No. 03-

IN THE

Supreme Court of the United States

SPRINGWELL NAVIGATION CORPORATION,

Petitioner,

v.

THE CHASE MANHATTAN BANK,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Gulf Oil Corp. v. *Gilbert,* 330 U.S. 501, 508-09 (1947), sets forth public and private interests to be balanced on a motion to dismiss for *forum non conveniens*. The private interests are "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises * * *; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public interests are "[a]dministrative difficulties" relating to court congestion; the burden of jury duty for "a community which has no relation to the litigation"; the interest, in "cases which touch the affairs of many persons," of "holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only"; "a local interest in having localized controversies decided at home"; and an interest in hearing a case "in a forum that is at home with the state law that must govern," rather than having a court "untangle problems in conflict of laws, and in law foreign to itself." Plaintiffs receive substantial deference and "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The questions presented by this petition are:

1. Whether a foreign beneficiary of a treaty guaranteeing "freedom of access to the courts" is entitled to substantial deference when choosing defendant's home forum instead of a forum that is home to neither party?

2. Whether *Gilbert*'s "compulsory process" factor is inapplicable absent some showing that witnesses would be "unwilling" to appear voluntarily or that the jury would otherwise be unable to assess witness demeanor?

3. Whether *Gilbert*'s foreign-law factor is inapplicable or insubstantial when *both* fora will conduct choice-of-law analysis and apply *mixed* law of shared heritage?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs/Appellants in the courts below were the current petitioner, Springwell Navigation Corporation, and the petitioner in No. 03-412, Pollux Holding Ltd.

Petitioner Springwell Navigation Corporation does not have any parent corporations and no public corporation owns 10% or more of its stock.

Defendant/Appellee in the courts below was respondent The Chase Manhattan Bank.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The district court's opinion and order dismissing the case on *forum non conveniens* grounds is unreported and is reproduced herein as Appendix B (pages B1-B18). The Second Circuit's opinion affirming the district court's dismissal is published at 329 F.3d 64, and is reproduced herein as Appendix A (pages A1-A18). The Second Circuit's order denying petitioner rehearing and rehearing *en banc* is unpublished, and is reproduced herein as Appendix C (pages C1-C2).

JURISDICTION

The Second Circuit issued its opinion on May 1, 2003, and denied petitioner's requests for rehearing and rehearing *en banc* on August 4, 2003. On October 21, 2003, Justice Ginsburg granted an extension of time to file this petition to and including December 3, 2003. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Treaty of Friendship, Commerce and Navigation, August 8, 1938, between the United States of America and Liberia, 54 Stat. 1739, Article I of which provides, in relevant part, that the nationals of each party

> shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of rights, and in all degrees of jurisdiction established by law.

STATEMENT OF THE CASE[1]

1. This case involves the dismissal, on *forum non conveniens* grounds, of a suit brought in the Southern District of New York by a Greek-owned Liberian corporation against the Chase Manhattan Bank, a New York banking corporation with its world headquarters and principal place of business in New York City. The suit alleges various acts and omissions by Chase Manhattan – both in New York and abroad – that constitute, *inter alia*, fraud, misrepresentation, and breach of fiduciary duty in connection with Chase's handling and supervision of plaintiff's investments. The suit was dismissed in favor of a forum in London, England.

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[1] Unless otherwise noted, the facts are taken from the opinions below, attached as Appendices A-B.

2. The wrongdoing alleged in this case has numerous connections with respondent's home forum of New York. For example, petitioner's investment relationship with Chase Manhattan Bank was managed by the Hellenic and Maritime Industries Group (the "Hellenic Group") of Chase's Private Bank division in New York. At the relevant times the Hellenic Group was headed from either New York or London, and the activities of that group were supervised by Chase officers at the Private Bank in New York. And from 1996 to 1999 – the investing period central to this case – the Hellenic Group was headed, and Springwell's relationship with Chase was managed, by Stewart Gager, a New York-based Managing Director of Chase's Private Bank. Gager played an active role in managing Springwell's investments with Chase and its interactions with a London-based salesperson, and Gager personally gave investment advice to Springwell on many occasions. Joint Appendix ("JA") in the Second Circuit, at JA349.

The case also has connections with the proposed alternative forum of London. For example, Springwell often dealt with Justin Atkinson, a London-based salesperson at a wholly-owned Chase subsidiary in London. JA57-58, JA826. But notwithstanding some connections with London, as well as with Greece, Moscow, and the Channel Islands, this case's many New York connections were far from incidental.

The investments relevant to this case included emerging-market debt instruments from Mexico, Argentina, and Brazil, and complex Chase-created derivative products based on Russian "GKO" bonds called GKO Linked (S Account) Notes ("GKO Notes" or "Notes").[2] All of the essential transactions

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[2] The GKO Notes were fixed-return derivative investment products payable in U.S. Dollars and issued by a Chase subsidiary in the Channel Islands. The underlying GKO's were purchased by Chase or one of its affiliates, presumably for its own account, and the derivative Notes shifted the risks, and supposedly the rewards, of those bonds to Chase clients such as Springwell. The Notes included forward foreign exchange contracts

regarding the convoluted and complex derivative GKO Notes took place at Chase New York, including: purchase confirmations, summary terms and conditions, and misleading "Risk Disclosure" statements all sent between New York and Greece; payments made by transferring funds to Chase in New York; questions directed to Chase employees in New York; copies of all notices required to be sent to New York; and demand for payment under the Notes only at "the offices of The Chase Manhattan Bank in New York City." JA410, JA739, JA742-96, JA829. The central decisions and transactions concerning financing for Springwell's investments also took place in New York. JA727-28, JA739, JA828.

By 1998, Springwell had a highly leveraged portfolio in which hundreds of millions of dollars were invested in high-risk emerging-market paper. That precarious position into which Chase led Springwell eventually imploded. The Russian government's GKOs were, in essence, a "pyramid" scheme that, in August 1998, collapsed and led to defaults on the GKOs and Chase's derivative GKO Notes. Other emerging market investments in Springwell's portfolio also plummeted in value and defaulted around this time period. Springwell nonetheless was required to pay off the financing for those investments, which it did by a term-loan arrangement negotiated through Chase New York. JA89, JA223, JA801. As a result of those events, Springwell suffered more than $200 million in damages, including losses of more than $87 million on the GKO Notes alone.

Following the collapse, Chase New York made several proposals to Springwell in an attempt to resolve responsibility for the losses, with the negotiations all conducted with key financial and legal personnel at Chase New York. JA430-02,

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with several Russian banks (including Chase's Moscow affiliate) in order to hedge against the risk that the Ruble would be devalued by locking in a fixed rate between Dollars and Rubles.

JA436-42, JA801-04, JA807-08, JA810-23. Those negotiations were unsuccessful.

3. In December 1999, Springwell filed this action in the Southern District of New York against Chase, seeking damages for breach of fiduciary duty, breach of contract, and misrepresentation in connection with Chase's recommendation and sale to Springwell of various highly risky investments that were entirely unsuitable for Springwell's investment objectives.

The essential elements of Springwell's Complaint, JA53-70, are that: Chase misled Springwell by misrepresentation and omission regarding the safety and suitability of the investments it recommended to Springwell; Chase misrepresented and failed to disclose the magnitude and true nature of the risks associated with the GKO Notes and related currency transactions; Chase overreached and abused its fiduciary trust in structuring the GKO Notes in a manner that placed all of the risks on the purchasers but paid to the purchasers only a small portion of the underlying return; Chase senior managers in New York failed to supervise adequately its London salesperson or to monitor and assess adequately Springwell's portfolio; and Chase breached its fiduciary duty to Springwell to maximize Springwell's post-collapse return on its investments.[3]

Chase moved to dismiss based on *forum non conveniens*. After being denied discovery regarding forum issues, JA491, Springwell opposed the motion to dismiss with such evidence as was available to it, and Chase replied.

4. The district court, without having heard oral argument, granted Chase's motion to dismiss. App. B1-B18.

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[3] In its briefing in the Second Circuit, Springwell also alleged continuing post-Comlaint violations of fiduciary duty by Chase New York in its handling the vestiges of Springwell's investments that remained stuck with Chase and stated its intention to add those allegations to the Complaint by amendment. Springwell Br. 12, 26-27; Springwell Reply 11, 25.

The district court held that Springwell, a foreign corporation, was due only "minimum" deference for its selection of Chase's home forum in which to bring suit. App. B17. While the court passingly noted that Springwell was the beneficiary of an access-to-courts treaty between the United States and Liberia – entitling Springwell to the same initial deference as a citizen of the United States – the court nonetheless focused solely on Springwell's foreign residence and its supposed lack of "connections to the United States" in order to find that Springwell's "choice of forum should not be accorded particularly strong deference." App. B10. The district court gave no consideration to defendant Chase's residence in New York when considering the deference due Springwell's choice of a New York forum.

In conducting the *forum non conveniens* balancing, the court ruled that although the private-interest convenience factors failed to demonstrate oppressiveness or vexation to Chase, two public-interest factors – local interest and application of some foreign law – and a limited private-interest concern regarding lack of compulsory process over several witnesses favored dismissal. App. B10-B16.

5. Petitioner appealed and the Second Circuit affirmed. App. A1-A18. Like the district court, the Second Circuit gave virtually no deference to Springwell's choice of forum. In rejecting Springwell's argument that the U.S.-Liberian Treaty granting "freedom of access to the courts" entitled Springwell to substantial deference in its choice of a U.S. forum, the court held that the Treaty "stops well short of granting the nationals of both countries" *equal* access and hence "the Liberian treaty does not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen." App. A10-A11. The court further discounted any deference potentially due from equal "citizen" status absent U.S. *residence*, arguing that such claimed deference "impermissibly conflates citizenship and convenience, and assigns an artificial weight to citizenship." App. A12.

The court also rejected Springwell's argument that where plaintiff brings suit in *defendant's* home forum, that choice should receive the same presumptive deference as when a plaintiff sues in its own home forum, and that where a home-forum defendant seeks transfer to a forum that is home to *neither* party, defendant should face a higher burden of deference to plaintiff's choice of forum. Springwell Br. 21. The court instead held that while a plaintiff's choice of its own home forum can be assumed to be motivated by convenience, the "choice of the defendant's home forum provides a much less reliable proxy for convenience." App. A13.

Regarding the elements of the *Gilbert* balance itself, the Second Circuit merely endorsed the district court's finding that the sole private interest factor of compulsory process for unwilling witnesses "weighs heavily in favor of dismissal" and held that such finding was not "clearly erroneous." App. A16. In doing so, the court rejected Springwell's contention that because defendant failed to show *any* unwillingness of friendly Chase witnesses to appear for trial in New York, and hence failed to show any need for such compulsory process, the *Gilbert* factor regarding "unwilling" witnesses did not apply at all. Springwell Br. 36-38; Springwell Reply 17-19.

The court also rejected Springwell's argument that given the trial-demeanor basis of the compulsory-process element, the unchallenged availability of video depositions, and England's reliance on written, rather than live, testimony for the case-in-chief, this factor had no significant weight against a New York forum and instead should have weighed in *favor* of a New York forum. Springwell Br. 36-39; Springwell Reply Br. 17-19.

Finally, regarding the public-interest factor involving application of foreign law, the court found that, despite the likely application of *both* New York and English law to various aspects of the case, there was no "abuse of discretion" in the district court's conclusion that "choice of law considerations strongly tipped in favor of litigation in England." App.

A18. In doing so, the court rejected Springwell's arguments that where *both* fora would have to conduct choice of law analyses and apply some foreign law, this factor was a wash, and that application of English law, which shares a common heritage with New York law, was at best a minimal consideration in the *Gilbert* balance. Springwell Br. 53-54, 57; Springwell Reply 26, 29.

Petitioner sought rehearing and rehearing *en banc*, both of which were denied. App. D1.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below improperly diminishes deference to a plaintiff's initial choice of forum in a manner that conflicts with the U.S.-Liberian Treaty and other similarly worded bilateral treaties and conflicts with the deference applied in other circuits to a plaintiff's choice of the defendant's home forum. The decision below also misinterprets the *Gilbert* balancing factors relating to compulsory process for "unwilling" witnesses and to application of foreign law, in a manner inconsistent with *Gilbert* itself and with the treatment of those factors in other circuits.

I. THE DENIAL OF DEFERENCE TO PETITIONER'S CHOICE OF RESPONDENT'S HOME FORUM CONFLICTS WITH U.S. TREATY OBLIGATIONS AND WITH THE DECISIONS OF OTHER CIRCUITS.

It is well-established that a federal court with jurisdiction over a case has a solemn obligation to exercise that jurisdiction absent rare and compelling circumstances to the contrary. *Colorado River Water Conservation Distr.* v. *United States*, 424 U.S. 800, 817 (1976). Although jurisdiction may be declined if the chosen forum is unusually inconvenient, dismissal on the grounds of *forum non conveniens* is an infrequent and disfavored outcome. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of

forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947).

A. The Treaty-Imposed Obligation To Allow Freedom of Access to the Courts Requires Substantial Deference to a Treaty-Beneficiary's Choice of Forum.

The U.S.-Liberian Treaty of Friendship, Commerce, and Navigation provides "freedom of access to the courts" for citizens of the signatories. The Second Circuit's dismissal of that Treaty-guaranteed access as providing something less than equal treatment to U.S. litigants, and as having little effect on *forum non conveniens* analysis, misconstrues and undermines the United States' treaty obligations to Liberia and to numerous other nations having similarly worded treaties with the United States.

The Second Circuit held that the U.S.-Liberian Treaty provides less deference than do other treaties that provide for "national treatment" regarding access to courts. App. A10-A11 (distinguishing, *inter alia*, the U.S.-Ireland Treaty, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(c), 1 U.S.T. 785, 790-91("Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to having access to the courts of justice * * *.")). That holding ignored the plain language of the U.S.-Liberian Treaty, which, if anything, is *broader* than other "national treatment" treaties and provides an unqualified "freedom of access" to the courts of the signatories.

At a minimum, however, the Treaty in this case should be read as providing at least equal access to that granted home-country nationals and the beneficiaries of other treaties having the same core purpose despite any minor evolution in wording. To hold otherwise, as did the court below, relegates treaty beneficiaries to the status of other foreign litigants from countries that have not entered into such bilateral agreements

with the United States, and thus renders such treaty provisions meaningless.[4]

In denigrating the significance of the U.S.-Liberian Treaty, the decision below will have consequences well beyond the parties to this one treaty given that comparable wording appears in various other treaties. *See, e.g.*, Treaty of Friendship, Commerce, and Consular Rights, June 19, 1928, U.S.-Austria, Art. I, 47 Stat. 1876 ("The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other"); Treaty of Friendship, Commerce, and Consular Rights, June 5, 1928, U.S.-Norway, Art. I, 47 Stat. 2135 (same); Treaty of Friendship, Commerce, and Consular Rights, Dec. 7, 1927, U.S.-Honduras, Art. I, 45 Stat. 2618 (same); Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, Art. VI, 33 Stat. 2105 ("The citizens or subjects of each of the two High Contracting Parties shall have free access to the Courts of the other"). Similar provisions can be found in the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Paraguay, Art. IX, 12 Stat. 1091, and the Treaty of Commerce, Oct. 2-14, 1881, U.S.-Serbia, Art. IV, 22 Stat. 963.

The decision below thus will affect suits by citizens from any of those countries brought in the United States and suits by U.S. citizens brought in any of those countries.

The Second Circuit's focus on residence rather than on treaty rights and citizenship status, App. A12, was an unwar-

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[4] The Second Circuit's denigration of the Liberian Treaty relative to other supposedly stronger bilateral treaties is particularly inappropriate given that the real parties in interest here are Greek citizens entitled to the benefit of just such a supposedly stronger treaty. *See* Treaty of Friendship, Commerce, and Navigation, Aug. 3, 1951, U.S.-Greece, Art. VI, 5 U.S.T. 1829 (according nationals of either party "national treatment and most-favored-nation treatment with respect to access to the courts of justice"). This Court in *Piper Aircraft Co.* v. *Reyno*, of course, made a point of looking to the real parties in interest rather than the nominal party bringing suit. 454 U.S. 235, 242, 261 (1981).

ranted diminution in the rights and obligations negotiated by the United States and Liberia for their respective citizens and court systems. Withdrawing treaty deference from plaintiffs who are not United States residents reduces the value of the treaties to a virtual nullity, since much of the value of the treaties is that they provide a heightened standard of treatment for United States and foreign beneficiaries of such treaties as compared to citizens of countries that have not entered into such reciprocal relationships with the United States. Many of the persons and companies that can be expected to make use of the treaties are residents of their own countries who engage in international business involving the reciprocal nation. Therefore, denying non-residents favorable treatment when they need to access the courts of the signatory nations disserves both United States and foreign beneficiaries engaged in such business. If citizenship, apart from residence, is given no weight, then there is little difference in the treatment that will be accorded beneficiaries and non-beneficiaries of the treaties.

The United States should not be presumed to have entered into such pointless international obligations. Rather, citizenship itself – and hence treaty provisions benefiting citizens of the signatories – should accord a significant, though not dispositive, boost in deference, even absent residence within the forum.

The Second Circuit's refusal to assign any meaningful weight to citizenship under the Treaty conflicts with this Court's own recognition in *Piper Aircraft Co.* v. *Reyno* that, although it is not determinative of the deference issue, United States "[c]itizens *or* residents deserve somewhat more deference than foreign plaintiffs." 454 U.S. 235, 257 **(**1981) (emphasis added). It also conflicts with cases from other circuits holding that citizenship itself is important to the degree of deference, separate from a party's residence. *See, e.g.*, *Reid-Walen* v. *Hansen,* 933 F.2d 1390, 1394 (CA8 1991) ("the relevant distinction is whether or not the plaintiff who has se-

lected the federal forum is a United States citizen"); *Burt* v. *Isthmus Development Corp.,* 218 F.2d 353, 357 (CA5) ("courts should require positive evidence of unusually extreme circumstances … before exercising any such discretion to deny a citizen access to the courts of this country"), *cert. denied,* 349 U.S. 922 (1955).

Given such conflicts, and the substantial damage to U.S. rights and obligations under multiple bilateral treaties, the effect of the U.S.-Liberia Treaty on *forum non conveniens* deference is an important national issue that should be resolved by this Court.

B. Plaintiff's Choice of Defendant's Home Forum Deserves Substantial Deference where the Only Proposed Alternative Is a Forum that Is Home to Neither Party.

The Second Circuit also erred by dismissing plaintiff's choice of *defendant's* home forum and defendant's attempt to transfer to a forum that was home to *neither* party as factors triggering heightened deference. In so doing, the Second Circuit brought itself into conflict with the more deferential approaches of other circuits.

The Tenth Circuit, for example, holds that "a forum resident should have to make a stronger case than others for dismissal based on *forum non conveniens.*" *Gschwind* v. *Cessna Aircraft Co.*, 161 F.3d 602, 609 (CA10 1998), *cert. denied*, 526 U.S. 1112 (1999). The Eighth Circuit likewise finds that "where the forum resident seeks dismissal, this fact should weigh strongly against dismissal." *Reid-Walen,* 933 F.2d at 1395. And the First Circuit recognizes that the "deference accorded the plaintiff's choice of forum is enhanced when the plaintiff has chosen a forum in which the defendant maintains a substantial presence." *Mercier* v. *Sheraton Int'l, Inc.*, 981 F.2d 1345, 1354 (CA1 1992), *cert. denied*, 508 U.S. 912 (1993).

As explained by the Third Circuit, such an attempted transfer *away* from the defendant's home forum is particularly "puzzling in that frequently the *forum non conveniens* issue is raised by a defendant sued away from home who seeks to convince the court that the balance of relevant factors should be tipped against requiring it to defend in a forum far from its home jurisdiction." *Lony* v. *E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (CA3 1991) (citations omitted). Indeed, in the current case, as in *Lony*, the defendant was headquartered in the forum, was an extremely large employer within the forum, yet sought to move the action against it to a forum thousands of miles away, which the *Lony* court, quoting Alice, found "'curiouser and curiouser.'" *Id*. Indeed, even this Court has found it "strange" when a party objects to suit in its home forum. *Gilbert,* 330 U.S. at 510 (discussing plaintiff's objection to having suit transferred back to plaintiff's home forum).

The decisions of other circuits increasing deference where suit is brought in defendant's home forum are far more faithful to this Court's decision in *Gilbert* and to the principles underlying the doctrine of *forum non conveniens*.

Deference to a choice of *either* party's home forum derives not merely from defendant's amenability to suit at home, but also from the presumed-convenience to *either* party of being in its own home forum and the symmetrical nature of the *Gilbert* balancing test in examining the convenience or the inconvenience of *both* plaintiffs and defendants.

By asking only whether the choice of a defendant's home speaks to plaintiff's convenience, the Second Circuit ignored the very point of the symmetry principle, which is that deference to plaintiff's choice and skepticism of defendant's motion are two sides of the same coin. Suit in defendant's home forum is relevant not because what it says about *plaintiff's* motivations – though in this case New York was plainly more convenient than plaintiff's home fora of Liberia or Greece – but because it should be presumed convenient to the defen-

dant and casts presumptive doubt upon the *defendant's* motivations in seeking transfer to a third forum not home to *either* party. Deference to plaintiff and skepticism of defendant slide along the same scale and should equally raise the bar for a *forum non conveniens* motion.

In this case there was no dispute that plaintiff's home fora of Liberia or Greece would have been more inconvenient for *all* parties, including plaintiff, given that Liberia had virtually no connection to the case and Greece would have involved translation problems for the mostly English-language documents and witnesses. Where a foreign plaintiff such as Springwell is pressed by practicality and common sense into choosing between two or more non-home fora, its choice should not be denied deference merely because it has rejected suit in its home forum for good and sufficient reasons. Far from indicating a tactical decision to forgo convenience in favor of some inappropriate objective, the decision in these circumstances shows a serious consideration of the conveniences notwithstanding such other tactical advantages Springwell might have had from suing at home. Unlike many situations where a plaintiff seeks a U.S. forum instead of its home forum, here, where plaintiff's "home" forum is demonstrably less appropriate for the case, the most reasonable presumption is that plaintiff has selected the next most convenient forum in which to bring the suit. Indeed, even Chase seems to recognize that Springwell's "home" fora are not, in this instance, presumptively convenient locations: Chase has *not* suggested transfer to Greece or Liberia.

Conversely, Chase's effort to transfer this case *away* from its forum of residence to a third-party forum must be viewed with a skepticism equal and opposite to the deference given a plaintiff suing in its home forum. Such a move on its face suggests that the motion is not being made for convenience, but rather for tactical advantage. Unlike Springwell's obvious and valid reasons for eschewing its home fora of either Liberia or Greece, there are no similarly facial deficiencies

with New York as a forum. And, with numerous documents and witnesses in *both* fora, there is no presumptive reason to assume that England will serve the conveniences of the parties better than New York.

By ignoring the choice of defendant's home forum as a factor enhancing deference, the Second Circuit has inverted the ordinary deference to plaintiff's choice of forum directed by *Gilbert*. Had Chase been the party to bring suit in New York, it plainly would have received substantial deference. But in seeking to *leave* New York it faces no comparably significant hurdle. The Second Circuit thus has shifted the prerogative of choosing a forum to the defendant, in conflict with the very limited nature of *forum non conveniens* principles and the decisions of other courts. This Court should grant certiorari to resolve the conflict and to reestablish the proper allocation of deference in forum analysis.

II. *GILBERT*'S COMPULSORY-PROCESS FACTOR IS INAPPLICABLE ABSENT A SHOWING THAT WITNESSES ARE UNWILLING TO APPEAR IN PLAINTIFF'S CHOSEN FORUM OR THAT A JURY WOULD BE UNABLE TO ASSESS THE DEMEANOR OF SUCH WITNESSES.

In addition to erring regarding the deference that permeates *forum non conveniens* analysis, the Second Circuit also misconstrued the very nature of some of the specific interests in the *Gilbert* balance. The Second Circuit's endorsement of the finding that the compulsory process factor "weighs heavily in favor of dismissal," even absent any indication of "unwilling" witnesses likewise was error and creates a conflict with other circuits. In this case there was not even an allegation – much less evidence – that witnesses friendly to the defendant would be unwilling to appear in New York. This case thus presents an ideal vehicle for deciding whether some showing of "unwillingness" to appear in the initial forum is a prerequisite to the application of that *Gilbert* factor.

In contrast to the decision below, both this Court and other circuits have emphasized the "unwilling" witness aspect of that *Gilbert* factor. *See, e.g.*, *Gilbert,* 330 U.S. at 508 ("availability of compulsory process for attendance of *unwilling*, and the cost of obtaining attendance of *willing*, witnesses") (emphasis added); *Polythane Systems, Inc.* v. *Marina Ventures Intern., Ltd.*, 993 F.2d 1201, 1207 (CA5 1993) ("no showing of necessary witnesses residing in Maryland who would be *unable* to attend the trial in Texas"), *cert. denied*, 510 U.S. 1116 (1994) (emphasis added); *Contact Lumber Co.* v. *P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446, 1451 (CA9 1990) ("compulsory process to obtain the attendance of *hostile* witnesses") (emphasis added); *see also*, *Mercier* v. *Sheraton Int'l, Inc*., 935 F.2d 419, 428 (CA1 1991) (agreeing with district court's determination that *Gilbert* factors relating to witnesses were "about equal" based in part on district court's rejection of compulsory process factor because defendant "had failed to establish that [its foreign] witnesses would be unwilling to come to the United States or to provide depositions on a voluntary basis").

The decision below thus conflicts with those decisions and raises a straight-forward legal question regarding the nature of *Gilbert*'s compulsory-process factor. If some showing of "unwilling[ness]" is required before that factor can be weighed in favor of dismissal, then the courts below erred as a matter of law in weighing it "heavily" in this case.[5] And

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[5] The error of the Second Circuit's decision was further compounded by the fact that England, as a forum, was at an intrinsic disadvantage regarding witness demeanor regardless of which witnesses could or could not be compelled to appear there. While a New York court could assess witness demeanor – either live or on tape – at all phases of the trial, Chase's own expert suggested that in England virtually all "evidence in chief" or "direct evidence" from witnesses is introduced in the form of *written* statements. JA263. New York thus would afford greater opportunity to assess witness demeanor *regardless* of where the witnesses were located and thus this factor actually *favors* a New York forum.

because the compulsory-process factor has substantial potential to influence virtually every case where there is even a colorable alternate forum, this Court's time would be well spent in resolving the conflict and clarifying the nature of that *Gilbert* factor.

III. *GILBERT*'S FOREIGN-LAW FACTOR IS INAPPLICABLE OR INSIGNIFICANT WHERE BOTH FORA SHARE A COMMON LEGAL HERITAGE AND BOTH WOULD HAVE TO CONDUCT CHOICE OF LAW ANALYSES AND APPLY MIXED LOCAL AND FOREIGN LAW.

Finally, the Second Circuit erred in its treatment of *Gilbert*'s application-of-foreign-law factor, finding the need to apply English law as well as New York law was a substantial factor favoring dismissal. App. A18. There was no dispute in this case, however, that both English and New York Courts would be required to apply a mixture of English and New York law to this case. *Compare* Springwell Br. 53-55 *with* Chase Br. 42-44. Springwell had contended that this factor was therefore a wash regardless of the greater or lesser proportions of New York or English law to be applied. *Compare* Springwell Br. 53-55 *with* Chase Br. 44. In assessing the relative convenience of competing fora, shifting the burden of choice of law analysis and application of non-local law from a U.S. court to a foreign forum does not enhance the convenience of the case as a whole, and U.S. courts should not seek to enhance their own convenience at the expense of their foreign colleagues.

Furthermore, as other courts have recognized, the need to apply foreign law is not a sufficient basis to dismiss a case not otherwise substantially inconvenient. *See, e.g., Gschwind*, 161 F.3d at 609 (unfamiliarity with alternative forum's law not dispositive). Indeed, the relevance of this factor is particularly limited where the "foreign" law – in this case English law – shares familiar historical roots with U.S. law. *See Byrne* v. *British Broadcasting Corp.*, 132 F. Supp.2d 229, 238

(S.D.N.Y. 2001) ("Courts in either country would have to apply the law of the other, and the application of the law of another English common law jurisdiction 'does not impose a significant burden on this Court.'") (citation omitted); *cf. Reid-Walen*, 933 F.2d at 1401 (Jamaican substantive law descended from Great Britain, contained concepts akin to American law, legal matters were not complex, and no language barrier to understanding of Jamaican law).

IV. THIS CASE RAISES IMPORTANT AND RECURRING NATIONAL ISSUES THAT SHOULD BE RESOLVED BY THIS COURT.

Given the ever-increasing internationalization of commerce, disputes between United States and foreign business entities will undoubtedly grow apace and can be expected to have connections with multiple fora. Where such international commerce is mediated by treaties between the United States and selective trading partners, courts should be especially reluctant to impose roadblocks to interactions between such countries. *Forum non conveniens* dismissals can be just such roadblocks unless used sparingly and with due regard for a foreign treaty beneficiary's free access rights to the judicial system. Used too casually, as it was in this case, it can have a significant adverse impact on the predictable resolution of international business disputes.

Overly aggressive application of the *forum non conveniens* doctrine in the Second Circuit is particularly troubling given that New York is an international financial center and home to many companies that do business throughout the world under the guidance and control of their corporate headquarters. Allowing such companies more readily to abandon their home forum whenever their dealings touch upon multiple fora will have a widespread impact and thus presents an important issue meriting the attention of this Court. And given the conflict among the circuits regarding the various questions raised in this petition, a grant of certiorari will serve

the added function of restoring some uniformity of approach to *forum non conveniens* analysis that has not received substantial attention from this Court in nearly a generation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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