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 THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ERICA T. KLENICKI
MICHAEL A. TILGHMAN II
NAM LEGAL CENTER
733 10th St., NW, Suite 700
Washington, DC 20001

JEREMY C. MARWELL
MATTHEW X. ETCHEMENDY
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6740
metchemendy@velaw.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: **Page(s)**

Statutes:

Other Authorities:

Other Authorities—Continued: **Page(s)**

Other Authorities—Continued: **Page(s)**

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae is the National Association of Manufacturers ("NAM"). The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs 13 million people, contributes nearly $2.9 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM is dedicated to manufacturing safe, innovative, and sustainable products that provide essential benefits to consumers while protecting human health and the environment. The NAM supports negotiating and implementing trade agreements in a manner that provides regulatory certainty and open markets for U.S.-manufactured goods, eliminates unfair barriers, sets fairer and stronger standards, diversifies sources for trade, and ensures supply chain resiliency. Similarly, the NAM supports clear standards for liability in litigation, and a stable and predictable legal environment for manufacturers.

---

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were given timely notice of the intent to file this brief.

The NAM has grave concerns about the Eighth Circuit's decision in this matter, and a strong interest in the outcome of the case. If the Eighth Circuit's decision stands, it threatens to invite a wave of foreign torts into U.S. courts, seeking to impose state-law standards on the overseas operations of foreign entities with U.S. parent companies—and to impose liability on those U.S. parents for overseas operations regardless of whether those operations comply with the law of the foreign country involved. Particularly in light of plaintiffs' ability to shop for preferred state-law forums, the Eighth Circuit's approach could seriously undermine the regulatory certainty U.S. manufacturers and other businesses need to invest in overseas operations. The NAM presents this brief to explain how the Eighth Circuit's decision threatens U.S. manufacturers and risks fostering an even worse litigation environment than the one this Court foreclosed in *Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931 (2021).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The decision below created a playbook for mass-tort plaintiffs alleging foreign harms to proceed in U.S. courts under U.S. state-law standards. In so doing, the Eighth Circuit blessed an end-run around the reasonable expectations of U.S. businesses that invest in foreign industrial or commercial operations. And by subjecting U.S. businesses with foreign subsidiaries to the risk of foreign tort litigation in U.S. courts, the Eighth Circuit's approach creates an acute disincentive to foreign investments of the kind Petitioners made here. Such disincentives to investment are,

however, precisely the opposite of what the United States needs. Open global markets and bilateral investment benefit U.S. businesses, supply chains, U.S. consumers, and foreign citizens and governments alike—facilitating productivity growth, employment, knowledge exchange, and research and development, both in the United States and overseas. Disincentivizing foreign investment by U.S. companies, as the Eighth Circuit's decision would do, would not only imperil those economic benefits, but could even lead to worse *environmental* outcomes in foreign countries. This Court's intervention is needed to prevent such deleterious consequences from materializing.

2. The Eighth Circuit's decision also threatens to turn back the clock on this Court's past efforts to cabin similar litigation with similarly harmful effects on U.S. businesses. As Petitioners observe, this litigation particularly echoes *Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931 (2021). And, from the standpoint of the U.S. business community, it presents many of the same practical concerns as the litigation in *Nestlé*. In fact, it presents some of those concerns even *more* acutely; if left to stand, the Eighth Circuit's decision could usher in an era of domestically litigated foreign mass torts even more burdensome than the (strikingly similar) Alien Tort Statute ("ATS") litigation *Nestlé* forbade. Among other things, the Eighth Circuit's decision opens the door to a wave of litigation seeking to impose liability on U.S. companies for their foreign affiliates' activities based on *state tort law* standards—exposing U.S. companies to potential liability under 50 different bodies of law. Worse, that approach will open up more options for abusive forum-shopping by

plaintiffs seeking to bring suit in the most favorable (to them) courts, and under the most liability-friendly substantive legal rules. This Court's intervention is needed to prevent such doctrinal backsliding.

3. Unfortunately, the decision below appears to create a blueprint for future plaintiffs to bring even more lawsuits akin to this one, including suits against companies that have done nothing wrong by the standards applicable in the countries where they have invested in industrial or commercial operations. Even blameless companies could easily be subjected to years of prohibitively expensive discovery under the Eighth Circuit's approach. Indeed, such litigation costs are particularly severe in cases like this—so much so that the opportunity to impose such costs on defendants (with accompanying pressure on defendants to settle even meritless claims) is a well-recognized incentive for plaintiffs to fight to maintain their claims in a U.S. forum. This Court should not leave unreviewed the Eighth Circuit's decision to expose U.S. companies to such burdensome and unpredictable litigation simply because they have invested in foreign operations.

ARGUMENT

I. The Eighth Circuit's Decision Threatens to Damage the Regulatory Stability That Is Necessary to Encourage Global Investment.

As Petitioners explain, this case concerns alleged injuries to Peruvians, in Peru, as a result of operations in Peru, occurring at facilities directly owned by a Peruvian company and regulated by Peruvian authorities. See Pet. 1. Ordinarily, then, one would expect the litigation to proceed in Peruvian courts, not a

federal district court in Missouri. In fact, the plaintiffs' sole basis for pursuing their claims in the United States is the lone fact that Doe Run Peru, the Peruvian owner of the metallurgical complex at issue, has U.S. parent companies—hence, the plaintiffs' strategic decision to sue numerous U.S.-based affiliates and officers, but not Doe Run Peru itself. See *id.* at 7; Pet. App. 2a, 4a. Yet despite such an attenuated connection to the United States or U.S.-based conduct, the district court and the Eighth Circuit allowed the suit to proceed beyond the pleadings stage. Pet. App. 3a. The litigation has already been exceptionally long and burdensome, with "more than 15 years" of proceedings, Pet. App. 92a, including extensive discovery involving "millions of pages of documents." Dkt. 545 at 28-29.[2]

The Eighth Circuit's decision to allow this litigation to proceed is gravely concerning. When U.S. companies invest in foreign industrial or commercial activities, they reasonably expect that litigation involving asserted environmental harms—or similar mass-tort claims focused on overseas operations and overseas injuries—will generally occur in the courts of the foreign jurisdiction at issue, absent an agreement stating otherwise or some other fact-specific reason why U.S. courts would be the logical, efficient, and expected forum. Here, however, the Eighth Circuit blessed an end-run around such expectations, and created a playbook for mass-tort plaintiffs alleging foreign harms to proceed in the United States, should they believe they

[2] Citations to "Dkt." herein follow the same conventions as the petition, referring to the district court docket entry (case 11-cv-44 (E.D. Mo.)), with page numbers corresponding to ECF-stamped pagination. Accord Pet. 5 n.1.

can secure strategic advantages by doing so. Under the Eighth Circuit's approach, little more seems to be required, in order for plaintiffs to avail themselves of this end-run, than the presence of U.S. parent companies.

In effect, then, the Eighth Circuit's decision burdens U.S. investment in overseas industrial or commercial activities, such as mining, manufacturing, and so forth, by imposing a new form of cost (or potential cost) associated with such investment. After all, rational companies must weigh the risk of exposure to such U.S.-based mass-tort litigation when making investment decisions. Broadly, the result is a disincentive to foreign investment—whether by generating costly and lengthy litigation seeking to hold overseas activities to U.S. state-law tort standards, or by disrupting the investment expectations among foreign nations and U.S. companies, such as the usual expectation (unless otherwise bargained-for) that the foreign nation's laws will generally apply to industrial or commercial activities in that country.

Perhaps worse, the Eighth Circuit's decision risks damaging the United States' relationship with foreign partners like Peru, which has understandably objected to this litigation proceeding in U.S. courts applying Missouri (rather than Peruvian) law. See Pet. 8-9 (describing objections by the Peruvian government to the litigation at issue); see also *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (observing how recent increases in extraterritorial suits have "generated," rather than alleviated, "diplomatic strife"). That, in turn, could cause the United States' trading partners to revisit their willingness to support open

investment environments. It is not unrealistic to fear that foreign governments may reconsider their adoption of "macroeconomic policy and legal framework[s] facilitating opportunities for investment" if the result is litigation that might require a U.S. trial court or common-law jury "to pass judgment on [those governments'] official acts and policies" in connection with environmental harms allegedly caused by industrial activities within their borders. Dkt. 545-3 at 3, 7 (communication from Peru regarding this case).

Such disincentives to investment are precisely the opposite of what the United States needs. Open global markets and bilaterial investment benefit U.S. businesses, supply chains, U.S. consumers, and foreign citizens and governments alike.

Domestically, direct foreign investment by U.S. businesses opens access to foreign markets, enabling sales to customers that U.S. manufacturers and other businesses could not otherwise reach, and generating revenues that can be re-invested domestically. See Comments of the National Association of Manufacturers 3-4, Dkt. No. USTR-2024-0002 (Apr. 22, 2024), https://perma.cc/527Z-YR3X (NAM comments submitted to Office of the U.S. Trade Representative on promoting supply chain resilience) (NAM Comments). Foreign direct investment also allows U.S. businesses to increase their competitiveness in foreign markets, both by gaining irreplaceable on-the-ground knowledge that allows them to create and sell more competitive products and by leveling the playing field against foreign competitors in those same markets. *Ibid.* The proof is in the numbers: U.S. parents, defined as U.S. resident entities owning 10% or more of

a foreign business enterprise, employed 30.2 million U.S. workers in 2022, accounting for 22.6% of total private industry employment in the United States. See News Release, Activities of U.S. Multinational Enterprises, 2022, Bureau of Econ. Analysis (Aug. 23, 2024), https://perma.cc/U652-QB4A. And they accounted for $5.3 trillion in value added—23.3% of the total for U.S. private industry. *Ibid*. U.S. parents similarly provided $448.9 billion in worldwide research and development expenditures in 2022. *Ibid.*

Just as the United States benefits from outbound investment by U.S. firms with foreign subsidiaries, it also benefits from reciprocal foreign direct investment *into* the United States, which supports millions of U.S. jobs, substantial U.S. exports, and capital and research and development investments. NAM Comments, *supra*, at 3. Majority-owned U.S. affiliates of foreign multinational enterprises employed 8.35 million U.S. workers in 2022, and performed $80.3 billion in research and development. See News Release, Activities of U.S. Affiliates of Foreign Multinational Enterprises, 2022, Bureau of Econ. Analysis (Nov. 15, 2024), https://perma.cc/87KZ-7KDE. They also contribute hundreds of billions of dollars annually to U.S. goods exports. *Foreign Direct Investment (FDI): United States*, SelectUSA, https://perma.cc/N8DR-5E97 (last visited Jan. 23, 2025) (reporting $412.1 billion in U.S. goods exports attributable to majority foreign-owned firms operating in the United States in 2021).

Foreign direct investment by U.S. businesses also provides a range of economic benefits to the host countries. That includes the straightforward economic

utility from infusions of monetary capital. But the benefits extend much further, to include transfers of technology or other new capital inputs, the development of human capital (e.g., better employee training), increased beneficial competition within the host country, and corporate tax revenues. See Prakash Loungani & Assaf Razin, *How Beneficial Is Foreign Direct Investment for Developing Countries?*, 38(2) Fin. & Dev. (June 2001), https://perma.cc/HED4-SVPC; see also Peter Kusek & Andrea Silva, *What Matters to Investors in Developing Countries: Findings from the Global Investment Competitiveness Survey*, in World Bank Group, *Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications* 19, 19 (2018) (*Global Investment Competitiveness Report*), https://perma.cc/SVJ4-ZR2E (noting benefits of "technology transfer, stronger managerial and organizational skills, increased access to foreign markets, and export diversification").

In fact, by disincentivizing U.S. investment overseas, litigation like this could ultimately—and most perversely—lead to worse *environmental* outcomes in foreign countries. "Importantly, foreign investors are becoming increasingly prominent players in delivering global public goods, addressing climate change, improving labor conditions, setting global industry standards, and delivering infrastructure to local communities." Anabel Gonzalez, Christine Zhenwei Qiang & Peter Kusek, *Overview*, in *Global Investment Competitiveness Report* 1, 1 (citation omitted); see also Binyam Afewerk Demena & Sylvanus Kwaku Afesorgbor, *The Effect of FDI on Environmental Emissions: Evidence from a Meta-Analysis*, 138 Energy Pol'y, No.

111192 at 11-12 (2020), https://perma.cc/P2CT-LYWS (meta-analysis finding a "significant inverse relationship between [foreign direct investment (FDI)] and emissions"—i.e., that "an increase in FDI reduces emissions"—thus "indicat[ing] that FDI does not only improve economic growth, but could also potentially reduce environmental pollution").

Indeed, arguably the best way to encourage long-term improvement in developing nations' environmental standards is through foreign investment that unlocks mutual economic benefits, facilitating the kind of development and prosperity that allows those countries to implement environmental standards on par with the United States'. See, *e.g.*, Gene M. Grossman & Alan B. Krueger, *Economic Growth and the Environment*, 110 Q. J. Econ. 353, 370-371 (1995). Lack of economic development, by contrast, can lock countries into destructive environmental practices. Cf. *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018) (opinion of Kennedy, J.) ("[A]llowing plaintiffs to sue foreign corporations under the ATS" may ultimately "deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights.").

Lawsuits like the one at issue here could even reasonably be construed as efforts to impose liability on businesses for investing in, or doing business in, certain countries, such as ones perceived to have poor human rights or environmental records. Intentionally or not, they may, at the limit, effectively "impose embargo[es] or international sanctions through civil actions in United States courts." *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d

Cir. 2009); see *id.* at 261 (plaintiffs' allegations "serve[d] essentially as proxies for their contention that [the defendant energy company] should not have made any investment in the Sudan"). Such quasi-sanctions are particularly harmful not only because of the economic consequences (e.g., reduced foreign capital investment) but also because they "interfere with the ability of the U.S. government to employ the full range of foreign policy options when interacting with regimes whose policies the United States would like to influence." Br. for United States as *Amicus Curiae* in Support of Pet'rs 21, *Am. Isuzu Motors, Inc.* v. *Ntsebeza*, No. 07-919, 2008 WL 408389, at *21 (U.S. Feb. 11, 2008). Consistent with that understanding, the State Department has often *encouraged* foreign investment for its potential to support positive reform in other countries. See *ibid.*[3]

The case at hand illustrates some of the benefits that can come from U.S. companies investing abroad. The environmental situation at La Oroya was dire in the mid-1990s. See Pet. 5. At the same time, the economic—and ultimately, human—costs of simply shutting down the metallurgical complex would have been severe. See *id.* at 5-6. Peru thus sought a foreign company to invest in the complex and fund environmental

[3] As one illustration, when the United States suspended sanctions against Burma in 2012, the Secretary of State encouraged American businesses to "[i]nvest in Burma and do it responsibly; be an agent of positive change and be a good corporate citizen"—noting that "these are important steps that will help bring the country into the global economy, spur broad-based economic development, and support ongoing reform." Hilary Rodham Clinton, Sec'y of State, Remarks with Foreign Minister of Burma (May 17, 2012), https://perma.cc/57KB-LA3G.

improvements while keeping the facility operational. See *ibid.*; see also Pet. App. 3a, 20a (describing Environmental Remediation and Management Plan). And, while the plaintiffs argue that Missouri common-law standards of care were not satisfied, the fact remains that Petitioners invested over $300 million on environmental upgrades and modernization, which ultimately yielded considerable environmental improvements in the area. See Pet. 7 (describing investments and improvements in environmental performance at the La Oroya complex, with record cites). Without the foreign investment that this lawsuit effectively seeks to penalize, there is every reason to believe the situation would have been worse from an environmental standpoint. Cf. *id.* at 6 (noting that potential buyers' fears of inherited environmental liability contributed to failure of Peru's initial auction).

II. The Eighth Circuit's Decision Invites State Tort Suits Even More Disruptive Than the Litigation This Court Foreclosed in *Nestlé*.

This is not the first time that mass-tort plaintiffs have pursued—or a court of appeals has endorsed—similar litigation strategies, presenting similar disincentives to foreign investment and commerce. As Petitioners observe, this litigation particularly echoes *Nestlé USA, Inc.* v. *Doe*, 141 S. Ct. 1931 (2021). And, from the standpoint of the U.S. business community, it presents many of the same practical concerns as the litigation in *Nestlé*. In fact, as explained further below, it presents some of those concerns even *more* acutely. Thus, if left to stand, the Eighth Circuit's decision could usher in an era of domestically litigated

foreign mass torts that would be even more deleterious than the ATS-based litigation *Nestlé* addressed.

In *Nestlé*, plaintiffs sought to sue U.S.-based defendants in domestic federal court for allegedly aiding and abetting slavery on Ivory Coast cocoa plantations. *Nestlé*, 141 S. Ct. at 1935. As here, the alleged harmful acts and injuries occurred overseas; plaintiffs' asserted basis for proceeding in U.S. court consisted of broad and generic allegations regarding corporate decision-making. *Id.* at 1935, 1937; *Doe* v. *Nestlé, S.A.*, 906 F.3d 1120, 1123 (9th Cir. 2018). Invoking the ATS, see 28 U.S.C. § 1350, the plaintiffs urged the federal courts to recognize a judicially crafted cause of action for aiding and abetting forced labor. *Nestlé*, 141 S. Ct. at 1936. This Court, however, held that such a lawsuit could not proceed under the ATS, because it was an impermissible extraterritorial application of the statute. *Nestlé*, 141 S. Ct. at 1936-37.

The basic similarities between *Nestlé* and this case are not subtle. Both involved allegations of harms suffered by foreign individuals in foreign countries, which arose from foreign commercial activities. And both were part of the same recognizable plaintiffs'-side litigation strategy. As the NAM and other trade associations observed in an *amicus* brief supporting the defendants in *Nestlé*, that case was one of "more than 150 ATS lawsuits" that had been filed in recent decades "against U.S. and foreign corporations for business activities in a wide range of industry sectors," with "[d]ozens of major U.S. corporations" having been targeted. Br. of *Amici Curiae* Chamber of Commerce of the United States of America, the National Association of Manufacturers, et al., at 24, *Nestlé USA, Inc.* v.

Doe, No. 19-416, 2020 WL 5501204, at *24 (U.S. Sept. 8, 2020). In other words, plaintiffs (or rather plaintiffs' counsel) were attempting to transform U.S. courts into worldwide mass-tort arbiters, applying U.S. legal standards to allegations of overseas harms. Cf. Br. for Pet'r Nestlé USA, Inc., at 2, *Nestlé USA, Inc.* v. *Doe*, No. 19-416, 2020 WL 5289315, at *2 (U.S. Aug. 31, 2020) (noting that *Nestlé* was part of a pattern of "plaintiffs * * * fil[ing] dramatically more-expansive suits" than Congress intended under the ATS, grounded on "scant connection to the U.S."). This Court's decision largely foreclosed such efforts under the ATS. Yet the same essential strategy is evident here.

Notwithstanding the clear similarities between the cases, the Eighth Circuit distinguished *Nestlé* principally on the ground that *Nestlé* involved the ATS, a federal statute, and not state law. See Pet. App. 10a-11a.[4] As Petitioners explain, the Eighth Circuit's analysis gave short shrift to the overlapping considerations that motivate both the presumption against extraterritoriality at issue in *Nestlé* and the adjudicatory comity doctrine at issue here. See Pet. 21. And the Eighth Circuit ultimately elided the reality that both doctrines reflect a similar exercise of judicial restraint as to what causes of action or what exercises of jurisdiction are appropriate for U.S. forums. Compare

[4] It bears noting that some commentators predicted a post-*Nestlé* shift in plaintiffs'-side strategy to "state courts" for litigation of this kind, given the major limits *Nestlé* placed on ATS-based litigation. Clara Petch, Note, *What Remains of the Alien Tort Statute after* Nestlé USA, Inc. *v.* Doe*?*, 42 Nw. J. Int'l L. & Bus. 397, 421 (2022).

Mujica v. *AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014) (Adjudicatory comity "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." (citation omitted)), with *Kiobel*, 569 U.S. at 116 (acknowledging that while the presumption against extraterritoriality is usually applied to statutes "regulating conduct," it should "similarly constrain courts considering causes of action that may be brought under the ATS"); see also *Yegiazaryan* v. *Smagin*, 143 S. Ct. 1900, 1908 (2023) (The presumption against extraterritoriality "reflects concerns of international comity insofar as it 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" (quoting *Kiobel*, 569 U.S. at 115)).

In addition, from a practical standpoint, the Eighth Circuit's decision opens the door to *Nestlé*-style litigation grounded in state common law that would be *even more* threatening to regulatory stability and foreign relations than similar litigation predicated on the ATS. As explained above, see *supra* Part I, legal stability and predictability are essential for foreign investment by U.S. businesses—indeed, they are prerequisites to the continued health of the business environment more generally. Lawsuits proceeding under judicially crafted standards pursuant to the ATS would, of course, be seriously problematic from that perspective. Nonetheless, even judicially created federal standards would theoretically provide *some* degree of legal uniformity for U.S. companies contemplating foreign investment—because once the contours of the relevant federal cause of action were established, a single

federal standard would apply. However, even that limited degree of uniformity would not exist if plaintiffs could sidestep *Nestlé* by bringing similar suits under state common law, as the plaintiffs in this case have sought to do.

State law is, of course, far from uniform. For starters, it varies a great deal on critical substantive tort doctrines, such as different contributory or comparative negligence rules that can have a huge impact on bottom-line liability (or lack thereof) for defendants. Compare, *e.g.*, *Diaz* v. *Carcamo*, 253 P.3d 535, 541 (Cal. 2011) (describing California's pure comparative negligence approach), with Tex. Civ. Prac. & Rem. Code § 33.001 (forbidding liability where claimant's percentage of responsibility is over 50%). And even where substantive rules of liability are ostensibly similar between states—e.g., the widespread adoption of generalized "reasonable care" standards—their development through state-specific precedent varies widely. Moreover, there is persistent variability as to evidentiary rules, such as whether and to what degree a state has adopted the *Daubert* standard (as opposed to the *Frye* standard, or some other standard) for the admissibility of expert witness testimony. See, *e.g.*, David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony* § 22:10 (West 2024-2025 Edition). This significant variability necessarily influences bottom-line outcomes in different forums, regardless of the underlying facts. And that, in turn, makes it all the more difficult, in contexts where state common law governs, for U.S. companies to predict which actions or investment decisions will or will not

subject them to liability.[5] Opening the door to a wave of state-law tort litigation seeking to impose liability on U.S. companies for their foreign affiliates' foreign activities would thus strike a serious blow to regulatory certainty.

And there are other, related problems with the approach the Eighth Circuit blessed here. In many instances, plaintiffs may be able to engage in forum shopping (whether by manipulating the choice of which specific U.S. entities to sue or otherwise), allowing them to select the most plaintiff-friendly state legal regime from a menu of options. There is also the possibility of multiple lawsuits regarding the same basic subject matter proceeding in multiple different forums, and thus under the laws of different states, with no clear mechanism for consolidation or other forms of procedural streamlining. All this is exacerbated by the lack of clarity regarding how to apply the adjudicative comity doctrine itself: As Petitioners note, the Eighth Circuit's approach to adjudicative comity aligns with the approaches of the Third and Eleventh Circuits but departs from other circuits, such as the Fifth and Ninth Circuits, on key points, see Pet. 14-21, thereby creating yet-additional points of

[5] Indeed, in part for this reason, the NAM has long supported legislation that guarantees federal preemption for federally approved products and services in national commerce, and that limits state tort lawsuits that unacceptably interfere with uniform and predictable federal regulatory regimes. See *Competing to Win* 7, National Association of Manufacturers (Feb. 2024), https://perma.cc/92PX-DWR4.

divergence among potential forums.[6] The consequence is a degree of confusion that could potentially make the ATS-focused litigation of the pre-*Nestlé* era look appealing by comparison.

That outcome simply is not tolerable from the standpoint of U.S. businesses that invest in foreign affiliates. Clarity in jurisdictional rules "promote[s] greater predictability," which "is valuable to corporations making business and investment decisions," *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010), and "generally reduces litigant costs," Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 Va. L. Rev. 1, 8 (2011); see also Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 Vand. L. Rev. 509, 522 (2012) (Clear jurisdictional rules "are also more predictable in their application, which may facilitate efficient bargaining in the shadow of the law."); cf. *Turner Ent. Co.* v.

---

[6] The Eighth Circuit's specific approach to analyzing adjudicatory comity also creates problematic unpredictability. For example, the Eighth Circuit appeared to place weight on details about the formalities of *how* Peru expressed its opposition to this litigation. See Pet. App. 10a (observing that the government of Peru had neither "submitted a declaration of its position in this case" nor "directly assert[ed] its sovereignty"). It did so despite the Peruvian government having previously made formal protests to the litigation at issue. See Pet. 17 (summarizing protests). Making the comity analysis dependent upon such unpredictable factual details—such as a foreign nation's chosen *form* of objection to litigation, rather than the substance of its objections—creates further uncertainty about where lawsuits can and will proceed. Such unpredictability and lack of clarity are issues that this Court can address and remedy by clarifying the nature of the comity inquiry, on which circuits are currently unclear and divided.

Degeto Film, 25 F.3d 1512, 1518 (11th Cir. 1994) (recognizing adjudicatory comity as a question of whether a court should "abstain from the exercise of jurisdiction").

Decisions like *Nestlé* have made significant strides in bringing jurisdictional clarity with respect to federal law and the presumption against extraterritoriality. See *Jesner*, 138 S. Ct. at 1407 (opinion of Kennedy, J.) (holding "that foreign corporations may not be defendants in suits brought under the ATS"); *Kiobel*, 569 U.S. at 124 (holding ATS does not apply extraterritorially); *Nestlé*, 141 S. Ct. at 1935-36 (holding suit for alleged tortious activity abroad, with "major operational decisions" allegedly made "from within the United States," sought improper extraterritorial application of the ATS). Yet the Eighth Circuit's decision here hinders, if not reverses, such progress by allowing plaintiffs to rely on state law and effectively bypass *Nestlé*. That outcome will only exacerbate litigation risk and regulatory uncertainty for U.S. businesses, producing *Nestlé*-like litigation with radically different (and potentially conflicting) results in different forums, even under similar facts. And the disparate nature of state common law will likely serve to hinder U.S. diplomatic and economic policies as well. Cf. *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003) ("[A]t some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations.'"). This Court's intervention is needed to prevent such doctrinal backsliding.

III. This Case Demonstrates the Adverse Consequences of Litigating Foreign Tort Claims in U.S. Courts under State Common Law Standards.

It will not take long for the investment disincentives and harmful regulatory uncertainty canvassed above to materialize. Unfortunately, the decision below appears to create a roadmap for future plaintiffs to bring even more lawsuits akin to this one, including suits against companies that have done nothing wrong by the standards applicable in the countries where they have invested in industrial or commercial operations. After all, the district court determined that, with the exception of one fact-specific defense, "Missouri law applies to the claims." Pet. App. 29a. Thus, under the Eighth Circuit's approach, suing a U.S. company for environmental, labor-related, or other alleged injuries stemming from the operations of a foreign subsidiary appears not to require *any* allegation of *any* violation of the laws of the relevant foreign country. Instead, falling short of one U.S. state's standards (in the judgment of one U.S. jury) would seem to suffice.

Many of the plaintiffs' theories in this case illustrate the problems with this approach, including the regulatory uncertainty that lawsuits of this kind would inflict. What constitutes a "reasonable" degree of environmental protection, or a "reasonable" pace of environmental improvement, under state common-law standards—for *overseas* operations in countries that may (on entirely reasonable grounds) have different expectations regarding environmental regulation? Cf. *Chavez* v. *Cedar Fair, LP*, 450 S.W.3d 291, 294 (Mo. 2014) (en banc) (articulating "ordinary negligence

rule" requiring "the degree of care of a reasonable person of ordinary prudence under similar circumstances"). The answer is largely in the eye of the beholder, particularly given that U.S. states do not have well-developed bodies of law concerning matters such as companies' duties vis-à-vis environmental standards for industrial operations in foreign countries. Cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in part and concurring in the judgment) (observing that "different courts in different nations will not necessarily apply even similar substantive laws similarly").[7] Simply put, the Eighth Circuit has paved the way for lawsuits that could well impose crushing liability on companies for the overseas activities of foreign subsidiaries that were entirely compliant with the laws and norms of the country in which they operated.

Again, the plaintiffs' filings in this case illustrate the point. The allegations in the amended complaint are strikingly vague and general. Indeed, they contain almost no factual assertions beyond ordinary corporate activity by Petitioners. See generally Dkt. 474. The allegations do not come close to establishing a legal nexus between Petitioners' domestic conduct and the alleged harms in Peru—the nexus is no greater than that found insufficient in *Nestlé*. Compare Pet. CA Br. 59-64 (documenting evidence showing no more than "ordinary corporate oversight" of Doe Run Peru's

[7] Much the same could be said for plaintiffs' allegations regarding "undercapitalization" of Doe Run Peru—a standard hardly free of subjectivity. See Dkt. 1233 at 70, 78-92 (Petitioners disputing the proposition that Doe Run Peru was undercapitalized under a variety of metrics).

conduct by Petitioners), and Dkt. 1233 at 52-92 (same), with *Nestlé*, 141 S. Ct. at 1937 (observing that "[p]leading general corporate activity" "do[es] not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct"). Nor does the amended complaint provide any factual color on the alleged harmful activities, save generalized assertions along the lines that Petitioners "created, emitted or caused, and/or allowed to be emitted * * * lead and other hazardous substances" and that this caused harm. Dkt. 474 at 22.

If such allegations are sufficient to survive the pleading stage—including motions to dismiss on grounds of international comity—then it would take little effort for enterprising plaintiffs' attorneys to subject companies to years of extremely expensive discovery, separate and apart from the potential costs of eventual liability. Notably, the risk of unacceptably high discovery costs is particularly acute in the context of foreign torts, given the difficulties of taking discovery about foreign conduct in relatively remote locations. Even under the best of circumstances, "obtain[ing] discovery from foreign sources" is almost invariably an "expensive, cumbersome, and difficult" endeavor, rendering the litigation "prohibitively expensive and resource-consuming." Mark P. Chalos, *Successfully Suing Foreign Manufacturers*, 44-NOV Trial 32, 36-37 (2008); see also Jack Auspitz, *Issues in Private ATS Litigation*, 9 Bus. L. Int'l 218, 221 (2008) ("Discovery is therefore vastly expensive, especially since such suits often involve several dozen defendants, their interactions with each other and

government agencies, claims going back dozens of years, documents in foreign languages and other similar logistical hurdles."). Indeed, the United States' generous discovery rules are one of the reasons why plaintiffs' attorneys fight to keep foreign tort suits in U.S. courts. See Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 Tex. Int'l L.J. 321, 323 (1994) (noting the factors, including "more extensive pretrial discovery than is available anyplace else in the world," that make the United States a "magnet forum" for foreign plaintiffs). Such suits also expose even blameless businesses to significant reputational harm. See Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009) (explaining the "synergy between litigation and other tactics," including "the contribution of [ATS] corporate lawsuits," in "pressuring" businesses).

All told, these factors—litigation costs and reputational harms, among others—often combine to impose significant settlement pressure on businesses, regardless of whether they bear culpability for the alleged misconduct. See Auspitz, *supra*, at 221 (noting that "cost[s] of the defence" and "keeping the names of the defendants in the public and associated with the allegedly tortious conduct" serve "to pressure defendants into settlement"); *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (describing South African apartheid litigation as "a vehicle to coerce a settlement"). This Court should not leave unreviewed the Eighth Circuit's decision to expose U.S.

companies, including companies that may have done nothing unlawful by any properly applicable legal standards, to such risks.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JEREMY C. MARWELL
MATTHEW X. ETCHEMENDY
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6740
metchemendy@velaw.com

ERICA T. KLENICKI
MICHAEL A. TILGHMAN II
NAM LEGAL CENTER
733 10th St., NW, Suite 700
Washington, DC 20001

Counsel for Amicus Curiae

JANUARY 2025