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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARLOS DADA, *et al.*,

Plaintiffs-Appellants,

v.

NSO GROUP TECHNOLOGIES LIMITED, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of California, No. 3:22-cv-07513-JD, Hon. James Donato

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DEFENDANTS-APPELLEES' ANSWERING BRIEF

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September 16, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee NSO Group Technologies Ltd. is a privately owned corporation whose parent company is Defendant-Appellee Q Cyber Technologies Limited, a privately owned corporation whose parent company is OSY Technologies S.à.r.l.

No publicly held corporation owns 10% or more of either Defendant-Appellee's stock.

Date: September 16, 2024

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INTRODUCTION

This Court is unlikely to encounter a stronger case for dismissal on *forum non conveniens* grounds. Plaintiffs do not meaningfully dispute that (1) all parties live thousands of miles away from the forum, primarily in El Salvador or Israel; (2) all material witnesses and evidence are thousands of miles away, too; (3) most material witnesses and evidence are located in Israel and cannot be used here due to transfer restrictions under Israel's Defense Export Control Law; and (4) [redacted]. The district court's conclusion that "this case is tailor made for" *foreign non conveniens* dismissal, ER-7, is not just reasonable—it is entirely correct and should be affirmed.

Plaintiffs try to avoid these facts, but nothing in their brief changes that this "case involves foreign plaintiffs, foreign defendants, and foreign conduct." ER-5. Plaintiffs are Salvadoran journalists who claim that foreign governments, using Defendants' "Pegasus" technology, surveilled their devices in El Salvador and other foreign countries. Plaintiffs do not

dispute that Defendants—NSO Group and Q Cyber ("NSO")—are "in Israel" and have no "ties to[] this District." ER-8. And while Plaintiffs emphasize three Plaintiffs' connection to the United States, what matters is their connection to *this forum*. Indisputably, no Plaintiff has any connection to California or even lives within 2,000 miles of it.

Plaintiffs' brief boils down to the argument that California is a proper forum because Apple sued "Defendants in the same forum." But even Apple has now moved to dismiss that lawsuit due to the "significant obstacles" of litigating in this forum. Mot. to Dismiss at 3, *Apple Inc. v. NSO Grp. Techs. Ltd.*, No. 3:21-cv-09078 (N.D. Cal. Sept. 13, 2024), Dkt. 98 ("Apple MTD"). If anything, Apple's dismissal of its own lawsuit confirms that Plaintiffs' lawsuit was properly dismissed.

Regardless, the district court found Apple's lawsuit "stark[ly]" different from this lawsuit because California "is Apple's home forum, where it is headquartered and where its witnesses and evidence are located," and "Apple's claims are based on NSO's alleged hacking of Apple's servers and devices located here." ER-8. In contrast, NSO's alleged use of Apple's California infrastructure has no bearing on Plaintiffs' claims that their personal devices were accessed. Plaintiffs

specifically allege their devices were "infected" and "tak[en] control of" via NSO's *foreign* "network of servers" and *foreign* "operators' command-and-control servers." ER-25 ¶¶ 43–44. While Plaintiffs allege that California servers might have been used to *develop* Pegasus, *see* ER-24 ¶¶ 41–42, that conduct is immaterial to Plaintiffs' claims about how—at a much later time—Pegasus was *deployed* using foreign servers.

Plaintiffs also all but ignore the exceptional and unmanageable practical problems of litigating this case in California—obstacles that have now led Apple to dismiss its own lawsuit. Israel's strict restrictions on the disclosure of information about NSO's technology outside of Israel would severely impair the parties' ability to conduct discovery and present witnesses in California, and it would likely hobble NSO's own ability to defend itself. These practical concerns could be significantly mitigated, however, in an Israeli forum.

It was not a clear abuse of discretion to hold that this case does not belong in California. This Court should affirm the decision below.

JURISDICTIONAL STATEMENT

NSO agrees with the Statement of Jurisdiction set forth in Plaintiffs' brief. *See* AOB 2.

STATEMENT OF THE ISSUE ON APPEAL

Whether the district court clearly abused its discretion in dismissing this case on *forum non conveniens* grounds where the case involves foreign plaintiffs, foreign defendants, and foreign conduct and would present unmanageable practical problems if litigated here.

STATEMENT OF THE CASE

A. The Purely Foreign Nature Of This Lawsuit.

NSO is an Israeli company with "no offices or employees in California or elsewhere in the United States." 1-SER-3 ¶ 4; *see* ER-22 ¶ 32. NSO designs a strictly regulated cyber-intelligence technology, called "Pegasus," and licenses that technology to foreign governments the Israeli Government approves, for use in investigating terrorism and serious crimes. ER-22 ¶ 32; 1-SER-3–4 ¶¶ 5–9. NSO does not operate Pegasus; its foreign-government customers operate the technology and make all decisions about doing so. 1-SER-4 ¶ 10; *see* ER-22 ¶ 32; ER-25 ¶¶ 43–44. NSO's license agreements prohibit using its technology for any purpose other than preventing or investigating terrorism and criminal activity. 1-SER-4–5 ¶¶ 8, 10–11.

Plaintiffs are Salvadoran "journalists and others who write, produce, and publish El Faro, a digital newspaper based in El Salvador."

ER-17 ¶ 4. Nearly every Plaintiff currently resides in El Salvador; no Plaintiff resides in California. *See* ER-19–22 ¶¶ 14–31. One Plaintiff is a U.S. citizen, but he resides in El Salvador. *See* ER-17 ¶ 4; ER-20 ¶ 18.

Plaintiffs' claims—for computer access, trespass, and intrusion—all concern the alleged monitoring of their personal devices by foreign actors in foreign countries. Specifically, Plaintiffs allege that one of NSO's government customers used Pegasus to access their devices "[b]etween June 2020 and November 2021," when all Plaintiffs were "working in and around El Salvador." ER-28 ¶ 53. The foreign actors allegedly "infect[ed] targeted iPhones with Pegasus" through a foreign "network of servers operated and/or maintained by [NSO]," and then "t[ook] control of the infected iPhone[s]" by using foreign "command-and-control servers . . . to issue commands to each infected device." ER-25 ¶¶ 43–44.

Plaintiffs allege they discovered the access to their devices through an analysis by the independent research group Citizen Lab. ER-24 ¶ 41; ER-30 ¶¶ 60–61. Citizen Lab's report, which is incorporated into the complaint, linked the alleged access to a supposed "Pegasus customer operating almost exclusively in El Salvador," which "very likely . . . represents the Salvadoran government." John Scott-Railton et al.,

Project Torogoz, Citizen Lab Rsch. Rep. No. 148, Project Torogoz: Extensive Hacking of Media & Civil Society in El Salvador with Pegasus Spyware 1, 4–5 (Jan. 12, 2022), *available at* https://bit.ly/3zLUiJD; *see id.* at 8–9 (finding "a strong El Salvador government nexus"); ER-29 ¶ 58; ER-31 ¶ 63; ER-33–34 ¶¶ 73, 77; ER-40 ¶ 105 (linking alleged monitoring to Salvadoran government).

The only allegations even potentially connecting NSO's alleged conduct to California are that NSO developed its technology by allegedly accessing unspecified Apple servers long before Plaintiffs' devices were allegedly monitored. *See* ER-16 ¶ 3 (NSO "accessed Apple servers to identify and exploit vulnerabilities in Apple software and services"); ER-24 ¶ 42 (NSO "used [its] Apple ID accounts to discover vulnerabilities in Apple's software, to probe Apple's servers and services, and to test [its] software"). Although Plaintiffs allege that "many" Apple servers "are in California," ER-24 ¶ 41, they do not allege (and would have no basis to allege) that NSO ever used any California servers.

Plaintiffs have emphasized how Apple separately sued NSO in the Northern District of California. *E.g.*, ER-16 ¶ 3; AOB 1–2, 16, 21–22, 37–41. On September 13, 2024, however, Apple filed a motion to voluntarily

dismiss that lawsuit. *See* Apple MTD at 6. Apple explained that "dismissal" is "the course of action that will best protect its users," *id.*, because "Apple can no longer accept the risks entailed by" "disclosure of [its] information to third parties," *id.* at 2, and because [redacted] that "create significant obstacles to obtaining an effective remedy" in the United States, *id.* at 3.

B. The Practical Problems With Litigating In California.

As Apple now acknowledges, recent developments have created several unmanageable problems with litigating this case in California:

Israel's Defense Export Control Law prohibits the transfer of NSO's technology without a license—including in documents or orally through witness testimony—"from Israel to outside of Israel." 1-SER-24 § 15(a)(2). Violators face "three years' imprisonment." 1-SER-32 § 32(a).

In addition, [redacted] 2-SER-43 ¶ 2. [redacted]

[redacted] 2-SER-43 ¶ 3, 2-SER-47 (cleaned up); 2-SER-51.

[redacted]

C. Procedural History.

NSO moved to dismiss the complaint for lack of personal jurisdiction, failure to state a claim, and *forum non conveniens*. ER-5. Addressing only the last issue, the district court held that this case is "tailor made for" *forum non conveniens* dismissal because "[t]he nub of [it] is entirely foreign, and concerns the use of software produced in Israel to hack devices owned by a Salvadoran news service and used by journalists in El Salvador." ER-7.

The district court first addressed the level of deference owed to Plaintiffs' choice to litigate in California. "Although a 'defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing plaintiff's chosen forum,'" the district court held, "this presumption 'applies with less force' when, as here, plaintiffs' 'choice is not its home forum.'" ER-6 (quoting *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430 (2007)).

The district court then weighed the relevant public- and private-interest factors, addressing "all the parties sa[id] about *forum non conveniens*." ER-7–9. The court found "[t]he public interest factors . . . weigh against litigation in this District" primarily because the case "involves purely foreign plaintiffs and defendants, and events in foreign lands," and there was no "local interest or stake in the events alleged" in Plaintiffs' claims. ER-9. In these circumstances, "[b]urdening a jury in this District with all of this makes little sense." ER-9.

The district court similarly held that the private-interest factors favor dismissal, explaining that "neither side was present in, or had any ties to, this District in connection with the allegations in the complaint." ER-8. In addition, while "NSO will be the source of substantially more

evidence and witnesses than plaintiffs," "all of its material witnesses and evidence are located" in Israel, whereas "Plaintiffs did not demonstrate that any significant quantum of witnesses or evidence may be located in this District." ER-8. The district court added that "[l]itigating the case in this District would likely impose significantly heavier burdens on NSO than plaintiffs" because, while all parties were thousands of miles away from the forum, NSO and its witnesses were "more than twice as far away" as Plaintiffs. ER-8.

This appeal followed.

SUMMARY OF ARGUMENT

The district court properly recognized that this case is "tailor made for" *forum non conveniens* dismissal, ER-7, because it "involves foreign plaintiffs, foreign defendants, and foreign conduct," ER-5.

I. Appellate courts give substantial deference to a district court's dismissal for *forum non conveniens*. This Court may reverse the district court's decision only if it committed a clear abuse of discretion—a demanding standard of review that Plaintiffs cannot satisfy.

II. The district court did not clearly abuse its discretion in giving less deference to Plaintiffs' forum choice. *See* ER-6. Even "[a] U.S. citizen

plaintiff is entitled to less deference in his choice of forum if he does not reside in that forum," as is undisputedly the case here. *Ayco Farms, Inc. v. Ochoa*, 862 F.3d 945, 950 (9th Cir. 2017) (per curiam). Plaintiffs misunderstand how this Court has applied the "less deference" standard and ignore that the district court expressly considered Plaintiffs' residences in deciding how much deference to afford. *See* ER-6, 8. The district court properly factored that deference into how it balanced the relevant public- and private-interest factors.

III. The district court did not clearly abuse its discretion in weighing the public- and private-interest factors and concluding that all relevant factors favor dismissal, except for one that is neutral. ER-8–9.

A. It was not a clear abuse of discretion to rule that the public-interest factors "weigh against litigation" in California. ER-9. There is no "local interest or stake in the events alleged in the complaint." ER-9. Plaintiffs agree California has no interest in protecting *them*; they instead try to piggyback onto California's interest in *Apple*'s lawsuit. But even Apple agrees that litigating in California will *not* protect its interests. *See* Apple MTD at 1–2. And unlike Apple, Plaintiffs' claims do not turn on any alleged use of Apple's servers; they turn on the alleged

monitoring of their own devices—which they specifically allege was done by foreign actors using foreign servers. *See* ER-25 ¶¶ 43–44. California has at most a minimal interest in those allegations and so "should not be forced to bear the burden of this dispute." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1147 (9th Cir. 2001).

B. Nor was it a clear abuse of discretion to hold the private-interest factors favor dismissal. *See* ER-8. Plaintiffs do not dispute the basic facts about this case: (1) All parties are thousands of miles away from California (with NSO "more than twice as far away" as Plaintiffs), ER-8; (2) there is no "significant quantum of witnesses or evidence" in California, ER-8; instead, (3) "all of [NSO's] material witnesses and evidence are located" in Israel, ER-8, and largely *cannot* be brought to California in light of Israeli restrictions on the exporting of information about NSO's technology. It was more than reasonable to conclude that these factors favored litigation outside of California. Plaintiffs' erroneous arguments ignore these basic realities.

ARGUMENT

Dismissal on *forum non conveniens* grounds is appropriate where there is (1) "an adequate alternative forum" and (2) "the balance of

private and public interest factors favors dismissal." *Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 664 (9th Cir. 2009) (quotation marks omitted). Plaintiffs "do not dispute" that "Israel is an adequate alternative forum" for their lawsuit. ER-7. The only issue for this Court is whether the district court reasonably balanced the private- and public-interest factors to conclude that "litigation in a foreign forum would be more convenient for the parties." *Lueck*, 236 F.3d at 1142.

It did. This case involves alleged harm to foreign Plaintiffs by foreign actors in foreign countries thousands of miles from California. It is "tailor made for" dismissal on *forum non conveniens* grounds. ER-7.

I. This Court Strongly Defers To A District Court's *Forum Non Conveniens* Dismissal.

A *forum non conveniens* dismissal "is committed to the sound discretion of the trial court" and "may be reversed only when there has been a clear abuse of discretion." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). So long as the district "court has considered all relevant public and private interest factors" and "its balancing of these factors is reasonable, its decision deserves substantial deference." *Id.*; *accord Ayco Farms*, 862 F.3d at 948 (same). In other words, this Court cannot "substitut[e] its own judgment for that of the [d]istrict [c]ourt," *Piper*

Aircraft, 454 U.S. at 257, and must affirm unless it has "a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached," *Lockman Found. v. Evangelical All. Mission*, 930 F.2d 764, 771 (9th Cir. 1991) (cleaned up).

The amount of deference a district court gives a plaintiff's choice of forum in the balancing analysis is reviewed under the same standard. *See Ayco Farms*, 862 F.3d at 949–50 (holding "[t]he district court was within its discretion to view [plaintiff's] choice of forum with skepticism" and "afford[ ] less deference to [its] choice to file a lawsuit in California"); *cf. Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1229 (9th Cir. 2011) (reviewing for abuse of discretion district court's "affording [of] reduced deference to [plaintiff's] chosen forum").

II. The District Court Did Not Clearly Abuse Its Discretion In Giving Less Deference To Plaintiffs' Choice Of Forum.

Plaintiffs first challenge (at 15–20) how much deference the district court gave their forum choice. The district court applied "less deference" than normal because Plaintiffs—who all reside thousands of miles away from California—did not bring suit in their "home forum." ER-6 (quoting *Lueck*, 236 F.3d at 1145 & *Sinochem*, 549 U.S. at 430). That was not a

clear abuse of discretion. Plaintiffs' contrary arguments misunderstand the applicable standard.

A. Less Deference Was Appropriate Because No Plaintiff Is At Home In California.

As the district court explained, "[a]lthough a 'defendant invoking *forum non conveniens* ordinarily bears a heavy burden in opposing plaintiff's chosen forum,' this presumption 'applies with less force' when, as here, plaintiffs' 'choice is not its home forum.'" ER-6 (quoting *Sinochem*, 549 U.S. at 430). The district court was correct: "Less deference" is warranted because no Plaintiff is at home in California; they all live thousands of miles away.

The Supreme Court has repeatedly instructed that "the presumption in the plaintiff's favor 'applies with less force'" where, as here, "the plaintiff's choice is not its home forum." *Sinochem*, 549 U.S. 430 (citing *Piper Aircraft*, 454 U.S. at 255–56); *see also Lueck*, 236 F.3d at 1145 (a non-resident "plaintiff's choice of forum merits less deference than that of a plaintiff *who resides in the selected forum*, and the showing required for dismissal is reduced" (emphasis added)). Less deference "is fully justified" in these circumstances because, "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient.

When the plaintiff is foreign [to the forum], however, this assumption is much less reasonable." *Piper Aircraft*, 454 U.S. at 255–56.

Plaintiffs ignore both this controlling authority and its rationale. They contend it was improper to "afford[ ] reduced deference" here because "some of the Plaintiffs are U.S. citizens or residents." AOB 15 (quotation marks omitted). But the issue is not whether Plaintiffs are at home in the *United States*; it's whether they are at home in the *forum*. *See Piper Aircraft*, 454 U.S. at 255 ("a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum").

In fact, this Court has rejected Plaintiffs' distinction multiple times, holding instead that "[a] U.S. citizen plaintiff is entitled to *less* deference in his choice of forum if he does not reside in that forum." *Ayco Farms*, 862 F.3d at 950 (emphasis added); *accord*, *e.g.*, *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1079 (9th Cir. 2015) (applying "lesser degree of deference due the forum choice of a U.S. citizen residing" elsewhere); *Gemini Cap. Grp., Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1091 (9th Cir. 1998) ("the district court correctly acted on Ninth Circuit authority in granting . . . less deference" because "none of the Plaintiffs are Hawaii residents").

Plaintiffs and their *amicus* Professor Robertson cite no controlling authority to the contrary. Some of their Ninth Circuit cases, in fact, recognize that a district court "properly accord[s] less deference" where a plaintiff has not chosen his or her "true 'home' forum." *Bos. Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201, 1207 (9th Cir. 2009) (quoting *Gemini Cap.*, 150 F.3d at 1090); *see Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000) (*Piper Aircraft* requires "less deference," just "not . . . no deference"). All of their other cases are either non-precedential, out-of-circuit, or inapposite because they actually involved "a California plaintiff," *Carijano*, 643 F.3d at 1227 (quotation marks omitted), or decided a different question, *see Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 & n.6 (9th Cir. 2006) ("a resident alien . . . is entitled to the same deference as a citizen").

It was therefore reasonable—indeed, correct—for the district court to apply "less deference."

B. The District Court Properly Applied Less Deference.

Plaintiffs alternatively argue (at 17–20) that the district court "fail[ed] to give any deference" to their choice of forum. That is incorrect. The district court said it was applying "less deference"—not "no"

deference—and that is exactly what it did. ER-6 (quotation marks omitted).

There are no magic words a court must use when giving "less deference" to a plaintiff's forum choice. Often this Court has not even mentioned the plaintiff's choice of forum when weighing the relevant factors. *See*, *e.g.*, *Ayco Farms*, 862 F.3d at 950–51 (noting only defendants' residence); *Ranza*, 793 F.3d at 1078 (emphasizing "[t]he plaintiff does not even reside in the United States" when discussing parties' convenience); *Lueck*, 236 F.3d at 1146–47 (not mentioning plaintiffs' choice of forum); *Gemini Cap.*, 150 F.3d at 1091 (refusing to apply any "presumption of convenience").

Instead, as Plaintiffs' own *amicus* agrees, the appropriate deference is factored into "how strongly the movant must demonstrate" that the balance of factors favors dismissal. Robertson Br. 5. Under a lesser-deference standard, "if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper." *Lueck*, 236 F.3d at 1145 (cleaned up).

The district court cited *Lueck*'s standard and all relevant public- and private-interest factors. ER-7–8. It then applied that standard,

explaining "[t]here [wa]s little reason under the *forum non conveniens* factors to undertake the burden of litigating this foreign conduct here" because (among other reasons) "neither side was present in, or had any ties to, this District in connection with [Plaintiffs'] allegations," nor was there "any significant quantum of witnesses or evidence . . . located in this District." ER-7–8. In a separate paragraph, the court expressly weighed the parties' relative convenience, explaining that "[l]itigating the case in this District would likely impose significantly heavier burdens on NSO than plaintiffs," especially when "NSO will be the source of substantially more evidence and witnesses than plaintiffs," yet was "twice as far away" from the forum as Plaintiffs. ER-8.

That was not a clear abuse of discretion. Plaintiffs identify no public- or private-interest factor the district court overlooked. And they ignore the full paragraph where the court weighed the parties' relative burdens in light of their location. *See* ER-8. That express weighing distinguishes Plaintiffs' cited cases, which are non-precedential and cannot supplant the above controlling authorities anyway. *See Ito v. Tokio Marine & Fire Ins. Co.*, 166 F. App'x 932, 935 (9th Cir. 2006) (private-interest analysis "did not actually weigh" plaintiff's residence);

Neuralstem, Inc. v. ReNeuron, Ltd., 365 F. App'x 770, 771 (9th Cir. 2010) (district court "did not actually weigh" plaintiff's residence and "focus[ed] instead on the residency of potential witnesses").[1]

Plaintiffs apparently prefer (at 19) a different formulation of *Lueck*'s "unnecessarily burdensome" standard, under which NSO "bears a heavy burden" to justify dismissal. But NSO satisfied even that formulation: The district court found "*significantly* heavier burdens on NSO than plaintiffs" and held that all but one factor favored dismissal. ER-8–9 (emphasis added). Under any formulation of the applicable standard, dismissal was reasonable and not a clear abuse of discretion.

III. The District Court Reasonably Held That This Wholly Foreign Lawsuit Should Not Be Tried In California.

Plaintiffs also fail to identify any clear abuse of discretion in how the district court analyzed the relevant *forum non conveniens* factors. The court considered every factor the parties briefed and reasonably

[1] Plaintiffs fault the district court for not mentioning a U.S. citizen who resides in El Salvador or two residents of New York City and Washington, D.C. AOB 19; *see* ER-20–22 ¶¶ 18, 28, 31. But those Plaintiffs—who live roughly 2,450 and 2,550 miles away from San Francisco—did not materially change the district court's conclusions that Plaintiffs reside "approximately 2600 air miles" from the forum and NSO is "more than twice as far away" from the forum as Plaintiffs. ER-8.

found *every* factor favored dismissal except for one that was neutral. ER-7–9.

"[T]his case is tailor made for" dismissal on *foreign non conveniens* grounds, the court explained, because "[t]he nub of [it] is entirely foreign, and concerns the use of software produced in Israel to hack devices owned by a Salvadoran news service and used by journalists in El Salvador." ER-7. When "[e]very incident described in the complaint involved Salvadoran journalists covering Salvadoran news stories while working primarily in El Salvador," there "is little reason . . . to undertake the burden of litigating this foreign conduct here." ER-7.

Plaintiffs try to hide these facts. But they cannot escape the basic reality that they are "foreign . . . plaintiff[s]" who "cho[se] a forum with little or no relation to either the defendant or the action." *Ravelo*, 211 F.3d at 512–13. As their lead authority recognizes, dismissal was therefore "appropriate." *Id.*

A. The District Court Reasonably Concluded That The Public-Interest Factors Favor Dismissal.

The district court reasonably found "[t]he public interest factors . . . weigh against litigation in this District." ER-9. Those factors are (1) the "local interest" in the lawsuit, (2) the local "court's familiarity with

governing law," (3) the "burden on local courts and juries," (4) the amount of "congestion" in the local court, and (5) the costs of "resolving a dispute unrelated to" the forum. *Ayco Farms*, 862 F.3d at 950 (cleaned up). The district court found that three of the four relevant factors (factors 1, 3, and 5) favor dismissal and the fourth (factor 2) was neutral. Because the case "involves purely foreign plaintiffs and defendants, and events in foreign lands," the court reasoned, there was no "local interest or stake in the events alleged" in Plaintiffs' claims, and "[b]urdening a jury in this District with all of this makes little sense." ER-9.

These conclusions were reasonable and correct. They certainly do not support "a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached." *Lockman*, 930 F.2d at 771 (cleaned up). Plaintiffs' responses fundamentally misunderstand the purely foreign nature of their own claims and improperly try to piggyback onto different claims filed by a different plaintiff (Apple) in a different lawsuit.

1. California Has No Interest In Foreign Conduct By Foreign Actors Against Foreign Plaintiffs.

The district court reasonably held that no "local interest" weighed against dismissal. ER-9. California has no interest in protecting foreign

individuals whose foreign devices were allegedly accessed in foreign countries by foreign actors. Indeed, Plaintiffs do not dispute that California has no interest in protecting *them*. Their entire argument rests on California's ability to protect *others* who are not parties to this lawsuit and the United States' supposed generic interest in "preventing" *future* uses of spyware. *See* AOB 22–23, 27–28. It was not clear error to find that such attenuated interests do not support litigating this quintessentially foreign lawsuit in California. ER-9.

a. *No* alleged "unlawful activities" or "misconduct" occurred in California. *Contra* AOB 23–24. Plaintiffs' claims concern the alleged monitoring of their devices by foreign governments using NSO's Pegasus technology. Yet that technology was licensed under strict regulation by the Israeli Government to foreign governments, "which then operated the Pegasus technology themselves, to advance their own sovereign interests of fighting terrorism and serious crime" *in foreign countries*. 1-SER-4 ¶ 10. NSO thus did "not perform[] any actions relevant to Plaintiffs' lawsuit in California." 1-SER-3 ¶ 4. The "limited" role NSO played in "providing advice and technical support to assist customers in setting up"

the Pegasus technology all occurred in Israel or other foreign countries. 1-SER-4 ¶ 10.

Plaintiffs' own allegations confirm the purely foreign nature of this case. Their claims—computer access, trespass, and intrusion—turn on allegations that *foreign* actors accessed the *foreign* devices of *foreign* Plaintiffs in *foreign* countries. Plaintiffs specifically allege that foreign "servers operated and/or maintained by Defendants" were used "to infect targeted iPhones with Pegasus" and that the foreign "operators' command-and-control servers" were used "to exploit the Pegasus infection, taking control of the infected iPhone." ER-25 ¶¶ 43–44. Any "harms" thus occurred "in El Salvador and other locations" thousands of miles from California, as Plaintiffs admit (at 23).

The only potential California nexus that Plaintiffs identify concerns how Pegasus was developed. According to Plaintiffs, NSO developed Pegasus by accessing unspecified Apple servers that Plaintiffs do not even specifically allege were located in California. *See* ER-16 ¶ 3 (NSO allegedly "accessed Apple servers to identify and exploit vulnerabilities in Apple software"); ER-24 ¶ 42 (NSO allegedly "used [its] Apple ID accounts to discover vulnerabilities in Apple's software, to probe Apple's

servers and services, and to test [its] software"); ER-24 ¶ 41 ("many" Apple servers allegedly "are in California").

These circumstances critically distinguish this case from the *Apple* litigation—as the district court repeatedly recognized. ER-5, ER-8, ER-10. Unlike Apple, Plaintiffs are not California residents, and their claims do not turn on any alleged use of Apple's infrastructure; they turn on the alleged monitoring of their own devices by foreign actors using foreign servers. How NSO's technology happened to be *developed*, moreover, has no bearing on Plaintiffs' claims about how that technology was allegedly *deployed* much later to access their devices in foreign countries. Tellingly, Plaintiffs do not allege that NSO's use of Apple servers was itself unlawful.

Because this "dispute overwhelmingly concerns events in other states and countries," the district court "properly" held this factor favors dismissal. *Ayco Farms*, 862 F.3d at 951; *see Piper Aircraft*, 454 U.S. at 260–61 (where "accident occurred in [Scottish] airspace" and "all potential plaintiffs and defendants" are foreign, "[t]he [local] interest in this accident is simply not sufficient"); *Lueck*, 236 F.3d at 1147 (local forum had "slight" interest in suit over "crash involv[ing] New Zealand airline carrying New Zealand passengers" in New Zealand).

b. None of the supposed interests proffered by Plaintiffs (at 24–28) or their *amici* undermines, let alone changes, this result.

Plaintiffs and their *amici* primarily rely on California's "interest in protecting California companies." *See* AOB 24–25; Microsoft Br. 32–35. That reliance is misplaced because *Plaintiffs are not California companies*. Their lawsuit thus does not protect any California companies—as their own *amicus* agrees. *See* EPIC Br. 24–25 ("different type[ ] of harm" here). While any such interest would have been "protected in Apple's lawsuit against NSO," ER-9, even Apple agrees that litigating here would "severely undermine," not protect, its "ability to protect its users," Apple MTD at 2; *see id.* at 6 (similar). Besides, even if NSO were a California company, California's interest *still* would be insufficient. *See Lueck*, 236 F.3d at 1147 (local forum's "interest in the manufacturing of defective products by [local] corporations" that cause harm in foreign country "is slight"). Thus, it was not clear error to discount this interest.[2]

[2] Any public interest in hearing related cases in the context of transfer motions, *see* AOB 25 n.8, is irrelevant here because "dismissals on grounds of *forum non conveniens* and § 1404(a) transfers are not directly comparable," *Piper Aircraft*, 454 U.S. at 258 n.26.

Nor was it clear error to discount California's supposed "interest in protecting the ability of its citizens to read El Faro." *Contra* AOB 26. As the district court recognized, "California has no interest" in the readership of a Salvadoran newspaper. ER-9. Plaintiffs cite no contrary authority. The First Amendment interest on which they rely (at 26–27) is irrelevant here: NSO is not subject to the First Amendment; and in any event, Plaintiffs do not claim that NSO prevented anyone from reading El Faro or affected El Faro's distribution to readers. *Cf. Lamont v. Postmaster Gen.*, 381 U.S. 301, 306 (1965) (First Amendment violated where "federal agencies regulate[d] the flow of mail").

It also was not clear error to discount the United States' attenuated interests in Plaintiffs' communications with "U.S. embassy officials" and in "managing the use of spyware." ER-9. Plaintiffs cite no case holding the *United States*' supposed interests are relevant to whether *California* is a proper forum. Regardless, Plaintiffs failed to establish both interests.

First, it is pure speculation that any alleged Pegasus attack ever compromised any communications with any U.S. embassy officials. *See* ER-40 ¶ 105 ("the Citizen Lab could not confirm whether data was exfiltrated from Mr. Martínez's device"); ER-43 ¶ 121 (alleged Pegasus

attacks "coincided with three dates on which [Mr. Zablah] visited the U.S. Embassy in San Salvador," but no allegations that any communications were compromised); ER-46 ¶ 133 (Citizen Lab "could not identify which data was stolen" from Mr. Sanz "[d]uring" five-month period when he "communicated and attended meetings with U.S. Embassy officials"). It was therefore reasonable to disregard this asserted interest. *See* ER-9.

Second, the two generic policy documents cited by Plaintiffs do not establish any U.S. interest in this case. The Entity List imposes "license requirements for specified items" on certain entities, 15 C.F.R. § 744 supp. no. 4, while the Executive Order does not mention NSO and is limited to the *United States*' own *use* of "commercial spyware," Prohibition on Use by the United States Government of Commercial Spyware That Poses Risks to National Security, Exec. Order No. 14,093, 88 Fed. Reg. 18,957, 18,957 (Mar. 27, 2023). Neither document purports to transform U.S. courts into a roving police force that can punish alleged privacy violations or free-speech incursions across the globe. *See Piper Aircraft*, 454 U.S. at 260–61 (United States' "interest in ensuring that American manufacturers are deterred from" misconduct outside its borders "is simply not sufficient to justify the enormous commitment of

judicial time and resources" needed to try a foreign case here); *contra* EFF Br. 19–24; Microsoft Br. 12–31; Reps. Comm. Br. 7–9.

Israel, in sharp contrast, "has a very strong interest in this litigation." *Piper Aircraft*, 454 U.S. at 260 (foreign forum's "very strong interest" favors dismissal). Not only is this lawsuit against an Israeli corporation concerning a cyber-intelligence technology the Israeli Government approves and tightly regulates. 1-SER-3–4 ¶¶ 3, 5–9. [redacted]. 2-SER-55–56. As a result, Israeli courts "would likely have a greater understanding of the circumstances surrounding the dispute" and a greater interest in the action. *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1453 (9th Cir. 1990).

It was not a clear abuse its discretion to find that this factor favors dismissal.

2. Plaintiffs' Claims Require Resolution of Foreign Law.

Plaintiffs' argument about the second public-interest factor is based on the mistaken premise that the district court found "that this factor weighed in favor of dismissal." AOB 30. In fact, the district court treated

this factor as neutral, explaining that it "may" have "greater familiarity with the federal and state laws featured in the complaint," but there were countervailing considerations. ER-9.[3] That conclusion was reasonable.

While Plaintiffs focus on the law governing their own claims, AOB 28–30, they ignore that discovery in this lawsuit would "implicate Israel's Defense Export Control Law . . . and other Israeli laws pertinent to the sensitive activities of NSO," ER-12 ¶ 3; *see also infra* III.B.3. Given the sensitive nature of Plaintiffs' allegations, it is very likely the district court would be embroiled in frequent discovery disputes about the scope of Israeli law and whether it precludes certain discovery.

The district court could have "reasonably concluded that its lack of familiarity with [Israeli] law weighed *heavily* in favor of dismissal." *Alternate Health USA, Inc. v. Edalat*, 2023 WL 8732811, at *1 (9th Cir. Dec. 19, 2023) (emphasis added); *Piper Aircraft*, 454 U.S. at 260 n.29 ("Many *forum non conveniens* decisions have held that the need to apply

[3] Plaintiffs misread the decision below as holding that this factor "weighs against dismissal only if Plaintiffs prove 'they would not have plausible claims under the laws of other forums.'" AOB 29 (quoting ER-9). The district court said just the opposite: "The possibility that [Plaintiffs] may not be able to allege claims under federal or California state law *is of little moment*." ER-9 (emphasis added).

foreign law favors dismissal."). Even Plaintiffs' own authority recognizes that the need to apply foreign law "impose[s] a substantial burden on both the Court and the jurors" that "*clearly* favors" dismissal. *Gund v. Philbrook's Boatyard*, 374 F. Supp. 2d 909, 914 (W.D. Wash. 2005) (emphasis added). *A fortiori*, it was reasonable for the district court to take a more modest approach here and treat this factor as neutral.

3. Burdening California Courts With This Wholly Foreign Case Makes No Sense.

The district court held that "[b]urdening a jury in this District . . . makes little sense" because "a local jury would understandably struggle with being asked to sit for a long trial that involves purely foreign plaintiffs and defendants, and events in foreign lands." ER-9. This ruling was not just reasonable; it was correct.

This Court—including in Plaintiffs' own authorities—routinely holds that the burden on local courts is not justified where, as here, "the dispute overwhelmingly concerns events in other states and countries." *Ayco Farms*, 862 F.3d at 951; *see also*, *e.g.*, *Lueck*, 236 F.3d at 1147 ("Because the local interest in this lawsuit is comparatively low, the citizens of Arizona should not be forced to bear the burden of this dispute."); *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 704

(9th Cir. 1995) ("dispute between two [foreign] corporations" that did not "substantively involv[e] American companies" had "extremely attenuated" relation to local community).

Plaintiffs' primary response again turns on their mistaken view that "this case [is not] 'purely foreign.'" AOB 30–31 (quoting ER-9). Yes, it is: The unlawful conduct Plaintiffs allege concerns foreign actors accessing foreign Plaintiffs' foreign devices in foreign countries. Plaintiffs' fallback argument—that defendants were required to formally document an obvious "burden [on] an already busy court," AOB 31—rests on a misreading of their lone cited authority. In that case, it did not matter that the defendant "hardly touch[ed]" on this factor; the court still properly concluded that "litigating this case in this forum would add to an already busy docket and would require time and resources." *Cooper v. Tokyo Elec. Power Co.*, 166 F. Supp. 3d 1103, 1136 (S.D. Cal. 2015), *aff'd*, 860 F.3d 1193 (9th Cir. 2017). The same is true here.

Accordingly, there was no clear abuse of discretion on this factor.

4. No Party Addressed The Congestion Factor.

Plaintiffs suggest the district court "abuse[d] its discretion in concluding that [the congestion] factor is neutral, let alone favors

dismissal." AOB 32. But the district court did not weigh this factor at all. It addressed "all the parties say about *forum non conveniens*" and then "add[ed]" in passing that *Plaintiffs* never mentioned this factor, much less argued that it weighed against dismissal. *See* ER-9 ("The Court adds that plaintiffs did not explain why a trial here would be more expeditious and inexpensive than in Israel or elsewhere."). "[T]he district court in no way abused its discretion in failing to consider a matter when the evidence allowing it to do so appears never to have been presented to the court." *Gemini Cap.*, 150 F.3d at 1094.

Plaintiffs' cited authorities are all inapposite because, unlike here, the district court in those cases actually weighed a given factor despite having "very little information." *Bos. Telecomms.*, 588 F.3d at 1210; *see City of Almaty v. Khrapunov*, 685 F. App'x 634, 636 (9th Cir. 2017) (court weighed "added burdens on the Central District of California"); *Neelon v. Bharti*, 596 F. App'x 532, 534 (9th Cir. 2014) ("district court made several errors in weighing the factors that it did consider," including witness location, despite lacking "enough information to do so"). Here, it was not a clear abuse of discretion to give no weight to the congestion factor.

5. California Should Not Bear The Costs Of Resolving This Wholly Foreign Lawsuit.

The district court held that it "makes little sense" for California to incur the costs of a dispute "involv[ing] purely foreign plaintiffs and defendants, and events in foreign lands." ER-9. This ruling was reasonable given California's weak interest in this case. *Supra* III.A.1.

Plaintiffs' contention that "this factor does not apply" once again turns on their mistaken assumption that California has "a strong local interest in the suit." AOB 32. Because California's interest "is comparatively low, the citizens of [California] should not be forced to bear the burden of this dispute." *Lueck*, 236 F.3d at 1147; *see also*, *e.g.*, *Etaliq, Inc. v. Cisco Sys., Inc.*, 2011 WL 13220445, at *8 (C.D. Cal. July 20, 2011) ("Where the local interest in a controversy is weak as compared to the alternative forum's interest, courts have held that the burden on local courts and juries, and the related costs, are not justified.").

B. The District Court Reasonably Concluded That The Private-Interest Factors Favor Dismissal.

The district court also did not clearly abuse its discretion in analyzing the private-interest factors. Those are: "(1) the residence of the parties and the witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether

unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Carijano*, 643 F.3d at 1229 (quotation marks omitted).

The district court reasonably concluded that "[f]airness [and] convenience . . . demand" that this case be tried outside California. ER-10. There is no dispute that *all* the parties, material witnesses, and key evidence are located thousands of miles away from California. *See* ER-8. Nor is there any meaningful dispute that, should this case proceed in California, NSO's ability to participate in discovery [redacted] would be severely limited, not least by Israeli export laws that prohibit the disclosure of information about NSO's technology outside of Israel. *Infra* III.B.3. As even Apple now acknowledges, litigating in this forum presents unique and "significant obstacles." Apple MTD at 3. This is, in short, a textbook case for *forum non conveniens* dismissal.

1. No Party Or Witness Resides In California.

Undisputedly, no party resides within 2,000 miles of California, and no "significant quantum of witnesses" is in California. ER-8. So it was not error, much less clear error, for the district court to conclude that the

residences of the parties and witnesses do not favor California. Plaintiffs' objection ignores these basic facts.

Indeed, Plaintiffs leave out half the analysis by ignoring where the witnesses reside. Undisputedly, "NSO was in Israel at all pertinent times, and all of its material witnesses . . . are located there," as "it does not hold property or have employees in California." ER-8 (citing 1-SER-3 ¶ 4). And Plaintiffs allege their devices were accessed by foreign actors in foreign countries. *See* ER-25 ¶¶ 43–44; *supra* III.A.1.a. Accordingly, no key witnesses are located California; they are all located thousands of miles away in El Salvador, Israel, and other foreign countries where the alleged conduct occurred.

Plaintiffs' contention (at 33) that the district court "overlook[ed] Plaintiffs' residences" is plainly wrong. The district court specifically considered nearly every Plaintiff's *current* residence in concluding that "[l]itigating the case in this District would likely impose significantly heavier burdens on NSO than plaintiffs" because "Israel is more than twice as far away from San Francisco (approximately 7400 air miles) as El Salvador (approximately 2600 air miles)." ER-8. Expressly rounding out that tally by noting that a few other Plaintiffs also live thousands of

miles away "in New York City, Washington, D.C., Germany, and Mexico [City]," AOB 34, was unnecessary, as it would've changed nothing.

California cannot clearly be a "practical" forum for litigation (AOB 34) when no parties or key witnesses reside anywhere near there. There was no clear abuse of discretion on this factor.

2. California Is Not A Convenient Forum When The Closest Party Lives Thousands Of Miles Away.

The district court reasonably concluded that litigating in California "would likely impose significantly heavier burdens on NSO than plaintiffs." ER-8. It blinks reality for Plaintiffs to say California is *clearly* a more convenient forum when no party lives within 2,000 miles and NSO—7,400 miles away in Israel—undisputedly "will be the source of substantially more evidence and witnesses than plaintiffs." ER-8.

This Court confronted strikingly similar facts in *Ranza*, where the allegedly unlawful conduct "took place . . . in the Netherlands," "the relevant documents and witnesses [we]re mostly located abroad," and the U.S. citizen "plaintiff d[id] not even reside in the United States." 793 F.3d at 1078. On *de novo* review, *see id.* at 1068, a unanimous panel held that these circumstances made Oregon "an inconvenient forum for the

parties"—even though the defendant was "located in Oregon" and the plaintiff had chosen Oregon as the forum. *Id.* at 1078 (Fisher, J.).

Given *Ranza*'s holding that these circumstances favor dismissal under *de novo* review even when one party actually resides in the local forum, it cannot be *clear error* to reach the same conclusion when *no* party resides within 2,000 miles of the forum. *See*, *e.g.*, *Piper Aircraft*, 454 U.S. at 259 ("Finding that trial in the plaintiff's chosen forum would be burdensome . . . is sufficient to support dismissal . . . ."). Plaintiffs' contrary arguments misconstrue this factor and overlook the applicable standard of review.

Plaintiffs' focus (at 36) on their own travel demands ignores that what matters is *relative* convenience. *Forum non conveniens* dismissals often require plaintiffs "to travel much farther to litigate [their] case." AOB 36. In *Gemini Capital*, for example, the California plaintiffs had to travel nearly 6,700 miles to litigate their case in the island of Yap in Micronesia, some 4,200 miles farther than their chosen forum of Hawaii. 150 F.3d at 1090, 1092–95. Yet dismissal was still appropriate because "the balance of convenience militate[d] against bringing suit in [U.S.] courts." *Id.* at 1091–92. So too here: The *balance* of convenience favors

dismissal because Plaintiffs would need to travel thousands of miles regardless, whereas NSO—plus its witnesses and evidence—would need to travel 7,400 miles only if the case stayed in California.

Plaintiffs' responses are unavailing. They cite no evidence that the "armed conflict near [Israel's] border" has impeded operation of Israel's civil courts—which are many miles from Gaza. AOB 36. Those courts are, in fact, open and safely accessible today. *See* The Israeli Judicial Auth., *The Activity of the Courts and Labor Courts During Recess* (updated May, 19, 2024), https://www.gov.il/en/pages/courts_recess_duty. Any Plaintiffs who fear travel to Israel could attend hearings remotely or undergo "remote video depositions," as Plaintiffs have proposed. AOB 44 (quoting *Apple Inc. v. NSO Grp. Techs. Ltd.*, 2024 WL 251448, at *2 (N.D. Cal. Jan. 23, 2024)). Plaintiffs cite no contrary controlling authority. Indeed, their primary authority is an out-of-circuit personal-jurisdiction case involving disruption due to imminent regime change. *See Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 719 (1st Cir. 1996).

Nor do NSO's "other cases" in California somehow make California a "convenient" forum for *this* case. *Contra* AOB 37. Those cases all have distinct claims and different operative facts; none concerns the alleged

monitoring of Plaintiffs' devices. The only case Plaintiffs claim is actually "related" is Apple's lawsuit, AOB 37, and Apple has now moved to dismiss that case. Moreover, any overlapping allegations with *Apple* pertain to how the Pegasus technology was *developed* and have no bearing on Plaintiffs' claims about how it was later *deployed* to allegedly access their devices. Because *Apple* will be dismissed and does not involve the same claims and operative facts, Plaintiffs' cases are inapposite. *See Lockman*, 930 F.2d at 770 & n.4 (plaintiff's "copyright claims" and defendant's "copyright defense" in related action "ar[o]se out of a common nucleus of operative facts" (quotation marks omitted)); *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766, 780 (C.D. Cal. 2006) ("two proceedings investigating the crash of [flight] SQ006" brought by different plaintiff groups), *aff'd sub nom. Schijndel v. Beoing Co.*, 263 F. App'x 555 (9th Cir. 2008).

Nor did the district court clearly abuse its discretion by not "recognizing a presumption of convenience" in favor of Plaintiffs' forum choice. *Contra* AOB 39–40. "[T]he presumption of convenience . . . does not apply here" because "none of the Plaintiffs are [California] residents." *Gemini Cap.*, 150 F.3d at 1091; *see supra* II.A. While a "less deference" standard is appropriate here, such deference is merely factored into how

the various factors are weighed; no express deference to Plaintiffs' forum choice was required. *Supra* II.B. In fact, this Court has affirmed dismissal where the district court mentioned only the defendants' residence, *see Ayco Farms*, 862 F.3d at 950–51, or did not address any party's residence, *see Lueck*, 236 F.3d at 1146–47.

It was not a clear abuse of discretion to find the second factor favors dismissal.

3. Israeli Witnesses And Evidence Likely Would Not Be Accessible In California.

The district court reasonably held that "access to proof and witness availability" favor "litigating the case in Israel or elsewhere, and not here" because "all of [NSO's] material witnesses and evidence are located there," and Plaintiffs did not identify "any significant quantum of witnesses or evidence [that] may be located in this District." ER-8. Plaintiffs identify no error, much less clear error, in these conclusions, which are manifestly correct in light of Israel's strict regulation of NSO.

a. All evidence about NSO's technology is located in Israel—and likely will not be accessible if this case were tried in California.

Plaintiffs do not dispute that "all of [NSO's] material witnesses and evidence are located" in Israel. ER-8. While they contend (at 43) that NSO

did not "supply sufficient information" on this point, that is incorrect. NSO submitted a declaration from its CEO explaining that "[a]ll of Defendants' employees with knowledge relevant to this lawsuit reside in Israel, and any documentary evidence relevant to the case is located in Israel." 1-SER-3 ¶¶ 1, 4. The materiality and importance of testimony from NSO's own employees is obvious, given that the ultimate fact issues are whether NSO (through its employees) accessed Plaintiffs' phones. Contrary to Plaintiffs' apparent assumption, it simply was "not necessary" for NSO to "submit affidavits identifying the witnesses [it] would call and the testimony these witnesses would provide." *Piper Aircraft*, 454 U.S. at 258.

Should this case proceed in California, however, the parties will be deprived of access to huge swathes of that critical evidence. Evidence about NSO's technology cannot be lawfully transferred outside of Israel without risking criminal prosecution under Israel's Defense Export Control Law. *See* 1-SER-24 § 15(a)(2) (prohibiting "[t]ransfer of defense know-how through any means, including orally — from Israel to outside

of Israel"); 1-SER-32 § 32(a) (violators face "three years' imprisonment").[4] Accordingly, should this case proceed in California, NSO could be barred from producing protected documents in discovery or provide testimony or other evidence about its technology.

There are [redacted] "significant obstacles" that Apple found fatal to its own lawsuit against NSO. Apple MTD at 3. [redacted]

If this case continues in California, therefore, [redacted]

[4] Plaintiffs' unsupported assertion (at 42 n.14) that this legal prohibition on disclosure "equally" applies "in . . . Israeli courts" is wrong. The statute permits disclosure in Israel to "an Israeli citizen or an Israeli resident," so disclosure in Israeli proceedings to Israeli attorneys or before an Israeli judge would be allowed. *See* 1-SER-24 § 15(a)(2).

[redacted] These same problems would not exist in an Israeli forum, [redacted]

Plaintiffs' arguments (at 41–42) about the availability of "electronic discovery" and evidence from the *Apple* litigation do not fix these fatal access issues. Indeed, while non-Israeli evidence "should be readily available in electronic or other accessible form" for use in an Israeli proceeding, ER-8, most Israeli evidence cannot be used *at all* in a California proceeding. And there will be no *Apple* litigation to provide a ready supply of evidence for this case. Even third-party discovery from Apple could be difficult to obtain, given Apple's view that third-party discovery "would severely undermine the effectiveness of Apple's [security] program and ability to protect its users." Apple MTD at 2.

Because the *Apple* litigation will be dismissed (and was starkly different from Plaintiffs' claims anyway), Plaintiffs' cited cases about parallel litigation are inapposite. *See Lueck*, 236 F.3d at 1147 ("both "lawsuits revolve around the causes of the accident"); *Lockman*, 930 F.2d at 770 & n.4 ("copyright defense" and "copyright claims" both "arise out of a common nucleus of operative facts" (quotation marks omitted)); *Van Schijndel*, 434 F. Supp. 2d at 780 ("two proceedings investigating the crash of SQ006" brought by different plaintiffs "would be inefficient").

b. Balanced against NSO's witnesses and evidence—which would be largely inaccessible in a California forum—Plaintiffs identify no "significant quantum of witnesses or evidence [that] may be located in this District." ER-8. While they contend this "was not [their] burden to prove," AOB 43, the district court did not place any burden on Plaintiffs. It merely recognized that they had not refuted NSO's showing that all the key witnesses and evidence in this case are located in foreign countries, not California. This was reasonable, correct, and not a clear abuse of discretion. *See Ayco Farms*, 862 F.3d at 950–51 (affirming dismissal where, in analyzing private-interest factors, district court noted "the crux of the parties' dispute" occurred in Mexico and the

plaintiff "Ayco failed to identify any witnesses, documents, or evidence located in California").

This Court has held "the private interest factors weigh in favor of dismissal" where a "court cannot compel production of much of the [foreign] evidence, whereas the parties . . . can bring[] all the [other] evidence to [the foreign forum]." *Lueck*, 236 F.3d at 1147. Especially given the extraordinary restrictions on access to NSO's evidence here, it was not a clear abuse of discretion for the district court to reach the same conclusion.

4. Numerous Other Practical Problems Favor Dismissal.

Plaintiffs concede that "the remaining private-interest factors are neutral at best." AOB 44. Based on that concession alone, the district court's weighing of those factors would not be a clear abuse of discretion, as three factors would still favor dismissal, while none would favor California. In any event, the record for affirming the district court is even stronger than that because the remaining four factors all favor dismissal.

a. NSO's Witnesses Likely Cannot Be Compelled To Appear In California.

The fourth factor favors dismissal. NSO's material witnesses are all in Israel, *supra* III.B.1, and many are *former* employees whose "availability" NSO does not "control," *contra* AOB 44. It can be "reasonably predicted" those witnesses "could probably not be compelled to appear in California." *Ayco Farms*, 862 F.3d at 950–51; *see Lueck*, 236 F.3d at 1147 ("The district court does not have the power to order the production or appearance of [foreign] evidence and witnesses."); *Contact Lumber*, 918 F.2d at 1451 (defendant cannot "compel [foreign] witnesses to appear before U.S. courts"). NSO did not "concede[ ]" otherwise. *Contra* AOB 44. The declaration Plaintiffs cite agrees it is "very rare" for Israeli witnesses to be compelled to appear in U.S. court. ER-12 ¶ 2.

Even if NSO's witnesses could be compelled to appear in California, however, Israel's export laws could prohibit them from testifying about NSO's technology. *Supra* III.B.3.a. This would not be an issue in Israeli court, where no exporting of information would be necessary, and Israeli witnesses could be compelled to testify. ER-12 ¶ 2. Moreover, [redacted] *Supra* III.B.3.a. [redacted]

[redacted]

b. It Would Be Far More Costly To Litigate In California.

The fifth factor likewise favors dismissal because the costs of bringing key witnesses to trial in California are enormous. Even with "remote video depositions," AOB 44 (quoting *Apple*, 2024 WL 251448, at *2), it would be manifestly less costly to litigate in a forum where the party with "substantially more evidence and witnesses" resides, ER-8, than to force all parties and witnesses to travel thousands of miles to and from California for trial.

c. It Would Be Far More Difficult To Enforce A California Judgment.

The sixth factor favors dismissal as well. Plaintiffs do not dispute that enforcing any judgment would "be 'easier' in Israel." AOB 45. On its own, "the difficulty of enforcing" a forum's judgment "weighs against" that forum. *Carijano*, 643 F.3d at 1232; *Alternate Health USA Inc. v. Edalat*, 2022 WL 767573, at *9 (C.D. Cal. Mar. 14, 2022) ("[t]his factor weighs strongly in favor of dismissal" where it "would be easier to

enforce" a foreign judgment), *aff'd* 2023 WL 8732811 (9th Cir. Dec. 19, 2023).

But this factor even more strongly favors dismissal here because, as NSO pointed out (*contra* AOB 45), a California judgment could well be unenforceable in Israel. *See* Dkt. 54 at 7. Plaintiffs' primary authority, Israel's Foreign Judgments Enforcement Law, confirms that Israeli courts will not enforce a judgment that "might be detrimental to Israel's sovereignty or security." Eddy Meiri, *Foreign Judgments Enforcement in Israel*, 31 Int'l L. Practicum 39, 41 (2018). That would likely be the case with a California judgment here, as [redacted]. 2-SER-51–52.

d. Litigating In California Would Create Unmanageable Practical Problems.

Plaintiffs do not address the seventh factor and thereby tacitly concede that it, too, favors dismissal. Indeed, difficulties in using the testimony of many Israeli witnesses outside of Israel would directly impair the parties' access to evidence and pose "practical problems" throughout discovery and trial. *See Piper Aircraft*, 454 U.S. at 251, 257–

58 (a court does "not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held" in a foreign forum closer to "[a] large proportion of the relevant evidence"); *Umeda v. Tesla, Inc.*, 2022 WL 18980, at *1 (9th Cir. Jan. 3, 2022) (similar). If the case were brought in Israel, in contrast, the evidence and testimony would remain wholly within Israel, and an Israeli court could structure discovery to avoid [redacted] export-control concerns.

Litigating this matter in the United States thus would effectively prohibit NSO from producing critical evidence (documents and witnesses) and [redacted]. The district court reasonably concluded that the lawsuit should be dismissed and brought in Israel to avoid disproportionate "oppressiveness and vexation to [NSO]." ER-6 (quotation marks omitted).

* * *

It is hard to imagine a stronger case for *forum non conveniens* dismissal. It is already unusual for *all* parties and *all* key witnesses and *all* evidence to be located thousands of miles away from the forum. Yet there are *also* exceptional and unmanageable practical problems to litigating here that would severely impair not just the parties' ability to

conduct discovery and present witnesses, but even NSO's own ability to defend itself. The undeniable facts of this lawsuit plainly counsel in favor of litigation in a foreign forum.

At minimum, they do not leave "a definite and firm conviction that the district court committed a clear error of judgment." *Lockman*, 930 F.2d at 771 (cleaned up). The order below should be affirmed.

CONCLUSION

For the above reasons, this Court should affirm the order below.

Respectfully submitted,

s/Joseph N. Akrotirianakis

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September 16, 2024

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I state that I am not aware of any related case pending in this Court.

Date: September 16, 2024

s/ Joseph N. Akrotirianakis
Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), I certify that this brief complies with the length limitations set forth in Rule 32(a)(7)(B)(i) because it contains 10,152 words, as counted by Microsoft Word, excluding the items that may be excluded under Rule 32(a)(7)(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 365ProPlus in Century Schoolbook 14-point font.

Date: September 16, 2024

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