

In the **United States Court of Appeals**
for the Eighth Circuit

IRA L. RENNERT, ET AL.,

Defendants-Petitioners,

v.

A.O.A., et al.,

Plaintiffs-Respondents.

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

**MOTION FOR LEAVE TO FILE AMICUS BRIEF OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AND THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY**

The Chamber of Commerce of the United States of America and the Missouri Chamber of Commerce and Industry (“Amici”) respectfully ask this Court for leave to file the attached amicus brief in support of Defendants’ petition for permission to appeal an interlocutory order under 28 U.S.C. §1292(b).

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 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 briefs in cases, such as this one, that raise issues of concern to the business community.

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 that 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>.

In the absence of immediate review, the decision below threatens to impair trade and economic activity between American businesses and Peru.

Plaintiffs oppose Amici's motion for leave to file.

ARGUMENT

Although the Rules do not expressly allow or forbid amicus briefs in support of petitions for interlocutory appeal, courts routinely accept amicus briefs filed in these circumstances. *See, e.g.*, Doc. 12, *Serrano v. Union Pac. R. Co.*, No. 16-80101 (9th Cir. Oct. 18, 2016); *Feit Elec. Co., Inc. v. CFL Techs. LLC*, 800 F. App'x 911, 913 (Fed. Cir. 2020); Doc. 18, *Renasant Bank v. Landcastle Acquisition Corp.*, No. 20-90013 (11th Cir. Aug. 10, 2020); Doc. 9, *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 20-80026 (9th Cir. Mar. 30, 2020); Doc. 5, *Koby v. ARS Nat'l Servs., Inc.*, No. 10-80234 (9th Cir. Mar. 18, 2011).

The same precedent that supports the acceptance of amicus briefs in this posture demonstrates that this motion is timely. The seven-day deadline of Rule 29(a) only governs "amicus filings during a court's initial consideration of a case on the merits," not at the petitioning stage. Fed. R. App. P. 29(a)(1). Moreover, Defendants filed their §1292(b) petition just eleven days ago, and courts reviewing §1292(b) petitions have accepted proposed briefs filed at similar or later times. *See* Doc. 18, *Renasant Bank*, No. 20-90013 (11th Cir. Aug. 10, 2020) (granting motion for leave filed one month after petition was filed); Doc. 5, *Koby*, No. 10-80234 (9th Cir. Mar. 18, 2011) (granting motion

for leave filed nine days after petition was filed). The motion remains timely notwithstanding that Plaintiffs filed their opposition yesterday. Courts have accepted amicus briefs in this precise posture. *E.g.*, Doc. 5, *Renasant Bank*, No. 20-90013 (11th Cir. Aug. 10, 2020).

When exercising that inherent authority, this Court should “err on the side of granting leave.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002). As then-Judge Alito explained, “If an amicus brief that turns out to be unhelpful is filed, the [court], after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the [court] will be deprived of a resource that might have been of assistance.” *Id.*

Amici have participated in dozens of cases concerning international litigation brought in U.S. courts. *See, e.g.*, *Nestle 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). And their brief is desirable because it will assist the Court by presenting arguments and insights that have not been addressed by Defendants-Petitioners. In particular, amici 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 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.

CONCLUSION

For the foregoing reasons, the Court should grant this motion and allow Amici to file the attached brief.

Dated: February 10, 2023

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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: February 10, 2023

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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.

Additionally, 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 concerning international litigation brought in U.S. courts. *See, e.g., Nestle 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.

This brief is being filed pursuant to a motion for leave to file. Plaintiff-Respondents oppose the filing of this brief.

INTRODUCTION

This is an extraordinary case. On the way to denying Defendants’ motion for summary judgment, the district court took jurisdiction over mass tort claims of Peruvian citizens, arising from a Peruvian company’s operation of a smelting facility in La Oroya, Peru. That facility is subject to the environmental standards of Peruvian law, including a government grant of immunity, conditioned on hitting regulatory benchmarks, to encourage investors to rehabilitate an environmentally harmful but economically important facility in an impoverished region of the country.

Notwithstanding that this is a suit by Peruvian citizens arising from the actions of a Peruvian company at a Peruvian factory subject to Peruvian environmental law, the court held that Missouri juries should determine liability for plaintiffs’ injuries under state common law. In doing so, the court erroneously brushed aside principles of international comity, the Peruvian government’s formal objections to the lawsuit, and provisions of the United States-Peru Trade Promotion Agreement (TPA). Office of the United States Trade Representative, Executive Office of the President, Peru TPA: Final Text, <https://tinyurl.com/3w6mvcaw>. The ruling paves the way to discovery and jury trials for some 1,420 plaintiffs here, of whom only sixteen have participated in discovery so far, plus over 1,000 more in a similar consolidated action pending in the same federal court. Add. 6 & n.1, 78.

To be fair, the district court recognized that this is an “exceptional case.” Add. 78. It emphasized that this case presents “novel, difficult, and case-dispositive legal

questions” that beg for guidance from this Court, *id.*, and would control whether over 2,400 plaintiffs’ claims must be dismissed, or instead proceed to discovery and trial to hundreds of Missouri juries. The district court’s resolution of these questions, on which this Court’s sister circuits are already split, was at least debatable. The district court itself conceded that there are “substantial grounds for difference of opinion” on these issues, Add. 76, and certified the case for interlocutory appeal. This Court should grant the petition.

ARGUMENT

Amici agree with Petitioners—and the district court—that immediate review is warranted because the court’s ruling satisfies all three factors of 28 U.S.C. §1292(b). Add. 74-79. Amici write separately to emphasize the importance of immediate appellate review to the broader business community throughout Missouri, the rest of the Eighth Circuit, and the nation, and to highlight errors that, if embraced widely by federal courts, would unleash expensive and meritless litigation that would weaken American businesses and foreign relations between the United States and its trade partners worldwide.

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 to trials where Missouri juries would apply Missouri tort law to the claims of Peruvian citizens for alleged harms that occurred entirely within Peru because of the operation of a Peruvian smelting facility, owned by a Peruvian company and regulated under Peruvian law. These juries’ application of state law will override Peru’s policy choices regarding conduct in its own

territory: the environmental standards and immunity it devised for the La Oroya facility. Peru will be forced to watch its sovereign interests hang in the balance in a United States court, over its repeated objections—“an affront to its dignity” which 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)).

The ruling below imposes additional costs by hampering Peru’s ability to attract future investors to engage in similar projects. Indeed, the entire point of Peru’s grant of Petitioners’ immunity was to attract investors to acquire the La Oroya facility and remedy the poor environmental conditions at the facility, while preserving thousands of jobs in an economically depressed community. R. Doc. 545-9, at 7-10. In the Peruvian government’s own words, the progress of this case sets a “disturbing precedent for investors of both countries.” R. Doc. 545-13, at 3.

Letting this case 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 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). Besides 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).

These harms threaten to “disrupt our relations with” Peru. *Bi*, 984 F.2d at 586. Indeed, allowing this litigation to proceed will yield outcomes directly contrary to the primary goals of the 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.” TPA, Preamble. Without immediate review and reversal, the decision below will impede the TPA from accomplishing any of these objectives.

Worse still, these harms could have a broad ripple effect on trade and foreign relations between the United States and its partners. 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>. Many of these

agreements contain the same language which the district court misread here to open U.S. courts to foreign tort actions.

Without immediate review, American businesses reasonably will fear that federal courts will allow clever plaintiffs to attack legitimate international business activity through abusive litigation tactics—not only in Peru, but also 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 natural response could have a destabilizing effect on our nation’s ability to trade freely with its global partners, 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’s ruling contravenes international comity and the TPA.

The legal errors identified by Petitioners led the district court to an untenable result. Above all, the TPA protects both Peruvian and American sovereign interests in the enforcement of their respective laws within their respective borders. *See* Pet. 19-21. But the district court misinterpreted the “plain language” of the agreement, Add. 62, both to support its exercise of jurisdiction and permit the extraterritorial application of Missouri law. On both counts, the court failed in its duty under international comity principles to “demonstrate due respect for ... any sovereign interest expressed by a

foreign state.” *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 546 (1987).

A. Whether a dispute with international implications belongs in a domestic forum depends on the interests of the respective sovereigns and the adequacy of the alternative forum. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004). Peru provides an adequate and available forum, as multiple federal courts have found—including in environmental cases. *E.g.*, *Acuña-Atalaya v. Newmont Mining Corp.*, 2020 WL 1154783 (D. Del. Mar. 10), *aff’d* 838 F. App’x 676 (3d Cir. 2020); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011); *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899, 908 (S.D. Tex. 1996), *aff’d* 113 F.3d 540 (5th Cir. 1997).¹ Yet to keep this case in Missouri, the district court disregarded formal objections from the Peruvian government asserting its sovereign interests; misinterpreted TPA provisions squarely prohibiting suits like this one; and gave unjustifiable weight to minor state interests. The court should have dismissed the case on comity grounds.

From the outset, the Peruvian government has raised well-founded objections to adjudicating this matter in American courts. *See supra*. The district court even conceded that “Peru has a strong interest in the certainty, predictability, and uniformity of result” for claims under Article 1971, Add. 26, and confessed that it had previously been “too dismissive” of these objections, *id.* at 64. Nevertheless, the court still set aside these

¹ Defendants also conceded that they are amenable to process in Peru. R. Doc. 756, at 71.

concerns, recognizing “no powerful diplomatic interests” favoring dismissal on Peru’s part. *Id.* at 66. Never mind the letters from the Peruvian Ministry of Economy and Finance to the U.S. Department of State requesting it 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 3. To conclude Peru had no strong policy against the court’s exercise of jurisdiction, the district court highlighted that Peru had “acknowledged” in an arbitration filing—but not endorsed—that this case was going forward, without any “advocating for a Peruvian forum to hear these claims or an articulation that its sovereign interests are jeopardized.” Add. 66. Why that observation in another case disclaimed any sovereign interest here, the court did not explain. Preferring a source of such dubious relevance to direct diplomatic communications between the Peruvian and U.S. governments flouted international comity.

U.S. sovereign interests also favor dismissal. No federal statute bars the extraterritorial conduct at issue, suggesting that Congress has not viewed regulating it as a worthy exercise of its foreign-relations powers. Instead, the United States has formally recognized “the sovereign right of [Peru] to establish its own levels of domestic environmental protection and environmental development priorities.” 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 control its own environmental policies. Yet the district court rejected any suggestion that its “exercise of jurisdiction in this action impedes [the mutual sovereignty guarantee’s] rights or requirements,” and therefore

that there is any “United States foreign policy interest in resolving these claims in Peru.”
Add. 62.

The United States has strong sovereign 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). But uniformity is impossible if fifty iterations of state common law can regulate corporate actions in Peru. No Missouri interest can trump these federal interests. *See 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.”). Even absent the TPA, Missouri’s interests would be “*de minimis*” 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). Where an activity “occur[s] 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. *Mujica v. AirScan Inc.*, 771 F.3d 580, 611 (9th Cir. 2014). What’s more, Missouri also has strong, countervailing interests in warding off litigation targeting legitimate business activity that may discourage investment in Missouri’s economy. Missouri’s minimal interests in proceeding with this case are outweighed by both Peruvian and U.S. interests.

B. 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 this rationale directly contravenes the presumption’s basic rationale of “protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord.” *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013). 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, yet to give federal statutes extraterritorial effect, Congress must “affirmatively and unmistakably instruct[]” as much. *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 335 (2016). The presumption can only hold greater force, not less, against extraterritorial application of “state tort law.” *Al Shimari v. CACI Int’l, 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.*

CONCLUSION

This Court should authorize an appeal of the district court's order.

Dated: February 10, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with Rule 32(a)(7)(B) because it contains 2,591 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 are virus-free.

Dated: February 10, 2023

/s/ Patrick N. Strawbridge

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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.

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