Nos. 18-3552 & 19-1056

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

v.

DOE RUN RESOURCES CORP., ET AL.,
Defendants-Appellants.

&

IN RE DOE RUN RESOURCES, ET AL.

On Petition for a Writ of Mandamus of and on Appeal from the United States District Court for the Eastern District of Missouri, St. Louis, No. 4:11-CV-44-CDP

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS AND OPPOSITION TO MOTION TO DISMISS APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici curiae* states as follows:

The Chamber of Commerce of the United States of America has no parent company. No publicly held company owns 10% or more of its stock.

The Missouri Chamber of Commerce and Industry has no parent company. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the United States. 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 curiae briefs in cases, such as this one, that raise issues of concern to the business community. The Chamber has participated in dozens of cases concerning international litigation brought in U.S. courts. *See, e.g.*, *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 International Affairs Division is an advocate for international economic engagement that works with leaders in business and government to vigorously advance pro-business trade and investment policies that create jobs and spur economic growth. Of particular

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

relevance here, the Chamber's International Affairs Division has a robust program focused on trade and international engagement throughout the Caribbean and North, Central, and South America, including with 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 for 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 for 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 a substantial interest in this case. Their members transact business around the world, 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 such as this one harm businesses and impair legitimate international business activity and have the potential to create substantial adverse effects not just on the targeted businesses themselves, but on U.S. foreign policy and on the countries where the claims originate. To the point, "[t]he United States is Peru's leading commercial partner, and Peru is an increasingly important market for U.S. companies," U.S. Chamber of Commerce, U.S. Peru Free Trade Agreement, *available at*

https://www.uschamber.com/international/americas/us-peru-free-trade-agreement, but in the absence of immediate review, the decision below threatens to impair business activity between American businesses and Peru.

In addition, *amici* and their members are deeply concerned that Missouri has become the venue of choice for out-of-state—and out-of-country—plaintiffs seeking to take advantage of an anti-business legal environment, with courts known for consistently producing anti-business litigation results.[2] Missouri's increasingly anti-business environment, as evidenced in part by the outsized plaintiff recoveries, continues to take its financial toll and deter business investment in Missouri's economy. For example, the Chamber's Institute for Legal Reform has ranked Missouri 49th among the 50 States in the country in terms of "how reasonable and balanced the states' tort liability systems are perceived to be by U.S. businesses."[3]

This brief is being filed pursuant to a motion for leave to file.

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[2] *See Bloomberg News*, "Welcome To St. Louis, The New Hot Spot For Litigation Tourists" (Sept. 29, 2016), *available at* http://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis; American Tort Reform Association, "Judicial Hellholes" (Dec. 4, 2018), *available at* https://www.judicialhellholes.org/wp-content/uploads/2018/12/judicial-hellholes-report-2018-2019.pdf.

[3] U.S. Chamber Institute for Legal Reform, 2017 Lawsuit Climate Survey (Sept. 2017), at 2, 3, *available at* https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf.

INTRODUCTION

This is an extraordinary case, and the astonishing orders of the District Court deserve this Court's review. The Eastern District of Missouri would permit a mass tort suit to proceed in an American court, applying Missouri law, on behalf of a group of more than 1,400 Peruvian citizens who allegedly suffered injuries in Peru as a result of a Peruvian company's operation of a smelting facility in La Oroya, Peru that is subject to Peruvian regulation. Even though Peru has its own environmental standards in place, the plaintiffs argue that a Missouri jury should apply a negligence standard that would set the applicable emissions level for the operations of the smelting facility in that country, and award money damages that ultimately will be recoverable against the government of Peru.

It is unusual enough that a district court would authorize a suit with essentially no connection to the United States. But that is only the beginning. The plaintiffs did not even name the Peruvian company as a defendant; instead, they included as defendants the facility operator's parent company (an American corporation), several of its subsidiaries, and individuals connected with the parent company or its owner. On top of that, Peruvian law affords the facility operators immunity from suit: the U.S.-Peru Trade Promotion Agreement expressly bars disputes like this one from being heard outside of Peru. And hence the Peruvian government has formally objected to the maintenance of this case since its outset. Despite all that, the District Court permitted the case to proceed.

This case is also extraordinarily important. Clever plaintiffs have long 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 on behalf of foreign plaintiffs who seek to recover for injuries alleged to have occurred entirely outside of the United States. The federal courts, including the Supreme Court, have rightly curbed those litigation abuses, particularly in the context of the Alien Tort Statute and the Anti-Terrorism Act. *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); *Kemper v. Deutsche Bank AG*, 911 F.3d 383 (7th Cir. 2018). In the absence of immediate review, the decision below will end run these important precedents and authorize the same kind of abusive litigation. Indeed, thousands of similarly situated claimants are lined up behind the plaintiffs in this case; if this case is permitted to proceed toward trial, not only will those thousands of claimants do the same, but many more will try to exploit the precedent set by the court below by bringing lawsuits in that court and other district courts on behalf of foreign nationals for injuries occurring overseas that are (or should be) governed by foreign law. Plaintiffs should not be permitted to use state tort law to accomplish what the Supreme Court has barred under these federal statutes.

This case cries out for immediate appellate review. Petitioners-Appellants have thoroughly explained why their appeal is properly before this Court and the motion to dismiss should be denied. Petition for Writ of Mandamus ("Petition") at

13-42; Defendants-Appellants' Opposition to Motion to Dismiss Appeal ("Opposition") at 11-29. *Amici* agree with those points, but do not seek to repeat them. Instead, *amici* write separately to emphasize the importance of immediate appellate review to the broader business community in Missouri and the rest of the Eighth Circuit, and throughout the nation, and to highlight several fundamental errors the district court made in allowing the case to proceed—errors that, if embraced by other district courts outside of Missouri, would unleash expensive and meritless litigation against American businesses that would weaken the business community and our economy, to the benefit of no one other than the plaintiffs' bar.

BACKGROUND

The La Oroya Facility. This case concerns Peru's efforts to attract private investors to clean up and operate a smelting facility in La Oroya, Peru. To put it simply, by the 1990s, the decades-old facility was a mess; the site suffered from contamination problems and other adverse environmental impacts. Peru, however, did not want to close the facility, because of its importance to "the social and economic development of the region," given that approximately half the population of La Oroya are employees of the facility or their dependents. Appx312, 309.

Peru sought help from private investors, but not a single potential investor expressed interest in the property. App. 384. Understanding that investors were deterred from getting involved out of fear that they might risk liability for past contamination and environmental impacts arising from efforts to remediate the

property, *id.* at 385, Peru came up with a solution. In order to attract investors, Peru promised immunity from suit for the facility's operators so long as they met established regulatory standards specific to the site (set out in a "Environmental Remediation and Management Plan" commonly known by its Spanish acronym "PAMA"). Appx330-35. And it further promised to indemnify the operators for any damages incurred in contravention of the immunity it guaranteed in exchange for modernizing and remediating the La Oroya facility. Appx335.

In 1997, Peru awarded ownership of the La Oroya facility to Doe Run Peru, a company formed by Defendants-Appellants The Renco Group and Doe Run Resources consistent with Peru's requirement that the facility be operated by a Peruvian company. Pursuant to its promises of immunity and indemnification, Peru formally agreed that Doe Run Peru and its affiliates could not be held liable for "claims by third parties" so long as Doe Run Peru abided by the PAMA's environmental standards, and that Peru would indemnify Doe Run Peru and its subsidiaries for any damages they might incur in contravention of that immunity. App. 334-35, 341, 351.[4]

The Peru TPA. The operation of the La Oroya facility is subject to the U.S.-Peru Trade Promotion Agreement (the "Peru TPA"). This comprehensive free trade agreement was intended to "promote economic growth, and expand trade between

[4] Peru's guarantee of immunity is backed by Article 1971 of its Civil Code, which confers immunity for conduct taken in "regular exercise of a right." Appx234, 238.

the two countries," Office of the United States Trade Representative ("USTR"), Peru TPA Final Text, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa/final-text, while "provid[ing] a secure, predictable legal framework for investors," USTR, Peru Trade Promotion Agreement, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa. In the Peru TPA's Preamble, the United States and Peru resolved to:

> STRENGTHEN the special bonds of friendship and cooperation between them and promote regional economic integration;
>
> PROMOTE broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production;
>
> ***
>
> ESTABLISH clear and mutually advantageous rules governing their trade;
>
> ENSURE a predictable legal and commercial framework for business and investment;
>
> ***
>
> AVOID distortions to their reciprocal trade.

USTR, Peru TPA, Preamble, *available at* https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file971_9505.pdf.

As relevant here, the Peru TPA reserves to and guarantees Peru "the sovereign right … to establish its own levels of domestic environmental protection." Peru TPA, Art. 18.1. To safeguard this sovereign right, the Peru TPA bars the U.S. from "undertak[ing] environmental law enforcement activities in [Peruvian] territory."

Id., Art. 18.3(5). The Peru TPA further provides that environment-related claims arising within Peru's borders would be resolved "under [Peru]'s laws" in a forum "under [Peru]'s jurisdiction." *Id.*, Art. 18.4(4).

The Lawsuit. Notwithstanding these provisions, a group of more than 1,400 plaintiffs sued Defendants-Appellants in Missouri, seeking to recover damages from injuries allegedly caused by Doe Run Peru's operation of the La Oroya Facility.

Shortly after the filing of the complaint in this case, the Peruvian government objected to the maintenance of this case. By letter from the President of Peru's Council of Ministers (the Peruvian cabinet) to the U.S. Ambassador to Peru, the Peruvian government stated that only "Peruvian authorities should hear the facts of this case," because the matter is within the "exclusive jurisdiction … of Peru." Letter of Oct. 31, 2007 (Appx210). More recently (in 2017), the Peruvian government reiterated its opposition to the assertion of jurisdiction over this matter by a U.S. court in a letter to the State Department. Appx207.

Despite the Peru TPA's bar on this kind of action being heard in the United States, Peruvian statutory and contractual grants of immunity to Doe Run Peru for the claims advanced here, and the Peruvian government's repeated objections to the maintenance of this suit, the District Court held that the suit nonetheless could proceed in federal district court, applying Missouri law to injuries that allegedly occurred in Peru. In the absence of immediate review, then, Defendants-Appellants will be forced to defend themselves in the Eastern District of Missouri against a mass

tort suit on behalf of a group of more than 1,400 Peruvian citizens who allegedly suffered injuries in Peru as a result of a Peruvian company's operation of a smelting facility in La Oroya, Peru that is subject to Peruvian regulation.

ARGUMENT

Amici agree with Defendants-Appellants that this appeal is properly before this Court and the motion to dismiss should be denied. *Amici* write separately to emphasize that immediate appellate review is necessary to protect trade and foreign relations between the United States and its trading partners around the world; and to explain that the District Court failed to properly respect international comity by allowing this action to proceed.

Without immediate review, the decision below will negate the immunity that Peru promised in order to encourage Doe Run Peru to contract with Peru in the first place; impose serious financial risks on Defendants-Appellants (and thus on Peru, their indemnitor); undermine the goals of the Peru TPA; disrupt the U.S.-Peru relationship; and threaten to disrupt trade and foreign relations more broadly.

In its decision below, the District Court contravened the doctrine of international comity by ignoring crucial differences between Missouri and Peruvian law and allowing this action to proceed in a Missouri forum (applying Missouri law) rather than a Peruvian one. As explained more fully below, the Court's immediate intervention is needed; the Court should grant the petition for writ of mandamus or deny the motion to dismiss the appeal.

I. Immediate Appellate Review Is Warranted To Protect Trade And Foreign Relations Between The United States And Its Partners.

Without immediate review, this case will proceed toward trial over the repeated objections of the Peruvian government. And any trial ultimately would allow a Missouri jury to decide whether and to what extent the Peruvian government must compensate its own citizens for alleged harms that occurred entirely within Peru as a result of the operation of a Peruvian smelting facility subject to Peruvian regulation. *See supra* pp. 8-9. Moreover, the same Missouri jury's "application of state-law tort principles will override [Peru]'s policy choices regarding conduct in its own territory: the environmental standards and immunity [it] devised for the La Oroya facility." Petition at 31. Because Peruvian sovereign interests plainly hang in the balance, forcing Peru to watch those interests be adjudicated in a United States court over its repeated objections is "an affront to its dignity and may ... affect our relations with it." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)).

Moreover, authorizing a trial imposes upon Peru a risk of substantial financial liability. Thousands of similarly situated plaintiffs are already lined up behind the plaintiffs here. Petition at 4. Peru has promised to indemnify Doe Run Peru for any damages incurred in contravention of the immunity it guaranteed in exchange for modernizing and remediating the La Oroya facility. *See supra* pp. 8-9. Peru thus will be ultimately liable for any money judgment awarded by a Missouri jury if this case were to proceed to trial.

There is additional financial risk, of course, in the absence of immediate review. Defense costs are especially high in this type of litigation given the foreign conduct at issue and the difficulties or impossibilities of taking discovery in a remote location. As a fundamental matter, "obtain[ing] discovery from foreign sources" almost invariably is an "expensive, cumbersome, and difficult" process—one that often renders the litigation as whole "prohibitively expensive and resource consuming." Mark P. Chalos, *Successfully Suing Foreign Manufacturers*, 44-NOV Trial 32, 36-37 (2008). On top of that, the usual difficulties of overseas discovery are 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) ("[W]itnesses and documents are often overseas, typically in remote locations and developing countries.").

Even apart from the costs of litigation and the direct risk of an adverse monetary judgment against Defendants-Appellants (and indemnified by Peru), the mere fact of this case advancing toward trial will hamper Peru's ability to attract future investors to engage in similar projects. Indeed, this was the entire point of the grant of immunity, which Peru promised in order to attract investors to acquire the La Oroya facility and remediate the poor environmental conditions at the facility, while preserving thousands of jobs in an economically depressed community. *See supra* pp. 7-8; Petition at 3. By effectively negating Peru's guarantee of immunity from suits like this one, the continued maintenance of this case thus sets a "disturbing

precedent for investors of both countries," Letter of Oct. 31, 2007 from Jorge del Castillo Galvez, President of the Council of Ministers, to Hon. Michael McKinley, Ambassador of the United States to Peru, at 2 (Appx211). Permitting this case to proceed thus harms both sides of the economic equation: American businesses will be apprehensive about making investments in Peru; and Peru will be inhibited in its ability to attract private 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).

All of these harms threaten to "disrupt our relations with" Peru. *Id.* Indeed, allowing this litigation to proceed will yield outcomes directly contrary to the primary goals of the Peru TPA, which Peru and the United States adopted to "ESTABLISH clear and mutually advantageous rules governing their trade; ENSURE a predictable legal and commercial framework for business and investment; … and AVOID distortions to their reciprocal trade." *See supra* __. In short, in the absence of immediate review, the decision below will neither "promote economic growth, [nor] expand trade between the two countries." *See supra* p.9.

Worse still, these harms could have a ripple effect that may more broadly harm trade and foreign relations between the United States and its partners. Although this case concerns an American business's investment in Peru, Peru is not unique in this regard. 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, *see* USTR, Free Trade Agreements, *available at* https://ustr.gov/trade-agreements/free-trade-agreements, as well as trade and investment framework agreements with nearly or bilateral investment treaties with nearly 100 other countries, *see* 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. Without immediate review, American businesses reasonably will fear that U.S. courts will allow clever plaintiffs to exploit the precedent below to attack legitimate international business activity through abusive litigation tactics—not only in Peru, but in countries across the globe. American businesses thus may keep their investment dollars at home rather than do business with America's international trading partners. This "heightened risk of international discord" could have a destabilizing effect on our nation's ability to trade freely with its global partners, Opposition at 18, and thus harm American businesses and undermine United States policy of "opening markets throughout the world to create new opportunities and higher living standards for families, farmers, manufacturers, workers, consumers, and businesses." USTR, Mission of the USTR, *available at* https://ustr.gov/about-us/about-ustr.

II. The District Court Failed To Properly Respect International Comity In Allowing The Suit To Proceed.

The doctrine of international comity is a long-standing means for U.S. judges to resolve legal issues that arise when a particular case implicates the sovereign

interests of a foreign state. *See* Joseph Story, *Commentaries on the Conflict of Laws* § 38 (1883). At its core, comity is the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). The Supreme Court "ha[s] long recognized the demands of comity in suits involving foreign states," even when the sovereign merely has a "coordinate interest in the litigation." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987); *see also Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873 (2018).

The doctrine of international comity has multiple applications. Among them, it is a central concern in determining whether a dispute with international implications should be heard in a domestic or foreign forum, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004); and it underlies the presumption against extraterritoriality of American laws, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013). The District Court contravened principles of international comity in both respects.

A. The District Court Failed To Respect International Comity In Allowing This Action To Proceed In A Missouri Forum Over A Peruvian Forum.

In considering whether a dispute with international implications is appropriately heard in a domestic or foreign jurisdiction, the primary factors that domestic courts consider are the sovereign interests and the adequacy of the alternative forum. *Ungaro-Benages*, 379 F.3d at 1238; *see also Torres v. Southern*

Peru Copper Corp., 965 F. Supp. 899, 908 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997). Both the interests of the sovereigns and the adequacy of Peruvian courts require dismissal.

1. *Sovereign Interests Require Dismissal on Comity Grounds*.

The district court committed fundamental legal errors in assessing the sovereign interests of Peru, the United States, and Missouri. The court disregarded official submissions from the Peruvian government indicating that its sovereign interests were at stake; misinterpreted a treaty between the United States and Peru squarely prohibiting suits such as this one; and asserted broad Missouri interests despite no Eighth Circuit or Supreme Court precedent justifying its approach. When these interests are properly weighed, it is clear the court should have dismissed the case on comity grounds.

Peru's Sovereign Interests. Federal courts must "take care to demonstrate due respect for ... any sovereign interest expressed by a foreign state." *Aerospatiale*, 482 U.S. at 546. From the outset of this litigation, the Peruvian government has objected to the adjudication of this matter in American courts. Shortly after the filing of the complaint in this case, the President of Peru's Council of Ministers (the Peruvian cabinet) lodged a statement with the U.S. ambassador objecting to American jurisdiction because only "Peruvian authorities should hear the facts of this case." Letter of Oct. 31, 2007 (Appx210). Peru's Special Commission on International-Investment Disputes reaffirmed "the importance of [Peru's] sovereign rights with

respect to these issues" in 2017, emphasizing that the suit violated the Peru TPA. Letter of Apr. 3, 2017 from Ricardo Ampuero Llerena, President of the Special Commission, to Patrick W. Pearsall, Chief of Investment Arbitration, United States Department of State, at 2 (Appx206).

Peru's concern for its sovereignty is well founded. In order to incentivize Doe Run to take over an economically vital plant with a problematic environmental record, Peru agreed to indemnify Doe Run for claims made against it by third parties, so long as the plant met certain Peruvian environmental standards. *See* Appx334-35, 351. If a Missouri jury is permitted to apply American common law and potentially impose hundreds of millions of dollars in liabilities on Peru, Peru's sovereign interests are clearly implicated. *See Pimentel*, 553 U.S. at 866 (a threat to a country's property is "'an affront to its dignity'").

The District Court fundamentally misunderstood the nature of Peru's sovereign interests. It asserted that "Peru has an interest in seeing that its Peruvian citizens receive appropriate compensation if they have been harmed by wrongful actions of Americans," Op. at 59. That might be true in some instances, but not necessarily when the Peruvian government is ultimately footing the bill. Governmental immunity is, after all, quite common. Moreover, the district court's assertion is no justification for allowing the claims of Peruvian citizens to be adjudicated in Missouri under Missouri law, particularly when those Peruvian plaintiffs "allege harm suffered entirely in Peru from allegedly inadequate emissions

control by a Peruvian smelting facility, a subject regulated by the Peruvian government." Opposition at 15. Insofar as Peru determines that compensating alleged victims is in its sovereign interest, Peru may do so through its own domestic processes, applying its own law. Forcing Peru to do so as a result of Missouri common law fails to accord Peru sufficient comity.

Given the sovereign interests of Peru, it is unsurprising that in a nearly identical case, the Fifth Circuit affirmed dismissal on international comity grounds:

> The challenged activity and the alleged harm occurred entirely in Peru; Plaintiffs are all residents of Peru; enforcement in Peru of any judgment rendered by this Court is questionable; the challenged conduct is regulated by the Republic of Peru and exercise of jurisdiction by this Court would interfere with Peru's sovereign right to control its own environment and resources; and the Republic of Peru has expressed strenuous objection to the exercise of jurisdiction by this Court. This Court therefore dismisses this action under the doctrine of comity of nations.

Torres v. S. Peru Copper Corp., 965 F. Supp. 899, 908-09 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997). In *Torres*, the court correctly recognized that the doctrine of international comity required "deference to the laws and interests" of Peru. *Id.* at 908.

But here, despite Peru's official government statements and substantial financial exposure, the District Court held that "Peru's sovereignty is not at issue" and that Peru's "lack of an express sovereign interest weighs heavily against dismissal." Op. at 58-60. The District Court disregarded Peru's official government

position because two members of the Peruvian legislature sent letters to Peru's Ministry of Finance criticizing the government's position. *Id.* at 56-57.

This would be akin to a foreign court disregarding the U.S. Secretary of State's declaration of American sovereign interests because two members of the House of Representatives sent letters to the State Department complaining about the official position of the United States. In adopting this position—which appears to have no basis in the Peruvian Constitution—the District Court failed to heed the Supreme Court's admonition that it must pay "due respect" to "any sovereign interest expressed by a foreign state." *Aerospatiale*, 482 U.S. at 546; *see also Hebei*, 138 S. Ct. at 1869 (federal courts must "accord respectful consideration to a foreign government's submission" while considering all "relevant" "circumstances"). The district court's utter disregard for the sovereign interests of Peru was fundamental error.[5]

The United States' Sovereign Interests. The sovereign interests of the United States also favor dismissal. No federal statute bars the extraterritorial conduct at

[5] The District Court also disregards the expressed sovereign interests of Peru because the government letters were "obtained" for purposes of supporting "positions in this litigation." Op. at 58. But that is exactly why nations submit such statements in the first place—to protect their interests in ongoing litigation. And there is no indication that the position of Peru *changed*; it just had not been (and did not need to be) expressed until this litigation arose. The District Court's approach is unsupported by precedent and is at odds with long-established diplomatic practice of foreign sovereigns expressing their position on litigation in U.S. courts. *See The Navemar*, 303 U.S. 68, 76 (1938).

issue. This suggests that neither Congress nor the President views the conduct at issue here as falling within the core sovereign interests of the United States.

More importantly, the Peru TPA reserves adjudication of such matters to Peruvian Courts. As Petitioners correctly note, Petition at 5, the Peru TPA recognizes "the sovereign right of each Party to establish its own levels of domestic environmental protection and environmental development priorities." Peru TPA, Art. 18.1. If the common law of all fifty states could be brought to bear against American-owned entities operating in Peru, Peru would no longer be in control of its environmental policies. Consistent with the Agreement's sovereignty provision, the treaty bars Peru and the United States from engaging in "environmental law enforcement activities" in the other's territory. *Id.*, Art. 18.3(5).[6] These provisions recognize the underlying truth that nations "need to respect foreign law as a matter of comity." *Fernando v. Haekkerup*, 596 Fed. App'x 40, 40-41 (2d Cir. 2015).

The United States has a strong sovereign interest in ensuring that its international agreements are upheld. It also has a strong interest in "uniformity in this country's dealings with foreign nations," which would be difficult to accomplish

[6] The District Court misreads Article 18.4 of the Peru TPA Agreement to suggest that the United States is *required* to permit state common law suits like the one at issue here. Op. at 60-61. This is wholly inconsistent with Article 18.1's mutual sovereignty guarantee. Moreover, read in its totality, it is clear that Article 18.4 is referencing environmental violations arising in a country's own territory.

if fifty iterations of state common law could potentially regulate corporate actions in Peru. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

Missouri's Sovereign Interests. The State of Missouri's interests cannot trump federal law as embodied in the Peru TPA. *See* U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land."). And at a minimum, the U.S.-Peru Agreement's mutual sovereignty provisions suggest that a comity-based dismissal is appropriate. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) ("There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy.").

But even in the absence of the treaty, Missouri's interests would be minimal because the case is brought by foreign plaintiffs and arises out of events happening in a foreign country. *Saleh v. Titan Corp.*, 580 F.3d 1, 12 (D.C. Cir. 2009) ("The interests of any U.S. state ... are *de minimis* in this dispute—all alleged abuse occurred in [a foreign country] against [foreign] citizens."). A single state's interest "scarcely outweigh[]" the United States' interests. *Mujica v. AirScan Inc.*, 771 F.3d 580, 611 (9th Cir. 2014). Where an activity "occurs exclusively within the territory of a foreign state and involved solely foreign victims," the foreign government's interest in preventing state jurisdiction outweighs the state's interest in retaining jurisdiction. *Id.* Missouri's minimal interests in proceeding with this case are outweighed by both Peru's and the United States' interests.

2. *The Adequacy of the Alternative Forum Favors Dismissal on Comity Grounds*.

Peru provides an adequate and available forum for the litigation of this dispute. Courts across the country frequently hold that Peru offers an appropriate forum in comity and *forum non conveniens* analyses.[7] *See, e.g.*, *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011) (holding that Peru provided an adequate alternative forum in action brought by members of Peruvian indigenous group and California nonprofit against petroleum company for environmental contamination); *Torres*, 965 F. Supp. at 902-03, *aff'd*, 113 F.3d 540 (finding that Peru provided an adequate alternative forum in action alleging environmental harm from mine and smelting plant). In fact, "every federal court to consider the issue has found Peru to be an adequate forum." *Acuña-Atalaya v. Newmont Mining Corp.*, 308 F. Supp. 3d 812, 824 (D. Del. 2018). Because defendants have conceded that they are amenable to process in Peru, Appx126, and because Peru offers remedies for the sort of environmental wrongs plaintiffs are pursing, an adequate and available forum exists, *see Torres*, 965 F. Supp. at 904, *aff'd*, 113 F.3d at 540; *Carijano*, 643 F.3d at 1225.

[7] Some of these cases determined the adequacy of the alternative forum for *forum non conveniens* purposes, although this analysis is "equally pertinent to dismissal on the grounds of comity." *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998); *Mujica*, 771 F.3d at 612 n.25.

B. The District Court Failed To Respect International Comity In Ignoring Crucial Differences Between Missouri And Peruvian Law.

Petitioners-Appellants argued that they are immune from suit under Article 1971 of Peru's Civil Code and the Peru's Environmental Remediation and Management Plan. Opposition at 24. Despite full briefing on the question whether the Peruvian statute allowed Defendants-Appellants to invoke immunity, the District Court completely failed to address whether Doe Run is immune from suit pursuant to Peruvian law. In fact, the words "immunity" and "Article 1971" never even appear in the District Court's opinion. Nonetheless, the District Court brazenly concluded that "the laws of Peru do not actually conflict in any significant, substantive way with Missouri and New York law." Op. at 49. This conclusion ignores the fact that Petitioners are guaranteed immunity under Peruvian law but could face significant liability under Missouri law.

The District Court's failure to address this conflict is all the more egregious given the strong presumption against extraterritorial application of American law. *See, e.g.*, *Morrison v. Natl. Australia Bank Ltd.*, 561 U.S. 247, 261 (2010) ("we apply the presumption [against extraterritoriality] in all cases"). The presumption against extraterritorial application is rooted in international comity; it presumes that American law "governs domestically but does not rule the world" and thus "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel*, 569 U.S. at 115. For a federal

law to apply extraterritorially, Congress must "affirmatively and unmistakably instruct[]" that it do so, and "when a statute gives no clear indication of an extraterritorial application, it has none." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016).

The rationale for the presumption against extraterritoriality "should make courts even more reluctant to apply state law outside the boundaries of the United States." *Denty v. SmithKline Beecham Corp.*, 907 F. Supp. 879, 886 (E.D. Pa. 1995). International affairs are not an area of "traditional state responsibility." *Garamendi*, 539 U.S. at 419 n.11. To the contrary, the Constitution vests foreign relations in the national government, U.S. Const. art. I, § 8; art. II, §§ 1-3, and explicitly prohibits states from engaging in most foreign relations activities, U.S. Const. art. I, § 10. The Fourth Circuit has explained that "given that the Constitution entrusts foreign affairs to the federal political branches, limits state power over foreign affairs, and establishes the supremacy of federal enactments over state law, the presumption against extraterritorial application is even stronger in the context of state tort law." *Al Shimari v. CACI Intern., Inc.*, 679 F.3d 205, 231 (4th Cir. 2012). It simply "defies belief that, notwithstanding the constitutional entrustment of foreign affairs to the national government, [Missouri] silently and impliedly wished to extend the application of its tort law to events overseas." *Id.*

The District Court's expansive interpretation of Missouri's common law contravenes the presumption against extraterritoriality and violates basic notions of

international comity. In so doing, the district court unnecessarily forced Missouri law into sharp conflict with Peruvian law: Peruvian law guarantees immunity; Missouri law does not. The District Court's erroneous conclusion to the contrary (Op. at 49) simply elides the question of Peruvian immunity entirely. Had the District Court addressed the question of immunity, it would have been required to dismiss the case.

CONCLUSION

For the foregoing reasons, the Court's immediate intervention is needed; *amici curiae* respectfully request that the Court grant the petition for writ of mandamus or deny the motion to dismiss the appeal.

Respectfully submitted,

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Dated: January 14, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief exceeds the type-volume limitations of Fed. R. App. P. 29(d) because it contains 6,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Accordingly, *amici curiae* file contemporaneously herewith a motion for leave to exceed the word limitations.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Times New Roman 14-point font.

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CIRCUIT RULE 28A(H) CERTIFICATION

Pursuant to Circuit Rule 28A(h)(2), I hereby certify that the motion has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2019, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Eighth Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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