No. 08-56270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOMAS MAYNAS CARIJANO, *et al.*,

Plaintiffs/Appellants/Cross-Appellees,

v.

OCCIDENTAL PETROLEUM CORPORATION, *et al.*,

Defendants/Appellees/Cross-Appellants.

On Appeal From The United States District Court
For the Central District of California, Case No. 07-5068-PSG(PJWx)

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL FOREIGN TRADE COUNCIL, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE U.S. COUNCIL FOR INTERNATIONAL BUSINESS AND USA*ENGAGE AS AMICI CURIAE IN SUPPORT OF DEFENDANTS/APPELLEES/CROSS-APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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DISCLOSURE STATEMENT

The National Association of Manufacturers, the National Foreign Trade Council, the Organization for International Investment, the U.S. Council for International Business and USA*Engage (collectively, "Amici") are not owned by any parent corporation(s), and no publicly held corporation owns more than ten percent of stock in any Amici.*

* Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici state that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief and no person—other than Amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Circuit Rule 29-2, the National Association of Manufacturers, the National Foreign Trade Council, the Organization for International Investment, the U.S. Council for International Business and USA*Engage (collectively, "Amici"), respectfully submit this brief as amici curiae in support of the Petition for Rehearing *En Banc* by Defendants/Appellees/Cross-Appellants Occidental Petroleum Corporation and Occidental Peruana, Inc. ("Occidental") in *Carijano, et al. v. Occidental Petroleum Corporation, et al.*, ___ F3d. ____ (9th Cir. 2010). All parties have consented to Amici's submission of this brief.

Amici are industry associations that collectively represent thousands of U.S. corporations and U.S. subsidiaries of multinational corporations that engage in foreign commerce and investment. Amici member corporations are periodically sued by foreign plaintiffs in U.S. courts over their activities in foreign countries. They therefore have a significant interest in the continued correct application of the doctrine of *forum non conveniens*, which allows for the dismissal of suits that should more appropriately be heard in foreign courts. Amici believe that their legal perspective and experience can help provide the Court with insights regarding the impact of the *Carijano* Panel's decision on the doctrine of *forum non conveniens*.

PRELIMINARY STATEMENT

In its decision reversing the trial court's dismissal of this suit for *forum non conveniens*, the Panel majority concluded that nearly conclusive weight should have been given to the "choice" of a U.S. forum by a U.S. advocacy organization that joined a suit previously filed by twenty-five foreign plaintiffs relating to events that occurred in Peru. If allowed to stand, the Panel decision will make it much more difficult for courts in the Ninth Circuit to dismiss under the doctrine of *forum non conveniens* many suits that should be more appropriately litigated in a foreign court with a closer connection to the parties and facts. Under the Panel's unprecedented rule, many foreign plaintiffs would be able to avoid *forum non conveniens* dismissal simply by enlisting a U.S. advocacy group with a humanitarian interest in the suit's subject matter to serve as a nominal plaintiff.

The Panel majority's decision is inconsistent with established Supreme Court precedent holding that, when considering dismissal for *forum non conveniens*, federal courts must not place decisive emphasis on "any one factor" and, in particular, should not give weight to the choice of forum of a nominal U.S. plaintiff when the "real parties in interest" are foreign. Moreover, the likelihood that this decision will open the Ninth Circuit's floodgates to suits by forum-shopping foreign plaintiffs raises a question of exceptional importance for judicial

efficiency and economy in international litigation. For these reasons, Amici respectfully submit that rehearing *en banc* is appropriate here.

ARGUMENT

The Panel's decision calls for *en banc* review because it misapplied the doctrine of *forum non conveniens* in a way that conflicts irreconcilably with the Supreme Court's decision in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), and with this Circuit's own decisions in *Vivendi S.A. v. T-Mobile USA Inc.*, 586 F.3d 689 (9th Cir. 2009), and *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163 (9th Cir. 2006). The Panel's decision also conflicts with numerous decisions of other circuits in an area where there is a need for national uniformity: the receptiveness of United States courts to forum-shopping by foreign plaintiffs. *See* Cir. R. 35-1. The Panel's decision also presents an issue of exceptional importance. The district courts in this Circuit hear many cases brought by foreign plaintiffs involving disputes with international dimensions. The Panel's decision provides a roadmap for future foreign plaintiffs suing over injury in foreign countries to avoid *forum non conveniens* transfer by simply adding a nominal U.S. person as a party, which greatly relaxes a plaintiffs' burden for showing a foreign forum to be inadequate. The *en banc* Court should re-align this Circuit's *forum non conveniens* law with established Supreme Court guidance before the Panel's errors become precedent for other cases and make this Circuit a magnet for international forum-shopping.

I. The Panel Decision Conflicts with the Supreme Court's Decision in *Piper* By Giving Overwhelming Weight to the Presence of a Nominal U.S. Plaintiff Who is Not the Real Party In Interest

The Supreme Court laid down bedrock principles of *forum non conveniens* law in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), a case with facts and procedural history comparable to the present dispute. In *Piper*, the estates of five Scottish citizens killed in an airplane crash in Scotland sued the airplane manufacturer in the United States. The claim was nominally brought by the estates' U.S. executrix. *Id*. at 240.

After a careful analysis of the relevant factors, the district court in *Piper* dismissed on the grounds of *forum non conveniens*. A Third Circuit panel reversed, ruling that the trial court had abused its discretion in conducting its analysis and that dismissal is never appropriate when the foreign law is less favorable to the plaintiff. The Supreme Court, in an opinion by Justice Thurgood Marshall, reversed the Third Circuit, holding that *forum non conveniens* dismissal was proper. In doing so, the Supreme Court enunciated key principles to guide *forum non conveniens* analysis in future cases:

- The "presumption" in favor of the plaintiff's choice of forum "applies with less force when the plaintiff *or real parties in interest* are foreign," even if there is a nominal U.S. plaintiff. *Id.* at 255 (emphasis added).

- "[T]he need to retain flexibility" is paramount in the *forum non conveniens* analysis: "If central emphasis were placed on any one

> factor, the *forum non conveniens* doctrine would lose much of the flexibility that makes it so valuable." *Id.* at 249-50.

The Supreme Court also rebuked the Third Circuit for reversing the district court's analysis and emphasized that "[t]he *forum non conveniens* determination is committed to the sound discretion of the trial court" and "may be reversed only where there has been a clear abuse of discretion." *Id.* at 257. The Court of Appeals must not "substitut[e] its own judgment for that of the District Court." *Id.*

The Panel's analysis of *forum non conveniens* in this case runs afoul of all these *Piper* principles in a similar factual situation.

The primary factor that led the Panel to conclude *forum non conveniens* dismissal was an abuse of discretion was the presence of Amazon Watch, a U.S. advocacy organization added as a plaintiff only after Occidental announced its intention to file a *forum non conveniens* motion. The Panel's preoccupation with Amazon Watch conflicts not only with *Piper*'s distinction between nominal plaintiffs and the "real parties in interest," but also with its admonition to "retain flexibility" and to avoid treating any one factor as dispositive. Moreover, contrary to the Supreme Court's direction, the Panel second-guessed the district court's analysis of the *forum non conveniens* factors, substituting its own judgment for the district court's on nearly every factual issue.

A. The Panel Ignored *Piper's* Direction to Focus on the "Real Parties in Interest" in Determining How Much Deference to Give to the Plaintiffs' Choice of Forum

Under *Piper*, a U.S. plaintiff's choice of a U.S. forum is entitled to deference on the presumption that the forum was chosen as a matter of convenience. *Piper*, 454 U.S. at 255-56. On the other hand, when a foreign plaintiff chooses a U.S. forum, a presumption that the decision was made on the basis of convenience becomes "much less reasonable" and that choice is entitled to little deference. *Id.* at 256; *see also id.* at 256 n.23 (noting with approval that "the lower federal courts have routinely given less weight to a foreign plaintiff's choice of forum").

This distinction between domestic and foreign plaintiffs is rooted in concerns about global forum shopping. As the Supreme Court noted, American courts are "extremely attractive to foreign plaintiffs," offering such plaintiff-friendly features as extensive discovery, jury trials, and contingency fees. *Id.* at 252 & n.18. Courts must be alert to the possibility that a foreign "plaintiff chooses a particular forum, not because it is convenient, but solely in order to harass the defendant or take advantage of favorable law." *Id*. at 249 n.15.

Piper instructs the lower courts to distinguish between domestic and foreign plaintiffs by looking at the "real parties in interest," not at nominal plaintiffs who may well have been named simply to manufacture a reason to keep the dispute in a U.S. court. In *Piper*, the plaintiffs' choice of forum was entitled to less deference

because the real parties in interest (the estates of Scottish decedents) were foreign even though a U.S. citizen was a nominal plaintiff, having been appointed the executrix to enable filing in U.S. court. *Piper*, 454 U.S. at 261. This Circuit, as well, has previously held that "eleventh-hour efforts to strengthen connections with the United States" by adding a domestic co-plaintiff "allow the district court to reduce the deference due a plaintiff's choice of forum." *Vivendi SA v. T-Mobile USA Inc.*, 586 F.3d 689, 695 (9th Cir. 2009).

In this case, the Panel placed tremendous weight on the presence of Amazon Watch, a U.S. advocacy group, as the twenty-sixth plaintiff. It held that the district court abused its discretion by "erroneously affording reduced deference to [Amazon Watch's] chosen forum." Op. 19475. It reached this conclusion even though Amazon Watch appears to be no more the "real party in interest" with respect to the events in Peru than was the U.S. executrix in *Piper* or the eleventh-hour co-plaintiff in *Vivendi*.

The first twenty-five plaintiffs are Peruvian Achuar who assert various environmental claims arising out of the alleged contamination of the remote area of Peru in which they live. Op. 19462. No doubt Amazon Watch has a humanitarian interest in these events, Op. 19461-62, just as many other U.S. advocacy groups have social policy interests in overseas operations of U.S. companies. Amazon

Watch does not claim to have suffered, however, any environmental or health damages in Peru, as the Achuar plaintiffs do.

These facts present, if anything, even more compelling grounds for reduced deference to the plaintiffs' chosen forum than in *Piper*. Amazon Watch is not a court appointed representative of the Peruvian plaintiffs. Unlike the *Piper* executrix, the presence of Amazon Watch is not legally required for those plaintiffs to be heard. Moreover, Amazon Watch was brought into the suit as a party later for the obvious purpose of trying to avoid a *forum non conveniens* transfer. Amazon Watch is the only U.S. plaintiff in the case.

While the U.S. plaintiff in *Piper* at least had standing as executrix to sue in federal court, Amazon Watch's standing is highly dubious for the reasons stated in Occidental's Petition for Rehearing *En Banc*. *See* Occidental Pet. at 12. The Panel, however, refused even to consider the standing issue, based on a misapplication of the holding in *Sinochem International Co. v. Malaysia International Shipping Co.*, 549 U.S. 422 (2007).

Sinochem held that if a case clearly belongs in a foreign court as a matter of efficiency and convenience, a court may properly *dismiss* on that ground without assessing whether the plaintiff also lacked standing. That limited exception—allowing standing not to be reached as an issue because of dismissal otherwise on

forum non conveniens grounds—did not create a new rule allowing a case to be kept in U.S. court even if a key plaintiff lacks standing to bring its claim.[1]

B. The Panel Disregarded *Piper's* Emphasis on "Flexibility" by Relying on Amazon Watch at Nearly Every Step of the *Forum Non Conveniens* Analysis

The Panel's substantial reliance on the presence of Amazon Watch is also inconsistent with the Supreme Court's repeated emphasis in *Piper* and its prior decisions on the need to "retain flexibility" and avoid placing dispositive weight on "any one factor" in applying the *forum non conveniens* doctrine. *Piper*, 454 U.S. at 250 (citing previous decisions) ("In fact, if conclusive or substantial weight were given to [any one factor such as] the possibility of a change in law, the *forum non conveniens* doctrine *would become virtually useless*.") (emphasis added).

Notwithstanding *Piper*'s clear instruction, Amazon Watch emerges as the decisive factor in the Panel's analysis not only of the deference due to the plaintiff's choice of forum but also for five of the other *forum non conveniens* factors. For example, in analyzing the private-interest factor of residence of the parties, the Panel emphasized Amazon Watch's California residence, faulting the district court for not giving it weight. Op. 19476. The Panel worried that traveling

[1] *Cf. Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1041 n.36 (9th Cir. 2010) (observing that while courts can decide certain questions "against the plaintiff without determining whether the plaintiff has standing…no court has ever bypassed a prudential standing issue to rule *in favor* of the party *lacking* prudential standing" (emphasis in original)).

to Peru might be inconvenient and costly for Amazon Watch. *Id.* at 19477. It stressed as a matter of "evidentiary considerations" that Amazon Watch's "executives, key employees, and relevant documentary evidence within its control are in California," as if this case about Occidental's conduct in Peru prior to 2000 will somehow turn on testimonial admissions by a California advocacy group whose interest in the events only started in 2001. *Id.* at 19479. According to the Panel, "[t]he district court again also failed to consider Amazon Watch" in connection with the public interest factors, leading the Panel to conclude—incredibly—that, because Amazon Watch is headquartered in San Francisco, California's interest in this matter outweighs Peru's interest in the health of its own nationals. And the Panel found Peru an inadequate forum in part out of concern that it might not offer a clear equivalent for Amazon Watch's unfair competition claim under California law. *Id.* at 19468.

It is clear that the presence of Amazon Watch made all the difference for the Panel, overshadowing other factors that should have been given much more weight, such as the actual location of the evidence and witnesses that were likely to be important at trial as a practical matter. This central emphasis on a single factor is precisely what led the Supreme Court to reverse the Third Circuit in *Piper*. Indeed, although the single factor at issue in *Piper* was the difference in substantive law between the U.S. and Scotland, Justice Marshall specifically noted

that even a U.S. "*citizen's forum choice should not be given dispositive weight*…. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Piper*, 454 U.S. at 255 n.23 (emphasis added).

* * *

To the knowledge of Amici, prior to the Panel's decision, no court in the United States had ever held that the Supreme Court standards of according less weight to the forum selection of foreign parties can be negated by simply adding a domestic advocacy group with a humanitarian interest in the case as an additional party. The Panel's decision makes new law. If it stands, it will likely become standard practice for foreign plaintiffs in this Circuit to join a sympathetic U.S. advocacy group as a plaintiff in an effort to make their complaint *forum non conveniens*-proof. Courts should not encourage such forum shopping tactics just as they have long reproved the fraudulent joinder of defendants in removal cases.[2] The *en banc* Court should rehear this case and realign Circuit law on *forum non conveniens* with the Supreme Court's decision in *Piper* and this Court's own decision in *Vivendi*.

[2] *See generally Rose v. Giamatti*, 721 F. Supp. 906, 914 (S.D. Ohio 1989) (discussing "long-established doctrine" that federal courts "disregard nominal or formal parties to the action and determine jurisdiction based only upon the citizenship of the real parties to the controversy"); 13F Charles Alan Wright et al., Federal Practice & Procedure § 3641.1 (2010).

II. The Panel Erred in Rejecting the Trial Court's Determination that Peru is an Adequate Alternative Forum

In *Piper*, the Supreme Court reversed the Third Circuit not only for placing conclusive weight on a single factor, but also for conducting the *forum non conveniens* analysis *de novo* rather than deferring to the analysis of the district court. Justice Marshall noted that the Third Circuit had "expressly acknowledged that the standard of review was one of abuse of discretion," but concluded that it "seem[ed] to have lost sight of this rule, and substituted its own judgment for that of the District Court." *Piper*, 454 U.S. at 257. The Panel has made the same mistake in this case, and it also departed from well-established precedent by finding Peru to be an inadequate forum.

A. The Panel Erred In Finding That Peru Could Not Offer a Satisfactory Remedy Because of "Suggestions" of Corruption and "Potential" Inadequacy

This Circuit's precedent requires a party to make a "powerful showing" that includes specific and "sordid" evidence when arguing that a foreign nation's judicial system is corrupt. *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1179 (9th Cir. 2006); *see also Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 385 (S.D.N.Y. 2001). The Panel disregarded the *Tuazon* standard. Op. 19469-70.

The Panel held that the district court committed error by overlooking "suggestions" of corruption and "troubling evidence of *potential* inadequacy." *Id.*

at 19469-70 (emphasis added). Such insinuations do not meet *Tuazon*'s "powerful showing" requirement. The Panel's approach also conflicts with the law of other circuits.[3] For all practical purposes, *Tuazon*'s "powerful evidence" standard will no longer exist if the Panel's decision crediting mere "suggestions" of corruption is allowed to stand.

The Panel also created an inter-circuit conflict by concluding that Peru's judicial system is potentially inadequate. In making this assessment, the Panel did not acknowledge cases in other circuits that have reached precisely the opposite conclusion.[4] As a matter of international comity and judicial harmony, it is unseemly for one circuit to characterize Peru's courts as "potentially" too corrupt

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[3] *See, e.g.*, *Stroitelstvo Bulgaria Ltd. v. Bulgarian-Am. Enter. Fund*, 589 F.3d 417, 421 (7th Cir. 2009) ("[G]eneralized, anecdotal complaints of corruption are not enough for a federal court to declare that [Bulgaria's] legal system is so corrupt that it can't serve as an adequate forum."); *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 499 (2d Cir. 2002) (refusing "to pass value judgments on the adequacy of justice and the integrity of Ukraine's judicial system on the basis of no more than . . . bare denunciations and sweeping generalizations (quotation omitted)); *Leon v. Millon Air, Inc.*, 251 F.3d 1305, 1312 (11th Cir. 2001) (requiring "extreme amounts of partiality or inefficiency" and placing the burden on the plaintiff to "substantiate[] his allegations of serious corruption or delay" with "significant evidence documenting the partiality or delay (in years) typically associated with the adjudication of similar claims").

[4] *See, e.g.*, *Torres v. S. Peru Cooper Corp.*, 113 F.3d 540, 544 (5th Cir. 1997); *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 881 (5th Cir. 1987); *Diaz v. Humboldt*, 722 F.2d 1216, 1219 (5th Cir. 1984), *overruled on other grounds*, *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987); *Flores v. S. Peru Copper Corp.*, 253 F. Supp. 2d 510, 539 n.29, 539-40 (S.D.N.Y. 2002) (collecting cases finding Peru to be an adequate forum), *aff'd on other grounds*, 414 F.3d 233 (2d Cir. 2003); *Sudduth v. Occidental Peruana, Inc.*, 70 F. Supp. 2d 691, 697 (E.D. Tex. 1999); *Vargas v. M/V MINI LAMA*, 709 F. Supp. 117, 118-20 (E.D. La. 1989).

to provide a fair forum for litigation when all other courts have found the Peruvian courts acceptable. It is particularly imperative that the courts of the United States speak with one voice in such matters. *See Naftogaz*, 158 F. Supp. 2d at 385.

B. The Panel Erred In Finding That Peru Could Not Offer a Satisfactory Remedy Because Peru Does Not Offer Punitive Damages

The Supreme Court in *Piper* also held that a U.S. court should not retain a suit because the foreign forum might be "less favorable" to the plaintiff by offering more modest damages. *See Piper*, 454 U.S. at 247. "[I]f the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper." *Id.* at 250. The Court held that "[a]lthough the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages may be smaller" in the Scottish courts, those differences were not reasons to retain the case in the United States court. *Piper*, 454 U.S. at 255.

In the present case, the Panel faulted the district court for failing to consider fully whether punitive damages are available under Peruvian law. The Panel's analysis flies in the face of *Piper* by assigning weight to the concern that the damages permitted under Peruvian civil law may not be as favorable to plaintiffs as those under United States law. Op. 19467-68. If the reasoning of the Panel is allowed to stand, forum-shopping plaintiffs could simply include a punitive damages claim in their Ninth Circuit complaints and thereby increase their chances

to avoid a *forum non conveniens* transfer not only to Peru but also to any other civil code country in the world. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008) ("[n]oncompensatory damages are not part of the civil-code tradition and thus unavailable in such countries as France, Germany, Austria, and Switzerland").

CONCLUSION

For the foregoing reasons, Amici respectfully submit that this Court should grant Defendants' Petition for Rehearing *En Banc*.

Respectfully submitted,

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