

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANNICK JOELL PIERRE-LOUIS, ANTOINE VINCENT GUYARD,
THIBAUD GUYARD, a minor, by his father Antoine Vincent Guyard,
individually as heirs of Abdon Joseph Pierre-Louis, deceased and individually
as heirs of Lawrence Pierre-Louis, deceased, LEON NOEL EDMOND
LORNE, MELANIE SUZIE MARTINE, a minor, by her mother
Marie-Nelly Martine individually as heirs of Serge Nal, deceased,
Plaintiffs-Appellants,

v.

NEVVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC.,
a Florida corporation, WEST CARIBBEAN AIRWAYS, S.A., a
Colombian corporation,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF DEFENDANTS-APPELLEES

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

I hereby certify that, to the best of my information and belief, the following is a complete list of interested persons pursuant to Eleventh Circuit Rule 26.1. This certificate has been amended since the certificate filed by the defendants-appellees by the addition of new interested persons, who are indicated in bolded text.

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Sharon Swingle

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Thornton, J. Thompson, Esq.

Ungaro, Judge Ursula, U.S. District Court, S.D. FL

West Caribbean Airways, S.A.

Decedent	Personal Representative & Relationship to Decedent (if known)
Antiste, Bernard Emmanuel Thomas	Marie-Georges Telle (sister)
Antiste, Clara Delphine	Sylvie Mylene Venus (mother)
Amant, Chantal Auberte	Antoine Jean Georges Jacques (husband)
Armede, Clinde Denis	Andre Armede (father)
Bapte, Christiane	Sylvia Bapte (daughter)
Bapte, Sylvain	Sylvia Bapte (daughter)
Bapte, Thomas	Sylvia Bapte (niece)
Baray, Lucien	Nathalie Severine Baray (daughter)
Baray, Minette	Nathalie Severine Baray
Berisson, Georges	Patricia Berisson
Berisson, George	Gisele Berisson (daughter)
Berisson, Paul	Patricia Berisson
Berisson, Paul	Gisele Berisson (daughter)
Bermont, Hector	Sabrina Bermont (daughter)
Berton, Francis	
Berton, Marie-Pierette	Andre Vincent Landes
Boucand-Cabrera, Catherine	Odile Cabrera
Bouton, Marie Andree	Michel Bachaumont (son)
Cabrera, Charles Jose	Odile Cabrera
Cadare, Marie-Pierre	

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Catorc, Maylys	Pierre Catorc (father)
Chassol, Eugene	Carine Chassol (daughter)
Chassol, Georgette	Carine Chassol (daughter)
Coloras, Antoine Alex	Christelle Alexandrine Coloras (daughter)
Coloras, Monique Alphonsine	Christelle Alexandrine Coloras (daughter)
Couffe, Raphaelle	Michelle Theodore Mitrail
Couffe, Robert	Adrienne Couffe
Croisy, Danielle	Tina Croisy (daughter)
Croisy, Victor	Tina Croisy (daughter)
Damboramin, Laurence Marie-Louise Regine Ramin	
Delahaye, Guy	Cecile Dany Delahaye (daughter)
Desir, Alex Andre	Joseph Hubert Desir
Dijon, Raymond	Pascal Louis Dijon (son)
Druze, Maurice Raymond	Gislaine Druze (wife)
Duranville, Marie-Josephe	Felix Fostan
Ensfelder, Eugenie Edmee	Bertin Hugues Ensfelder (husband)
Etifier, Emilie Justine	Patrick Etifier (son)
Eudaric, Evelyne	Hervey Eudaric
Fabien, Lucienne	Samuel Leopoldie
Felicite, Bertrand Raoul	Nicaise Marie Romuald Minar (daughter)
Felicite, Marie Carmen	Nicaise Marie Romuald Minar
Filin, Christian	Yvonne Filin (sister)
Florine, Ghislaine Myrlene	Judelise Norbert Consil (mother)

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Galbert, Huguette	Gislaine Druze
Galbert, Joseph	Henri Galbert
Galbert, Marie Eugenie	Monette Marie-Claire
Germany, Andre Abel	Herve Nicolas Germany (son)
Germany, Delphin	Jean-Louis Germany (son)
Germany, Nelly	Jean-Louis Germany (son)
Germany, Rosemond	Herve Nicolas Germany (son)
Hierso, Fanny	Marcel Andre Hierso (son)
Hierso, Maurice	Marcel Andre Hierso (son)
Hierso, Vernier	Nicole Hierso (daughter)
Hierso, Victorine	Nicole Hierso (daughter)
Hospice, Andree Liliane	Stanislas Marie-Andree Lafontaine (sister)
Hospice, Henri Alex	Daniel Hospice
Iphaine, Max	Maguy Marlene Iphaine
Jeabert, Antoinette	Francois Jeabert (husband)
Jean-Francois, Jeannine	Albert Denis Emmanuel Jean-Francois (father)
Jean-Francois, Veliane	Albert Denis Emmanuel Jean-Francois (husband)
Jeremie, George Appolinaire	Alex Jeremie (brother)
Joachim-Arnaud, Jimmy	Simone Joachim-Arnaud
Joseph-Boniface, Marie Josephe	Sebastien Licare (brother)
Joseph-Boniface, Marie Josephe	Nadine Berisson
Kelbian, Lucien Abdon	Viviane Kelban (daughter)
Kemper, Arsene	Fernand Olivier Baccarard (husband)

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Lafontaine-Hospice, Andree Liliane	Daniel Hospice
Lagier, Rene	Roger Lagier (husband)
Lagier, Yolaine	Andre Lagier (husband)
Lanoir, Freddy	Jenny Lanoir
Laurent, Jean Germany	Mickaelle Chamlong (daughter)
Legendart, Christian	Avit Legendart (father)
Lenogue, Severine Dorothee	Joseph Lenogue (brother)
Limeri, Karine	Jean-Yves Limeri (husband)
Magloire, Raphael Victor	Magloire, Francette (sister)
Mainge, Benedicte Marie-Aurore	Nicolas Mainge Annick Burner Alain Burner
Mainge, Hubert	Nicolas Mainge
Mainge, Jocelyne Eloise Mainge	Mederic Marie-Catherine (father)
Mainge, Max Sebastien	Mederic Marie-Catherine (father-in-law)
Mainge, Vivian	Julie Maynge (daughter)
Maquiaba, Elodie	Valerie Viardot
Maquiaba, Elodie	Luciane Taupin (aunt)
Marie-Antoinette, Bertin Laure	Berte Frantz Marie-Antoinette (sister)
Marie-Luce, Bertin	Manuel Clerence
Marie-Luce, Marcel	Ketty Emmanuelle Marie-Luce
Marie-Luce, Marcel	Patrick Voyer (son)
Marie-Lucie, Romuld Marthe	Jacqueline Laurence Lonete (husband)
Massal, Maeva	Henri Galbert

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Massal, Maeva	Bernabe Massal (grandfather)
Massal, Max	Bernabe Massal (father)
Massal, Murielle	Henri Galbert
Massal, Murielle	Bernabe Massal (father-in-law)
Massal, Nicolas	Henri Galbert
Massal, Nicolas	Bernabe Massal (grandfather)
Mauconduit, Angelo	Nathalie Mauconduit (daughter)
Mauconduit, Lisette	Nathalie Mauconduit (daughter)
Monlouis Felicite, Marie-Odile	
Monlouis-Felicite, Marie-Odile David	Jeanne Rose-Marie Godier (mother)
Montlouis-Felicite, Christian	Guy Montlouis-Felicite
Nal, Serge	Marie-Suzette Martine (wife)
Noelo, Andre	Daniel Noela (son)
Pelage, Lydie	Liliane Pelage (sister)
Pepinter, Henri	Hugues Pepinter (son)
Pepinter, Parfaite-Rose	Hugues Pepinter (son)
Peters, Alix	Monique Josephe Gerard Peters
Peters, Alix	Andre Pulchel Coique
Peters, Marie Claude	Monique Josephe Gerard Peters
Peters, Marie-Claude	Andre Pulchel Coique (brother)
Pierre-Louis, Abdon Joseph	Kylliem Pierre Louis (son)
Pierre-Louis, Laurence	Kylliam Pierre-Louis (son)
Porro, Eveline	Denise Caster
Ramin, Denis Francois Marc	Regine Ramin
Rainette, Erick	Marielle Cyndie Rainette (daughter)

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Rainette, Maguy	Marielle Cyndie Rainette (daughter)
Raphose, Gerty	Desiree Marie-Gregoire Gombe
Raphose, Gerty	Lydia Frederic Gombe (sister)
Raphose, Therese	Christine Briand (daughter)
Raphose, Urbain	Christine Briand (daughter)
Roch, Berthe	Victor Roch (husband)
Rosamond, Jean-Michel	Marie Therese Seneron
Rosamond, Jean-Michel	Patrick Maxime Felicite (cousin)
Saffache, Jocelyne	Nathalie Andor (sister)
Sainte-Rose, Berthe Luce	Sabrina Simone Ensfelder (niece)
Saxemard, Marcel	Silvelyne Saxemard (daughter)
Scaglioni, Davide	Madeline Procolam Piazza
Sebastien, Georgette	Sabine Zoe Sebastien
Seraline, Ginette	Corinne Maurice (daughter)
Surin, Gislaine	Thierry Surin (son)
Taupin, Marie-Annick	Luciane Taupin (sister)
Toulon, Anthony Gustave	Loic Ludovic Toulon (son)
Toulon, Gabrielle	Loic Ludovic Toulon (son)
Valquin, Andre Philibert	Marlene Ludovic Valquin (wife)
Venkatapen, Michel	Danielle Venkatapen
Venkatapen, Sohan	Danielle Venkatapen
Verin, Gislaine	Daniel Verin (son)
Victorin, Anicet	Gabrielle Cadignan-Victorin
Victorin, Anicet	Michael Bachaumont (son)
Violton, Prosper Lucien	Fred Violton

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Voyer, Christiane Lazare

Karine Janie Voyer (daughter)

Voyer, Felix Raphael

Karine Janie Voyer (daughter)

/s/ Sharon Swingle
Sharon Swingle
Counsel for the United States

**ELEVENTH CIRCUIT RULE 28(C)
STATEMENT REGARDING ORAL ARGUMENT**

The United States, appearing as *amicus curiae* in this litigation in support of defendant-appellees Newvac Corp. *et al.*, respectfully requests that the Court grant oral argument in this appeal. This appeal raises an issue of first impression in the United States Courts of Appeals — whether the procedural doctrine of *forum non conveniens* applies in actions governed by the Montreal Convention. The resolution of that question of treaty construction will affect U.S. courts’ ability to decline to exercise jurisdiction over cases with only an attenuated connection to this country, and could also affect our foreign relations with other nations. The United States suggests that this issue warrants oral argument before the Court, and further requests that counsel for the United States be permitted to participate in any oral argument that is granted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15828
(consolidated with Nos. 07-15830 and 07-15902)

ANNICK JOELL PIERRE-LOUIS, ANTOINE VINCENT GUYARD,
THIBAUD GUYARD, a minor, by his father Antoine Vincent Guyard,
individually as heirs of Abdon Joseph Pierre-Louis, deceased and individually
as heirs of Lawrence Pierre-Louis, deceased, LEON NOEL EDMOND
LORNE, MELANIE SUZIE MARTINE, a minor, by her mother
Marie-Nelly Martine individually as heirs of Serge Nal, deceased,
Plaintiffs-Appellants,

v.

NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC.,
a Florida corporation, WEST CARIBBEAN AIRWAYS, S.A., a
Colombian corporation,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF DEFENDANTS-APPELLEES

INTERESTS OF THE UNITED STATES

The Convention for the Unification of Certain Rules for International Carriage
by Air, done at Montreal May 28, 1999 (“Montreal Convention”), establishes an
international legal framework for resolving claims arising out of international air

carriage. The Montreal Convention is the exclusive means by which passengers can seek damages for death or personal injury in cases covered by it. *See* Montreal Convention, Article 27; *see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161, 174-176, 119 S. Ct. 662, 668, 674-675 (1999) (construing predecessor agreement to Montreal Convention). The United States is a party to the Montreal Convention, which came into force in 2003.

The United States has a substantial interest in the construction that domestic courts give to treaties to which the United States is a party. Furthermore, the United States has an interest in protecting the authority of U.S. courts to decline to exercise jurisdiction over litigation that has only an attenuated connection to this country and is more properly heard in another available forum. Under the *forum non conveniens* doctrine, a court may dismiss a case over which it has jurisdiction when “an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff’s convenience, or the chosen forum is inappropriate because of considerations affecting the court’s own administrative and legal problems.” *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 127 S. Ct. 1184, 1190 (2007) (quotation marks and internal alterations omitted). The doctrine “finds its roots in the inherent power of the courts ‘to manage their own affairs so as to achieve

the orderly and expeditious disposition of cases.”” *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497 (2d Cir. 2002) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S. Ct. 2123, 2132 (1991)).

The United States files this brief pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29(a), to set out the view of the Executive that courts may apply the *forum non conveniens* doctrine to claims brought under Article 33 of the Montreal Convention.¹

STATEMENT OF THE ISSUE

Whether the doctrine of *forum non conveniens* applies to claims for death or personal injury governed by the Montreal Convention.

STATEMENT OF THE CASE

This mass tort litigation arises out of an airplane crash in Venezuela of West Caribbean Airways flight 708, en route from Panama to Martinique. *See In re: West Caribbean Airways, S.A.*, No. 06-227480-CIV-UNGARO, Order, at 2-3 (S.D. Fla. Sept. 27, 2007). All 160 passengers and crew members aboard the flight were killed in the crash. *See id.* at 2. The plaintiffs are residents of Martinique, as were their decedents. *See id.* at 1. Defendant West Caribbean Airways is a Colombian corporation. *See id.* Defendant Newvac Corporation is a Florida corporation. *See*

¹ In submitting this brief as *amicus curiae*, the United States takes no position on the separate question whether the district court’s application of *forum non conveniens* to dismiss the plaintiffs’ lawsuits constituted an abuse of discretion.

id. Newvac had entered into a contract with West Caribbean Airways under which West Caribbean agreed to provide an aircraft and crew for charter flights; Newvac had also entered into a contract with Globe Trotter Agency, a Martinique travel agency, in which Newvac agreed to provide aircraft, hotel, transportation, and sightseeing services for excursions to be sold by Globe to individual passengers. *See id.* at 2. The crash occurred on a return flight from Panama on one of the excursions provided by Newvac and sold by Globe Trotter. *See id.*

Multiple sets of plaintiffs filed suit in the U.S. District Court for the Southern District of Florida, with various plaintiffs bringing claims against West Caribbean Airways; its Colombian insurance company, Aseguradora Conseguros; and Newvac and its alleged alter egos Go 2 Galaxy, Inc. and Jacquer Cimetier. *In re West Caribbean Airways, S.A. et al.*, No. 06-22748-UNGARO-BENAGES, “Galbert” Plaintiffs Consolidated Complaint, R. 152 (S.D. Fla. filed Aug. 30, 2007) (“Galbert Complaint”); *Bapte v. Newvac Corp.*, No. 06-cv-61813, Complaint, R. 1 (S.D. Fla. filed Dec. 6, 2006); *Pierre-Louis v. Newvac Corp.*, No. 07-cv-61165, Complaint, R. 1 (S.D. Fla. filed Aug. 17, 2007). The plaintiffs claimed that the aircraft used for the excursions was maintained and flown in an unsafe manner; they sought to hold the defendants jointly and severally liable for compensatory and punitive damages as well

as fixed damages under Article 21(1) of the Montreal Convention.² *See, e.g., Galbert Complaint*, at 16-23. The suits were consolidated for discovery purposes. *See Galbert v. West Caribbean Airways*, No. 06-cv-227478, Order, R. 20 (S.D. Fla. Dec. 28, 2006); *Bapte v. Newvac Corp.*, No. 06-cv-61813, Order, R. 29 (S.D. Fla. Apr. 6, 2007).

Defendant Newvac moved to dismiss the litigation on *forum non conveniens* grounds. Accepting the position of the United States as set forth in a Statement of Interest, the district court held that *forum non conveniens* applies in cases encompassed by the Montreal Convention. *See In re: West Caribbean Airways, S.A.*, No. 06-cv-22748, Order, R. 165 (S.D. Fla. Sept. 27, 2007) (“Order”).

The district court held that the plain language of Article 33(4) of the Montreal Convention, under which “[q]uestions of procedure shall be governed by the law of the court seised of the case,” supports application of *forum non conveniens*, which is “firmly entrenched in the procedural law of the United States.” *See Order* at 16-17, 21. The district court also noted that the drafters of the Montreal Convention had

² The Montreal Convention provides that, in cases of accidental death or injury of a passenger on board an aircraft, the carrier is strictly liable for damages in an amount up to “100,000 Special Drawing Rights,” approximately \$158,000 at current exchange rates. Montreal Convention, Art. 21(1). For damages above that amount, the carrier is not liable if it proves that the damage “was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents” or “was solely due to the negligence or other wrongful act or omission of a third party.” Montreal Convention, Art. 21(2).

discussed *forum non conveniens* extensively and that they envisioned that the doctrine would apply in states, including the United States, that recognized it. *See* Order at 34-35, 45. Furthermore, U.S. courts had repeatedly invoked the doctrine in cases governed by the predecessor agreement to the Montreal Convention, the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 (“Warsaw Convention”), and the en banc Fifth Circuit had held that the doctrine applied in Warsaw Convention cases. *See* Order at 20-22 & n.18. The district court acknowledged that the Ninth Circuit had adopted a contrary construction of the Warsaw Convention, *see Hosaka v. United Air Lines, Inc.*, 305 F.3d 989 (9th Cir. 2002), *cert. denied*, 537 U.S. 1227, 123 S. Ct. 1284 (2003)), but questioned the soundness of *Hosaka*’s reasoning and also characterized the case as of “limited precedential value” in light of the differences in drafting history and background between the Warsaw Convention and the Montreal Convention. Order at 13-15, 19-20 & n.17, 26-27.

The district court subsequently applied *forum non conveniens* to dismiss the plaintiffs’ claims. *In re: West Caribbean Airways, S.A.*, No. 06-cv-22748, Order, R. 184 (S.D. Fla. Nov. 13, 2007).

SUMMARY OF ARGUMENT

The Montreal Convention does not prohibit a U.S. court from applying *forum non conveniens* in a case governed by the Convention. The text of the treaty provides that the respective domestic laws of the Parties will govern questions of procedure. *See* Art. 33(4). Under U.S. law, *forum non conveniens* is a procedural doctrine of general applicability. Application of *forum non conveniens* is also consistent with the general principle that a forum state's procedural rules apply under a treaty absent an express statement to the contrary.

It is unnecessary to look beyond the plain language of Article 33(4), but even if that text were ambiguous, the Montreal Convention's drafting history would support application of *forum non conveniens*. Prior to the drafting of the Montreal Convention, U.S. courts had uniformly applied the doctrine of *forum non conveniens* under the Warsaw Convention, and the delegates of the Montreal Convention envisioned that the doctrine would continue to apply in countries in which it had previously been recognized, including the United States. The historical record of the Montreal Convention's transmittal to and approval by the Senate similarly manifests the view of the President and the Senate that the Montreal Convention permitted the application of past precedent under the Warsaw Convention. Finally, significant

weight is due to the Executive's view that the Montreal Convention permits application of *forum non conveniens*.

The plaintiffs rely on *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002), and *Milor v. British Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.), but those decisions — interpreting a different convention — do not overcome the plain language, negotiating history, U.S. ratification history, and Executive Branch construction of the Montreal Convention. *Hosaka* and *Milor* rely heavily on the unsettled nature of *forum non conveniens* in 1929, when the Warsaw Convention was drafted, and the lack of any evidence that the Warsaw Convention's drafters intended to incorporate the doctrine. In contrast, the Montreal Convention was drafted against a background of U.S. courts' application of *forum non conveniens* in Warsaw Convention cases and the statements of delegates that this practice would continue under the Montreal Convention. Finally, in *Hosaka*, the Executive had not provided its authoritative interpretation of the treaty. This Court should affirm the district court's holding that the Montreal Convention does not foreclose application of *forum non conveniens*.

ARGUMENT

THE *FORUM NON CONVENIENS* DOCTRINE APPLIES TO SUITS BROUGHT IN U.S. COURTS THAT ARE GOVERNED BY THE MONTREAL CONVENTION

A. The Text Of The Montreal Convention Supports The Availability Of *Forum Non Conveniens* In Cases Governed By The Convention.

“When interpreting a treaty, [the court] begin[s] with the text of the treaty and the context in which the written words are used.” *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 496, 699, 108 S. Ct. 2104, 2108 (1988). Here, the text and context of the Montreal Convention make clear that the treaty permits application of the *forum non conveniens* doctrine in U.S. Courts.

Article 33 of the Montreal Convention prescribes the grounds for jurisdiction over claims encompassed by the Convention. A suit for damages may be brought, “at the option of the plaintiff,” in the courts in the country in which the carrier is domiciled; the country in which the carrier has its principal place of business; the country where the carrier “has a place of business through which the contract has been made;” or the country that is the “place of destination.” Art. 33(1). Where an action seeks damages for death or injury to a passenger, the plaintiff may also bring the action in the country where the passenger had his principal and permanent residence at the time of the accident, if the carrier operates passenger air services to or from that country and does so “from premises leased or owned by the carrier itself

or by another carrier with which it has a commercial agreement.” Art. 33(2). Finally, Article 33(4) provides that “[q]uestions of procedure shall be governed by the law of the court seised of the case.”

The plain language of this last provision — Article 33(4) — supports application of *forum non conveniens* in cases governed by the Convention and brought in U.S. courts. Moreover, the rule articulated in Article 33(4) is consistent with the background international law principle, which the Supreme Court has endorsed, that “absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.” *Breard v. Greene*, 523 U.S. 371, 375, 118 S. Ct. 1352, 1354 (1998) (per curiam); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 2682-2683 (2006).

Under U.S. law, the doctrine of *forum non conveniens* “is procedural rather than substantive.” *American Dredging Co. v. Miller*, 510 U.S. 443, 453, 114 S. Ct. 981, 988 (1994). The doctrine functions as “a supervening venue provision, permitting displacement of ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined.” *Sinochem Int’l*, 127 S. Ct. at 1190 (citation and internal quotation marks omitted). “The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue

statute.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 517, 67 S. Ct. 829, 942 (1947). As a well-established procedural doctrine of general application in U.S. courts, *forum non conveniens* clearly falls within Article 33(4).

B. The Negotiating History Of The Montreal Convention Makes Clear That It Was Not Intended To Preclude Application Of *Forum Non Conveniens*.

The plain language of Article 33(4) of the Montreal Convention is sufficient to resolve the question addressed in this amicus brief. Even if that text were ambiguous, however, an examination of the drafting history of the Convention would make clear that it permits application of the *forum non conveniens* doctrine. As we next set out in detail, the drafters of the Montreal Convention chose not to explicitly codify the doctrine in the treaty, but they envisioned that it would continue to apply in countries, such as the United States,³ that had previously applied *forum non*

³ At the time the Convention was drafted and signed, a number of U.S. district courts had previously applied the doctrine in cases brought under the Warsaw Convention. *See, e.g., Lu v. Air China Int’l Corp.*, No. CV 92-1254, 1992 WL 453646, at *3 (E.D.N.Y. Dec. 16, 1992) (granting motion to dismiss on *forum non conveniens* grounds); *Thach v. China Airlines, Ltd.*, No. 95 Civ. 8468, 1997 WL 282254, at *2 (S.D.N.Y. May 27, 1997) (denying on the merits motion to dismiss on *forum non conveniens* grounds); *Galv v. Swiss Air Transport Co., Ltd.*, No. 86 Civ. 5551, 1987 WL 15580, at *2 (S.D.N.Y. Aug. 3, 1987) (same); *Harpalani v. Air India, Inc.*, 622 F. Supp. 69, 73-74 (N.D. Ill. 1985) (same); *McLoughlin v. Commercial Airways (Pty) Ltd.*, 602 F. Supp. 29, 32-33 (E.D.N.Y. 1985) (same). Furthermore, the U.S. Court of Appeals for the Fifth Circuit sitting en banc had held that the Warsaw Convention did not suspend a federal court’s power to apply the doctrine of *forum non conveniens*. *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1160- (continued...)

conveniens under the Warsaw Convention.

The Warsaw Convention, which was superseded by the Montreal Convention as between parties to both treaties, did not provide for claims for death or injury to be brought in the country of the passenger's permanent residence. *See* Warsaw Convention, Art. 28(1). At the conference at which the Montreal Convention was negotiated and adopted, the United States delegate pressed strongly for inclusion of this fifth ground for jurisdiction. *See, e.g.*, International Civil Aviation Organization, International Conference on Air Law, Montreal, 10-28 May 1999, Volume I: Minutes ("Minutes"), at 9. In making this proposal, the United States delegate reassured the other delegates that "the doctrine of forum non-convenien[s] would provide discipline against unwarranted forum shopping." *Id.*; *see also* International Civil Aviation Organization, International Conference on Air Law, Montreal, 10-28 May 1999, Volume II: Documents ("Documents"), at 108 (United States comments) (explaining that fifth basis for jurisdiction "could well result in fewer 'forum shoppers' winding up in U.S. courts" because, *inter alia*, "U.S. courts are far more likely to dismiss lawsuits brought by non-U.S. residents on the grounds of *forum non conveniens* if a

³(...continued)

1162 (5th Cir. 1987) (en banc), *vacated on other grounds sub nom., Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S. Ct. 1928 (1989), *vacated in part and aff'd in part on remand*, 883 F.2d 17 (5th Cir. 1989). No U.S. court had held to the contrary at the time the Montreal Convention was drafted — nor, with the exception of *Hosaka*, has any U.S. Court done so in the years since.

convenient homeland court is available to the plaintiff”). At the time the United States delegate made those statements, the relevant provision of the draft Convention was identical to the final version of Article 33(4). *See* International Conference on Air Law, Draft Convention for the Unification of Certain Rules for International Carriage by Air, Reference Text, DCW Doc. No. 4, 5/3/99, Documents at 45.

Other delegates continued to express concerns that the addition of a fifth ground of jurisdiction would encourage forum shopping. *See, e.g.*, Minutes at 104 (French delegate, stating that proposal would encourage “systematic ‘forum shopping’”). At the same time, however, the French delegate suggested that “the creation of the fifth [ground for] jurisdiction would render it easier to reject claims submitted by foreign citizens against air carriers of high compensation States on the basis of legal means such as the principle of *forum non conveniens*.” *Id.*; *see also id.* (“[T]he Delegate of France averred that the fifth jurisdiction would lead to the situation where nationals of high compensation States would systematically bring claims against air carriers in their respective States, as would foreign citizens who were not excluded by legal means such as the principle of *forum non conveniens*.”); DCW Doc. No 33, 17/5/99, Documents at 196 (presentation by France) (asserting that fifth jurisdiction should not be included because the result would be an increase in U.S. courts’ use of *forum non conveniens* to dismiss claims brought by foreign

citizens). Whatever the merits of this suggestion, the French delegate seemed to envision that U.S. courts could apply the *forum non conveniens* doctrine under the terms of the draft article on jurisdiction.

The United States delegate responded to concerns about forum shopping by reiterating that, in U.S. courts, “a case would be dismissed if it were brought in an inconvenient forum to the parties for no good reason.” Minutes at 108. As the delegate explained, “[i]t was the view of his Delegation, as well as of aviation defense lawyers and aviation plaintiffs’ lawyers with whom he had spoken, that the number of cases which would be brought to the United States by the fifth jurisdiction would be offset by the number of cases which would be dismissed on the grounds of *forum non conveniens*, due to the existence of a ‘home court’ convenient forum for the ‘forum shopping’ plaintiff.” *Id.* The United States delegate also submitted for the other delegates’ consideration a written synopsis of two U.S. cases to illustrate how the doctrine of *forum non conveniens* might apply under the proposed jurisdictional article. See Documents at 151 (discussing *Piper Aircraft v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981), and *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990), *cert. denied*, 499 U.S. 962, 111 S. Ct. 1587 (1991)).

The draft Convention article on jurisdiction was subsequently examined in-depth by a smaller group of delegates (the “Friends of the Chairman’s Group”) that

included delegates from the United States and a number of other major countries. *See* Minutes at 109. The delegate from Sweden expressed concern to the group that, while “reference had been made to the possibility of provisions on *forum non conveniens* and his Delegation welcomed any such wording that would enable States presently applying that principle to continue doing so, * * * he advised against any attempt to make that a standard provision for all States.” Minutes at 144. The Swedish delegate noted that “*forum non conveniens* was unknown to most civil law countries and a number of States had firm instructions on such a position.” *Id.*

As discussions continued relating to the jurisdictional provision and the proposed fifth basis of jurisdiction, the Chairman invited the group to consider whether “the concept of *forum non conveniens*, known to some jurisdictions but probably not precisely known to other jurisdictions in the same form, might be codified” in some form in the jurisdictional provision. Minutes at 148. He proposed that the fifth basis for jurisdiction could be included, but that a passenger who sought to bring suit in this jurisdiction “would have to demonstrate that it would be highly inconvenient and disadvantageous for him to resort to the existing four jurisdictions — the reverse side of *forum non conveniens*.” Minutes at 148-149. The Chairman also queried whether the group should consider modifying the draft Montreal Convention to “provide expressly” for consideration of the convenience of

the forum, so as to “attain universal application of the principle of *forum non conveniens* as an important principle in the interpretation of the new Convention.” *Id.* at 158. In making this suggestion, the Chairman “noted that, in most of the existing jurisdictions, a forum would have to make that determination,” *id.* — *i.e.*, that the doctrine would already be applicable under the existing draft article.

Subsequently, the Australian delegate proposed an amendment to the jurisdictional article intended to codify “the principle of fairness embraced by the concept of *forum non conveniens*.” DCW Doc. No. 40, 20/5/99, Documents at 213. The Australian delegate’s proposal provided for dismissal of an action for damages for a passenger’s death or personal injury where a defendant established that it was “manifestly unfair” to permit the action to be heard in that forum and that “there exists another jurisdiction in which the matter may properly, and with a view to the interests of all the parties, more fairly and conveniently be heard and decided.” *Id.* at 214. The Chairman explained that this amendment would “ensur[e] uniformity” in the application of the principle of *forum non conveniens* “by enshrining it in the new Convention.” Minutes at 159 (responding to comment by Swiss delegate “that the principle of *forum non conveniens* was relatively unknown in his country, as well as in other European countries).

The Australian proposal sparked considerable discussion. The United States delegate, for example, declared that the doctrine of *forum non conveniens* would apply to all suits encompassed by the Convention “whether the Group prescribed that or not,” and also pointed out that “there were jurisdictions which did not apply, understand or perhaps even desire *forum non conveniens*.” Minutes at 159. The United States delegate also noted that the United States was “unalterably opposed to any provision which would create a higher hurdle for the application of the fifth jurisdiction than would be applicable to the other four jurisdictions.” Minutes at 159. The United States delegate suggested that, if other delegates were concerned “that by having the fifth jurisdiction, some Court would conclude that the *forum non conveniens* doctrine should not be applied,” this concern could be eliminated by adding the phrase “including the doctrine of *forum non conveniens* or other similar doctrines” at the end of the existing sentence, “Questions of procedure shall be governed by the law of the Court seised of the case.” *Id.*

Other delegates also appeared to agree that *forum non conveniens* would already apply under the terms of the draft Montreal Convention in countries that recognized the doctrine. The Australian delegate expressed “surprise[.]” that “any Court anywhere in the world which had an option to exercise jurisdiction would not be expected to exercise considerations of fairness and equity,” and noted that the

proposed amendment to codify *forum non conveniens* was “quite consistent with current judicial practice in many countries around the world.” Minutes at 160. Similarly, the Singapore delegate observed “that the doctrine of *forum non conveniens* was a common law doctrine which would apply in all cases unless there were a statutory provision against it.” Minutes at 162.⁴

Multiple countries objected to the proposal to codify and make mandatory the application of *forum non conveniens*, however, on the ground that the doctrine was not recognized in their domestic legal systems. *See, e.g.*, Minutes at 160 (Chilean delegate) (“emphasizing that it would be very difficult to harmonize the principle of the *forum non conveniens* with his country’s legal system” and “averr[ing] that several Latin American countries would have similar problems”); Minutes at 161 (Swedish delegate) (noting that codification of *forum non conveniens* could “lead to substantial ratification problems for a large number of European countries, including his”).

Furthermore, the Observer from the International Union of Aviation Insurers noted that the English High Court had recently held that the doctrine of *forum non*

⁴ The Singapore delegate’s position was consistent with the holding of the Singapore Court of Appeal in *Brinkerhoff Maritime Drilling Corp. v. P.T. Airfast Servs. Indonesia*, [1992] 2 S.L.R. 776 (Sing. C.A.) (available at <http://www.singaporelaw.sg/rss/judg/10211.html>) declining on *forum non conveniens* grounds to adjudicate a case governed by the Warsaw Convention.

conveniens did not apply in English courts in actions governed by the Warsaw Convention. Minutes at 161.⁵ Following up on this comment, the United Kingdom delegate contended that any codification of the doctrine in the Montreal Convention would impinge on a litigant’s right in the United Kingdom to bring an action at the place of his choice, and “would introduce litigation at a point where it did not currently exist.” Minutes at 162.

The Chairman sought to resolve this divide by proposing a new version of the jurisdictional provision, under which a court would be explicitly authorized to decline to consider a case where another forum was significantly more convenient, but *only* where the case was brought under the so-called fifth ground of jurisdiction — the country of the passenger’s permanent residence in cases of passenger death or injury. *See* Draft Consensus Package, Article 27, DCW-FCG No. 1, Documents at 491, 494. The Chairman urged that the *forum non conveniens* doctrine should be codified in this way “because of the need for uniformity; whereas the doctrine of *forum non*

⁵ The Observer noted that, “despite the theoretical availability of *forum non conveniens* in the United States,” there were no reported cases in which a U.S. court had applied the doctrine to dismiss an action under the Warsaw Convention. Minutes at 161. As noted above (at p. 11 n.3), there were multiple reported cases from U.S. Courts at that time in which a court had applied the doctrine but not dismissed the action, as well as at least one unreported decision dismissing a case on *forum non conveniens* grounds.

conveniens might well exist in some jurisdictions, it might not exist in others.” Minutes at 171.

This new proposal brought strong objections both from proponents of *forum non conveniens* (who contended that the doctrine should be applied to all cases under the Convention, not just those brought under the fifth ground of jurisdiction), *see* Minutes at 180 (United States delegate), and also from opponents (who objected to the doctrine being imposed on their courts in Montreal Convention cases). *See, e.g.*, Minutes at 173 (French delegate); Minutes at 181 (Swedish delegate); Minutes at 181 (Swiss delegate).

The United States delegate suggested that “the best way forward at this juncture would be to keep the first sentence of paragraph 4 and to clarify that nothing here was intended to limit the ability of courts, in their discretion,” to decline to hear a case under the *forum non conveniens* doctrine. Minutes at 180.

The Swiss delegate countered with the observation that *forum non conveniens* “was obviously a matter of procedure and not of substance,” and that the doctrine “was not used in a common and uniform way within the different national legal systems which knew this instrument.” Minutes at 181. Under the plain text of the first sentence of the proposed article, the Swiss delegate concluded, “whenever a case was brought before a court which applied the principle [of *forum non conveniens*],

the court would have to examine the case” to determine whether to dismiss it on that ground. Minutes at 181-182. Given this, the Swiss delegate continued, the additional language suggested by the United States delegate was superfluous. Minutes at 182. The Swiss delegate also asserted that, as a matter of procedure, the doctrine of *forum non conveniens* was simply outside the scope of a Convention dealing “with liability, which was a matter of substance and not of procedure.” Minutes at 182. Asserting that it was “essential * * * not to bring in elements which were not a matter of substance,” the Swiss delegate proposed maintaining the current wording of the parallel provision of the Warsaw Convention. Minutes at 182.

Although the Chairman returned to the suggestion of the United States delegate that additional language could be drafted to eliminate any negative inference regarding applicability of *forum non conveniens*, Minutes at 183-184, the United States delegate did not draft or present any additional language. Instead, and consistent with the views expressed by the Swiss delegate, the Friends of the Chairman’s Group presented a consensus package to the full conference that contained a jurisdictional provision that was unchanged from the earlier draft and provided that “Questions of procedure shall be governed by the law of the Court seised of the case.” *See* Minutes at 199 (presenting consensus package); Documents at 271, 274 (DCW Doc. No. 50, Consensus Package, Art. 27(4)). Notably, there were

no objections to this proposal — including none from the United States delegate, who had repeatedly indicated that the United States would not agree to any text that would foreclose application of the *forum non conveniens* doctrine in Montreal Convention cases. *See, e.g.*, Minutes at 159, 180. In these circumstances, the clear implication is that the delegates understood that application of *forum non conveniens* in cases covered by the Montreal Convention would depend upon the procedural law of the forum state in which the suit was initiated, and, in particular, that the doctrine would be available in suits brought in the courts of the United States.

C. In Signing The Montreal Convention And Giving Advice And Consent, The President And The Senate Intended To Continue Past Practice Under the Warsaw Convention, Which Included Application Of *Forum Non Conveniens*.

Forum non conveniens was well established in U.S. courts as a procedural doctrine at the time the Montreal Convention was drafted, signed, and presented by the President to the Senate for its advice and consent. Specifically, the doctrine had repeatedly been employed in cases governed by the Warsaw Convention, and no U.S. court had held that the Convention foreclosed its application. *See* p.11 n.3, *supra*; *see also In re Air Crash Off Long Island, N.Y., on July 17, 1996*, 65 F. Supp.2d 207, 210-217 (S.D.N.Y. 1999) (holding that *forum non conveniens* is procedural doctrine that

applies under jurisdictional provision of Warsaw Convention).⁶ The historical record of the Convention's transmittal by the President to the Senate and of its approval by the Senate shows that no change from this past practice was intended.

In submitting the Montreal Convention to the Senate for its advice and consent, the President attached an explanation of the treaty prepared by the Department of State. Sen. Treaty Doc. 106-45, Attachment to September 6, 2000, President's Letter of Transmittal to the Senate, Article-by-Article Analysis of the Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal May 28, 1999. The State Department explained that Article 33(4) of the Montreal Convention, like the provision of the Warsaw Convention from which it derived,⁷ "provides that procedural questions are to be determined by the law of the forum." *Id.* at 19. The State Department also explained that, while some provisions in the Montreal Convention were new or different from the Warsaw Convention and related

⁶ The Ninth Circuit's decision in *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002), that the Warsaw Convention did not permit application of *forum non conveniens* in cases governed by the Convention was issued after the Montreal Convention had been drafted and transmitted to the Senate for its advice and consent.

⁷ In the English-language version of the Warsaw Convention prepared by the League of Nations, Article 28(2) provided that "Questions of procedure shall be governed by the law of the Court seised of the case." 137 League of Nations Treaty Series 11, 28. The English-language version of the Warsaw Convention prepared by the State Department and presented to the Senate for its advice and consent used the slightly different terminology "Questions of procedure shall be governed by the law of the court to which the case is submitted." *See* 49 Stat. 3014, 3021.

protocols, “efforts were made in the negotiations and drafting to retain existing language and substance of other provisions to preserve judicial precedent relating to other aspects of the Warsaw Convention, in order to avoid unnecessary litigation over issues already decided by the courts under the Warsaw Convention and its related protocols.” See S. Exec. Rpt. No. 108-8, at 68 (2003) (Responses of Hon. J. Shane, Department of Transportation, and J. Byerly, Department of State, explaining that “The language of the [Warsaw Convention] and protocols was tracked specifically for the purpose of preserving, to the greatest extent possible, the validity of judicial precedents that apply to the provisions of the previous convention and protocols.”).

The Senate Executive Report recommending that the Senate give its advice and consent to the Montreal Convention also reflected the understanding that prior judicial precedent under the Warsaw Convention would continue to apply, as relevant, under the Montreal Convention. S. Exec. Rpt. No. 108-8, at 3. Invoking the views expressed by the Executive Branch on this issue (which had been prepared prior to the Ninth Circuit’s decision in *Hosaka*), the Senate Report explained that “[i]n the nearly seventy years that the Warsaw Convention has been in effect, a large body of judicial precedent has been established in the United States,” and “[t]he negotiators of the Montreal Convention intended to preserve these precedents.” *Id.* This evidence that the Executive and the Senate intended to continue in force this

prior precedent under the Warsaw Convention provides yet another reason to conclude that Article 33(4) of the Montreal Convention permits application of *forum non conveniens*. The strength of this evidence regarding the intent of the Executive and the Senate is not affected by the fact that the Ninth Circuit subsequently rejected application of the doctrine in *Hosaka*.

D. The Executive’s Construction Of Article 33(4) As Permitting Application Of *Forum Non Conveniens* Is Entitled To Great Weight.

Any ambiguity in the text or negotiating history of the Montreal Convention should be resolved in favor of the Executive’s construction of Article 33(4) to permit application of *forum non conveniens*. As the Supreme Court has repeatedly recognized, in interpreting international treaties, courts should give “great weight” to “the meaning given them by the departments of government particularly charged with their negotiation and enforcement.” *Sanchez-Llamas*, 548 U.S. 331, 126 S. Ct. at 2685 (quoting *Kolovrat v. Oregon*, 366 U.S. 187, 194, 81 S. Ct. 922, 926 (1961)); accord *United States v. Stuart*, 489 U.S. 353, 369, 109 S. Ct. 1183, 1193 (1989). Not only did the State Department negotiate the Montreal Convention, but “when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice. That voice is the voice of the State Department, which in such matters speaks for and on behalf of the President.” *United States v. Li*, 206 F.3d 56, 67 (1st Cir.) (en banc) (Selya and Boudin, JJ., concurring), *cert. denied*, 531 U.S. 956,

121 S. Ct. 379 (2000); *see also Mora v. People of the State of N.Y.*, No. 06-0341, 2008 WL 1820836, at *13 (2d Cir. Apr. 24, 2008) (views of *United States* set out in amicus brief filed by Department of Justice and Department of State “constitute another very powerful reason” for accepting construction of treaty).

E. *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002), And *Milor v. British Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.), Do Not Support A Contrary Conclusion.

In arguing against application of *forum non conveniens* under Article 33(4) of the Montreal Convention, the plaintiffs rely primarily on decisions by the Ninth Circuit and the British Court of Appeal construing the jurisdictional provision of the Warsaw Convention. *See Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002); *Milor v. British Airways, Plc.*, [1996] Q.B. 702 (Eng. C.A.). The courts in those cases held that the jurisdictional provision of the Warsaw Convention prohibited the application of the *forum non conveniens* doctrine. In reaching that conclusion, the Ninth Circuit explicitly declined to express an “opinion as to whether the text and drafting history of the Montreal Convention” showed an intent to foreclose application of *forum non conveniens* under the later treaty. *Hosaka*, 305 F.3d at 1001 n.17.

As an initial matter, it is far from clear that the decisions in *Hosaka* and *Milor* are correct with regard to the Warsaw Convention. *Milor*, in particular, has a number

of obvious inaccuracies. For example, Justice Phillips' lead opinion relied heavily on the fact that, while the English text of the jurisdictional provision of the Warsaw Convention provided that "an action for damages may be brought" in various jurisdictions, and "brought" could mean "instituted or commenced," the French text of the provision used a word that conveyed the meaning of "commenced and pursued." Q.B. 702 (emphasizing that French text of Warsaw Convention employed a different term in Article 29, and inferring from this difference that Article 28(1)'s use of "brought" was intended to encompass "both the initiation and the pursuit of the action" and thus to bar application of *forum non conveniens*). As the Ninth Circuit subsequently noted in *Hosaka*, the Montreal Convention's French text also used different terms for "brought" and did so "in a manner that undermines the *Milor* court's analysis." 305 F.3d at 996. Furthermore, although the *Milor* lead opinion asserted that the doctrine of *forum non conveniens* was "well established in the United States" in 1929, the district court in this case correctly noted that the term "forum non conveniens" was not even in use in the United States in 1929 and that the parameters of the doctrine remained unclear until the Supreme Court's decisions in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947), and *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 67 S. Ct. 828 (1947). See Order at 20 & n.17. And the Ninth Circuit's decision in *Hosaka* rejecting application of *forum non*

conveniens under the Warsaw Convention was at odds with the uniform prior practice of district courts and directly in conflict with the en banc Fifth Circuit’s holding in *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147. Finally, both *Milor* and *Hosaka* relied on the fact that *forum non conveniens* was not well-settled in 1929, but the fact that a procedural doctrine develops under domestic law only after the ratification of a treaty would not necessarily foreclose its application under a treaty provision explicitly incorporating domestic procedural law.

In any event, the analyses in *Hosaka* and *Milor*—interpreting Article 28 of the Warsaw Convention — do not demonstrate that Article 33 of the Montreal Convention prohibits application of *forum non conveniens*. Unlike the Warsaw Convention, the Montreal Convention was negotiated and ratified at a time when multiple U.S. courts had applied that doctrine under treaty text (Article 28(2) of the Warsaw Convention) that was very similar to the final treaty provision at issue here. If the drafters had intended to halt that past practice, they would have said so explicitly. Furthermore, the negotiating history makes clear that delegates from both common law and civil law countries intended that, consistent with the language of the Montreal Convention, *forum non conveniens* would continue to apply in countries that recognized that procedural doctrine. Finally, and unlike in *Hosaka*, the Executive Branch has formally explained its view that *forum non conveniens* applies

under the Montreal Convention — a position that is entitled to great weight. In these circumstances, the decisions in *Hosaka* and *Milor* are an inadequate basis on which to conclude that the Montreal Convention forecloses application of *forum non conveniens*.

CONCLUSION

This Court should affirm the district court’s holding that *forum non conveniens* applies to claims governed by the Montreal Convention.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,732 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief Of The United States As Amicus Curiae In Support Of Defendants-Appellees were served on the Court and following counsel by overnight delivery, postage prepaid, on May 14, 2008:

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