No. 20-1033

IN THE
Supreme Court of the United States

GRUPO CEMENTOS DE CHIHUAHUA S.A.B. DE C.V.,
GCC LATINOAMÉRICA, S.A. DE C.V.,
PETITIONERS,

V.

COMPAÑIA DE INVERSIONES MERCANTILES, S.A.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361 (the "Hague Service Convention" or "Convention") applies *only* where a country's domestic law requires the party seeking service to "transmit a judicial * * * document for service abroad." Hague Service Convention, art. 1. In this case, the district court permitted substituted service upon Petitioners' U.S. agent (its counsel) under Federal Rule of Civil Procedure 4(f)(3), which authorizes service pursuant to a court order by any "other means not prohibited by international agreement." Because service was accomplished through a domestic agent and did not require transmitting any document abroad, the Hague Service Convention's service provisions did not apply. A unanimous panel of the Tenth Circuit accordingly held that Respondents' method of service was not prohibited by the Hague Service Convention. That holding is consistent with this Court's precedent and the precedent of every circuit court to have considered the question. The Tenth Circuit's decision did not address the entirely separate question presented in the petition: whether *email* service violates the Hague Service Convention where a defendant is served abroad—*i.e. not* via an agent *within* the United States.

The Tenth Circuit also held that personal jurisdiction was proper where, as here, the defendant's U.S. contacts were part of the business activities that led to the action to enforce a foreign arbitral award.

The questions presented are:

1. Whether a court may order substituted service upon a U.S. agent of a foreign defendant under Federal Rule 4(f)(3).
2. Whether the Tenth Circuit's finding of specific personal jurisdiction rests on a premise that the court below would reject in light of *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021).

RULE 29.6 STATEMENT

Compañía de Inversiones Mercantiles S.A. has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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INTRODUCTION

Petitioners Grupo Cementos de Chihuahua S.A.B. de C.V. and GCC Latinoamérica, S.A. de C.V. ("GCC") admittedly cannot satisfy any of this Court's criteria for certiorari. GCC does not identify a circuit conflict, or any issue of exceptional importance warranting this Court's review. But the petition suffers from an even more fundamental defect: it conflates distinct issues to manufacture a split of authority in the district courts on a question that the Tenth Circuit simply did not address.

GCC frames its first question presented as whether "*email* service on a foreign party under Rule 4(f)(3) violates the Hague Service Convention" and points to a disagreement among district courts as to that issue. Pet. 8 (emphasis added). But even if a conflict among district courts were enough to warrant this Court's review, the question whether the Hague Service Convention permits "email service on a foreign party" abroad is not properly presented in this case. That is because the district court here ordered substituted service on GCC's *U.S. counsel in New York* and therefore did not require the transmittal of any document abroad. As this Court held in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, U.S. courts may order substituted service on a U.S. agent of a foreign defendant without running afoul of the Hague Service Convention, because the Convention "applies" only when a forum state's laws "requir[e] the transmittal of documents abroad." 486 U.S. 694, 700 (1988). The Tenth Circuit's decision is consistent with this Court's settled precedent—and with every circuit court to have addressed the issue since *Volkswagenwerk*.

Certiorari on the first question presented should accordingly be denied.

GCC also argues in the alternative that this Court should GVR the Tenth Circuit's decision in light of this Court's decision in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). But a GVR is only appropriate when an intervening decision "reveal[s] a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration[.]" *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Because *Ford Motor* flatly rejected the very arguments GCC advanced in the Tenth Circuit, there is no basis to GVR in this case.

The petition should be denied.

TREATY PROVISIONS AND RULES

In addition to the provisions and rules set forth in the petition, the relevant provisions of the Hague Service Convention include:

> The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency * * * *

Hague Service Convention, art. 5.

Relevant provisions of Rule 4 of the Federal Rules of Civil Procedure also include:

> (f) Serving an Individual in a Foreign Country. Unless federal law provides otherwise, an individual—other than a minor, an incompetent person, or a person whose waiver has been filed—

> may be served at a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents * * * or
>
> (3) by other means not prohibited by international agreement, as the court orders.

Fed. R. Civ. P. 4(f).

STATEMENT OF THE CASE

A. Legal Background

The Hague Service Convention is a multilateral treaty that was formulated in 1964 "to provide a simpler way to serve process abroad," and "facilitate proof of service abroad." *Volkswagenwerk*, 486 U.S. at 698. The Convention requires each state to establish a central authority to receive requests for service of documents from other countries. Hague Service Convention, art. 2. Once a central authority receives a request, it must serve the documents by a method consistent with the internal law of the receiving state. *Id.* at art. 5.

Article 1 of the Hague Service Convention states that the "Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad." *Id.* at art. 1. "By virtue of the Supremacy Clause, the Convention pre-empts inconsistent methods of service prescribed * * * in all

cases to which it applies." *Volkswagenwerk*, 486 U.S. at 699 (citing U.S. Const. art. VI).

But the Convention "does not apply" unless the internal law of the forum state requires the transmittal of documents abroad in order to effectuate service. *Id.* at 708. "Where service on a domestic agent is valid and complete under [U.S. law], * * * the Convention has no further implications." *Id.* at 707. That is so even if "as a practical matter, [the domestic agent is] certain to transmit the complaint [abroad] to notify [the defendant] of the litigation." *Ibid.*

Service on a foreign corporation in federal court is governed by Federal Rule of Civil Procedure 4(h), which permits a corporation to be served by one of several methods, including "in any manner prescribed by Rule 4(f) for serving an individual." Fed. R. Civ. P. 4(h)(2). Rule 4(f), in turn, provides that "an individual * * * may be served at a place not within any judicial district of the United States" by "any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by [the Hague Service Convention]," or *alternatively* by any "other means not prohibited by international agreement, as the court orders." Fed. R. Civ. P. 4(f)(1), (3).

Accordingly, a party may effect service by means "authorized" by the Hague Service Convention without a court order under Rule 4(f)(1), or by "other means not prohibited" by the Hague Service Convention if that party obtains a court order under Rule 4(f)(3).

B. Events Leading to the U.S. Enforcement Action

This case arises from GCC's refusal to honor a $36 million arbitration award issued more than six years ago. The arbitration concerned GCC's breach of a joint venture agreement governing the parties' relationship as the two principal shareholders of Bolivia's largest cement company, Sociedad Boliviana de Cemento, S.A. ("SOBOCE").

The parties' business relationship, including the formation of the joint venture and GCC's breach of the underlying agreement, has substantial ties to the United States. In March 2005, the parties selected Miami for their first meeting to discuss the terms of the agreement. Pet. App. 5a. On the basis of that Miami meeting, GCC made a formal offer to purchase a 47% interest in SOBOCE for $59 million. Pet. App. 5a, 58a.

In September 2005, CIMSA and GCC executed a shareholder agreement pursuant to which GCC would acquire a 47% interest in SOBOCE. GCC paid for the SOBOCE shares through a Wells Fargo bank account in San Francisco. Each year from 2005 to 2011, GCC directed SOBOCE to distribute dividends—approximately $21 million in total—to the same Wells Fargo account in San Francisco. Pet. App. 99a.

The shareholder agreement provided the parties a right of first refusal with respect to one another's shares. Pet. App. 2a. In late 2009, GCC informed CIMSA of its intention to sell its shares in SOBOCE upon the expiration of the five-year holding period set forth in the shareholder agreement. Pet. App. 6a. Accordingly, the parties agreed to meet again in

Miami to negotiate a deal. In early 2010, the parties returned to Miami on six different occasions, where they discussed price, sales terms, valuation and other key provisions. *Ibid.*

In May 2010, the parties signed an agreement for CIMSA to purchase the shares. However, a few days before the transaction was scheduled to close, the Government of Bolivia expropriated a division of SOBOCE's business, and as a result, the parties were unable to carry out the sale at that time. Pet. App. 6a.

The parties resumed negotiations on a new agreement, and in mid-2011, sent their principals to meet in Houston. In the weeks that followed, the parties continued to discuss the proposals presented at the Houston meeting. *Ibid.*

In July 2011, GCC notified CIMSA that a Peruvian company, CCS, had made a formal offer to purchase its shares in SOBOCE. CIMSA reiterated its willingness to purchase those shares. In response, GCC indicated that, assuming the parties could reach an agreement on all other relevant terms, it would accept payment terms proposed at the Houston meeting. *Ibid.*

By early August 2011, the parties had nearly finalized the terms of the transaction, and GCC instructed CIMSA to hire New York counsel to draft a final agreement. GCC retained Cleary Gottlieb Steen & Hamilton LLP ("Cleary"), and CIMSA retained Curtis, Mallet-Prevost, Colt & Mosle LLP. Pet. App. 6a-7a. GCC sent CIMSA a draft purchase agreement that was governed by New York law. *Id.* at 7a.

A key issue at this juncture of the negotiations was GCC's demand that CIMSA provide a guarantee to ensure its compliance with the longer payment schedule. The parties had already agreed that in the event of CIMSA's default, GCC would be entitled to sell to a third party not only its shares, but also 4% of CIMSA's interest in SOBOCE, which, at GCC's request, was to be placed in a trust held by a U.S. bank designated by GCC. However, the day before CIMSA's right of first refusal expired, GCC informed CIMSA that it wanted CIMSA to pledge at least 27% of its shares. CIMSA refused, and GCC proceeded to sell its shares to the Peruvian company, CCS, in August 2011. *See ibid.*

In November 2011, CIMSA commenced arbitration against GCC pursuant to the mandatory arbitration provision in the shareholder agreement, seeking either to annul the transfer to CCS or to obtain monetary damages. The parties selected a reputable and experienced three-member arbitral tribunal. The seat of the arbitration was La Paz, Bolivia, and Bolivian law governed the arbitral proceedings. *Ibid.*

Following briefing and a hearing, the tribunal issued a merits award in September 2013. The tribunal determined that GCC breached CIMSA's right of first refusal because, during the parties' negotiations in 2011, GCC had created a legitimate expectation that CIMSA's proposed payment schedule would be accepted. The tribunal concluded that monetary damages were the appropriate remedy. Pet. App. 60a. Following further briefing and another hearing, on April 10, 2015, the tribunal issued a damages award, quantifying CIMSA's damages at $34.1 million, plus legal fees,

administrative costs and expenses, totaling more than $36.1 million, plus post-award interest. *Ibid.*

GCC refused to pay the award.

C. CIMSA's Efforts to Serve GCC in the U.S. Enforcement Action

In September 2015, CIMSA filed a petition to confirm the damages award in the district court pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (the "New York Convention") (9 U.S.C. § 201 *et seq*).[1] Immediately upon commencing the action, CIMSA transmitted the relevant judicial papers with the proper forms to Mexico's central authority under the Hague Service Convention, requesting appropriate service upon GCC's headquarters at its widely-publicized address in Chihuahua, Mexico. *See* Pet. App. 13a.

The request for service included hundreds of pages of materials, including certified translations of the pleadings and supporting declarations in accordance with the Hague Service Convention. CIMSA incurred substantial costs to prepare and transmit these materials to Mexico's central authority. SA.56.[2]

On October 14, 2015, CIMSA received notification from the Mexican central authority rejecting the service request. SA.57. The letter accompanying the rejection stated that the service request did not

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[1] Both Bolivia and the United States are parties to the New York Convention.

[2] Citations herein to "SA." refer to the Supplemental Appendix filed in the court of appeals on August 29, 2019 (No. 19-1151, Doc. 010110392280).

include all necessary translations even though the supposedly missing translations related to a document that GCC itself had published, and to the parties' arbitration agreement, which was originally drafted in Spanish. SA.57, 66-67.

The central authority also requested separate service forms for each defendant, even though they are corporate affiliates and share the same address. *See* Pet. App. 120a. CIMSA complied, and resubmitted its request for service with the requested changes. *Ibid.* In November 2015, the Mexican central authority informed CIMSA that it had accepted the service documents and forwarded the request for service to the state court in Chihuahua. SA.57. CIMSA heard nothing from the central authority for *nearly two years*.

In June 2017, CIMSA received notification from the Mexican central authority that local authorities in Chihuahua had been unable to locate GCC's headquarters, purportedly because the address was invalid, and so service could not be completed. Pet. App. 13a. The headquarters address CIMSA used in its request for service, however, is the official address listed on GCC's website and in its annual financial reports (which are publicly available and on file with the Mexican securities regulators). SA.151-152. It was also the address GCC provided for purposes of the underlying arbitration with CIMSA. SA.58.[3]

[3] After receiving the notification from the central authority, CIMSA independently confirmed the address by sending a copy of the summons and complaint via private courier (DHL) directly to that address. DHL had no difficulties delivering the package to GCC, and provided proof of delivery. *See* Pet. App. 120a.

Notwithstanding the Mexican authorities' failure to serve the judicial papers in accordance with their treaty obligations under the Hague Service Convention, GCC acquired actual knowledge of this action. Pet. App. 121a.

In addition, CIMSA, through its New York counsel, had numerous discussions about this action with GCC's counsel at Cleary immediately after the action was commenced and in the months that followed. *See* Pet. App. 121a. Yet GCC refused to authorize Cleary to accept service, and informed CIMSA of that decision through Cleary. *Ibid.* At that point, in May 2018, CIMSA filed a motion for alternative service upon Cleary. *Id.* at 13a. CIMSA likewise filed a motion to confirm the award. In July 2018, GCC cross-moved to dismiss the petition for lack of personal jurisdiction and interposed defenses to confirmation of the award under the New York Convention. *Ibid.*

D. The District Court Authorizes Substituted Service Upon GCC's U.S. Counsel

In October 2018, the district court granted CIMSA's motion for alternative service upon GCC's U.S. counsel. Pet. App. 121a. The court concluded that CIMSA "made reasonable efforts to serve [GCC] pursuant to the Hague Convention" and demonstrated "that the court's intervention [would] avoid further unduly burdensome or futile efforts at service." *Id.* at 119a (*quoting Clancy Sys. Int'l, Inc. v. Image Sensing Sys.*, No. 16-cv-01848-CMA-KMT, 2016 U.S. Dist. LEXIS 190020, at *7-8 (D. Colo. Oct. 14, 2016) (internal quotations and citations omitted)).

In reaching that conclusion, the district court found that "[t]he failure to effectuate service [under the Hague Service Convention] was due not to any error on CIMSA's part, but was the result of the [Mexican] judicial officer's purported inability to locate [GCC] at the address provided." Pet. App. 120a. The district court further found that, in light of "the Mexican authorities' inability or unwillingness to serve [GCC] at their corporate headquarters," it was "doubtful that further attempts to effectuate service under the Hague Convention would be efficient or successful." *Ibid.* The district court also determined that GCC was "on notice of the[] proceedings and [was] in regular contact with counsel," having "submitted multiple briefs and other filings," yet GCC nevertheless "refuse[d] to waive service or authorize their counsel to accept service." *Id.* at 121a.

Accordingly, the district court stated that it would "not abide [GCC's] irksome and peevish attempts to frustrate service unnecessarily," and therefore concluded that service on GCC through its "U.S. counsel, Cleary Gottlieb and/or general counsel Sergio Saenz, by email [would] comport with due process." Pet. App. 121a. CIMSA promptly served GCC by emailing the relevant papers to Cleary in New York.

E. The District Court Asserts Personal Jurisdiction and Confirms the Arbitral Award

In December 2018, the district court denied GCC's motion to dismiss for lack of jurisdiction, concluding that it could properly exercise specific jurisdiction over GCC pursuant to Fed. R. Civ. P. 4(k)(2), which permits courts to aggregate

nationwide contacts in order to exercise jurisdiction where the defendant's contacts with any one state are insufficient. Pet. App. 117a-118a. The district court found that GCC's contacts with the United States—the 2005 Miami meeting, the 2010 Miami meetings, the 2011 Houston meeting, the use of a United States bank account, the retention of a New York attorney, and the inclusion of a New York choice-of-law provision in the 2011 purchase agreement—reflected GCC's "purposeful availment" of the privilege of conducting business in the forum. It further found that "CIMSA's claims 'arise out of' [GCC's] contacts with the United States." *Id.* at 111a. In so holding, the district court rejected GCC's argument that only activities relating to the arbitration itself, rather than the parties' underlying business relationship, could be considered in deciding whether an enforcement action arose out of contacts with the United States.

In March 2019, the district court granted CIMSA's petition to confirm the award, rejecting GCC's defenses to confirmation under the New York Convention. Pet. App. 94a-95a. GCC appealed to the Tenth Circuit. *Id.* at 2a.

F. The Tenth Circuit's Decision

In August 2020, the Tenth Circuit issued a decision affirming the district court's rulings on service, jurisdiction, and the merits of the confirmation proceedings.

With respect to service, the Tenth Circuit held that the district court had properly authorized service on GCC through service upon GCC's U.S. counsel, Cleary. It noted that the purpose of the Hague Service Convention is to "simplify,

standardize, and generally improve the process of serving documents abroad." Pet. App. 39a (quoting *Water Splash, Inc. v. Menon*, 137 S. Ct. 1504, 1507 (2017)). It also noted that "the relevant inquiry under Rule 4(f)(3) is not whether the agreement affirmatively endorses service outside the central authority* * * * It is whether the alternative service method in question is 'prohibited' by the agreement." *Id.* at 42a. It explained that "[t]he district court approved service on GCC's American counsel because the Mexican central authority did not or would not serve GCC, despite a well-known headquarters address." *Ibid.* It concluded that "'numerous courts have authorized alternative service under Rule 4(f)(3),' including '[s]ervice upon a foreign defendant's United States-based counsel,' in cases involving countries that 'have objected to the alternative forms of service permitted under Article 10 of the Hague Convention.'" *Id.* at 43a (quoting *Richmond Techs., Inc. v. Aumtech Bus. Sols.*, No. 11-CV-02460-LHK, 2011 WL 2607158, at *11-13 (N.D. Cal. July 1, 2011)).

The Tenth Circuit further rejected GCC's argument that service on United States counsel was "foreclosed by the text of Rule 4(f)," refusing to accept GCC's "cramped interpretation of Rule 4(f)." Pet. App. 44a-45a (quoting *Bazarian Int'l Fin. Assocs., LLC v. Desarrollos Aerohotelco, C.A.*, 168 F. Supp. 3d 1, 14 (D.D.C. 2016)). Instead, it concluded that service upon a foreign corporation through "retained United States counsel does not run afoul of the rule's application to individuals and corporations located in foreign countries, where service will be completed." *Id.* at 45a.

With respect to jurisdiction, the Tenth Circuit first considered the proper test for determining whether a claim "arises out of or relates to" a defendant's in-forum contacts. The Tenth Circuit acknowledged three different standards for the relatedness inquiry: "substantial connection," "but-for" causation, and proximate cause. The court noted that in contract actions, it has "consistently applied the more-restrictive proximate-cause approach," and neither party disputed the applicability of that standard. Pet. App. at 22a (quoting *Emp'rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1161 n.7 (10th Cir. 2010)).

With that framework in place, the court of appeals held that the district court "properly determined that CIMSA's injury arose out of or related to GCC's nationwide contacts," and that "[c]ontacts concerning GCC's underlying breach of contract are pertinent, and those contacts satisfy the applicable test for 'proximate cause.'" Pet. App. 4a. It further found that the district court "correctly decided that exercising personal jurisdiction over GCC comported with fair play and substantial justice because CIMSA established minimum contacts and GCC did not make a compelling case to the contrary." *Ibid.*

The Tenth Circuit then rejected GCC's attempt to restrict the requisite causal connection, concluding that "the test for proximate causation for purposes of personal jurisdiction may be, in appropriate circumstances, somewhat looser than the tort concept of proximate causation." Pet. App. 29a. Because it found that GCC's contacts had "causative features," CIMSA had satisfied that test in this case. *Id.* at 30a.

Lastly, the Tenth Circuit agreed with the district court that GCC failed to establish a defense to confirmation of the award under the New York Convention, and upheld the district court's decision confirming the award. Pet. App. 45a-55a.

To date, GCC has refused to pay or bond the U.S. judgment.

ARGUMENT

I. The Tenth Circuit's Decision on Substituted Service Is Consistent with Supreme Court and Circuit Precedent

The first question presented does not meet any of this Court's criteria for certiorari. It does not implicate any conflict among the courts of appeals and does not raise any issue of exceptional importance. GCC's request is nothing more than a misconceived effort to confuse the relevant question in hopes of obtaining review of a fact-bound determination. But the Tenth Circuit's decision on substituted service is a faithful application of this Court's precedent. No further review is warranted.

A. There Is No Division of Authority as to Substituted Service on a U.S. Agent of a Foreign Corporation

GCC frames the first question presented as whether "service by *email on the U.S. counsel* of a foreign party pursuant to Federal Rule of Civil Procedure 4(f)(3) violate[s] the Hague Service Convention." Pet. i (emphasis added). But GCC then dedicates its entire brief to addressing whether "*email service on a foreign party* under Rule 4(f)(3) violates the Hague Service Convention." Pet. 8 (emphasis added). GCC thus improperly conflates

two distinct questions—(1) whether email service directly on a defendant abroad is permitted under the Hague Service Convention; and (2) whether service (via email or otherwise) on a domestic agent implicates the Hague Service Convention in the first instance. GCC points to a division among district courts on the *first* of these questions, but it is only the second which is presented by the Tenth Circuit's decision. And *that* holding—*i.e.* that substituted service on GCC's U.S. agent is consistent with the Hague Service Convention—does not create any conflict in authority.

1. In *Volkswagenwerk*, this Court held that service on a U.S. subsidiary of a foreign defendant is permissible, notwithstanding the Hague Service Convention's service provisions. 486 U.S. at 707-08. There, the foreign defendant was a German company located in Germany, which is a party to the Hague Service Convention. The lower court authorized the plaintiff to effect substituted service on the foreign corporation by serving the complaint on its U.S.-based subsidiary, which was deemed to be the foreign corporation's involuntary agent for service of process. *Id.* at 696-97. The Court noted that, by its terms, the Convention applies only when a signatory's law requires that a "document[] [be] transmitted for service abroad." *Id.* at 701.

The Court therefore concluded that the Convention did not apply to substituted service on a domestic agent because that method of service did not require the "sending [of] documents to Germany." *Id.* at 706. The defendant protested that "as a practical matter, [the domestic subsidiary] was certain to transmit the complaint to Germany to notify [the parent] of the litigation." *Id.* at 707. But

this Court rejected that argument. "Where service on a domestic agent is valid and complete under [the law of the forum state]," the Court explained, "the Convention has no further implications." *Ibid.* Accordingly, "internal, private communications [that] take place between the agent and a foreign principal are beyond the concerns of [the Convention]. The only transmittal to which the Convention applies is *a transmittal abroad that is required as a necessary part of service*." *Ibid.* (emphasis added).

Here, the district court authorized CIMSA to serve GCC's domestic counsel, Cleary, under Rule 4(f)(3), which broadly permits service by any "other means not prohibited by international agreement, as the court orders." Fed. R. Civ. P. 4(f)(3). Because emailing the judicial papers to Cleary *in the United States* did not require CIMSA to send documents to Mexico, that method of service did not "trigger" the Hague Service Convention. *Volkswagenwerk*, 486 U.S. at 705. And because the Convention's service provisions do not apply, service by email (or any other means approved by the court) on GCC's U.S. agent (its counsel) is compatible with the Convention. In short, because "service on a domestic agent [was] valid and complete under [U.S. law,] the Convention has no further implications." *Id.* at 707.

The Tenth Circuit thus rightly rejected "GCC['s] conten[tion] that in light of Mexico's objections, the Hague Service Convention does not authorize service methods beyond the use of that country's central authority." Pet. App. 42a. As the court explained, "the relevant inquiry under Rule 4(f)(3) is not whether the agreement affirmatively endorses service outside the central authority" but "whether the alternative service method in question is

'prohibited' by the agreement." *Ibid.* Because the Hague Service Convention does not "prohibit"—or even apply to—service on domestic counsel, it is fully authorized by Rule 4(f)(3).

The Tenth Circuit cited several other courts that have permitted the same method of service. *See* Pet. App. 44a-45a; *Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1239–40 (Fed. Cir. 2010) (indicating that service may be made on foreign defendants' "domestic subsidiaries or domestic counsel") (citations omitted); *Marks Law Offices, LLC v. Mireskandari*, 704 F. App'x 171, 177 (3d Cir. 2017) (authorizing service on a foreign defendant's U.S. counsel); *see also Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries (OPEC)*, 766 F.3d 74, 83 (D.C. Cir. 2014) ("A number of courts thus have sanctioned service on United States counsel as an alternative means of service under Rule 4(f)(3) without requiring any specific authorization by the defendant for the recipient to accept service on its behalf." (collecting cases)).[4] There is no circuit court decision to the contrary.

2. Left without any conflict of authority on the actual issue decided by the Tenth Circuit, GCC attempts to shoehorn the decision below into a disagreement among district courts regarding alternative service *directly* upon a foreign defendant via email. Pet. 16-18. GCC asserts that "[a]t least a dozen courts have recognized that email service is improper because the methods of service the Hague Service Convention allows are exclusive, and email service is not among the listed methods," while "the

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[4] *See also*, *e.g.*, *Bazarian*, 168 F. Supp. at 14; *In re Cathode Ray Tube CRT Antitrust Litig.*, 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014).

majority position is that email service is permitted under Rule 4(f)(3) despite the express limitations set forth in the Hague Service Convention." Pet. 11-12.

But that issue has nothing to do with the facts of this case, which involves substituted service on a U.S. agent, not alternative email service directly on a foreign defendant abroad.

GCC is correct that district courts are divided on the question of whether *email* service directly upon a foreign defendant is permissible under the Hague Service Convention. Pet. 11-12. Specifically, some courts have indeed held that, because email service is not expressly included in the Hague Service Convention, it is prohibited as a means of serving a party abroad, while other courts have held that email service directly upon a party abroad is permissible as an alternative because it is not expressly prohibited by the Convention. *Compare, e.g.*, *Mapping Your Future, Inc. v. Mapping Your Future Servs., Ltd.*, 266 F.R.D. 305, 308 (D.S.D. 2009) (holding that the Hague Service Convention does not permit sending a copy of the summons and complaint by email directly to a defendant abroad denying plaintiff's motion for authorization to serve defendant by email), *with Sulzer Mixpac AG v. Medenstar Indus. Co.,* 312 F.R.D. 329, 331-32 (S.D.N.Y. 2015) (permitting email service directly on Chinese corporation abroad notwithstanding China's objections to alternative methods of service under the Hague Service Convention). Since the method of service the Tenth Circuit allowed—service upon GCC's U.S. counsel—did not involve email service *abroad*, that division of district court authority is not implicated here.

GCC's reliance on the fact that Cleary was served via email is thus a red herring. Nothing in this case turns on *how* U.S. counsel was served. The key issue is that the district court authorized a method of service that did not require the transmittal of documents abroad, and thus did not trigger the Hague Service Convention.[5] The use of email here was entirely incidental.

In short, the Tenth Circuit permitted substituted service on a U.S. agent consistent with this Court's precedent and the consensus of every court to have addressed this issue since *Volkswagenwerk*. GCC has failed to identify any relevant split of authority, let alone a circuit conflict warranting this Court's review.

B. The Tenth Circuit Correctly Authorized Service on GCC's U.S. Counsel

Review is also unwarranted because the Tenth Circuit's carefully reasoned decision in this case is faithful to this Court's precedent.

1. Rule 4(f)(3) authorizes service pursuant to a court order by any "other means not prohibited by international agreement." Fed. R. Civ. P. 4(f)(3). As

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[5] GCC characterizes "email service on U.S. counsel" as a "common means" of effectuating "email service" on a foreign defendant in contravention of the Hague Service Convention. Pet. 9. But that gets things backwards. Parties seek—and district courts authorize—service on U.S. counsel precisely because that method of service does not require the transmittal of documents abroad, and thus does not implicate the Hague Service Convention. Nor is there anything "problematic," *ibid*, about a party who has chosen to avail itself of U.S. counsel being served via that counsel—especially where, as here, that party has systematically sought to evade service abroad in order to defeat enforcement of an arbitral award.

the Tenth Circuit identified, the only relevant question under Rule 4(f)(3) is whether anything in the Hague Service Convention affirmatively *prohibits* service to a domestic agent of a foreign defendant.

GCC argues, in effect, that the Convention "prohibits" service here because of its pre-emptive effect. Pet. 3 (arguing that the Convention "provides the 'exclusive' method of service and 'pre-empts' other methods of service") (quoting *Volkswagenwerk*, 486 U.S. at 699, 706). But, GCC's reliance on *Volkswagenwerk* for this proposition is misplaced. In *Volkswagenwerk* this Court held that the Convention only "pre-empts inconsistent methods of service [in] cases *to which it applies*." *Volkswagenwerk*, 486 U.S. at 699 (emphasis added). It simultaneously held that the Hague Service Convention "did not apply" to service on a foreign defendant's U.S. agent. *Id.* at 698.

The *only* difference is that, here, the relevant agent is the defendant's U.S. counsel, rather than its domestic subsidiary, as it was in *Volkswagenwerk*. But, as courts faithfully applying *Volkswagenwerk* have recognized, there is no sensible distinction between a domestic subsidiary and domestic counsel for purposes of substituted service—in both instances, service is complete when the relevant agent is served domestically, and neither method of service thus *requires* the transmission of documents abroad (even if, in both cases, documents will likely be transmitted abroad "as a practical matter"). *Id.* at 699; *see also, e.g.*, *Brown v. China Integrated Energy, Inc.*, 285 F.R.D. 560, 564 (C.D. Cal. 2012) ("The mere fact that the foreign individual defendants reside in a country that is a signatory to the Convention * * *

does not compel the conclusion that the Convention applies to service on those defendants. * * * If valid service occurs in the United States * * * the Convention is not implicated regardless of the location of the party.") (citing *Volkswagenwerk*, 486 U.S. at 707); *Arista Records LLC v. Media Servs. LLC*, No. 06 Civ. 15319 (NRB), 2008 U.S. Dist. LEXIS 16485, at *8-9 n.7 (S.D.N.Y. Feb. 25, 2008) ("Neither the Hague Service Convention nor apparently any other current international agreement between the United States and the Russian Federation prohibits service on a Russian defendant through service on his counsel in the United States. * * * The Hague procedures carry no implications for valid service on a domestic agent.") (citing *Volkswagenwerk*, 486 U.S.at 707); *FMAC Loan Receivables v. Dagra*, 228 F.R.D. 531, 534 (E.D. Va. 2005) ("[T]he Hague Convention does not apply to [service on U.S. counsel in] this case since 'the only transmittal to which the Convention applies is a transmittal abroad that is required as a necessary part of service.'" (quoting *Volkswagenwerk*, 486 U.S. at 707).

2. GCC does not and cannot distinguish the Tenth Circuit's decision from *Volkswagenswerk* and its progeny. GCC argues that Rule 4 "applies only to 'serv[ice] at a place not within any judicial district of the United States,'" and that therefore, "if service is deemed to have occurred within the United States, then Rule 4(f)(3), by its express terms, does not apply." Pet. 20. It is telling that GCC's argument ultimately devolves into one about the Tenth Circuit's purported misreading of Rule 4, *not* the Hague Service Convention question that the petition presents for review. That alone underscores that the petition should be denied.

In any event, GCC is wrong as to Rule 4 as well. Rule 4 requires only that the "*individual * * * be served* at a place not within any judicial district of the United States." Fed. R. Civ. P. 4(f) (emphasis added). The rule therefore turns on *where* the "individual" being "served" is geographically present at the time that service is accomplished. As the Tenth Circuit noted, where a defendant is served via a "domestic conduit like a law firm or agent," "the foreign individual" is still geographically present "outside a United States judicial district" at the time he is served, and thus falls within "Rule 4's plain language." Pet. App. 44a. That makes perfect sense, and aligns with conclusions of numerous courts that have addressed the question. *See, e.g., Cathode Ray Tube*, 27 F. Supp. 3d at 1010 ("[C]ourt orders generally crafted under Rule 4(f)(3) require transmission of service papers to a foreign defendant via a domestic conduit like a law firm or agent—ultimately, the foreign individual is served and thereby provided notice outside a United States judicial district, in accordance with Rule 4's plain language."); *Bazarian*, 168 F. Supp. at 14 ("This Court disagrees with the defendants' cramped interpretation of Rule 4(f) and instead holds that permitting service of a foreign individual or corporation through retained United States counsel does not run afoul of the rule's application to individuals and corporations located in foreign countries, where service will be completed."). Indeed, GCC notably fails to cite *any* authority for the proposition that Rule 4(f)(3) does not permit service on a foreign defendant via U.S. counsel within the United States.

Instead, GCC protests that "if service is deemed to have occurred outside the United States," for

purposes of Rule 4(f)(3) "then the Hague Service Convention [must] apply." Pet. 20-21. But that misstates the test for the Hague Service Convention's applicability, which turns exclusively on whether a judicial document is required to be transmitted abroad in order to effect service. Once service is accomplished on a U.S. agent, the defendant is deemed served without any "require[ment]" that the document be transmitted abroad. *Volkswagenwerk*, 486 U.S. at 707. That is so, even if the defendant is geographically abroad—and thus "served" outside of the United States for purposes of Rule 4(f)(3).

GCC objects to this result as using "Rule 4(f)(3) [as] an end-run around the Hague Service Convention." Pet. 21. To the contrary, the Tenth Circuit's reading aligns the requirements of the Hague Service Convention and the Federal Rules—unlike GCC's approach, which places them in unnecessary conflict. Indeed, GCC's interpretation would collapse the carefully delineated provisions of Rule 4(f).

Under Rule 4(f)(1), a party may serve an individual "by any internationally agreed means of service that is reasonably calculated to give notice, *such as those authorized by [the Hague Service Convention]*." Fed. R. Civ. P. 4(f)(1) (emphasis added). Rule 4(f)(3) specifically provides an *alternative* means of service that can be accomplished only pursuant to a court order, by any "*other means* not prohibited by international agreement." Fed. R. Civ. P. 4(f)(3) (emphasis added). Under GCC's theory, the reference in Rule 4(f)(3) to "*other* means" would make little sense, since any method of service permitted under that provision

would need to be expressly "authorized" by the Hague Service Convention, just like service under Rule 4(f)(1). Thus, Rule 4(f)(3) would be redundant under GCC's reading.[6]

There is no reason to create such an irreconcilable conflict between the Hague Service Convention and the Federal Rules. Where documents are transmitted for purposes of the Hague Service Convention does not control whether service is made "at a place not within any judicial district of the United States" for purposes of Rule 4(f)(3). The Tenth Circuit was correct to analyze these two inquiries separately. And for all the dust that GCC tries to kick up, it identifies no error in the decision below—let alone an error that warrants this Court's review.

C. The Tenth Circuit's Decision Does Not Present an Issue of Exceptional Importance

The Tenth Circuit's decision is also of very limited precedential importance beyond the facts of the parties' dispute.

1. The Tenth Circuit addressed the issue of substituted service in a highly specific context in

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[6] GCC's interpretation also makes little sense as a practical matter. If Rule 4(f)(3) were construed to forbid substituted service on a U.S. agent of a foreign defendant located in a state party to the Hague Service Convention, then U.S. courts would be powerless to bring a foreign defendant properly within their jurisdiction when that party is (like GCC here) able to evade service abroad under the Convention. That is not and should not be the rule. *See* Fed. R. Civ. P. 1 ("[The Federal Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

which the district court authorized substituted service after GCC had effectively insulated itself from service in Mexico and then refused to accept service through its U.S. counsel. The Tenth Circuit's review thus arose from the district court's factual inquiry into whether CIMSA had acted with reasonable diligence in attempting to serve GCC under the Hague Service Convention and whether further attempts would be futile. This Court does not need to engage in any fact-bound error correction as to that issue.

To be sure, some courts have refused to authorize substituted service on a U.S. agent in cases involving the Hague Service Convention but not for any reason that is relevant here. For instance, in some of those cases, the plaintiff had not even attempted to serve the foreign party under the Hague Service Convention first.[7] Here, the district court found that CIMSA made diligent efforts to serve GCC through the Mexican central authority pursuant to the Hague Service Convention and only sought substituted

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[7] *See, e.g.*, *Habas Sinai Ve Tibbi Gazlar Istihsal A.S. v. Int'l Tech. & Knowledge Co.*, No. 19-608, 2019 U.S. Dist. LEXIS 219724, at *10 (W.D. Pa. Dec. 23, 2019) ("Likewise, as Plaintiff has not attempted service on [the foreign parties] under the Hague Service Convention, its proposed service on [defendant's CEO] by means of email is not authorized under Rule 4(f)(3)."); *Rubie's Costume Co. v. Yiwu Hua Hao Toys Co.*, No. 2:18-cv-01530-RAJ, 2019 U.S. Dist. LEXIS 204380, at *9 (W.D. Wash. Nov. 25, 2019) ("In addition, Plaintiff has failed to demonstrate that these defendants are elusive or otherwise striving to evade service of process."); *Midmark Corp. v. Janak Healthcare Private Ltd.,* No. 3:14-cv-088, 2014 U.S. Dist. LEXIS 60665, at *9 (S.D. Ohio May 1, 2014) ("Service by alternative means prior to allowing the Central Authority of India an opportunity to serve Defendants * * * is not warranted *at this juncture*." (emphasis added)).

service after those efforts proved futile. Pet. App. 120a. As far as CIMSA is aware, no court has denied substituted or alternative service under those circumstances.

2. GCC rings a false alarm in calling for this Court to intervene preemptively to stop district courts from rendering potentially voidable judgments in "the dozens of cases allowing email service under Rule 4(f)(3)." Pet. 24. None of those cases would be resolved on the question presented here, where service was authorized upon a U.S. agent, not via email on the foreign defendant directly. Nor is there merit to GCC's assertion that this "Court has been starved of opportunity" to adjudicate issues of foreign service, Pet. 24, as such issues routinely make their way to this Court through ordinary circuit splits or disagreements among the highest state courts. *See, e.g., Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1055 (2019) (granting certiorari to resolve circuit split on proper method for serving a foreign state); *Water Splash*, 137 S. Ct. at 1508 (granting certiorari to resolve circuit split on whether the Hague Service Convention permits service by mail); *Henderson v. United States*, 517 U.S. 654, 660 & n.8 (1996) (granting certiorari to resolve circuit split on the interplay between service of process provision in federal maritime law and Rule 4); *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 615-16 (1990) (settling disagreement among circuits courts and state courts of appeals on in-state service); *Volkswagenwerk*, 486 U.S. at 697-98 (granting certiorari to resolve split among state high courts on whether Hague Service Convention applies where a foreign national is served through its U.S. agent).

Ultimately, the reason why the issue in *this* case has not reached the Court before is not because it is peculiarly evasive of review, but because the answer is straightforward and the circuits are aligned. The petition should be denied.

II. The Tenth Circuit's Ruling on Personal Jurisdiction Is Consistent with *Ford Motor*

Certiorari should also be denied as to the second question presented. Far from "call[ing] into question" the Tenth Circuit's decision, Pet. 10, 25, this Court's reasoning in *Ford Motor* actually confirms that the Tenth Circuit's personal jurisdiction analysis was correct.

1. In *Ford Motor*, this Court rejected a strict "causation-only" approach to the requirement that plaintiff's injuries "arise out of or relate to" the defendant's in-forum activity, explaining that it has "never framed the specific jurisdiction inquiry as always requiring proof of causation—*i.e.*, proof that the plaintiff 's claim came about because of the defendant's in-state conduct." 141 S. Ct. at 1026. The Court explained that although the relatedness requirement "indeed serves to narrow the class of claims over which a state court may exercise specific jurisdiction," none of this Court's precedents "has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do." *Ibid.* And it expressly held that the relatedness test is satisfied even if the plaintiff's claims would be the same without the defendant's in-forum contacts. *Id.* at 1029.

GCC advanced the exact same "causation only" standard in the Tenth Circuit, arguing that the

district court lacked specific personal jurisdiction because "CIMSA's alleged injury would have occurred regardless of GCC's U.S. contacts identified by the district court." CA10 Opening Brief at 26. The Tenth Circuit rejected that argument, concluding that "the test for proximate causation for purposes of personal jurisdiction may be, in appropriate circumstances, somewhat looser than the tort concept of proximate causation." Pet. App. 29a. It therefore found that CIMSA had satisfied this test: "GCC's contacts *not only* constitute events in the causal chain leading to CIMSA's financial loss, but *also* form part of the narrative determining when and how GCC's breach occurred." *Id.* at 30a (emphasis added). The Tenth Circuit's conclusion that "some causal relationship" is sufficient for purposes of personal jurisdiction is consistent with *Ford Motor*. *Id.* at 29a. Indeed, the Tenth Circuit's test was arguably *stricter* than the Court's conclusion in *Ford Motor*, because it explicitly required a causal connection. The Tenth Circuit emphasized that its decision "should not be understood as unduly diluting the proximate causation standard or adopting a 'substantial connection' test." *Id.* at 30a. By contrast, *Ford Motor* arguably does not require any causal analysis. *Ford Motor* thus provides no basis for reconsideration of the Tenth Circuit's decision.

2. GCC further argues that "if this Court holds in *Ford Motor*—as it did in *Bristol Myers Squibb*—that there must be a connection between the forum contacts and the claim itself, then it would call into question the Tenth Circuit's contrary conclusion, thereby commending remand." Pet. 27. Again, GCC mischaracterizes the decision below. The Tenth Circuit expressly acknowledged that there must be

"a connection between the forum and the specific claims at issue." Pet. App. 24a (quoting *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017)). Applying that test, the Tenth Circuit held that there *was* such a "connection" here because confirmation of an arbitral award turns on "whether the beneficiary of an award can show he or she sustained an injury caused by the defendant's forum activities in connection with the claim that led to the arbitration." Pet. App. 27a.[8]

That is precisely why the Tenth Circuit rejected GCC's argument based on its cramped reading of *Bristol-Myers Squibb*. Pet. App. 24a (noting that *Bristol-Myers Squibb* "merely applied the principle that there must be 'a connection between the forum and the specific claims at issue,'" which was the same principle the court was applying here); *see also Ford Motor*, 141 S. Ct. at 1031 (quoting same language from *Bristol-Myers Squibb*). Nothing in *Ford Motor* remotely conflicts with the decision below. And having squarely rejected GCC's identical argument with respect to *Bristol-Myers Squibb*, there is no reason to think the Tenth Circuit would re-consider its view in light of *Ford Motor*—which simply re-affirms the Tenth Circuit's correct reading of that case.

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[8] Indeed, GCC's contrary argument—that because the claim at issue is enforcement of an arbitral award a court cannot look to the underlying wrong that gave rise to that award—defies common sense. It would mean that a U.S. court would *never* have jurisdiction to enforce an arbitral award rendered outside the United States. That would be a sea-change in the law, and is in no way commanded (or even suggested) by *Ford Motor*, *Bristol-Myers Squibb* or any other decision of this Court.

3. Finally, the very different factual context presented in *Ford Motor* makes it all the more unlikely that it would alter the Tenth Circuit's reasoning. *Ford Motor* dealt with a products liability dispute between a consumer and an out-of-state automobile manufacturer whose cars were widely marketed and distributed in the forum through a nationwide stream of commerce. *See Ford Motor*, 141 S. Ct. at 1022-24. The factual analysis in that context—a domestic tort action involving a non-contractual relationship between consumer and manufacturer—has little relevance to the factual inquiry in an action to enforce an international arbitration award arising out of an agreement to arbitrate under the New York Convention, and an underlying breach of contract dispute between foreign parties engaged in international commerce involving the United States, U.S. persons, and U.S. assets.

Perhaps recognizing that *Ford Motor* is far afield from this case, GCC argues that because personal jurisdiction was purportedly a "close question" here, "there is a substantial likelihood that *any* change or clarification of the causation test will affect the Tenth Circuit's decision on personal jurisdiction." Pet. 26 (emphasis added). That rationale would presumably require this Court to GVR in light of *Ford Motor* in all "close" cases involving specific personal jurisdiction. As this Court has explained, however, that is not the rule: a petitioner cannot just point to a change in the applicable law, but must show a "reasonable probability that the decision below rests upon a *premise that the lower court would reject*" on remand. *Lawrence*, 516 U.S. at 167 (emphasis added). GCC cannot articulate such a "premise." As noted above, *Ford Motor* expressly

rejected GCC's primary argument on appeal—and applied a standard that is arguably *more* relaxed than the "proximate cause" test the Tenth Circuit adopted. GCC provides no reason why the Tenth Circuit would disturb that holding on remand.

In short, *Ford Motor* not only fails to warrant reconsideration of the Tenth Circuit's decision, it actually confirms the decision's validity. GCC's speculative request for a GVR is plainly meritless and should be denied.

CONCLUSION

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

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