No. 24-601

In the Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION, ET AL.,
PETITIONERS,

v.

KATE REID, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROFESSOR SAMUEL ESTREICHER SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Samuel Estreicher is the Dwight D. Opperman Professor of Public Law at New York University School of Law. He is also the Director of its Center for Labor and Employment Law, and Director of its Institute of Judicial Administration.

Professor Estreicher is a renowned expert on international litigation, foreign relations law, federal courts, and administrative and regulatory law. He is the co-author of Samuel Estreicher & Thomas H. Lee, *In Defense of International Comity*, 93 S. Cal. L. Rev. 169 (2020) (hereinafter "Estreicher & Lee"), which sets forth his views on international comity abstention, a principal focus of the Petition. Professor Estreicher regularly teaches foreign relations law, among other subjects. He (along with Professor Lee) has regularly filed amicus briefs in this Court and lower courts dealing with international comity issues. He authors a regular column on foreign relations law for the New York Law Journal. He also served as the Chief Reporter of the American Law Institute ("ALI")'s Restatement of Employment Law, is a member of the ALI's consultative group on the Restatement Fourth of Foreign Relations Law, and recently completed his four-

[1] Pursuant to this Court's Rule 37.2, *Amicus* provided timely notice to all parties of his intent to file this brief. Further, per Rule 37.6, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no party, counsel for a party, or any person other than *Amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this amicus brief.

year term as a member of the Internal Justice Council of the United Nations.

This brief represents Professor Estreicher's views as a teacher and scholar and not necessarily the views of any organization with which he is affiliated. He is filing this brief in support of the Petition, to call the Court's attention to the continuing importance of international comity as a freestanding doctrine of restraint in helping U.S. courts tread carefully in cases implicating U.S. relations with foreign states, and to urge the Court to take up the Petition to resolve certain gaps and inconsistencies in the law as highlighted by Eighth Circuit's ruling below.

SUMMARY OF ARGUMENT

As litigation has become increasingly trans-national, consideration of international comity in judicial decision-making has taken on growing significance. Justice Breyer has observed that "the old legal concept of 'comity' has assumed an expansive meaning," no longer referring "simply to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual; it used to prevent the laws of different nations from stepping on one another's toes. Today it means something more." Stephen Breyer, *The Court and the World: American Law and the New Global Realities* 91 (2015). "Since there is no Supreme Court of the World, national courts must act piecemeal, without direct coordination, in seeking interpretations that can dovetail rather than clash with the working of foreign statutes," and in doing so they must "listen to

foreign voices, to those who understand and can illuminate relevant foreign laws and practices." *Id.* at 92.

Principles of international comity abstention play a critical role in urging federal and state courts to take seriously U.S. interests in avoiding frictions with foreign states when hearing "foreign cubed" cases—cases occurring on foreign soil, involving foreign plaintiffs and often the application of foreign law, and implicating foreign policy concerns.[2]

The Petition addresses a case originating in the Missouri state courts but later removed to federal court, which involves questions of compliance with Peruvian environmental law in connection with a Peruvian subsidiary of a U.S. corporation's operation of Peruvian mines in causing environmental harms in that country. The Eighth Circuit below rejected Petitioners' claim for international comity abstention because this case (a) was not of that "rare" breed of "often calamitous cases" warranting what the court termed "prospective international comity"—"prospective" since there were no past Peruvian judgments seeking recognition and enforcement in the U.S. or pending parallel U.S. and Peruvian court

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[2] "Foreign-cubed" generally refers to cases in which a foreign plaintiff sues a foreign defendant for acts committed on foreign soil. *RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 363 (2016) (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment). In this case, more than 1400 Peruvian citizen claimants have brought suit both on their own behalf and through next friends who are Missouri residents. Pet. App. 1a, 2a.

proceedings ("parallel proceedings"); (b) involved a U.S. company's "negligence" in making corporate decisions out of Missouri; and (c) "[n]either the State Department nor the government of Peru has submitted a declaration of its position in this case." Pet. App. 7a–10a.

The Eighth Circuit here essentially truncated the international comity inquiry to the point of rendering it a dead letter in many cases. The presence of parallel proceedings is certainly a relevant factor, but it is not a required element. A formal declaration by the U.S. State Department is another relevant factor, but there are many reasons, including political considerations, that often preclude such a declaration. Despite the court's insistence on a formal "declaration," Peruvian officials made clear Peru's opposition to this U.S. court proceeding in official correspondence, to which the Eighth Circuit should have given appropriate weight instead of dismissing the correspondence out of hand. Pet. App. 10a, 80a–82a; ECF 545-3, 545-13. The Peruvian officials submitted two letters, one dated October 2007 and the other dated April 2017. The 2007 letter argued that this case should be heard in Peru based on principles of international law. The letter requested that the State Department notify the relevant Missouri court that the lawsuit must be filed in Peru and "take other steps" the ensure that any court of the United States would refuse to review the case. ECF 545-13. The Peruvian officials sent the April 2017 letter pursuant to Article 10.21 of the U.S.–Peru Trade Promotion Agreement ("TPA") in relation to arbitration proceedings brought by Petitioners Renco and Doe

Run Resources against Peru. ECF 545-3. The April 2017 letter incorporated the officials' October 2007 letter and reiterated that Peruvian authorities must hear and resolve this dispute in Peru. *Id.* Specifically, the Peruvian authorities stated that "Peru has long emphasized and maintains the importance of its sovereign rights with respect to these issues, including as reflected in the Treaty ratified thereafter and conveyed in arbitration." *Id.* at 4.

Consideration of international comity concerns is especially salient as extraterritorial international human rights and other lawsuits migrate to state courts in circumstances where, unlike the instant proceeding,[3] removal to federal court will not be available; and, other than international comity, there may be no clear federal basis for this Court's review of such suits even where they pose marked tensions with U.S. foreign relations.

[3] Removal occurred in this case because Renco Group, one of the Petitioners here, had initiated arbitration proceedings to compel Peru to defend and indemnify Renco. The arbitration agreement between Renco and Peru fell under the Convention on the Recognition and Enforcement of Arbitration Awards which allows removal "where the subject matter of an action or proceeding . . . relates to an agreement or award falling under the Convention." 9 U.S.C. §205; Pet. App. 4a–5a.

ARGUMENT

I. Principles of International Comity Abstention Are Essential in Helping U.S. Courts Deal with Cases That Pose a Significant Risk of Tensions with Foreign States.

In our increasingly interconnected world, the United States is an influential global player in a way that the Founders could hardly have imagined, and it is becoming increasingly common for decisions made in our courts to have significant repercussions in other countries. The need for judicial sensitivity to litigation that could cause friction with foreign nations has been obvious from our country's early years. This sensitivity has been woven into the fabric of American jurisprudence at least since the early nineteenth century. Indeed, even before the concept of "comity" was formally articulated in Justice Joseph Story's *Commentaries on the Conflict of Laws* (1834), this Court, in recognizing the implied immunity of a public armed vessel of a friendly foreign state in a U.S. port, declined jurisdiction where important foreign governmental interests were at stake. *See The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812).[4]

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[4] *The Schooner Exchange* Court declined jurisdiction over the foreign vessel, which had taken shelter during a storm in the port of Philadelphia, despite the American libellants' plea for jurisdiction under the 1789 Judiciary Act, which provided that the district courts "shall also have exclusive original cognizance of *all* civil causes of admiralty and maritime jurisdiction." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (emphasis added). Chief Justice Marshall reasoned: "Those general

By the end of the nineteenth century, this Court had applied the principle of international comity to compel abstention in appropriate cases, honoring the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); *see generally* Estreicher & Lee, *supra*, at 190–97 (providing a summary of the history of international comity starting in the early 1800s).

The traditional principles from cases like *The Schooner Exchange* and *Hilton* have not always been carried forward to the present day in a fully coherent fashion. *See generally* Estreicher & Lee, *supra*, at 175–77 (providing a comprehensive overview of the problematic state of current law). Relying on indeterminate, manipulable multi-factor tests, U.S. courts lack a workable analytic framework to assist them in appropriately analyzing the growing number of foreign-cubed suits by foreign plaintiffs seeking to leverage the American judicial system to address wrongs they have suffered in their home countries.

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statutory provisions . . . which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction." *The Schooner Exchange*, 11 U.S. at 146.

A clearer analytical framework continues to be needed because international comity plays an essential role in focusing judicial attention on possible conflicts with U.S. foreign relations in permitting these essentially extraterritorial claims to proceed in U.S. courts. Cognate doctrines like the presumption against extraterritoriality can be helpful when dealing with federal laws, but they are not clearly applicable to state courts in international tort cases under state laws. The "act of state" doctrine plays a role where sovereign acts of foreign states are involved. And other avenues such as forum non conveniens ("FNC") emphasize litigation convenience, and in many jurisdictions lead to a strong bias in favor of resident plaintiffs (perhaps one reason the suit below was initially brought in Missouri state court).[5] Limits on personal jurisdiction can be invoked in appropriate cases, but having a U.S. corporation as defendant typically eliminates that obstacle.

The bottom line is that existing doctrines do not adequately further the need for international comity

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[5] As the Seventh Circuit recognized in *Macedo v. Boeing Company*, there is "a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point to trial in the alternative forum," especially where plaintiff has filed suit in his home forum. 693 F.2d 683, 688 (7th Cir. 1972). Litigation convenience is a paramount consideration in FNC determinations, but "[w]hen a plaintiff chooses a foreign forum for its claim, courts are reluctant to assume that convenience motivated that choice." *Empresa Lineas Maritimas Argentinas S.A. v. Schichau-Unterweser, A.G.*, 955 F.2d 368, 373 (5th Cir. 1987).

in U.S. courts that our history, tradition, and precedents prescribe.

II. The U.S. Courts of Appeals' Struggle to Adequately Address International Comity Concerns Demonstrates the Need for a Clearer Analytical Framework.

In the modern era, the U.S. Courts of Appeals have recognized international comity as an independent basis for abstention or dismissal in sensitive foreign relations cases dating back to the 1970s. *See, e.g.*, *In Re: Vitamin C Antitrust Litig.*, 8 F.4th 136 (2d Cir. 2021); *Ungaro Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004); *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 884 n.7 (5th Cir. 1982), *vacated on other grounds*, 460 U.S. 1007 (1983); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613–615 (9th Cir. 1976).

A. The Ninth Circuit's *Timberlane* Factors (1976)

The Ninth Circuit kicked off the modern era of international comity law in the mid-1970s, when it articulated a "multi-factor balancing test" in *Timberlane Lumber Company v. Bank of America, N.T. & S.A.*, 549 F.2d 597, 614–15 (9th Cir. 1976).

The *Timberlane* factors are as follows: (1) "degree of conflict with foreign law or policy"; (2) "nationality or allegiance of the parties and the locations or principal places of businesses or corporations"; (3) "extent to which enforcement by either state can be expected to achieve compliance"; (4) "relative sig-

nificance of effects on the United States as compared with those elsewhere"; (5) "extent to which there is explicit purpose to harm or affect American commerce"; (6) "foreseeability of such effect"; (7) "relative importance to the violations charged of conduct within the United States as compared with conduct abroad"; and (8) "whether in the face of [potential conflict], the contacts and interests of the United States are sufficient to support the exercise of . . . jurisdiction"). *Id.*

B. The Third Circuit's *Mannington Mills* Factors (1979)

The Third Circuit took a stab at revising the *Timberlane* factors in *Mannington Mills, Inc. v. Congoleum Corporation*, arriving at a ten-part test, instead of eight. 595 F.2d 1287, 1297–98 (3d Cir. 1979) ("The factors we believe should be considered include: 1. Degree of conflict with foreign law or policy; 2. Nationality of the parties; 3. Relative importance of the alleged violation of conduct here compared to that abroad; 4. Availability of a remedy abroad and the pendency of litigation there; 5. Existence of intent to harm or affect American commerce and its foreseeability; 6. Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; 7. If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; 8. Whether the court can make its order effective; 9. Whether an order for relief would be acceptable in this country if made by the foreign nation under

similar circumstances; 10. Whether a treaty with the affected nations has addressed the issue.").

The Ninth and Third Circuit's tests were well-intentioned attempts to operationalize traditional concerns respecting international comity, but unfortunately, they proved too unpredictable and manipulable to provide a workable framework.

C. The Second Circuit's Attempt to Refocus International Comity in *Animal Science II* (2021)

In 2021, the Second Circuit made an effort to gather together many of the relevant principles in international comity doctrine in *In Re: Vitamin C Antitrust Litigation* (more commonly referred to as *Animal Science II*), 8 F.4th 136 (2d Cir. 2021). In that case, before diving into the *Timberlane* and *Mannington Mills* factors, the court went back to first principles. The court wrote that, "[a]s a general matter, international comity 'takes into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law.'" *Id.* at 144 (quoting *In re Maxwell Commc'n Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996)). The appeals court further noted: "[F]oreign policy, reciprocity, comity, and limitations of judicial power are considerations . . . bearing on the decision to exercise or decline jurisdiction." *Animal Sci. II*, 8 F.4th at 144 n.9 (quoting *Mannington Mills*, 595 F.2d at 1296)).

In determining whether a district court has erroneously declined to dismiss an action on international comity grounds, the Second Circuit noted that it reviews "relevant questions of statutory interpretation de novo," *Animal Science II*, 8 F.4th at 142, when analyzing prescriptive comity—i.e., the authority to legislate. It applies essentially the same standard for adjudicative comity issues—i.e., the authority to adjudicate. *Id.* at 142 n.7 (noting that the case involved "prescriptive comity" and applying a de novo standard of review to "relevant questions of statutory interpretation," and that in reviewing a decision to decline jurisdiction as a matter of "adjudicative comity," the appellate court applies "an unusually rigorous abuse-of-discretion standard that leaves little practical distinction between review for abuse of discretion and review de novo" (internal quotation omitted)).

Animal Science II showed a special solicitude for the potential effect on foreign relations of an intrusive exercise of U.S. jurisdiction in a case to which China attached "great importance"—even though China was not a party—because China "perceive[d] th[e] case as threatening its rights as a sovereign to enact and enforce regulations governing Chinese companies conducting business within China's borders." *Id.* at 161. Furthermore, China had "already taken umbrage at the district court's treatment of its representations about the meaning and operation of its law." *Id.* Given the probability that "enforcement of a sizeable damages award and permanent injunction against defendants" would serve as a further "irritant" to China, and *in the absence of a*

view expressed by the U.S. Department of State, the Second Circuit panel concluded that China's reactions "tip[ped] in favor of dismissal for reasons of international comity." *Id.* at 162–63; *see also Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 392 (2d Cir. 2011) (the "public [interest] factor [in the FNC inquiry] of permitting Peru to apply its cap statute to the disbursement of governmental funds to satisfy the Award tips the [FNC] balance decisively against the exercise of jurisdiction in the United States."); *Acosta v. JPMorgan Chase & Co.*, 219 F. App'x 83, 87 (2d Cir. 2007) (public interest factor favors dismissal where resolution of case "will require extensive applications of both Uruguayan and Argentine law" and the "interest of the United States pales compared to the 'immense interest' of Uruguay" (citation omitted)); *Abad v. Bayer Corp.*, 563 F.3d 663, 671 (7th Cir. 2009) (Posner, J.) ("[T]he uncertainty of Argentine law is a compelling reason why this case should be litigated in Argentina rather than in the United States.").

D. A Proposed Clarification of the Analytical Framework for Comity Abstention

Today, multivariate balancing tests like *Timberlane* and *Mannington Mills* seem hopelessly indeterminate and readily manipulable to achieve outcome-driven ends.

Just because a certain test may in some instances be indeterminate, however, does not mean the function that the test serves is unimportant or should

be abandoned.[6] More concise and workable frameworks can be derived from existing precedents. For example, *Amicus* (with Professor Thomas H. Lee) has elsewhere proposed the following framework that distills existing federal common law on adjudicative comity into a straightforward test that leads to principled, workable results:

"Our proposed federal common law framework has four central elements: (1) deference to specific, well-considered State Department statements of interest regarding whether the court should exercise its jurisdiction in a particular case; (2) ascertaining the relevant practice of other nations—particularly the reciprocal practice of any nation directly implicated; (3) respecting applicable U.S. statutes or treaties indicating a strong U.S. sovereign interest in hearing the case, or . . . statutory authorization to ignore or displace foreign sovereign acts or interests; and (4) findings as to whether parallel proceedings have been commenced or concluded in an alternative foreign forum. These four elements . . . inform what U.S. courts should do in suits posing risks of significant tensions with other countries. They address what is called "adjudicative comity," as contrasted with "prescriptive comity" which deals

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[6] *See* Brief for the United States as *Amicus Curiae* Supporting Petitioner at 25, *Republic of Hungary v. Simon*, 592 U.S. 207 (2021) (No. 18-1447) (observing that the "categorical rejection of international-comity-based abstention likely would be harmful to the foreign-relations interests of the United States" and "domestic litigation against foreign sovereigns, by its nature, often raises serious foreign-policy concerns").

with the question of which substantive law to apply—whether a state has a sufficiently strong interests in a controversy or connection with the litigants such that its substantive law ought to apply irrespective of the interests of other states.'" Estreicher & Lee, *supra*, at 171–72 (emphasis omitted).

Consider the following evaluation of these factors, as they pertain to the Petition:

U.S. State Department Views. When the State Department files a Statement of Interest ("SOI") urging abstention or dismissal, that is ordinarily highly relevant, if not determinative, as in the Ninth Circuit's decision in *Mujica v. AirScan*, 771 F.3d 580 (9th Cir. 2014). But generally, the State Department "does not take positions regarding . . . litigation between private parties, unless required to do so by applicable law." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 554 n.5 (1987) (Blackmun, J., concurring in part and dissenting in part); *see also* Harold H. Koh, *Private Official Immunity After* Samantar*: A United States Government Perspective*, 44 Vand. J. Transn'l L. 1141, 1160 (2011) (view of the Obama Administration's Legal Advisor to the U.S. State Department that "no inference should be drawn from the State Department's decision not to intervene in the case").

In *Torres v. Southern Peru Copper Corporation*, 113 F.3d 540, 545 (5th Cir. 1997), a case virtually on all fours with this one save a Missouri resident plaintiff)—mining operations in Peru causing environmental harms in that country—the apparent absence of an SOI from the State Department did not

prevent the appellate court from affirming dismissal of the plaintiff's class claims on FNC and international comity grounds. As the district court noted: "This controversy involves approximately 700 Peruvian plaintiffs alleging injuries as result of SPCC's mining and smelting operations in Peru . . . The only connection Plaintiffs have shown to Texas is that SPCC's controlling shareholder, ASARCO, 'conducts operations' in Texas . . . . The challenged conduct is regulated by the Republic of Peru and exercise of jurisdiction by this Court would interfere with Peru's right to control its own environment and resources," despite Peru's "strenuous objection to the exercise of jurisdiction by this Court." *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 907–909 (S.D. Tex. 1996).

Inconsistency with U.S.–Peru Trade Protection Agreement. As the third factor in the Estreicher-Lee analysis suggests, international comity required the Eighth Circuit to consider seriously whether allowing the litigation to proceed in a U.S. court was consistent with the U.S.–Peru Trade Protection Agreement ("TPA"). Pet. App. 99a–123a.

The TPA covers environmental harms arising out of Peruvian operations, obliges both the U.S. and Peru to enforce their laws, and provides a protest mechanism in Article 18.8 for persons suffering such harms (other than the arbitration procedure for the TPA parties themselves).

Instead of addressing the TPA as a substantial bilateral framework for dealing with environmental harms in Peru, the Eighth Circuit engaged in an

essentially freewheeling, breezy interpretation of the TPA and its U.S. implementation law, Pub. L. No. 110-138, 121 Stat. 1455 (2007), to conclude that "dismissal is not required under the TPA."[7] Surely, a request for the State Department's views before issuing this blanket conclusion would have been in order. While a U.S. court is not bound by the interpretation of a treaty by the affected foreign state

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[7] The panel relied on Article 18.4(4) of the TPA, which provides: "Each Party shall provide persons with a legally recognized interest under its law in a particular matter appropriate and effective access to remedies for violations of that Party's environmental laws or for violations of a legal duty under that Party's law relating to the environment or environmental conditions affecting human health, which may include rights such as: (a) to sue another person under that Party's jurisdiction for damages under that Party's laws . . . ." From the "plain language" of this text, the Eighth Circuit inexplicably found "a pathway for the plaintiffs to sue the defendants under Missouri law." Pet. App. 8a. Since the relevant environmental laws arguably violated in this case are Peru's, absent some contrary indication from other provisions of the TPA, the negotiation history, or the TPA parties themselves, the reference to "that Party's jurisdiction" would seem to be to Peru's courts. *See also* Pet. App. 102a ("Nothing in this Chapter shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another party." (quoting Art. 18.3(5) of the TPA)).

The Eighth Circuit also invoked language in the TPA implementation statute: "No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent" with the TPA, 121 Stat. 1455, §102(b)(1); *see* Pet. App. 8a–9a. Since no Missouri law would "be declared invalid" by application of international comity abstention in this case, the relevance of the panel's observation is not evident. Pet. App. 8a.

or other TPA party, it has an obligation under *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.,* 585 U.S. 33, 34 (2018), and Federal Rule of Civil Procedure 44.1 to give at least "respectful consideration" to the views of the two TPA parties.

Relevant Practice and Views of the Foreign State Directly Involved. Plaintiffs in this case apparently did not contest the fact that Peruvian government officials made clear their opposition to the U.S. litigation. The Eighth Circuit dismissed these protests seemingly because of the absence of a formal declaration (meeting the court's unspecified standards) or some "direct[ ] assert[ion] of Peru's sovereignty." Pet. App. 10a. Such insistence on a particular mode of expressing opposition has no basis in federal comity decisions or State Department practice.[8] It also requires the foreign state to navigate unfamiliar American pleading practices to make its views known.

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[8] The Eighth Circuit also questioned whether plaintiffs have an adequate alternative forum in Peru, despite Petitioners' perhaps belated consent to personal jurisdiction in the Peruvian courts: "While the timeliness of the consent can be debated, the record also contains letters from Peruvian officials suggesting there does not appear an adequate forum or remedy available to the plaintiffs under Peruvian law." Pet. App. 10a. If the adequacy of Peruvian forum was material, and there was any doubt on this score, inquiries could and should have been put directly to Peru. *See also Torres v. S. Peru Copper Corp.,* 965 F. Supp. 899, 903, 909 (S.D. Tex. 1996) (noting "the Fifth Circuit has explicitly or implicitly concluded that Peru is an adequate alternative forum for purposes of *foreign non conveniens* rulings"; and so holding in an analogous litigation).

Parallel Proceedings. As discussed, the presence of parallel proceedings is a relevant factor because of the possibility of duplicative, wasteful actions and inconsistent determinations, and the need to accommodate the foreign state's interests. The *absence* of parallel proceedings, however, is *not* invariably relevant, and certainly it is not determinative as the Eighth Circuit would have it. There can be many reasons for the absence of such proceedings, such as plaintiffs' own decision in this case to sue in a U.S. court.

Truncating the International Comity Inquiry? Tellingly, the Eighth Circuit's emphasis on the absence of past or pending parallel proceedings in this case may reflect an attempt by that court (and the Eleventh Circuit decisions it cites) to reduce the international comity inquiry to cases of direct conflict with foreign proceedings or with formal State Department declarations. Other comity considerations are relegated to the "prospective international comity" category where they will be subject to a form of strict scrutiny. *See GDC Acquisitions, LLC v. Gov't of Belize,* 749 F.3d 1024, 1030, 1034 (11th Cir. 2014) ("Far more rarely, courts have applied international comity prospectively, without a conflicting past or present foreign proceeding"; vacating dismissal on prospective international comity because *that exceptional doctrine* does not apply to the commercial dispute in this case." (emphasis added)).

There is no basis in this Court's jurisprudence for this doctrinal divide between retrospective and prospective international comity, which if applied

mechanically (as the Eighth Circuit did below) disserves U.S. foreign relations interests in dealing with this new, growing arena of extraterritorial litigation, coming this way via state and federal courts.

III. CONCLUSION

For the reasons set forth above, this Court should grant the Petition.

Respectfully submitted,

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