Docket Nos. 24-2179 (L), 24-3463

In the

United States Court of Appeals

For the

Ninth Circuit

CARLOS DADA, et al.,

Plaintiffs-Appellants,

v.

NSO GROUP TECHNOLOGIES LIMITED, et al.,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 3:22-cv-07513-JD · Honorable James Donato

APPELLANTS' REPLY BRIEF
[REDACTED]

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INTRODUCTION

This case involves the deployment of malicious spyware, called Pegasus, using servers located in California as a necessary component of an attack on individual smartphones. The Amended Complaint alleges that Defendants–Appellees ("Defendants") developed *and deployed* Pegasus using Apple software, servers, and services, in California, in violation of federal and state law, to harm Plaintiffs–Appellants ("Plaintiffs"), who include U.S. citizens and residents. Defendants bear the burden to prove that dismissal for *forum non conveniens* is appropriate, but the only way they can do so is by contorting the record beyond recognition.

Plaintiffs' opening brief explained why the district court's decision to dismiss this case was an abuse of discretion and why the public- and private-interest factors favor hearing this case in California, especially considering the deference owed to Plaintiffs' choice of forum. Defendants' central argument to the contrary, that this case lacks a connection to California (or even the U.S.), ignores or misdescribes many of the Amended Complaint's allegations and improperly rests on unproven assumptions and inferences. Defendants' acts are part of a pattern of behavior that has harmed U.S. citizens and residents, as well as U.S. technology companies, many of which are in California, and has been treated as a serious national security threat by the U.S. government. Defendants used U.S.-based resources to facilitate cyberattacks and espionage with direct effects in the U.S., including in California, only to

then claim that a U.S. court cannot touch them. Defendants seek not merely to close U.S. courts to Plaintiffs but to force them into Israeli courts, paradoxically arguing that the [redacted], which would ordinarily suggest that an Israeli court would *not* be an adequate forum, mean that Plaintiffs are required to bring suit in Israel.[1] The Court should reject this argument, reverse the ruling below, and remand the case for further proceedings.

ARGUMENT

I. The district court abused its discretion by denying Plaintiffs the deference due to their choice of forum.

The district court abused its discretion by failing to defer to Plaintiffs' choice of forum.[2] First, the district court failed to afford the heightened deference owed to U.S. citizen and resident plaintiffs. *Boston Telecomms. Grp., Inc. v. Wood*, 588 F.3d

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[1] Defendants' arguments are part of a pattern of seeking to avoid accountability in U.S. courts. Previously, they argued that Apple's separate but related case required dismissal because Apple's customers were not included as a party. *E.g.,* Defendants' Motion to Dismiss at 1:24–28, 10:3–10, *Apple Inc. v. NSO Grp. Techs. Ltd.*, No. 3:21-cv-09078-JD, 2024 WL 251448 (N.D. Cal. Mar. 3, 2022), ECF No. 28. Here, they claim that Plaintiffs' (Apple customers) suit cannot proceed because Apple has moved to dismiss its case. Defs. Br. 6-7. For the reasons discussed, *infra*, Section II.A.1., Defendants are wrong.

[2] Defendants assert that the standard of review is "clear abuse of discretion," Defs. Br. 10—further attempting to improperly raise the bar for Plaintiffs to remain in the forum of their choosing—but this Court reviews *forum non conveniens* dismissals for simple abuse of discretion. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011); *see also Lewis v. Liberty Mut. Ins. Co.*, 953 F.3d 1160, 1163–64 (9th Cir. 2020).

1201, 1207 (9th Cir. 2009) ("[W]here the Plaintiff is a United States citizen, the defendant must satisfy a heavy burden of proof [and] unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." (citation omitted)). The district court did not even acknowledge that one plaintiff is a U.S. citizen or that others reside in the United States, an error Defendants ignore on appeal. ER-008; Defs. Br. 21. Lumping all Plaintiffs into the same category deprived them of the heightened deference owed to the U.S. citizen and resident Plaintiffs' choice of forum and is thus an abuse of discretion. *Salebuild, Inc. v. Flexisales, Inc.*, 633 F. App'x 641, 642 (9th Cir. 2015) ("[T]he presence of a foreign co-plaintiff does not lessen the deference owed a domestic plaintiff."); *see also Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1344; *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 101–03 (2d Cir. 2000) (holding that the district court erred when it failed to appropriately credit the U.S. residency of two plaintiffs in a mixed plaintiff pool comprising of residents and non-residents). The approach taken by the district court and urged by Defendants would inappropriately punish U.S. citizens and residents with reduced deference to their choice of forum simply for suing alongside other victims who are foreign. That is not the law, nor should it be.

Second, the district court abused its discretion when it failed to give Plaintiffs' choice of forum *any* deference. *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000). The district court correctly stated that a defendant invoking *forum*

non conveniens bears a lighter burden when a plaintiff sues outside the plaintiff's home forum, ER-006, but U.S. citizens and residents suing within the United States, even outside of their home forum, are entitled to more deference than the baseline afforded to foreign plaintiffs, and deference is owed even to *entirely* foreign plaintiffs' choice of forum. *Boston Telecomms.,* 588 F.3d at 1207. Yet the district court failed to recognize or provide even that baseline level of deference. Those failures tainted the district court's analysis, irreparably skewing its ability to properly weigh the public- and private-interest factors. *See Carijano*, 643 F.3d at 1236 (holding the district court's initial failure to afford deference "[struck] an unreasonable balance with the [public- and private-interest] factors"); *see also Neuralstem, Inc. v. ReNeuron, Ltd.*, 365 F. App'x 770, 771 (9th Cir. 2010) (holding that the district court abused its discretion because it did not accord the plaintiff's choice forum adequate deference); *Ito v. Tokio Marine & Fire Ins. Co.*, 166 F. App'x 932, 935 (9th Cir. 2006) (the district court committed reversible error when it "did not actually weigh" the plaintiff's choice of forum).[3]

[3]As the amicus brief of Professor Cassandra Burke Robertson notes, most circuits have *forum non conveniens* tests "that distinctly analyze the three elements of the doctrine: (1) deference to a plaintiff's choice of forum; (2) adequacy of an alternative forum; and (3) the [] public and private interest factors." Robertson Br. 5. This approach is most faithful to Supreme Court precedent, which makes clear that each element of a *forum non conveniens* analysis is distinct and must be assessed separately. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (adequate

Defendants point to a case in which this Court declined to apply a "presumption of convenience" for a plaintiff suing outside their home forum, Defs. Br. 18 (citing *Gemini Cap. Grp., Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9th Cir. 1998)), but this Court has since clarified that courts must always accord proper deference to a plaintiff's choice of forum, even if that plaintiff is not a resident of that particular forum. *See Neuralstem*, 365 F. App'x at 771 (criticizing defendant's "rel[iance] upon *Gemini Capital*" by stating that the Ninth Circuit had "recently clarified" that a non-resident plaintiff's choice of forum is still entitled to deference); *see also Ravelo Monegro*, 211 F.3d at 514 (stating that non-resident plaintiffs' choice of forum is entitled to some deference). In all the other cases on which Defendants rely, Defs. Br. 18, this Court acknowledged the importance of establishing deference as the starting point for weighing the relevant factors, exactly what the district court did not do here. *See, e.g.*, *Ayco Farms, Inc. v. Ochoa*, 862 F.3d 945, 949–50 (9th Cir. 2017) (acknowledging and discussing deference to plaintiff's choice of forum before determining that, on balance, the forum was inconvenient); *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1076–79 (9th Cir. 2015) (same); *Lueck v. Sunstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001) (acknowledging that "where the plaintiff is a United States citizen, the defendant must satisfy a heavy burden of

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alternative forum); *id.* at 256 (deference owed to plaintiff's choice of forum); *id.* at 257 (balance of public- and private-interest factors).

proof" and although "a foreign plaintiff's choice deserves less deference . . . less deference is not the same as no deference" before concluding the balance of factors nonetheless favored dismissal (cleaned up)).[4]

Misreading this clear and consistent caselaw, Defendants suggest that the district court was not required to "even mention[] the plaintiff's choice of forum when weighing the relevant factors," Defs. Br. 18, arguing that deference can be implicitly "factored into 'how strongly the movant must demonstrate' that the balance of factors favors dismissal," *id*. (quoting Robertson Br. 5).[5] The former suggestion simply cannot be squared with the law and the latter argument is belied by the way the district court analyzed the public- and private-interest factors, including, for example:

[4] The outcomes of these cases are not instructive here, as the factors the Court balanced in the shadow of deference to the plaintiffs' forum are readily distinguishable. For example, in *Ayco Farms*, related litigation was ongoing in the foreign forum, while the plaintiffs' primary tie to California had been established only "at the eleventh hour," and there was no identification of "any witnesses, documents, or evidence located in California." 862 F.3d at 950. *Ranza* and *Lueck* are distinguished in Section II, *infra*.

[5] In fact, Professor Robertson said the exact opposite: "The level of deference received by a plaintiff is treated as a 'threshold inquiry' and must be assessed as a distinct factor by the court because this inquiry determines how strongly the movant must demonstrate that the balance of private and public interest factors outweigh the plaintiff's choice." Robertson Br. 5.

(1) Flipping the burden onto Plaintiffs and faulting them for not showing California was convenient, ER-008–09, when it was Defendants' burden to show it was inconvenient. *Carijano*, 643 F.3d at 1227.

(2) Chastising Plaintiffs for not showing that "they would not have plausible claims under the law of other forums," ER-009, even though it was Defendants' burden to show that they could obtain relief in those forums. *Carijano*, 643 F.3d at 1225.

(3) Crediting untested assumptions and inappropriately drawing inferences favorable to Defendants, including:

Discounting the importance and relevance of Apple's California-based servers, ER-008, despite Plaintiffs' well-pled allegations of their central role in Defendants' scheme. ER-024–26 (Am. Compl. ¶¶ 41–45). Defendants then rely on this conclusion to claim that their alleged use of Apple's infrastructure is irrelevant. Defs. Br. 25.

Postulating that a local jury would struggle sitting for "a long trial that involves purely foreign plaintiffs and defendants, and events in foreign lands" despite applauding their ability to handle complex cases in the immediately preceding sentence. ER-009. Such a conclusion contradicts past rulings of this Court. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181-82 (9th Cir. 2006) ("Juries routinely address subjects that are totally foreign to them, ranging from the foreign

language of patent disputes to cases involving foreign companies, foreign cultures and foreign languages."). Defendants echo this claim. Defs. Br 31-32.

Speculating, with no support, that a "good argument could be made that California has no interest whatsoever in El Faro's readership," ER-009, summarily dismissing Plaintiffs' persuasive arguments to the contrary. ER-017 (Am. Compl. ¶ 4); Plaintiffs' Opp'n 9–10, *Dada v. NSO Grp. Techs. Ltd.*, No. 3:22-cv-07513-JD, 2024 WL 1024736 (N.D. Cal. Mar. 8, 2024). Defendants then treat California's alleged lack of interest as a settled issue. Defs. Br. 27.

Dismissing Plaintiffs' evidence of the United States' interest in managing the use of spyware as a "massive generalization of no utility for the *forum non conveniens* analysis," (ER-009), an assertion Defendants then adopt as their own without refuting the validity of the specific evidence Plaintiffs produced about the important nature of that interest and its connection to this case. Defs. Br. 27; Plaintiffs' Opp'n 9-10.

Thus, by failing to expressly weigh up the deference due to Plaintiffs' choice of forum and allowing that lack of deference to infect its analysis, the district court abused its discretion. *See Carijano,* 643 F.3d at 1224, 1229.

II. The district court abused its discretion by misapplying the *forum non conveniens* factors.

Defendants were required to demonstrate that the balance of public- and private-interest factors strongly favors them and make a clear showing of "such

oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent." *Ravelo Monegro*, 211 F.3d at 514 (quoting *Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th Cir. 1983)). Yet, as the district court did below, Defendants' arguments ignore these requirements and instead falsely characterize this case as "purely foreign," Defs. Br. 4, 22, 24, despite Plaintiffs' well-pled allegations centered on unlawful acts in California, the existence of U.S. citizen and resident plaintiffs, and the impact of this case on California interests. Moreover, Defendants lean on speculative catastrophizing about the need to obtain discovery in Israel that ignores well-established mechanisms in federal court for managing foreign discovery and fail to explain how the specific concerns they raise could credibly obstruct resolution of Plaintiffs' particular claims.

A. The district court abused its discretion by misapplying the public-interest factors.

The district court failed to credit the Amended Complaint's allegations regarding the state and federal interests in this case, did not account for its familiarity with state and federal law, and mischaracterized the burden on local juries and courts. Defendants' arguments rest on a series of equally absurd premises, including, but not limited to: (i) California has no interest in redressing violations of California law that take place partly in California, Defs. Br. 24–25; (ii) California has no interest in its residents' access to information published in a foreign country, *id.* at 27; (iii) the U.S.'s national security interest in this case does not implicate California,

id. at 27-28; (iv) the U.S. does not have an interest in deterring cyber-attacks against journalists, *id.* at 27–29; and (v) a U.S. court should not hear a case alleging violations of federal and California law because multinational discovery may be implicated, *id.* at 30.

Defendants' arguments also improperly contradict allegations in the Amended Complaint that must be taken as true at this stage, such as: the attacks compromised Plaintiffs' communications with U.S. officials, *id.* at 27–28; Defendants deployed, not just developed, Pegasus using Apple servers, *id.* at 25; and some of the relevant servers are in California, *id.* at 24.

Without these mischaracterizations of the governing law and the Plaintiffs' allegations, it is clear the public-interest factors favor California. This case centers on conduct that took place, in part, in California and targeted and harmed a California corporation in violation of U.S. policy. It raises issues of California and federal law best heard by a court sitting in California. The remaining public-interest factors similarly do not counsel in favor of dismissal and thus favor Plaintiffs.

1. California has a strong local interest in addressing the unlawful conduct that occurred within its borders.

Plaintiffs' chosen forum, California, has a strong local interest in this case. The district court's assertion that this case is foreign and warrants dismissal, ER-009, is false and underscores the district court's abuse of discretion.

First, California has a strong local interest in addressing unlawful activity conducted within the state. *See Boston Telecomms.*, 588 F.3d at 1212 (finding California had an "interest in preventing fraud from taking place within its borders," even though no party was based in California). Defendants accessed Apple servers, including those in California, to target Apple and its customers and to deploy Pegasus against Plaintiffs, all in violation of California and federal law. *See* ER-016, -019, -024–25 (Am. Compl. ¶¶ 3, 13, 41–43). The fact that some—or even many—of the harms that resulted from those unlawful acts may have been felt outside of the forum does not diminish California's interest in this case. *City of Almaty v. Khrapunov*, 685 F. App'x 634, 636 (9th Cir. 2017) (finding a local interest where a Kazakh city sued its former mayor for misusing the city's public assets); *Neuralstem, Inc.*, 365 F. App'x at 772 (finding California had an interest even though the "locus" of harm stemming from the challenged conduct was in another state). Nor does any interest Israel may assert in this case diminish California's interest. *Tuazon*, 433 F.3d at 1182 (courts "ask only if there is an identifiable local interest in the controversy, not whether another forum also has an interest.").

Defendants try to disguise California's interest in the alleged wrongdoing by asserting that none of the relevant conduct took place in California, ignoring the

well-pled allegations that the Court must accept as true at this stage.[6] *Carijano*, 643 F.3d at 1222; *Shi v. New Mighty U.S. Tr.*, 918 F.3d 944, 948 (D.C. Cir. 2019) (courts must "accept[] as true all factual allegations in the complaint and draw[] all reasonable inferences in favor of the nonmoving party."). For example, the Amended Complaint alleges that Defendants used servers located in California to develop and deploy Pegasus against Plaintiffs. ER-016, -024 (Am. Compl. ¶¶ 3, 41–43). Any assertions by Defendants that they did not deploy Pegasus, or that none of the relevant servers are in California, Defs. Br. 23–24, cannot be credited at this stage. Regardless, Defendants admit that NSO Group assisted clients that purchased Pegasus, *id.*, and while the precise nature of that assistance and the extent to which it involved acts in California are issues for discovery, this admission reveals the gamesmanship behind Defendants' effort to distance themselves from any "deployment" of Pegasus and present themselves as operating fully inside of Israel with no connection to the U.S. or the forum.

Second, California has a strong interest in this case because of its interest in protecting companies based in California. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1119 (9th Cir. 2002). Defendants' argument that such an interest is lacking

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[6] In several places, Defendants appear to deliberately misconstrue Plaintiffs' allegations by misleadingly adding the word "foreign" before a quote from the Amended Complaint in a transparent attempt to suggest that Plaintiffs' allegations included that fact. *E.g.*, Defs. Br. 3, 5, 24.

because Plaintiffs are not themselves California companies, Defs. Br. 26, fails because the harm experienced by Plaintiffs and Apple has the same locus: Defendants' intrusion on Apple's software and services to develop and deploy Pegasus. Apple was harmed when Defendants targeted and accessed its servers to abuse Apple and its customers. ER-016, -024–25 (Am. Compl. ¶¶ 3, 41–43). Plaintiffs were harmed when Pegasus was deployed against them as a result of that same process. *Id.* Under the facts alleged, protecting Apple's interest goes together with protecting Plaintiffs from unlawful digital attacks.

Defendants suggest, Defs' Br. 24, that California's interest in protecting its businesses does not matter, but the case they rely on, *Lueck*, recognizes the local interest in litigation involving local corporations. 236 F.3d at 1147. True, *Lueck* was ultimately dismissed on *forum non conveniens* grounds, but that dismissal was based on several facts missing here: *Lueck* dealt with a domestic airplane crash in New Zealand, involving solely New Zealand plaintiffs and no U.S. citizens or residents, where the harm was felt *entirely* outside of the chosen forum, and litigation was already ongoing in New Zealand. 236 F.3d at 1141–42, 1147. By contrast, the Amended Complaint alleges that Defendants unlawfully abused California-based companies and accessed servers in California, which they used to launch Pegasus, ER-016, -024 (Am. Compl. ¶¶ 3, 41), meaning some of the harm was felt in

California. That harm is bound together with the harm to Plaintiffs, who include a U.S. citizen and U.S. residents—a critical and categorical distinction from *Lueck*.

Defendants do not—and cannot—justify the district court's decision that the local interest factor weighed against dismissal in the related case *Apple v. NSO Group* but weighed in favor of dismissal here. The fact that a local interest is implicated in another case in the forum does not negate—but rather confirms—the forum's interest in the present case. *Cf. Boston Telecomms.*, 588 F.3d at 1212. Defendants' new argument that there is no local interest because Apple has recently moved to dismiss its case, Defs. Br. 26, fails. That argument ignores the role Defendants played in Apple's decision by taking actions to "avoid producing information" during discovery. Plaintiff's Motion for Voluntary Dismissal 3:10–11, *Apple Inc. v. NSO Grp. Techs. Ltd.*, No. 3:21-cv-09078-JD, ECF No. 98. Defendants' obstinate behavior and refusal to participate in discovery in another case does not in any way diminish California's interest in this case. Nor does Apple's decision to address the harm done to it in other ways mean that the harm ceases to exist, still less that *California* has no interest in addressing the unlawful activities Defendants committed in part in California and that harmed Plaintiffs.

Third, California has a strong local interest in El Faro's reporting. *See Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 307 (1965) (recognizing a protected First Amendment interest in receiving information from foreign sources); *see also*

Summers v. Starwood Hotels, 2013 WL 12113227, at *11 (C.D. Cal. Feb. 27, 2013) (noting that California has a local interest if its citizens have suffered injury). The Amended Complaint explicitly alleges that the Pegasus attacks against Plaintiffs have undermined El Faro's ability to operate and provide the independent journalism its readers, including those in California, rely on. ER-017–18, -030–31, -047 (Am. Compl. ¶¶ 6, 62, 63, 136). Defendants argue that the First Amendment cannot be directly enforced against them, Defs. Br. 27, but that is beside the point: the key here is that California has an interest in protecting its citizens' First Amendment interests and that the unlawful acts alleged in this case harmed those interests.

Fourth, when analyzing the public-interest factors, courts consider not just the interest of the individual local forum, but the U.S.'s interest as well. *Cooper v. Tokyo Elec. Power Co., Inc.*, 860 F.3d 1193, 1211 (9th Cir. 2017) (considering "the United States' interest in compensating its military servicemembers"); *Otto Candies, LLC v. Citigroup, Inc.*, 963 F.3d 1331, 1351–52 (11th Cir. 2020) ("The United States has a stake in this litigation, and that should factor into the public interest analysis."). Indeed, failure to consider the U.S.'s interest is an abuse of discretion. *Otto Candies, LLC*, 963 F.3d at 1351–52; *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 33 (2d Cir. 2002) ("[T]he district court's ruling falls outside the permissible range of decisions, once the interest of the United States in enforcing its securities laws is factored into

the equation."). As such, the district court abused its discretion when it failed to properly account for the U.S.'s interest in this case proceeding in a local forum.

Defendants are wrong when they say the U.S. does not have any interest in this case. Defs. Br. 28. Here, the U.S. has at least two relevant interests. The first is its interest in protecting communications with U.S. embassy officials. *See* Microsoft Br. 15, 19; *cf. Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 325 (D.D.C. 1998) (explaining that "[i]n the conduct of U.S. foreign relations and activities abroad, confidential communications can often be essential" and that a violation of confidentiality may "deprive the United States Government of valuable information . . . and damage national security"); *see United States v. Sepulveda*, 57 F. Supp. 3d 618, 622 (E.D. Va. 2014) (noting the "significant American interest of protecting United States citizens who serve their country by working abroad in diplomatic capacities."). The Amended Complaint alleges that the Pegasus attacks compromised communications with U.S. embassy officials and communications that took place within U.S. embassies. ER-040, -043, -046 (Am. Compl. ¶¶ 105, 121, 133).[7]

[7] Defendants claim that whether any communications with U.S. embassy officials were compromised "is pure speculation." Defs. Br. 27. This assertion introduces an issue of fact that cannot be decided at this stage and contradicts the Amended Complaint, which alleges that Defendants' attacks on Plaintiffs' smartphones coincided with dates on which they were communicating with embassy officials. *E.g.,* ER-043, -046 (Am. Compl. ¶¶ 121, 133). These allegations are speculative only insofar as *all* allegations are speculative until they are proven through the discovery

The second interest lies in ensuring accountability for cyber-attacks against journalists, Exec. Order No. 14,093, 88 Fed. Reg. 18,957, 18,957 (Mar. 27, 2023); ER-027 (Am. Compl. ¶ 50). Defendants claim that the Department of Commerce's "Entity List" does not support any such national interest because it purportedly only imposes license requirements. Defs. Br. 28. But as the Commerce Department makes clear, the Entity List is meant to include entities who have engaged in "activities sanctioned by the State Department and activities contrary to U.S. national security and/or foreign policy interests." *Entity List*, Bureau of Indus. and Sec., U.S. Dept. of Com., https://web.archive.org/web/20241104193949/https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list#expand (last visited Nov. 4, 2024). Defendants also claim that the Executive Order does not establish a U.S. interest because it does not mention NSO and applies to the U.S.'s own use of spyware. Defs. Br. 28. But the fact that the Executive Order does not directly mention the facts of this case does not weaken the strength of the interest it espouses in preventing the use of spyware against journalists. Because the United States also has a strong interest in this case, the district court abused its discretion in finding that this factor weighed in favor of dismissal.

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process. In any event, they must be accepted as true at this stage of the proceedings. *See Carijano*, 643 F.3d at 1222.

2. Plaintiffs' claims turn on California and federal law.

Plaintiffs bring claims under California and federal law, which counsels in favor of proceeding in this forum. *See, e.g.*, *City of Almaty*, 685 F. App'x at 636 (reversing a *forum non conveniens* dismissal because the plaintiff's claims were governed by either federal or California law). Defendants ignore entirely that the district court abused its discretion by holding that familiarity with the governing law weighs against dismissal only if Plaintiffs prove "they would not have plausible claims under the law of other forums." ER-009. That is not a requirement under the caselaw. To the extent Plaintiffs' ability to bring claims under foreign law in a foreign court matters, it matters only insofar as Defendants must prove the existence of a satisfactory remedy under the laws of an alternative forum before the court will weigh the public and private interest factors. *Carijano*, 643 F.3d at 1225 (noting defendant's burden of proving the existence of a satisfactory remedy under the laws of an alternative forum).

Instead, this factor is meant to determine whether a case governed by foreign law can be resolved by the law that courts and juries are familiar with; because state and federal law govern, this factor plainly favors Plaintiffs. *Ravelo Monegro*, 211 F.3d at 512 (this factor promotes "the interest in trying the case in a forum familiar with the applicable law"); *Gund v. Philbrook's Boatyard*, 374 F. Supp. 2d 909, 914

(W.D. Wash. 2005); *Apple*, 2024 WL 251448, at *2 (familiarity with governing law "greatly enhances the fair and efficient disposition of the case").

Defendants argue this factor favors them because Israeli law will be implicated by discovery disputes, Defs. Br. 30, but the fact that the district court may have to apply Israeli law to resolve discrete discovery issues does not counsel in favor of dismissal because courts look to the *substantive law* that will govern the dispute. *See, e.g.*, *City of Almaty*, 685 F. App'x at 636 (explaining that this factor favors California where "United States law governs the resolution of Almaty's federal claims, and California law governs Almaty's common law claims"); *Apple*, 2024 WL 251448, at *2 ("There is no question that the Court's familiarity with the claims Apple alleges under California state law exceeds that of any court in Israel, which greatly enhances the fair and efficient disposition of the case."); *WhatsApp*, 2023 WL 7726411, at *4 (same).

Federal courts routinely encounter and resolve ancillary issues of foreign law and have well-established procedures for doing so effectively and efficiently. For example, courts often rely on expert witnesses when dealing with issues of foreign law and there is no reason the same could not be done here. *See* Fed. R. Civ. P. 44.1 (describing process for ascertaining foreign law in U.S. courts); *DP Aviation v. Smiths Indus. Aerospace and Def. Sys. Ltd.,* 268 F.3d 829, 848 (9th Cir. 2001) ("In

some cases foreign law may be proved by reference to authorities; in others foreign law experts may testify.").

3. The remaining public interest factors favor Plaintiffs.

The remaining factors—the relative congestion of courts, the burden on local courts, and the costs of resolving the dispute—favor Plaintiffs because Defendants have not proved that they weigh in favor of dismissal. Defendants bear the burden of showing that Israel is a less congested forum, *see City of Almaty*, 685 F. App'x at 636–37 (congestion in the plaintiff's chosen forum "is of little relevance without a comparison to the congestion of" the foreign forum), and yet they continue to displace it onto Plaintiffs, as the district court did. Defendants have never offered any evidence that Israeli courts are less congested than California courts, and so this factor favors Plaintiffs.

The parties agree that the factors regarding the burden on local courts and the costs of resolving the dispute do not support dismissal unless the case "overwhelmingly" concerns foreign events. *See* Defs. Br. 31–32, 34. As discussed, *see supra*, Section II.A.1, there is a strong local and U.S. interest in this case; thus, these factors favor Plaintiffs.

B. The district court abused its discretion in applying the private-interest factors.

The district court also abused its discretion in concluding that the private-interest factors favor dismissal. In assessing these factors, the district court failed to

properly account for Plaintiffs' residences and those of other witnesses, failed to hold Defendants to their burden to explain the materiality and importance of witnesses or evidence located in Israel, and erroneously weighed the balance of conveniences between the parties.

1. Plaintiffs' residences weigh in favor of California.

The district court was required to weigh the residence of all parties and abused its discretion by failing to do so. *See, e.g.*, *Cooper*, 860 F.3d at 1211 (weighing plaintiffs' residences); *Carijano*, 643 F.3d at 1230 (admonishing the district court for not considering the residences of all the parties). In particular, the district court was required to assess all parties' residences as of the filing of the Complaint. *See Cooper*, 860 F.3d at 1211 (analyzing residences and difficulty of travel for all parties at time of filing). Instead, the district court largely ignored Plaintiffs' residences and focused on NSO Group's location in Israel and the supposed burden it would face traveling to California. *See* ER-008. At the time of filing, Plaintiffs lived in El Salvador, New York City, Washington D.C., Germany, and Mexico. ER-020–22 (¶¶ 18, 28, 31). Accounting for Plaintiffs' residences, California is a far more convenient forum than Israel and the district court abused its discretion by concluding otherwise.

Contrary to Defendants' argument, the fact that the district court mentioned El Salvador does not mean it actually "considered nearly every Plaintiff's *current* residence." Defs. Br. 36. Not all Plaintiffs reside in El Salvador and, in any case, El

Salvador is significantly closer to California than Israel, further demonstrating this forum's convenience. Defendants' attempt to tarnish Plaintiffs for purportedly "ignoring where [] witnesses reside," Defs. Br. 36, falls flat. Courts consider this under the factor relating to the location of witnesses and documents. *Boston Telecomms.*, 588 F.3d at 1210.

2. California is a more convenient forum for all parties.

California is unquestionably the most convenient forum for this dispute. No forum is perfectly convenient for all the parties, but Plaintiffs have chosen California for its relative convenience to them and Defendants are already litigating similar cases in California, have retained local counsel, and are sophisticated companies with significant resources and international reach. Israel is not convenient for Plaintiffs and, among other considerations, is currently not a safe travel destination. *Israel, the West Bank and Gaza Travel Advisory*, U.S. Dept. of State (July 31, 2024) https://web.archive.org/web/20241104201008/https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/israel-west-bank-and-gaza-travel-advisory.html (advising individuals to reconsider travel to Israel due to "terrorism and civil unrest"). Against this clear guidance, Defendants' argument that Israel is safe because its courts are open is unpersuasive. Defs. Br. 39. That courts are functioning says nothing about whether it safe to travel to Israel and certainly does not mean that Israel is more convenient than California.

Defendants' reliance on *Ranza* to argue that the balance of conveniences favors litigation in Israel, Defs. Br. 37–38, is misplaced. *Ranza* involved conduct that occurred entirely outside of the U.S.: the sole plaintiff resided abroad permanently in the defendants' preferred forum (the Netherlands), 793 F.3d at 1078, and none of the relevant conduct took place in the United States. *Id*. at 1078. Moreover, the plaintiff in *Ranza* had already (and unsuccessfully) litigated her claims in the preferred forum, eliciting "an inference" of forum shopping. *Id*. at 1077. Defendants' reliance on *Gemini Capital* is equally misplaced. Defs. Br. 38. In that case, there was a separate, related case already proceeding in the defendant's preferred forum (Yap State Court). 150 F.3d at 1094. Here, there is no related case already proceeding in Israel, but there are similar cases proceeding in California. *See, e.g., WhatsApp, Inc. v. NSO Grp. Techs. Ltd.*, 472 F.Supp.3d 649 (N.D. Cal. 2020).

Any argument from Defendants that litigation in California would inconvenience them rings hollow. Defendants are sophisticated, well-resourced corporations, already represented by U.S. counsel, who previously attempted to do business with federal and state, including California, agencies. ER-022–23. It defies reality for Defendants to claim it would be inconvenient for them to travel here for litigation given these facts. *See Tuazon*, 433 F.3d at 1180 ("It is neither unimaginable nor unreasonable that [the defendant], having operated in the state for a half-century, should defend a lawsuit there.").

3. The location of witnesses and documents favors litigating in California.

Under this factor Defendants bear the burden of demonstrating that dismissal is warranted because material witnesses and documents are located outside of the forum. *See Boston Telecomms.*, 588 F.3d at 1210 (a defendant must provide "information sufficient to assist the court in assessing the 'materiality and importance' of" witnesses and documents outside the forum (citation omitted)); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1335 (9th Cir. 1984). The district court abused its discretion when it flipped the burden onto Plaintiffs, suggesting they needed to "demonstrate that any significant quantum of witnesses or evidence may be located in this District," ER-008, and then overlooked the relevant evidence that was located in California. Much of that evidence–which relates to the deliberate targeting of Apple and the use of Apple's software, servers, and services–is in California, and so this factor favors Plaintiffs. *See* ER-016–17, -023–26 (Am. Compl. ¶¶ 3, 39, 41–44).

Tellingly, Defendants do not seriously attempt to justify the court's analysis of this factor, focusing almost exclusively on arguments that the district court did not address. These arguments are meritless: neither Israeli law nor the [redacted] demonstrate that California courts would be "deprived of . . . critical evidence" about this case, *contra* Defs. Br. 42, and there is nothing but conjecture to support Defendants' argument that discovery would be substantially more difficult in California than in Israel. For this reason, two courts have already rejected

Defendants' identical arguments in this context. *See Apple Inc. v. NSO Grp. Techs. Ltd.*, 2024 WL 251448 at *2 (N.D. Cal. Jan. 23, 2024) (calling NSO's arguments related to witness and evidence availability a "wash"); *WhatsApp Inc. v. NSO Grp. Techs. Ltd.*, 2023 WL 7726411 at *2–3 (N.D. Cal. Nov. 15, 2023) (finding considerations of access to evidence and other sources of proof did not favor dismissal).

Defendants have not met their burden of explaining the materiality and importance of evidence located outside the forum. Instead, they rely on self-serving assumptions and unsupported conclusions that certain evidence cannot leave Israel, which this Court cannot credit. *See Boston Telecomms.*, 588 F.3d at 1209 ("conclusory" arguments about witnesses outside the forum do not warrant dismissal under this factor). For example, Defendants miss the mark when they claim that "[e]vidence about NSO's technology cannot be lawfully transferred outside of Israel without risking criminal prosecution under Israel's Defense Export Control Law." Defs. Br. 42 (citing Section 15(a)(2) of the Export Control Law). This argument hinges on Pegasus constituting "defense know-how" under the Export Control Law, but Defendants offer no argument to explain how, precisely, they believe the Export Control Law would apply to information about Pegasus. Even if it does, Section 15(a)(2) allows for the export of certain "defense know-how," including research, to be transmitted outside of Israel with a defense export license. SER-24.

Most importantly, however, Defendants' argument that litigating in an Israeli court would avoid considerations related to the Export Control Law, Defs. Br. 43–44, ignores reality. As Plaintiffs pointed out to the district court, the Export Control Law's limitation on the dissemination of "defense know-how" applies in Israeli courts as well. Opp'n 11:11–19, *Dada*, No. 3:22-cv-07513-JD, ECF No. 48; *see also WhatsApp Inc.*, 2023 WL 7726411 at *2 ("[T]he Israeli restrictions would impose similar limits on the parties' access to evidence regardless of whether the case is litigated in California or in Israel."). If this is an issue, it is not an issue that affects the forum analysis.

Defendants also argue that [redacted], which were never part of the initial motion-to-dismiss briefing in this case, [redacted]. Defs. Br. 43–44. Even if the Court considers these [redacted],[8] they favor Plaintiffs' argument for permitting this case to proceed in a U.S. court. Contrary to Defendants' representations, Defs. Br. 43, [redacted],

[8] As argued in Plaintiffs' pending Motion to Strike, because the [redacted] were not actually filed with the district court within the meaning of Federal Rule of Appellate Procedure 10(a), they are not part of the record on appeal and the [redacted] and the portions of the Answering Brief that rely on them must be struck.

[redacted] *Id.* (emphasis added). Crucially, [redacted] their existence does not counsel toward dismissal of this case in favor of Israeli litigation.

4. The remaining private-interest factors favor Plaintiffs.

The remaining factors—whether unwilling witnesses can be compelled to testify, the cost of bringing witnesses to trial, the enforceability of a judgment, and all other practical problems—favor Plaintiffs because Defendants have not proved that they weigh in favor of dismissal.

Defendants acknowledge that Israeli witnesses can be compelled to testify in U.S. courts, ER-012, which weighs against dismissal. In any event, as Plaintiffs have stated, they do not anticipate calling third-party witnesses who might be unable to testify. *See* Opp'n 11:8–9, *Dada*, No. 3:22-cv-07513-JD, ECF No. 48.

The cost of bringing witnesses to trial favors Plaintiffs. Defendants' argument on this point boils down to: It would be costly for witnesses to travel from Israel to California for depositions. The use of alternative mechanisms like "remote video

depositions" would reduce that burden. *Apple*, 2024 WL 251448, at *2; *see Boston Telecomms.*, 588 F.3d at 1210 (holding that it was an abuse of discretion to consider witness-related factors neutral when both parties would rely on video testimony for witnesses "scattered across the globe"). The Court cannot credit Defendant's bald assertion, made without any supporting evidence, that "even with remote video depositions," litigation will be prohibitively costly in California, Defs. Br. 48, particularly for companies with international reach and significant resources who are already litigating in California.

Defendants claim a judgment from a federal court may not be enforceable because it "might be detrimental to Israel's sovereignty or security," *id.* at 49, but this is a speculative and conclusory assessment that the Court cannot credit.

Finally, Defendants mistakenly argue that because Plaintiffs did not explicitly address whether "litigation in California would create unmanageable practical problems," Defs. Br. 49-51, this factor favors dismissal. But it was Defendants who did not raise this argument at the district court, and it is too late for them to do so now. *See AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213–14 (9th Cir. 2020) ("Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal." (quoting *In re Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000))). In any event, Plaintiffs' briefing with this Court makes clear that there would be no unmanageable practical problems with litigating in California.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the district court's decision and remand the case for further proceedings.

Dated: November 6, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Respectfully submitted,

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