No. 23-237

IN THE

Supreme Court of the United States

WINFRED WAIRIMU WAMAI, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF ADAM TITUS WAMAI, ET AL.,

Petitioners,

v.

INDUSTRIAL BANK OF KOREA,

Respondent.

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

BRIEF FOR THE AMERICAN FOREIGN SERVICE ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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RULE 29.6 STATEMENT

The American Foreign Service Association has no parent company and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE AMICUS[1]

Pursuant to Supreme Court Rule 37.3, the American Foreign Service Association (AFSA) respectfully submits this brief as amicus curiae in support of petitioners.

Established in 1924, AFSA is the professional association and exclusive representative for the U.S. Foreign Service. AFSA's close to 16,800 members include active-duty and retired members of the Foreign Service at the Department of State, the U.S. Agency for International Development (USAID), Foreign Commercial Service, Foreign Agricultural Service, Animal and Plant Health Inspection Service, and U.S. Agency for Global Media.

AFSA is both the principal advocate for the long-term institutional wellbeing of the professional career Foreign Service and responsible for safeguarding the interests of AFSA members. AFSA also seeks to increase understanding among the American people about the vital role of the U.S. Foreign Service in sustaining American global leadership.

Nearly 80 percent of active-duty members of the Foreign Service choose to join AFSA. AFSA's members are career professionals who volunteer to live and work abroad for roughly two-thirds of their careers—usually serving abroad with their families, but sometimes unable to—representing America to the people

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[1] No counsel for any party authored this brief in whole or in part, and no person other than the amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties were timely notified of this filing at least ten days in advance.

and leaders of other countries. Members of the Foreign Service are posted to more than 270 U.S. embassies, consulates, and other missions that are scattered across the globe—most in difficult and many in dangerous environments.

By representing the Foreign Service, AFSA acts in pursuit of the national interest. The Foreign Service Act of 1980, the legal foundation for the Foreign Service, opens by declaring that "a career foreign service, characterized by excellence and professionalism, is essential in the national interest." 28 U.S.C. § 3901(a)(1). AFSA speaks for its members individually, ensuring that the law is upheld and due process followed, but also, crucially, advocates for the long-term health and vigor of the Foreign Service as an institution, certain in the conviction that a career Foreign Service, characterized by excellence and professionalism, is in America's national interest.

This case concerns the interaction between Congress's efforts to provide civil remedies to those injured by state sponsors of terrorism, on the one hand, and the common law doctrine of *forum non conveniens*, on the other. Many AFSA members have been—and will be—victims of terrorist attacks carried out at the behest or with the assistance of state sponsors of terrorism. AFSA has a strong interest in ensuring that these members have access to a viable forum not only to pursue their valid claims, but also to ultimately recover in a timely fashion. Accordingly, AFSA urges that the petition be granted, and the judgment below reversed.

SUMMARY OF ARGUMENT

This Court should grant certiorari to resolve the extant circuit split over the application of *forum non conveniens* to cases involving both U.S. and non-U.S. plaintiffs—clarifying that plaintiffs' choice of a U.S. forum is entitled to substantial deference. That is especially the case when, as here: (1) the plaintiffs are either U.S. nationals or employees of the U.S. government (or their family members); (2) the plaintiffs are pursuing remedies Congress specifically created for them under U.S. law; and (3) the defendant engaged in misconduct within the United States.

This question is important not only to petitioners, but to every member of the Foreign Service—and indeed every other U.S. person or U.S. government employee—who has been injured or may in the future be injured by an act of terrorism involving a state sponsor of terrorism. As a general matter, such state sponsors of terrorism keep no obvious assets in the United States for judgment creditors to pursue. When culpable third parties like banks move money for those state sponsors through the U.S. financial system, plaintiffs with valid judgments should be able to execute on those assets without having to litigate in far-flung and potentially hostile jurisdictions. The alternative is that plaintiffs may spend years building up meritorious claims only to be unable to enforce their judgments due to the vagaries of foreign law—a result that would undermine Congress's objective of protecting our people.

ARGUMENT

I. The Question Presented Is Important and Warrants This Court's Immediate Review

Now is a critical time for U.S. nationals and U.S. government employees pursuing claims for relief against state sponsors of terrorism. After years of litigation, many deserving victims of terrorist attacks have proved their cases and won substantial judgments against Iran and other governments that carried out or assisted in those acts of terrorism. But state sponsors of terrorism deliberately keep their assets outside the United States whenever possible, which has made collection on these judgments extremely difficult.

Congress anticipated and sought to remedy that issue in the Terrorism Risk Insurance Act of 2002 (TRIA), Pub. L. No. 107-297, 116 Stat. 2322, which provides that "[n]otwithstanding any other provision of law," any person who has "obtained a judgment against a terrorist party on a claim based upon an act of terrorism" to seek "the blocked assets of that terrorist party . . . in order to satisfy such judgment." *Id.* § 201(a) (28 U.S.C. § 1610 note). The term "terrorist party" includes terrorist organizations as well as state sponsors of terrorism. *See id.* § 201(d)(4). And blocked assets include funds that have been seized or frozen pursuant to many of the United States' sanctions programs. *Id.* § 201(d)(2).

In enacting this statutory provision, Congress's clear purpose was "to deal comprehensively with the problem of enforcement of judgments rendered on behalf of victims of terrorism in any court of competent

jurisdiction by enabling them to satisfy such judgments through the attachment of blocked assets of terrorist parties." H.R. Conf. Rep. No. 107-779, at 27 (2002). Indeed, Congress could not have spoken more clearly, making such assets available to victims in "every case," and "[n]otwithstanding any other provision of law." TRIA § 201(a) (28 U.S.C. § 1610 note).

Congress also intended for these provisions to aid the nation in the fight against terrorism. Thus, supporters of the bill in the House explained that providing access to blocked assets not only provided "a small but important token of justice" to the victims, but also imposed "a direct and immediate cost" on state sponsors of terrorism, thus constituting "one effective financial tool . . . against terrorists and those who help them," which created an "economic incentive to stop" acts of terrorism. 148 Cong. Rec. H6133, H6134 (Sept. 10, 2002) (Rep. Fossella); *see also id*. (Rep. Cannon) (explaining that "[t]his language imposes immediate financial costs on the states that sponsor terrorism"); *id*. at H6135 (Rep. Grucci) (explaining that this remedy allows the victims of terrorism "to punish the terrorists even more by seizing their assets, seizing their money, which in turn will slow down their operations"); *id*. at H6136 (Rep. Watt) (explaining that "[c]ompensating victims" using blocked assets "raise[s] the price" of terrorism, thus hopefully "deter[ring] future acts of violence," and "send[ing] a message to terrorist organizations and the states that sponsor them, we will not stand for the murder of innocent Americans"); *id*. at H6137 (Rep. Shays) (explaining that "this provision will cut financing for terrorism off at the knees").

In the Senate, too, legislators explained that "paying American victims of terrorism from the blocked and frozen assets of these rogue governments and their agents will really punish and impose a heavy cost on those aiding and abetting the terrorists. This tougher U.S. policy will provide a new, powerful disincentive for any foreign government to continue sponsoring terrorist attacks on Americans, while also discouraging any regimes tempted to get into the ugly business of sponsoring future terrorist attacks." 148 Cong. Rec. S11524, S11527 (Nov. 19, 2002) (Sen. Harkin); *see id.* (explaining that the legislation ensures that "American victims of state-sponsored terrorism and their families will finally be able to secure some measure of justice and compensation" because "[t]his new legislation enables American victims to fight back, to hold the terrorists who are responsible accountable to the rule of law, and to make the perpetrators and their sponsors pay a heavy price.").

The concerns that motivated Congress to act in 2002 are, if anything, even stronger today. Since 2002, anti-American terrorists have not relented; if anything, they have intensified their assaults on American assets and personnel abroad. The intervening years have seen dozens of terrorist attacks on U.S. embassies and consular facilities, many resulting in severe injuries to and deaths of U.S. personnel, employees, and contractors. The 2012 assault on the U.S. Special Mission in Benghazi, Libya, which killed Ambassador Christopher Stevens and three other American personnel, is only the most notorious example. *See*, *e.g.*, James Sturke, *Nine killed as US consulate in Jeddah attacked*, The Guardian (Dec. 6, 2004),

https://www.theguardian.com/world/2004/dec/06/saudiarabia.usa; Associated Press, *Gunmen attack U.S. Embassy in Syria*, NBC News (Sept. 12, 2006), https://www.nbcnews.com/id/wbna14794377; Sharon Behn, *Taliban Militants Attack US Consulate in Afghanistan*, Voice of Am. News (Sept. 13, 2013), https://www.voanews.com/a/afghan-militants-strike-us-consulate/1748890.html; Al Jazeera, *US embassy, five other sites targeted by letter bombs in Spain* (Dec. 1, 2022), https://www.aljazeera.com/news/2022/12/1/us-embassy-five-other-sites-targeted-by-letter-bombs-in-spain. Access to robust remedies accordingly remains as important as it ever was—especially to members of the Foreign Service and to others serving on the front line in conflict zones where terrorist attacks are more likely to occur.

The upshot is that this Court should recognize that the question presented is important to more than just the parties before this Court; it is important to every past and future American victim of terrorism who ultimately pursues justice through the courts. And given the role that Congress intended for this regime to play in deterring acts of terrorism, the question presented is also important to the national interest as a whole.

II. This Court Should Grant Certiorari and Reverse, or Vacate and Remand

This Court's review is warranted to resolve the split among the courts of appeals, reaffirm the Court's longstanding requirement of deference to plaintiffs' choice of their home forum, and support Congress's

intention to provide victims of state-sponsored terrorism with a viable remedy in U.S. court.

Alone among the circuits, the Second Circuit gives "minimal deference" to the plaintiffs' choice of forum where U.S. plaintiffs are outnumbered by foreign plaintiffs. Pet. App. 12a. That rule applies even where, as here, the absolute number of U.S. plaintiffs is substantial and the non-U.S. plaintiffs are U.S. government employees or their survivors. The Second Circuit's approach is sharply out of step with the jurisprudence of the D.C., Ninth, and Eleventh Circuits, all of which employ the "strong presumption" in favor of the plaintiff's choice of her home forum required by this Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981).

The D.C. Circuit's decision in *Simon v. Republic of Hungary*, 911 F.3d 1172 (D.C. Cir. 2018), *vacated and remanded on other grounds*, 141 S. Ct. 691 (2021), both illustrates the split and explains why the Second Circuit's minority view is misguided. In *Simon*, four U.S. residents and ten foreign nationals brought suit against the Republic of Hungary and a private freight carrier for injuries suffered during the Holocaust. The district court dismissed the claims, in part, on *forum non conveniens* grounds, concluding—like the Second Circuit here—that the plaintiffs' choice of forum was entitled to "minimal deference" because ten of the fourteen plaintiffs were foreign and so would "be required to travel internationally" for trial "regardless of whether the litigation is in the United States or Hungary." *Id*. at 1183 (quotation omitted).

The D.C. Circuit reversed. It noted that under *Piper*, the "starting point" of the analysis is "'a strong presumption in favor' of the plaintiff's choice of the

forum," which is even stronger "'when the plaintiff has chosen [her] home forum.'" 911 F.3d at 1182 (alteration in original) (quoting *Piper*, 454 U.S. at 255-56). That is, the plaintiffs' "choice of forum controls, and 'unless the balance is *strongly* in favor of the defendant, the plaintiffs' choice of forum should *rarely* be disturbed.'" *Id*. at 1183 (emphasis in original) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). The mere "addition of foreign plaintiffs," the court explained, "does not render for naught the weighty interest of Americans seeking justice in their own courts." *Id*. Absent evidence that the U.S. plaintiffs "are in the case only as jurisdictional makeweights seeking to manipulate the forum choice," the plaintiffs' "preference for their home forum continues to carry important weight in the *forum non conveniens* analysis." *Id*. And as the court further explained, "[t]he presence of foreign plaintiffs" in addition to U.S. plaintiffs "certainly does not" so overwhelm the plaintiffs' preference as to "justify the preference for a forum"—here, Korea—"in which *no* plaintiff resides." *Id*. (emphasis in original). The Ninth and Eleventh Circuits have reached the same conclusion, creating a square 3-1 split. *See Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1228 (9th Cir. 2011) (plaintiffs' choice of U.S. forum entitled to deference where one of 26 plaintiffs was a U.S. person); *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1343-45 (11th Cir. 2020) (plaintiffs' choice of forum entitled to deference where two of 39 plaintiffs were U.S. persons).

That split warrants the Court's review, and the judgment of the Second Circuit should be reversed. For more than 70 years, this Court has held that absent indications that the forum was chosen to "'vex,'

'harass,' or 'oppress' the defendant" "the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil*, 330 U.S. at 508; *see also M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6 (1972) (stating that "under normal *forum non conveniens* doctrine . . . 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'").

In *Piper*, the Court reaffirmed both the presumption that "a plaintiff's choice of forum should rarely be disturbed" and explained the limited circumstances in which that presumption may be overcome: "when an alternative forum has jurisdiction to hear the case, *and* when" either "trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' *or* . . . the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems.'" 454 U.S. at 241 (alteration in original) (emphasis added). The Court went on to clarify—consistent with its longstanding precedent—that in a case where *none* of the plaintiffs are U.S. persons, the presumption that their chosen U.S. forum is convenient carries less weight. *Id.* at 255-56 (citing cases).

What *Piper* did *not* say, or even suggest, is that the mere addition of foreign plaintiffs vitiates the presumption of convenience afforded to legitimate (non-"makeweight") U.S. plaintiffs. But that is effectively what the Second Circuit's rule requires. The "minimal deference" it affords to mixed groups of U.S. and foreign plaintiffs is identical to the deference *Piper* affords to completely non-U.S. plaintiff groups—even where, as here, none of the foreign plaintiffs reside in (or anywhere near) the defendant's preferred forum. The effect is a bizarre distortion of core principles of

forum non conveniens in which a U.S. forum that is strongly presumed to be convenient to the U.S. plaintiffs is abandoned in favor of a forum that is systematically *in*convenient for everyone except the defendant.

The lack of deference for the plaintiffs' chosen forum is particularly inappropriate where, as here, the absolute number of U.S. plaintiffs is substantial; there is no suggestion that any of those plaintiffs are "jurisdictional makeweights" added to the case solely to manufacture venue; even the foreign plaintiffs are "U.S. government employees or family members of such employees," Pet. App. 12a n.1, all of whom gave their lives, their health, or their loved ones in the service of the United States; and all the plaintiffs were viciously attacked and injured *because of* their association with the United States. As a leading commentator explains, plaintiffs with such "strong bona fide connection[s] to the forum" should be "presumed to have chosen the forum for reasons of convenience or expense, rather than forum shopping." 14D Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3828.2 (4th ed.).

Even if this case involved only ordinary civil litigation, the circuit conflict detailed above would merit this Court's review. But the conflict is especially acute here because the Second Circuit's minority rule undercuts a special statutory scheme designed to facilitate access to a U.S. forum. Congress has authorized victims of terrorism—including U.S. citizens and foreign nationals employed by the U.S. government and surviving relatives—to sue state sponsors of terrorism in U.S. courts. *See* Pet. 25-27; *see also* 28 U.S.C. § 1605A(a)(2). To give those judgments teeth,

Congress gave litigants a path to enforce those judgments in U.S. courts.

In the TRIA, Congress established that that "in every case" where a "person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism," that person can sue in the United States and "execut[e]" on any "blocked assets" of the terrorist party or its instrumentalities. *Id*. § 201(a) (28 U.S.C. § 1610 note). Congress defined an "act of terrorism" broadly to include attacks on life or property outside the United States. *Id.* § 102(1)(A)(iii) (15 U.S.C. § 6701 note). Anyone who was victimized by an act of terrorism—regardless of their residence—can attempt to satisfy their judgment in U.S. federal court, "[n]otwithstanding any other provision of law." *Id.* § 201(a) (28 U.S.C. § 1610 note). Congress thus opened the doors to the federal courts for victims residing inside the United States and those residing outside.

The Second Circuit's rule undercuts this scheme. In addition to shutting out foreign plaintiffs, the appellate court's approach limits U.S. residents' ability to work collectively with foreign plaintiffs to enforce their judgments in U.S. courts. But for the TRIA and similar anti-terrorism statutes to function effectively, U.S. and foreign plaintiffs must be able to seek relief collectively in U.S. courts. Collective action in cases like this—where there are 323 plaintiffs—reduces costs, allows efficiencies through economies of scale, and maximizes the chance of recovery. The Second Circuit's rule dashes these efficiencies by forcing U.S. residents to artificially limit the number of foreign plaintiffs in their lawsuits.

Further, pursuing collective relief in a U.S. court is often the only way terrorism victims can obtain any

relief. A foreign venue may refuse to recognize a U.S. judgment—a risk that is heightened when it comes to judgments that may implicate a state sponsor of terrorism. This risk is far from theoretical. Here, Korea may not recognize plaintiffs' underlying judgments against Iran because Korea's Supreme Court has yet to recognize an exception to sovereign immunity for acts of terrorism. *See* Pet. App. 15a-16a. At the very least, forcing plaintiffs to litigate in a (potentially hostile) foreign venue significantly burdens those plaintiffs who do not reside in that jurisdiction.

The fact that the Second Circuit's rule allows it to downplay these weighty interests only further illustrates how far the court has strayed from the other circuits. By reversing the Second Circuit's decision and re-affirming that a U.S. plaintiff's choice of a U.S. forum receives substantial deference even where non-U.S. plaintiffs are involved, this Court can not only restore uniformity to the law, but also ensure that Congress's statutory scheme for providing redress and relief to victims of terrorist attacks functions as enacted.

III. In the Alternative, This Court Should Call for the Views of the Solicitor General

If the Court is uncertain about the virtues of plenary review, it would be appropriate to call for the views of the Solicitor General. The United States has previously weighed in on related matters. For example, in *Opati v. Republic of Sudan*, No. 17-1268, this Court invited the Solicitor General to file a brief at the petition stage regarding whether punitive damages were available against state sponsors of terrorism in cases based on acts occurring before the punitive

damages provision was enacted—and the government recommended that the Court hear the case. At the merits stage, the United States filed a brief supporting the plaintiffs, explaining that the government has "a strong interest in opposing state-sponsored terrorism, and in supporting appropriate recoveries for victims," while also managing "[l]itigation against foreign states in United States courts," which "can have significant foreign affairs implications for the United States." U.S. *Opati* Br. 1. Those same interests are in play here, and it would make sense for the Court to consider seeking the government's views about whether the Second Circuit's legal rule balances them appropriately.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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