No. 24-601

IN THE

Supreme Court of the United States

THE DOE RUN RESOURCES CORPORATION, A NEW YORK CORPORATION; D. R. ACQUISITION CORP., A MISSOURI CORPORATION; MARVIN K. KAISER; ALBERT BRUCE NEIL; JEFFREY L. ZELMS; THE RENCO GROUP, INC.; IRA L. RENNERT; DOE RUN CAYMAN HOLDINGS LLC, A MISSOURI LIMITED LIABILITY COMPANY,

Petitioners,

v.

SR. KATE REID; MEGAN HEENEY, AS NEXT FRIENDS OF; A. O. A.; MEYLITH A. CASO ARROYO; Y. C. A.; A. C. C.; D. R. G.; J. R. G.; S. A. L.; JEAN P. QUISPE MORALES; B. Q. M.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

If the decision below stands, *Nestlé* is dead. Plaintiffs portray this case as a run-of-the-mill state-law tort action directed at what American corporations did in Missouri. But Plaintiffs' claims are about emissions in Peru from a Peruvian smelting facility operated by a Peruvian company that allegedly injured Peruvian citizens in Peru. The only "conduct" in the United States that Plaintiffs even *allege* is Defendants' supposed U.S. "decisionmaking," like expense approval. But *Nestlé* holds that, even when a parent company makes relevant decisions in the United States, that is insufficient to allow fundamentally foreign claims to proceed in U.S. courts. The legal issues presented here about the proper forum for Plaintiffs' suit warrant review now, before thousands of extraterritorial claims proceed further. The Eighth Circuit's decision allowing the case to remain in Missouri distorted adjudicatory international comity and the TPA beyond recognition in ways that, if left uncorrected, will allow plaintiffs to evade *Nestlé* simply by bringing their claims under state law and open U.S. courts to a flood of foreign tort litigation.

ARGUMENT

I. The Eighth Circuit's Ruling On Adjudicatory International Comity Presents Legal Questions Warranting This Court's Review.

A. The Eighth Circuit's decision implicates three circuit splits.

Plaintiffs' main argument against a split is that circuits agree on the three main factors guiding adjudicatory international comity. Opp.12-14; Pet.13. But Plaintiffs ignore that lurking just beneath the surface lie sharp disagreements, yielding divergent outcomes in materially identical cases. Pet.13-21. In particular, courts disagree on the role of parallel foreign proceedings, the respect due to the views of foreign governments, and the inferences to draw from the U.S. government's non-participation in a case. Pet.13-21.

So Plaintiffs deflect, arguing that everything looks the same if you don't look too closely. Opp.12-14. That is rather like suggesting there can be no circuit split on the application of the Fourth Amendment because everyone agrees it bars "unreasonable searches and seizures."

Plaintiffs next pretend the Eighth Circuit's elaboration of the adjudicatory comity doctrine does not implicate legal issues at all. Opp.11. But as both the district court and the Eighth Circuit concluded, this case presents "controlling questions of law on which there is substantial ground for difference of opinion." Pet.App.16a (citing 28 U.S.C. § 1292(b)). The conflicts

presented address critical aspects of adjudicatory international comity requiring this Court's resolution.

Parallel foreign proceedings. Plaintiffs admit that circuits approach adjudicatory comity differently, depending on whether a plaintiff has initiated parallel foreign proceedings. Opp.11-12.

The Third, Eighth, and Eleventh Circuits put a virtually insurmountable thumb on the scale *against* comity abstention in the absence of foreign parallel proceedings, permitting it only in truly "calamitous" cases. Pet.14-15. The Fifth and Ninth Circuits have rejected this approach—the Ninth Circuit over a dissent in *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014), *see* Pet.15, a point to which Plaintiffs offer no response. Thus, the Fifth and Ninth Circuits do not alter their analytical framework for adjudicatory comity based on whether there are parallel proceedings. Pet.15. This split is clear and warrants review.

Views of the foreign sovereign. The Eighth Circuit refused to credit Peru's formal protests of this litigation for one reason: because Peru expressed those protests diplomatically, to the executive branch, instead of "directly" to the judiciary "in this case." Pet.App.10a. There can be no dispute—and indeed Plaintiffs concede—that the Ninth Circuit in *Mujica* credited similar diplomatic démarches. Opp.14.

Plaintiffs try to avoid the split by distorting the Eighth Circuit's decision. First, Plaintiffs claim the Eighth Circuit found Peru's protests equivocal. Opp.14-15. The Eighth Circuit held no such thing. Pet.App.10a. Plaintiffs next argue that "the district

court reasonably exercised its discretion in weighing … 'competing letters'" from Peru. Opp.14; *see* Opp.18-19 (similar). But the Eighth Circuit did not embrace Plaintiffs' contention that Peru's formal protests did not represent the official views of Peru. Pet.App.10a. Plaintiffs' claim that two Peruvian congressmen expressed disagreement with Peru's executive branch, Opp.18-19, is not a proper basis to reject Peru's formal protest (as one of those congressmen explained himself in a prior appeal). *See* Letter at 6, *Reid v. Doe Run Res. Corp.*, No. 18-3552 (8th Cir. Jan. 29, 2019). This meritless distraction cannot sidestep the circuit conflict.[1]

Views of the U.S. government. The Eighth Circuit, breaking from other circuits, inferred from the U.S. government's "silen[ce]" that U.S. interests must weigh against dismissal. Pet.19-20. Plaintiffs embrace the Eighth Circuit's inference wholeheartedly. Opp.17. But no other circuit has articulated such an inference—which this Court and the State Department have repeatedly cautioned against. Pet.19-20.

Plaintiffs downplay this split. First, they incorrectly suggest Defendants told the Eighth Circuit *not* to solicit the views of the U.S. government. Opp.15. Defendants actually said the opposite: that if there was any uncertainty about the government's position, the court "could solicit the views of the U.S. government." CA8 Reply Br. 22-23. Defendants further

[1] Statements by Peru's U.S. lawyers in an arbitration proceeding between Defendants and Peru, Opp.15 n.4, do not contradict, and in any event could not supersede, Peru's formal diplomatic protests of this litigation.

explained, however, that the U.S. government had already expressed its view clearly in the TPA. *Id*. at 21-23. Moreover, Defendants argued explicitly that it was inappropriate to draw any *negative* inference from the government not filing a Statement of Interest—which is what the Eighth Circuit did. *Id*. at 22.

Second, while international comity turns principally on the sovereign interests of the United States and Peru, Plaintiffs focus on *Missouri's* supposed interests in the case. Opp.17-18. Those interests are minimally relevant, if at all. Missouri law would not extraterritorially govern the operation of the La Oroya facility even if Defendants directly operated it. Pet.23-24, 30. So Missouri has no interest in enforcing its laws in Peru—as Missouri, joined by 13 other States, confirms in its amicus brief. States Br. 3.

Plaintiffs' response to that point is irresponsible: They posit that Defendants must have *bribed* the Missouri Attorney General to take this position in the Eighth Circuit. Opp.18 n.5. It should come as no surprise that this wild accusation is baseless, as Defendants demonstrated below.[2] Repeating the unfounded charge here is especially preposterous given the chorus of 13 other States joining Missouri's position.

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[2] Plaintiffs allege a donation to Attorney General Bailey three months after Missouri filed its amicus brief. Opp.18 n.5. There was no such donation; one Defendant donated to a *Missouri PAC* (the Liberty and Justice PAC), which by law operates independently of any campaign. Defs.' Opp. To Plfs.' Mot. To Correct 2-3 (8th Cir. Oct. 20, 2023).

B. The Eighth Circuit's decision conflicts with *Nestlé*.

Plaintiffs do not even attempt to defend the Eighth Circuit's conclusion that *Nestlé* has no application to state law—because state law plainly does not apply extraterritorially. Pet.23. Instead, Plaintiffs double-down on the Eighth Circuit's legal error in characterizing Defendants' "decision-making in the United States" as sufficient to maintain this suit in U.S. court. Pet.App.11a. Although Plaintiffs claim "tortious conduct" in the United States, Opp.2, the most they assert is U.S. corporate "decisionmaking" as the basis for allowing this case about Peruvian emissions to proceed in Missouri. Opp.i, 5-6, 21-22. But that is the very reasoning this Court rejected in *Nestlé*. *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 634 (2021). The command of *Nestlé* is clear: Even if Doe Run Peru's U.S. corporate parents made relevant decisions in the United States (which they did not), that would not justify hearing a fundamentally foreign lawsuit in the United States. That is especially true here because the alleged U.S. financial decisionmaking has nothing to do with whether the La Oroya facility was operated negligently; such decisions at most relate to Plaintiffs' efforts to seek a veil-piercing *remedy*.

Plaintiffs fail to distinguish *Nestlé*. They suggest that the allegations and evidence here are more specific than in *Nestlé*. But the plaintiffs' allegations of U.S. decisionmaking there were far more specific than Plaintiffs suggest. *See Doe v. Nestle, S.A.*, 906 F.3d 1120, 1123, 1126 (9th Cir. 2018). Moreover, the claim in *Nestlé* that "every major operational decision by

both companies is made in or approved in the U.S.," 593 U.S. at 634, is functionally identical to Plaintiffs' narrative.

Plaintiffs also try to distinguish *Nestlé* because this case involves a summary judgment record. Opp.22. That is a distinction without a difference. The question for this Court is not what the summary judgment record shows. The petition instead presents a legal question of whether U.S. corporate decisionmaking is sufficient to maintain a tort action brought in the United States by foreign citizens regarding harms in their own country. *Nestlé* is clear that the answer is no.

This case illustrates just how mischievous Plaintiffs' end run around *Nestlé* is. Plaintiffs litigated these cases for 17 years, claiming decisionmaking in the United States. But the summary judgment record shows that to be an utter fiction. Plaintiffs have never been able to point to a single operational decision made in the United States. Nor have they been able to link any spending authorization in the United States to the alleged harms in Peru. Only 4% of Doe Run Peru's spending was subject to the cited approval process. Dkt. 1233 at 62. Moreover, Plaintiffs' own expert could not identify *any* environmental expense request that Defendants ever denied, Dkt. 1276 at 69, and Doe Run Peru spent over *$300 million* on environmental projects. That Plaintiffs' claims have nonetheless persisted for so long highlights the enormous practical cost of the Eighth Circuit's decision.

II. The Eighth Circuit's Egregious Misinterpretation Of The TPA Presents An Important Legal Question Warranting Review.

The Eighth Circuit's misinterpretation of the TPA—a question of law—undermines Peru's sovereignty, along with the sovereignty of the 16 other nations with whom the United States has nearly identical agreements. Plaintiffs say this error should be ignored because there is not yet a circuit split. Opp.11. But the Eighth Circuit ruled that the TPA *invites* foreign plaintiffs to sue in the United States over foreign environmental injuries, threatening to turn the United States into a universal tort forum.

The Eighth Circuit's ruling flies in the face of the TPA's text and structure. The TPA recognizes repeatedly that both the United States and Peru have "the sovereign right … to establish [their] own levels of domestic environmental protection and environmental development priorities." Art. 18.1. Thus, each country agreed to make available "judicial … proceedings" *in that country* to remedy "violations of [*that country's*] environmental laws." Art. 18.4(2); *see also* Art. 18.4(4). The TPA also protects each Party's sovereignty by making clear that it does not "empower [U.S.] authorities to undertake environmental law enforcement activities in the territory of [Peru]," Art. 18.3(5), and vice versa. *See* National Mining Association (NMA) Br. 8-9, 15-18 (explaining TPA's enforcement mechanisms and negotiating history). All of these provisions are about respecting the other sovereign's exclusive right to govern and enforce its environmental laws within its own borders.

Plaintiffs argue that their claims fall within TPA Article 18.4(4) because they have "'a legally recognized interest' under Missouri law." Opp.20-21. In other words, in Plaintiffs' view, the TPA requires "[*Missouri*] [to] provide persons with a legally recognized interest under [*Missouri*] law … appropriate and effective access to remedies for violations of [*Missouri's*] environmental laws." Art. 18.4(4).

Plaintiffs' argument strongly reinforces the need for this Court's intervention. To start, Plaintiffs do not have any protected interest under Missouri law because Missouri law does not apply extraterritorially in Peru—a point Plaintiffs do not directly dispute. Pet.23-24. The Eighth Circuit's contrary holding violates core constitutional principles. Compounding the obviousness of the Eighth Circuit's error, Missouri is not even a "Party" to the treaty, so the agreement does not pertain to Missouri law at all. *E.g.*, Art. 18.4(4) (domestic environmental enforcement obligations apply to "[e]ach Party"). Instead, when the TPA refers to a "Party's environmental laws," *id.*, it "means an act of Congress or regulation promulgated pursuant to an act of Congress." *See* Art. 18.14 (definitions); S. Rep. No. 110-249, at 32 (2007) (relevant laws are those "enforceable by the federal government," not the states); NMA Br. 14.

Plaintiffs try to evade review by citing the TPA's implementing statute, which says that "[n]o State law, or the application thereof, may be declared invalid … [a]s inconsistent with the Agreement." Pub. L. No. 110-138, § 102(b)(1), 121 Stat. 1455, 1457 (2007); Opp.21. But that provision has no bearing here, because Defendants make no preemption argument, nor

do they contend that Missouri law is invalid. Adjudicatory comity is not about displacing substantive law, but deciding which forum has a predominant interest in *adjudicating* the case under applicable law. That Missouri law does not apply extraterritorially in Peru has nothing to do with the TPA; this independent constitutional principle simply illustrates that Plaintiffs' attempts to shoehorn their claims into the TPA's text fail.

In short, the Eighth Circuit's misreading of the TPA is indefensible. As detailed further below, its egregious error has significant implications for international trade and diplomacy warranting immediate review.

III. This Petition Is An Appropriate Vehicle For Reviewing The Important Legal Questions Presented.

The decision below, if left intact, will transform foreign tort litigation in the United States and provide foreign plaintiffs a roadmap for evading this Court's extraterritoriality precedents. Pet.25-27. Numerous amici agree.

The National Association of Manufacturers explained how the Eighth Circuit's decision "create[s] a blueprint" for foreign plaintiffs "to impose liability on U.S. companies for their foreign affiliates' activities based on *state tort law* standards." NAM Br. 3-4, 12-19. As NAM notes, such suits may even be brought "against companies that have done nothing wrong by the standards applicable in the countries where they have invested in industrial or commercial

operations," *id.* at 4—as is the case here.[3] These adverse consequences are likely to harm foreign relations and disincentivize foreign investment. *Id.* at 4-12.

In a similar vein, the National Mining Association explained how the Eighth Circuit's misinterpretation of the TPA applies equally to trade agreements with 16 other countries. NMA Br. 19-20. This error consequently threatens to undermine these countries' expectations that the United States will respect their sovereignty, impacting future negotiation of these agreements. *Id.* at 19, 21. And it has reciprocal effects, allowing foreign courts to preside over fundamentally American disputes applying foreign law. *Id.* at 20-21.

Plaintiffs' principal response to all of this is to claim that "the questions presented seldom arise." Opp.24. But the Eighth Circuit's decision interprets a common trade agreement provision to affirmatively invite foreign plaintiffs to sue in the United States, renders international comity toothless to bar such claims, and holds that such claims are not extraterritorial even when their only connection to the United States is a corporate parent's U.S. decisionmaking. Pet.App.8a, 10a-11a. That decision will ignite an explosion of foreign litigation against U.S. companies—

[3] For example, Plaintiffs' principal complaint is that Defendants did not mitigate fugitive emissions sooner. Opp.3-6. But the PAMA obligated Defendants to make specific improvements in a specific sequence, Pet.6—and did not originally include any fugitive emissions projects. *See* Dkt. 1233-66.

particularly as foreign plaintiffs look to state-law tort claims to circumvent *Nestlé*. NAM Br. 14 n.4.

Plaintiffs try to evade review with a grab-bag of supposed vehicle problems. For example, Plaintiffs suggest that abstention was inappropriate because Peru is not an adequate forum. Opp.19. But that was not the basis for the Eighth Circuit's decision.[4] Nor did the Eighth Circuit mention judicial economy or fairness in its analysis. Opp.19. And the existence of distinct doctrines, Opp.24, do not weigh against review. Forum non conveniens, for example, protects convenience of the parties, not sovereignty.

Plaintiffs then urge this Court to wait until final judgment to decide where this case should be litigated. Opp.23-24. This makes no sense. Reviewing the Eighth Circuit's comity analysis *after* final judgment would be largely pointless; the damage would be done. It would be little comfort to say, after the fact, that a U.S. court should not have heard the case and violated Peru's sovereignty. Deferring review in a case of this magnitude means expending enormous resources continuing to adjudicate these claims—which also creates tremendous settlement pressure, running the risk that the Eighth Circuit's decision will *never* be reviewed.

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[4] The Eighth Circuit said in passing that Peruvian congressmen's letters suggested Peru was not an adequate forum Pet.App.10a. The cited letters do not say what the Eighth Circuit claimed, *see* Dkts. 640-85, 640-86, and the district court never found otherwise. Moreover, all Defendants have unambiguously consented to jurisdiction in Peru. *Compare* Opp.19; *with* CA8 Appellants' Br. 48 n.9; Dkt. 756 at 70 n.31.

As in *Nestlé*, this Court should not hesitate to grant review here where the legal question is whether the case should proceed in U.S. court at all. *See* 593 U.S. at 632 (reviewing decision reversing grant of motion to dismiss); *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 333-35 (2016) (same).

Finally, Plaintiffs smear Defendants with false narratives. As Plaintiffs concede, the environmental situation in La Oroya was dire *before* Doe Run Peru acquired the facility. Opp.3. Doe Run Peru complied with applicable law (the PAMA, Pet.6-7), poured over $300 million into fixing the facility (while keeping the facility operational, as Peru mandated), and dramatically decreased emissions—no matter how much Plaintiffs try to deny it. Dkt. 1233-58 at 8 (main stack lead emissions reduced by 68% and main stack arsenic emissions by 93%). Doe Run Peru's parent companies have nonetheless been mired in almost two decades of litigation in Missouri under Missouri law about claimed harms in Peru.

That situation is untenable. As the amici explain, the Eighth Circuit's framework for allowing foreign environmental claims like this to proceed in U.S. courts would trigger an onslaught of foreign claims that will chill environmental investment and "lead to *worse* environmental outcomes in foreign countries." NAM Br. 9 (emphasis altered). Review is needed, without delay.

CONCLUSION

This Court should grant the petition for a writ of certiorari, or, at minimum, request the views of the Solicitor General.

Respectfully submitted,

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