No. 12-997

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

REPLY TO BRIEF IN OPPOSITION

CHRISTOPHER LANDAU, P.C.
Counsel of Record
BRANT W. BISHOP, P.C.
JOHN K. CRISHAM
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

Counsel for Petitioner

[Additional counsel listed on signature block]

March 21, 2013

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The brief in opposition only confirms that this Court's review is warranted. Respondents insist, as did the Third Circuit, that a federal appellate court has an "independent obligation to evaluate its own subject-matter jurisdiction" even where, as here, the district court exercised discretion under *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007), to dismiss a case on non-merits grounds without addressing jurisdiction. Opp. 4 (emphasis modified). As a matter of law and logic, that position cannot be reconciled with *Sinochem*. A district court's discretion to dismiss on non-merits grounds without addressing jurisdiction is illusory if an appellate court has an independent obligation to decide the jurisdictional issue. None of respondents' attempts to square the decision below with *Sinochem*, or subsequent appellate rulings applying that case, withstands even casual scrutiny. Accordingly, this Court should grant the petition and either summarily reverse the decision below or set the case for plenary review.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Cannot Be Squared With *Sinochem* Or Subsequent Appellate Rulings Applying That Case.

The petition here presents a simple question: "[w]hether 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." Pet. i. As explained in the petition, both the Fifth and Ninth Circuits have answered that question in the affirmative. *See* Pet. 14 (citing *Ibarra v. Orica*

U.S. of Am. Inc., No. 11-51094, 2012 WL 4353436, at *2 (5th Cir. Sept. 24, 2012) (*per curiam*); *Bierman v. Toshiba Corp.*, 473 F. App'x 756, 757 & n.1 (9th Cir. 2012) (*per curiam*)). Here, in contrast, the Third Circuit answered that question in the negative, invoking its "independent obligation to address [its] subject-matter jurisdiction," Pet. App. 3a, as a justification for proceeding directly to the jurisdictional issue and reversing the district court under a *de novo* standard of review, *see id.* at 4-6a.

Respondents defend the Third Circuit's decision by arguing that "all federal courts have an independent obligation to determine whether subject-matter jurisdiction exists." Opp. 7. That argument might have more force had it not been rejected by this Court (unanimously, no less) in *Sinochem*. That decision teaches that a federal court must address subject-matter jurisdiction before resolving a case on the *merits*, but need not address subject-matter jurisdiction before resolving a case on *non-merits* grounds like *forum non conveniens*. *See* 549 U.S. at 430-35. "[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." *Id.* at 425.

Respondents seek to transfer that discretion to the courts of appeals. According to respondents, "[w]hile a district court's refusal to address the issue of subject-matter jurisdiction before ordering a non-merits dismissal may *also* be reviewed for abuse of discretion, subject-matter jurisdiction remains nonwaivable and can be raised *sua sponte* by a reviewing court." Opp. 8 (emphasis in original). In other words, the appellate court—no less than the

trial court—has discretion to decide the sequencing of threshold issues, and may choose to address subject-matter jurisdiction before a non-merits issue like *forum non conveniens*.

That position comports neither with *Sinochem* nor with respondents' own argument that "all federal courts have an independent *obligation* to determine whether subject-matter jurisdiction exists." Opp. 7 (emphasis added). If such an "obligation" were triggered here, then *both* the trial court *and* the appellate court would have been required to address federal subject-matter jurisdiction at the outset. Respondents cannot have it both ways: they cannot argue that the Third Circuit had an *obligation* to address federal subject-matter jurisdiction while also arguing that "a jurisdictional analysis is always *permissible* by a reviewing court." *Id.* at 8 (emphasis added). A court cannot simultaneously have both an obligation and discretion to address a jurisdictional issue. *Sinochem* made clear that the sequencing of threshold issues is a discretionary call. *See* 549 U.S. at 431-33.

And *Sinochem* left no doubt that such discretion is vested in "a district court," *id.* at 425, not an appellate court. Accordingly, while respondents fail to address the question presented by the petition, the answer is clear: an appellate court must review a district court's exercise of its *Sinochem* discretion for abuse of discretion. The Fifth and Ninth Circuits, as noted above, do just that. *See, e.g., Ibarra*, 2012 WL 4353436, at *2; *Bierman*, 473 F. App'x at 757 & n.1. An appellate court cannot evade that deferential standard of review, as the Third Circuit did here, by invoking its own "independent obligation to address

[its] subject-matter jurisdiction." Pet. App. 3a. That obligation, as *Sinochem* held, simply does not apply in the context of a non-merits decision like a *forum non conveniens* dismissal. *See* 549 U.S. at 431-33.

II. This Court Should Summarily Reverse The Decision Below.

Because the answer to the question presented by the petition is so clearly dictated by *Sinochem*, this Court may wish to resolve the circuit conflict on that question by summarily reversing the decision below and affirming the district court's decision to dismiss this case on *forum non conveniens* grounds.

Although the Third Circuit did not apply abuse-of-discretion review, respondents suggest that the appellate court would have been constrained to conclude that the district court here violated its *Sinochem* discretion under that standard of review. *See* Opp. 6. That suggestion is meritless. The district court acted well within its discretion by dismissing this case for resolution in Norway.

As the district court explained, this case involves allegations of injury by Norwegians in Norway. *See* Pet. App. 12a n.2. Thus, "Norwegian law will almost certainly control this dispute." *Id.* Respondents have not challenged the adequacy of the Norwegian courts. Needless to say, those courts are better suited than American courts to interpret and apply Norwegian law, *see id.*; indeed, Norwegian courts exist for that very purpose. In addition, "the overwhelming majority of evidence and proof necessary for resolving this case is located in Norway," *id.*, and it would be cumbersome and expensive to try this case here, *see id.* American courts have more than enough work adjudicating the

lawsuits that belong here, and do not need to assume responsibility for adjudicating tort actions arising around the globe. *See*, *e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 (1981) (noting, in upholding a *forum non conveniens* dismissal, that "[t]he American courts … are already extremely attractive to foreign plaintiffs" and warning that an increase in "[t]he flow of litigation into the United States would … further congest already crowded courts.").

Nor is there any reason to defer to respondents' choice of forum, "because the assumption that [their] choice of forum is convenient 'is much less reasonable'" when they leave their own home forum to sue abroad. Pet. App. 11a n.2 (quoting *Piper Aircraft*, 454 U.S. at 255-56). Indeed, the district court below found, with some understatement, that "th[e] likelihood [that respondents were engaged in forum shopping] seems more than 'plausible.'" *Id.* (quoting *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 71 (2d Cir. 2001) (*en banc*)). As the district court explained, "[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." *Id.* (internal quotation omitted).

Like *Sinochem*, then, "[t]his is a textbook case for immediate *forum non conveniens* dismissal." 549 U.S. at 435. Respondents' arguments to the contrary are unpersuasive.

First, respondents assert that, "as this case originated in state court, the sequencing of the district court's decision with respect to the motion to remand and a motion to dismiss had dispositive

consequences which were not present in *Sinochem*, a case originally filed in federal court." Opp. 5. That assertion is mystifying. There is no reason to think that a district court has any less *Sinochem* discretion in cases removed from state court than in cases originally filed in federal court. Regardless of where the case was first filed, the principle remains the same: a district court need not resolve a controversy over federal subject-matter jurisdiction before dismissing a case on non-merits grounds. *See Sinochem*, 549 U.S. at 431-33.

Second, respondents argue that "[h]ere, the jurisdictional analysis was simple and straightforward" while the *forum non conveniens* analysis was "long and arduous." Opp. 6. Neither premise is correct, much less so clearly correct that the district court abused its discretion by concluding otherwise. District courts, after all, are not likely to follow a "long and arduous" path to dismissal when an alternative "simple and straightforward" path is equally available.

Respondents challenge the district court's *forum non conveniens* analysis by arguing that their "claims focus exclusively on Petitioner's negligence and gross negligence committed in the United States, the country in which Petitioner's decisions that gave rise to the dangerous working conditions were made." Opp. 2. This is a routine argument for opposing *forum non conveniens* dismissal of claims brought against American defendants by foreign plaintiffs alleging injury abroad, and is routinely rejected. *See, e.g.*, *Piper Aircraft*, 454 U.S. at 257-59; *Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 252 (4th Cir. 2011); *Vasquez v. Bridgestone/Firestone, Inc.*,

325 F.3d 665, 672-73 (5th Cir. 2003); *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1145-47 (9th Cir. 2001). Indeed, respondents' argument rings particularly hollow in this case, given that they are not even suing in the jurisdiction in the United States (Texas) in which petitioner is headquartered. It certainly was not a "clear abuse of discretion," *Piper Aircraft*, 454 U.S. at 257, for the district court to conclude that this dispute should be litigated in Norway, not Delaware. *See* Pet. App. 10-12a n.2.

Nor is the jurisdictional issue here remotely as "simple and straightforward" as respondents contend. Opp. 6. Respondents do not, and cannot, deny that Congress enacted the Class Action Fairness Act of 2005 (CAFA), codified in relevant part at 28 U.S.C. § 1332(d), to provide defendants a federal forum in cases, like this one, where they are sued by hundreds of plaintiffs. Instead, respondents essentially argue that they took advantage of a loophole in CAFA by splitting their lawsuit (which they had already filed on two previous occasions) into four separate—*albeit identical*—state-court complaints. *See* Opp. 2; *see generally* CA3 App. 176-328 (complaints). According to respondents, the district court was required to crown their unsubtle jurisdictional ploy with success. *See* Opp. 2, 6-7. That position is contrary to this Court's recent decision in *Standard Fire Ins. Co. v. Knowles*, __ U.S. __, 2013 WL 1104735 (Mar. 19, 2013), which recognized that "allowing the subdivision of a $100 million action into 21 just-below-$5-million state-court actions … would squarely conflict with [CAFA's] objectives," *id.* at *5 (slip op. 6); *see also Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 407 (6th Cir. 2008) (rejecting similar attempt to

avoid CAFA jurisdiction through pleading gimmicks).

Whatever the merits of the jurisdictional issue, the whole point of *Sinochem* is that a district court has discretion to do precisely what the district court did here. While the district court may have had discretion to decide the jurisdictional issue first, the court did not remotely abuse its discretion by deciding the *forum non conveniens* issue first and dismissing this case on that ground.

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.

March 21, 2013

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
BRANT W. BISHOP, P.C.
JOHN K. CRISHAM
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

STEVEN DILLARD
BRETT YOUNG
FULBRIGHT & JAWORSKI LLP
Fulbright Tower
1301 McKinney, Suite 5100
Houston, TX 77010

JOHN M. SEAMAN
ABRAMS & BAYLISS LLP
20 Montchanin Road
Suite 200
Wilmington, DE 19807

Counsel for Petitioner