkbank cites (Br. in Opp. 17) that *increased* deference for some foreign plaintiffs reaffirmed the "significant deference" due to a "U.S. plaintiff's choice of forum." *Shi* v. *New Mighty U.S. Trust*, 918 F.3d 944, 949 (D.C. Cir. 2019).

Broadening the lens thus only confirms lower-court disagreement on the legal standard. That other circuits have not embraced the Second Circuit's singularly elastic sliding-scale approach helps explain why its outlier, nose-counting answer to the question presented also has not gained traction elsewhere.

B. Halkbank's principal response (Br. in Opp. 13-17) is to deny that the Second Circuit follows a nose-counting approach. That denial contradicts that court's decisions and Halkbank's own position below.

1. For the Second Circuit's understanding of its approach, one need only look to its ruling in *Wamai*—a companion case presenting the same issue (brought by victims of some of the same attacks), on which the decision below expressly relied. Pet. App. 19a-20a n.1. In *Wamai*, the Second Circuit recounted that it has "repeatedly affirmed" the "application of less deference * * * where the U.S. resident plaintiff[s] * * * are outnumbered by non-resident plaintiffs." 2023 WL 2395675, at *2 n.1. The litany of cases *Wamai* listed had likewise held that "district court[s] appropriately * * * reduc[ed] the overall deference accorded on the ground that less than half of the plaintiffs are United States residents." *Wilson* v. *Eckhaus*, 349 F. App'x 649, 651 (2d Cir. 2009).

The court of appeals in this case, in turn, needed nothing but a citation of *Wamai* (and the "cases" it "collect[ed]") to reject petitioners' claim for *Piper*'s strong deference. Pet. App. 20a n.1. The court's repeated, reflexive application of that principle makes clear that, absent correction by this Court, the Second Circuit will continue to withhold *Piper*'s strong presumption whenever foreign co-plaintiffs predominate.

2. Halkbank should not be heard to argue otherwise because it expressly *acknowledged and advocated continuing to apply* that misguided approach below. Resp. C.A. Br. 21-26. Halkbank argued in the Second Circuit that the district court "correctly reduced deference because foreign plaintiffs substantially outnumber U.S. plaintiffs." *Id.* at 17. In support, it explained that the Second Circuit had "applied that rule at least four times." *Ibid.*; see *id.* at 23. Indeed, Halkbank portrayed that principle as so firmly embedded in circuit law as to excuse the absence of any supporting citation by the district court. *Id.* at 17, 23.

In any event, Halkbank's new, revisionist position is unsupported. It asserts (Br. in Opp. 14) that the Second Circuit has "expressly rejected" an approach reducing deference for U.S. plaintiffs, but its only evidence is a pair of cases that *heightened* deference for certain *foreign* plaintiffs. *Id.* at 14-15 (citing *Norex Petroleum Ltd.* v. *Access Industries, Inc.*, 416 F.3d 146, 154 (2d Cir. 2005), and *Bigio* v. *Coca-Cola Co.*, 448 F.3d 176, 178-180 & n.1 (2d Cir. 2006)). Neither decision has stopped the Second Circuit from zeroing out *Piper*'s strong presumption—as this case, *Wamai*, and the cases *Wamai* canvassed all show. To the contrary, the Second Circuit has cited *Norex* to support "reducing the overall deference accorded on the ground that less than half of the plaintiffs are United States residents." *Wilson*, 349 F. App'x at 651.

Halkbank's fallback contention that the Second Circuit's reduced-deference determinations have not turned "merely" on the number of foreign plaintiffs (Br. in Opp. 16) fares no better. The court has repeatedly held that the predominance of foreign plaintiffs is *sufficient* for diminishing deference. See, *e.g.*, *Bahgat* v. *Arab Republic of Egypt*, 631 F. App'x 69, 70 (2d Cir.

2016) ("Three of the plaintiffs currently reside in Egypt, and the selection of a U.S. forum by such plaintiffs is entitled to less deference."); Pet. App. 19a. That it has also invoked additional deference-reducing factors is of no moment. But even if the Second Circuit considered the U.S.-to-foreign-plaintiffs ratio only alongside other factors, that still would leave it at odds with other circuits.

At bottom, Halkbank cannot now hide from a test the Second Circuit has "repeatedly affirmed" and (at Halkbank's urging) applied here, which accords "less deference * * * where the U.S. resident plaintiff[s] * * * are outnumbered by non-resident plaintiffs." *Wamai*, 2023 WL 2395675, at *2 n.1. That test is irreconcilable with other circuits' precedent. Only this Court can resolve the direct conflict.

II. THE SECOND CIRCUIT'S RULE IS WRONG

Having denied that the Second Circuit follows the nose-counting rule that the decision below and *Wamai* recited, Halkbank unsurprisingly does not try to defend it. It does not dispute that such an approach conflicts with *Piper*, is vague and indeterminate, and yields arbitrary, untenable results. Pet. 19-21. That should end the merits analysis; the legal standard applied by the decision below has no defenders.

Halkbank briefly defends a different, more nebulous approach that it mistakenly ascribes to the Second Circuit. Under that approach, the proportion of foreign plaintiffs counts as just one of "many factors," none dispositive. Br. in Opp. 24. But Halkbank's defense is immaterial because that is not the Second Circuit's test. See p. 5, *supra*.

Halkbank's defense is doubly unavailing because that invented approach *also* violates *Piper*. Under

Halkbank's theory, the problems of considering an illegitimate factor are cured by folding it in with enough other, permissible factors. But that dilution theory is backed by nothing. And it conflicts with *Piper*'s binary rule that a non-token U.S. plaintiff suing at "home" is entitled to "strong" deference—full stop. 454 U.S. at 255. Halkbank's suggestion (Br. in Opp. 23) that its proposed approach follows from *Koster* v. *(American) Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), ignores that *Piper* cited *Koster* for the proposition that "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum," 454 U.S. at 255.

Halkbank ultimately reveals that it seeks to narrow *Piper* by insinuating (Br. in Opp. 25) that faithfully applying it threatens "flexibility" in *forum non conveniens* cases. But the deference determination is not where the doctrine's flexibility is housed. Deference "*set*[*s*] *the scales*" for balancing the "private and public interests." *Simon*, 911 F.3d at 1183, 1185 (emphasis added). Setting those scales correctly is critical; selecting the wrong degree of deference is "legal error." *Ibid.* But it is the beginning of the analysis, not the end. The considerations Halkbank seeks to smuggle into the deference inquiry may be relevant at the later interest-balancing stage. Nothing in this Court's precedents, however, provides any basis to *double*-count them and thereby deprive U.S. plaintiffs of the presumption in favor of their forum choice.

Moreover, even if Halkbank's new nose-counting-plus rule could be squared with *Piper*, Halkbank's concessions in this Court confirm that its proposed test cannot justify the judgment below. As petitioners argued below, the nature of this action to enforce existing U.S.-court judgments means there is no need for

individual petitioners to participate in-person in discovery or trial as their claims have already been litigated to judgment. *E.g.*, Pet. C.A. Br. 22-23. Halkbank, mistaking that argument for an admission, now vigorously *agrees*. Br. in Opp. 3, 11, 28-29. The inconvenience to foreign plaintiffs of traveling to the United States thus is *undisputedly* absent here. Meanwhile, a U.S. forum is convenient for all petitioners—especially in contrast to Turkey (where no plaintiff is known to reside). As between (1) pursuing enforcement of already-obtained, executable U.S.-court judgments while represented by existing counsel in a familiar legal system, and (2) engaging new, foreign counsel to restart enforcement efforts in an unfamiliar foreign court (and language), the convenient choice is easy, as petitioners showed below. Pet. C.A. Br. 26-34.

A court applying the test Halkbank now posits—in which the proportion of foreign co-plaintiffs *may* diminish *Piper*'s presumption if their presence severely undermines the forum's convenience—thus would find no reason to dilute *Piper*'s strong deference here. Yet the Second Circuit nevertheless reduced deference to next to nothing. If Halkbank's test would produce that untenable result even in this case, it is indistinguishable from the Second Circuit's erroneous, undefended rule.

III. THIS IS AN IMPORTANT AND RECURRING ISSUE

A. Halkbank has no answer to the importance of the question presented and its particular significance in cases like this. Halkbank does not dispute that the decision below will prevent American victims of terrorism—including the hundreds of U.S. servicemen, employees, contractors, and family members in this case alone—from utilizing their express statutory right to pursue collective litigation in U.S. courts to

enforce U.S. judgments against sponsors of terrorism. Nor does Halkbank deny that the Second Circuit's rule will deprive terrorism victims of their legal remedies if forced to litigate in far-flung, often-hostile jurisdictions. And it does not dispute that the Second Circuit's outlier rule will have outsized consequences because New York—a global banking hub—is the most important U.S. jurisdiction for judgment enforcement. See Pet. 24-27.

Halkbank also does not dispute that collective action by U.S. and foreign terrorism victims in U.S. court, in place of piecemeal litigation around the world, is fundamental to Congress's design in the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, § 201, 116 Stat. 2337 (28 U.S.C. § 1610 note). Halkbank instead contends that petitioners cannot prevail under TRIA because the disputed assets are not currently "blocked." Br. in Opp. 29. That is incorrect. The Iranian assets became "blocked" assets as soon as Halkbank brought them to New York, 31 C.F.R. § 560.211(a), and any further transactions in the assets were "void," *id.* § 560.212(a). Petitioners seek to require Halkbank to turn over Iranian funds that but for Halkbank's fraudulent scheme would have been frozen and in all events would be subject to execution under TRIA upon return to New York. See 2d Am. Compl. ¶ 182 (D. Ct. Doc. 46).

More importantly, Halkbank's premature protest over the underlying merits misses the point. The decision below disabled petitioners from litigating the merits of their TRIA claim. The question presented is whether the Second Circuit's rule compelling that dismissal should stand. Halkbank's own view of the merits does nothing to diminish the harmful consequences of that rule, which has precluded the plaintiffs in this

case, *Wamai*, and others from having those merits adjudicated by a U.S. court. That misguided rule amply warrants plenary review.

B. None of the purported vehicle problems Halkbank advances (Br. in Opp. 25-30) poses a genuine barrier to review.

Halkbank's assertion (Br. in Opp. 26) that petitioners "waived" the question presented is simply false. As Halkbank elsewhere acknowledges (*id.* at 27), petitioners argued in the district court that "great deference" is required because "many plaintiffs are U.S. nationals." D. Ct. Doc. 67, at 17 & n.9. In any event, the issue indisputably was both "pressed" in and "passed upon" by the Second Circuit. *United States* v. *Williams*, 504 U.S. 36, 41 (1992); see, *e.g.*, Pet. C.A. Br. 22-23; Pet. App. 19a-20a. The issue is preserved.

Halkbank has matters backwards in asserting (Br. in Opp. 28-29) that the case is a *poor* vehicle because the non-U.S. plaintiffs need not testify or appear in person. That the only arguable (but for *Piper*) reason to accord less deference when foreign-resident plaintiffs predominate is undisputedly inapplicable makes this case a better vehicle for review. There is no basis here for affirming on an alternative ground under the unprecedented hybrid approach Halkbank posits (but which *Piper* forecloses). See pp. 7-9, *supra*.

Finally, Halkbank's conjecture (Br. in Opp. 27-28) that the courts below would reach the same result even if the court of appeals' ruling is reversed is no reason to forgo review. Applying the wrong degree of deference is a "legal error" that "set[s] the scales wrong from the outset" and distorts the weighing of the "private and public interests." *Simon*, 911 F.3d at 1183, 1185. As *Piper* itself explained, to "overcome"

the "strong presumption" in favor of U.S. plaintiffs' choice of U.S. court, a defendant must "clearly" prevail on the balancing of "private and public interest[s]." 454 U.S. at 255; see *Iragorri*, 274 F.3d at 74.

It is highly doubtful that Halkbank could overcome *Piper*'s presumption here. This case involves hundreds of U.S. victims of terrorism—including American servicemen and government employees—suing to enforce already-final U.S.-court judgments under state and federal law. Their claims concern fraudulent transactions running through New York's banking system that circumvented U.S. security policies and frustrated satisfaction of federal-court judgments. Evidence relevant to establishing Halkbank's responsibility is already in the United States, due to a recent criminal conviction of a Halkbank executive for his facilitation of the scheme. See *United States* v. *Atilla*, 966 F.3d 118, 122 (2d Cir. 2020). The proper legal standard would very likely alter the outcome. At a bare minimum, it calls the Second Circuit's entire analysis into serious doubt.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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