

## Notes

# **MAKING *FORUM NON CONVENIENS* CONVENIENT AGAIN: FINALITY AND CONVENIENCE FOR TRANSNATIONAL LITIGATION IN U.S. FEDERAL COURTS**

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### ABSTRACT

*The forum non conveniens (“FNC”) doctrine allows a federal court to dismiss a case from the U.S. legal system in favor of a more convenient foreign jurisdiction. When a party moving for dismissal under the FNC doctrine succeeds, the losing party may immediately appeal that decision as of right to an appellate court. But if the motion to dismiss for FNC is denied, the right to an appeal is unavailable until after a final judgment is issued in the case.*

*This dichotomy in appellate review results from Van Cauwenberghe v. Biard, where the Supreme Court held that motions to dismiss for FNC do not fall within the collateral order exception to the final judgment rule in federal courts.*

*Yet motions to dismiss for FNC by definition deal with transnational disputes, and the Supreme Court has recently been limiting the ability for transnational litigation to proceed in U.S. courts. This Note argues that the values underpinning the Supreme Court’s recent jurisprudence restrictive of transnational litigation—separation of powers, comity, fairness, and efficiency—similarly support the Supreme Court altering the appellate regime for denied motions to dismiss for FNC to allow for immediate appeals as of right.*

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*Currently, there are some limited, case-by-case opportunities to seek interlocutory review of FNC denials. But these mechanisms have proven to be ineffective. Overruling Biard is the best way to alter the appellate framework for denied motions to dismiss for FNC. Doing so would strengthen the utility of the FNC doctrine and serve the Supreme Court's interest in limiting the volume of transnational litigation heard in U.S. federal courts.*

## INTRODUCTION

Imagine that you are a defendant in a lawsuit in U.S. federal court. For more than three and a half years, you spend significant time and resources litigating a claim. Although you initially file a motion to dismiss the case, the district court denies your motion. This forces you to proceed to trial, where you lose on the case's merits. Afterwards, you make an appeal to the circuit court of appeals. There, as suddenly as the litigation began, it ends without any discussion of the merits. This time, you emerge victorious: the circuit court orders the trial court judgment vacated and the case removed from the U.S. legal system in favor of litigation in a foreign state's courts.

Your victory is bittersweet. While you achieved your desired result, you know that you will never get back the time, money, and energy spent litigating a case that you sought dismissed—for the very reasons provided by the circuit court, no less—over three years earlier. The rules for appealing decisions in federal courts did not allow you to seek reversal of the district court's earlier denial of your motion, and this forced you to continue litigating until the court of appeals could hear your case after final judgment at trial.

This hypothetical was the reality in *Gonzalez v. Naviera Neptuno A.A.*,<sup>1</sup> a case dealing with the “wrongful death claims of the *Peruvian* survivors of a *Peruvian* sailor killed in the United States while serving on a *Peruvian* flag vessel, owned by *Peruvian* citizens, under articles prepared pursuant to a *Peruvian* collective bargaining agreement.”<sup>2</sup> Following a trial on the merits, the case was dismissed on appeal based on a motion to dismiss first filed by the defendant and denied by the district court judge more than three years earlier.<sup>3</sup>

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1. *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876 (5th Cir. 1987).

2. *Id.* at 877 (emphasis added).

3. *Id.* at 881.

The motion at issue was a motion to dismiss for *forum non conveniens* (“FNC”), which, in the federal courts,<sup>4</sup> argues that an alternative forum exists outside of the United States that is both adequate to hear the litigation and more convenient for this purpose than the U.S. court.<sup>5</sup> The FNC doctrine is a judicially developed common law doctrine<sup>6</sup> that U.S. courts have used for more than two centuries.<sup>7</sup> The doctrine remains a viable tool for courts to dismiss transnational cases from the U.S. legal system,<sup>8</sup> but a dismissal for FNC is initially left to the discretion of a federal trial judge.<sup>9</sup>

A difficulty arises when one of the litigants seeks review of the district court judge’s ruling on a motion to dismiss for FNC. If the trial judge *grants* the defendant’s motion to dismiss, the plaintiff may immediately appeal that decision to the circuit court,<sup>10</sup> arguing that the judge abused her discretion in granting the motion.<sup>11</sup> However, if the trial judge instead *denies* the motion to dismiss for FNC, no immediate

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4. It is important to note that most states also have some form of the FNC doctrine and, while many states mirror the federal doctrine in their own law, FNC is not uniform at the state level. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 356–57 (6th ed. 2018) (noting that all states except Montana, which has rejected the doctrine, and Idaho and Oregon, which have not formally adopted the doctrine, incorporate the FNC doctrine into state law through cases or statutes that mirror the federal common law doctrine or that include modifications to make state law more stringent than the federal FNC analysis). When this Note discusses the FNC doctrine, it exclusively refers to the uniform federal standard.

5. See *id.* at 347 (noting that, under the FNC doctrine, “a U.S. court may dismiss an action (otherwise within its jurisdiction) in favor of a substantially more convenient and appropriate foreign forum”).

6. *Id.* at 349.

7. See RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* 38 (2007) (noting that use of the FNC doctrine by U.S. courts can be traced as far back as the year 1801).

8. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430–31 (2018) (Sotomayor, J., dissenting) (highlighting the continuing availability of the FNC doctrine to dismiss transnational litigation from U.S. courts).

9. See Cassandra Burke Robertson, *Forum Non Conveniens on Appeal: The Case for Interlocutory Review*, 18 SW. J. INT’L L. 445, 446 (2012) (noting that a district court has discretion to dismiss a case under the FNC doctrine).

10. See MICHAEL KARAYANNI, *FORUM NON CONVENIENS IN THE MODERN AGE: A COMPARATIVE AND METHODOLOGICAL ANALYSIS OF ANGLO-AMERICAN LAW* 49 (2004) (identifying that a dismissal for FNC is subject to appellate review).

11. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (“The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . .”).

appeal as of right is permitted; the movant only has a right to raise the issue on appeal following a final judgment.<sup>12</sup>

This dichotomy in appealability as of right for FNC rulings arises from the Supreme Court's decision in *Van Cauwenberghe v. Biard*.<sup>13</sup> In *Biard*, the Court held that denials of motions to dismiss for FNC do not fall within the collateral order doctrine—a narrow exception to the final judgment rule that permits appellate review of certain interlocutory orders.<sup>14</sup> Consequently, litigants, like those in *Gonzalez*, may proceed through the time and expense of discovery, motion practice, and trial only to be kicked out of the U.S. legal system on appeal.<sup>15</sup>

Yet few parties will ever successfully obtain reversal by an appellate court of a district court's denial of a motion to dismiss for FNC after trial on the case's merits.<sup>16</sup> This is not because erroneous denials of motions to dismiss do not occur; rather, numerous factors—notably including the significant financial costs of and time involved in litigating a case on the merits—lead the vast majority of litigants to settle their cases before trial.<sup>17</sup> In addition, a party challenging an FNC denial after final judgment “must display substantial prejudice” on appeal.<sup>18</sup> Such prejudice cannot be shown when the moving party is otherwise successful on the merits during the appeal.<sup>19</sup> Consequently, “review after final judgment is ineffective to vindicate a wrongfully denied motion for FNC.”<sup>20</sup>

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12. See *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (indicating that denials of motions to dismiss for FNC are “unsuited for immediate appeal as of right”).

13. *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988).

14. *Id.* at 530 (holding that the denial of a motion to dismiss for FNC is not “a collateral order subject to appeal as a final judgment”).

15. See *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 881 (5th Cir. 1987) (“Although . . . a trial on the merits has occurred[,] . . . we believe Neptuno has shown sufficient prejudice to warrant vacating that judgment and, in effect, transferring the case to Peru.”).

16. Research for this Note has identified *Gonzalez* as the only such instance.

17. See Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009) (“Casual conventional wisdom often has it that about 95 percent of cases settle.”).

18. *Yukos Capital S.A.R.L. v. Samaraneftgaz*, 592 F. App'x 8, 9 (2d Cir. 2014) (citation omitted). This standard at least requires the appellant to illustrate the content of additional evidence that would have been available in the non-U.S. forum and how the use of that evidence may have changed the result in the case. See *id.* at 9–10 (determining that appellant “failed to demonstrate the prejudice necessary to challenge the *forum non conveniens* ruling” because appellant did not “proffer[] what testimony [a witness unable to testify in the U.S. forum] might have given or how that testimony might have affected the case's outcome”).

19. *Indasu Int'l, C.A. v. Citibank, N.A.*, 861 F.2d 375, 380 (2d Cir. 1988).

20. *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015).

Further, parties are rarely able to seek immediate appellate review of a denied motion to dismiss for FNC before final judgment.<sup>21</sup> Defendants in the *Gonzalez* case sought such review through a certification for interlocutory appeal and a writ of mandamus.<sup>22</sup> Both efforts were unsuccessful,<sup>23</sup> and this is the norm for defendants seeking immediate appellate review of a denied FNC motion.<sup>24</sup>

The dichotomy in the availability of prompt appellate review for FNC decisions has particular salience in the context of transnational litigation, where forum selection concerns are particularly acute.<sup>25</sup> This Note adopts a working definition of transnational litigation as “cases involving foreign parties, foreign harms, or foreign law.”<sup>26</sup> In transnational cases, the choice of forum is highly contested because different forums can substantially affect the outcome of a case on its merits.<sup>27</sup> Numerous reasons exist for the impact of various forums on transnational litigation, including that rules governing procedure, substance, and choice of law differ far more significantly across countries than they do across U.S. states.<sup>28</sup> Moreover, differences in political and socioeconomic backgrounds of lawyers and courts are more pronounced in the transnational setting, as are risks of forum bias and concurrent litigation proceedings.<sup>29</sup> Finally, judgment enforcement can be more difficult in the transnational litigation context than when litigating within a single domestic jurisdiction.<sup>30</sup>

Additionally, forum selection for transnational litigation is especially important when one of the potential forums is a U.S. federal court.<sup>31</sup> Jury trials, contingency fees, broad discovery, high damages awards (including punitive damages), and the fact that each party typically covers its own attorneys’ fees are all distinguishing features of

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21. *Id.*

22. *Gonzalez v. Naviera Neptuno A.A.*, 832 F.2d 876, 877–78 (5th Cir. 1987).

23. *Id.*

24. Robertson, *supra* note 9, at 470 (noting that certification and mandamus are “only rarely applied in forum non conveniens cases”). Certification and mandamus are discussed in-depth within Part II.

25. BORN & RUTLEDGE, *supra* note 4, at 3.

26. Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 391 (2017).

27. See Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 783 (1985) (“The choice of forum has thus become a key strategic battle fought to increase the chances of prevailing on the merits.”).

28. BORN & RUTLEDGE, *supra* note 4, at 3.

29. *Id.*

30. *Id.*

31. *Id.*

litigation in a U.S. forum compared to litigation elsewhere in the world.<sup>32</sup> These characteristics tend to be plaintiff friendly,<sup>33</sup> and they have resulted in the general idea that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”<sup>34</sup>

Yet the Supreme Court has recently made it tougher for transnational litigation to proceed in U.S. federal courts.<sup>35</sup> For example, the Supreme Court has restricted the extraterritorial reach of numerous federal statutes, tightened the requirements for personal jurisdiction over foreign defendants, and heightened the pleading standards required of plaintiffs, all of which help to limit transnational litigation in U.S. federal courts.<sup>36</sup> The FNC doctrine remains a key tool for defendants seeking the dismissal of complaints with extensive foreign connections, but the Supreme Court has not altered the landscape of appellate review for FNC motions in its recent decisions despite otherwise increasing restrictions on transnational litigation.

This Note argues that the Supreme Court should reverse its current doctrine to allow for immediate appeals as of right from orders denying motions to dismiss for FNC. Doing so would be in line with the Court’s current jurisprudential trends restricting transnational litigation in U.S. federal courts. Immediate appellate review would also further the policy rationales—including respect for the separation of powers, adherence to general principles of international comity, and concerns about litigation fairness and efficiency—underlying recent Supreme Court decisions in this area.

This argument contributes to the burgeoning academic discussion surrounding transnational litigation in U.S. courts<sup>37</sup>—a conversation

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32. *Id.* at 3–4.

33. *Id.* at 3.

34. *Smith Kline & French Labs. Ltd. v. Bloch* [1983] 1 W.L.R. 730 (AC) at 733 (Eng.).

35. See GEORGE T. CONWAY, III, JOHN BELLINGER, III, R. REEVES ANDERSON & JAMES L. STENGEL, U.S. CHAMBER INST. FOR LEGAL REFORM, *FEDERAL CASES FROM FOREIGN PLACES: HOW THE SUPREME COURT HAS LIMITED FOREIGN DISPUTES FROM FLOODING U.S. COURTS* 1 (2014) (“Recent decisions by the United States Supreme Court . . . have cut back attempts to involve U.S. courts in controversies with minimal, if any, connection to the United States.”).

36. See *id.* at 1, 42 (identifying that recent Supreme Court decisions have restricted extraterritoriality and utilized tougher jurisdiction and pleading standards to limit transnational litigation in U.S. federal courts).

37. See generally Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015) (highlighting an increasing reluctance by U.S. courts to hear transnational cases); John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433 (2015) (discussing the U.S.

with important global implications for litigants, lawyers, and the legal profession. This Note engages with this dialogue by taking the Supreme Court's recent jurisprudence and supporting policy rationales as a given while suggesting an additional mechanism by which the Court could further its stated goal of limiting transnational litigation: reforming the appellate regime for denied motions to dismiss for FNC.

The Note proceeds in five substantive parts. Part I outlines and provides the policy rationales for the FNC doctrine, the final judgment rule, and the collateral order exception to the final judgment rule. Part I also presents the Supreme Court's *Biard* decision, which combined these doctrines to hold that denied motions to dismiss for FNC are not immediately appealable as of right. Part II critiques the appellate framework resulting from the *Biard* decision by detailing the failures of the current regime for appealing FNC denials. Part III then illustrates the Supreme Court's recent jurisprudence restricting transnational litigation in U.S. federal courts. Part IV follows by arguing that reversing *Biard* and allowing immediate appeals from FNC denials fits within this trend and supports the separation of powers, comity, fairness, and efficiency values used by the Court to justify restrictions on transnational litigation. Part V responds to potential counterarguments to this proposal.

#### I. *FORUM NON CONVENIENS*, THE FINAL JUDGMENT RULE, AND THE COLLATERAL ORDER EXCEPTION: A PRIMER ON THE DOCTRINES AND THE *BIARD* HOLDING

The current appellate framework for denied motions to dismiss for FNC results from the interplay of various doctrines and case law. The FNC doctrine allows a federal court to dismiss a case from the U.S. legal system in favor of a more convenient foreign jurisdiction. The final judgment rule prevents interlocutory orders in a case from being immediately appealed to an appellate court unless the order falls within the collateral order exception to the rule. The Supreme Court held in *Biard* that denied FNC motions do not fall within the exception, thereby resulting in the dichotomous appellate framework for motions

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judiciary's perceived retreat from international law and its effect for litigants seeking to use U.S. courts as a litigation forum); Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941 (2017) (discussing the use of parochial procedures favoring U.S. parties in U.S. courts); Austen L. Parrish, *Fading Extraterritoriality and Isolationism? Developments in the United States*, 24 IND. J. GLOBAL LEGAL STUD. 207 (2017) (opining on the conventional perspective that U.S. courts are limiting transnational litigation).

to dismiss for FNC. This Part details these doctrines, the policy rationales for each, and the facts and holding of the *Biard* case as background on current law and concludes by highlighting how lower courts have criticized the Supreme Court's approach and holding in *Biard*.

#### A. *The Forum Non Conveniens Doctrine*

*Forum non conveniens* is designed “to respond to those limited instances in which the plaintiff’s chosen forum was highly inconvenient, either from the perspective of the defendant or the chosen forum.”<sup>38</sup> In the federal court system, the FNC doctrine is part of federal procedural common law.<sup>39</sup> When invoked, the doctrine serves as a mechanism to dismiss a case from the U.S. legal system.<sup>40</sup>

The Supreme Court’s decision in *Piper Aircraft Co. v. Reyno*<sup>41</sup> outlines the doctrine as it stands today.<sup>42</sup> As articulated in *Piper*, conducting an FNC analysis is a two-step process<sup>43</sup> left to the discretion of the district court judge and subject to the abuse of discretion standard of appellate review.<sup>44</sup> The first step in the FNC analysis is to ask whether an adequate alternative forum is available.<sup>45</sup> Being “amenable to process” in another jurisdiction will ordinarily satisfy the requirement.<sup>46</sup> But even if a party is amenable to process in another jurisdiction, the alternative forum may still be deemed inadequate if no satisfactory remedy is available.<sup>47</sup> A lack of satisfactory remedy includes, but is not limited to, situations where the forum forbids litigation over the dispute’s subject matter.<sup>48</sup> Notably, the mere fact

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38. JOACHIM ZEKOLL, MICHAEL COLLINS & GEORGE RUTHERGLEN, TRANSNATIONAL CIVIL LITIGATION 371 (2013).

39. *See id.* at 393 (“The *forum non conveniens* principles . . . are generally thought to be procedural principles applied in the federal courts, as a matter of federal common law.”).

40. *Id.* at 372.

41. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

42. *See* BORN & RUTLEDGE, *supra* note 4, at 356 (noting that *Piper Aircraft* “is the leading contemporary statement of the *forum non conveniens* doctrine”).

43. BRAND & JABLONSKI, *supra* note 7, at 73.

44. *See Piper Aircraft Co.*, 454 U.S. at 257 (“The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . .”).

45. *See id.* at 254 n.22 (“At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.”).

46. *Id.*

47. *Id.*

48. *Id.*

that the law in the alternative forum may be less favorable to the plaintiff is not enough to deem the forum inadequate.<sup>49</sup> Similarly, a change in law favorable to the movant, even when the movant engages in “reverse forum-shopping” and purposely seeks more favorable law through an FNC motion, should not be considered in the FNC analysis.<sup>50</sup> If there is no adequate alternative forum available, the motion to dismiss for FNC will be denied and the litigation will continue.<sup>51</sup>

If an adequate alternative forum does exist, the inquiry proceeds to the second step of the FNC analysis, which is a balancing of public and private interest factors.<sup>52</sup> Private interest factors include: “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises . . . ; and all other practical problems that make trial of a case easy, expeditious and inexpensive.”<sup>53</sup> Public interest factors include:

the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.<sup>54</sup>

In balancing the public and private interest factors, no single factor is dispositive.<sup>55</sup> Further, deference is owed to the plaintiff’s choice of forum, which is assumed to be convenient,<sup>56</sup> although foreign plaintiffs

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49. *See id.* at 247 (“The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum.”).

50. *Id.* at 252 n.19.

51. *See* BRAND & JABLONSKI, *supra* note 7, at 73 (noting that proof of an adequate alternative forum is required first before continuing to the second step of the FNC analysis).

52. *See id.* (identifying that “a balancing of private and public interest factors to determine the most appropriate forum” comes after concluding that an adequate alternative forum is available).

53. *Piper Aircraft Co.*, 454 U.S. at 241 n.6 (citation omitted).

54. *Id.* (citation omitted).

55. *See id.* at 249–50 (“If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.”).

56. *Id.* at 255–56.

receive less deference than citizens or residents of the forum.<sup>57</sup> That said, dismissal is possible even from a plaintiff's home forum when public and private interest factors suggest that litigation in the forum would overly burden the defendant or court.<sup>58</sup> The FNC inquiry is ultimately focused on convenience;<sup>59</sup> dismissal for FNC may therefore be granted when a plaintiff chooses a forum *only* for its favorable law, or merely to annoy a defendant, rather than for the forum's convenience.<sup>60</sup>

The FNC analysis is a fact-intensive inquiry designed to afford flexibility to judges.<sup>61</sup> Because the FNC issue can be decided before addressing whether jurisdiction is proper,<sup>62</sup> district court judges can promptly dismiss cases without expending unnecessary time and resources. Further, a court can impose conditions on FNC dismissals to ensure that the alternative forum is truly adequate.<sup>63</sup> Such conditions often include requirements that the movant accept jurisdiction in the alternative forum or agree to pay any judgment that the foreign jurisdiction renders.<sup>64</sup> If the conditions are not met, or the alternative forum refuses to accept the case, the litigation returns to the U.S. trial court.<sup>65</sup>

The Supreme Court has fashioned the FNC doctrine to consider "interests of justice."<sup>66</sup> The Court has noted the attractiveness of U.S. courts to foreign plaintiffs and highlighted that, on a systemic level, docket congestion would only increase in already-crowded U.S. courts without dismissals based on FNC.<sup>67</sup> At the same time, the doctrine "represents a clear choice for equity over efficiency [in individual

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57. *Id.* at 255 n.23.

58. *Id.*

59. *See id.* at 248–49 (noting that a previous Supreme Court case held "that the central focus of the *forum non conveniens* inquiry is convenience").

60. *Id.* at 249 n.15.

61. *See id.* at 249–50 ("[E]ach case turns on its facts. If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable." (citation omitted)).

62. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007) ("We hold that . . . 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.").

63. BORN & RUTLEDGE, *supra* note 4, at 413.

64. *Id.*

65. *Id.*

66. *Piper Aircraft Co.*, 454 U.S. at 254.

67. *Id.* at 251–52.

cases], and for fairness in a particular case over predictability of procedural status.”<sup>68</sup> The doctrine also serves to promote various additional interests, including the efficient and fair use of U.S. domestic legal resources, the avoidance of inappropriately expansive potential liability for U.S. defendants, and paying deference to the interests and policies of foreign forums.<sup>69</sup>

### *B. The Final Judgment Rule and Its Collateral Order Exception*

Under the final judgment rule, codified at 28 U.S.C. § 1291,<sup>70</sup> the courts of appeals “have jurisdiction of appeals from all *final decisions* of the district courts of the United States.”<sup>71</sup> Notably, a district court decision is “final” when it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>72</sup> Consequently, an order from the district court granting a motion to dismiss for FNC is immediately appealable—it ends the litigation in the district court. But a district court order *denying* a motion to dismiss for FNC is not immediately appealable because the parties are free to continue the litigation.<sup>73</sup>

The rationales for the final judgment rule are straightforward. The rule allows for comprehensive review upon final judgment of different stages of the litigation’s proceedings.<sup>74</sup> Further, the rule prevents piecemeal appellate review of litigation from clogging the legal system.<sup>75</sup> The final judgment rule is therefore an outgrowth of Congress’s desire to avoid the inefficiencies and excess costs that result from repeated, frivolous, or unnecessary appeals in the federal courts.<sup>76</sup>

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68. BRAND & JABLONSKI, *supra* note 7, at 73.

69. BORN & RUTLEDGE, *supra* note 4, at 369–70.

70. 28 U.S.C. § 1291 (2018). The statute applies to all federal courts of appeals other than the United States Court of Appeals for the Federal Circuit. *Id.*

71. *Id.* (emphasis added).

72. *Catlin v. United States*, 324 U.S. 229, 233 (1945) (citation omitted).

73. *See* ZEKOLL et al., *supra* note 38, at 394 (“[O]nly the granting (but not the denial) of a motion to dismiss on *forum non conveniens* grounds is immediately appealable under the final judgment rule, 28 U.S.C. § 1291.”).

74. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

75. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974).

76. *See* *Will v. Hallock*, 546 U.S. 345, 350 (2006) (noting that policy interests underlying § 1291 include “the sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise” (citations omitted)).

The collateral order doctrine is a judicially developed exception to the final judgment rule.<sup>77</sup> The doctrine allows immediate appeals as of right from interlocutory orders that “fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.”<sup>78</sup> The doctrine constitutes an effort to read § 1291 practically, rather than technically.<sup>79</sup>

It is worth emphasizing that the class of decisions covered by the collateral order doctrine is narrow. The Court has held that “[t]o come within the ‘small class’ of decisions excepted from the final-judgment rule . . . the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.”<sup>80</sup> The Court has noted that these conditions are “stringent” so that the collateral order exception does not overpower the final judgment rule.<sup>81</sup>

The policy rationale favoring the collateral order doctrine is clear—some interlocutory orders are on issues so important, yet distinct from the case’s merits, that requiring a party to wait until after a final judgment to appeal the order effectively extinguishes the right at issue.<sup>82</sup> Under this rationale, denied motions to dismiss for FNC, as a class, are a prime candidate for immediate appellate review as of right. Forcing a movant to wait until after final judgment for review of the issue virtually destroys the movant’s right to litigate in an appropriate forum. But, as explained below, the Supreme Court rejected this rationale in *Biard*, holding that the denial of a motion to dismiss for FNC does not fall within the collateral order exception to the final judgment rule.<sup>83</sup>

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77. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467–68 (1978) (noting that the Court had developed the “exception” in a previous decision); Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 426–27 (2013) (identifying the collateral order doctrine as “one of the existing judicial exceptions to the final judgment rule”).

78. *Cohen*, 337 U.S. at 546.

79. See *id.* (“The Court has long given this provision of the statute this practical rather than a technical construction.” (citations omitted)).

80. *Coopers & Lybrand*, 437 U.S. at 468.

81. *Will*, 546 U.S. at 349–50.

82. *Cohen*, 337 U.S. at 546.

83. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 530 (1988).

C. Van Cauwenberghe v. Biard

The basic facts of *Van Cauwenberghe v. Biard* are straightforward. Biard, a resident of Belgium, filed a civil suit in U.S. district court against Van Cauwenberghe, also a Belgian resident, over a defaulted loan relating to a U.S. mortgage.<sup>84</sup> Biard asserted claims under federal statutory law, the common law of fraud, and other provisions of state law.<sup>85</sup> Van Cauwenberghe moved to dismiss the civil suit for FNC, but the district court summarily denied the motion.<sup>86</sup> The court of appeals affirmed this decision “in a one-line order” citing precedent on the collateral order doctrine, and the Supreme Court then granted certiorari.<sup>87</sup>

The Supreme Court affirmed the circuit court’s decision denying Van Cauwenberghe an immediate appeal as of right from his denied motion to dismiss for FNC.<sup>88</sup> In doing so, the Court concluded “that the question of the convenience of the forum is not completely separate from the merits of the action[] . . . and thus is not immediately appealable as of right.”<sup>89</sup> Step two of the FNC analysis asks district courts to identify whether the chosen forum is inconvenient enough to warrant dismissal.<sup>90</sup> Because that assessment—which involves reviewing a party’s ability to access evidence, determining the availability of witnesses, and assessing the forum’s interest in deciding the controversy—requires the district court to engage with the merits of the parties’ dispute at the FNC stage, the denial of an FNC motion does not fall into the collateral order exception.<sup>91</sup>

The Court did concede that “[i]t is . . . undoubtedly true that in certain cases, the [FNC] determination will not require significant inquiry into the facts and legal issues presented by a case, and an immediate appeal might result in substantial savings of time and expense for both the litigants and the courts.”<sup>92</sup> Yet the Court made clear that it considers categories of cases, and not individual disputes,

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84. *Id.* at 519–20.

85. *Id.* at 520.

86. *Id.* at 521.

87. *Id.*

88. *Id.* at 530.

89. *Id.* at 527 (citation omitted).

90. *Id.* at 528.

91. *Id.* at 528–29.

92. *Id.* at 529.

when determining appealability under § 1291.<sup>93</sup> Ultimately, the Court “believe[d] that in the main, the issues that arise in *forum non conveniens* determinations will substantially overlap factual and legal issues of the underlying dispute, making such determinations unsuited for immediate appeal as of right under § 1291.”<sup>94</sup>

The Court’s decision in *Biard* was not inevitable. The Fourth Circuit had previously held that denials of motions to dismiss for FNC were immediately appealable under the collateral order doctrine,<sup>95</sup> and some state courts had as well.<sup>96</sup> Moreover, the Supreme Court’s rationale has been subsequently criticized. The Third Circuit noted in dictum that the Supreme Court has been inconsistent when discussing the FNC doctrine, because “in a context other than the collateral-order doctrine . . . the Supreme Court . . . ha[s] held *forum non conveniens* dismissals not to be rulings on the merits.”<sup>97</sup>

The Supreme Court has responded to these critiques by agreeing that, generally, “[a] *forum non conveniens* dismissal den[ies] audience to a case on the merits.”<sup>98</sup> The Court maintains that this is consistent with *Biard*, which only focused on the FNC doctrine in the collateral order context.<sup>99</sup> According to the Court, *Biard*’s observation about overlap between factual and legal issues within the FNC doctrine “makes eminent sense when the question is whether an issue is so discrete from the merits as to justify departure from the rule that a party may not appeal until the district court has rendered a final judgment disassociating itself from the case.”<sup>100</sup>

In short, the Supreme Court has concluded that the FNC doctrine does not generally involve the merits of a case, but the doctrine is

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93. *Id.*

94. *Id.*

95. *See Hodson v. A.H. Robins Co.*, 715 F.2d 142, 145 n.2 (4th Cir. 1988) (reaching the merits on appeal of a district court judge’s order denying a motion to dismiss for FNC after concluding “that all of the requirements of the rule of *Cohen* . . . are present”).

96. *See Wyeth Labs., Inc. v. Jefferson*, 725 A.2d 487, 495 (D.C. 1999) (indicating that reversals of orders denying motions to dismiss for FNC are rare but have been permitted under D.C. law). Note that Washington, D.C., would later change its law to align its procedures relating to the FNC doctrine with those of the federal courts. *See Rolinski v. Lewis*, 828 A.2d 739, 742 (D.C. 2003) (overruling D.C. law allowing FNC denials to be “immediately appealable as a matter of right under the collateral order doctrine”).

97. *Malay. Int’l Shipping Corp. v. Sinochem Int’l Co.*, 436 F.3d 349, 359 (3d Cir. 2006), *rev’d*, 549 U.S. 422 (2007).

98. *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422, 432 (2007) (second alteration in original) (citation omitted).

99. *Id.* at 432–33.

100. *Id.* at 432 (citations omitted).

nonetheless still too involved with a case's merits to satisfy the collateral order doctrine's requirement that the decision in question "resolve an important issue completely separate from the merits of the action."<sup>101</sup> This inconsistency in the Court's reasoning, highlighted by the Third Circuit,<sup>102</sup> can be resolved by allowing for immediate appeals as of right from denied motions to dismiss for FNC under the collateral order doctrine.

## II. FAILURES OF THE CURRENT APPELLATE REGIME FOR DENIED MOTIONS TO DISMISS FOR FNC

This Part identifies the limited options available to a litigant seeking to immediately appeal a denied motion to dismiss for FNC following *Biard* and highlights the failure of each to afford any meaningful appellate review.

Outside of the collateral order doctrine, litigants have three potential options available for appealing an order denying a motion to dismiss for FNC: (i) waiting until final judgment after trial to appeal the FNC ruling; (ii) using 28 U.S.C. § 1292(b) to request the certification of interlocutory review; and (iii) applying for a writ of mandamus.<sup>103</sup> None of these options provide effective review of a denied motion to dismiss for FNC.

### A. *Appeal After Final Judgment*

Waiting for final judgment to appeal an order denying a motion to dismiss for FNC is ineffective because the movant will be unlikely to meet the substantial prejudice standard after final judgment.<sup>104</sup> Moreover, the work that the FNC doctrine does to avoid inconvenience to the parties and the forum will have already been undermined if a case makes it to final judgment,<sup>105</sup> and remanding the case is itself inconvenient, costly, and time consuming.<sup>106</sup> Orders denying motions to dismiss for FNC are consequently rarely reversed on appeal after trial.<sup>107</sup>

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101. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

102. *See supra* note 97 and accompanying text.

103. *See In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015) (discussing the inadequacy of traditional appeals and the use of § 1292(b) while analyzing a mandamus petition).

104. *Id.* at 289.

105. *Id.* (citation omitted).

106. Robertson, *supra* note 9, at 457.

107. *Id.*

*B. Interlocutory Review Under § 1292(b)*

Use of 28 U.S.C. § 1292(b) also fails to remedy the erroneous denial of a motion to dismiss for FNC.<sup>108</sup> Section 1292(b) allows for interlocutory appeals in civil cases where an order in question “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from [which] may materially advance the ultimate termination of the litigation.”<sup>109</sup> Notably, the *Biard* court stated that “[o]ur conclusion that the denial of a motion to dismiss on the ground of *forum non conveniens* is not appealable under § 1291 is fortified by the availability of interlocutory review pursuant to 28 U.S.C. § 1292(b).”<sup>110</sup> For the *Biard* court, it was enough that § 1292(b) was available when necessary.<sup>111</sup>

Time has shown that this rationale was misguided. Not only is the statutory ground for interlocutory review under § 1292(b) narrow, but it also requires approval from both the trial and appellate courts.<sup>112</sup> This is no easy task, as the movant must convince the trial court that it should allow an appeal from its own order and the appellate court that exceptional circumstances warrant a departure from the statutory final judgment rule.<sup>113</sup> The appellate court may deny the request for any reason.<sup>114</sup> These requirements have rendered § 1292(b) ineffective for litigants seeking interlocutory review of district court orders,<sup>115</sup> as certification for review under § 1292(b) occurs very infrequently.<sup>116</sup>

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108. See *In re Lloyd's*, 780 F.3d at 288 (arguing that interlocutory review under 28 U.S.C. § 1292(b) is limited, which contributes to the lack of effective remedies for erroneous denials of motions to dismiss for FNC).

109. 28 U.S.C. § 1292(b) (2018).

110. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

111. *Id.* at 530.

112. *In re Lloyd's*, 780 F.3d at 288.

113. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474–75 (1978).

114. *Id.* at 475.

115. See Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1245 (2007) (noting that “[s]ection 1292(b) has not been an effective method for obtaining appellate review over interlocutory orders,” because “the certification requirement gives district courts a veto over § 1292(b) appeals” and “the federal appellate courts have narrowly construed § 1292(b)’s requirements so that relatively few certified appeals are accepted”).

116. See Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 195–96 (2001) (noting that district court judges “rarely grant certification” and that “[a]ctual appeals are even rarer, because the appellate courts refuse to accept review of a significant percentage of certified orders”).

More specifically, § 1292(b) is rarely utilized in FNC cases.<sup>117</sup> An empirical study of certification requests under § 1292(b) in the First Circuit from 1958 to 2014 identified only two attempts to achieve certification in FNC cases, both of which were unsuccessful.<sup>118</sup> Similarly, a survey of certification requests in the Federal Circuit between 1995 and 2010 identified 117 petitions under § 1292(b),<sup>119</sup> none of which were related to an FNC motion.<sup>120</sup> Moreover, there is good reason to believe that these numbers underestimate denials of certification—they disregard petitions denied at the district court level, and decisions denying certification are rarely reported.<sup>121</sup>

Ultimately, a movant will rarely obtain reversal of a denied FNC motion under § 1292(b). It appears that, in the three decades since *Biard*, only two decisions have been reported in which courts granted § 1292(b) petitions and reversed denials of motions to dismiss for FNC.<sup>122</sup> Consequently, the Supreme Court’s confidence that § 1292(b) can serve as a mechanism for appealing erroneous denials of motions to dismiss for FNC has proven to be unfounded.

### C. *A Writ of Mandamus*

Mandamus is an extraordinary remedy<sup>123</sup> rarely applied in FNC cases.<sup>124</sup> Congress has codified the availability of the writ of mandamus at 28 U.S.C. § 1651(a): “The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>125</sup> The Supreme Court has highlighted that the writ

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117. Robertson, *supra* note 9, at 470.

118. Tony Weigand, *Discretionary Interlocutory Appeals Under 28 U.S.C. 1292(b): A First Circuit Survey and Review*, 19 ROGER WILLIAMS U. L. REV. 183, 250, 252 (2014).

119. Alexandra B. Hess, Stephanie L. Parker & Tala K. Toufanian, *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995-2010)*, 60 AM. U. L. REV. 757, 764 (2011).

120. *See id.* app. at 785–843 (identifying the 117 total § 1292(b) petitions considered by the Federal Circuit between 1995 and 2010).

121. Weigand, *supra* note 118, at 220.

122. *See* *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 386, 388–89 (2d Cir. 2011) (remanding a case to the district court with instructions to dismiss for FNC after receiving the case on appeal under § 1292(b)); *Ford v. Brown*, 319 F.3d 1302, 1304 (11th Cir. 2003) (same).

123. PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 721 (8th ed. 2014).

124. Robertson, *supra* note 9, at 470.

125. 28 U.S.C. § 1651(a) (2018).

of mandamus is “a drastic and extraordinary remedy reserved for really extraordinary causes,” which includes “only exceptional circumstances amounting to a judicial usurpation of power[] . . . or a clear abuse of discretion.”<sup>126</sup>

Given that mandamus “is one of the most potent weapons in the judicial arsenal,” the Supreme Court has required three necessary conditions before the writ can be issued.<sup>127</sup> First, there must be no other adequate means of relief available.<sup>128</sup> Second, the petitioner must prove a “clear and indisputable” right to mandamus.<sup>129</sup> Finally, the issuing court must believe mandamus is appropriate.<sup>130</sup> In short, while mandamus is technically available in FNC cases,<sup>131</sup> such relief is extraordinarily rare.<sup>132</sup>

The complete menu of available relief for litigants seeking to appeal the denial of a motion to dismiss for FNC is therefore very unappealing: neither seeking mandamus, asking for certification under § 1292(b), nor waiting until after final judgment on the merits are likely to offer an adequate means of review, and immediate appellate review of the decision under the collateral order doctrine is foreclosed by *Biard*.

### III. CURRENT TRENDS LIMITING TRANSNATIONAL LITIGATION IN U.S. FEDERAL COURTS

As a consequence of both the final judgment rule and the lack of meaningful alternatives for obtaining immediate appellate review of denied motions to dismiss for FNC, some transnational cases inevitably proceed in the U.S. legal system when they should never have been litigated in a U.S. forum. Despite this unique treatment of FNC motions, the Supreme Court has otherwise sought to restrict transnational litigation in the federal courts. This Part uses examples from the Court’s recent case law on the presumption against

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126. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (citations omitted).

127. *Id.*

128. *Id.* at 380–81 (citation omitted).

129. *Id.* at 381 (citation omitted).

130. *Id.* (citation omitted).

131. *See In re Lloyd’s Register N. Am., Inc.*, 780 F.3d 283, 287 (5th Cir. 2015) (granting a writ of mandamus where a motion to dismiss for FNC was erroneously denied “without written or oral explanation”).

132. Robertson, *supra* note 9, at 470.

extraterritoriality, personal jurisdiction, and pleading standards to illustrate this trend.

Overall, growing evidence suggests that U.S. courts, and particularly the Supreme Court, are becoming increasingly hostile to transnational litigation.<sup>133</sup> Scholars have offered numerous theories for this development, including an increased sense of sovereignty,<sup>134</sup> “an emerging market for transnational law”<sup>135</sup> in which U.S. courts are becoming less attractive and foreign forums are becoming increasingly hospitable to transnational cases,<sup>136</sup> and a general concern that U.S. taxpayer-funded resources are being used for court cases with limited or no connection to the United States.<sup>137</sup> The Supreme Court has reformed both substantive and procedural law as part of this increasing hostility to transnational litigation,<sup>138</sup> and immediate appeals from FNC denials would be consistent with this aversion.

While scholar Maggie Gardner has suggested that the Court’s recent jurisprudence is reason enough to eliminate the FNC doctrine entirely,<sup>139</sup> this Note instead argues that the current landscape of transnational litigation provides justification for the Supreme Court to reform the collateral order doctrine to include denials of motions to dismiss for FNC. Immediate appeals as of right from denied FNC motions would help further the Supreme Court’s chosen policy of limiting transnational litigation in U.S. federal courts by dismissing more cases from the U.S. legal system before those cases are adjudicated on the merits.

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133. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1088 (2015).

134. Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT’L L. 259, 292, 294–95 (2012) (identifying attitudes toward sovereignty and a sentiment of “integrity anxiety” as impacting U.S. resistance to transnational litigation and international law).

135. Bookman, *supra* note 133, at 1085.

136. See Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L L. 31, 33 (2011) (“[T]he United States is no longer as attractive to litigants as it supposedly once was, and . . . other countries will increasingly draw litigants to their courts through a combination of *ex ante* forum selection agreements and *ex post* forum shopping.”).

137. See Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75, 78 (2014) (identifying “the notions that U.S. courts are funded by American taxpayers and that jury pools, too, are a limited resource to be preserved for American plaintiffs” as “rationales for why American courts are disinclined to hear cases brought by foreign plaintiffs”).

138. See CONWAY, III ET AL., *supra* note 35, at 1–2 (highlighting that U.S. courts are restricting transnational litigation on statutory and procedural grounds).

139. Gardner, *supra* note 26, at 399.

A. *Expansion of the Presumption Against Extraterritoriality*

A prominent example of the Supreme Court's recent skepticism toward transnational litigation is its expansion of the presumption against extraterritoriality. The presumption is a canon of statutory interpretation that limits the reach of federal statutes beyond U.S. territory.<sup>140</sup> The "presumption had all but been given up for dead" through the 1980s, but recent cases invoking the presumption have served to "foreclose[] a large amount of transnational litigation that had formerly been taken for granted, including suits by U.S. plaintiffs."<sup>141</sup> These cases include *Morrison v. National Australia Bank Ltd.*,<sup>142</sup> which applied the presumption to securities fraud actions,<sup>143</sup> *Kiobel v. Royal Dutch Petroleum Co.*,<sup>144</sup> which applied the presumption to the Alien Tort Statute (ATS),<sup>145</sup> *RJR Nabisco, Inc. v. European Community*,<sup>146</sup> which indicated that the presumption applied to certain portions of the Racketeer Influenced and Corrupt Organizations Act (RICO),<sup>147</sup> and *Jesner v. Arab Bank, PLC*,<sup>148</sup> which extended *Kiobel* to categorically foreclose the possibility of suing foreign corporations under the ATS.<sup>149</sup>

*RJR Nabisco* identifies the robust process a court must now follow when determining whether a statute has extraterritorial reach: "At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear,

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140. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. This principle represents a canon of construction . . . rather than a limit upon Congress's power to legislate." (citations omitted)).

141. Bookman, *supra* note 133, at 1098–99.

142. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010).

143. *Id.* at 265 ("In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.").

144. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

145. *Id.* at 117 ("The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS."). The ATS states that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2018).

146. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016).

147. *Id.* at 2101 ("[W]e find that the presumption against extraterritoriality has been rebutted—but only with respect to certain applications of the statute.").

148. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

149. *Id.* at 1407 ("[T]he Court holds that foreign corporations may not be defendants in suits brought under the ATS.").

affirmative indication that it applies extraterritorially.”<sup>150</sup> If Congress has shown such intent in the statute, then the statute (or the relevant provisions) apply extraterritorially.<sup>151</sup> However,

[i]f the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute’s “focus.” If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.<sup>152</sup>

The outcome of this recent “retreat to territoriality” by the Supreme Court has not been lost on litigants and commentators.<sup>153</sup> “Lower courts are taking the directive seriously, applying the doctrine to other areas long thought to defeat the presumption, including . . . federal criminal law.”<sup>154</sup> Practitioners have argued that *Morrison* “revolutionized” the federal courts’ handling of litigation involving U.S. securities laws because, among other things, it “categorically extinguished” securities cases involving foreign plaintiffs, foreign defendants, and foreign conduct (“foreign-cubed” cases) from U.S. federal courts.<sup>155</sup> Together, *Morrison*, *Kiobel*, *RJR Nabisco*, and *Jesner* illustrate a clear trend by the Supreme Court to curb the ability of transnational litigation to proceed in U.S. federal courts.

#### B. Narrowed Availability of Personal Jurisdiction

This trend is also evident in the Supreme Court’s recent approach to personal jurisdiction, which “involves the power of a court to adjudicate a claim against the defendant’s person and to render a judgment enforceable against the defendant and any of its assets.”<sup>156</sup> Personal jurisdiction has both statutory and constitutional elements; the latter is further divided into “general” and “specific” jurisdiction.<sup>157</sup>

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150. *RJR Nabisco*, 136 S. Ct. at 2101.

151. *Id.*

152. *Id.*

153. Bookman, *supra* note 133, at 1098.

154. *Id.* at 1099.

155. CONWAY, III ET AL., *supra* note 35, at 4 (citation omitted).

156. BORN & RUTLEDGE, *supra* note 4, at 79.

157. *Id.* at 79–82, 88.

General jurisdiction “permits a court to adjudicate *any* claim against a defendant.”<sup>158</sup> Specific jurisdiction “permits only the adjudication of claims that are related to or arise out of a defendant’s contacts with the forum state.”<sup>159</sup> Only one of the two constitutional forms of personal jurisdiction is required to proceed with litigation.<sup>160</sup>

The Supreme Court narrowed the availability of general jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*<sup>161</sup> and *Daimler AG v. Bauman*.<sup>162</sup> Prior to these decisions, the standard had been one of reasonableness—general jurisdiction existed when a defendant had “sufficiently continuous and systematic” contacts with a forum.<sup>163</sup> Now, however, a court only has general jurisdiction over a defendant if the defendant’s “affiliations with the State are so continuous and systematic as to render [the defendant] essentially at home in the forum State.”<sup>164</sup> This curtails the number of forums to which a defendant can be subject to general jurisdiction, and “[f]or many corporate defendants, this has reduced their susceptibility to suit from just about everywhere to only the forums where they are incorporated and perhaps where they have their principal place of business.”<sup>165</sup> This stricter test renders U.S. courts unable to exert general jurisdiction over many foreign defendants at all.<sup>166</sup>

The Supreme Court has similarly narrowed the standard for specific jurisdiction.<sup>167</sup> The *J. McIntyre Machinery, Ltd. v. Nicastro*<sup>168</sup> case evidences this trend. There, a plurality of the Court explained that “[a]s a general rule, the exercise of judicial power is not lawful unless

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158. *Id.* at 88.

159. *Id.*

160. *See* Bookman, *supra* note 133, at 1092–93 (noting that specific jurisdiction over a defendant may still be available even when general jurisdiction is not).

161. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918, 927 (2011) (rejecting general jurisdiction in a transnational litigation case based on a stream of commerce theory regarding the limited flow of products from foreign subsidiaries of a U.S. company into a U.S. forum).

162. *Daimler AG v. Bauman*, 571 U.S. 117, 120–21, 139 (2014) (rejecting general jurisdiction in a transnational litigation case with a foreign plaintiff, foreign defendant, and foreign injury where jurisdiction was asserted based solely on the contacts of the foreign company’s U.S. subsidiary with the chosen U.S. forum).

163. Bookman, *supra* note 133, at 1091–92.

164. *Goodyear*, 564 U.S. at 919 (citation omitted).

165. Gardner, *supra* note 26, at 432 (citations omitted).

166. *Id.*

167. *See id.* at 433 (highlighting that “the Court’s jurisprudence . . . ha[s] checked exorbitant invocations of specific jurisdiction as well”).

168. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011).

the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.”<sup>169</sup> Applying this standard, the Court refused to find jurisdiction over a foreign defendant whose product caused injury to a New Jersey plaintiff in New Jersey because, despite targeting the United States generally for placement of its products, the defendant had not purposely availed itself of the New Jersey market specifically.<sup>170</sup> For the Court, “personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.”<sup>171</sup> Consequently, “[b]ecause the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State.”<sup>172</sup>

The *McIntyre* case has been described by one scholar as “territoriality on steroids, fetishizing the concept of a purposeful contact with a specific sovereign (and its territory) such that even harm in a particular territory is insufficient to support jurisdiction without accompanying targeted contacts with that sovereign.”<sup>173</sup> But whether one agrees with the outcome in *McIntyre* or not, it is clear that, along with recent restrictions on general jurisdiction, this narrowing of specific jurisdiction increases the likelihood that a court will not have the power to hear a transnational case, thereby limiting transnational litigation in U.S. federal courts.

### C. Heightened Pleading Standards

Finally, the Supreme Court has limited transnational litigation in U.S. courts by heightening pleading standards from notice pleading to plausibility pleading.<sup>174</sup> To properly state a claim in federal court, Federal Rule of Civil Procedure 8(a)(2) requires that a pleading need only include “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>175</sup> This requirement gained the moniker “notice pleading” after the Supreme Court’s decision in *Conley v.*

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169. *Id.* at 877–78 (plurality opinion) (citation omitted).

170. *See id.* at 878, 885–86 (detailing the facts of the case and identifying that the defendant had marketed to the United States generally but not to New Jersey specifically).

171. *Id.* at 884.

172. *Id.*

173. Bookman, *supra* note 133, at 1093.

174. *See* CONWAY, III ET AL., *supra* note 35, at 42 (highlighting the Supreme Court’s change in pleading requirements as limiting the ability to bring transnational claims in U.S. courts).

175. FED. R. CIV. P. 8(a)(2).

*Gibson*,<sup>176</sup> which stated that “all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>177</sup> The Supreme Court changed course fifty years later in *Bell Atlantic Corp. v. Twombly*,<sup>178</sup> where it adopted a “plausibility” standard, holding that “we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face,” and stated that this requires a plaintiff to “nudge[] their claims across the line from conceivable to plausible.”<sup>179</sup> The Court expanded this standard beyond *Twombly*’s specific factual context<sup>180</sup> two years later by concluding, in *Ashcroft v. Iqbal*,<sup>181</sup> that plausibility pleading requirements apply to all civil actions.<sup>182</sup> Consequently, the heightened pleading standards apply in transnational cases.<sup>183</sup>

Heightened pleading standards can be especially impactful in the transnational litigation context. ATS cases, for example, are transnational by definition, as they require an alien plaintiff, but they also require a “violation of the law of nations or a treaty of the United States.”<sup>184</sup> Plaintiffs may therefore be required to plead a violation of the law of nations with enough particularity to satisfy plausibility pleading requirements.<sup>185</sup> This is a difficult task and, combined with the additional requirements imposed by the presumption against extraterritoriality, is likely to foreclose or dissuade foreign plaintiffs from bringing claims under the ATS.<sup>186</sup>

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176. *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

177. *Id.* at 47.

178. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

179. *Id.* at 570.

180. *See id.* at 553 (“We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct and now reverse.” (emphasis added) (citation omitted)).

181. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

182. *See id.* at 678 (referencing *Twombly* while holding that “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face” (citation omitted)).

183. Childress III, *supra* note 37, at 1032.

184. 28 U.S.C. § 1350 (2018).

185. Childress III, *supra* note 37, at 1033.

186. *Id.* at 1033–34; *see also* CONWAY, III ET AL., *supra* note 35, at 42, 43 n.12 (identifying lower court decisions applying heightened pleading standards to dismiss transnational cases under the ATS and RICO).

*D. Supreme Court Justifications for Restricting Transnational Litigation Support Strengthening the FNC Doctrine*

Of course, this “restrictive ethos to federal procedural and substantive law in transnational cases” is not immune to critique.<sup>187</sup> Some argue that the trend heavily favors corporate defendants<sup>188</sup>—indeed, corporations have celebrated the restrictions.<sup>189</sup> Additionally, the limitations leave some plaintiffs without a remedy,<sup>190</sup> deprive U.S. defendants of their preferred home forum, and force dispute resolution into foreign forums, which in turn decreases U.S. influence abroad and reduces the role played by the United States in the market for transnational litigation and in promoting human rights.<sup>191</sup> Foreign states may retaliate by instituting blocking statutes or disfavoring U.S. companies, and U.S. companies may be competitively disadvantaged at home due to litigation costs that are increasingly irrelevant for foreign companies.<sup>192</sup>

The Supreme Court acknowledges these criticisms but has repeatedly found them unpersuasive. Instead, the Court has relied on notions of litigation fairness and efficiency, separation of powers, international comity, respect for foreign relations and sovereignty, and concerns about forum shopping to support its current transnational litigation jurisprudence.<sup>193</sup> Whether or not one agrees with the Supreme Court’s weighing of the interests when it comes to

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187. Childress III, *supra* note 37, at 999.

188. See Bookman, *supra* note 133, at 1093 (noting that the outcome of *McIntyre* “encourag[es] foreign companies to avoid jurisdiction by structuring their business so as not to target individual states”); Steinitz, *supra* note 137, at 77 n.13 (“Domestically, *Kiobel* belongs to an expanding pro-corporate-defendant jurisprudence that has characterized the Supreme Court in recent history.”).

189. See CONWAY, III ET AL., *supra* note 35, at 2 (“[R]ecent decisions have given American companies new tools to oppose the importation of foreign disputes into U.S. courts.”); *id.* at 42 (noting that recent trends “should help courts and defendants more efficiently weed out international lawsuits that never should have been imported into the United States in the first place”).

190. See Gardner, *supra* note 26, at 432 (“[F]oreign corporations may no longer be susceptible to the general jurisdiction of any U.S. court.”).

191. Bookman, *supra* note 133, at 1124, 1127–28.

192. *Id.* at 1129.

193. See *id.* at 1100, 1123 (noting that separation of powers suggests that foreign affairs should be left to the political branches, international comity cautions respect for the regulatory authority of foreign states, and forum shopping creates inefficiencies that current jurisprudence redresses); Childress III, *supra* note 37, at 1041–42 (highlighting concerns about excessive litigation, case management, high costs, crowded dockets, respect for foreign policy, and a fear of “legal imperialism” as influences on the Court’s approach to transnational litigation).

transnational litigation, the Supreme Court is clearly charting it a narrow path in federal courts.

Professor Gardner concludes that these doctrinal developments affecting transnational litigation render the FNC doctrine unnecessary, particularly given that “forum non conveniens increasingly provides defendants with an unjustified second (or third or fourth) bite at the apple of dismissal.”<sup>194</sup> For Gardner, FNC “is dangerously redundant” and should be “retire[d].”<sup>195</sup> But consistent jurisprudence and policy rationales favor the opposite: strengthening the doctrine’s utility by allowing for immediate appeals as of right from denials of motions to dismiss for FNC. Federal courts should be empowered to use the doctrine more aggressively, along with other doctrinal tools provided by the Supreme Court, to achieve the Court’s current preference for limiting transnational litigation in U.S. federal courts. If defendants receive another bite at the apple of dismissal as a result, the Supreme Court’s reluctance to use the U.S. federal court system as a forum for transnational litigation justifies this opportunity.

#### IV. INCREASING FNC’S CONVENIENCE BY OVERTURNING *BIARD*

This Part situates the *Biard* decision within the Supreme Court’s current trend of limiting transnational litigation in U.S. federal courts. While several methods exist for altering current doctrine to allow for immediate appeals as of right from denied FNC motions—including through new Supreme Court case law, Supreme Court rulemaking, or Congressional enactment—this Part argues that directly overturning *Biard* with new case law is the best option available and would allow the Court to use the FNC doctrine as an additional tool for achieving its stated policy objectives in restricting transnational litigation in U.S. federal courts.

##### A. *Overturning Biard Using New Case Law*

The most promising method to alter the rules of appealability for denials of motions to dismiss for FNC is through direct Supreme Court action. Most notably, the Court can and should revisit and revise its holding in *Biard* with new case law to allow such denials to fall within the collateral order doctrine. While *stare decisis* generally cuts against revisiting precedent, the Supreme Court was interpreting judge-made

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194. Gardner, *supra* note 26, at 431.

195. *Id.* at 391.

doctrine in *Biard* rather than a federal statute, and the Court will afford less deference to *stare decisis* in this situation than when reviewing an act of Congress.<sup>196</sup> Additionally, overruling *Biard* would not cause “significant damage to the stability of the society governed by” its rule,<sup>197</sup> and a seeming lack of reliance by parties specifically on the appellate regime *Biard* endorses when making litigation decisions would weigh against giving its holding great deference.<sup>198</sup> Moreover, the Court could easily distinguish the facts of *Biard*, which centered on a loan dispute, from the kinds of global transnational cases that have become more common in the three decades since the case was decided,<sup>199</sup> and this further reduces the deference the Court should afford to *Biard*’s holding.<sup>200</sup>

The Supreme Court has said that “the class of collaterally appealable orders must remain narrow and selective in its membership.”<sup>201</sup> Orders held to meet the standards of the collateral order doctrine include: stays issued in light of ongoing state court proceedings;<sup>202</sup> orders involving absolute, qualified, or sovereign immunity; and orders involving the criminal double jeopardy defense.<sup>203</sup> Orders that do not meet the doctrine’s requirements, because the corresponding motions are available in almost every litigation, include those tied to personal jurisdiction, statutes of limitations, motions for summary judgment, and motions to dismiss for failure to state a claim.<sup>204</sup>

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196. See, e.g., *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (“The principle of *stare decisis* has special force in respect to statutory interpretation because Congress remains free to alter what we have done.” (citation omitted)).

197. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

198. See *id.* at 854–55 (noting that the potential costs of overruling a decision increase if “the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation” (citation omitted)).

199. Again, the district court in *Biard* summarily denied the relevant motion to dismiss for FNC. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521 (1988). This lack of thorough district court review may have resulted from unique circumstances surrounding the case that are easily distinguishable from contemporary transnational litigation, including that the case involved two individual parties and that *Van Cauwenberghe* had previously been extradited to the United States, sentenced in related criminal proceedings, and prohibited from leaving the country. *Id.* at 520.

200. See *Casey*, 505 U.S. at 855 (indicating that “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification” reduces the amount of deference that the Court needs to give to the rule (citation omitted)).

201. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (citation omitted).

202. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10–13 (1983).

203. *Will v. Hallock*, 546 U.S. 345, 350 (2006).

204. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994).

Motions to dismiss for FNC cannot be made in every case. The federal transfer of venue statute, 28 U.S.C. § 1404,<sup>205</sup> applies to case transfers among U.S. federal courts, but it does not cover dismissals in favor of a foreign forum, which are still covered by the FNC doctrine.<sup>206</sup> This renders potential FNC cases, those seeking dismissal from the U.S. legal system entirely, a distinct and narrow class: “Between 1990 and 2006, there were roughly 691 (about 43 per year) reported transnational forum non conveniens decisions by federal courts.”<sup>207</sup> This reality helps satisfy the collateral order doctrine’s requirement of covering categories of cases<sup>208</sup> without fear that including FNC denials under the doctrine would inundate appellate dockets with immediately appealed FNC cases.

Additionally, of the three requirements for an order to be immediately appealable under the collateral order doctrine,<sup>209</sup> *Biard* only discussed the requirement that the order “resolve an important issue completely separate from the merits of the action.”<sup>210</sup> The Court determined that denials of motions to dismiss for FNC did not meet this standard and fortified this conclusion with an understanding that appeals would remain available under § 1292(b).<sup>211</sup> Yet, as explained in Part II above, reliance on § 1292(b) for appeals in FNC cases is misguided.<sup>212</sup> Further, other judges have critiqued<sup>213</sup> the Supreme Court’s conclusion in *Biard* that motions to dismiss for FNC “will substantially overlap factual and legal issues of the underlying dispute.”<sup>214</sup>

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205. 28 U.S.C. § 1404 (2018). Section (a) of the statute states specifically that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” *Id.* § 1404(a).

206. BORN & RUTLEDGE, *supra* note 4, at 356 (reiterating that § 1404(a) “does not apply to dismissals in favor of foreign forums, which continue to be governed by the common law doctrine of *forum non conveniens*”).

207. Childress III, *supra* note 37, at 1036 (citation omitted).

208. See *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (“In fashioning a rule of appealability under § 1291, . . . we look to categories of cases, not to particular injustices.”).

209. See *supra* note 80 and accompanying text (outlining the contours of the collateral order doctrine).

210. *Biard*, 486 U.S. at 527 (citation omitted).

211. *Id.* at 529.

212. See *supra* Part II (highlighting the infrequent use and ineffectiveness of appeals under § 1292(b)).

213. See *supra* note 97 and accompanying text (discussing the Third Circuit’s critique of *Biard*).

214. *Biard*, 486 U.S. at 529.

The Supreme Court's decision in *Sinochem International Co. v. Malaysia International Shipping Corp.*<sup>215</sup> is a starting point for this proposed reform. The Court's reasoning in *Sinochem* is somewhat inconsistent—acknowledging that FNC is “a threshold, nonmerits issue” while also claiming that FNC decisions are too involved with a case's merits to fit into the collateral order doctrine.<sup>216</sup> This apparent contradiction should be resolved in favor of treating FNC as an issue truly distinct from the merits and consequently covered by the collateral order doctrine, particularly since *Sinochem*'s holding encouraged the use of FNC in certain situations before even reaching questions of personal jurisdiction.<sup>217</sup> If the Supreme Court is adamant that FNC can be an immediate first avenue for dismissing a case, it makes sense for that determination to be immediately appealable so as to avoid ever wading into difficult jurisdictional questions and to be consistent with the Court's trends against permitting transnational litigation in U.S. federal courts.

Moreover, other than the Court's stated preference for not expanding the collateral order doctrine,<sup>218</sup> there is little to suggest why denied FNC motions as a class include too much factual and legal overlap with a case's merits to qualify for collateral appeal. The *Gonzalez v. Naviera Neptuno A.A.* case discussed above illustrates this point.<sup>219</sup> A threshold determination of whether the United States or Peru is the more convenient forum need not wade into the merits of proving a wrongful death claim. The inquiries are conceptually distinct, and this will consistently be true for transnational litigation cases as a class.

Further, other classes of motion denials that currently are immediately appealable under the collateral order doctrine—most notably denials of motions for qualified immunity<sup>220</sup>—arguably include even more factual and legal overlap with a case's merits than motions

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215. *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422 (2007).

216. *Id.* at 432–33.

217. *See id.* at 436 (holding that it is proper for courts to decide FNC motions prior to determining jurisdiction when jurisdictional questions are difficult and FNC factors favor dismissal).

218. *See Will v. Hallock*, 546 U.S. 345, 349–50 (2006) (noting that stringent conditions keep the class of collateral order cases small and in line with the doctrine's policy goals and the benefits of finality).

219. *See supra* notes 1–3 and accompanying text.

220. *See Will*, 546 U.S. at 350 (identifying denials of qualified immunity as immediately appealable under the collateral order doctrine).

to dismiss for FNC. For example, qualified immunity is a judicially developed common law doctrine invoked to provide government officials with immunity from civil damages claims.<sup>221</sup> An official receives this qualified immunity unless she “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>222</sup> Denial of qualified immunity is subject to immediate appeal under the collateral order doctrine<sup>223</sup> despite the fact that, to determine whether immunity applies, a court must investigate the objective reasonableness of an official’s conduct and whether that conduct violated clearly established law of which the officer should have been aware,<sup>224</sup> both of which are arguably substantive inquiries.

It is therefore unclear why the Supreme Court views FNC denials as too entangled with the merits to warrant appellate review under the collateral order doctrine. The Court has logical room to retreat from this holding and align with other judges who have made arguments that “[t]he decision on the merits[] . . . disposes of plaintiff’s substantive rights, while the [FNC] decision addresses defendant’s rights (and the rights of other participants in the law suit) to be tried in a forum convenient to them and to be free from vexatious and harassing litigation.”<sup>225</sup> Additionally, as explained above, the Supreme Court’s jurisprudence since the 2007 *Sinochem* case has decidedly restricted transnational litigation.<sup>226</sup> Should the Court wish to revisit its understanding that FNC denials are too entangled with a case’s merits to fall within the collateral order doctrine, it can use its recent limitations on transnational litigation as justification.

Stronger arguments exist that FNC denials also satisfy the first and third prongs for immediate appealability under the collateral order doctrine, both of which went unaddressed in *Biard*. Little doubt exists, for example, that FNC determinations “conclusively determine the disputed question,” which is the first requirement.<sup>227</sup> Winning a motion to dismiss for FNC will remove a case from the U.S. legal system, a

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221. See *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (noting that “immunity from suits for damages” for government officials stems from the common law).

222. *Id.* at 818.

223. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

224. See *supra* note 222 and accompanying text.

225. *Nalls v. Rolls-Royce Ltd.*, 702 F.2d 255, 258 (D.C. Cir. 1983) (Wilkey, J., dissenting).

226. See *supra* Part III (discussing recent trends in Supreme Court jurisprudence limiting transnational litigation in U.S. courts).

227. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

rather conclusive outcome and one that is also consistent with the Supreme Court’s transnational litigation jurisprudence. Similarly, “it is hard to imagine [a] case becoming any *less* appropriate for trial” in a U.S. forum after a motion to dismiss for FNC has already been denied and significant expenditures of time and resources made in the case.<sup>228</sup>

The third requirement of the collateral order doctrine—that an order “be effectively unreviewable on appeal from a final judgment”<sup>229</sup>—is also met in FNC cases. The “crucial question” relevant to the third prong of the collateral order doctrine is “whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders.”<sup>230</sup> FNC denials meet this standard. Not only is waiting until after final judgment ineffective,<sup>231</sup> but postponing review also severely threatens the interest at issue—“the right not to be tried in an unreasonably inconvenient forum.”<sup>232</sup> This is true for the entire class of FNC cases, which all seek expulsion of the case from the U.S. legal system.

Additionally, the goals of the FNC doctrine, including avoiding overcrowded dockets, preventing overuse of U.S. legal resources, and respecting foreign states’ policy choices,<sup>233</sup> are some of the same interests that the Supreme Court has articulated when restricting transnational litigation in U.S. federal courts.<sup>234</sup> Including orders denying motions to dismiss for FNC as a class within the collateral order doctrine by overturning *Biard* with new case law therefore supports the substantial public interest in limiting transnational litigation articulated by the Supreme Court while also remedying the lack of effective review for erroneous FNC denials.

### *B. Altering the Biard Framework Through Rulemaking*

The Supreme Court could also achieve the same result through the rulemaking process. 28 U.S.C. § 2072 allows the Supreme Court “to prescribe general rules of practice and procedure and rules of evidence

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228. *Nalls*, 702 F.2d at 258 (Wilkey, J., dissenting).

229. *Coopers & Lybrand*, 437 U.S. at 468.

230. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009).

231. *In re Lloyd’s Register N. Am., Inc.*, 780 F.3d 283, 288 (5th Cir. 2015).

232. *Nalls*, 702 F.2d at 260.

233. BORN & RUTLEDGE, *supra* note 4, at 369–70.

234. *See supra* note 193 and accompanying text (describing rationales for the Supreme Court’s current case law trending against transnational litigation in U.S. courts).

for cases in the United States district courts . . . and courts of appeals” that “may define when a ruling of a district court is final for the purposes of appeal under section 1291.”<sup>235</sup> Additionally, 28 U.S.C. § 1292(e) states that “[t]he Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”<sup>236</sup> Consequently, the Supreme Court has the authority to determine, by rule, that a denial of a motion to dismiss for FNC is final for purposes of appellate review.

As it relates to this rulemaking power, the Supreme Court has highlighted that “rulemaking, not expansion by court decision, [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable.”<sup>237</sup> In fact, the Court used its rulemaking authority to allow appellate courts to conduct interlocutory reviews of decisions granting or denying class certification requests.<sup>238</sup>

Unfortunately, some values that the Supreme Court lauds about the rulemaking process—including that it seeks pragmatic solutions while also utilizing experience from judges and practitioners—can also serve as vices.<sup>239</sup> If the Court tried to alter the appellate framework for denied FNC motions by following the measured and laborious approach it took in the class action context, which led to *discretionary* appellate court review of class certification orders, the Court may fail to improve FNC jurisprudence at all. Discretionary review for FNC denials technically exists already under § 1292(b), but this discretion is highly underutilized and ultimately ineffective.<sup>240</sup> Further, plaintiff and defense bars are unlikely to agree on allowing immediate appellate review of denials of motions to dismiss for FNC given that, as with the Supreme Court’s jurisprudence in other areas of transnational litigation, plaintiffs’ lawyers are likely to believe that FNC dismissals disproportionately benefit corporate defendants.<sup>241</sup>

Additionally, the FNC context is distinct from the class certification context. FNC denials will always more narrowly deal with questions relating to transnational litigation, while class certification

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235. 28 U.S.C. § 2072(a), (c) (2018).

236. *Id.* § 1292(e).

237. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009).

238. *LOW ET AL.*, *supra* note 123, at 721.

239. *Mohawk Indus.*, 558 U.S. at 114.

240. *See supra* notes 115–16 and accompanying text.

241. *See supra* note 188 and accompanying text.

orders can apply to both transnational and domestic litigation contexts. This makes FNC denials better suited for inclusion under the collateral order doctrine. If the Supreme Court wants to turn the FNC doctrine into an even more useful tool for restricting transnational litigation in U.S. courts, it should seek to overturn *Biard* on its own and hold in new case law that denials of motions to dismiss for FNC are immediately appealable as of right under the collateral order doctrine.

### C. Seeking Legislation to Achieve Reform

Finally, scholar Cassandra Burke Robertson has argued that congressional intervention is the most desirable method for achieving reform in this area.<sup>242</sup> Congress may step in at any time to revise the FNC or collateral order doctrines, as both are judicially developed federal procedural common law.<sup>243</sup> Doing so would align with the perspective that Congress is better situated than the courts to weigh transnational policy interests, including international comity and respect for the sovereignty of foreign nations.<sup>244</sup>

Yet Congress is unlikely to pass such a statute,<sup>245</sup> because “[a]part from imperfect foresight, Congress suffers from another shortcoming as a jurisdiction-managing institution—lack of interest.”<sup>246</sup> Congress, for example, has never intervened to address the FNC doctrine, despite the doctrine’s long history in U.S. courts.<sup>247</sup> There is little reason to believe that Congress will act in these areas now, and overturning *Biard* with new case law thus remains the best option for allowing immediate appeals as of right from denied motions to dismiss for FNC.

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242. See Robertson, *supra* note 9, at 467–68 (identifying statutory intervention as the most desirable method for allowing appeals from denials of motions to dismiss for FNC).

243. See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 815–16 (2008) (“If Congress chooses to legislate, conflicting federal procedural common law must give way to federal statute.”).

244. See Robertson, *supra* note 9, at 468 (“Congress could better account for the relevant policy interests affected by [FNC]. Specifically, it could weigh comparative sovereign interests, foreign relations, and economic realities.”).

245. *Id.*

246. James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. PA. L. REV. 493, 534 (2011).

247. BRAND & JABLONSKI, *supra* note 7, at 37–38 (noting that the FNC concept in U.S. courts can be traced as far back as the year 1801).

## V. DEFENDING A CHANGE TO IMMEDIATE APPEALS AS OF RIGHT FROM DENIED MOTIONS TO DISMISS FOR FNC

This Part addresses some additional plausible critiques to the argument that the Supreme Court should overturn *Biard* with new case law if it seeks to strengthen the FNC doctrine by allowing immediate appeals as of right from denied FNC motions in light of its goal to restrict transnational litigation in U.S. federal courts. Objections may include that such appeals are unnecessary or that the FNC doctrine is itself so inherently flawed that any reform efforts are bound to fail.

To begin, critics might argue that the Supreme Court does not need to alter the appellate scheme for FNC denials because the Court's other efforts to limit transnational litigation in U.S. courts either (i) sufficiently reduce the number of cases that merit dismissal through an FNC motion, rendering the doctrine unhelpful, or (ii) otherwise fulfill the same function as immediate appellate review of FNC denials without needing to expand the collateral order doctrine. Yet the Supreme Court sees the FNC doctrine as an integral component of its ability to analyze the proper forum for transnational litigation and does not endorse relegating the doctrine to a secondary role. For example, the recent dissent in *Jesner* and the opinion concurring in the judgment in *Kiobel* both highlighted the important role of the FNC doctrine in ensuring litigation takes place in the proper forum.<sup>248</sup> Given the continued filing of motions to dismiss for FNC, allowing immediate appellate review of FNC denials under the collateral order doctrine would only increase the utility of the doctrine for this purpose.

Other critics may suggest that inherent problems with FNC as a doctrine render futile any attempt to alter the appellate scheme for denied FNC motions. One way to make this type of argument is to assert that the FNC doctrine is unhelpful because it gives insufficient guidance for judges and leads to unpredictable results.<sup>249</sup> Similar arguments claim that the doctrine infringes on comity and foreign relations considerations that it supposedly seeks to advance by cutting

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248. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1430–31 (2018) (Sotomayor, J., dissenting) (highlighting that FNC serves alongside other tools, including narrowed grounds for personal jurisdiction, to dismiss transnational cases from U.S. courts); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 (2013) (Breyer, J., concurring in the judgment) (noting that the FNC doctrine serves as a limiting principle that “help[s] to minimize international friction”).

249. See Gardner, *supra* note 26, at 395 (“[S]cholars and judges alike have critiqued the doctrine for its poor design and overbroad discretion, the combination of which provides too little guidance for judges and thus too little predictability for parties.”).

off access to courts and imposing litigation on alternative forums.<sup>250</sup> Statistics indicating that 40 to 50 percent of motions to dismiss for FNC in published opinions are granted,<sup>251</sup> and that over 95 percent of cases dismissed for FNC never reach trial in an alternative forum,<sup>252</sup> may suggest that FNC dismissals are already too frequent and ultimately do not result in litigation continuing in an alternate forum.

These arguments are unpersuasive. First, statistics regarding FNC motions can be misleading. They do not take into consideration countervailing factors that may prevent a case from going to trial in a foreign forum, including settlement negotiations. Moreover, looking at the grant rate for motions to dismiss for FNC in reported cases will not tell the full story of judicial reliance on the doctrine, as unreported cases are more likely to include denials of these motions than their published counterparts.<sup>253</sup> Further, concerns about how disputes may proceed in an alternative forum must be calibrated against the idea, both in the United States and in foreign countries, that U.S. courts should not be “de facto world courts.”<sup>254</sup>

Second, the discretionary nature of the FNC doctrine, which may make it appear to be inconsistently applied, is a common attribute of legal balancing tests that choose to sacrifice predictability in favor of more case-specific review.<sup>255</sup> To the extent that concerns remain about consistent application of the doctrine or a lack of perceived guidance

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250. *See id.* (highlighting the possibility of retaliation by a foreign forum in response to a dismissal based on FNC as harmful to long-term U.S. interests).

251. *See id.* at 396 (“[F]ederal judges grant roughly half of motions to dismiss for forum non conveniens, at least in written opinions.”); *id.* at n.33 (citing articles suggesting a dismissal rate of between 40 and 50 percent for motions to dismiss for FNC during different ranges of years studied between 1982 and 2012).

252. *See* Steinitz, *supra* note 137, at 77–78 (“[E]mpirical data available demonstrate that less than four percent of cases dismissed under the doctrine of forum non conveniens ever reach trial in a foreign court.” (quoting *Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring))).

253. *Cf.* Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL’Y 83, 97 (2009) (“[P]ublished opinions . . . constitute only a small portion of opinions, and that portion is decidedly unrepresentative.” (citation omitted)); Weigand, *supra* note 118, at 220 (discussing that, in the context of § 1292(b) requests for interlocutory appeal, denials are more likely to go unreported than “grants of certifications and allowances of appeal”).

254. Steinitz, *supra* note 137, at 78–79.

255. *See* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 646 (2014) (“With rules, the Court can buy itself uniformity, predictability, and low decision costs, at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes. With Standards, it can buy itself nuance, flexibility, and case-specific deliberation, at the expense of uncertainty, variability, and high decision costs.”).

for lower court judges, such worries can be assuaged by supporting the proposal to allow for immediate appellate review of denied motions to dismiss for FNC.

It should also be noted that a federal appellate regime for motions to dismiss for FNC where both grants and denials of the motion are immediately appealable as of right has proven operational in the past. Both the Fourth Circuit and state courts so held prior to the Supreme Court's decision in *Biard*,<sup>256</sup> and numerous states continue to allow for immediate appeals from denials of motions to dismiss from their own FNC doctrines.<sup>257</sup> Canada, which also has an FNC doctrine,<sup>258</sup> similarly has federal and provincial law that allows for immediate appeals as of right from denied motions to dismiss for FNC.<sup>259</sup> If the Supreme Court wants to alter the current appellate regime to allow for immediate appeals as of right from denied FNC motions, concerns that such a framework is untenable are therefore non-starters.

Moreover, the justifications for making this proposed doctrinal change should be clear in the context of the Supreme Court's recent jurisprudence limiting transnational litigation in U.S. federal courts. The Supreme Court has identified that "United States law governs domestically but does not rule the world."<sup>260</sup> Additionally, the Court's jurisprudence seeks to avoid separation of powers concerns resulting from encroaching on the foreign policy expertise of the political branches.<sup>261</sup> Further, general principles of comity restrain the court from "offending foreign nations or infringing on their regulatory authority."<sup>262</sup> Notably, international comity—"the recognition which one nation allows within its territory to the legislative, executive or

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256. See *supra* notes 95–96 and accompanying text.

257. See, e.g., FL. R. APP. P. 9.130(a)(3)(C)(ix) (2018) (listing "the issue of forum non conveniens" as a non-final order from which appeal may be brought); 210 PA. CODE § 311(c) (2018) ("An appeal may be taken as of right from an order in a civil action or proceeding changing venue, transferring the matter to another court of coordinate jurisdiction, or declining to proceed in the matter on the basis of forum non conveniens or analogous principles.").

258. See BRAND & JABLONSKI, *supra* note 7, at 75–85 (discussing Canada's FNC doctrine).

259. See, e.g., Federal Courts Act 27(1), R.S. 1985, c. F-7 (Can.) (stating that "[a]n appeal lies to the Federal Court of Appeal" from both final and interlocutory judgments of the Federal Court); *Mazda Canada Inc. v. Cougar Ace (The)*, [2008] F.C.R. 219, paras. 25–27 (Can. Fed. Ct. App.) (reversing the lower court's denial of a motion to dismiss for FNC on immediate appeal and holding that Japan was the proper forum for the litigation); *Bouzari v. Bahremani*, [2015] ONCA 275, para. 54 (Can. Ont. Ct. App.) (reversing the lower court's denial of a motion to dismiss for FNC on immediate appeal and finding England to be the proper forum).

260. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (citation omitted).

261. *Id.* at 116.

262. Bookman, *supra* note 133, at 1100.

judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws”<sup>263</sup>—is increasingly important as the number of adequate alternative forums increases in quantity and overall desirability for litigants.<sup>264</sup>

These systemic concerns regarding the role of the U.S. legal system and its federal courts have combined with practical considerations about fairness to defendants,<sup>265</sup> the drain on U.S. resources of hearing unnecessary cases,<sup>266</sup> and the reality that plaintiffs will forum shop for favorable rules and biased populations<sup>267</sup> to incentivize the Supreme Court to limit transnational cases in U.S. federal courts. These considerations also justify immediate appellate review of denied motions to dismiss for FNC: without such review, a single trial judge’s decision may moot these policy interests by improperly keeping a case within the U.S. legal system without any effective method of appellate review.<sup>268</sup>

Immediate appealability can also increase the predictability of the specific types of transnational cases that should not proceed in a U.S. federal court by allowing appellate panels to consistently review denials of FNC motions for consistency. This review then increases the amount of case precedent for lower court judges to use as guidance when applying the doctrine to new cases. Finally, defendants otherwise settling with plaintiffs out of convenience rather than merit may also be more willing to defend themselves through the legal process if they know that a panel of appellate judges—who arguably have a better view of systemic concerns regarding international comity or the types of cases that should not be heard in U.S. courts than individual district court judges more involved in the daily litigation process and motion practice with litigants—will review the merits of their FNC claim.

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263. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

264. *See Quintanilla & Whytock*, *supra* note 136, at 33–35 (juxtaposing a decrease in transnational litigation in U.S. courts alongside the increasing likelihood that other countries will be chosen in place of the United States as the forum for transnational litigation).

265. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (discussing the weight afforded to the “unique burdens placed upon one who must defend oneself in a foreign legal system”).

266. *See Childress III*, *supra* note 37, at 1041–42 (discussing docket and case management concerns along with costs and abuses of litigation as reasons that U.S. courts are restricting transnational litigation).

267. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984).

268. *See supra* Part II (outlining the ineffectiveness of all current methods for reviewing a denial of a motion to dismiss for FNC).

Immediate appellate review of denied FNC motions is therefore about more than performing standard error correction on appeal. Such review is about fulfilling systemic goals of the U.S. federal courts in limiting transnational litigation as articulated by the Supreme Court of the United States. Immediate appellate review as of right from denied motions to dismiss for FNC would give the federal courts another mechanism by which to achieve this policy at the outset of a litigation and would also be consistent with *Sinochem's* holding that motions to dismiss for FNC can be addressed even before standard personal jurisdiction issues.<sup>269</sup> Ultimately, this outcome would be best achieved—and readily so—by the Supreme Court overruling *Biard* with new case law.

#### CONCLUSION

This Note has identified the dichotomy in the current appellate regime for motions to dismiss for FNC whereby grants of the motion are immediately appealable as of right but denials of the motion, under the Supreme Court's *Biard* precedent, are not subject to immediate appeal under the collateral order doctrine. Altering this framework to allow for immediate appeals as of right from denied FNC motions would align with the Supreme Court's recent jurisprudence limiting transnational litigation in U.S. federal courts. The most straightforward way for the Court to make this change is to reverse its thirty-year-old holding in *Biard* with new case law. This would allow the Court to use the FNC doctrine as an additional tool to further its separation of powers, comity, fairness, and efficiency rationales for restricting the use of U.S. federal courts as a forum for transnational litigation.

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269. See *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (holding that it is proper for courts to decide FNC motions prior to determining jurisdiction when jurisdictional questions are difficult and FNC factors favor dismissal).