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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ARCHANGEL DIAMOND CORPORATION
LIQUIDATING TRUST,

Petitioner,

v.

OA O LUKOIL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Absent extraordinary circumstances, should federal courts deny *forum non conveniens* dismissal of an American resident plaintiff's RICO claims in order to fulfill Congress' policy that RICO plaintiffs be incentivized through treble damages and attorney fees to act as private attorney generals to remedy serious national problems for which public prosecutorial resources are inadequate?

RULE 29.6 STATEMENT

Anglo American PLC is a publicly traded company and has a majority shareholding of De Beers SA, which has an indirect majority shareholding in Cencan SA, which has a greater than 10% interest in Petitioner. To Petitioner's knowledge, there is no other parent corporation or publicly held corporation that owns 10% or more of its stock or membership interests.

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The decision of the Tenth Circuit (App., *infra*, 3a-22a) is reported at 812 F.3d 799. The decision of the Tenth Circuit denying the petition for rehearing and rehearing en banc (*id.* at 1a - 2a), is unreported. The decision of the United States District Court for the District of Colorado (*id.*, at 23a - 94a), is reported at 75 F. Supp. 3d 1343.

JURISDICTION

The judgment of the Tenth Circuit was entered on February 9, 2016. That court denied a timely petition for rehearing and rehearing en banc on April 1, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254(1). The district court's jurisdiction rests upon 28 U.S.C. § 1331 and 1337(a) and 18 U.S.C. § 1964(c) because the case arose under the laws of the United States based on claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961-1968.; and pursuant to 28 U.S.C. §1332(a) based upon diversity of citizenship.

STATEMENT OF THE CASE

Petitioner Archangel Diamond Corporation Liquidation Trust ("Petitioner") is a liquidating trust created by the Bankruptcy Court for the District of Colorado. It is a Colorado citizen based on the citizenship

of its trustee and maintains its principal place of business in Colorado. It is the successor to Archangel Diamond Corporation (“Archangel”), which maintained its principal place of business in Colorado at all relevant times.

FACTUAL BACKGROUND

In 1993, Archangel, then based in Canada, entered into an agreement with a Russian state entity, subsequently privatized and now known as Archangelskgeoldobycha (“AGD”) which was bidding for a diamond exploration/development license (the “License”) in Russia. In return for Archangel’s serving as its sole source of finance, AGD agreed to transfer the License to a joint venture company in which Archangel would have a 40% interest. AGD won the License and Archangel provided funds. In 1996, AGD discovered diamonds worth billions. In 1997, Archangel moved its principal office to Colorado, where its CEO, CFO, and many other employees resided. App. 4a - 5a.

The 1999 Illegal Scheme

After taking control of AGD in February 1998, OOO Lukoil (“Lukoil”), Russia’s largest oil company with extensive American operations from Maine to Florida, engaged in an “Illegal Scheme” to harm Archangel. Lukoil wired and mailed over 75 fraudulent communications to lull Archangel into believing AGD would transfer the License. The fraudulent communications were received by, relied upon, and harmed Archangel in Colorado, causing it to spend millions of dollars to support the License. Lukoil never intended to transfer the License. It wanted only to obtain financing from Archangel before forcing it into bankruptcy and stealing the profits from the diamond mine. App. 28a - 29a.

The Illegal Scheme Continues into 1999 and 2000

When the License had not been transferred, Archangel filed arbitration against AGD and Lukoil in Stockholm in August 1998. The arbitrators held they lacked jurisdiction over Lukoil, but heard claims against AGD. Lukoil, through AGD, then induced Archangel to enter into the “1999 Agreement” to stay the arbitration and provide further investment. Lukoil then sent many more fraudulent communications to lull Archangel into believing AGD would honor the Agreement and the 1999 Agreement. When AGD dishonored the 1999 Agreement, Archangel renewed arbitration in October 2000. In July 2001, the arbitrators held they lacked jurisdiction over the dispute. App. 5a.

Colorado State Court Claims

In November 2001, Archangel brought claims against AGD and Lukoil in Colorado state court. In October 2002, the trial court dismissed for lack of personal jurisdiction. As a result, Archangel terminated all of its Colorado employees and closed its office. In 2005, the Colorado Supreme Court affirmed dismissal of AGD but reversed as to Lukoil. In the meantime, in November 2005, the Swedish court reversed the dismissal of AGD in the arbitration. In May 2007, the arbitration was renewed. Colorado state court litigation continued. App. 6a - 7a.

Bankruptcy

In June 2009, Archangel, drained of all resources by the Colorado litigation and Swedish arbitration, as Lukoil intended, was placed into bankruptcy in Colorado.

Archangel's only assets were its claims against Lukoil and AGD, which were placed into a liquidating trust (Petitioner) with a Colorado resident trustee. Petitioner has in excess of 30 American beneficiaries. The Bankruptcy Court approved counsel and an expense funder to prosecute the claims against Lukoil, on a contingency basis. The arbitration against AGD had no funder and was terminated in October 2009. It was uncontroverted that neither Petitioner's counsel nor its expense funder, nor anyone else, is willing to prosecute claims on a contingency basis against powerful Lukoil in easily influenced Russian courts. Termination of this litigation, therefore, is the "death knell" of Petitioner's claims. App. 19a; 32a.

PROCEDURAL BACKGROUND

District Court Proceedings

In January 2012, Petitioner brought claims in the District of Colorado under RICO, and Colorado statutory and common law, after the state court dismissed again for lack of personal jurisdiction in October 2011 and later affirmed on appeal. Unlike many RICO cases, the Complaint does not allege "garden variety" fraud claims nor is the harm caused limited to private parties. App. 33a.

First, Lukoil violated RICO (18 U.S.C. §1962(c) & (d)) by operating the AGD enterprise through a pattern of racketeering directed at Archangel in Colorado from February 1998 through at least August 2000. Lukoil conducted the operations of AGD through a pattern of over 75 predicate acts of mail and wire fraud (18 U.S.C. §§1341 and 1343). CA 10 Appendix A98-107. Petitioner claims damages of millions of dollars to recover the funds which

it was defrauded into providing to AGD, plus hundreds of millions of dollars for lost profits related to the diamond mine.

Second, Lukoil violated RICO (18 U.S.C. §1962 (c) & (d)) by operating Colorado-based DS Engineering, Inc. (“DSE”) and offshore “Slush Fund Companies” enterprises (Oldberry Investment, Ltd., Gilwood Investments, Ltd., and Lukoil Israel, Ltd.) through a pattern of racketeering. From March 1999 through at least 2010, Lukoil, through the enterprises and its agents, including U.S. residents, committed hundreds of racketeering acts as its regular way of conducting business. This included the “Cash Smuggling” scheme by which its Colorado employees smuggled an average of \$40,000 cash to Russia monthly for over ten years, violating the anti-money laundering statute (18 U.S.C. §1956(a)) and Travel Act (18 U.S.C. §1952) by “structuring” the cash in bundles of less than \$10,000 to evade currency reporting requirements. DSE sent invoices for the cash by wire, and Lukoil directed Slush Fund Companies to reimburse the cash by wire in violation of the wire fraud statute.¹ CA 10 Appendix A98-107.

1. Under *H.J. Inc. v. Northwest Bell Tel. Co.*, 492 U.S. 229, 239-240, 242 (1989), Petitioner pled DSE-related conduct to establish a pattern of racketeering through “multiple schemes” over many years and “a regular way of conducting defendant’s ongoing legitimate business.” “A pattern of racketeering activity may be based upon predicate acts directed against non-plaintiffs as long as one act injures the plaintiff so as to create standing for that plaintiff.” *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1347 (2d Cir.1994).

Dismissal

In December 2014, the District Court dismissed for lack of personal jurisdiction and *forum non conveniens*. As the District Court recognized, dismissal for *forum non conveniens* is an “extraordinary” remedy that should only rarely be granted. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 721-22 (1996). An American plaintiff’s choice of an American forum is entitled to substantial deference, *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 606 (10th Cir. 1998), and “should rarely be disturbed.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981). Beyond deference, in the Tenth Circuit, the *forum non conveniens* analysis is a two-pronged inquiry. The defendant must establish (1) an “available and adequate alternate forum” can hear the case, *Fireman’s Fund Ins. Co. v. Thyssen Mining Constr. of Can.*, 703 F.3d 488, 495 (10th Cir. 2012), and (2) retaining the case in the plaintiff’s chosen forum would “establish... oppressiveness and vexation to a defendant... out of all proportion to plaintiff’s convenience, or when the chosen forum [is] inappropriate because of considerations affecting the court’s own administrative and legal problems.” *Piper*, 454 U.S. at 241 (quotations omitted).

The District Court correctly held Petitioner’s forum choice was entitled to a “strong presumption” and “substantial deference.” App. 83a. Under *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947), the District Court found the private interest factors weighed for Petitioner, but it did not give full consideration to Petitioner’s uncontested evidence that dismissal to Russia would be the “death knell” of its claims,² and Petitioner’s key

2. *OMI Holdings v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1097 (10th Cir. 1998), observed litigation in another forum might impose

Colorado witnesses, i.e. the former Archangel officers and employees, would testify live in Colorado, but not go to Russia, while Lukoil's Russian witnesses were under its control and available to testify in Colorado.³ App. 89a - 90a. The District Court erroneously held the *Gilbert* public interest factors "weigh heavily" for dismissal based in part on its *sua sponte* determination that finding interpreters for Lukoil's four Russian witnesses to testify at trial would be an administrative burden, App. 90a, and "Russian law applies to a significant part of the parties' dispute," despite Petitioner bringing only RICO and domestic law claims. App. 87a. The District Court gave no consideration to the public policies underlying RICO.

The Tenth Circuit Decision

The Court of Appeals affirmed only on *forum non conveniens*. App. 22a. It concluded that it did not have a "firm conviction" the District Court abused its discretion in finding the private interest factors only slightly favored Petitioner, and giving little weight to dismissal being the "death knell" of Petitioner's claims, App. 19a, and that the

a burden "so overwhelming as to practically foreclose pursuit of the lawsuit". *Rivendell Forest Prods. v. Canadian Pac. Ltd.*, 2 F.3d 990, 994, fn. 7 (10th Cir. 1993)), stated "[t]he shifting of costs ... may be a relevant consideration in granting dismissal ... when the moving party has substantially fewer financial resources than the non-moving party." Nonetheless, neither the District Court nor Tenth Circuit gave this much consideration.

3. The "ability to produce live testimony can weigh strongly in favor of a particular forum." *Interfact Partners Intern. Ltd. v. Hannah*, 575 F.3d 97, 105 (1st Cir. 2009). See 17 Moore's Federal Practice §111.74 ("live testimony of witnesses is considered especially important in actions ... such as fraud") (citation omitted). Colorado is the only forum where all witnesses will testify live.

District Court's conclusion regarding the public interest factors was not "plainly unreasonable," App. 21a, even though there was no evidence that finding interpreters for a mere four witnesses would pose a burden on the District Court or that Petitioner's claims implicated difficult issues of Russian law. Like the District Court, the Tenth Circuit gave no consideration to the important public policy concerns underlying RICO. It simply dismissed "the importance of enforcing RICO ... in United States courts" as neither "dispositive nor convincing." App. 22a. Petitioner's petition for en banc review and panel reconsideration was denied.

REASONS FOR GRANTING THE PETITION

Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction provided by Congress. *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). *Forum non conveniens* proceeds from a premise similar to abstention doctrines, as discussed in *Quackenbush*, although different factors are considered. *Id.*, 517 U.S. at 721-22. Based on these concerns, dismissal for *forum non conveniens* is an "extraordinary" remedy that should only rarely be granted. *Id.* Thus, an American plaintiff's choice of an American home forum "should rarely be disturbed." *Piper*, 454 U.S. at 241.⁴ This Court has never affirmed *forum non dismissal* of an American resident plaintiff's federal claims to a foreign forum.

4. Notably, *forum non conveniens* dismissal imposes a much greater burden on an American plaintiff, relegating Petitioner to a far-away Russian forum governed by Russian law in Russian language proceedings, compared to *Colorado River*, where abstention was to a state court.

The Tenth Circuit, as well as other Circuits affirming *forum non conveniens* dismissal of RICO claims, fail to consider the compelling public interest reasons that federal courts should not abstain from hearing an American resident plaintiff's RICO claims absent extraordinary circumstances. They ignore that RICO is to "be liberally construed to effectuate its remedial purposes... [which] are nowhere more evident than in the provision of a private action for those injured by racketeering activity" to supplement government efforts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1985). These courts also give no weight to RICO's "design[] to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees ... [bringing] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective [of] RICO is the carrot of treble damages." *Agency Holding Corp. v. Mallery-Duff & Assoc. Inc.*, 483 U.S. 143, 151 (1987). These decisions are contrary to the dictates of *Colorado River*, *Quackenbush*, and *Piper*. This Court should correct this nationwide error.

I. THE TENTH CIRCUIT'S DECISION, ALONG WITH THOSE OF OTHER CIRCUITS, CONFLICTS WITH *COLORADO RIVER*, *QUACKENBUSH*, AND *PIPER* AND SEVERELY LIMITS RICO AS A STATUTORY TOOL AGAINST CROSS-BORDER CRIMINAL ACTIVITIES.

The Tenth Circuit's decision, along with those of other Circuits dismissing RICO claims for *forum non conveniens*, presents a significant issue of exceptional importance because it fails to fulfill the jurisdiction

provided by Congress and severely limits RICO as a civil tool to combat cross-border misconduct brought by private litigants who are following Congress' invitation that they act as "private attorneys general." *Rotella v. Wood*, 528 U.S. 549, 557 (2000). In this case, it also denies an American plaintiff its right to have disputes decided at home before an American jury and under American law. *Piper*, 454 U.S. at 241.

The Tenth Circuit and other decisions conflict with *Colorado River's* admonition that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction provided by Congress, *Quackenbush's* statement that *forum non conveniens* is an "extraordinary" remedy, and *Piper's* caution that an American plaintiff's choice of forum "should rarely be disturbed." They wrongly focus on whether the foreign forum provides adequate remedies to replace those offered by RICO, rather than on the *Gilbert* public interest factors implicating Congress' concerns, thereby compromising RICO's public policy to incentivize plaintiffs to act as "private attorneys general" in order to supplement federal and state law enforcement.

The decisions affirming *forum non conveniens* dismissal of RICO claims give no real consideration to the United States' "substantial interest" in enforcing the federal ... laws ... [and] in discouraging injuries that occur within its boundaries" which is recognized when determining personal jurisdiction when federal claims are at issue. *Synthes (U.S.A.) v. G.M. Dos Reis Jr. Ind. Com. De Equip. Medico*, 563 F.3d 1285, 1299 (Fed. Cir. 2009). The "virtually unflagging obligation" to exercise jurisdiction is underscored in this case, where the District Court found Petitioner's choice of forum was entitled to "substantial deference", and the *Gilbert* private interest factors favored Petitioner. Federal courts should not

dismiss RICO claims for *forum non conveniens* absent exceptional circumstances for numerous reasons.

A. *Forum Non Conveniens* Dismissal Denies Full Weight to RICO's Public Policies

Dismissing RICO claims for *forum non conveniens* simply because a foreign forum may offer an adequate damages remedy eviscerates Congress' stated purpose of incentivizing private citizens to supplement law enforcement in the United States. Federal courts should give full weight to this public policy before abstaining from jurisdiction. *See Sedima*, 473 U.S. at 500 ("It is not for the judiciary to eliminate the [RICO] private action in situations where Congress has provided it"). RICO is to "be liberally construed to effectuate its remedial purposes... 84 Stat. 947." *Sedima*, 473 U.S. 479 at 497-98. RICO's "remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity" under §1964(c) to supplement government efforts. *Id.* RICO is "designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees ... [bringing] to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective [of] RICO is the carrot of treble damages." *Agency Holding*, 483 U.S. at 151. *Forum non conveniens* dismissal thwarts these purposes.

B. *Forum Non Conveniens* Dismissal Ignores RICO'S Venue Provision

United States v. National City Lines, Inc., 334 U.S. 573 (1948) held that the venue provision of the Clayton Act deprived a court of discretion to dismiss a Sherman

Act suit to another district on *forum non conveniens* grounds. As *National City* reasoned, “[t]o have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by *forum non conveniens*, would have been incongruous, to say the least.” *Id.* at 581 (footnotes omitted). *National City* further held, “Congress’ mandate regarding venue and the exercise of jurisdiction is binding upon the federal courts. *Const. Art. III, § 2*. Our general power to supervise the administration of justice in the federal courts ... does not extend to disregarding a validly enacted and applicable statute or permitting departure from it.” 334 U.S. at 589. Although the venue provision was later amended at 28 U.S.C. §1404, it only authorizes the transfer of a case from one federal district to another. It does not permit *forum non conveniens* dismissal to a foreign forum.

In reversing the *forum non conveniens* dismissal of a Sherman Act claim, *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), vacated and remanded on other grounds, 460 U.S. 1007 (1983) relied on *National City*’s limitation that the venue provision preclude *forum non conveniens* dismissal, and further reasoned:

Sections 1 and 2 of the Sherman Act do not by their terms purport to define civil obligations owed by one party to another; they make it felonious to restrain unreasonably or to monopolize the commerce of the United States. The treble damages action created for “private attorneys general” by § 4 of the Clayton Act, while “designed primarily as a

remedy,” *Brunswick*, 429 U.S. at 486, 97 S. Ct. at 696, is designed at least in part to “penalize wrongdoers and deter () wrongdoing.” *Id.* at 485, 97 S. Ct. at 696 ... A dismissal for *forum non conveniens*, then, would be the functional equivalent of a decision that defendants’ acts are beyond the reach of the Sherman Act.

Mitsui, 610 F.2d at 891.

RICO is modeled after the antitrust laws, as *Agency Holding* observed: “RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney’s fees. Both statutes bring to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate.” *Id.*, 483 U.S. at 151. RICO’s venue provision is essentially identical to those of the antitrust laws.⁵ Under the logic of *National City* and *Mitsui*, *forum non conveniens* should not apply to RICO. At a minimum, federal courts should take into account the significant public policies underlying RICO before ordering the extraordinary remedy of dismissal, as occurs under the anti-trust laws.

5. See 18 U.S.C. §1965(1) (“Any civil action or proceeding under this chapter [18 USCS §§ 1961 et seq.] against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.”). Cf. 15 U.S.C. §22 (“Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business, and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.”)

C. *Forum Non Conveniens* Dismissal Defeats Congress' Intent That RICO Would Apply to Foreign Conduct and Defendants

RICO's substantive sections, §1962(a), (b), and (c), make it unlawful through a pattern of racketeering to invest in, acquire any interest or control in, or conduct or participate in the affairs of "any enterprise which is engaged in, or the activities of which affect, interstate or *foreign commerce*." 18 U.S.C. § 1962 (emphasis added). Congress placed the language addressing "foreign commerce" in RICO's substantive provisions, not in a mere subsidiary definition of commerce. This clearly evidences Congress's intent that RICO would apply to racketeering in foreign commerce and by foreign defendants. Dismissal for *forum non conveniens* defeats this application.⁶

6. As Professor Lear observed, "Forum non conveniens dismissals in disputes governed by United States statutory law present a head-on conflict with Congress. Without question, Congress has the constitutional power to create legislation that regulates conduct abroad. Once a court concludes that Congress has sought to regulate the event in dispute, there is no place for a forum non conveniens inquiry to operate. The very questions central to the forum non conveniens assessment have already been answered by the democracy." Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 Iowa Law Review, 1147, 1177-78 (footnote omitted) (2006).

D. *Forum Non Conveniens* Dismissal Defeats Congress' Inclusion In RICO Of Many Racketeering Acts Which By Definition Occur Abroad

RICO makes it unlawful to engage in “a pattern of racketeering activity,” 18 U.S.C. § 1962, and “racketeering activity” specifically includes twenty-five racketeering acts that facially apply to extraterritorial conduct, *id.* § 1961(1). These acts include many crimes that by definition occur abroad, including two pled here, 18 U.S.C. § 1952 (foreign travel in aid of racketeering) and 28 U.S.C. § 1956 (international money laundering). Congress' recent amendment to RICO underscores its interest in combatting foreign related crime.⁷ RICO's text clearly evidences Congress' interest in its application to foreign defendants and its legislative history compels the same conclusion.⁸ *Forum non conveniens* dismissal defeats these considerations.

7. The “USA Patriot Act”, 115 Stat. 382 (2001) added subsection G to §1961(1) which made “any act that is indictable under any provision listed in section 2332(g)(5)(B)” of Title 18 a predicate act. Subsection G now contains over fifty offenses mainly dealing with international terrorism as RICO acts, including many which by definition occur abroad, such as violation of 18 U.S.C. § 32 (destruction of aircraft in overseas or foreign air commerce); 18 U.S.C. § 2332a (use of weapons of mass destruction against Americans or U.S. property abroad); 18 U.S.C. § 2332b (terrorism transcending national boundaries); 18 U.S.C. § 2339B (supporting foreign terrorist organizations); and 18 U.S.C. § 2339C (financing terrorism abroad).

8. In 1970, Congress found America awash in organized crime activities that “seriously burden ... foreign commerce.” 84 Stat. 923 (1970). Congress further found “organized crime’s “operations are national and international.” Cong. Rec. Vol.

E. This Case Presents A Classic Application For RICO

Lukoil's pattern of racketeering from 1999 through 2010 not only targeted Petitioner, but involved hundreds of DSE-related racketeering acts which defrauded the United States in violation of currency reporting requirements. The U.S. interest in enforcing RICO to deter criminal acts through "private attorneys general" overwhelms any administrative burden on the district court to provide interpreters for Lukoil's four Russian witnesses or to decide limited issues of Russian law. Whether Russia has an interest in this dispute because Lukoil is a defendant or the diamond mine is located there is irrelevant when crimes occurred and harm suffered in the United States are at issue. This Court should grant the Petition and provide clear guidance to the lower courts that RICO claims by American resident plaintiffs should not be dismissed for *forum non conveniens*, absent exceptional circumstances.

II. THE ISSUE PRESENTED HERE IS SIGNIFICANT AND RECURRING.

The significance of the Tenth Circuit's decision, as well as those of other circuits, transcends this case. Circuits that have affirmed and continue to affirm *forum non*

116, 819 (1970). "Because many rackets are conducted by highly organized syndicates whose influence extends over State and National borders, the Federal Government should come to the aid of local law enforcement authorities." *Id.* at 844. The Senate Report even described the problems of international money laundering, referencing criminal organizations' ability to draw \$50 million checks from "numbered" Swiss bank accounts. *Id.* at 597.

conveniens dismissal of RICO cases have wrongly focused on *Piper's* language that a change in remedy is not an obstacle to dismissal. This wrongly conflates whether the foreign forum is adequate with the public interest. See e.g. *Yavuz v. 61 MM, Ltd.*, 576 F.3d 1166, 1177 (10th Cir. 2009) (“even though certain claims, such as Yavuz’s RICO claim, may not be available in Swiss courts, Switzerland may still be an adequate forum”); *PT United Can Co. v. Crown Cork & Seal Co.*, 138 F.3d 65, 74 (2d Cir. 1998) (“The availability of an adequate alternate forum does not depend on the existence of the identical cause of action in the other forum”); *Richards v. Lloyd’s of London*, 135 F.3d 1289, 1296 (9th Cir. 1998) (“the loss of RICO claims does not suffice to bar dismissal for forum non conveniens.”); *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 952 (11th Cir. 1997) (“a plaintiff’s inability to assert a RICO claim in the foreign forum does not preclude *forum non conveniens* dismissal.”)

But the availability of an adequate remedy in foreign forum is not the concern at issue. RICO, the antitrust laws, and similar statutes are designed to protect the *public* welfare and this must be considered through the lens of the *Gilbert* public interest factors. RICO was enacted to provide resources to overwhelmed law enforcement to deter criminal activity, particularly interstate and international misconduct. Like the antitrust laws, its provisions for treble damages and legal fees are not designed just to provide compensation, but to provide a “carrot” to incentivize “private attorneys general” to provide support for the public good. *Agency Holdings*, 483 U.S. at 151. Unless this Court provides clear guidance that RICO claims brought by American resident plaintiffs may only be dismissed for *forum non conveniens* based

on extraordinary circumstances, such as an overwhelming burden on the foreign defendant, or a compelling burden on the court system, RICO's important policies will be severely damaged.

III. THE FINDINGS OF THIS CASE PERMIT THIS COURT TO DECIDE THE MATTER BASED SOLELY ON THE *GILBERT* PUBLIC INTEREST FACTORS.

Unlike other *forum non conveniens* cases, this case presents a straightforward opportunity for this Court to focus on the import of RICO under the *Gilbert* public interest factors. The District Court found Petitioner's choice of forum is entitled to substantial deference and the *Gilbert* private interest factors favor Petitioner. The only reason supporting dismissal concerned the *Gilbert* public interest factors. Thus, this case turns on the weight – which Petitioner argues should be dispositive – which should be given to the Congressional public policy of encouraging private attorneys general to supplement federal and state law enforcement underlying RICO.

IV. RESOLUTION OF THE IMPORTANT ISSUE OF THE DISPOSITIVE EFFECT OF PUBLIC POLICY INTERESTS UNDERLYING FEDERAL STATUTES SUCH AS RICO MAY ELIMINATE CONFUSION AMONG THE CIRCUITS.

Because this Court has never addressed the public policy concerns implicated by federal statutory claims on *forum non conveniens*, the Circuits have adopted contradictory approaches. As discussed above, the Fifth Circuit does not permit *forum non conveniens* dismissal

of Sherman Act claims based on public policy grounds. *Mitsui*, 610 F.2d at 891. In contrast, the Second Circuit rejected *Mitsui* and affirms *forum non conveniens* dismissal of antitrust claims. *Capital Currency Exchange, N.V. v. National Westminster Bank plc*, 155 F.3d 602 (2d Cir. 1998). And, to add to this confusion, even though the Fifth Circuit refuses to dismiss Sherman Act claims based on public policy, it rejected this approach when applied to RICO. *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144 (5th Cir. 1989) (affirming dismissal of RICO claims).

To top this off, many circuits consider the importance of enforcing federal statutes when determining personal jurisdiction under the Fifth Amendment's due process clause. *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 940 (11th Cir. 1997) ("the fact that the United States is the sovereign asserting its power undoubtedly must affect the way the constitutional balance is struck."); *Synthes*, 563 F.3d at 1299 ("The United States has a 'substantial interest' in enforcing the federal ... laws ... [and] also has an interest in discouraging injuries that occur within its boundaries.") But, inexplicably, the circuits don't consider this when deciding *forum non conveniens*.

Congress' creation of federal statutory rights and provision of jurisdiction to the federal courts has significant import. Substantial public policy concerns are implicated when federal courts abstain from jurisdiction imposed by substantive federal statutes which are designed to encourage domestic litigation, especially when resident American citizens who are harmed in America bring claims. This Court should grant the petition and provide guidance on this important issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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