No. 12-

IN THE
Supreme Court of the United States

CONOCOPHILLIPS COMPANY,

Petitioner,

v.

JARL ABRAHAMSEN, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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February 12, 2013

QUESTION PRESENTED

Whether a district court's discretionary decision to dismiss a case on non-merits grounds without addressing federal subject-matter jurisdiction is subject to abuse-of-discretion review on appeal.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner ConocoPhillips Company hereby states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In 2006, the Third Circuit held that federal courts "must have jurisdiction before they can rule on which forum, otherwise available, is more convenient to decide the merits." *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co.*, 436 F.3d 349, 363-64 (3d Cir. 2006). This Court unanimously reversed, holding that federal courts have discretion to dismiss a case on the non-merits ground of *forum non conveniens* without first addressing their own jurisdiction to decide the merits. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430-35 (2007).

Sinochem governs this case. This is a tort suit brought by 123 Norwegians who allege that they were injured by exposure to harmful substances on the job in Norway. As the district court recognized, the dispute will "almost certainly" be governed by substantive Norwegian law, and the courts of Norway provide a more-than-adequate forum to resolve it. And there is no mystery why plaintiffs filed here: as the district court noted, "[p]laintiffs' counsel has made several statements that indicate that the choice to file in a U.S. jurisdiction was motivated by the perception that 'the sky's the limit when it comes to legal actions in the United States.'" Accordingly, the district court exercised its discretion under *Sinochem* to dismiss the case on *forum non conveniens* grounds without first deciding whether removal from state court was proper under, *inter alia*, the "mass action" provision of the Class Action Fairness Act of 2005 (CAFA), codified in relevant part at 28 U.S.C. § 1332(d).

The Third Circuit, however, vacated the district court's dismissal order on jurisdictional grounds.

According to the Third Circuit, a federal appellate court's "independent obligation" to examine its own subject-matter jurisdiction "entails the authority to examine jurisdictional issues that the District Court chose to bypass, relying on *Sinochem*." Thus, the Third Circuit never reviewed the district court's exercise of its *Sinochem* discretion to address *forum non conveniens* before jurisdiction.

The Third Circuit thereby effectively gutted *Sinochem*. Where, as here, a district court exercises its *Sinochem* discretion to dismiss a case, the question on appeal is whether the district court abused that discretion. A court of appeals cannot evade that discretionary standard of review by invoking its own independent obligation to examine federal subject-matter jurisdiction. *Sinochem* would be meaningless if an appellate court's obligation to examine federal jurisdiction trumped a district court's discretion to dismiss a case on a non-merits ground like *forum non conveniens* without reaching a jurisdictional issue.

As might be expected, the Third Circuit's decision conflicts with decisions of other courts of appeals applying *Sinochem* to affirm non-merits dismissals without first addressing federal subject-matter jurisdiction. More fundamentally, however, the Third Circuit's decision conflicts with *Sinochem* itself. If appellate courts are not required to review a discretionary *Sinochem* decision for abuse of discretion, then the discretion vested in the district court is illusory. Accordingly, this Court should grant the petition, and either summarily reverse the decision below or set the case for plenary review.

OPINIONS BELOW

The Third Circuit's opinion is reported at 2012 WL 5359530, and is reprinted in the Appendix to this petition ("App.") at 1-6a. The district court's unreported opinion is reprinted at App. 9-13a.

JURISDICTION

The Third Circuit entered judgment on November 1, 2012, App. 1a, and denied a timely petition for rehearing on December 5, 2012, App. 7-8a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Background

This case involves alleged injuries suffered by persons engaged in offshore drilling in the Ekofisk oil field off the coast of Norway. *See* Pet. App. 9a n.1. Respondents are 123 former employees or contractors of petitioner's Norwegian affiliates, Phillips Petroleum Company Norway and/or ConocoPhillips Norway, or their estates or family members. *See id.* Respondents allege that, while on the job, these employees or contractors were exposed to "toxic materials, including [but] not limited to, benzene and benzene-containing products such as petroleum products, solvents, and cleaning agents," that caused personal injuries. CA3 App. 179, 222, 266, 300. There is no allegation that any respondent ever lived or worked in the United States, or that any of the challenged exposures occurred anywhere but Norway. *See* App. 9a n.1.

Norway has established a comprehensive legal and regulatory scheme to govern the health, safety, and environmental impact of its offshore drilling

operations. *See* CA3 App. 652-55. Such laws and regulations address, among other things, the health effects of various chemicals, including benzene, on offshore drilling workers. *See id.* In addition, Norway has established a cradle-to-grave social welfare system that provides insurance and benefits for work-related injuries. *See id.* at 644-51. Norwegian law also requires all parent companies of offshore drilling entities operating in its territory to execute a Guarantee Declaration ensuring that Norway can adjudicate all claims for liability brought by persons working for those entities. It is undisputed that petitioner has executed such a Declaration, which would allow respondents to pursue legal recourse against petitioner in Norway. *See id.* at 636-40.

B. Proceedings Below

Notwithstanding the undisputed availability and adequacy of a Norwegian forum, respondents originally filed this case in January 2009 as a putative class action in Texas state court. *See* Pls.' Original Pet., *Holum v. ConocoPhillips Co.*, No. 2009-01-506-D (103rd Dist. Ct., Cameron Cnty., Tex.), CA3 App. 57-80. Petitioner timely removed the complaint to federal court under CAFA and the federal-question statute, 28 U.S.C. § 1331. *See* Notice of Removal, *Holum v. ConocoPhillips Co.*, No. 09-cv-95 (S.D. Tex.), Dist. Ct. Dkt. 1. After petitioner moved to dismiss on a variety of grounds (including *forum non conveniens*), respondents voluntarily dismissed the case without prejudice. *See* Notice of Voluntary Dismissal, Dist. Ct. Dkt. 11; Order of Dismissal, Dist. Ct. Dkt. 13, CA3 App. 82.

In April 2010, respondents re-filed the case as a single multi-plaintiff action in Delaware state court. *See* Compl., *Aarsland v. ConocoPhillips Co.*, No. N10C-04-278 (Super. Ct. New Castle Cnty., Del.), CA3 App. 84-170. Petitioner again timely removed the case to federal court under CAFA and the federal-question statute, and again moved to dismiss on a variety of grounds (including *forum non conveniens*). *See* Notice of Removal, *Aarsland v. ConocoPhillips Co.*, No. 1:10-cv-491 (D. Del.), Dist. Ct. Dkt. 1; Motion to Dismiss, Dist. Ct. Dkt. 7. And again, before responding to the motion, respondents voluntarily dismissed their complaint without prejudice. *See* Notice of Voluntary Dismissal, Dist. Ct. Dkt. 12, CA3 App. 172-74.

In the apparent hope that "the third time's a charm," respondents filed this suit yet again in July 2010 in Delaware state court. To try to avoid removal under CAFA, however, they divided their identically pleaded claims among four separate complaints. *See* Compl., *Abrahamsen v. ConocoPhillips Co.*, No. N10C-07-129 (Super. Ct. New Castle Cnty., Del.), CA3 App. 176-215; Compl., *Andreassen v. ConocoPhillips Co.*, No. N10C-07-130 (Super. Ct. New Castle Cnty., Del.), CA3 App. 217-62; Compl., *Aarsland v. ConocoPhillips Co.*, No. N10C-07-131 (Super. Ct. New Castle Cnty., Del.), CA3 App. 264-96; Compl., *Aasen v. ConocoPhillips Co.*, No. N10C-07-132 (Super. Ct. New Castle Cnty., Del.), CA3 App. 298-328. Yet again, petitioner timely removed the case under CAFA and the federal-question statute, *see* Notice of Removal, *Abrahamsen v. ConocoPhillips Co.,* No. 1:10-CV-692 (D. Del.), Dist. Ct. Dkt. 1, CA3 App. 31-55, and moved to dismiss on a variety of grounds (including

forum non conveniens), *see* Mot. to Dismiss, Dist. Ct. Dkt. 3, CA3 App. 599-603; Br. in Support of Mot. to Dismiss, Dist. Ct. Dkt. 4, CA3 App. 604-34. This time, the parties fully briefed that motion and, at respondents' insistence, the district court (Sleet, C.J., D. Del.) permitted targeted discovery on the *forum non conveniens* issue. In addition to opposing the motion to dismiss, respondents moved to remand the case to state court. *See* Mot. to Remand, Dist. Ct. Dkt. 13, CA3 App. 388-407.

The district court, however, granted the motion to dismiss on *forum non conveniens* grounds. *See* App. 10-13a n.2. As the court explained, "[t]he doctrine of *forum non conveniens* provides a district court with substantial discretion to 'resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.'" *Id.* (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981)). "Four factors have been identified as relevant to a *forum non conveniens* dismissal motion: (1) the amount of deference to be afforded to the plaintiff's choice of forum; (2) the availability of an adequate alternative forum; (3) the balancing of the relevant 'private interest' factors; and (4) the balancing of the relevant 'public interest' factors." *Id.* (citing *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 189-90 (3d Cir. 2008), and *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 46 (3d Cir. 1988)).

As a threshold matter, the court concluded that respondents' forum choice "is not afforded deference," because they are Norwegians who "aver that their injuries occurred in Norwegian territory" but are seeking to litigate in a foreign forum. *Id.* In addition, their counsel "has made several statements

that indicate that the choice to file in a U.S. jurisdiction was motivated by the perception that 'the sky's the limit when it comes to legal actions in the United States.'" *Id.* (quoting CA3 App. 659-60).

The court next determined that "an adequate, alternative forum exists in which to litigate this case," *i.e.*, the courts of Norway. *Id.* As the court explained, (1) respondents "are Norwegian citizens who allege their injuries occurred in Norway," (2) "Norway's administrative and judicial systems are sophisticated, and can adjudicate negligence-based claims like those raised in this lawsuit," and (3) petitioner "has previously submitted to Norwegian jurisdiction in connection with claims arising out of the activities of its subsidiaries operations in Norway." *Id.*

Finally, the district court held "that the private and public interest factors weigh in favor of *forum non conveniens* dismissal." *Id.* As to the public interest factors, the court concluded that "[t]he facts and circumstances underlying this case demonstrate that, even though [petitioner] is incorporated in Delaware, Norway's interests are dominant." *Id.* Moreover, the court explained, "neither the citizens of Delaware, nor of the United States, have any interest in a claim for personal injuries to Norwegians allegedly occurring off the coast of Norway." *Id.* That is especially true, the court recognized, because "it is undisputed that all of the petroleum resources in Norway are government-owned and/or controlled, creating a strong interest for the peoples of Norway in the outcome of this litigation," and that "the Norwegian government has constructed a legislative, regulatory and adjudicatory

scheme for handling claims for work-related injuries and illnesses such as those [respondents] allege in this lawsuit." *Id.* In addition, "Norwegian law will almost certainly control this dispute," and "Norway's legal system is better suited to interpret its own laws." *Id.*

As to the private interest factors, the court concluded that "[t]he overwhelming majority of evidence and proof necessary for resolving this case is located in Norway," and that respondents, "their family members, friends, co-workers and treating physicians are in Norway." *Id.* Given that "many witnesses will speak Norwegian, and business documents and medical records will be in Norwegian, both of which will require significant translation and other costs for depositions, motions practice and ultimately trial," the relevant private interest factors "also support dismissal." *Id.* Accordingly, the district court granted petitioner's motion to dismiss and denied respondents' pending remand motion as moot.

Respondents appealed, and the Third Circuit vacated the dismissal order and remanded the case to the district court with instructions to remand to state court. *See* App. 1-6a. The Third Circuit acknowledged that the district court had "exercised its discretion under *Sinochem* … to bypass the jurisdictional inquiry in favor of a non-merits dismissal on *forum non conveniens* grounds." App. 2-3a. Nonetheless, the Third Circuit did not review the district court's exercise of that discretion. Instead, the court declared that "[w]e have an independent obligation to address our subject-matter jurisdiction. … That obligation here entails the

authority to examine jurisdictional issues that the District Court chose to bypass, relying on *Sinochem*." App. 3-4a.

The Third Circuit thus proceeded immediately to the jurisdictional issue and concluded that federal subject-matter jurisdiction was lacking. *See* App. 4-6a. In light of that conclusion, the appellate court "vacate[d] the *forum non conveniens* dismissal and remand[ed] to the District Court with instructions to remand to state court." App. 6a; *see also* App. 2a ("*Because we find that federal subject-matter jurisdiction does not exist in this case*, we will vacate the order of the District Court and direct the District Court to remand the matters to state court.") (emphasis added).

Petitioner unsuccessfully sought *en banc* review. *See* App. 7-8a. This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Cannot Be Squared With This Court's *Sinochem* Decision, Or Other Court Of Appeals Decisions Following *Sinochem*.

This Court squarely held in *Sinochem* (reversing a contrary Third Circuit decision) that "a district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection." 549 U.S. at 425. "In particular," this Court continued, "a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the

case." *Id.* at 431. In other words, "there is no mandatory sequencing" of non-merits issues. *Id.* (internal quotation omitted).

The Third Circuit's decision in this case cannot be reconciled with that holding. The district court here made a discretionary decision to address the threshold issue of *forum non conveniens* before the threshold issue of jurisdiction. On appeal from that decision, the Third Circuit's role was limited to analyzing whether the district court thereby abused its discretion. The Third Circuit, however, never undertook that analysis.

Rather, the Third Circuit began its analysis by invoking its own "independent obligation to address [its own] subject-matter jurisdiction." App. 3a. The appellate court thereby put the analysis on the wrong track. *All* federal courts, whether at the trial or the appellate level, have the same independent obligation to examine their own subject-matter jurisdiction. *Sinochem*, however, teaches that this obligation is not inconsistent with deciding non-merits issues like *forum non conveniens* before deciding subject-matter jurisdiction. *See* 549 U.S. at 430-35.

An appellate court's independent obligation to address its own subject-matter jurisdiction, in other words, does not require it to address federal subject-matter jurisdiction before reviewing a district court's discretionary decision to dismiss on *forum non conveniens* grounds. It would defeat the whole point of *Sinochem* if a court of appeals were required to address federal subject-matter jurisdiction before reviewing a district court's discretionary decision to

dismiss a case on non-merits grounds without addressing such jurisdiction.

Thus, an appellate court's independent obligation to address federal subject-matter jurisdiction has no bearing in the *Sinochem* context. The Third Circuit, however, asserted that this obligation "entails the authority to examine jurisdictional issues that the District Court chose to bypass, relying on *Sinochem*." App. 3-4a. That assertion is mystifying. No one questions that, as a matter of raw power, appellate courts have the "authority" to examine jurisdictional issues that district courts choose to bypass in reliance on *Sinochem*. Such authority, however, does not allow appellate courts to bypass the discretionary *Sinochem* regime. Certainly, an appellate court cannot change the discretionary standard of review applicable to a district court's sequencing of non-merits issues by invoking its own authority to decide jurisdictional issues.

But that is precisely what happened here. After declaring that it had the "authority to examine jurisdictional issues that the District Court chose to bypass, relying on *Sinochem*," App. 3-4a, the Third Circuit concluded that this case did not fall within federal subject-matter jurisdiction, and consequently vacated the order of dismissal and instructed the district court to remand the case to state court, *see* App. 4-6a; *see also* App. 2a ("*Because we find that federal subject-matter jurisdiction does not exist in this case*, we will vacate the order of the District Court and direct the District Court to remand the matters to state court.") (emphasis added). The Third Circuit *never once addressed* the district court's exercise of its discretion under *Sinochem*, and

certainly did not conclude that the district court had abused such discretion. Indeed, the word "discretion" appears only *once* in the Third Circuit's opinion, in a description of the district court's decision. *See* App. 2-3a ("Rather than decide the motion to remand, the District Court exercised its discretion under *Sinochem* … to bypass the jurisdictional inquiry in favor of a non-merits dismissal on *forum non conveniens* grounds.").

The Third Circuit thereby sidestepped the critical issue on appeal: whether the district court abused its discretion under *Sinochem* by dismissing this case on *forum non conveniens* grounds without addressing subject-matter jurisdiction. There is not a single word in the Third Circuit's opinion to suggest that the district court's *forum non conveniens* analysis was erroneous. Nor is there a single word in the Third Circuit's opinion to suggest that, under the circumstances of this case, the district court was required to address jurisdiction before *forum non conveniens*. Rather, as noted above, the Third Circuit simply asserted its own "obligation" and "authority" to address subject-matter jurisdiction, App. 3a, and vacated the district court's order on that ground alone.

That approach cannot be squared with the discretionary *Sinochem* regime. *Sinochem* specifically held that district courts have the "discretion" to dismiss on *forum non conveniens* grounds without addressing jurisdiction. 549 U.S. at 425, 429. As a matter of law and logic, it follows that such discretionary decisions are reviewed on appeal for abuse of discretion. *See, e.g.*, *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 111 (2008); *Gall v.*

United States, 552 U.S. 38, 46 (2007); *Koon v. United States*, 518 U.S. 81, 96-100 (1996); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). And, as this Court has explained, "deference … is the hallmark of abuse-of-discretion review." *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997); *see also Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008). The Third Circuit was required to, but did not, apply the deferential abuse-of-discretion standard of review here.

Indeed, in their briefing in the Third Circuit, *respondents themselves* framed the issue as a discretionary one. In the "Standard of Review" section of their opening brief, they acknowledged that "[a] district court's refusal to address the issue of subject matter jurisdiction before ordering a non-merits dismissal (such as *forum non conveniens*) is reviewed for abuse of discretion." Pls.' CA3 Br. (May 10, 2012), at 6. They similarly framed their merits arguments as a challenge to the district court's exercise of its discretion. *See id.* at 7 ("[T]he district court abused its discretion by refusing to immediately remand this case to state court based on a clear lack of subject matter jurisdiction …."); *id.* at 17 ("[T]he district court should have remanded the case instead of embarking on a long and arduous *forum non conveniens* analysis, and it was an abuse of discretion to do otherwise."); *see also* Pls.' CA3 Reply Br. (June 25, 2012), at 5 ("The district court abused its discretion by failing [to] remand Appellants[] four separate complaints ….").

Not surprisingly, the Third Circuit's refusal to engage in abuse-of-discretion review cannot be squared with decisions by other circuits applying

such deferential review to district courts' sequencing decisions under *Sinochem*. *See, e.g.*, *Ibarra v. Orica U.S. of Am. Inc.*, No. 11-51094, 2012 WL 4353436, at *2 (5th Cir. Sept. 24, 2012) (*per curiam*) ("Appellants have not shown that the district court abused its discretion in considering the question of forum non conveniens before resolving jurisdictional questions."); *Bierman v. Toshiba Corp.*, 473 F. App'x 756, 757 & n.1 (9th Cir. 2012) (*per curiam*) ("On abuse of discretion review, we AFFIRM the district court's determination[]" not to exercise supplemental jurisdiction over claims without first addressing whether there was any federal subject-matter jurisdiction in the first place). Thus, if this case had been dismissed on *forum non conveniens* grounds by the Texas district court in which petitioner first filed its motion, that dismissal would have been subject to abuse-of-discretion review, whereas the Third Circuit here simply addressed the jurisdictional issue *de novo* in the first instance. Needless to say, in our unified federal judicial system, the standard of appellate review applicable to a district court's decision should not turn on where the case is filed.

The Third Circuit's reliance on the Ninth Circuit's decision in *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1087 (9th Cir. 2009), *see* App. 4a n.2, is misplaced. That case did not hold that a court of appeals must (or even may) decide an issue of federal subject-matter jurisdiction where the district court dismissed on *forum non conveniens* grounds without reaching that issue. Rather, as the Ninth Circuit explained, the district court in that case *actually decided the issue of subject-matter jurisdiction.* *See* 582 F.3d at 1087 ("[I]t is abundantly clear that the district court concluded it

had subject-matter jurisdiction over this suit."). Needless to say, where a district court does *not* exercise discretion under *Sinochem* to dismiss a case on non-merits grounds without addressing a jurisdictional issue, a court of appeals cannot review the exercise of any such discretion.

To be sure, the Ninth Circuit in *dictum* "question[ed] whether *Sinochem* restricts our ability to address an issue of subject-matter jurisdiction," even if not reached by the district court, and cited its "independent obligation to examine our own and the district court's jurisdiction." *Id.* (internal quotation omitted). That *dictum* further suggested that a court of appeals itself has discretion "under *Sinochem*" to determine "whether the jurisdictional issue should be addressed, regardless of the path the district court chose to take." *Id.*

For the reasons explained above, that *dictum* is inconsistent with *Sinochem*, which held that *district courts* have discretion over sequencing. *See* 549 U.S. at 425, 429. Once a district court has exercised such discretion, an appellate court is not free to exercise its own discretion in the first instance; rather, an appellate court's role is limited to determining whether the district court abused its discretion. *See, e.g.*, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (*per curiam*) ("The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in doing so."). Appellate courts, after all, are courts of "review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *see also Wood v. Milyard*,

132 S. Ct. 1826, 1834 (2012). Indeed, a district court's exercise of its discretion under *Sinochem* would be meaningless if an appellate court were free to exercise the same discretion on appeal.

It follows that the Third Circuit erred by addressing the jurisdictional issue here in the first instance instead of reviewing the district court's exercise of its *Sinochem* discretion. The Third Circuit had neither the "obligation" nor the "authority," App. 3a, to deny such deferential review.

II. This Court Should Summarily Reverse The Decision Below.

Because the decision below cannot be reconciled with *Sinochem*, or decisions of other appellate courts applying that precedent, summary reversal is warranted. Although summary reversal is strong medicine, it is appropriate where, as here, "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." Eugene Gressman *et al.*, *Supreme Court Practice* 350 (9th ed. 2007) (internal quotation omitted). Apart from the clear conflict between the decision below and *Sinochem*, a number of additional considerations warrant summary reversal in this case.

First, the Third Circuit's approach undermines the *forum non conveniens* doctrine, which seeks to move disputes into the most convenient forum as expeditiously as possible. *See, e.g.*, *Piper*, 454 U.S. at 251; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). Nothing is more wasteful than prolonged litigation over the proper forum to litigate a dispute in the first place. *See, e.g.*, *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S.

800, 818-19 (1988). Particularly in an era of congested court dockets and limited judicial resources, the *forum non conveniens* doctrine plays an important role in the administration of justice. *See*, *e.g.*, *Piper*, 454 U.S. at 252. This Court should reassure district courts that, when they dismiss a case on *forum non conveniens* grounds without addressing a jurisdictional issue, their decision will be reviewed only for abuse of discretion, and they will not be sandbagged by *de novo* review of the very jurisdictional issue they did not decide.

Second, the *forum non conveniens* issue here is particularly clear cut and compelling. As the district court explained, this is a tort suit by Norwegians alleging injury in Norway. *See* App. 11-12a n.2. The courts of Norway are available, and better suited than American courts, to decide these issues, which "almost certainly" will be governed by Norwegian substantive law. *Id.* Norway obviously has a much stronger interest than the United States in the safety of Norwegian workers in their Norwegian workplaces. If ever a case were motivated by improper forum shopping, this is it; indeed, as the district court noted, respondents' counsel is on record as stating that these lawsuits were filed in the United States because of a belief that "'the sky's the limit'" to the damages available in American courts. *Id.* (quoting CA3 App. 659-60). It is an affront to Norway and its legal system, which long predates our own, to keep this litigation in an American court.

And *third*, summary reversal is warranted to send a message that gamesmanship to evade federal jurisdiction will not be rewarded. It is quite obvious what is going on here, where (as the district court

noted) respondents have "filed this lawsuit for the third time, dividing their identically pleaded claims among four separate[] complaints." App. 9a. Respondents are trying to avoid both the letter and the spirit of CAFA: they split their previously filed class action and mass action into separate (albeit identically pleaded) complaints to "plead around" the law. Regardless of whether a court, under these circumstances, may treat the separate complaints as one under CAFA, *see, e.g.*, *Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008)—an issue this Court has never decided—this is a textbook case for a non-merits dismissal on *forum non conveniens* grounds under *Sinochem*. By reversing on jurisdictional grounds without deferring to the district court's *Sinochem* discretion, the Third Circuit twisted the law to crown respondents' gamesmanship with success.

CONCLUSION

For the foregoing reasons, the Court should grant this petition and summarily reverse the decision below. In the alternative, the Court should grant this petition and set the case for plenary review.

February 12, 2013

Respectfully submitted,

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