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

REPLY TO BRIEF IN OPPOSITION

STEVEN R. PERLES
Counsel of Record
EDWARD B. MACALLISTER
PERLES LAW FIRM, PC
816 Connecticut Avenue, NW, 12th Floor
Washington, DC 20006
(202) 955-9055
sperles@perleslaw.com

STEVEN W. PELAK
PELAK LAW FIRM PLLC
1717 Pennsylvania Ave. NW Suite 650
Washington, D.C. 20006

DAVID J. DICKENS
JEFFREY A. TRAVERS
THE MILLER FIRM, LLC
108 Railroad Avenue
Orange, VA 22960

JOHN EAVES, JR.
BRADY EAVES
EAVES LAW FIRM
101 N. State Street
Jackson, MS 39201

Counsel for Petitioners

326260

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. IBK Cannot Refute The Circuit Conflict 1

A. IBK mis-frames the central legal question to obscure the Circuit conflict 1

B. IBK's arguments regarding the conflicting Circuits support the grant of certiorari 4

C. IBK correctly points out that the Circuit conflict is a recurring problem 7

II. The Separation of Powers Compels a Strong Presumption in Favor of Petitioners' Choice to Enforce their U.S. Judgments in the U.S. 7

III. The Questions Presented Are Important and Recurring 11

TABLE OF CITED AUTHORITIES

Page

CASES:

Aldana v. Del Monte Fresh Produce N.A., Inc.,
578 F.3d 1283 (11th Cir. 2009) 6

Bahgat v. Arab Republic of Egypt,
631 F. App'x 69 (2d Cir. 2016) 2

Carijano v. Occidental Petroleum Corp.,
643 F.3d 1216 (9th Cir. 2011),
cert. denied, 569 U.S. 946 (2013) 5

Cisneros v. Alpine Ridge Group,
508 U.S. 10 (1993) 8

Darr v. Burford,
339 U.S. 200 (1950) 7

Degen v. United States,
517 U.S. 820 (1996) 9

FUNB v. Arab Afr. Int'l Bank,
48 F. App'x 801 (2d Cir. 2002) 3

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947) 5, 9

Hernandez v. Mesa,
140 S. Ct. 735 (2020) 9

Page

Hosaka v. United Airlines, Inc.,
305 F.3d 989 (9th Cir. 2002), *cert. denied*,
537 U.S. 1227 (2003). 9

In re Air Crash Over the S. Indian Ocean,
946 F.3d 607 (D.C. Cir. 2020) 5, 6

In re Air Crash Over the S. Indian Ocean, on March 8, 2014,
352 F. Supp. 3d 19 (D.D.C. 2018). 6

Jesner v. Arab Bank, PLC,
138 S. Ct. 1386 11

Kingstown Cap. Mgmt., L.P. v. Vitek,
2022 WL 3970920 (2d Cir. 2022) 4

Nestle USA v. Doe,
141 S. Ct. 1931 (2021). 12

Norex Petroleum Ltd. v. Access Industries, Inc.,
416 F.3d 146 (2d Cir. 2005) 4

Otto Candies, LLC v. Citigroup, Inc.,
963 F.3d 1331 (11th Cir. 2020). 5, 6

Owens v. Turkiye Halk Bankasi A.S.,
2023 WL 3184617 (2d Cir. 2023). 2

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981). .1, 2, 3, 4, 6

Page

Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 73 (2d Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004) 3

Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) 9

Rubin v. Islamic Republic of Iran, 583 U.S. 202 (2018) 8

Saudi Arabia v. Nelson, 507 U.S. 349 (1993) 12

Simon v. Republic of Hungary, 911 F.3d 1172, 1183 (D.C. Cir. 2018), *vacated and remanded on separate grounds*, 592 U.S. 207 (2021) 1, 5

Sprint Communications, Inc. v. Jacobs, 571 U.S. 69 (2013) 9

Teague v. Lane, 489 U.S. 288 (1989) 7

United States v. National City Lines, 334 U.S. 573 (1948) 10

United States v. National City Lines, Inc., 337 U.S. 78 (1949) 10

Page

Wave Studio, LLC v. Gen. Hotel Mgmt. Ltd.,
712 F. App'x 88 (2d Cir. 2018) .3

Wenzel v. Marriott Int'l, Inc.,
629 F.App'x 122 (2d Cir. 2015) 4

STATUTES AND OTHER AUTHORITIES:

28 U.S.C. § 1404(a). 10

28 U.S.C. § 1605A . . . . *passim*

31 C.F.R. § 535.201 11

31 C.F.R. § 535.203(a) 11

31 C.F.R. § 560.211(a) 11

31 C.F.R. § 560.212(a) 11

Fed. R. Civ. P. 69 12

Terrorism Risk Insurance Act of 2002 (TRIA), Public Law 107-297, as amended,
28 U.S.C. § 1610 note . . . . *passim*

REPLY BRIEF FOR PETITIONERS

The Second Circuit has departed from *Piper Aircraft Co. v. Reyno* to create a test which determines deference given to plaintiffs' choice of forum not based on residence but by analyzing multiple factors. The D.C., Ninth, and Eleventh Circuits rejected that deviation, which results in reduced weight to a U.S. resident's choice of forum. Under *Piper*, that choice should receive "strong" deference and can only be "overcome" when "the private and public interest factors clearly point towards trial in the alternative forum." 454 U.S. 235, 255 (1981).

The Second Circuit's reordering of the elements of a multi-factor test has skewed the analysis of deference, ensuring that the presence of foreign plaintiffs will result in minimal, rather than "strong" deference to the choice of a U.S. plaintiff. Application of this incorrect deference is a "legal error" that "set[s] the scales wrong from the outset" and distorts the weighing of the "private and public interests" in the *forum non conveniens* analysis. *Simon v. Republic of Hungary*, 911 F.3d 1172, 1183 (D.C. Cir. 2018), *vacated and remanded on separate grounds*, 592 U.S. 207 (2021).

I. IBK Cannot Refute The Circuit Conflict

A. IBK mis-frames the central legal question to obscure the Circuit conflict

IBK seeks to obscure the Circuit conflict by mis-framing the *forum non-conveniens* issue presented by Petitioners. Resp.17. But IBK cannot refute the D.C., Ninth, and Eleventh Circuit's explicit rejection of the

Second Circuit's analysis. The Court made clear in *Piper* that the "strong presumption in favor of the plaintiff's choice of forum" is determined first, and whether it can be "overcome" second. 454 U.S. at 255. This formulation cleanly separates the deference analysis from the weighing of the public and private factors.

IBK seeks to obscure the conflict by restating the legal question at a 50,000 foot level, arguing "Like other circuits, the Second Circuit considers multiple factors in reviewing *forum nonconveniens* dismissals", but then admits that in the Second Circuit, the deference due to a U.S. plaintiff is not "strong" but subject to a "sliding scale." Resp.17. In a mixed citizenship group of plaintiffs, the Second Circuit's sliding scale reduces the "strong" deference that the U.S. plaintiff's choice of forum would otherwise be accorded under *Piper* and in the D.C., Ninth, and Eleventh Circuits. *See* App.12a n.1.

IBK argues that the Second Circuit's sliding scale is not problematic because each decision cited by Petitioners "endorsed reduced deference based on factors beyond just plaintiff groups' residence make-up." Resp.22. That is incorrect. The Second Circuit in *Bahgat v. Arab Republic of Egypt* found "diminished deference" simply based upon the presence of foreign nationals. 631 Fed.App'x. 69, 70 (2d Cir. 2016); *see also Owens v. Turkiye Halk Bankasi A.S.*, 2023 WL 3184617, at *2 (2d Cir. 2023)(affirming district court which found that "because the vast majority of plaintiffs reside overseas rather than in the United States, plaintiffs' choice of forum was entitled to less deference"). The Second Circuit below stated: "We have repeatedly affirmed district courts' application of less deference to the plaintiffs' choice of forum in the *forum non conveniens*

analysis where the U.S. resident plaintiffs' lawsuit are outnumbered by non-resident plaintiffs." App.12a n.1. Three Second Circuit opinions were cited in support which made no reference to any factor beyond the minority U.S. resident status of each plaintiff group. *Id.*

IBK insists that there are only "slight variations" between the Second Circuit's *forum non-conveniens* analysis and the D.C., Ninth, and Eleventh Circuits but it cannot refute the Petition's recitation of those Circuit's explicit rejection of the Second Circuit analysis. Pet.14-17.

By pushing the majority of the *forum non conveniens* analysis onto the residence of plaintiffs via the sliding scale, this indeed "significantly 'skews' the ultimate outcome." Resp.19. IBK admits that the lesser deference which would normally result from a mixed citizenship plaintiff group would "bolster the defendant's case," Resp.17, even with no make-weight plaintiffs or forum shopping. As a result, the D.C., Ninth, and Eleventh Circuits have rejected that approach as contrary to *Piper*.[1]

IBK argues that the deference sliding scale is a "flexible approach [which] has led to myriad outcomes in the Second Circuit that belie petitioners' simplistic

---

1. IBK cites *Wave Studio, LLC v. Gen. Hotel Mgmt. Ltd.*, 712 F.App'x 88, 90 (2d Cir. 2018); *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 73 (2d Cir. 2003), *cert. denied*, 540 U.S. 1149 (2004); and *FUNB v. Arab Afr. Int'l Bank*, 48 F.App'x 801, 803 (2d Cir. 2002). They also incorrectly awarded lesser deference to a U.S. plaintiff's choice of forum in a mixed citizenship plaintiff group, as done by the Second Circuit below. App.12a n.1.

account," Resp.19.[2] But IBK's main case in support, *Norex Petroleum Ltd.* v. *Access Industries, Inc.*, involving one foreign plaintiff, does not bear on the question of deference due to the forum choice of a U.S. plaintiff in a mixed citizenship plaintiff group. 416 F.3d 146, 155 (2d Cir. 2005).

IBK also argues that its contrary approach to minimizing the deference owed to a U.S. plaintiff's choice of forum does not matter because some courts have denied transfer motions even though "diminished deference was owed to plaintiffs' choice of forum" and other courts have ordered "dismissals despite finding maximum deference to plaintiffs' forum choice." Resp.20-21. Occasional odd results do not lessen the Court's need to address the Circuit split identified by Petitioners and the Second Circuit's desregard of *Piper*.

B. IBK's arguments regarding the conflicting Circuits support the grant of certiorari

Instead of recognizing the strong presumption under *Piper* and applying it to mixed citizenship plaintiff groups, the Second Circuit uses the presence of foreign plaintiffs to minimize deference to the forum choice of U.S. plaintiffs. This will result in routine dismissals of FSIA § 1605A judgment enforcement actions which commonly include U.S. and non-U.S. resident plaintiffs.

---

2. IBK cites *Wenzel v. Marriott Int'l, Inc.*, 629 F.App'x 122, 124 (2d Cir. 2015) and *BFI Grp. Divino Corp. v. JSC Russian Aluminum*, 298 F.App'x 87, 91 (2d Cir. 2008), but neither case involved a mixed citizenship plaintiff group. IBK also cites *Kingstown Cap. Mgmt., L.P. v. Vitek*, 2022 WL 3970920, at *3 (2d Cir. 2022), but it is a case involving all foreign entities.

• Ninth Circuit

IBK's attempt to distinguish *Carijano v. Occidental Petroleum Corp.*, Resp.23-24, ignores its ruling: "*Piper* 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." 643 F.3d 1216, 1228 (9th Cir. 2011), *cert. denied*, 569 U.S. 946 (2013).[3]

• D.C. Circuit

Similarly, IBK attempts to dance around key holdings of *Simon*, which stated: "The starting point is that the Survivors' choice of forum controls, and 'unless the balance is *strongly* in favor of the defendant, the plaintiff›s choice of forum should *rarely* be disturbed.'" 911 F.3d at 1183 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)). *Simon* thus cleanly separated the deference analysis from the other *Piper* factors and appropriately recognized that "the addition of foreign plaintiffs does not render for naught the weighty interest of Americans seeking justice in their own courts." *Id.*

IBK also cites the D.C. Circuit decision *In re Air Crash Over the S. Indian* Ocean, 946 F.3d 607 (D.C. Cir. 2020). But this decision correctly assigned "the greatest degree of deference" to the U.S. plaintiff's choice of forum. *Id.* at 614-15. Also, *In re Air Crash* was a Multi-District

---

3. The Eleventh Circuit also found that the Ninth Circuit in *Carijano* "reject[ed]" the Second Circuit's "sliding scale." *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1341 (11th Cir. 2020).

Litigation ("MDL") matter consolidated for MDL pretrial proceedings which did not announce any rule regarding "foreign plaintiffs in a mixed plaintiff group," as IBK incorrectly contends. Resp.26.[4]

- Eleventh Circuit

IBK's discussion and comparison of *Otto Candies, LLC v. Citigroup, Inc.* omits the fact that the Petitioners here sued IBK in New York for the fraudulent conveyances it committed in New York. Pet.6-7. Furthermore, the Eleventh Circuit in *Otto Candies* found the Second Circuit's deference sliding scale unconvincing. 963 F.3d at 1344 n.4.

IBK also cites *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283, 1294 (11th Cir. 2009) for the proposition that "the Eleventh Circuit has affirmed *forum non conveniens* dismissals even in suits by solely domestic plaintiffs where the litigation has strong ties to a foreign jurisdiction." Resp.27. Whether certain courts have occasionally found a U.S. plaintiff's choice of forum insufficient even with strong deference, due to other *Piper* factors, does not bear on the question of the irreconcilable Circuit conflict. Pet.14-20.

---

4. Concerns of forum shopping motivated the district court in *In re Air Crash*, which is not a factor in this case. *See In re Air Crash Over the S. Indian Ocean, on March 8, 2014*, 352 F.Supp.3d 19, 45 (D.D.C. 2018).

C. IBK correctly points out that the Circuit conflict is a recurring problem

IBK's argument that "The Court has repeatedly declined to grant certiorari on this issue," Resp.27-29, concedes that this issue is recurring and needs the Court's guidance to sort out inconsistency and lack of uniformity among the lower courts. It is impossible to tell why the Court denied certiorari in the cases cited by IBK. Otherwise meritorious "[p]etitions may have been denied because…the issue was [] not ripe enough…*or, for one reason or another, it was desirable to wait and see.*" *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting) (emphasis added). "The variety of considerations [that] underlie denials of the writ, counsels against according denials of certiorari any precedential value." *Teague v. Lane*, 489 U.S. 288, 296 (1989)(quotation omitted).

II. The Separation of Powers Compels a Strong Presumption in Favor of Petitioners' Choice to Enforce their U.S. Judgments in the U.S.

IBK does not dispute that the Constitution's separation of powers principle limits and restricts the *forum non conveniens* doctrine. IBK does not contest that the judiciary would usurp Congress' legislative power and undercut our Constitution's separation of powers if it were allowed to reject jurisdiction and decline to exercise judicial power except in rare and carefully limited circumstances. Recognizing the Second Circuit's error in this regard, IBK instead states that "to abrogate the doctrine of *forum non conveniens*, a clear Congressional statement is required" and that Congress has made no clear statement here. Resp.37.

To the contrary, Congress in §201(a) of the Terrorism Risk Insurance Act of 2002 ("TRIA") and multiple provisions of the Foreign Sovereign Immunities Act ("FSIA") has directed the judiciary to hear the claims of §1605A judgment creditors in U.S. courts. Pet.31-32. That said, Petitioners seek not to abrogate the *forum non conveniens* doctrine; instead, Petitioners seek relief from the Second Circuit's failure to provide a strong presumption in favor of Petitioners' choice of a U.S. forum. Pet.28-31, 35-36. The Second Circuit's disregard of Congress' statutory language and purpose violates the separation of powers principle particularly where, as here, Congress has relied on its foreign policy and national security expertise and authorities. Pet. 33-34.

Through TRIA §201(a) and multiple FSIA provisions applicable to ALL §1605A judgment creditors—domestic and foreign, Congress plainly intended that strong deference be afforded the choice of a U.S. forum by §1605A judgment creditors. Pet.31-32. Congress in TRIA §201(a) specifically directed that the judiciary "in every case" involving a §1605A judgment "shall ... subject to execution or attachment ... to satisfy such judgment" the blocked assets of designated state sponsors of terrorism. Congress imposed that legislative command with the further direction that it shall control "Notwithstanding any other provision of law." TRIA §201(a). A "clearer statement is difficult to imagine."[5] Related provisions within FSIA supplement that direction and conclusion. *See Rubin v. Islamic Republic of Iran*, 583 U.S. 202, 215 (2018)(Congress established "special avenues of relief" for §1605A judgment creditors "[t]hroughout the FSIA").

5. *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) (quotation omitted).

IBK's reliance on *Hosaka v. United Airlines, Inc.* further highlights the need for this Court to clarify "more fully the tension between" the *forum non conveniens* doctrine and "the Constitution's separation of legislative and judicial power." *Hernandez v. Mesa*, 140 S.Ct. 735, 741 (2020). *Hosaka* "presume[d] that federal statutes' venue provisions do not preempt forum non conveniens unless Congress' contrary intent is manifestly clear." 305 F.3d at 994 n.4. The Second Circuit here extended that approach by disagreeing "with any suggestion that the nature of this lawsuit requires a departure from our legal framework for a *forum non conveniens* analysis." App.20a.

By ignoring Congress' directions and purpose and assigning minimal deference to Petitioners' choice of a forum, the Second Circuit disregarded the Constitution's separation of legislative and judicial powers and this Court's caution that "a federal court's obligation to hear and decide a case is virtually unflagging." *Sprint Communications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quotation omitted). To the extent that *forum non conveniens* arises from the judiciary's inherent powers, the *forum non conveniens* doctrine "must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority." *Degen v. United States*, 517 U.S. 820, 823 (1996). That is especially so for the judiciary: "Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980).

One year following its rulings in *Gulf Oil Corporation* and *Koster*, this Court emphasized the importance of such restraint and discretion. The Court stated that the *forum*

non conveniens "doctrine is not a principle of universal applicability" and that "[a]t least one invariable, limiting principle" exists; that is, "whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect." *United States v. National City Lines*, 334 U.S. 573, 596-597 (1948) ("NCL I").[6]

The Court explained that a lower court may not determine whether Congress had invested the plaintiff with a right of choice based on "the court's view that applicability of the doctrine would serve the ends of justice in the particular case." *Id.* at 597. Rather, the Court found that legislative language and purpose determined whether Congress had chosen "to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection." *Id.*

This case provides an excellent vehicle for the Court to clarify the caution necessary to minimize the risk that the lower courts may arrogate legislative power when employing the *forum non conveniens* doctrine to decline jurisdiction and dismiss an action, particularly so as here where the Petitioners' choice of a U.S. forum is to enforce final U.S. judgments.

---

6. Subsequent legislation establishing the domestic venue transfer provision (28 U.S.C. §1404(a)) superseded the particular result in *NCL I*. *United States v. National City Lines, Inc.*, 337 U.S. 78 (1949). In transnational matters, the Court's description in *NCL I* of the proper limit and restraint upon the *forum non conveniens* doctrine remains valid.

III. The Questions Presented Are Important and Recurring

IBK does not dispute the importance of the questions presented or contest that the Second Circuit's ruling will prohibit U.S. victims of terrorism from relying upon TRIA §201. IBK does not dispute that Congress repeatedly has enacted statutory provisions to establish special means of judgment enforcement for these U.S. and non-U.S. judgment creditors. Pet.28-32.

Furthermore, IBK does not dispute that TRIA §201(a) carries "special power and force" because it was made in a matter of foreign policy "by the branches most immediately responsive to, and accountable to, the electorate." *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1407 (Kennedy, J., opinion). Instead, IBK states that the Petitioners' TRIA claim is "manifestly meritless" because the disputed assets currently are not blocked in the United States. Resp.38. That merits argument is incorrect. The Iranian assets became "blocked" in the United States, by operation of law, when IBK brought them to the United States, 31 C.F.R. §§535.201, 560.211(a), and any further transactions in the assets were "null and void," *id.* §§535.203(a), 560.212(a). Petitioners seek to compel IBK to turn over Iranian assets that but for IBK and Iran's fraudulent scheme and concealment would have been held and would be subject to execution under TRIA in New York.

Finally, without legal support, IBK suggests the "argument that TRIA Section 201(a) somehow abrogated normal *forum non conveniens* principles" is inapplicable to Petitioners' state law claims for fraudulent conveyances in New York. Resp.37. IBK's fraudulent conveyances in New York injured the Petitioners in the United States and

violated New York law. Accordingly, Petitioners' choice of a New York forum warrants the same strong deference owed their TRIA claim and reliance on New York procedural law pursuant to Fed.R.Civ.P. 69 to satisfy their judgments.[7]

IBK's premature and new arguments ignore the adverse effect of the erroneous decision below and the Circuit conflict. That effect prevents the Petitioners here as well as in *Owens v. Halkbank* (S.Ct. No. 23-197) from having the merits of their judgment enforcement actions adjudicated by a U.S. court.

---

7. If this Court's precedent controlled in South Korea, a court there would send this action back to the U.S. where it began and belongs. *See Nestle USA v. Doe*, 141 S.Ct. 1931, 1936-1937 (2021) (claim arose in Ivory Coast where the injury occurred, even though the corporation made or approved every major operational decision in the U.S.); *Saudi Arabia v. Nelson*, 507 U.S. 349, 357-358 (1993) (the gravamen of a complaint lies where the injury occurred, not where the preceding conduct that led to the injury occurred).

*****

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN W. PELAK
PELAK LAW FIRM PLLC
1717 Pennsylvania Ave. NW
Suite 650
Washington, D.C. 20006

DAVID J. DICKENS
JEFFREY A. TRAVERS
THE MILLER FIRM, LLC
108 Railroad Avenue
Orange, VA 22960

STEVEN R. PERLES
Counsel of Record
EDWARD B. MACALLISTER
PERLES LAW FIRM, PC
816 Connecticut Avenue, NW,
12th Floor
Washington, DC 20006
(202) 955-9055
sperles@perleslaw.com

JOHN EAVES, JR.
BRADY EAVES
EAVES LAW FIRM
101 N. State Street
Jackson, MS 39201

Counsel for Petitioners