No. 12-385

IN THE

Supreme Court of the United States

OCCIDENTAL PETROLEUM CORPORATION, ET AL.,
Petitioners,

v.

TOMAS MAYNAS CARIJANO, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. In this case, a California resident nonprofit organization, in conjunction with foreign plaintiffs, sued a California corporation in California, the only forum in which jurisdiction could be perfected against all defendants, and defendants have no assets to satisfy a judgment in their proposed alternate forum. In the absence of any evidence or findings that the California plaintiff's claims were manufactured for the purposes of litigation, is that plaintiff's choice to sue in its home state entitled to the ordinary substantial deference?

2. *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), allows district courts to decide threshold non-merits issues – including *forum non conveniens* – before deciding questions of subject matter jurisdiction. The district court here granted *forum non conveniens* dismissal without ruling on defendant's claim that the U.S. organizational plaintiff lacked standing, and the court of appeals reversed that dismissal. Was the court of appeals required to first address standing, or was it proper for that court to decide only the issue the district court decided, while remanding the standing issue to the district court and allowing defendants to raise *forum non conveniens* again if standing was found to be lacking?

RULE 29.6 STATEMENT

Respondent Amazon Watch is a nonprofit, nongovernmental corporation with no parent corporation or shares held by any publicly traded company. EarthRights International, counsel for respondents, is also a nonprofit, nongovernmental corporation with no parent corporation or shares held by any publicly traded company.

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BRIEF IN OPPOSITION

The Ninth Circuit's decision in this case creates no circuit splits and faithfully applies the law of this Court. Even if there were error, review would be premature and unnecessary at this stage.

Respondents, plaintiffs-appellants below, sued petitioners in the petitioners' home district; in California, the state that is also home to Amazon Watch, one of the plaintiffs; in the only place where respondents could be sure of perfecting jurisdiction over all defendants; and in the only jurisdiction where it was certain that a judgment could be satisfied, since petitioners no longer had any substantial assets in Peru, their preferred forum. In evaluating petitioners' *forum non conveniens* motion, the Ninth Circuit decided, consistent with *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981), and following the caselaw of other circuits, that such circumstances justify substantial deference to the local plaintiff's choice of forum. Petitioners stretch to find parallels with *Piper* and other cases by calling Amazon Watch a "nominal" plaintiff, or by suggesting that Amazon Watch was added solely to defeat *forum non conveniens*, but Amazon Watch is asserting its own claim, and no court has found evidence that it manufactured its involvement in the subject matter in order to increase ties with California.

Respondents further claim that the Ninth Circuit could not have reversed the district court's *forum non conveniens* dismissal without first deciding Amazon Watch's standing, even though the district court had declined to address standing prior to *forum non conveniens*, relying directly on this Court's decision in *Sinochem International Co. v. Malaysia International*

Shipping Corp., 549 U.S. 422 (2007). *Sinochem* expressly allows district courts to decide threshold issues – including *forum non conveniens* – in any order, thus allowing a district court to dismiss a case on the basis of *forum non conveniens* before deciding questions of subject matter jurisdiction. *Id.* at 425. Thus the Ninth Circuit simply reviewed the district court's decision, and remanded issues not yet decided.

Petitioners claim that the Ninth Circuit invoked "hypothetical jurisdiction," but that discredited doctrine involved deciding merits issues before determining subject matter jurisdiction – the term does not apply to the decision of a non-merits issue such as *forum non conveniens*. *Id.* at 432. A decision on *forum non conveniens* cannot be a non-merits decision when dismissal is granted, but a decision on the merits when dismissal is denied.

Petitioners' interpretation of *Sinochem* is untenable. Under any view, an appellate court must first determine whether the district court was correct to dismiss on *forum non conveniens* grounds. But if error is found, petitioners would apparently prohibit the courts of appeals from so ruling, and instead require that they decide issues of subject matter jurisdiction in the first instance without the benefit of a decision from the district court – even where such decisions are impossible due to the need for factual development. Petitioners would preclude the most sensible course – the one that the Ninth Circuit took here – and posit that an appellate court that reverses a *forum non conveniens* dismissal cannot remand for consideration of threshold jurisdictional issues. This would undermine the very purpose of *Sinochem*,

which was to ease the burdens on the courts. *Id.* at 436.

The Ninth Circuit's decision is a run-of-the-mill *forum non conveniens* ruling that creates no new law and applies existing precedent. And even the alleged errors claimed by petitioners would not make a difference in this case. The Court of Appeals made clear that the district court was free to revisit the issue of *forum non conveniens* after determining the standing question. If petitioners are correct that Amazon Watch lacks standing, then the district court will determine *forum non conveniens* in the absence of Amazon Watch as a plaintiff – precisely the analysis that petitioners seek. There is no reason for this Court to intervene to tackle issues never decided below when the district court is poised to decide them.

Review of the degree of deference afforded Amazon Watch's choice of forum is likewise unnecessary, because the Ninth Circuit made clear that its *forum non conveniens* decision did not depend on the level of deference. There is no issue here worthy of certiorari.

RESTATEMENT OF THE CASE

1. Respondents, plaintiffs-appellants below, are the non-profit indigenous rights organization Amazon Watch and 25 indigenous Achuar individuals from northern Peru (the "Achuar plaintiffs"). As petitioners' statement details, the Achuar plaintiffs allege that their lands and health have been injured by contamination from the operations of petitioners Occidental Petroleum and its subsidiary, Occidental Peruana (together, "Oxy"), which operated in close

proximity to several Achuar communities in Peru's Lot 1AB.[1]

2. Respondents chose to sue Oxy in 2007 in Los Angeles, where Oxy is headquartered, because, as the record indicates, in "December of 2006, Oxy announced that it was withdrawing from Peru." Ct. of App. Excerpts of Record ("ER") 41. Respondents believe that, at the time of the filing of the complaint, "Oxy no longer ha[d] any producing operations in Peru and [was] not subject to service there." *Id.* Oxy has never disputed these allegations.

Furthermore, as the complaint alleges, "the abuses herein originated with conduct in the State of California, including, without limitation, approval by Oxy of the use of substandard technology and polluting practices in Lot 1AB and other actions directed towards fostering and/or concealing Oxy's unfair and illegal practices toward the Achuar people." ER 55.

Amazon Watch, which is headquartered in California and which has a longstanding relationship with the Achuar, chose to sue in its own right and join the Achuar plaintiffs in the First Amended Complaint. Amazon Watch's mission is to protect the indigenous peoples of the Amazon, ER 41, and since 2001, long before litigation was contemplated,

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[1] Petitioners generally misconstrue the allegations of respondents' complaint as applying to Occidental Peruana, and not Occidental Petroleum. The complaint makes no such distinction. Ct. of App. Excerpts of Record 19.

Amazon Watch has been working with the Achuar to investigate the contamination, to determine the health risks, to demand that Oxy clean up its mess, and to combat Oxy's ongoing fraudulent concealment of the harmful contamination in Lot 1AB. ER 36-40. Amazon Watch has expended its own resources and staff time on these activities, which have frustrated its ability to carry out its core mission of protecting the indigenous peoples of the Amazon. ER 36-41.

Amazon Watch filed a claim for unfair business practices pursuant to California's unfair competition law, section 17200 of the Business and Professions Code. Amazon Watch alleged that, diverting from its mission to protect the indigenous peoples of the Amazon, it had expended resources to investigate and expose Oxy's ongoing contamination of the Achuar communities and continued concealment of that contamination. ER 40.

3. The Achuar plaintiffs allege that they have continued to suffer harm from Oxy's actions subsequent to Oxy's withdrawal from Peru. Although petitioners are correct in stating that the Achuar plaintiffs allege that this harm results in part from the contamination left behind by Oxy, it also results from post-2000 contamination and ongoing pollution from operations now run by PlusPetrol. The Achuar plaintiffs allege that Oxy is responsible for this contamination due to their negligent design and construction of the oil exploration and production facilities, which continues to harm the Achuar plaintiffs long after Oxy itself has left. ER 35, 43, 45-47. Respondents specifically alleged that Oxy's practices are "ongoing and continuous." ER 55.

Respondents also allege that Oxy failed to inform the Achuar of the health risks of the contamination in their communities and concealed the harmful nature of its activities, and that this concealment remains ongoing. ER 34-36, 55. Respondents sought declaratory and injunctive relief to remedy this and other wrongful acts. ER 42.

4. After the filing of the First Amended Complaint, petitioners moved to dismiss all claims on the basis of *forum non conveniens* and moved to dismiss Amazon Watch on the basis of Article III and statutory standing. Petitioners' *forum non conveniens* motion included an extensive declaration from a Peruvian law expert, outlining how most of the claims could be litigated in Peru, Ct. of App. Supp. Excerpts of Record ("SER") 24-60, but failed to suggest that Amazon Watch could litigate its claim in Peru. Nor did petitioners' motion indicate that Oxy had any assets in Peru with which to satisfy a judgment, or that Occidental Petroleum would have been subject to jurisdiction in Peru.

Petitioners' original statutory standing challenge, which posited that Amazon Watch needed a restitution claim in order to be eligible for injunctive relief under the the California unfair competition law, was rejected by the California Supreme Court, in *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310 (2011); *see POM Wonderful LLC v. Coca-Cola Co.,* 679 F.3d 1170, 1178-79 (9th Cir. 2012) ("The California Supreme Court has now made clear that standing under section 17204 (the UCL standing provision) does not depend on eligibility for restitution.").

In response to petitioners' *forum non conveniens* motion, respondents sought limited discovery on key issues relating to the adequacy of Peru as an alternate forum and to contest petitioners' unsupported assertions regarding the locations of witnesses and evidence. ER 320-338. In the event of a *forum non conveniens* dismissal, respondents also sought to brief appropriate conditions of dismissal, including that a judgment in Peru should be satisfied. ER 92-93.

Without oral argument, the district court granted the *forum non conveniens* motion as to all claims and plaintiffs, but did not rule on the standing motion. ER 3-15. The district court's ruling omitted any discussion of the enforceability of any judgment against Oxy in Peru. Nor did it find that Amazon Watch would have any remedy in Peru. The district court also denied all discovery, ER 4-5, and refused to mandate any conditions of dismissal, declining even to accept additional briefing on this issue. ER 2. Although the district court's ruling applied a vague level of reduced deference to Amazon Watch's choice of forum ("only some deference"), ER 14, the district court did not make any findings that Amazon Watch was a "nominal" plaintiff, that it had been added for tactical reasons, or that its addition to the case after the initial filing rendered its choice of forum irrelevant.

Respondents appealed to the Ninth Circuit, and petitioners cross-appealed the failure to decide the standing challenge. Petitioners did not argue that the Ninth Circuit could not reverse on *forum non conveniens* without addressing standing.

The Ninth Circuit reversed. After rehearing, the panel's amended opinion found that the district court had erred in its analysis of the public and private convenience factors, and in applying reduced deference to the forum choice of California resident Amazon Watch. The Ninth Circuit's analysis of the public and private factors concluded that none of them pointed toward dismissal; all were either neutral or pointed toward retaining the case. Pet'n App. 31a. In particular, the Ninth Circuit noted that the district court had entirely overlooked the enforceability of the judgment, and held that this factor pointed strongly toward retention of the case. *Id*. 26a-27a. Thus, the panel found that petitioners had not met their burden to show "'oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience.'" *Id.* 31a (quoting *Piper*, 454 U.S. at 241).

The panel also found that the analysis of the public and private factors failed to outweigh the deference owed to the plaintiffs' choice of forum. The Ninth Circuit criticized the "vague intermediate standard of deference" applied by the district court, Pet'n App.18a, especially because Amazon Watch was a local plaintiff "entitled to a strong presumption that its choice of forum was convenient." Pet'n App. 21a. That presumption was undiminished in this case because the plaintiffs had not tactically chosen to file in a forum with tangential relation to the subject matter, and because there was no evidence that Amazon Watch had acquired an interest in the case or assumed its injury for tactical reasons. *Id.* 20a-21a. Although the record included no findings that Amazon Watch had been added for tactical reasons, the Ninth Circuit nonetheless held that any

suggestion of such motivation was outweighed by the fact that the plaintiffs had chosen to sue in Oxy's "home forum," that they had alleged substantial conduct in that forum, and that Amazon Watch had "long-standing involvement" and had asserted "actual injury" arising from Oxy's alleged conduct. *Id.* 20a.

The Ninth Circuit also suggested that, even if dismissal were otherwise appropriate, the district court should have imposed certain conditions on the dismissal, including requiring waiver of the statute of limitations and that a judgment of a Peruvian court would be honored by Oxy. Pet'n App. 31a-34a.

The Ninth Circuit addressed only the issue addressed by the district court – *forum non conveniens* – and declined to decide the standing motion in the first instance, without the benefit of the district court ruling on the issue. Instead, the Ninth Circuit remanded for a ruling on the standing question, and indicated that the district court would be free to revisit the *forum non conveniens* decision if Amazon Watch were dismissed as a plaintiff (or, presumably, if there were some other fundamental change in circumstances). Pet'n App. 36a, 117a-118a.

Following the amended opinion, petitioners petitioned for rehearing *en banc*. Although the vote was not published, the Ninth Circuit denied Oxy's petition for rehearing *en banc*, with five judges signing a dissent. Pet'n App. 109a. That dissent did not take issue with the panel's substantive analysis of *forum non conveniens*, or its decision regarding the degree of deference to be afforded to Amazon Watch. The only issue addressed was whether it was appropriate for the Ninth Circuit to reverse the non-merits *forum non conveniens* dismissal without

addressing the standing question. *Id*. 109a-114a. The unanimous three-judge panel[2] concurred in the denial of rehearing *en banc*, pointing out that they did not endorse the discredited doctrine of "hypothetical jurisdiction," but merely addressed a "'non-merits ground for dismissal'" before addressing standing. Pet'n App. 114a (quoting *Sinochem*, 549 U.S. at 432).

The panel's concurrence made explicit that their decision on *forum non conveniens* did not bind the district court if the circumstances changed:

> Occidental is free, on remand, to renew its motion to dismiss on the ground that Amazon Watch may not have standing to assert its claim . . . and, should the district court dismiss Amazon Watch, Occidental may once again seek to dismiss the case on *forum non conveniens* grounds.

Pet'n App. 114a; *see also id.* 117a-118a. The panel also explained that it could not decide the question of standing "on the bare pleadings," because evidence was needed to assess Amazon Watch's claims of injury:

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[2] The panel's opinion was 2-1 when issued. Following the death of Judge Rymer, who had dissented, Judge Gould was drawn to replace her. Judge Gould concurred in the denial of rehearing after the amended opinion was issued, such that the panel was unanimous in its judgment. Pet'n App. 114a.

> Occidental disputes the existence, the cause and the redressability of the harm alleged by Amazon Watch. Resolving these issues will require factual development on a number of fronts. For example, to show harm, Amazon Watch may produce evidence of the manner in which Occidental's conduct forced it to divert resources from its central mission of protecting the rainforest and advancing the rights of the indigenous people of the Amazon.

Id. 115a. Thus, the Ninth Circuit "could not" address standing "in the first instance here." *Id.* 116a.

REASONS FOR DENYING THE PETITION

I. Petitioners do not identify any conflict with the caselaw of this Court. The Ninth Circuit's decision is consistent with this Court's decisions in *Piper Aircraft*, *Sinochem*, and *Steel Co.*

A. The Ninth Circuit's decision does not contravene *Piper Aircraft* because Amazon Watch is not a nominal plaintiff but has its own substantive claim.

The Ninth Circuit's decision was a standard application of this Court's *forum non conveniens* test derived from *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981). Indeed, the dissent from the denial of rehearing *en banc* did not mention the panel's application of *Piper* at all, and petitioners themselves quibble with only one aspect of the application of *Piper* – the degree of deference afforded to the forum

choice of the domestic California plaintiff, Amazon Watch. As set forth below, *see infra* Part III.B, the level of deference makes no difference here because it did not affect the outcome, but in any event there is no conflict with *Piper*.

Petitioners suggest that because Amazon Watch is a "nominal domestic plaintiff," Pet'n at 19, like the U.S. plaintiff at issue in *Piper*, the Ninth Circuit's decision contravenes *Piper* in affording any deference at all to Amazon Watch's choice of forum. This argument fails, because Amazon Watch is not a nominal plaintiff. The Ninth Circuit faithfully applied *Piper*.

In *Piper*, this Court discounted the forum choice of an administratrix of an estate – who did not know any of the decedents or their survivors, and whose claims derived only from her position as executrix, 454 U.S. at 239 – where the "real parties in interest" were foreign. *Id.* at 255. The only other case petitioners cite concerning nominal plaintiffs, *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), similarly involved domestic plaintiffs who were the legal representatives – "administrators, curators, and/or tutors" – of foreign real parties in interest. *Id.* at 1060.

By contrast, Amazon Watch is not representing foreign real parties in interest. Instead, Amazon Watch has, as the Ninth Circuit noted, "actual long-standing involvement in the subject matter of the litigation" and has asserted "actual injury resulting from defendants' alleged conduct." Pet'n App. 20a. *See also infra* Part IV.

Although petitioners suggest that Amazon Watch's claim is "redundant," Pet'n at 16, Amazon

Watch may well be better situated to seek some forms of relief than the Achuar themselves. One district court has held that plaintiffs who were injured by relying on misrepresentations, but who now have knowledge of the falsity of the defendant's claims, may not have standing to enjoin deceptive practices because their "knowledge precludes them from showing likelihood of future injury." *Laster v. T-Mobile USA, Inc.*, No. 05cv1167, 2009 U.S. Dist. LEXIS 116228, at *10 (S.D. Cal. Dec. 14, 2009). By contrast, Amazon Watch's standing derives not from relying on Oxy's misrepresentations but from diverting resources in order to challenge those misrepresentations, such that Amazon Watch may be better positioned than the Achuar to remedy Oxy's fraudulent concealment.

Thus petitioners' suggestion that Amazon Watch "adds nothing to this suit," Pet'n at 21, is incorrect. Even if it were, however, petitioners cite no caselaw that suggests that a plaintiff with a real – as opposed to nominal – claim is entitled to less deference if that claim is duplicative of other plaintiffs' claims. Amazon Watch has a due process right to litigate its own claim.[3]

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[3] This right is so strong that it prohibits barring the claims of parties who never appeared in a prior action, even if "adjudications of the identical issue [] stand squarely against their position." *Blonder-Tongue Lab. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971). Thus if Amazon Watch had not joined the Achuar plaintiffs' suit, it could have filed its own suit and had the right to litigate that suit even if the

Petitioners suggest that the factors that led to reduced deference in *Piper* are present here, but that is plainly not the case. In *Piper*, as petitioners acknowledge, the plaintiff had admitted that the action "was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position." 454 U.S. at 240. No similar circumstance is present here. Instead, as the Ninth Circuit found, the evidence suggested that the plaintiffs filed in Los Angeles in order to obtain jurisdiction over the defendant. *See* Pet'n App. 20a-21a. As the Ninth Circuit noted, Oxy withdrew from Lot 1AB in 2000, and may no longer have any assets in Peru. Pet'n App. 9a, 26a-27a. There was no showing that, absent its consent, the lead defendant would have been subject to personal jurisdiction in Peru at all.[4]

Achuar plaintiffs had already been dismissed on the basis of *forum non conveniens* – and even if the claims asserted were identical. Amazon Watch's right to litigate its claims should not be diminished because it chose to maximize efficiency by joining with an existing suit.

[4] As the Ninth Circuit's original opinion noted, defendants' Peruvian law expert opined that one of the defendants, Occidental Peruana, would be subject to personal jurisdiction in Peru. Pet'n App. 88a. But there is no evidence that this should have been obvious to the plaintiffs before they filed their suit, nor any suggestion that Occidental Petroleum Corporation itself would have been amenable to suit in Peru absent its consent to jurisdiction there as a

Piper held that, when plaintiffs sue in their home forum, it is "reasonable" to assume that the choice was made for reasons of convenience. 454 U.S. at 256. Ordinarily, no such assumption is warranted when a foreign plaintiff comes to the United States to sue. Here, however, the Ninth Circuit properly found compelling evidence that the choice was motivated by convenience. Thus the court below could not have reduced the deference afforded to Amazon Watch's choice of forum; indeed, the Achuar plaintiffs' choice of forum was likewise entitled to deference. If anything, the decision below is compelled by, rather than in conflict with, *Piper*.

B. The Ninth Circuit's decision is consistent with *Sinochem* and *Steel Co.*, because *forum non conveniens* is a non-merits issue that appellate courts can reverse without considering all other threshold issues in the first instance.

1. Petitioners suggest that the Ninth Circuit was not permitted to reverse a *forum non conveniens* ruling and remand to the district court for a determination of Article III standing, but that is exactly what this Court's jurisprudence allows. Any other result would directly contravene *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007). This is not a close

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result of this lawsuit. *Id.* The plaintiffs sued in the only forum in which they could be sure of obtaining jurisdiction over the defendants.

question nor worthy of this Court's review, because *Sinochem* is clear that *forum non conveniens* is a non-merits issue that can be decided before subject matter jurisdiction in the appropriate case.

In *Sinochem*, this Court ruled that a district court may dismiss a case on the basis of *forum non conveniens* without addressing objections to the court's Article III jurisdiction. 549 U.S. at 432. Petitioners rely principally on *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), a case that they cite only for its general propositions, without acknowledging that the holding of *Steel Co.* was specifically discussed in *Sinochem*. In *Steel Co.*, this Court ruled that courts must satisfy themselves of subject matter jurisdiction – and, in particular, Article III standing – before proceeding to make determinations of the merits of a case. 523 U.S. at 88-89. Petitioners suggest that the Ninth Circuit violated this rule by deciding, for the time being, that this case should remain in the United States. This is squarely opposed to *Sinochem*, which made clear that *forum non conveniens* is not a merits issue:

> A *forum non conveniens* dismissal "den[ies] audience to a case on the merits," *Ruhrgas* [*AG v. Marathon Oil Co.*], 526 U.S. [574], at 585 [(1999)]; it is a determination that the merits should be adjudicated elsewhere. The Third Circuit recognized that forum non conveniens "is a non-merits ground for dismissal." 436 F.3d, at 359. A district court therefore may dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter

> and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant.

Sinochem, 549 U.S. at 432.

There is simply no way to reconcile petitioners' interpretation with *Sinochem*. Although Petitioners accept, as they must, that a *forum non conveniens* dismissal is not a dismissal on the merits, they do not seem to understand that a non-merits decision is not magically converted to a merits decision simply by changing the outcome. Denying a *forum non conveniens* motion is no more a decision on the merits than granting such a motion.

Petitioners draw a distinction between dismissing a case and retaining it, but the relevant distinction under *Steel Co.* and *Sinochem* is not dismissal or retention – it is whether the decision is a merits-based or non-merits-based decision. The specific holding of *Steel Co.*, which petitioners do not cite, was that it was not permissible "to decide *the cause of action* before resolving Article III jurisdiction." 523 U.S. at 95 (emphasis added). The Court spoke of "two centuries of jurisprudence affirming the necessity of determining jurisdiction before proceeding to the merits," *id.* at 98, and referred to the doctrine of "hypothetical jurisdiction" as the practice of "'assuming' jurisdiction for the purpose of deciding the merits," *id.* at 94. The Ninth Circuit's decision did not invoke "hypothetical jurisdiction," because it did not say anything about the merits of the case before determining subject matter jurisdiction.

Nothing in *Steel Co.* changes the fact that a decision on *forum non conveniens* is not a merits-based decision. Petitioners ignore the fact that *Steel*

Co. focused on the propriety of deciding the merits prior to determining jurisdiction; they cite only to broad propositions that a court may not "proceed" without determining its jurisdiction, Pet'n at 28, and may not "resolve contested questions of law" in the absence of jurisdiction, *id.* at 30. But *Sinochem* states clearly: "Resolving a *forum non conveniens* motion does not entail any assumption by the court of substantive 'law-declaring power.'" 549 U.S. at 433. Nothing in *Steel Co.* suggests that a court may not make non-merits decisions before deciding Article III standing; if that were the rule, a court could not even rule on routine procedural matters before determining standing.

2. The Ninth Circuit's decision must be correct because an appellate court must be permitted to remand standing issues that require factual development rather than decide them in the first instance on appeal. Where a case has been dismissed on *forum non conveniens* grounds, the case could not be remanded for such factual development unless the dismissal is vacated or reversed.

Although courts must satisfy themselves of their own jurisdiction, and may not decide cases on the merits where jurisdiction is lacking, appellate courts have "discretion to remand issues, even jurisdictional ones, to the trial court when that court has not had the opportunity to consider the issue in the first instance." *Salmon Spawning & Recovery Alliance v. United States Customs & Border Protection*, 550 F.3d 1121, 1134 (2008) (collecting cases). This is especially necessary where, as here, the appellate court determines that the facts must first be developed at the district court. In *Reno v. Catholic Social Services*,

509 U.S. 43 (1993), for example, this Court determined that Article III jurisdiction depended on whether a particular application for adjustment of status was rejected at the "front desk"– which could not be ascertained from the record. *Id.* at 63-65. "This lack of evidence precludes us from resolving the jurisdictional issue here . . . we must vacate the judgment of the Court of Appeals, and remand with directions to remand to the respective District Courts for proceedings to determine which class members were front-desked." *Id.* at 66-67.

Petitioners imply that factual development is not needed for determination of Amazon Watch's standing, but that is beside the point – regardless of whether such factual development was necessary here, it is obviously necessary in *some* cases, and if so then there must be no categorical rule against remand to determine standing.

There is no way to reconcile the possibility that factual development would be required to determine standing (or other jurisdictional issues) with petitioners' proposed rule that an appellate court cannot reverse a *forum non conveniens* dismissal without addressing all jurisdictional objections. Perhaps petitioners are suggesting that an appellate court could remand for factual development without addressing the *forum non conveniens* dismissal. In that case the district court's jurisdiction over the dismissed case would be doubtful, but in any event such a remand – which would necessarily imply that the district court had erred by addressing *forum non conveniens* without first addressing subject matter jurisdiction and developing the facts necessary to do so – would directly contravene *Sinochem*.

II. The Ninth Circuit's decision does not conflict with any decision from any other circuit, and is fully consistent with the Second Circuit's jurisprudence.

No Court of Appeals has adopted petitioners' view of *Sinochem*, but petitioners claim that the Ninth Circuit's decision on the deference afforded to Amazon Watch's choice of forum creates a split with cases from two other circuits. Those cases, from the D.C. Circuit and the Second Circuit, disregarded the interests of a domestic plaintiff where the courts found that the forum choice of such plaintiffs was not motivated by genuine convenience. But since there was no such finding here, and the Ninth Circuit rejected that characterization (and the facts do not support it), there is no circuit split.

1. There is no split with the D.C. Circuit, because here, unlike in the case on which petitioners rely, there was no suggestion in the record that the U.S. plaintiff was added for tactical reasons. In *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), the D.C. Circuit found that the fact that one of the plaintiffs was a U.S. resident was "not in any way dispositive" of the *forum non conveniens* challenge, *id.* at 798, and that the *forum non conveniens* analysis should not be "overly protective of the discretion of plaintiffs to sue in inconvenient forums when all other private and public factors clearly favor dismissal." *Id.* at 799.

Although *Pain* was hardly a close case – unlike here, the court found that the public and private convenience factors favored dismissal – the court of appeals found reason to disregard the U.S. plaintiff's choice of forum because there was "some suggestion

in the record that that plaintiff may have been made a party precisely to defeat dismissal on forum non conveniens grounds," *id.* at 797, and cited record evidence in support of this conclusion, *id.* at 797 n.130. Here, by contrast, there has been no such finding; indeed, the record evidence confirms Amazon Watch's participation in these matters for many years preceding its decision to join as a plaintiff. The Ninth Circuit's decision does not conflict with *Pain*.

2. Nor is there any conflict with the Second Circuit's jurisprudence, on which the Ninth Circuit relied extensively. Indeed, the Second Circuit recognizes that substantial deference is afforded a plaintiff's choice of forum when it is motivated by the necessity to obtain jurisdiction over the defendants, which is the case here.

Petitioners cite *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001), which held that "the degree of deference to be given to a plaintiff's choice of forum moves on a sliding scale depending on several relevant considerations," such that "[t]he more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice." *Id.* at 71-72. Although petitioners suggest that the Ninth Circuit applied a "rigid, binary approach to deference," the opinion below did no such thing. The Ninth Circuit below cited several reasons to indicate that the plaintiffs' choice of forum was dictated by valid motivations: In addition to the fact that Amazon Watch, which had been supporting the Achuar for many years even before joining as a plaintiff, is headquartered in California, Oxy's

headquarters are located in California, and some of the alleged tortious conduct allegedly occurred in California. Pet'n App. 20a.

Most importantly, *Iragorri* itself recognized that deference is appropriate when it appears that the plaintiff has chosen the defendant's home forum due to the uncertainty of obtaining jurisdiction over the defendant in the plaintiff's home forum, noting that where a plaintiff

> leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit, this would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant. This is all the more true where the defendant's amenability to suit in the plaintiff's home district is unclear. A plaintiff should not be compelled to mount a suit in a district where she cannot be sure of perfecting jurisdiction over the defendant, if by moving to another district, she can be confident of bringing the defendant before the court.

274 F.3d at 73. Although the Second Circuit was specifically referring to U.S. residents suing in other districts, the same reasoning applies where a foreign plaintiff comes to the U.S. home of a defendant in order to ensure jurisdiction over the defendant. In subsequent caselaw, the Second Circuit has clarified that although there is no automatic rule granting deference to foreign plaintiffs who sue in the defendant's home forum, "substantial deference

would still be generally appropriate" when a plaintiff chooses to sue in the defendant's home forum in order "to obtain jurisdiction over [the] defendant." *Pollux Holding, Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 74 (2d Cir. 2003).

In *Norex Petroleum, Ltd. v. Access Industries, Inc.*, 416 F.3d 146 (2d Cir. 2005), the Second Circuit vacated a *forum non conveniens* dismissal where it was "doubtful" that the foreign plaintiff "could have perfected jurisdiction over all defendants in either of its presumptively convenient home forums," precisely because – following *Iragorri* – the plaintiff's decision to litigate "where all defendants were amenable to suit (and where some reside or are incorporated) is properly viewed as a strong indicator that convenience, and not tactical harassment of an adversary, informed its decision to sue outside its home forum." *Id.* at 155. The Ninth Circuit specifically relied on *Norex* in determining that deference was warranted here. Pet'n App. 20a-21a.

Petitioners' suggestion that the Ninth Circuit's decision is in conflict with *Iragorri* and its progeny is incorrect. In fact, these cases provide strong support for the Ninth Circuit's conclusion that substantial deference was appropriate in part because the plaintiffs sued in Oxy's home forum to ensure jurisdiction over the defendants.

III. Review is not warranted because the alleged errors would make no difference in this case.

Even if the petitioners had pointed to actual flaws in the Ninth Circuit's reasoning or application of the relevant standards, review would not be warranted here because the claimed errors are

immaterial in this case. Although petitioners suggest that the *forum non conveniens* analysis was flawed because it assumed Amazon Watch's standing, the Ninth Circuit made it clear that the district court is free to reconsider *forum non conveniens* if Amazon Watch is dismissed as a plaintiff. The only issue is which court decides these matters first. The level of deference afforded to Amazon Watch's forum choice made no difference, because the Ninth Circuit found – in analysis with which petitioners do not take issue – that *none* of the public and private convenience factors favor dismissal. Finally, petitioners suggest that statements in *dicta* strengthen the case for review, but *dicta* necessarily would not change the outcome.

A. Review is unwarranted and premature because, if Amazon Watch lacks standing, petitioners will have the opportunity to raise *forum non conveniens* again.

This case is at a preliminary stage in which review by this Court is unnecessary and premature. While petitioners urge scrutiny of Amazon Watch's standing, the Ninth Circuit remanded to the district court to consider precisely that question. And while petitioners argue that Amazon Watch should not have been given significant weight in the *forum non conveniens* analysis, they will have the opportunity to raise a new *forum non conveniens* motion if the district court determines that Amazon Watch does not, in fact, have standing.

Regardless of whether Amazon Watch has standing, the Ninth Circuit's decision will not prejudice petitioners. If Amazon Watch has standing,

there is no harm, because the Court of Appeals assumed its standing for the purpose of its *forum non conveniens* analysis. If Amazon Watch lacks standing, then petitioners will get exactly what they want – a *forum non conveniens* analysis that does not consider Amazon Watch. Either way, review by this Court is unnecessary.

B. Because none of the public and private factors weighed in favor of the foreign forum, the level of deference afforded did not affect the outcome.

Petitioners' only substantive quarrel with the Ninth Circuit's application of the *Piper* standard is the level of deference granted to Amazon Watch. But this made no difference to the outcome, because none of the public and private interest factors favored dismissal.

As the Ninth Circuit summed up, in analysis that petitioners do not challenge:

> The private factors based on convenience and evidentiary concerns favor neither side, while the residence of the parties and enforceability of the judgment factors weigh against dismissal. All of the public interest factors are neutral.

Pet'n App. 31a. Thus, the Ninth Circuit stated that petitioners simply had not met their burden to show "'oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience.'" *Id.* (quoting *Piper*, 454 U.S. at 241).

The Ninth Circuit went on to say that the factors "*also* fail to outweigh the deference owed to Amazon Watch's chosen forum." Pet'n App. at 31a (emphasis added). But given that none of the factors weighed in favor of dismissal, the level of deference afforded is immaterial to the result. Even if the plaintiffs' choice of forum were afforded no deference at all, the factors, on balance, weighed in favor of retention of the case. In *Piper Aircraft*, this Court indicated that where strong deference to the plaintiff's choice of forum is warranted, dismissal is warranted "only when the private and public interest factors clearly point towards trial in the alterative forum." 455 U.S. at 255.

Because petitioners do not challenge the Ninth Circuit's analysis of the individual factors, their objections could not change the result here.

C. Certiorari is not appropriate to review *dicta*.

Perhaps ironically in a petition where they suggest that there is no real case or controversy under Article III, petitioners argue that alleged *dicta* by the Ninth Circuit is "further grounds for granting certiorari." Pet'n at 31. This Court should not grant certiorari to correct what petitioners argue is *dicta*.

Petitioners argue that the Ninth Circuit's discussion of whether the district court erred in failing to impose appropriate conditions of dismissal was *dicta* because the Ninth Circuit reversed that dismissal. Pet'n at 13 n.6. Nonetheless, petitioners suggest that, before determining Article III jurisdiction, such conditions could not be imposed because the court might lack power over the defendants. This objection is misplaced, of course,

because there is no question that the district court had subject matter jurisdiction over all of the claims of the Achuar plaintiffs. In any event, it is not a reason to grant certiorari. If this Court wishes to decide the question of whether conditions can be imposed in a *forum non conveniens* dismissal where objections to subject matter jurisdiction have not been resolved, it will need to do so in a case where that question is actually presented; otherwise the Court's ruling, too, would merely be *dicta*.

IV. Summary reversal is highly inappropriate where no lower court has addressed the substantive issue, and in any case cannot be granted because Amazon Watch plainly has standing.

Petitioners urge this Court to summarily reverse and decide an issue that no lower court has passed on: whether Amazon Watch has standing. It can hardly be said that certiorari is warranted to correct a mistake that the lower courts have not yet even made. In any event, petitioners are wrong in claiming that Amazon Watch lacks standing.

Petitioners argue that that because Amazon Watch's activities with respect to Oxy's contamination of Lot 1AB did not begin until after Oxy left Peru, Amazon Watch's injuries cannot be traceable to Oxy's actions. This is wrong, for two reasons. First, although Oxy left Lot 1AB in 2000, the harm from Oxy's operations there is ongoing. As the complaint alleges, both the pollutants left behind by Oxy and the systems designed by Oxy continue to pollute the Achuar communities. ER 35, 43, 45-47, 55. Combating this ongoing pollution diverts Amazon Watch's resources and frustrates its mission of

protecting indigenous groups such as the Achuar. Second, the complaint also alleges that Oxy fraudulently concealed the contamination and the health risks resulting from the hazardous wastes from their operations. ER 34-36. This practice is ongoing, and Amazon Watch has expended resources in countering Oxy's fraudulent misinformation. ER 36-41.

These allegations are sufficient to confer standing pursuant to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Just as the plaintiff in that case had suffered injury because its activities of counseling low-income home-seekers were frustrated by illegal discriminatory steering practices, Amazon Watch's ability to protect the rights of the Achuar communities has been "perceptibly impaired" by Oxy's conduct. *Id.* at 379. Although Petitioners suggest that this harm is "self-inflicted," Pet'n at 32, that is no more the case than in *Havens Realty* itself. There, the plaintiff could have chosen not to provide services to assist low-income individuals in seeking housing, and could have chosen not to "'devote significant resources to identify and counteract the defendant's racially discriminatory steering practices.'" 455 U.S. at 379.

Petitioners cite *Fair Employment Council v. BMC Marketing Corp.*, 28 F.3d 1368 (D.C. Cir. 1994), in support of their position that Amazon Watch's injury is purely "self-inflicted" and not traceable to Oxy. Pet'n at 32. But *Fair Employment Council* amply demonstrates Amazon Watch's standing. The D.C. Circuit, citing *Havens Realty*, stated that if the defendant's "discriminatory actions have 'perceptibly impaired'" the plaintiff's programs, standing is

present. *Id.* at 1276. There can be little doubt that Amazon Watch's programs of protecting the land and indigenous people of the Peruvian Amazon have been impaired both by the ongoing contamination from Oxy's operations and by Oxy's failure to inform the Achuar of the health risks of the contamination. *See* ER 36-41.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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