No. 20-_____

IN THE

United States Court of Appeals for the Fifth Circuit

IN RE VICINAY CADENAS, S.A.

On Petition For a Writ of Mandamus to the
United States District Court for the Southern District of Texas in
Petrobras America, Inc. v. Vicinay Cadenas, S.A., No. 4:12-cv-00888,
Judge David Hittner, Presiding

PETITION FOR A WRIT OF MANDAMUS

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May 22, 2020

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

Petitioner:

Vicinay Cadenas, S.A. is a private company that is owned by Vicinay Marine S.L., a private company domiciled in Bilbao, Spain.

Vicinay Marine S.L. is controlled by Vicinay S.A., which has a majority shareholding in Vicinay Marine S.L. and is a private company domiciled in Bilbao, Spain.

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Respondents:

The Honorable David Hittner, United States District Judge, United States District Court for the Southern District of Texas.

United States District Court for the Southern District of Texas

Petrobras America Inc.:

Petrobras America Inc. has as its ultimate parent Petrobras Brasil, which is publicly traded as Petróleo Brasileiro S.A. (BM&F Bovespa: PETR4, PETR3; NYSE: PBR, PBRA; BMAD: XPBR, XPBRA; MERVAL:APBR).

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INTRODUCTION

Petitioner Vicinay Cadenas, S.A. ("Vicinay Cadenas") seeks mandamus to correct the district court's clear errors of law on a matter of great importance caused by the current pandemic. This is a more than $165 million commercial dispute between Spanish- and Brazilian-owned entities where the central liability question is whether Vicinay Cadenas's employees committed intentional or gross fault. A verdict for plaintiff Petrobras America Inc. ("Petrobras") could very well condemn Vicinay Cadenas to insolvency, thereby destroying many generations' worth of family wealth. Most of the witnesses—and all of the fact witnesses and party representative for Vicinay Cadenas—are located abroad. On January 3, 2020, the district court set a jury trial for this June.

The world then changed dramatically. Given the near certainty that none of the foreign witnesses or Vicinay Cadenas's party representative would be lawfully permitted to enter this country until 2021 at the earliest, the parties ***jointly*** moved in early May to reschedule the trial until January 18, 2021, an agreed date that was available on the district court's calendar. But the court arbitrarily denied that agreed motion, instead decreeing that the jury trial would begin on ***July 13, 2020***—when the novel coronavirus will be still actively spreading, international travel will be severely curtailed, and foreign witnesses and Vicinay Cadenas's party representative will almost certainly be legally barred from attending. *See* Order of

May 11, 2020, ECF No. 499 ("Order") (Ex. A). The result is that ***all*** of Vicinay Cadenas's fact witnesses and its key expert witnesses will have to testify remotely via videoconference, and Vicinay Cadenas will have no party representative present at trial—even though all those people are ready and willing to appear.

The order violates the plain terms of the Federal Rules of Civil Procedure and infringes on Vicinay Cadenas's constitutional right to physically attend trial through its party representative. Federal Rule of Civil Procedure 43(a) requires that in almost all situations "witnesses' testimony ***must be taken in open court***," and the rule permits remote video testimony only "[f]or good cause in ***compelling circumstances***." Fed. R. Civ. P. 43(a) (emphases added). Likewise, the "arbitrary exclusion" of a represented party "who wishes to be personally present in the courtroom" during a civil trial violates the Due Process Clause of the Fifth Amendment. *Helminski v. Ayerst Labs.*, 766 F.2d 208, 214 (6th Cir. 1985). Thus, "[a] party to a lawsuit has a right to attend the trial absent an overwhelming reason to the contrary." *Marks v. Mobil Oil Corp.*, 562 F. Supp. 759, 768 (E.D. Pa. 1983) *aff'd*, 727 F.2d 1100 (3d Cir. 1984).

The district court identified no "compelling circumstances" or "overwhelming reason" justifying a jury trial by video during a global pandemic or exclusion of Vicinay Cadenas's party representative. This is a commercial case presenting no pressing issues of time sensitivity or public importance, where ***both***

sides have agreed to a later date that remains open on the court's schedule and would likely allow all parties and witnesses to attend. Nor did the court provide any reason—much less a compelling or overwhelming one—for unfairly handicapping Vicinay Cadenas. Whereas at least one of Petrobras's party representatives and some of its fact witnesses are in the U.S. and could attend despite the pandemic, and its putative remote witnesses are in convenient time zones, ***all*** of Vicinay Cadenas's fact witnesses and principal experts will have to participate remotely at extreme hours, and its party representative will be barred entirely from attending in person.

Only mandamus can address the district court's clear and indisputable errors of law. That court's decision to proceed with a jury trial involving international entities against the parties' wishes during a once-in-a-lifetime global pandemic that has closed borders threatens irreparable harm to Vicinay Cadenas, as well as potential jurors, witnesses, lawyers, and supporting staff. These harms would be ***heightened***, not lessened, if this Court waited until final judgment to deem the trial void. Moreover, the prejudicial effect of the court's asymmetrical violations of Rule 43 and constitutional due process will be difficult, if not impossible, to analyze on appeal. The Court should therefore issue the writ and direct that the parties' agreed motion be granted.

RELIEF SOUGHT

Vicinay Cadenas seeks a writ of mandamus ordering the district court to grant the parties' Agreed Motion to Modify Order Setting Trial and to Modify Trial Scheduling Order, ECF No. 498 (the "Agreed Motion") (Ex. B), and schedule trial for January 18, 2021, or such other time as it is legal and possible for witnesses and party representatives to attend in person.

ISSUE PRESENTED

Whether the district court committed legal error or clearly abused its discretion, in a manner warranting this Court's immediate review, by insisting—without compelling or overwhelming reasons and against both parties' wishes—on holding a jury trial by video in an international dispute during a global pandemic when (1) critical witnesses, including ***all*** of one side's fact witnesses and (2) one side's party representative, will be unable to attend.

FACTUAL BACKGROUND

A. The Case.

This petition arises from a commercial dispute over defects in a chain used in an offshore oil production system. *See generally Petrobras Am. Inc. v. Vicinay Cadenas, S.A.* ("*Petrobras II*"), 780 F. App'x 96 (5th Cir. 2019). Vicinay Cadenas, a family-owned company located in Bilbao, Spain, manufacturers chains for use in such systems. Petrobras is the U.S.-based subsidiary of an oil and gas

conglomerate based in Brazil. The presiding judge is the Honorable David Hittner of the Southern District of Texas.

This case involves claims of over $165 million before prejudgment interest[1] and presents no issues of time sensitivity or public importance. The applicable rules of decision are state products-liability principles, *see Petrobras Am., Inc. v. Vicinay Cadenas, S.A.* ("*Petrobras I*"), 815 F.3d 211, 218 (5th Cir. 2016), and no party or court has ever called for expedited district court proceedings. The case's duration has been long because, in 2014 and 2018, the district court issued two dispositive orders that this Court subsequently reversed. *See Petrobras II*, 780 F. App'x at 96-103; *Petrobras I*, 815 F.3d at 213-18.

This Court's latest mandate issued July 10, 2019. The next day, the district court set the case for a jury trial in March or April of 2020. On January 3, 2020, at the parties' joint request, the district court ordered that the jury trial would instead proceed in June 2020.

B. The Coronavirus Pandemic.

That January 3 was a Friday. The following Monday, an article reported on a "mystery viral pneumonia that ha[d] infected 59 people" in and around Wuhan, China, but had not yet "led to any deaths." Wall Street Journal, *Health Officials*

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1 *See* Joint Pretrial Order, ECF No. 486, at 11 (Petrobras seeks $160 million in actual damages, in addition to attorneys' fees).

Work to Solve China's Mystery Virus Outbreak (Jan. 6, 2020) (https://tinyurl.com/y7jutjj5). Two days later, Chinese scientists opined publicly that some cases were attributable to "a new strain of coronavirus." Wall Street Journal, *New Virus Discovered By Chinese Scientists Investigating Pneumonia Outbreak* (Jan. 8, 2020) (https://tinyurl.com/ycwqq67j). But it was reported that although "[s]ome past coronavirus outbreaks, such as SARS and MERS, have had high death rates"—causing 1,625 worldwide fatalities between them—"there is no suggestion this new illness would cause such issues." *Id.*

The world, of course, changed dramatically since then. The novel coronavirus has now killed at least 335,418 people worldwide, infected at least 5,159,674, *see* Johns Hopkins University, *Coronavirus Research Center* (https://coronavirus.jhu.edu/), and radically altered life here and around the world. Governments virtually everywhere, concerned about catastrophic losses of life, have gone to unprecedented lengths to restrict travel, discourage group gatherings, and encourage social distancing to slow the virus's spread.

Those governments include the United States (where the trial of this case will be held), Spain (where all of Vicinay Cadenas' fact witnesses and its party representative reside), and Australia (where two of Vicinay Cadenas' critical experts reside). On March 11, the U.S. banned travel from most European countries, including particularly hard-hit Spain, and that ban remains in effect. *See*

Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus, 85 Fed. Reg. 15045 (Mar. 11, 2020). The European Union restricted all non-essential outside travel beginning on March 17, and Spain extended that restriction through at least mid-June. *See*, *e.g.*, El País, *Spain to Extend Restrictions on International Travelers Until June 15* (May 15, 2020) (https://tinyurl.com/ybgr5mon). Australia has imposed a mandatory, fourteen-day quarantine on all returning travelers[2] and has also generally banned its own citizens and permanent residents from travelling internationally.[3] Brazil also imposed an international travel ban, though it has expired. *See* Andrea Salcedo et al., *Coronavirus Travel Restrictions, Across the Globe*, N.Y. Times (May 8, 2020) (https://tinyurl.com/ul3mfw3); *see also* Jordan Fabian & Eric Martin, *Trump Considers Brazil Travel Ban in Latest Sign of Virus Woes*, Bloomberg News (May 19, 2020) (https://tinyurl.com/y99wjthd).

U.S. courts have altered their own operations. On April 13, the Supreme Court announced that half the remaining unargued cases this Term would be postponed, thus delaying decision for up to a year. *See*, *e.g.*, Mark Sherman,

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2 Kelly Burke, *Australia Closes Borders to Stop Coronavirus*, 7 News AU (Mar. 19, 2020) (https://tinyurl.com/y9z77ghm).

3 *See Covid-19 and the Border: Leaving Australia*, (https://covid19.homeaffairs.gov.au/leaving-australia).

Supreme Court to Hold Arguments by Teleconference, Associated Press (Apr. 13, 2020) (https://tinyurl.com/ya2qpzkr). This Court has canceled numerous oral arguments and all in-person arguments. Every other federal circuit and district court has taken similar steps. *See* Sarah Jarvis, Law360, *Coronavirus: The Latest Court Closures & Restrictions* (May 22, 2020) (https://tinyurl.com/yczfpj34).

Courts have been particularly restrictive with jury trials, where many people must gather together in person. Beginning on April 22, the Southern District of Texas issued Special Orders suspending all jury trials until at least July 6 and directing attorneys to contact the presiding judge in each case to modify other deadlines. *See* Special Orders H-2020-13 & H-2020-16, *In re: Court Operations in the Houston and Galveston Divisions Under the Exigent Circumstances Created by the Covid-19 Pandemic* (S.D. Tex. Apr. 22 & May 18, 2020) (https://tinyurl.com/ybphaw6r). It is unknown whether jury trials will be permitted in the Southern District after July 6, when the existing Special Order expires. Yet the district court set this case for a jury trial only one week later.

The Texas state courts have also barred jury trials until further notice. Those courts recently announced that they will begin to hold some non-essential proceedings after June 1, 2020, but jury trials remain prohibited pending further guidance. *See* State of Texas, Office of Court Administration, *Guidance for All Court Proceedings During COVID-19 Pandemic (For Proceedings on or after*

June 1, 2020) (https://tinyurl.com/y9r4ujat). But whereas the Texas courts are allowing many proceedings to be conducted remotely by videoconference, those courts have specifically ordered that jury trials may ***not*** be conducted remotely. *See* Texas Judicial Branch, *Court Operation Guidance* (https://www.txcourts.net/court-guidance) (stating that "most essential and non-essential proceedings, ***except for jury trials***, can be conducted remotely") (emphasis added).

C. The Agreed Motion And The Order On Review.

Given the Special Order and the continuing uncertainty regarding international travel and the feasibility of large public gatherings such as jury trials, Vicinay Cadenas and Petrobras coordinated with one another in an attempt to identify available trial dates while accounting for the district court's schedule and the effects of the pandemic. On May 5, they filed a ***joint*** motion to continue the trial until January 18, 2021, and to reset other deadlines. *See* Agreed Motion. In support, they noted that both parties have trial participants who must travel from around the country and the world to attend trial in Houston. They pointed out that fact witnesses and the party representative for Vicinay Cadenas are non-U.S. nationals who reside in Spain, and that two of Vicinay Cardenas's experts, who are critical to its case, are non-U.S. nationals who reside in Australia. *See id.* at 2-3. The parties also explained that at least one of Petrobras's party representatives and one of its witnesses would travel from Brazil. *Id.* at 2.

After setting forth some of the many travel restrictions and other concerns that would bear on those individuals' ability to attend trial, the parties noted that in addition to the Special Order (which had already dislodged the original, June trial date), "the COVID-19 global pandemic has made the current trial setting unfeasible for client representatives and several trial participants," who would likely be unable "to attend trial in the United States for the foreseeable future and through the end of this year." *Id.* at 5. The parties thus represented to the district court that "the first mutually available trial setting for the Parties and their respective counsel, witnesses, experts, and client representatives is January 18, 2021," and jointly requested that trial be set for that date. *Id.* at 4, 6.

The district court, however, denied the Agreed Motion on May 11, 2020. Citing the case's "eight-year history" and a "commit[ment]" to "ensur[ing] that cases are timely and justly heard and resolved," the court rejected the joint proposal to hold trial when witnesses and party representatives can appear, instead ordering that jury selection and trial will proceed on July 13—just three weeks later than the date set in early January. Order at 8-9 (holding that further delay was inappropriate because "seven continuances and scheduling orders have" already "been issued").

The court acknowledged that the pandemic crisis could prevent "representatives and witnesses [from] appear[ing] in person at trial." *Id.* at 8. Yet

it dismissed the concern about witnesses by noting it could "permit the parties to move for witnesses, if determined to be unavailable at the time of trial, to testify remotely or by deposition." *Id.* at 8 n.15. The court, however, made no further comment on the problem that party representatives could not attend a trial starting on July 13.

LEGAL STANDARD

Mandamus should issue "when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re DaimlerChrysler Corp.*, 294 F.3d 697, 699 (5th Cir. 2002) (quoting *In re Dresser Indus., Inc.*, 972 F.2d 540, 542-43 (5th Cir. 1992)). Even absent extraordinary circumstances, the writ is appropriate where "the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." *In re E.E.O.C.*, 709 F.2d 392, 394 (5th Cir. 1983) (citation omitted).

REASONS WHY THE WRIT SHOULD ISSUE

I. THE DISTRICT COURT CLEARLY AND INDISPUTABLY ABUSED ITS DISCRETION.

A. The Court Violated Rule 43(a) In Requiring Remote Video Testimony.

The district court's Order is a clear violation of Rule 43. As pertinent here, that Rule provides that "witness[] testimony ***must*** be taken in open court" and allows remote video testimony only in "compelling circumstances." Fed. R. Civ. P. 43(a) (emphasis added). As this Court has held, the rule evinces a "a clear preference for live in-court testimony." *United States v. Navarro*, 169 F.3d 228, 239 (5th Cir. 1999); *see also Prideaux v. Tyson Foods, Inc.*, 387 F. App'x 474, 479 (5th Cir. 2010) ("The Federal Rules of Civil Procedure [generally] require that witness testimony be presented live, in open court."). While exceptions may be made "in compelling circumstances" where the court has no other choice, Fed. R. Civ. P. 43(a), neither good cause nor compelling circumstances exist where "the circumstances offered to justify" trial by video could have been "reasonably foresee[n]," *Prideaux*, 387 F. App'x at 479.

The district court's extraordinary decision to hold trial as soon as possible, despite the parties' agreement that a later date would further the interests of justice, is legal error and a clear abuse of discretion. *Cf. DaimlerChrysler Corp.*, 294 F.3d at 699. If trial begins on July 13, the need for video testimony is virtually

certain—not merely foreseeable. As the parties told the district court, both litigants are based in foreign countries from which travel to the United States is unsafe and all but impossible, and many witnesses and experts reside abroad as well. Indeed, the United States has advised its own citizens to "avoid all international travel" whatsoever. *See* U.S. Dep't of State, *Global Level 4 Health Advisory – Do Not Travel*, Mar. 31, 2020 (https://tinyurl.com/w9bm5b4). The other countries at issue have similar restrictions. *See supra* at 6-7. If trial proceeds while those restrictions or others like them remain in place, numerous witnesses and party representatives will be unable to attend, and much of the witness testimony will have to take place via remote video.

No compelling circumstances exist to justify that result, and the district court identified none.[4] District courts may reschedule trials where cause exists to do so, as it indisputably does here. *See* Fed. R. Civ. P. 16(b)(4). Indeed, the advisory committee on the Federal Rules of Civil Procedure has made clear that where a witness's absence is foreseeable and other witnesses are likely to "be available at a later time," "reschedul[ing] the trial" is preferable to allowing ***any*** video testimony.

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[4] The district court *sua sponte* raised the prospect of remote video testimony in the Order. Having done so on its own, the court was thereby obligated to follow the strictures of Rule 43(a) and due process. The parties did not discuss those issues in their motion because the motion was filed precisely to allow witnesses and party representatives to appear in person at a time when it was reasonably anticipated it would become lawful for them to do so.

Cf. Fed. R. Civ. P. 43 advisory committee's note to 1996 Amendment. That is because trial by video reduces the extent to which "[t]he ... ceremony of trial and the presence of the factfinder may exert [on witnesses their] powerful force for truthtelling," and deprives the jury of "[t]he opportunity to judge the demeanor of a witness face-to-face." *Id.* Rule 43(a) thus codifies the view that trial by video undermines the core purposes of trial itself. *Id.* (noting that "[t]he importance of presenting live testimony in court" is "accorded great value in our tradition" and "cannot be forgotten").

The district court offered no reason whatsoever—much less a compelling one—for insisting on proceeding without live witnesses. The parties agreed to a January date that is open on the district court's calendar and would allow all witnesses to testify in person, with the parties' representatives present. This is particularly important to Vicinay Cadenas. As this Court held in its latest decision in this case, the central liability question for trial is whether Vicinay Cadenas committed "intentional or gross fault," *Petrobras II*, 780 F. App'x at 102, an issue upon which it would be critical for the jury to directly perceive the witnesses' demeanor and veracity. The district court has no other trials on its schedule, and appears to still be available on the date the parties proposed.

The fact that "seven continuances and scheduling orders have been issued" over eight years, Order at 8 (emphasis omitted), does not provide a "compelling

circumstance" that would justify discarding the bedrock principle of "live testimony in court." *See* Fed. R. Civ. P. 43(a) advisory committee's note to 1996 Amendment. This case's long duration is largely attributable to this Court's two remands after reversals of prior dispositive orders. *See supra* at 5. To the extent the district court suggested that the duration involved the parties' failure to prosecute the case, that suggestion is unsupported.[5] Nor would the suggestion justify the district court's Order in any event, since any further delay would plainly be attributable to an international calamity of neither party's making.

The court's stated "commit[ment]" to ensuring that cases are "timely and justly heard and resolved," Order at 8, provides no "compelling" basis for the Order either. As noted, jury trials by video ***threaten*** justice by undermining the adjudicative process's truth-seeking function. *See supra* at 13-14. Nor is justice served by ignoring the parties' own wishes and insisting on a trial by video that neither party asked for or wanted. This is not a case involving recalcitrant witnesses; to the contrary, both parties' witnesses and party representatives are

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[5] In its Order, the district court emphasized a statement by Vicinay Cadenas's counsel in 2017, three months before a previously set trial date, that the parties were "not in any way ready for trial." Order at 6. But that statement referred to a stay of discovery by ***the magistrate judge***—not the parties' lack of preparedness. *See Status Conference Tr.*, ECF No. 282, 38:1-11. Moreover, as the district court acknowledged, trial would not have occurred on that date regardless, because, in an order that was later reversed, the court ultimately granted summary judgment. Order at 6-7.

ready and willing to appear. In fact, holding this particular trial in the face of the parties' agreement that it should be delayed would be particularly damaging, insofar as the district court's refusal to accommodate foreign witnesses testifying on behalf of foreign parties could threaten the appearance of impartiality and the international reputation of this country's courts. Although the wheels of justice must continue to turn, there are doubtless many more pressing matters involving only local parties.

Trial by video will also be uniquely unfair to one side—Vicinay Cadenas. Whereas at least one of Petrobras's party representatives and some of its witnesses are located in the U.S. and will likely be able to attend, ***all*** of Vicinay Cadenas's fact witnesses, its party representative, and two critical expert witnesses are non-U.S. nationals located in countries (Spain and Australia) from which travel to and from the United States has been banned. Moreover, although Petrobras's foreign participants are mostly in Brazil, where times zones are similar to those in Texas, Vicinay Cadenas's foreign witnesses are in Spain and Australia, which are on the other sides of the globe. Thus, Vicinay Cadenas alone will be prejudiced by the inherent difficulty of having its witnesses and experts testify at extraordinarily inconvenient hours—often in the middle of the night—in their time zones. Moreover, as noted below, Vicinay Cadenas will also be uniquely prejudiced by the fact that its party representative will be seen by the jury only through remote

video—if at all—whereas Petrobras's U.S.-based party representatives could be seen by the jury in person during the entire trial, thereby possibly conveying a greater commitment to the case in the jurors' eyes.

Nor could the district court avoid a trial by video by allowing deposition testimony to be read into the record. Even if that were preferable to the simple expedient of rescheduling this non-urgent matter—and it is not—neither party affirmatively questioned its own witnesses at their depositions. That is the usual practice in cases, such as this one, where depositions are taken for discovery purposes rather than for the perpetuation of absent witness testimony. *See*, *e.g.*, John S. Worden, *Deposition Testimony Takes the Stand in California* (Dec. 19, 2019) (https://tinyurl.com/y92noojr) ("Questioning your own witness while defending a deposition is a rare practice."). Depositions were taken well before the novel coronavirus, at a time when both parties expected witness would and could attend live. *See* Order, ECF No. 293, at 1. Reading deposition testimony into the record would thus result in a trial without any direct examinations.

The law clearly prohibits the district court from arbitrarily denying Vicinay Cadenas the right to present its case in open court. *See*, *e.g.*, *United States v. Olaniyi-Oke*, 199 F.3d 767, 771 (5th Cir. 1999) (court may not arbitrarily deny continuance where it is sought "based on the unavailability of a witness"); *see also IQ Prods. Co. v. Onyx Corp.*, 48 F. App'x 107, 2002 WL 31017634, at *2 (5th Cir.

2002) (rule applies in civil cases as well). If trial begins on July 13, it will be, as to Vicinay Cadenas, a trial by video that the Federal Rules of Civil Procedure clearly prohibit. The district court's insistence on charging forth notwithstanding that Rule's clear requirements is both an error of law and a clear abuse of discretion.

B. The District Court Contravened Due Process By Requiring A Trial That Vicinay Cadenas's Representative Cannot Attend.

The district court's clear error in disregarding Rule 43's requirements was compounded by its equally grave error in arbitrarily decreeing—against both parties' wishes—that trial must be held during a time when it foresaw that Vicinay Cadenas's party representative will be unable to attend. That error, which deprives Vicinay Cadenas of its constitutional right to be physically present during a trial at which its very existence is threatened, also warrants mandamus.

As noted, it has been held that the "arbitrary exclusion" of a represented party "who wishes to be personally present in the courtroom" during a civil trial violates the Due Process Clause. *Helminski,* 766 F.2d at 214. Although this Court apparently has not yet confronted the issue, the right of a party to attend its own trial is well-accepted in both federal and state courts.[6] The due process right to

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6 *See*, *e.g.*, *Gonzalez-Marin v. Equitable Life Assurance Soc'y of U.S.*, 845 F.2d 1140, 1146 (1st Cir. 1988) (citing *Helminski* for proposition that defendant seeking to exclude plaintiff from trial "bears the burden of establishing prejudice, and that mere prejudice alone does not suffice unless the court is satisfied that the plaintiff cannot comprehend the proceedings"); *Kesterson v. Jarrett*, 728 S.E.2d 557, 561-65 (Ga. 2012) ("The right of parties to be present in court when their

attend one's own trial "is based not only on what the party can do to the case, but on what the case will do to the party." *Kesterson*, 728 S.E.2d at 566. The right also protects the party's ability to participate and to be heard fully in all stages of the trial, including in jury selection. *See Preferred Props., Inc. v. Indian River Estates, Inc.*, 276 F.3d 790, 797 (6th Cir. 2002) (holding party representatives have the right to attend voir dire "absent compelling reasons" since parties can be

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causes are heard is undoubtedly strong as a matter of federal law."); *Green v. N. Arundel Hosp. Ass'n, Inc.*, 785 A.2d 361, 373 (Md. 2001) (under Due Process clause, "a party to civil litigation has a right to be present for and to participate in the trial of his/her case"); *Cary ex rel. Cary v. Oneok, Inc.*, 940 P.2d 201, 204 (Okla. 1997) ("Regardless of their approach, courts agree [that] [t]he ideals behind due process and a fair trial permit a party to be present in the courtroom absent extreme conditions"); *Mason v. Moore*, 226 A.D.2d 993, 994 (N.Y. App. Div. 1996) ("It is axiomatic that, absent an express waiver or unusual circumstances, a party to a civil action is entitled to be present during all stages of the trial."); *Carlisle v. Nassau County*, 64 A.D.2d 15, 18 (N.Y. App. Div. 1978) (The "right to be present at all stages" of trial is "basic to due process of law."); *Nat'l Ins. Co. of Am. v. Broome*, 401 S.W.2d 862, 864-65 (Tex. App. 1966) ("The right of the defendant to be present and testify in his behalf before the jury is a valuable right which should not be denied when his presence at the trial is beyond his control"); *see also Galella v. Onassis,* 487 F.2d 986, 997 (2d Cir. 1973) (although court has power to exclude a party from deposition "such an exclusion should be ordered rarely indeed"); *Hines v. Wilkinson*, 163 F.R.D. 262, 266 (S.D. Ohio 1995) ("[T]he courts may exclude a party from a deposition only in 'extraordinary circumstances,'" which is "fully consistent with the notion that a party's right to attend a deposition has a constitutional dimension and is therefore entitled to special protection.") (citation omitted); *Macartney v. Compagnie Generale Transatlantique*, 253 F.2d 529, 536 (9th Cir. 1958) ("both parties (and their counsel) are entitled to attend all proceedings from the time the jury is impaneled until it is discharged."). *But see Faucher v. Lopez*, 411 F.2d 992, 996 (9th Cir. 1969).

helpful in noticing things that their lawyers might miss); *Carlisle*, 64 A.D.2d at 20 (rejecting "patent anomaly" that "a party has a right to be present when he or his claim is judged by his peers, but not when the individual peers are being selected").

The right of the party representative to attend trial is not satisfied merely because its legal counsel will be in the courtroom: "since an attorney is merely the representative or agent of the litigant and not the litigant's 'alter ego,' … a court may not exclude arbitrarily a party who desires to be present merely because he is represented by counsel; such exclusion would violate the due process clause of the Fifth Amendment." *Helminski*, 766 F.2d at 213 (citation omitted). The party's "right not only to be an interested and concerned observer of a proceeding which ultimately affects him, but to help plan and plot trial strategy is in no way denigrated by the presence of retained or assigned counsel." *Carlisle*, 64 A.D.2d at 19. Thus, this Court has held that a district court "impinge[s] on [the] due process right to retain counsel" if it prevents the party from conferring with its counsel throughout trial. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1119 (5th Cir. 1980).

For corporations like Vicinay Cadenas, the due process right to attend trial is confirmed by Federal Rule of Evidence 615(b). This Rule states that while a court may ordinarily exclude witnesses from the courtroom when others are testifying,

the court may ***not*** exclude a witness who is "an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney." *Id.* This exception exists because "[a]s the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present." *Id.* at advisory committee's note to 1972 Proposed Rules. Thus, the purpose of this exception "is to give corporations the right to have a representative present throughout a trial." *Roberts ex rel. Johnson v. Galen of Va., Inc.*, 325 F.3d 776, 785 (6th Cir. 2003). Otherwise, "[e]xclusion of persons who are parties would raise serious problems of confrontation and due process." Fed. R. Evid. 615 advisory committee's note to 1972 Proposed Rules. Here, Vicinay Cadenas's party representative is also a fact witness, *see* Joint Pretrial Order, ECF No. 486, at 48, so the right recognized in Rule of Evidence 615 applies with still more force.

To be sure, the right of a party to be present at trial "is not absolute." *Green*, 785 A.2d at 375. But a party "has a right to attend the trial absent an overwhelming reason to the contrary." *Marks,* 562 F. Supp. at 768. *See also Hines*, 163 F.R.D. at 266 (party may be excluded from deposition only in "extraordinary circumstances") (citing 8 Wright, Miller & Marcus, *Federal Practice & Procedure,* § 2041 at 536 (1994)); *Cary*, 940 P.2d at 204 (recognizing right of "a party to be present in the courtroom absent extreme conditions").

Indeed, even when the presence of a party would arguably prejudice the jury, "[i]f the trial court concludes that the party can comprehend the proceedings and assist counsel in any meaningful way, the party cannot be involuntarily excluded regardless of prejudicial impact." *Helminski*, 766 F.2d at 218. Exclusion is improper "[i]f there is any indication that the plaintiff's presence could have assisted in the presentation of his case." *Id*.

Mandamus is warranted here because the district court identified ***no*** reason why Vicinay Cadenas should be deprived of the presence of its representative at trial, much less an "overwhelming reason." As explained above as to the court's violation of Rule 43, none of the reasons posited by the court for holding an expedited trial by video during a worldwide pandemic could justify scheduling trial when Vicinay Cadenas's party representative is legally prohibited from traveling to Houston.[7] It would be impossible for that representative to fully participate through remote video because "such services are not designed to capture a trial's continual and sometimes overlapping conversations between attorneys, witnesses,

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[7] *See*, *e.g.*, *Adkins v. Serv. Wire Co.*, 2002 WL 31443208, at *5 (W.D. Va. Oct. 31, 2002) (holding, under *Helminski*, that trial should be held in West Virginia rather than Texas because a litigant "has a legitimate and significant interest in attending his own trial"); *Grayson Consulting, Inc. v. Cathcart*, 2014 WL 1512029, at *2 & n.1 (D.S.C. Apr. 8, 2014) (severing claim and directing trial be held in California where it was physically impossible for party to travel to South Carolina).

and the court" and would not allow the party "to review evidence that is identified and admitted during the trial." *Grayson*, 2014 WL 151029, at *2 n.1. Moreover, the seven-hour time difference between Houston and Spain would require Vicinay Cadenas's representative to attempt to monitor and participate in trial in the middle of the night. In *Grayson*, even a three-hour difference was deemed unduly prejudicial when the plaintiff would have to participate at night. *Id*.

Moreover, even if the representative could somehow appear before the jury remotely when not testifying—and it is doubtful whether he could—that would not remove the prejudice from his physical absence in this potentially fateful $165 million case. Petrobras's case to the jury will include the highly-charged allegation that Vicinay Cadenas "knew that the tether chain, which it manufactured, had a defect, but recklessly and intentionally concealed the defect" from Petrobras. Joint Pretrial Order, ECF No. 486, at 10. If trial proceeds on July 13, the jury will not observe in the courtroom any Vicinay Cadenas representative when Petrobras—with its own representative present—argues its case that, if accepted, would condemn Vicinay Cadenas to insolvency. As was held in *Safeway Stores, Inc. v. Watson,* 562 A.2d 1242, 1245 (Md. 1989), wrongful exclusion of a party representative is prejudicial because "[e]xperienced trial attorneys and judges understand the importance of 'humanizing' a corporate defendant in a jury trial" and "a party is entitled to be present to have a firsthand view of the proceedings for

purposes of evaluating the constantly changing prospects or exigencies for settlement, and to participate in tactical decisions that must be made, sometimes quickly, in the course of a trial." "To try th[is] case against an empty chair could send a strong implicit message to the jury" that Vicinay Cadenas has "neglect[ed] even to attend trial, thereby risking a distinct and [] profound disruption of fairness." *McElwain v. Harris*, 2006 WL 1049935, *2 (D.N.H. Apr. 18, 2006).

This is not a case where the district court simply exercised its discretion after weighing the conflicting interests of opposing parties. ***Both*** parties asked the court to hold trial when it was anticipated that their party representatives could be present. There is no reason why this case requires expedited treatment, yet the district court arbitrarily decreed that trial will occur despite foreseeing that Vicinay Cadenas's representative cannot attend. And just as with the Rule 43 issue, the court's ruling has unfairly prejudiced Vicinay Cadenas. The plaintiff, Petrobras America, is a Houston-based U.S. subsidiary of the Petrobras conglomerate. Accordingly, even though it might not have a representative of its Brazilian parent present at trial, Petrobras will still be able to have a U.S. party representative in the courtroom to provide a "humanizing" face for the jury. *Safeway Stores, Inc.,* 562 A.2d at 1245. By contrast, Vicinay Cadenas is a small, family-owned Spanish company, all of whose officers and employees are located in Spain, and none of whom could attend. As with the violation of Rule 43, the asymmetrical prejudice

to Vicinay Cadenas further demonstrates the district court's clear legal error and manifest abuse of discretion.

II. THIS COURT'S IMMEDIATE INTERVENTION IS WARRANTED.

The district court's errors "compel" this Court's "prompt intervention." *DaimlerChrysler*, 294 F.3d at 699 (quoting *Dresser Indus.*, 972 F.2d at 542-43). Forcing two international parties to resolve a $165 million dispute by means of a jury trial that one party and most witnesses cannot attend due to a global pandemic threatens to undermine the reputation of this country's courts. That stain would remain—indeed, it would likely worsen—if the result of that trial were later reversed on appeal because it never should have occurred in the first place. Mandamus is warranted for that reason alone.

A. There Is A Serious Potential For Irreparable Harm.

Mandamus is also appropriate because there is "a serious potential for irreparable harm" that cannot be remedied after final judgment. *In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985). Even if some witnesses could attend trial in person by mid-July, the district court's insistence on proceeding immediately after expiration of the current jury-trial prohibitions will force them and many others to confront an unacceptable choice. Given the benefits of appearing in person, any non-local witness or lawyer who is may legally travel by mid-July will have a strong incentive to do so, despite significant private and public health risks

associated with nonessential international and cross-country travel.[8] And due to post-travel quarantine rules that are likely to remain long beyond when borders open, many such individuals would likely have to begin their travels well in advance of trial, even though real-time circumstances may result in a last-minute continuance the district court is powerless or unwilling to override.[9]

The public is also ill-served, and may be irreparably harmed, by the district court's insistence on overriding the parties' agreement and mandating a trial in July. By their very nature, jury trials—particularly in complex commercial disputes such as this—require a large confluence of people congregating together.

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[8] *See generally*, *e.g.*, Centers for Disease Control and Prevention, *Coronavirus in the US – Considerations for Travelers* (May 22, 2020) (https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html) ("Because travel increases your chances of getting and spreading COVID-19, ***staying home is the best way to protect yourself and others from getting sick***.") (emphasis original); Centers for Disease Control and Prevention, *Travel: Frequently Asked Questions and Answers* (May 20, 2020) (https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html) ("CDC recommends that travelers avoid all nonessential international travel because of the COVID-19 pandemic.").

[9] As noted, although the Special Order prohibits jury trials only through the expiration of that order on July 6, it is still unknown what restrictions will continue following that date. Many analogous plans have been extended in light of current conditions. *Compare*, *e.g.*, Order, Gen. Dkt. No. 2020-3 (5th Cir. Mar. 18, 2020) (canceling in-person oral argument through April 2) *with* Order, Gen. Dkt. No. 2020-4 (5th Cir. Mar. 25, 2020) (canceling oral argument through April 30). Thus, although the Texas state courts have begun to hold more proceedings, jury trials remain prohibited and they cannot be held remotely in any event. *See supra* at 9.

If any juror, prospective juror, witness, expert, party representative, counsel, or support personnel, were to become gravely ill or worse traveling to or from, or attending, the district court's mid-pandemic trial, success in the ordinary appellate process would offer no consolation. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 318-19 (5th Cir. 2008) (granting mandamus with respect to motion to transfer venue because "the harm—inconvenience to witnesses, parties and other—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle"). There is no reason—much less the required compelling or overwhelming reasons—for inflicting those risks on the many people, including the jury pool, whose presence would be unwilling.

If key witnesses are unwilling to face those risks, that may also place an unfair thumb on the scale in favor of settlement, which provides yet another reason to grant mandamus. The writ should issue where an erroneous interlocutory order so threatens a party's interests that it will almost surely seek to settle rather than proceed. *See*, *e.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (mandamus appropriate where "sheer ***magnitude*** of the risk" arising from order meant that appeal from final judgment would "come too late to provide effective relief"); *Ruiz v. Scott*, 124 F.3d 191, 1997 WL 533095, at *10 n.15 (5th Cir. 1997) (unpublished) (noting that the "'clear and indisputable' right to relief standard might be relaxed in the context of an issue of law where the failure to do

so would likely cause the mandamus petitioner severe harm []or there are other compelling circumstances ... "). The court's Order threatens to force Vicinay Cadenas into a fundamentally flawed and unfair trial that may not be worth a $165 million "roll [of] the[] dice" in the hope of a favorable appeal. *Cf. Rhone-Poulenc*, 51 F.3d at 1298; *see also In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., concurring) (recognizing that threat of ruinous liability can create "enormous momentum for settlement" and leave party "no realistic opportunity ... to appeal").[10] The Order promises a trial that will acutely prejudice Vicinay Cadenas, which will suffer the inherent difficulties of having its fact witnesses, experts, and party representatives testify and watch the proceedings in the middle of the night, while most of Petrobras witnesses and its representative sit in the courtroom and the remainder of its witnesses testify and view trial from locations where the time zones are roughly the same. *See supra* at 22-25. The Order thus places an unfair thumb on the scale. Mandamus is warranted for that independent reason as well.

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10 This is a "bet the company" case in a very real sense for Vicinay Cadenas, whose total valuation is far less than the amount Petrobras seeks here. *Compare supra* at 5 & n.1 (Petrobras seeking roughly $165 million) *with* Vicinay Cadenas, S.A., *Memoria de Sostenibilidad 2016*, at 20 (https://tinyurl.com/ycwaufuv) (listing, as of 2016, Vicinay Cadenas's total equity and liabilities at around €65 million).

Mandamus is also warranted because the court's violations will be difficult, if not impossible, to review on appeal from final judgment. In some circumstances, a party denied a continuance due to witness unavailability must make a heightened showing of prejudice to obtain reversal on appeal. *See*, *e.g.*, *Olaniyi-Oke*, 199 F.3d at 771 ("The required prejudice has also been termed 'severe' prejudice and 'serious' prejudice."); *Preferred Props.*, 276 F.3d at 798 (declining reversal because party "has not alleged any prejudice resulting from his absence"). But the concerns that animate Rule 43 raise precisely the sorts of witness-demeanor and credibility issues that appellate courts are ill-situated to probe. The same is true for violations of a party's right to be present at trial, which often involves subtle and immeasurable prejudice from jurors' perceptions and the party's inability to participate in trial with counsel. The Order hamstrings the ability of Vicinay Cadenas's experts to respond to opposing testimony, asks jurors to judge the credibility of witnesses testifying by video in the middle of the night from halfway around the world, and prohibits Vicinay Cadenas from offering a human face to jurors and participating actively in its own trial, while its opponent can do so. Rule 43 and the due process precedents reflect the judgment that it is possible for issues like those to be dispositive. Yet if they are, a cold appellate record may not reflect that prejudice. Mandamus is warranted for that independent reason. *See*, *e.g.*, *Volkswagen*, 545 F.3d at 318-19 (granting mandamus in part

because, on appeal from final judgment, petitioner would be unable to demonstrate effect of venue on trial's outcome).

Mandamus is thus warranted and appropriate because Vicinay Cadenas has "no other adequate means to attain the relief it desires." *In re Itron, Inc.*, 883 F.3d 553, 567 (5th Cir. 2018) (citation and alteration omitted). The district court's error would create a fundamentally unfair trial, expose participants to health risks that no final judgment will remedy, unduly encourage settlement, and, in all likelihood, escape meaningful review after trial. The writ should be granted.

B. Advisory Mandamus Is Warranted.

The Court should also grant mandamus for the independent reason that the Court's supervisory role requires its intervention. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957) (encouraging use of "supervisory" mandamus to ensure "proper judicial administration in the federal system"). Although "historically … a drastic remedy" limited to "extraordinary cases," in modern times the writ can serve "as a one-time-only device to settle new and important problems that might ... otherwise evade[] expeditious review." *E.E.O.C.*, 709 F.2d at 394 (quotations removed); *see also In re Cray Inc.*, 871 F.3d 1355, 1358-60 (Fed. Cir. 2017) (mandamus appropriate to resolve timely issue even where "the law was unclear and the [district court's] error [was] understandable").

Mandamus is warranted on that ground. The propriety of forcing a jury trial in an international case with witnesses and party representatives who cannot travel to this country presents novel questions that are likely to bear on numerous future matters, particularly during the current pandemic. Indeed, if the questions presented by this petition do not arise repeatedly, it will only be because the Order is so far beyond the pale that no other court follows suit. It is critical for this Court to clarify that in the midst of this global crisis, a refusal to provide reasonable accommodations to litigants who have agreed upon them is inconsistent with the federal courts' fundamental role.

Prompt resolution would also aid the efficient administration of justice. By refusing to finally resolve the issues presented now, the Court would risk exposing prospective and actual jurors, witnesses, the parties, lawyers, and support staff for both the parties and the court, to a serious and potentially fatal virus in service of an unfair trial whose result may end up being thrown out on the ground that it never should have happened in the first place. If all those people are to be exposed to these risks, this Court should at least confirm in advance that those risks are justified and lawfully imposed.

The district court's extraordinary Order would force two foreign entities to proceed against their wishes, in the middle of a global public health catastrophe, with a video jury trial most of their witnesses and one party's representative cannot

attend in person. The Order would grievously prejudice Vicinay Cadenas, expose participants to potential health risks, and, in the absence of any explanation for the district court's apparent urgency, undermine that court's role as a servant of the public. The Court should grant mandamus.

CONCLUSION

For the foregoing reasons, the Court should grant mandamus and order the district court to grant the Agreed Motion and to reset trial for a date when it will be legal and possible for witnesses and party representatives to attend in person.

Respectfully submitted,

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May 22, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2020, I electronically filed the foregoing document using the Court's CM/ECF system and served it via ECF on:

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Fed. R. App. P. 21(d)(1) because it contains 7,777 words, excluding the documents exempted by Fed. R. App. P. 21(d) and the parts of the petition exempted by Fed. R. App. P. 32(f). This petition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

Dated: May 22, 2020

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