IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

SHAHLA M RABIE CORTEZ,

Petitioner,

vs.

PALACE RESORTS, INC, PALACE RESORTS, LLC,
& TRADCO, LTD., INC.,

Respondents.

On Petition For Discretionary Review From
The Third District Court of Appeal of Florida Case No. 3D09-3468

PETITIONER'S BRIEF ON JURISDICTION

Michael Diaz, Jr.
Florida Bar No. 606774
Carlos F. Gonzalez
Florida Bar No. 0494631
Gary E. Davidson
Florida Bar No. 0069094
DIAZ REUS & TARG, LLP
2600 Miami Tower
100 Southeast Second Street
Miami, Florida 33131
Telephone: (305) 375-9220
Facsimile: (305) 375-8050

Counsel for Petitioner

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STATEMENT OF THE CASE AND FACTS

This case is about whether a U.S. citizen who was raped in Mexico can sue for damages in Florida. Petitioner sued in Florida because Respondents, whose negligence is at issue here, maintain extensive operations in Miami-Dade County. The Third District Court of Appeal determined that this was not enough. In particular, the appellate court ruled that Petitioner's choice of Florida was not entitled to any deference given the fact that she was a citizen of California. This ruling expressly and directly conflicts with this Court's decision in *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996), and constitutes a violation of the privileges and immunities clause of the U.S. Constitution. Accordingly, this Court should grant discretionary review.

Although the ruling below expressly adopted *Kinney*, it incorrectly applied this Court's decision to its analysis. *See Rabie Cortez v. Palace Holdings, S.A. de C.V.*, 66 So. 3d 959, 962 (Fla. 3d DCA 2011) ("In reviewing the order on appeal we necessarily follow the *Kinney* guidelines."). In *Kinney*, this Court made clear that our courts should adopt the federal forum non conveniens standard. *Kinney*, 674 So. 2d at 93. This standard gives great deference to a U.S. citizen's choice of forum. *See id.* at 91 (finding that "the reviewing court always should remember that a strong presumption favors the plaintiff's choice of forum"). Despite the appellate court's recognition "that there is a strong presumption against disturbing

a plaintiff's choice of forum," it nonetheless declined to honor Petitioner's forum choice because she "is an out-of-state resident with very little, if any contact with Florida." *Rabie Cortez*, 66 So. 3d. at 962-63. In refusing to respect Petitioner's choice of Florida as the most appropriate forum for this litigation due to her California residency, the Third District failed to correctly apply the federal forum non conveniens standard as required by *Kinney*.

Petitioner sued in Florida because this is where the corporate entities responsible for her "negligent vacation packaging" claim run their business. All of the defendants at issue are based in Florida, and their commercial activities in this state are extensive. In fact,

> Miami is the operational, managerial, and marketing center for the entire Palace Resorts group and [. . .] the Florida Defendants control: marketing; sales to individuals, groups, and travel agents; timeshare programs; customer service; press relations; and finance for the entire Palace Resorts Group.

Rabie Cortez, 66 So. 3d at 965 (Rothenberg, J. dissenting).

It is difficult to fathom why these Florida defendants would, in good faith, move to dismiss for forum non conveniens. As the dissent aptly noted:

> The Florida Defendants manage the entire U.S. market, which represents seventy percent of the Palace Resorts' business; [and] the president of most of the Palace companies lives and works in Miami. . . . [C]ustomer complaints are investigated by the Florida Defendants at their Miami headquarters; the Florida Defendants issue refunds to unhappy customers, design vacation packages

> for all Palace Resort hotels, approve all marketing literature, manage hotel websites, and issue all press releases at their Miami headquarters; and their Miami headquarters is the record-keeping center for the Mexican Palace Resorts hotels.

Id. at 965-66 (Rothenberg, J. dissenting).

What is more, the Third District affirmed the dismissal of this case in favor of Mexico despite the fact that Lourdes Rodriguez, a key witness for the defense, has repeatedly and admittedly perjured herself with respect to critical facts relied on by trial courts in this and other cases to dismiss on forum non conveniens grounds. As Rodriguez conceded, her affidavit, filed in support of Defendants' motion to dismiss, was littered with false testimony. *See Rabie Cortez*, 66 So. 3d at 962, n. 4.

SUMMARY OF ARGUMENT

Discretionary review should be granted because the Third District Court of Appeal's decision here expressly and directly conflicts with this Court's ruling in *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996). In *Kinney*, this Court ruled that Florida courts should adopt the federal forum non conveniens standard. *Id.* at 93. In refusing to respect Petitioner's choice of Florida as the most appropriate forum for this litigation based on her California residency, the Third District ignored one of the most important tenets of federal forum non conveniens

law. Federal courts give great deference to a U.S. citizen's choice of forum, and so too should the Third District.

Beyond conflicting with *Kinney*, the Third District's refusal to honor Petitioner's choice of forum also violates the Privileges and Immunities Clause of the U.S. Constitution. Simply stated, Florida courts cannot discriminate against Petitioner because she is a California resident. Like any other Florida citizen, Petitioner is entitled to access Florida's courts.

ARGUMENT

I. The Third District's Decision Expressly And Directly Conflicts With This Court's Holding In *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86 (Fla. 1996).

In *Kinney*, this Court announced that "the time has come for Florida to adopt the federal doctrine of forum non conveniens." 674 So. 2d at 93. In applying the *Kinney* factors, "opinions of the federal courts that harmonize with the [*Kinney* analysis] should be considered persuasive." *Id*.

The U.S. Supreme Court has held that a U.S. citizen plaintiff cannot be denied access to his or her chosen home forum, unless litigation in that forum would be "oppressive and vexatious" to the defendant "out of all proportion to plaintiff's convenience." *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947). Both state and federal courts in Florida have similarly concluded that, before denying a U.S. citizen access to the courts of this country, the court must

require "positive evidence of unusually extreme circumstances, and . . . be thoroughly convinced material injustice is manifest." *Telemundo Network Group, LLC v. Azteca Int'l Corp.*, 957 So. 2d 705, 711 (Fla. 3d DCA 2007) (quoting *SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1100-01 (11th Cir. 2004) (internal quotation marks omitted)).

The Third District repeatedly recognized in its decision below that *Kinney* controlled its analysis of the forum non conveniens question. *Rabie Cortez*, 66 So. 3d at 962-63. Nevertheless, it ignored one of the key tenets of federal forum non conveniens law – that U.S. citizens are entitled to "great deference" in their choice of a "home forum"[1] in which to initially bring suit. *Iragorri v. United Technologies Corp.*, 274 F.3d 65, 71 (2d Cir. 2001). The majority found that the presumption is given less deference here because Petitioner is from another state "with very little, if any, contact with Florida." *Rabie Cortez*, 66 So. 3d 959, 962-63. Yet, *Kinney* made clear that a U.S. citizen's choice of forum "should rarely be disturbed," and can only be subject to scrutiny if "the balance is strongly in favor of the defendant." *Kinney*, 674 So. 2d at 89.

Contrary to *Kinney* and otherwise persuasive federal precedent, the Third District concluded that Petitioner was "not entitled to a strong presumption in favor

[1] Federal forum non conveniens principles define a plaintiff's "home forum" as any federal district court within the United States. *See Reid-Walen v. Hansen*, 933 F.2d 1390, 1394 (8th Cir. 1991).

of Florida as her initial forum choice . . . ." *Rabie Cortez,* 66 So. 3d at 963. The appellate court based its determination on Petitioner's status as "a California resident [who] chose to file suit in Florida, a forum that is not her residence." *Id*. No reading of *Kinney* would support the Third District's decision to treat Petitioner as a second-class citizen vis-à-vis Florida's courts.

Moreover, "[t]he deference owed to a plaintiff's choice [of forum] is at its highest level when that choice was motivated by legitimate reasons, i.e., the plaintiff's convenience and the ability to obtain jurisdiction over the defendant." *Hilton Int'l Co. v. Carrillo*, 971 So. 2d 1001, 1006 (Fla. 3d DCA 2008). The majority here made it seem as if there was no legitimate basis for suing in Florida. *Rabie Cortez*, 66 So. 3d at 962-63 (noting that since "the plaintiff is an out-of-state resident with very little, if any, contact with Florida . . . she is not entitled to a strong presumption in favor of Florida as her initial forum choice," and that "[w]ithout this strong presumption, the private interests clearly favor dismissal and resolution in a Mexican forum where the most significant evidence and witnesses are located.").

But Petitioner's choice of Florida made perfect sense. As the dissent explained:

> Miami is the operational, managerial, and marketing center for the entire Palace Resorts group and [. . .] the Florida Defendants control: marketing; sales to individuals, groups, and travel agents; timeshare

> programs; customer service; press relations; and finance for the entire Palace Resorts Group. The Florida Defendants manage the entire U.S. market, which represents seventy percent of the Palace Resorts' business; [and] the president of most of the Palace companies lives and works in Miami . . . . [C]ustomer complaints are investigated by the Florida Defendants at their Miami headquarters; the Florida Defendants issue refunds to unhappy customers, design vacation packages for all Palace Resort hotels, approve all marketing literature, manage hotel websites, and issue all press releases at their Miami headquarters; and their Miami headquarters is the record-keeping center for the Mexican Palace Resorts hotels.

Rabie, 66 So. 3d 965-66.

In addition to ignoring Petitioner's choice of forum, the Third District also failed to properly weigh the public and private interest factors at issue in any forum non conveniens analysis. For example, Respondents advanced no specific evidence showing that trial in Mexico would alleviate hardship related to the witnesses and documents necessary to sustain the claims and defenses in this action.

Further, the record is devoid of a single piece of competent evidence establishing that these documents and witnesses are indeed currently in Mexico. *See, e.g.*, *Wynn Drywall, Inc. v. Aequicap Program Administrators, Inc.*, 953 So. 2d 28, 30 (Fla. 4th DCA 2007) (requiring affidavits or other competent evidence for determining forum non conveniens disputes); *Hu v. Crockett*, 426 So. 2d 1275, 1279 (Fla. 1st DCA 1983) (basing forum non conveniens determination on the

competent evidence in the record). A claim that evidence is only available in Mexico would strain credulity – given that Respondents maintain extensive operations in Florida. As multiple district courts of appeal have found, "a forum non conveniens argument coming from a party sued where [it] resides is both puzzling and strange." *Cardoso v. FPB Bank*, 879 So. 2d 1247, 1250 (Fla. 3d DCA 2004) (quoting *Sanwa Bank, Ltd. v. Kato*, 734 So. 2d 557, 561 (Fla. 5th DCA 1999)).

Finally, the majority decision below also overlooked evidence demonstrating the unavailability and inadequacy of Quintana Roo, Mexico as an alternative forum for redressing the harms that Petitioner suffered.[2] Nor did the majority consider evidence that forcing Petitioner to resort to a Mexican court would result in undue inconvenience or prejudice.

II. The Third District's Failure To Give Deference Towards The Forum Choice Of A Sister State's Citizen Violates The U.S. Constitution's Privileges And Immunities Clause.

A Florida court's decision to afford less protection to the Florida forum choice of a sister state's citizen violates the Privileges and Immunities Clause of the United States Constitution. *See* U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens

[2] Among other serious defects, Respondents' own key witness admittedly submitted a perjured affidavit in support of Respondents' motion to dismiss. *See* (R. 44-49, 195-202, 742-747, 846-847, 852-853, 857-878, 950-954, 956-962); *see also* Ini. Br. at 5-7. The majority below disposes of these troubling admissions by simply indicating, in a footnote, that the issue was before the trial court and that this Court should not "reweigh this evidence." *Rabie*, 66 So. 3d 962, n. 4.

of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."). This Court has long recognized that the Privileges and Immunities Clause "places citizens of each state upon the same footing with citizens of other states so far as the advantages resulting from citizenship in those states are concerned . . . ." *See also State v. Bd. of Ins. Com'rs of Fla.*, 20 So. 772, 772 (Fla. 1896) *Scott v. Gunter*, 447 So. 2d 272 (Fla. 1st DCA 1983) ("the privileges and immunities secured by the Constitution are [those] of American citizens, whether resident or nonresident of a particular state.").

The U.S. Supreme Court has specifically held that "[w]ith respect to basic and essential activities . . . the States must treat residents and nonresidents without unnecessary distinctions." *Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 387 (1978). This requires a state to "accord to citizens of other states substantially the same right of access to its courts as it accords to its own citizens." *Mcknett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233 (1934); *see also Chambers v. Baltimore & O.R. Co.*, 207 U.S. 142, 148-49 (1907) (holding that "[a]ny law by which privileges to begin actions in the courts are given to its own citizens and withheld from citizens of other states is void . . . .").

The Third District's decision to treat Petitioner like a second-class citizen expressly and directly conflicts with this Court's recognition of the federal

Constitution's Privileges and Immunities clause, and discretionary review should likewise be granted on this point.

CONCLUSION

Petitioner was raped in Mexico and lives in California. The Third District ultimately treated these facts as dispositive of the forum non conveniens analysis. In so doing, the appellate court paid short shrift to this Court's decision in *Kinney*. Petitioner may live in California, but she is a U.S. citizen. As such, her choice of Florida as the most appropriate forum for this litigation is entitled to great deference. That Respondents maintain their principal operations in Florida and have apparently engaged in a multi-year effort to defraud the courts of this state to avoid litigation in this forum – as noted by the dissent – only confirms Petitioner's decision. Accordingly, this Court should grant discretionary review.

DATE: Miami, Florida
September 30, 2011

Michael Diaz, Jr.
Florida Bar No. 606774
Carlos F. Gonzalez
Florida Bar No. 0494631
Gary E. Davidson
Florida Bar No. 0069094
Diaz Reus & Targ, LLP
100 Southeast Second Street
2600 Miami Tower
Miami, Florida 33131
Telephone (305) 375-9220
Facsimile (305) 375-8050

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was hand-delivered this 30th day of September 2011 to the party listed below.

Ricardo J. Cata
Ronnie Guillen
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER, LLP
3800 Miami Tower
100 Southeast Second Street
Miami, Florida 33131
Counsel for Respondents

_____
Carlos F. Gonzalez

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the font requirements contained in FLA. R. APP. P. 9.210(a)(2).

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Carlos F. Gonzalez