No. 23-1625

In the United States Court of Appeals
for the Eighth Circuit

SR. KATE REID, ET AL.,
Plaintiffs-Appellees,

v.

THE DOE RUN RESOURCES CORPORATION, et al.,
Defendants-Appellants.

On Interlocutory Appeal from
the United States District Court
for the Eastern District of Missouri
No. 4:11-cv-00044-CDP, Hon. Catherine D. Perry

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF APPELLANTS AND REVERSAL

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DISCLOSURE STATEMENT

Under Federal Rules of Appellate Procedure 26.1 and 29(a)(4), amici state as follows:

Chamber of Commerce of the United States of America has no parent corporation, and no corporation owns 10% or more of its stock.

Missouri Chamber of Commerce and Industry has no parent corporation, and no corporation owns 10% or more of its stock.

No counsel for any party authored this brief in whole or in part; and no entity or person, aside from *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

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INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the courts. To that end, the Chamber routinely files amicus briefs in cases, such as this one, that raise issues of concern to the business community. The Chamber has participated in dozens of cases—including this one—concerning international litigation brought in U.S. courts. Doc. 5250849, *Rennert v. A.O.A.*, No. 23-8001 (Mar. 2, 2023); Doc. 4745808, *Reid v. Doe Run Resources Corp.*, No. 18-3552 (Jan. 14, 2019); *see also, e.g.*, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021); *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

The Chamber maintains an International Affairs Division that advocates worldwide for free enterprise, competitive markets, and rules-based trade and investment as the path to opportunity and prosperity for all. The Division advocates international economic engagement with leaders in business and government to vigorously advance pro-business trade and investment policies that create jobs and spur economic growth. Particularly relevant here, the Division has a robust program focused on trade and

international engagement throughout the Americas, including Peru. *See* https://www.uschamber.com/americas.

The Missouri Chamber of Commerce and Industry ("Missouri Chamber") is the largest business association in Missouri. Representing more than 40,000 employers, the Missouri Chamber advocates policies and laws that will enable Missouri businesses to thrive, promote economic growth, and improve the lives of all Missourians. The Missouri Chamber also advocates legislative policy and court outcomes that make Missouri attractive to job creators and encourage existing job creators to stay and grow within Missouri.

Amici have substantial interests in this case. Their members transact business worldwide, and many of them—based on nothing more than doing business internationally—have been unfairly targeted in U.S. courts by foreign plaintiffs suing for injuries alleged to have occurred entirely on foreign soil. Lawsuits like this one impair legitimate international business activity and can create substantial adverse effects not only on the targeted businesses themselves, but on American foreign policy and on the countries where the claims originate.

All parties consent to the filing of this brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

This case treads directly on core concerns of international trade and foreign relations—concerns that typically prevent federal courts from adjudicating such claims. Plaintiffs and the district court would have a Missouri jury apply Missouri tort law to the claims of Peruvian citizens that arose from events in Peru and which are regulated by Peruvian law.

By the district court's own account, Plaintiffs—all Peruvian citizens residing near the smelting facility once operated by Defendants' subsidiaries ("Doe Run Peru," or "DRP") in La Oroya, Peru—allege that "defendants did not exercise reasonable care when they failed to apply practices and implement controls recognized by industry and authoritative sources to reduce emissions." Add.22. Similarly, at the motion-to-dismiss phase, the court characterized the claims as a breach of Defendants' alleged duty "to control the toxic substances generated by the La Oroya Complex, to ensure that all were within safe levels, and to remediate and warn plaintiffs to prevent their being harmed." *A.O.A. v. Rennert*, 350 F. Supp. 3d 818, 840 (E.D. Mo. 2018); *see* R. Doc. 949, at 30-31. Make no mistake: this case is about imposing the standards of Missouri tort law upon an environmental remediation project in Peru.

The district court denied the international implications of the case. Rejecting the principles of international comity—which support abstention when a domestic court intrudes upon the province of foreign nations and courts—the district court reframed Plaintiffs' complaint as merely a matter of domestic business decisions, made by

Missouri's own "corporate citizens," Add.47, and whether their alleged negligence in domestic boardrooms injured Plaintiffs. It thus ordered a trial based on the premise that the alleged tortious conduct was "born out of [Defendants'] conduct and decisions made in the United States." Add.59. But the court's own characterization of Plaintiffs' claims belies that framing; this case is unquestionably about the alleged failure to control emissions *in Peru*.

International comity requires dismissal especially in light of the United States-Peru Trade Promotion Agreement (TPA). *See* Office of the United States Trade Representative, Executive Office of the President, Peru TPA: Final Text, https://tinyurl.com/3w6mvcaw; R. Doc. 545-12. Article 18 of this agreement guarantees Peru's "sovereign right" to set domestic environmental policy and determine the appropriate level of regulation to secure a safe environment and strong economic development. Plaintiffs' claims would displace Peruvian environmental law, and instead subject the management of the La Oroya Complex to Missouri tort law (as applied by a Missouri jury). Federal foreign policy bars such an infringement of Peruvian sovereignty—especially when (as here) the case has no meaningful connection to a domestic forum.

Other factors under comity doctrine also prevent this case from proceeding. First, adjudicatory comity instructs American courts to avoid hearing cases which properly belong in a foreign forum, based on the balance of the sovereign interests at stake. Here, those interests point in one direction: Peru is the appropriate forum for Plaintiffs' claims. Peru is where Plaintiffs reside, where their injuries arose. The only

connection to the United States is the corporate "operational decisions" of the parent companies whose Peruvian subsidiaries managed the La Oroya Complex—precisely the kind of allegations which the Supreme Court has repeatedly held fail to create a genuine sovereign interest in the case. *See Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1935-36 (2021); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). The district court erred by inserting an invented "true conflict" element as a threshold requirement for invoking comity, and by sending the case to trial despite American and Peruvian sovereign interests.

Second, "prescriptive comity" also bars Missouri state law from applying to conduct in Peru. Domestic law presumptively does not apply overseas, "to protect against unintended clashes between our laws and those of other nations." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). The district court held that this principle of comity is strictly a canon of statutory interpretation—and therefore did not restrain the application of Missouri's common law of torts. But the *source* of the law does not alter the balance in favor of deferring to Peruvian courts; the infringement upon Peruvian sovereignty is not lessened because it arises under state common law, rather than a statute.

Left undisturbed, the district court's ruling will have grave consequences for both sovereign interests and legitimate international commerce. It licenses opportunistic plaintiffs to bring improper foreign suits to federal court and try them under state law. It also circumvents the Supreme Court's repeated rulings that overseas conduct has no

substantial nexus to domestic forums simply by virtue of corporate decisionmaking within the United States. This Court should vindicate the federal government's supremacy in the realm of foreign affairs, as well as the principles of international comity, and reverse.

ARGUMENT

I. International comity restrains the serious threats that domestic laws can pose to foreign relations and other jurisdictions' sovereign rights.

"'[C]oncern for uniformity in this country's dealings with foreign nations' … animated the Constitution's allocation of the foreign relations power to the National Government." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003). "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." The Federalist No. 42, at 279 (J. Madison); *see also id.*, No. 44, at 299 (J. Madison) (emphasizing "the advantage of uniformity in all points which relate to foreign powers"). In light of these concerns, the Supreme Court has repeatedly imposed restraints on domestic laws that would intrude on federal foreign policy or other nations' prerogatives.

To avoid improper intrusions on international affairs, courts abstain from adjudicating cases under the doctrine of international comity. "Comity … rests on respect for the legal systems of members of the international legal community—a kind of international federalism—and thus 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Mujica v. AirScan, Inc.*, 771 F.3d 580, 605 (9th Cir. 2014) (quoting *Aramco*, 499 U.S. at 248); *see*

also Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 543 n.27 (1987) ("Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states."). International comity takes two forms. First is "the comity of courts," or adjudicatory comity, "whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). The second is "'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws." *Id.*; *see also Mujica*, 771 F.3d at 598-99.

II. This action intrudes upon both the foreign policy interests of the United States and the sovereign rights of Peru, and should be dismissed.

International comity should apply here and resolve this case. This litigation conflicts with the U.S.-Peru Trade Promotion Agreement and encroaches on Peru's sovereign rights to set and enforce its own domestic environmental regulations. The political branches of the federal government have determined American policy in this area, embodied above all in the TPA. American and Peruvian sovereign interests are aligned: both counsel that judicial proceedings on behalf of Peruvian citizens alleging harm from an operation in Peru are more appropriately litigated in Peru, not Missouri. The fact that a trial would also apply Missouri tort law in a foreign country further confirms as much: two nations' sovereign interests cannot be subject to a Missouri jury's application

of state common law. The district court should have abstained on international comity grounds and dismissed the case.

A. The Trade Promotion Agreement establishes American and Peruvian interests in adjudicating Plaintiffs' claims in a Peruvian forum.

Plaintiffs' claims directly conflict with the U.S.-Peru Trade Promotion Agreement. Plaintiffs allege that Defendants "negligently and recklessly generated, stored, and failed to control toxic wastes from the [La Oroya] mine, resulting in injury to the plaintiffs." *Rennert*, 350 F. Supp. 3d at 840; R. Doc. 949, at 32. And the negligence standard to be applied is that of Missouri common law. But the TPA recognizes "the sovereign right of [Peru] to establish its own levels of domestic environmental protection and environmental development priorities." Art. 18.1. Moreover, if either country believes the other is not complying with its treaty obligations, the exclusive remedy is arbitration under the treaty's terms. Art. 18.12(6). And the TPA further provides that outside a carefully negotiated provision concerning illegal logging, "[n]othing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party." Art. 18.3.5.

These provisions foreclose American courts from adjudicating Plaintiffs' claims. Peru already regulates its own domestic industries, balancing its own interests in environmental protection and economic development. Indeed, the very reason Peru first offered conditional immunity to prospective owners of the La Oroya Complex, *see* Add.25-26, was to encourage investment to modernize the facility and remedy its prior

environmental impact. *See* R. Doc. 843-17, at 20-21; Appellants' Br. at 5-6. Sending Plaintiffs' claims to trial, however, imposes state tort law over this carefully drawn regulatory scheme. Peru's "sovereign right … to establish its own levels of domestic environmental protection and environmental development priorities" would be meaningless if the common law of all fifty states could also be brought to bear against American-owned entities operating in Peru. Regulating conduct in Peru through mass tort suits in a Missouri federal court applying state law cannot be reconciled with the treaty's provisions.

Furthermore, through its conflict with the TPA, the suit interferes with the "foreign policy interests of the United States." *Mujica*, 771 F.3d at 604. The United States has strong interests in ensuring that its international agreements are upheld and in "uniformity in this country's dealings with foreign nations." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). Whenever state law can challenge that uniformity, the federal government "has less to offer and less economic and diplomatic leverage as a consequence." *Garamendi*, 539 U.S. at 424 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 377 (2000)). "It is not merely that the differences between the [Missouri tort law] and [the TPA] … threaten to complicate discussions; they compromise the very capacity of the [federal government] to speak for the Nation with one voice in dealing with other governments." *Crosby*, 530 U.S. at 381.

B. The district court erred by refusing to abstain on adjudicatory comity grounds.

Adjudicatory comity, also called the "comity of courts," is a "discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Mujica*, 771 F.3d at 599. Comity may trigger abstention in deference to either "a past or potential judicial proceeding elsewhere," as warranted by "the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum." *Id.* at 601; *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). Courts consider a wide "range of factors when deciding whether to abstain" on adjudicatory comity grounds. *Mujica*, 771 F.3d at 600. These factors broadly fall into three categories: "[1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." *Id.* at 603 (quoting *Ungaro-Benages*, 379 F.3d at 1238).

The presumption against extraterritoriality, or "prescriptive comity," similarly reflects the "presumption that United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007). It holds, as a "longstanding principle of American law[,] 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Aramco*, 499 U.S. at 248. The same principle holds true, too, for the application of state statutes and the common law. *See Tuttle v. Dobbs Tire & Auto Centers,*

Inc., 590 S.W.3d 307, 311 (Mo. 2019) ("Missouri statutes, absent express text to the contrary, apply only within the boundaries of this state and have no extraterritorial effect."); *City of New York v. Chevron Corp.*, 993 F.3d 81, 101 (2d Cir. 2021).

1. The district court first made a fundamental error (and took the minority view in a circuit split) by holding that dismissal on comity grounds categorically requires a threshold finding that it is "impossible" for parties to comply with the law of both nations. Add.51.

The court drew this strict "true conflict" rule from *Hartford Fire*, Add.48, but the court misread that case. In *Hartford Fire*, the Supreme Court never said that "true conflict" is a prerequisite: only that it was the "only substantial question in [that] litigation." 509 U.S. at 798. The Court did not analyze or discuss further the relation of this comity factor to the others or explain why it might be a predicate to even *reaching* the other factors. Instead, the Court declined "to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity." *Id.* No such "other considerations" were presented "in [that] litigation." *Id.*

Most circuits to consider the issue (including the most recent ones) have correctly held that *Hartford Fire* did not reach such a "dramatic result" as creating a predicate true-conflict requirement "*sub silentio*." *Mujica*, 771 F.3d at 600. To date, four circuits have rejected true conflict as a threshold requirement for comity, while only two have adopted it. *Compare id.*; *Ungaro-Benages*, 379 F.3d 1227; *In Re: Vitamin C Antitrust Litig.*, 8 F.4th 136, 145 & n.11 (2d Cir. 2021) ("In our prior opinion, we read *Hartford Fire*

'narrowly,' limiting its singular focus on the existence of a true conflict to that case's facts.… [W]e maintain that approach here."), *cert. denied sub nom. Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 143 S. Ct. 85 (2022); *Int'l Nutrition Co. v. Horphag Rsch. Ltd.*, 257 F.3d 1324, 1329 (Fed. Cir. 2001) ("[A]s long as the foreign court abides by 'fundamental standards of procedural fairness,' granting comity is appropriate."), *with United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1223 (10th Cir. 2000); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006).

Furthermore, numerous other courts have applied comity doctrine after *Hartford Fire* without treating a "true conflict" as a prerequisite. *See Mujica*, 771 F.3d at 600 ("[I]n post-*Hartford Fire* cases, conflict analysis has not been rigidly invoked to preclude consideration of the full range of principles relating to international comity."); *id.* at 601 (collecting cases). The Fifth Circuit, for example, affirmed dismissal of an environmental tort suit for substantially the same reasons that warrant dismissal here—without finding that it was impossible to comply with both sovereigns' laws. *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 909 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540, 544 (5th Cir. 1997) ("Our review of the record reflects neither error nor abuse of discretion in the district court's dismissal of the class tort action on the basis of *forum non conveniens* and comity among nations."). In that case, plaintiffs sued in Texas regarding "activity and the alleged harm [which] occurred entirely in Peru." *Torres*, 965 F. Supp. at 909. Plaintiffs themselves were "all residents of Peru," and "the challenged conduct is regulated by the Republic of Peru." *Id.* Federal-court jurisdiction threatened to "interfere with Peru's

sovereign right to control its own environment and resources." *Id.* And "the Republic of Peru ha[d] expressed strenuous objection to the exercise of jurisdiction by this Court." *Id.* But the *Torres* court never separately considered whether parties would find it impossible to comply with both laws; the infringement upon Peruvian authority alone was sufficient. *Id.* The same result should follow here.

2. The district court should not have imposed its "true conflict" threshold requirement. "Instead," it should have joined the majority of courts and "considered a range of factors when deciding whether to abstain from exercising jurisdiction due to a past or potential judicial proceeding elsewhere." *Mujica*, 771 F.3d at 600-01; *see also Ungaro-Benages*, 379 F.3d at 1238. These remaining factors—in addition to the interests expressed in the TPA, *supra* 8-9—require dismissal.

First, Peru provides an adequate forum for Plaintiffs' claims. *Mujica*, 771 F.3d at 608. Plaintiffs did not argue otherwise below. R. Doc. 1275, at 16-19. And though the district court held this was "not clear," Add.47, multiple federal courts have confirmed as much, including in environmental cases. *E.g.*, *Acuña-Atalaya v. Newmont Mining Corp.*, 612 F. Supp. 3d 384, 402 (D. Del. 2020) ("Plaintiffs here, citizens and natives of Peru, can be treated fairly by Peruvian courts in a dispute involving a United States corporation."), *aff'd* 838 F. App'x 676 (3d Cir. 2020); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011) (affirming determination that "Peru provides an adequate alternative forum for Plaintiffs to pursue their claims" because "(1) the defendant is amenable to process there; and (2) [Peru] offers a satisfactory remedy"); *Torres*, 965

F. Supp. at 903 ("The Court finds that Peru is an adequate forum."). Peru has also defended the adequacy of its courts in this action. *See, e.g.*, R. Doc. 545-3, at 6 ("Courts of the United States repeatedly have declined to exercise jurisdiction over actions that could properly be brought in Peru, finding that the courts of Peru are adequate."). Moreover, defendants have conceded that they are amenable to process in Peru, obviating any concern about personal jurisdiction. R. Doc. 756, at 71.

Second, Peruvian sovereign interests favor dismissal. Peruvian diplomatic officials have said as much in this very case. The Peruvian Ministry of Economy and Finance twice wrote to the U.S. Department of State requesting that the case be heard in Peru; that the relevant Missouri court be notified that it *must* be filed in Peru; and that the State Department take any appropriate steps "so that the state or federal courts of the United States refuse to review the case." R. Doc. 545-13, at 2 (2007 letter); R. Doc. 545-3 (2017 letter).

These two letters made Peru's interests clear. The first asserted two sovereign rights that required dismissal: first, "the right of the Republic of Peru to regulate and control its natural resources and the mining activities conducted within its territory"; and second, "the exclusive right of the Republic to legislate and to apply its law over the people—whether national or foreign—and over the assets that are located in its territory." R. Doc. 545-13, at 3. It further expressed "concern that if the … case is not dismissed …, this might constitute a disturbing precedent for investors of both countries and undermine the judicial security that we have to protect, in the spirit of the

reciprocity principle that governs the international relationship between Governments." *Id.* The 2017 letter confirmed this position, *see* R. Doc. 545-3, at 7, and reiterated the "importance of [Peru's] sovereign rights with respect to these issues, including as reflected in the [TPA]," *id.* at 4. It also discussed at length several provisions of the TPA to assert its "interest, as a matter of Peruvian law and under the Treaty, in preserving the integrity of sovereignty, including rights to safeguard public health, establish environmental policy and develop policies with respect to the development of natural resources." *Id.* at 6.

The district court confessed that it had previously been "too dismissive" of these objections, Add.64, when it balanced these letters against contrary letters, not from any official diplomatic source but from a group of Peruvian congressmen. By the court's own characterization, letters from the Peruvian government gave a "*lengthy recitation of Peru's sovereign interests under the TPA and its own laws*, as well as the effect extraterritorial determination of claims involving its policies regarding public health, the environment, and natural resources could possibly have on its sovereign interests, *which the letter claims would run counter to the "text and spirit" of the TPA*." Add.64-65 (emphasis added). And the court elsewhere conceded that "Peru has a strong interest in the certainty, predictability, and uniformity of result" for claims under Article 1971, Add.26.

Yet the court's "conclusion remain[ed] the same" that Peru had no strong interest against this case proceeding to trial in federal court. Add.65. To persist in this conclusion, the district court highlighted that Peru had "acknowledged" in an arbitration

filing—but not endorsed—that this case was going forward, without any "advocation for a Peruvian forum to hear these claims or an articulation that its sovereign interests are jeopardized." Add.66. All Peru said in that filing was that "a federal court will hear the Missouri Plaintiffs' claims"—not that it should, or that it would be in Peru's sovereign interest for it to do so. *See* Respondents' Counter-Memorial, at 123, *The Renco Group, Inc. & Doe Run Resources, Corp. v. The Republic of Peru & Activos Mineros S.A.C.*, Case No. 2019-47 (Perm. Ct. Arb., Apr. 1, 2022), available at https://pcacases.com/web/sendAttach/35805. In any case, that observation in another case could not on its own disclaim any sovereign interest here, and the district court did not explain how or why it could. In other words, the court seized on Peru's *silence* in one setting—of dubious relevance, since the propriety of this case was not presented there—to ignore its clear statements, specifically addressed to this litigation, of its sovereign interests.

Third, the United States' sovereign interests favor dismissal, too. The weight of American interests turns most of all on "the location of the conduct in question." *Mujica*, 771 F.3d at 604; *see also id.* ("comity is most closely tied to the question of territoriality."). Here, where the dispute turns on alleged mismanagement of the La Oroya Complex—and thus where "the activity at issue occurred abroad"—those interests warrant "far less weight, for comity purposes." *Id.* at 605.

Instead, the crucial American interest in this case is avoiding conflict with valued trade partners. In the Peruvian government's words, the progress of this case sets a

"disturbing precedent for investors of both countries." R. Doc. 545-13, at 3. Allowing it to go forward will inhibit Peru's ability to attract investors "to develop methods to deal with problems of this magnitude in the future." *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993). And by devaluing the TPA, it would "disrupt our relations with" Peru. *Id.*

Missouri's interests do not favor allowing this litigation to go forward, either. The case has been brought by foreign plaintiffs and arises out of events in a foreign country. Those facts alone limit Missouri to a "*de minimis*" interest. *Saleh v. Titan Corp.*, 580 F.3d 1, 12 (D.C. Cir. 2009). The only arguable connection to confer an interest on Missouri comes from corporate decisions made at meetings in the state. Add.59. The court held that mere corporate activities sufficed to confer a state interest, because the suit "seeks to hold Missouri and New York corporate citizens accountable for the harm they cause to others." Add.74. But applying state law cannot rest on Missouri's "general interest in good corporate behavior" among its citizens. *Mujica*, 771 F.3d at 610. That interest "should not be overstated" in cases like this one, especially "given that Plaintiffs are not [Missouri] citizens, that their claims concern events that occurred abroad, and that [two] Defendant[s] … [are] not … [Missouri] resident corporation[s]." *Id.*

Nestlé also forecloses the court's approach to evaluating domestic interests. There the Supreme Court held, in the Alien Tort Statute context, that "operational decisions" "made in or approved in the U.S." cannot "draw a sufficient connection between the cause of action … and domestic conduct." *Nestlé*, 141 S. Ct. at 1937; *see also Kiobel*, 569

U.S. at 125 (holding "mere corporate presence" cannot "suffice[]" to confer a genuine interest on a domestic forum). The *Nestlé* plaintiffs alleged the same kind of domestic corporate activity—decisionmaking with international effects—as Plaintiffs have alleged here. They claimed that the defendants had provided foreign cocoa farms with "technical and financial resources" in exchange for purchase rights; that this business arrangement "aided and abetted child slavery"; that the defendants "knew or should have known" that the farms with which they partnered "were exploiting enslaved children" and nevertheless "continued to provide those farms with resources"; and finally that defendants "made all major operational decisions from within the United States." 141 S. Ct. at 1935. Plaintiffs' allegations of domestic corporate activity are similar: in short, that "specific decisions to engage in conduct that forms the bases of [Plaintiffs'] claims were made in the United States." Add.55.

The district court misread *Nestlé* to distinguish it on this point. Add.53-55. The court wrote that *Nestlé* concerned only "general decision-making," while Plaintiffs here had alleged more. Specifically, Defendants' alleged domestic activity "included making decisions that caused DRP to emit toxins and other substances at levels harmful to plaintiffs, despite knowing of such harm." Add.54. And under *Nestlé*, the court reasoned, "decisions to engage in tortious conduct cannot be considered activities 'common to most corporations.'" Add.55. This gets *Nestlé* backwards. There the Supreme Court did not reject plaintiffs' arguments because they had alleged only unrelated, non-tortious domestic business activity. To the contrary, they had alleged that "all major

operational decisions" pertinent to their claim of aiding and abetting child slavery were made "within the United States." *Nestlé*, 141 S. Ct. at 1935. The Court instead rejected their claim because the very decisions plaintiffs attacked as tortious were *themselves* "activity common to most corporations." *Id.* at 1937. *Nestlé* holds that mere "decisionmaking" is the kind of "general corporate activity" that does not create a nexus with the state in which it occurs. *Id.* In short *Nestlé* supports the Defendants here, not the Plaintiffs.

But even if Missouri did have interests in this case going forward, they could not outweigh the contrary national interests. Comity principles protect against "the application of state laws, which do not necessarily reflect national interests." *Mujica*, 771 F.3d at 604 (quoting *Ungaro-Benages*, 379 F.3d at 1232-33). Courts therefore are "careful not to give undue weight to states' prerogatives." *Id.*

In sum, adjudicatory comity required the district court to abstain from hearing Plaintiffs' claims. In the Peruvian government's words, the progress of this case sets a "disturbing precedent for investors of both countries." R. Doc. 545-13, at 3. Allowing it to go forward will inhibit Peru's ability to attract investors "to develop methods to deal with problems of this magnitude in the future." *Bi*, 984 F.2d at 586. And by devaluing the TPA, it would "disrupt our relations with" Peru. *Id.* At the same time, no substantial interests support keeping the case in an American court. The district court thus erred by retaining jurisdiction and sending Plaintiffs' claims to trial.

C. Prescriptive comity forecloses international application of Missouri law.

The district court refused to apply the presumption against extraterritoriality because plaintiffs had raised only Missouri common-law claims, not statutory claims. Add.68-70. But while the presumption against extraterritoriality is often applied as a canon of statutory interpretation, the district court here disregarded the "principles underlying the presumption." *Kiobel*, 569 U.S. at 117; *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("rule of construction" is "derived from the principle of prescriptive comity" (quotation marks omitted)). The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. It also "rest[s] on broad concerns over separation of powers, intrusion on the political branches' monopoly over foreign policy, and judicial caution." *City of New York*, 993 F.3d at 102. And it "teach[es] that even outside of the statutory interpretation context, federal courts must proceed cautiously when venturing into the international arena so as to avoid unintentionally stepping on the toes of the political branches." *Id.* (holding that presumption against extraterritoriality barred foreign application of federal common law).

Consequently, courts must be "equally reluctant to give judge-made rules international effect" as statutes. *Id.* at 101. Judge-made common law, no less than statutory law, must be kept from "unintended clashes" with the laws of other nations. And while

City of New York specifically concerned federal common law, all the same concerns apply with even greater force to state common law. The Constitution vests in Congress the power to "regulate Commerce with foreign Nations" and expressly denies most foreign-relations powers to the States, U.S. Const. art. I §§8, 10. Applying state (as opposed to federal) common law internationally only carries greater risk of "sow[ing] confusion and needlessly complicat[ing] the nation's foreign policy, while clearly infringing on the prerogatives of the political branches" of the federal government. *City of New York*, 993 F.3d at 103. Yet the district court offered no rationale for exempting judge-made common law from comity principles. It should have refused to extend Missouri law overseas and dismissed Plaintiffs' claims.

III. The district court's ruling jeopardizes both sovereign interests and legitimate business activity.

As explained above, allowing this case to proceed impairs American and Peruvian sovereign interests, as well as the diplomatic relationship between the two. Worse still, these harms could have a broad ripple effect on trade and foreign relations between the United States, its partners, and the many American companies which transact business internationally.

Countries around the world regularly encourage foreign direct investment by U.S. multinational companies; indeed, the U.S. has trade promotion agreements like the Peru TPA with 20 different countries, as well as trade and investment framework agreements or bilateral investment treaties with nearly 100 other countries. See USTR, Free

Trade Agreements, available at https://ustr.gov/trade-agreements/free-trade-agreements; USTR, Trade & Investment Framework Treaties, available at https://ustr.gov/trade-agreements/trade-investment-framework-agreements; USTR, Bilateral Investment Treaties, available at https://ustr.gov/trade-agreements/bilateral-investment-treaties. Each of those countries no doubt has hundreds or thousands of manufacturing facilities, any one of which could pose some theoretical risk of harm to nearby residents. And many of these agreements contain the same language which the district court misread here to open U.S. courts to foreign tort actions. *See, e.g.*, United States-Mexico-Canada Agreement, art. 24.1 (recognizing "the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities"); United States-Chile Free Trade Agreement, art. 19.1 (same); United States-Korea Free Trade Agreement art. 20.1; United States-Australia Free Trade Agreement, art. 19.1; *cf. Garamendi*, 539 U.S. at 408 (highlighting that international agreement at issue had "served as a model for similar agreements with" other countries). If Plaintiffs can proceed to trial here, foreign nations and investors might reasonably suspect that these many other agreements are mere empty promises that United States will not interfere with their environmental standards.

Opening up federal courts to foreign disputes like this one also harms American businesses, subjecting them to abusive litigation tactics targeting legitimate international business activity. Suits like these expose even blameless companies to substantial reputational harm. *See* Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization:*

The Alien Tort Claims Act and Grassroots Mobilization in Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009) (discussing "synergy between litigation and other tactics" in "pressuring" corporations, and "the contribution of ATCA corporate lawsuits" to activists' "tactical repertoires"). And on top of vast potential liability, defense costs are especially high in this type of litigation, given the difficulties of taking discovery about foreign conduct in remote locations. Under the best circumstances, "obtain[ing] discovery from foreign sources" is almost invariably an "expensive, cumbersome, and difficult" process, often rendering the litigation "prohibitively expensive and resource consuming." Mark P. Chalos, *Successfully Suing Foreign Manufacturers*, 44-NOV Trial 32, 36-37 (2008). The usual difficulties of overseas discovery are only magnified here, where documents and witnesses are in a remote, impoverished region of Peru. *See* Jack Auspitz, *Issues in Private ATS Litigation*, 9 BUS. L. INT'L 218, 221 (2008).

Parties like Plaintiffs here have often sought to attack the legitimate business activities of American companies that transact business in other parts of the world through litigation in U.S. courts, seeking to recover for injuries alleged to have occurred entirely outside of the United States. The Supreme Court has rightly curbed those litigation abuses, particularly in the context of the Alien Tort Statute. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018) (holding "that foreign corporations may not be defendants in suits brought under the ATS"); *Kiobel*, 569 U.S. at 124 (holding ATS does not apply extraterritorially); *Nestlé*, 141 S. Ct. at 1935-36 (holding suit for alleged

tortious activity abroad, with "major operational decisions" made "from within the United States," sought improper extraterritorial application of the ATS).

Plaintiffs should not be permitted to use state tort law to accomplish what the Supreme Court has barred under federal law. By authorizing the same kind of abusive litigation, the decision below bypasses these important precedents. Compounding the problem, thousands of similarly situated claimants are lined up behind Plaintiffs, in this case and similar consolidated actions in the same district court. Add.6 & n.1, 78. Should this case proceed to trial, those thousands of claimants will follow. And other federal courts will become a hotbed of litigation on behalf of foreign nationals for injuries occurring overseas—suits properly governed by foreign law and adjudicated by foreign courts. In short, unless reversed, this case would set "a precedent that discourages American corporations from investing abroad" and consequently "might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights." *Jesner*, 138 S. Ct. at 1406 (plurality op.).

The district court's errors carry grave consequences, both for sovereign interests and for American companies transacting business overseas. This Court should avoid those consequences by correcting the district court's errors and ordering the case dismissed.

CONCLUSION

This Court should reverse the district court and remand this case with instructions to dismiss.

Dated: July 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 29(a)(5) because it contains 6,073 words, excluding the parts exempted by Rule 32(f). This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

The electronic version of the brief has been scanned for viruses and is virus-free.

Dated: July 6, 2023 *<u>/s/ Patrick N. Strawbridge</u>*

CERTIFICATE OF SERVICE

I filed a true and correct copy of this brief with the Clerk of this Court via the CM/ECF system, which will notify all counsel.

Dated: July 6, 2023 */s/ Patrick N. Strawbridge*