Nos. 24-2179 (L), 24-3463

United States Court of Appeals for the Ninth Circuit

CARLOS DADA, ET AL.,

Plaintiffs-Appellants,

v.

NSO GROUP TECHNOLOGIES LIMITED, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 3:22-cv-07513-JD

BRIEF OF *AMICUS CURIAE*
PROFESSOR CASSANDRA BURKE ROBERTSON
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Cassandra Burke Robertson is the John Deaver Drinko - BakerHostetler Professor of Law at the Case Western Reserve University School of Law.[1] An expert on Civil Procedure, Professor Robertson has extensively researched, taught, and been invited to speak on personal jurisdiction, *forum non conveniens*, and other forum-access doctrines. Her work has been published in prominent journals such as the Columbia Law Review, the UC Davis Law Review, the Emory Law Journal, and the Boston University Law Review. *Amicus curiae* Professor Robertson's interest in this appeal is to encourage the harmonization of *forum non conveniens* doctrine in the federal courts. This issue is of special importance here, where the district court incorrectly applied the doctrine.

SUMMARY OF ARGUMENT

Amicus makes three submissions: *First*, the Circuit should clarify the standard for analyzing *forum non conveniens* ("FNC") motions in the lower courts so that its precedent aligns with those of the Supreme Court and other circuit courts of appeal. Existing Ninth Circuit precedent reveals that there is not a conclusively established,

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E)(i), no party or party's counsel authored this brief in whole or in part. No party or party's counsel and no other person listed in Federal Rule of Appellate Procedure 29(a)(4)(E) contributed money for preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a)(2), all parties to this appeal have been requested to consent to the filing of this brief, and counsel for Plaintiffs-Appellants and Defendants-Appellees consent.

clear test for *forum non conveniens* dismissals. This case presents a good vehicle for addressing this problem, which will help harmonize FNC doctrine.

Second, the decision below should be reversed and remanded because the district court violated the "party presentation principle," under which courts must not decide cases based on arguments that were never raised by the parties. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). In this case, Defendants *never* argued that Plaintiffs' choice of forum is entitled to anything less than maximum deference (a consideration for the first FNC factor). The issue was thus never briefed by the parties, yet the district court placed near-dispositive weight on it. For that reason alone the decision should be reversed.

Third, even if it were proper for the district court to *sua sponte* consider an FNC argument that was never raised by the moving party (and it is not), the decision below should be reversed for applying the wrong legal standard to analyze what level of deference is owed to Plaintiffs in this "mixed-plaintiff" case – *i.e.*, a case in which there are both foreign and domestic plaintiffs. The district court erroneously held that Plaintiffs are not suing in their "home forum" (ER-006), despite the fact that Plaintiffs included among their number both U.S. citizens and U.S. residents. This was legal error, requiring reversal. *E.g.*, *Salebuild, Inc. v. Flexisales, Inc.*, 633 F. App'x 641, 642 (9th Cir. 2015) (reversing FNC dismissal); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227–29 (9th Cir. 2011) (same).

ARGUMENT

I. THE COURT SHOULD CLARIFY THE NINTH CIRCUIT'S FNC TEST

A. Background Principles

"The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when its jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). *Forum non conveniens* doctrine ("FNC") recognizes that, "[i]n rare circumstances, federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996). Originally applied to domestic disputes, the Supreme Court in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), first applied the doctrine to a transnational dispute endorsing dismissal in favor of a foreign forum. *See also Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

Following the Supreme Court's decisions in *Gilbert* and *Piper*, lower courts may dismiss civil actions in their discretion based on three principal factors: (1) the deference owed to a plaintiff's choice of forum; (2) the existence of an "adequate alternative forum"; and (3) the balance of the public and private interest factors, articulated in *Gilbert*. *See Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076–77 (9th Cir. 2015); *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 70–75 (2d Cir. 2001) (en banc); *see generally* 14D Wright & Miller, Fed. Prac. & Proc. Juris. § 3828 (4th ed.).

B. The Ninth Circuit Inconsistently Applies Various FNC Tests, Some Of Which Conflict With *Piper* And Other Circuits

Piper, the last Supreme Court case to directly address the substantive elements of FNC, makes clear that each of the three elements of an FNC analysis is distinct and must be assessed separately. *See* 454 U.S. at 254 n.22 (adequate alternative forum); *id.* at 256 (deference owed plaintiff's choice of forum); *id.* at 257 (balance of public and private interest factors); *see also* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. 390, 405-406 (2017) [hereinafter *Retiring FNC*] (describing the first two factors as "threshold inquiries"). The Ninth Circuit's FNC precedent inconsistently analyzes the level of deference owed to the plaintiff's choice of forum, sometimes failing to separately address this threshold inquiry. *See, e.g., Boston Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201, 1206–07 (9th Cir. 2009) (weighing deference to plaintiff's choice of forum as a private interest factor). The Court should clarify its analysis for FNC, and align its test with *Piper* and other circuits.

1. A Plaintiff's Choice Of Forum Is A Distinct Step In The FNC Analysis.

Gilbert and *Piper* establish that the plaintiff's choice of forum must be distinctly assessed by courts at the outset of an FNC analysis. *Gilbert*, 330 U.S. at 508; *Piper*, 454 U.S. at 255–56. Indeed, consideration of any FNC motion must start from the premise that "the plaintiff's choice of forum should rarely be disturbed"

unless the balance of interests "is strongly in favor of the defendant." *Gilbert*, 330 U.S. at 508. *Piper* further articulates that a foreign plaintiff's choice of forum receives less deference than that of a domestic plaintiff where their choice reflects forum shopping, rather than personal convenience. *Piper*, 454 U.S. at 255–56; Gardner, *Retiring FNC* at 405. As such, the level of deference received by a plaintiff is treated as a "threshold inquiry" and must be assessed as a distinct factor by the court because this inquiry determines how strongly the movant must demonstrate that the balance of private and public interest factors outweigh the plaintiff's choice.[2] Gardner, *Retiring FNC* at 405–06; *see, e.g.*, *Piper*, 454 U.S. at 255–56.

Most circuits since *Piper* have developed FNC tests that distinctly analyze the three elements of the doctrine: (1) deference to a plaintiff's choice of forum; (2) adequacy of an alternative forum; and (3) the *Gilbert* public and private interest factors. In doing so, the tests in these circuits ensure that the deference due to a plaintiff's choice of forum is a distinct analytical step. *E.g.*, *Simon v. Republic of Hungary*, 911 F.3d 1172, 1184 (D.C. Cir. 2018), *vacated on other grounds and remanded*, 592 U.S. 207 (2021); *Associação Brasileira de Medicina de Grupo v. Stryker Corp.*, 891 F.3d 615, 618–19 (6th Cir. 2018); *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 873 (3d Cir. 2013); *Iragorri*, 274 F.3d at 73.

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[2] FNC movants must also show that an adequate alternative forum is available. *Piper*, 454 U.S. at 254.

2. The Court Should Align The Ninth Circuit's Analysis With That Of Other Circuits In Order To Conform With Supreme Court Precedent.

In contrast to the circuit courts and cases noted just above, the Ninth Circuit has not conclusively established a clear test for FNC dismissals that aligns with the rationales of *Gilbert* and *Piper*. On some occasions, the Ninth Circuit has distinctly analyzed the deference due to a plaintiff's choice of forum. *See Ranza*, 793 F.3d at 1076–77, 1079; *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 693–95 (9th Cir. 2009). But in other cases, the Ninth Circuit has (incorrectly) treated the deference owed to a plaintiff's choice of forum as a private interest factor, or has completely failed to conduct an analysis of the deference owed. *See, e.g., Boston Telecomms. Grp.*, 588 F.3d at 1206–07; *Tuazon v. R.J. Reynolds Tobacco Co*., 433 F.3d 1163, 1177–78 (9th Cir. 2006).

Failing to distinctly assess the level of deference owed to the plaintiff's choice of forum makes the test difficult for lower courts to apply in a coherent fashion – as the decision below demonstrates. Because the Ninth Circuit's current and unclear approach strays from Supreme Court precedent, and because clarifying the Circuit's test to establish that deference owed to a plaintiff's choice of forum is a separate element will properly focus analysis of the FNC private and public interest factors, the Court should use this case as a vehicle to clarify the analysis for FNC. In doing so, the Circuit should adopt the three-element test utilized by other circuits.

II. THE DISTRICT COURT'S ANALYSIS OF PLAINTIFFS' CHOICE OF FORUM VIOLATES THE PARTY PRESENTATION PRINCIPLE

Before the district court, Defendants never made any arguments regarding the deference owed to Plaintiffs' choice of forum; they only argued that dismissal was warranted because "Israel is an adequate alternative forum and the private and public factors favor dismissal." No. 3:22-cv-07513-JD (N.D. Cal.), ECF 46 at 7; *see also* ECF 54 at 6-7. Nevertheless, the district court, without the benefit of any briefing on the issue, reached out and held that "[a]lthough a defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing plaintiff's chosen forum, this presumption applies with less force when, as here, plaintiffs' choice is not its home forum." *Dada v. NSO Grp. Techs. Ltd.*, 2024 WL 1024736, at *2 (N.D. Cal. Mar. 8, 2024) (internal quotation marks omitted).

To reach out, assess this factor, and then decide it against the non-moving party – without any briefing from Defendants on the point – was legal error in violation of the party presentation principle, which "[i]n our adversarial system of adjudication . . . [requires] rel[iance] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter on the matters the parties present." *Sineneng-Smith*, 590 U.S. at 375; *id.* at 375–76 ("[O]ur system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." (internal quotation marks and alterations omitted)).

Instead of deeming the point forfeited by Defendants and assuming that Plaintiffs were entitled to the deference ordinarily due their choice of forum, the district court conducted its own review of the operative complaint, stating that "most plaintiffs were located in El Salvador, and one in Washington D.C." *Dada*, 2024 WL 1024736, at *3 (citing Amended Complaint ("Am. Compl.") ¶¶ 14-31 (ER-019–022)). A more careful review of the cited paragraphs demonstrates that among the plaintiffs are a dual citizen of the United States and France, a resident of Mexico City, and a resident of New York, in addition to a resident of Washington, D.C. *See* Am. Compl. ¶¶ 18, 22, 28, 31 (ER-020–021). As described in Section III, *infra*, the district court's failure to properly acknowledge these plaintiffs was legal error as applied to the level of deference due Plaintiffs' choice of forum.

But even assuming *arguendo* the validity of the district court's deference analysis, it was wrong for the district court to reach the issue *sua sponte*. Plaintiffs were not obligated to respond to an argument never raised in Defendants' papers; as the parties with the "heavy burden" to demonstrate that dismissal for FNC was warranted, it was incumbent upon Defendants to demonstrate why, if at all, the presumption in favor of a plaintiff's choice of forum applied with less force.[3]

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[3] The district court similarly strayed from the party presentation principle when balancing the FNC public and private interest factors, since it "address[ed] the factors the parties discussed, *along with others that might be relevant*." *Dada*, 2024 WL 1024736, at *3 (emphasis added).

Although the district court arguably had the discretion to decide the motion on FNC grounds under *Sinochem* (a case involving FNC and subject-matter jurisdiction), it bears noting that Defendants also moved to dismiss for lack of personal jurisdiction on several bases, as well as for failure to state a claim, such that the parties ultimately devoted very little of their briefing to FNC. The district court even seemed to suggest that the issue was not sufficiently briefed. *See Dada*, 2024 WL 1024736, at *4 ("That is basically all the parties say about *forum non conveniens*.").[4]

The stark contrast between the decisions in the instant case and a related case, *Apple Inc. v. NSO Group Technologies Ltd.*, 2024 WL 251448 (N.D. Cal. Jan. 23, 2024), in which the same district judge declined to dismiss the case on FNC grounds, underscores the importance of adherence to the party presentation principle. In contrast to the instant case, where neither party addressed the deference owed a plaintiff's choice of forum and the district court addressed it *sua sponte*, the court in *Apple* noted that with respect to the public and private interest factors, "[t]he parties

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[4] The district judge's individual practices limit the parties to a mere 15 pages for opening and opposition briefs, despite the district's local rules permitting 25 pages, and Defendants moved for dismissal on numerous grounds. *Compare* Standing Order for Civil Cases Before Judge James Donato with N.D. Cal. Civ. L.R. 7-2(b); *but see* N.D. Cal. Civ. L.R. 1-5(o) ("Nothing in these local rules precludes a Judge from issuing Standing Orders to govern *matters not covered by these local rules*[.]" (emphasis added)). Such a tight restriction by a district judge – in contravention of the district's own local rules – may be inadequate to allow for proper "fram[ing] [of] the issues for decision." *Sineneng-Smith*, 590 U.S. at 375.

did not address each and every factor because some of them are not applicable, and the Court will follow suit." 2024 WL 251448, at *2. Not only that, "[t]he [c]ourt departed from its usual practice to allow NSO to file a supplemental brief for the motion to dismiss, which NSO used as an opportunity to make arguments that could and should have been made in its opening brief, and that involve purported facts that were available in many instances before that brief was filed." *Id.* at *3.

Despite receiving such fulsome briefing from NSO, the district court declined to dismiss on FNC grounds, holding that "[f]or the factors that the parties debate, NSO has not demonstrated that the circumstances of this lawsuit overcome the 'great deference' due to a plaintiff who has sued in its home forum, as Apple has done here." *Id.* at *2. The dispositive weight evidently afforded the plaintiff's choice of forum in *Apple*, as compared to the instant case, is demonstrated by the seemingly irreconcilable manner in which the district court weighed the public and private interest factors in each case. *Compare Apple*, 2024 WL 251448, at *2 (stating that "NSO's ostensible burdens with respect to witnesses and evidence in this District are neatly balanced by equivalent burdens Apple would face if this case were litigated in Israel"); *id.* ("The Court has handled a number of cases, including multi-district litigation matters, that involved witnesses and evidence located far outside of the United States, sometimes exclusively so, without undue difficulties or unfair burdens on a party."), *with Dada*, 2024 WL 1024736, at *4 (noting that "[l]itigating

the case in this District would likely impose significantly heavier burdens on NSO than plaintiffs" because "Israel is more than twice as far away from San Francisco . . . as El Salvador" and that this would "disproportionately burden NSO for trial and other court proceedings . . . particularly so because NSO will be the source of substantially more evidence and witnesses than plaintiffs"); *id.* ("Burdening a jury in this District with all of this makes little sense. . . . [A] local jury would understandably struggle with being asked to sit for a long trial that involves purely foreign plaintiffs and defendants, and events in foreign lands.").

In short, the district court in this case appears to have placed near-dispositive weight on its conclusion – without briefing by the parties – that Plaintiffs' choice of forum was not entitled to deference. But FNC is "'an exceptional tool to be employed sparingly,' and not a 'doctrine that compels plaintiffs to choose the optimal forum for their claim.'" *Carijano*, 643 F.3d at 1224 (quoting *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002)). Thus, if a defendant fails to join issue on a particular element of the FNC analysis, a district court cannot supply what it thinks a defendant's argument could or should have been. It was therefore legal error for the district court to place its thumb so firmly on the scale in favor of the non-moving party based on its *sua sponte* review of the record. Reversal is therefore required as a matter of law.

III. REMAND IS ALSO REQUIRED BECAUSE THE DISTRICT COURT INCORRECTLY ANALYZED THE LEVEL OF DEFERENCE OWED IN THIS "MIXED-PLAINTIFF" CASE

Irrespective of Defendants' failure to adequately address deference in their briefing, the district court erred in its *sua sponte* analysis of the issue. The Supreme Court was unequivocal in *Piper*: "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." 454 U.S. at 255 (citing *Koster v. (Am.) Lumbermens Mut. Cas. Co*., 330 U.S. 518, 522–23 (1947)). When a plaintiff brings suit in their home forum, "it is reasonable to assume that this choice is convenient." *Piper*, 454 U.S. at 255–56.

In the instant case, three of the plaintiffs are at home in the United States, *see* Am. Compl. ¶¶ 18, 28, 31 (ER-020–022), and their choice of forum requires a high level of deference. *Piper*, 454 U.S. at 255. Plaintiff Nelson Rauda Zablah lived in the United States when this case was initiated and the amended complaint was filed; Plaintiff José Luiz Sanz resides in the United States; and Plaintiff Roman Gressier is a U.S. citizen (the "U.S. Plaintiffs").[5] The district court did not acknowledge the United States citizenship of Mr. Gressier or the residence of Mr. Zablah. *Dada*, 2024

[5] Although less deference may be afforded to a United States citizen's choice of forum if he has moved abroad permanently, *see Iragorri,* 274 F.3d at 73 n.5, the district court failed to even consider this issue with respect to Mr. Gressier because its analysis pertained only to foreign plaintiffs. Moreover, nothing in the record suggests that Mr. Gressier permanently resides abroad.

WL 1024736, at *3 (citing Am. Compl. ¶¶ 14-31 (ER-019–022)). Consequently, the court failed to consider the deference due the U.S. plaintiffs in its FNC analysis. Instead, the court reasoned, in no uncertain terms, that "'[a]lthough a defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing plaintiff's chosen forum,' this presumption 'applies with less force' when, *as here*, plaintiffs' 'choice is not its home forum.'" *Dada*, 2024 WL 1024736, at *2 (citing *Piper*, 454 U.S. at 255–56) (emphasis added). This was legal error, and the Court should reverse and remand this case as a result.

Even if Messrs. Zablah and Sanz are foreign nationals resident in the United States,[6] a resident alien's choice of a United States forum is entitled to the same deference as a United States citizen also residing locally. *Piper*, 454 U.S. at 255. Indeed, this Circuit has interpreted the definition of "home forum" to include a forum where a plaintiff is a resident. *See Gemini Cap. Grp., Inc. v. Yap Fishing Corp*., 150 F.3d 1088, 1091 (9th Cir. 1998) (citing *Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd.,* 918 F.2d 1446, 1449 (9th Cir. 1990)); *see also Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101–02 (2d Cir. 2000) ("[T]he choice of a forum by its citizens *and residents* is entitled to greater deference than a stranger's choice." (emphasis added)).

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[6] The citizenship of Messrs. Zablah and Sanz is not apparent from the record.

Applying the correct deference analysis, the existence of foreign plaintiffs in this case cannot undermine the "considerable deference" to which the U.S. plaintiffs' choice of forum is entitled. *Carijano*, 643 F.3d at 1228. That is the law of this Circuit and others. *Id.*; *see also Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1343–44 (11th Cir. 2020) ("There . . . does not appear to be any practical or doctrinal basis to reduce deference to domestic plaintiffs who sue alongside foreign plaintiffs[.]"); *Simon*, 911 F.3d at 1183 (holding that "[t]he district court committed legal error at the first step by affording the Survivors' choice of forum only 'minimal deference,'" largely because "the addition of foreign plaintiffs does not render for naught the weighty interest of Americans seeking justice in their own courts.").

This Court's decision in *Carijano* is instructive. In that case, which Plaintiffs cited in their briefing below but the district court did not address, this Court acknowledged that "*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 at 1228. In *Carijano*, an American nonprofit organization called Amazon Watch was the sole domestic plaintiff alongside 25 foreign plaintiffs, had become involved in the subject of the litigation six years before the case was filed, and asserted "actual injury resulting from defendants' alleged conduct." *Id.* at 1228–29. The Court reiterated the Supreme Court's "clear instruction" in *Piper*, holding that Amazon Watch "was

entitled to a strong presumption that its choice of forum was convenient." *Id.* at 1229. Similarly, in the instant case, U.S. plaintiffs have been involved in the case since its inception and allege actual injuries resulting from Defendants' alleged conduct. *See* Am. Compl. ¶¶ 80-83, 120-23; 132-35 (ER-035, 043–044, 046–047). The district court was required to assess these factors in considering the level of deference to afford U.S. plaintiffs.

Courts may find that less deference should be afforded where a truly minimal link exists between a U.S. plaintiff and the forum. For example, a choice of a United States forum by a non-resident citizen who has moved abroad permanently may be given less deference because "it would be less reasonable to assume the choice of forum is based on convenience." *Iragorri*, 274 F.3d at 73 n.5. Similarly, "nominal" domestic plaintiffs "suing as subrogees, assignees, or representatives of foreign companies" are afforded less deference because they are not suing in their own right. *Pain v. United Techs. Corp*., 637 F.2d 775, 798 (D.C. Cir. 1980). And "a [domestic] party's intent in joining a lawsuit is relevant to the balancing of the *forum non conveniens* factors" to the extent that it betrays "an effort to take unfair advantage of an inappropriate forum." *Carijano*, 643 F.3d at 1228. However, each of these exceptions requires district courts to conduct a balancing exercise – *see, e.g.*, *id.* (balancing tactical motivations with Amazon Watch's longstanding involvement in the case) – that the court below failed to perform.

Accordingly, the district court erred as a matter of law in failing to appropriately analyze the deference owed to Plaintiffs' choice of forum where certain Plaintiffs are U.S. citizens or residents.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed and remanded.

Dated: July 22, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 3,938 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

The foregoing brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 365.

Dated: July 22, 2024

/s/ Kevin D. Benish
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