No. 23-1625

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SR. KATE REID, ET AL.,
Plaintiffs-Appellees,
v.

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

On Appeal from the United States District Court
for the Eastern District of Missouri (St. Louis)
No. 4:11-cv-00044-CDP, Hon. Catherine D. Perry

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INTRODUCTION

Plaintiffs bring Missouri common-law claims in an American court against American companies responsible for the lead emissions that poisoned them. The political branches have not barred those claims. Congress enacted no statute preempting them. Nor did it pass any law stripping U.S. courts of jurisdiction over them. The Executive Branch negotiated no treaty blocking those claims. And the State Department repeatedly has declined to object to them. Simply put, no federal law says anything about ejecting Plaintiffs' claims from U.S. courts.

So Defendants ask this Court to do what the political branches have not. These American companies and their American executives would rather litigate in Peru, thousands of miles from home. To get there, they invent a series of foreign-policy dilemmas and ask this Court to solve them by forcing the district court to abstain. That request rests on a novel doctrine that few circuits have ever endorsed and that only the Ninth Circuit today still employs. It tells courts to balance U.S. and foreign interests, predict how a given lawsuit might affect those interests, and then surrender their jurisdiction if they think the lawsuit will provoke diplomatic calamity. This Court need not decide whether to adopt the Ninth Circuit's dubious abstention doctrine because, even if it applied here, its factors weigh against abstention. Indeed, the district court spent nearly 40 pages weighing the relevant

sovereign interests before declining to abstain. Under any circuit's test, the court's careful analysis reflects no abuse of its broad discretion.

The U.S.-Peru Trade Promotion Agreement ("TPA"), which forms the centerpiece of Defendants' appeal, shows why abstention is unwarranted. Nothing in the TPA's text ousts private tort litigation from U.S. courts. To the contrary, the TPA's implementing statute contains a saving clause preserving state-law claims just like these. And a related provision allows only the United States – not private tort litigants – to raise an asserted conflict with the TPA as a litigation defense. Defendants' request for TPA-based abstention usurps that authority. Had the United States intended to funnel private tort claims into Peru's courts, it would have said so in the agreement itself – as it has done in other contexts.

The district court properly rejected Defendants' other arguments. It balanced the interests Defendants cite and determined they are not exceptional enough to warrant abstention. That judgment merits deference. Indeed, only one appellate decision has ever reversed a district court for declining to abstain on the grounds Defendants urge, and it did so because the State Department implored it to. This case is not comparable. The State Department's silence, plus the conflicting indicia of Peru's interests, reasonably led the district court to keep jurisdiction. And no evidence backs up Defendants' speculation that continuing to litigate this 15-year-old case suddenly will spark a foreign-policy crisis.

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Alternatively, the Court can affirm by rejecting Defendants' abstention doctrine altogether. Congress, not the judiciary, decides the scope of federal jurisdiction. And Congress has not authorized judges to throw out cases whenever they think a vague foreign-policy analysis demands it. Defendants' position flouts that principle, defies settled limits on abstention, and urges a jumbled multifactor test that is unworkable in practice. Other doctrines – including forum non conveniens, which Defendants have forfeited – already provide tools for screening out cases that belong elsewhere. This Court should not invent a new one.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by declining to abstain on international-comity grounds.

Most apposite cases: *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193 (9th Cir. 2017); *GDG Acquisitions, LLC v. Government of Belize*, 749 F.3d 1024 (11th Cir. 2014). The most apposite statutory provisions are reproduced in the Addendum. *See* 19 U.S.C. § 3805(a); 19 U.S.C. § 3805 note.

2. Whether adjudicative international comity furnishes a lawful basis for abstention without a parallel foreign proceeding.

Most apposite cases: *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *Gross v. German Found. Indus. Initiative*, 456 F.3d 363 (3d Cir. 2006).

STATEMENT OF THE CASE

A. Factual Background

1. This case is about state common-law torts committed by American corporations and their American executives. Defendants are billionaire Ira Rennert; several of his companies, including Missouri-based Doe Run Resources Corporation and The Renco Group, Inc. ("Renco"); and three former U.S.-based Doe Run Resources executives. Add.11-15.[1] Rennert is Renco's CEO and majority shareholder. R.Doc.640-57 at 5.[2] He "controls [Renco] and its subsidiaries." *Id.*

In 1994, Renco acquired Doe Run Resources, a St. Louis-headquartered company that operated a lead smelter in Herculaneum, Missouri. R.Doc.640-58 at 27; R.Doc.871-2. Rennert's new company faced a bleak future. The aging smelter required costly upgrades to meet stringent environmental standards, R.Doc.871-10 (Dep.67:25-68:6), and U.S. and Missouri regulators had fined Doe Run Resources for environmental violations, R.Doc.871-6. Dozens of local children who suffered from lead poisoning also had sued Doe Run Resources for negligence. App.228; R.Doc.640-2 (Dep.53:17-55:1). The mounting legal scrutiny imperiled Doe Run Resources' ability to continue turning a profit. App.76; R.Doc.640-3 at 3.

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[1] "Add." references cite Defendants-Appellants' Addendum.

[2] Record citations use the ECF-header pagination.

So Defendants went abroad to do what they could not do in Missouri. In 1997, at Rennert's direction, Defendants bought a metal smelting and refining complex in the remote mountain town of La Oroya, Peru. R.Doc.843-14; App.227; R.Doc.640-2 (Dep.50:9-16). Because Peruvian law required the purchaser to be a Peruvian company, Renco and Doe Run Resources formed Doe Run Peru to hold the smelter's assets and liabilities. R.Doc.1233-40 at 4.

Even before the acquisition, it was "obvious" to Defendants that the smelter's emissions had left La Oroya "highly contaminated." App.110; R.Doc.640-8 (¶ 10). From a 1996 assessment, they knew the smelter's main stack spewed "roughly 2.5 tons of lead" into the air every day, while other sources leaked "significant quantities" of "fugitive" emissions.[3] App.169; R.Doc.1233-15 at 28; *see* R.Doc.1277-62 (Dep.113:5-24). Defendants' consultants similarly warned them before the purchase closed in 1997 that the smelter was "not in compliance with [Peru's] ambient air lead standard" and that "fugitive emissions" were a big reason why. App.249; R.Doc.1279-S-8 at 10; R.Doc.1277-55 (Dep.57:3-59:11).

In buying the smelter, Defendants assumed obligations under a Peruvian emission-control plan called "PAMA." Add.8-9. Developed by Peru's Ministry of Energy and Mines, PAMA required Defendants "to reduce or eliminate emissions"

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[3] Fugitive emissions escape during the smelting process without passing through controlled emission points. R.Doc.1277-69 at 10 n.7.

to "comply with [Peru's] Maximum Allowable Levels." App.176; R.Doc.1233-20 at 6. The smelter's PAMA plan prescribed upgrades to "allow[]" the smelter to meet Peru's air-lead standards within 10 years. App.186; R.Doc.1233-20 at 16. The required projects included remediating contaminated areas, containing lead byproducts, and building sulfuric-acid plants. App.187-94; R.Doc.1233-20 at 17-24. Those steps did not set a ceiling; Defendants were encouraged to propose changes or take other measures too. R.Doc.871-124; R.Doc.1233-21 at 9.

2. Defendants did not reduce the smelter's emissions as PAMA required. Instead, they ramped up lead production, causing toxic emissions to soar. App.164, 165; R.Doc.1214-1 at 23, 28. La Oroya's air quality "deteriorated dramatically." R.Doc.1277-69 at 25. By 2004, air-lead levels near the plant exceeded 3.5 $\mu g/m^3$ – seven times Peru's annual standard. App.198, 200; R.Doc.1277-34 at 98, 217.

The lead the smelter emitted did not stay in the air; it poisoned the children living nearby. The Centers for Disease Control and Prevention ("CDC") and others found that "virtually the entire childhood population" of La Oroya had blood-lead levels far above dangerous levels. App.161; R.Doc.871-70 at 24; *see* R.Doc.1229-13 at 10-11. All agreed on the cause: "lead particles that are emitted by [Defendants'] metallurgical plant" – not historic emissions or other sources – were "the main reason for" those "blood lead levels." R.Doc.1233-23 at 34. The CDC thus stated that "[r]educ[ing] air lead emissions" should be the smelter's

"most immediate priority," because "no other interventions will have a great impact." App.158-59; R.Doc.871-70 at 14-15.

Defendants did not reasonably implement those recommendations. Add.22-23. They did not even attempt to address fugitive emissions until 2005, when Rennert declared in St. Louis that "the company need[ed] to develop a long term plan regarding lead abatement." App.235; R.Doc.871-71 at 5. Defendants then asked Peru's Ministry of Energy and Mines for a four-year delay in constructing sulfuric-acid plants – the costliest PAMA project – while proposing four other belated projects to reduce fugitive emissions. R.Doc.1233-66. The proposal admitted that fugitive emissions were "a significant source of contamination that was not being controlled." *Id.* at 3. The Ministry granted the extension but criticized Doe Run Peru's "lack of precaution and failure to comply with the progress that the company should have made." App.213-14; R.Doc.1277-75 at 5-6.

As Plaintiffs' experts testified, Defendants' tardy effort to reduce fugitive emissions was too little too late. R.Doc.1225-1 at 12-14; R.Doc.1277-34 at 135, 148-55. An independent panel agreed in 2006, finding that Defendants' "existing measures to collect fugitive emissions" were "inadequate" to address the "severe health problem" they had caused by releasing toxic emissions for eight years. App.205, 208; R.Doc.1277-73 at 60, 116. The panel urged Defendants to devise

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"[l]ong-term plans to further reduce emissions beyond those indicated in the PAMA extension request." App.204; R.Doc.1277-73 at 21.

Defendants never made such a plan. Instead, they closed the smelter in 2009, thrusting Doe Run Peru into bankruptcy the next year. R.Doc.640-6 at 18-21. Defendants also never met their PAMA obligations. R.Doc.1233-58 at 6. During the decade that Defendants operated the smelter, nearby air-lead levels always were at least double Peru's legal limit. App.200; R.Doc.1277-34 at 217.

The results were catastrophic. Plaintiffs were children who lived in or near La Oroya when Defendants controlled the smelter. Add.9. Each experienced lead poisoning as a child and today suffers from irreversible cognitive impairments, including learning disabilities and memory loss. R.Doc.1229-2; R.Doc.1229-11. These injuries stem from sustained childhood exposure to the lead that Defendants' smelter emitted. R.Doc.1229-11.

3. Defendants' U.S. conduct caused the smelter's toxic emissions. Add.55-59. Acting from St. Louis and New York, Rennert "controlled" Doe Run Peru through "operating guidelines" that gave him the final say over the smelter's operations. App.122; R.Doc.640-10 at 1. The other individual Defendants – U.S. residents Jeffrey Zelms (Doe Run Resources CEO), Marvin Kaiser (its CFO), and Bruce Neil (Doe Run Peru GM and later Doe Run Resources CEO) – implemented Rennert's directives. R.Doc.1279-S-3; R.Doc.1277-60 (Dep.58:13-23).

Defendants micromanaged Doe Run Peru from the United States in many ways. Add.34-39. For example, they required the company to obtain permission before spending money – even for minor expenses like renting a pickup truck. App.129; R.Doc.640-22 at 4; R.Doc.640-25. Under Defendants' policy, Doe Run Peru's expense requests were "forwarded to St. Louis for review and approval" by Kaiser, Zelms, and, ultimately, Rennert. App.131; R.Doc.640-22 at 6. That approval policy extended to lead-abatement measures. App.129; R.Doc.640-22 at 4.

Defendants often denied Doe Run Peru's requests for funds to implement controls to reduce emissions. In 2004, for example, Doe Run Resources denied a request for funds to upgrade the smelter's bag house, a common emissions-capture system. App.255; R.Doc.1279-S-57 at 8. In 2006, a Renco executive likewise rejected a Doe Run Peru request to increase funding for a PAMA project designed to "reduce[] fugitive dust emissions." App.258; R.Doc.1279-S-60 at 13.

Defendants also ensured the smelter's continued toxic emissions by depriving Doe Run Peru of the capital it needed to meet its PAMA obligations. Add.55-59. Within hours of buying the smelter, Defendants executed several loans obligating Doe Run Peru to repay the smelter's $247 million price tag, plus interest. R.Doc.1229-16 at 58-61. That maneuver deprived Doe Run Peru of funds Defendants had promised for PAMA projects and left it undercapitalized at inception. *Id.* Defendants similarly forced Doe Run Peru to make more than

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$100 million in intercompany payments to Doe Run Resources (and Renco) for U.S.-based services ranging from "[o]n site senior management" to "support for operational activities." R.Doc.640-37; *see* R.Doc.1229-16 at 25-51.

Defendants knew their conduct deprived Doe Run Peru of the money needed to control emissions. Add.33-34. Shortly after the acquisition, Daniel Vornberg, who headed environmental affairs for Doe Run Resources and Doe Run Peru, warned that the latter's intercompany debts meant it "CANNOT finance all of the PAMA projects . . . out of cash flow." App.147; R.Doc.871-38 at 1. Meanwhile, Defendants knew the smelter's emissions were poisoning nearby children. Rennert met monthly with Doe Run Resources and Doe Run Peru executives in St. Louis to discuss the smelter. App.234-35; R.Doc.871-S-71 at 4-5; R.Doc.1279-S-36; R.Doc.640-5 (Dep.201:12-24). At these and other meetings, Zelms, Kaiser, and Vornberg discussed how to address the "critical issue[ ]" of "[h]igh blood leads [sic] in the children in La Oroya." R.Doc.1279-S-32. Rennert and Doe Run Resources personnel also regularly traveled to Peru to inspect the smelter and La Oroya's air-lead levels. R.Doc.1279-S-16; *see* R.Doc.640-44 (Dep.238:6-239:11).

Yet Defendants continued to siphon off the money Doe Run Peru needed to curtail the toxic emissions responsible for those blood-lead levels. Add.32-34. In 2001, for example, a Doe Run Peru executive advised Kaiser that its "heavy interest burden" on its intercompany loans had "brought into question our ability

to meet PAMA requirements." R.Doc.871-42 at 2. Kaiser still insisted that Doe Run Peru pay Doe Run Resources $3 million "as originally requested." *Id.* at 1.

Defendants similarly fought efforts to curb emissions. Vornberg traveled to Peru in 1999 to "convince[ ]" Peruvian officials "it will take [the smelter] 25 years to achieve air lead standard if ever." App.149; R.Doc.871-65 at 1. Rather than back measures to achieve that standard, Vornberg peddled a toothless "community intervention program" and "implored" local officials not to "test and scare." App.149-50; R.Doc.871-65 at 1-2. Consistent with that misdirection, Doe Run Resources personnel often falsely blamed the lead poisoning on other sources. R.Doc.1225-1 at 17. Through such decisions, made at "offices in Missouri and New York," Defendants "caused [Doe Run Peru] to emit toxins and other harmful substances at levels harmful to plaintiffs." Add.54.

B. Procedural History

1. This "long and complicated" case traces to 2007, when Plaintiffs brought Missouri common-law tort claims in Missouri court. Add.4. Defendants removed the case, but the district court remanded because Plaintiffs alleged "only Missouri state-law claims." *A.A.Z.A. v. Doe Run Res. Corp.*, 2008 WL 748328, at *2 (E.D. Mo. Mar. 18, 2008). The remand order did not resolve Defendants' initial motion to dismiss, which had sought dismissal based on forum non conveniens,

international comity, and other grounds. *See A.A.Z.A. v. Doe Run Res. Corp.*, No. 4:07-CV-1874-CDP, ECF #35 at 2-4 (E.D. Mo. Dec. 17, 2007).

Three years later, Defendants removed the case again, this time based on a 2011 arbitration Renco had commenced against Peru. Add.5. The district court declined to remand and refused to stay the case pending the arbitration. *Id*. On interlocutory appeal, this Court affirmed. *See Reid v. Doe Run Res. Corp.*, 701 F.3d 840, 842 (8th Cir. 2012). In affirming the stay denial, the Court rejected Defendants' argument that Plaintiffs' claims hinged on Peru's environmental policies, explaining that those claims "do not . . . arise from PAMA" and "do not relate to the practices of" the Peruvian state-owned company that sold Defendants the smelter. *Id.* at 847. Rather, a jury need only "consider whether each defendant sufficiently caused the children's injuries according to the applicable law." *Id.*

2. In 2017, Defendants again moved to dismiss. R.Doc.543. They did not renew their forum-non-conveniens defense.

The district court denied the motion. The court first held that Missouri law applied. App.50; R.Doc.949 at 50. The court discerned no conflict between Missouri and Peruvian law, but if a conflict arose, "Missouri law would still control" due to "the allegations of wrongdoing in Missouri by Missouri corporations and citizens." App.50-51; R.Doc.949 at 50-51.

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As for international comity, the court found that U.S. and Peruvian "sovereign interests" did "not advocate for dismissal." App.55, 58; R.Doc.949 at 55, 58. That was because Defendants are U.S. residents based largely in Missouri, and Missouri "has a cognizable state interest in regulating the conduct of its citizens." App.59-60; R.Doc.949 at 59-60. The court further identified no true conflict warranting abstention. App.60; R.Doc.949 at 60. And it rejected the argument that the TPA compelled abstention. App.60-61; R.Doc.949 at 60-61.

3. In 2021, after years of discovery, Defendants sought summary judgment under Peruvian law and renewed their request for dismissal based on international-comity abstention, preemption, and the act-of-state doctrine. R.Doc.1231. They did not raise forum non conveniens. After considering the voluminous evidentiary record, the court denied the motion. Add.1-80.

The district court first revisited its choice-of-law analysis. The court reaffirmed that Missouri law largely governs, because "the laws of Missouri and Peru" do not "conflict on the torts alleged." Add.23. There was one exception: the court held that Peruvian law governs Defendants' "immunity *defense* under Article 1971" of Peru's Civil Code. *Id.* That ruling allowed Defendants to claim immunity "so long as they complied with the requirements of the PAMA." *Id.* But the court denied summary judgment on that defense, observing that "[w]hether defendants fully complied with PAMA is itself disputed." Add.27.

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The court then again declined to abstain on international-comity grounds. Add.48. The court rejected Defendants' argument that there was a "true conflict" between U.S. and Peruvian law. Add.51. In weighing that factor, the court did not resolve "[w]hether a true conflict is an absolute requirement or merely a factor to consider" in a comity analysis. *Id.* The court also "agree[d] with defendants that the nexus between the challenged conduct and the United States is critical," Add.54, but it identified substantial evidence that the "tortious conduct" reflected "conduct and decisions made in the United States," Add.59.

The court "continue[d] to disagree" with Defendants' reading of the TPA. Add.60. It held that the TPA's "plain language" supports "jurisdiction over plaintiffs' claims . . . that United States defendants violated Missouri law." Add.62. The court also found no tension with the TPA because "plaintiffs' claims do not hinder Peru's ability" to set environmental policy. Add.73.

The court further discerned "nothing . . . showing that the powerful diplomatic interests of the United States and Peru are aligned in supporting dismissal." Add.66. In assessing Peru's interests, the court was unpersuaded by "competing letters" from "Peruvian officials," noting they "were contradictory and were obtained for purposes of this litigation." Add.63-64. "Notably absent" from the record, the court observed, was any credible "articulation that [Peru's] sovereign interests are jeopardized by this Court's exercise of jurisdiction."

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Add.66. As for U.S. interests, "the State Department has thus far remained silent." *Id*. Accordingly, the court found Defendants had "failed to identify 'exceptional circumstances' justifying what would be a rare surrender of jurisdiction." Add.67.

The court last rejected Defendants' argument that "the presumption against extraterritoriality forecloses the application of Missouri common law." Add.68. As the court noted, Defendants offered no decision "that has found that state common law does not apply extraterritorially." Add.70.[4]

Citing the "controlling questions of law" its ruling implicates, the court certified its order for interlocutory review. Add.75. This appeal followed.

SUMMARY OF ARGUMENT

I. If Defendants' proposed form of abstention is ever justified, it is only when U.S. adjudication will trigger a diplomatic crisis. The district court did not abuse its discretion in declining to abstain.

A. The U.S.-Peru TPA provides no basis for abstention. Unlike other international agreements, the TPA contains no preemption or jurisdiction-stripping clause. The TPA's text does not address private litigation at all, much less specify an exclusive venue for such litigation. The TPA's implementing statute, which bars private parties from raising the TPA as a litigation defense, further confirms

[4] The district court also rejected Defendants' act-of-state and foreign-affairs-preemption arguments. Add.70-74. Defendants do not appeal those rulings.

that the TPA cannot displace state-law tort litigation from U.S. courts. Defendants ignore the implementing statute. And their other arguments misread the TPA's text and disregard ordinary conflict-preemption principles.

B. The district court correctly analyzed the other international-comity factors and discerned no foreign-policy catastrophe compelling abstention. The State Department has stayed silent throughout this 15-year-old litigation, despite Defendants' efforts to persuade it to intervene. The court thus properly declined to credit Defendants' speculation that this lawsuit will imperil U.S. foreign policy. Missouri's interests likewise disfavor abstention because Plaintiffs' claims are against Missouri defendants under Missouri common law. As for Peru's interests, Peru declined to file an amicus brief urging dismissal. The dueling letters Defendants cite instead – which they secretly obtained for litigation – are hardly authoritative expressions of Peru's sovereign interests. Other, conflicting letters cited below better articulate Peru's interests: to let injured Peruvian children seek damages in their preferred U.S. forum from the U.S. tortfeasors that harmed them.

At Defendants' urging, the district court also searched for but found no "true conflict" between Missouri and Peruvian law. That disfavors abstention under Defendants' own cases. The court did not treat a true conflict as a prerequisite to abstention, and every case agrees that the absence of true conflict is at least a factor. It weighs against abstention here. Indeed, the court allowed Defendants to

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assert an immunity defense if they complied with relevant Peruvian law. The availability of that defense forecloses any serious threat to Peru's sovereignty.

C. The federal statutory presumption against extraterritoriality does not affect this case. No such presumption attaches to Missouri common-law claims. But even if the federal presumption applied, it would not support abstention because Defendants are U.S. citizens whose U.S. conduct caused Plaintiffs' injuries. Defendants cannot persuasively analogize the ample evidence of their U.S. conduct to the bare-bones allegations of generic corporate activity in *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021). In straining to make this case look like *Nestlé*, Defendants mostly nitpick the district court's view of the evidence. Such factual disputes offer no basis for granting summary judgment and even less a basis for reversing an international-comity ruling on interlocutory review.

II. This Court need not decide whether Defendants' proposed abstention doctrine is valid. But if the Court does reach that question, it should reject the doctrine. The Supreme Court allows federal courts to surrender their jurisdiction only in exceptional circumstances, and international-comity abstention does not qualify. Adopting Defendants' novel doctrine would breach abstention's settled limits, upset the separation of powers, create an unmanageable multifactor test, and ask judges to become foreign-policy prognosticators. None of that is necessary. Courts already have tools for dismissing cases that belong elsewhere, such as

forum non conveniens and the act-of-state doctrine. The Court should not invent a new doctrine just so Defendants can dodge accountability in U.S. courts.

ARGUMENT

Federal courts "are obliged to decide cases within the scope of federal jurisdiction." *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72 (2013). That rule flows from "the undisputed constitutional principle that Congress, and not the Judiciary," tells courts what cases to hear. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989). Unless a statute says otherwise, therefore, a court's duty to decide the cases within its jurisdiction is "virtually unflagging." *Id.* A court commits "treason to the constitution" when it abdicates that duty. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Courts may surrender their jurisdiction only in "exceptional" circumstances. *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 813 (1976). Some courts have held that perceived international-comity concerns can present such a circumstance. Add.44-48. Those concerns typically arise when "courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings." *GDG Acquisitions, LLC v. Government of Belize*, 749 F.3d 1024, 1030 (11th Cir. 2014). When, unlike here, such "parallel proceedings" exist abroad, U.S. courts often afford respect for those proceedings

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by abstaining from hearing the same claims in the United States. *Royal & Sun All. Ins. Co. of Canada v. Century Int'l Arms, Inc.*, 466 F.3d 88, 93 (2d Cir. 2006).

"Far more rarely" – in fact, almost never – some courts have applied international-comity abstention without any "conflicting past or present foreign proceeding." *GDG*, 749 F.3d at 1030. The few courts to entertain this brand of abstention have done so only in "rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereigns align[] in supporting dismissal." *Id.* at 1034. Because such abstention calls on courts to weigh "the interests of our government, the foreign government and the international community," *id.* at 1030, this brief calls it "foreign-policy abstention."[5]

Defendants cite (and Plaintiffs know of) only four appellate cases to abstain without a parallel foreign proceeding. One is a 26-year-old Fifth Circuit case that devoted a single sentence to "comity among nations." *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 544 (5th Cir. 1997). Another is a two-decades-old Eleventh Circuit case from which that court later backtracked. *Compare Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004), *with GDG*, 749 F.3d at 1031. The final two are Ninth Circuit cases in which one or both affected

[5] There is a separate doctrine of "prescriptive comity," which poses "a question of statutory interpretation" asking whether "Congress, out of respect for foreign sovereigns, limited the application of domestic law." *In re Picard*, 917 F.3d 85, 100-01 (2d Cir. 2019). That doctrine does not apply to Plaintiffs' common-law claims.

sovereigns filed amicus briefs demanding dismissal. *See Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 567-68 (9th Cir. 2020) ("*Cooper II*"); *Mujica v. AirScan Inc.*, 771 F.3d 580, 609-12 (9th Cir. 2014).

This Court need not decide now whether those decisions were correct. Under any circuit's test, the court below did not abuse its broad discretion in declining to abstain. The simplest path forward thus is to affirm the district court's weighing of the international-comity factors Defendants cite. *Infra* Part I. But if this Court believes the decision below unreasonably weighed those factors, it should affirm by rejecting foreign-policy abstention altogether. *Infra* Part II.

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECLINING TO ABSTAIN ON INTERNATIONAL-COMITY GROUNDS

The district court carefully balanced the international-comity factors Defendants cite. This Court "review[s] the district court's decision regarding whether to abstain for abuse of discretion." *City of Jefferson City v. Cingular Wireless LLC*, 531 F.3d 595, 599 (8th Cir. 2008). That deferential standard "means the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013).

The decision below made no such mistake. Foreign-policy abstention considers several factors, mainly U.S. sovereign interests, foreign sovereign

interests, and the adequacy of any foreign forum. *See Mujica*, 771 F.3d at 603. But courts may not simply examine these factors and pick whatever forum they think best. Rather, in "weighing the considerations for and against abstention, a court's 'heavy obligation to exercise jurisdiction' exists regardless of what factors are present on the other side of the balance." *Royal & Sun*, 466 F.3d at 93 (quoting *Colorado River*, 424 U.S. at 820).[6] That weighty obligation – which usually overwhelms all other factors – "is not diminished simply because foreign relations might be involved." *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 394 (3d Cir. 2006). Foreign-policy abstention, if viable at all, must be "reserved for exceptional diplomatic circumstances." *GDG*, 749 F.3d at 1026.

The decision below found no such "exceptional circumstances" here. Add.67-68. Defendants show no error in that determination.

A. The U.S.-Peru TPA Does Not Support Abstention

Defendants try to meet abstention's high bar mainly by arguing (at 21) that the TPA "controls the comity analysis." According to Defendants, abstention is mandatory because this lawsuit "conflicts with the TPA." Defs.Br.23 (boldface omitted). That asserted conflict misunderstands the TPA's text and structure.

[6] *Royal & Sun* involved parallel foreign proceedings and so did not address foreign-policy abstention. 466 F.3d at 93. But the cited principle applies even more forcefully to the latter doctrine.

1. The TPA's text does not displace U.S. tort litigation

a. Interpreting the TPA, as with a statute, "begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506 (2008). The district court correctly read the TPA's "plain language" to disfavor abstention. Add.62. Nothing in the TPA or its implementing statute ("Act")[7] bars private tort litigation in U.S. courts.

The most striking thing about the TPA's text is what it lacks. To start, neither the TPA nor the Act includes an express-preemption clause precluding any type of state-law claim. Nor is there any clause stripping U.S. courts of jurisdiction over such claims. The TPA likewise creates no new private cause of action that might displace existing common-law remedies. *See* Act § 102(c)(1). And it designates no venue at all – much less an exclusive one – for resolving private tort litigation. The absence of such language tracks the United States' longstanding view that "trade agreements do not in any way preempt or invalidate federal, state, or local laws that may be inconsistent with those agreements."[8]

Other non-trade agreements highlight what is missing here. For example, the agreement in *Ungaro-Benages*, *see* 379 F.3d at 1231-32, created an

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[7] The TPA entered into force under U.S. law only when Congress enacted an implementing statute approving it. *See* 19 U.S.C. § 3805(a)(1); United States-Peru Trade Promotion Agreement Implementation Act, Pub. L. No. 110-138, 121 Stat. 1455 (2007), *reprinted in* 19 U.S.C. § 3805 note.

[8] Office of the United States Trade Representative, *State Sovereignty and Trade Agreements: The Facts* (Apr. 14, 2005), https://tinyurl.com/3rrvj7ps.

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international tribunal to supply "the *exclusive* remedy and forum" for "*all* claims that have been or may be asserted against German companies" arising from Nazi Germany.[9] Similarly, the treaty in *Cooper II*, *see* 960 F.3d at 567-69, provided that "jurisdiction over actions concerning nuclear damage from a nuclear incident *shall lie only* with the courts of the Contracting Party within which the nuclear incident occurs."[10] Other examples abound.[11] Simply put, the Executive Branch knows how to negotiate treaty language ousting private litigation from U.S. courts. The TPA's omission of comparable language is strong evidence the United States did not intend it to have the same effect. *Cf. Rutledge v. Pharmaceutical Care Mgmt. Ass'n*, 141 S. Ct. 474, 484 (2020) (Thomas, J., concurring) ("Congress knows how to write sweeping pre-emption statutes. But it did not do so here.").

The TPA's other textual features confirm the point. The chapter Defendants cite (at 23-25) requires the United States to provide all "persons with a legally recognized interest under its law" with "appropriate and effective access to remedies" for "violations of a legal duty under [U.S.] law relating to the environment,"

[9] Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," Art.1(1) (July 17, 2000) (emphases added).

[10] Convention on Supplementary Compensation for Nuclear Damage, S. Treaty Doc. 107-21, Art.XIII(1) (2002) (emphasis added).

[11] *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (surveying government's "longstanding practice" of "[m]aking executive agreements to settle claims of American nationals against foreign governments").

including the right "to sue another person under [U.S.] jurisdiction for damages." Art.18.4(4)(a). The district court correctly read that language to support Plaintiffs' claims. Add.62. Indeed, Plaintiffs are within the class this clause protects – they have "a legally recognized interest" under Missouri law, Art.18.4(4) – and Defendants are undisputedly U.S. persons falling "under [U.S.] jurisdiction." Art.18.4(4)(a). It would invert that language to force Plaintiffs to bring claims against U.S. companies under U.S. law only in *Peru's* courts.

Other provisions reinforce that the TPA does not eject private tort litigation from U.S. courts. The TPA does create an elaborate dispute-resolution mechanism, but it governs only claims involving a "Party" – that is, the U.S. and Peruvian governments. *See*, *e.g.*, Art.21.3(1) (allowing "the complaining Party" to "select the forum"); Art.21.3(2) (Party's "forum selected shall be used to the exclusion of the others"); *cf.* Art.10 § B ("Investor-State Dispute Settlement"). Chapter 18 extends that mechanism to the environment, Art.18.12(1), prescribing a way for the "consulting Parties" to resolve government-to-government disputes over environmental policy, Art.18.12(6). But those provisions are silent about where *private* litigants should sue each other. Had the United States and Peru intended to dictate the forum for nonparty tort litigation, they would have said so.

b. The TPA's implementing statute drives home the point in three ways. *First*, Congress preserved state-law remedies. In a section titled "Relation of

Agreement to State Law," the Act provides that, "except in an action brought by the United States," no "State law" or its "application" may "be declared invalid [as] inconsistent with the Agreement." Act § 102(b). The term "state law" naturally "include[s] common law." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 522 (1992) (plurality). Thus, under § 102(b), only the United States – not private defendants – may argue that the TPA overrides Missouri common law. *See Dandamudi v. Tisch*, 686 F.3d 66, 81 (2d Cir. 2012) (identical clause in NAFTA implementing statute barred party from "argu[ing] that the state law is preempted"). That principle bars Defendants' TPA-based abstention argument. Indeed, Defendants invoke abstention (at 27) to do just what the clause forbids: to invalidate an application of Missouri law as "inconsistent with" the TPA.

The Executive Branch agrees. In submitting the TPA to Congress for approval, *see* 19 U.S.C. § 3805(a)(1)(C)(ii), President Bush supplied an "authoritative expression by the Administration concerning its views." SAA[12] at 1. As the Administration explained, "only the United States is entitled" to rectify "an unresolved conflict between state law, or the application of a state law, and the Agreement." *Id.* at 4. That principle reflects a core sovereign prerogative: that the Executive Branch reserves sole authority "to determine how it will conform

[12] Statement of Administrative Action at 1 (Sept. 27, 2007), https://tinyurl.com/2s47excf; *see* 19 U.S.C. § 3805(a) (requiring this statement).

with the Agreement's rules at the federal and non-federal level." *Id*. Defendants' attempt to enforce the TPA themselves usurps that authority.

Second, the implementing statute confirms that the TPA does not affect private litigation. Just after the saving clause, Congress restricted the TPA's "effect" on "private remedies," mandating that no private litigant "shall have any cause of action or defense under the Agreement." Act § 102(c)(1) (cleaned up); *see id.* § 102(c)(2) (similar). That provision independently forecloses Defendants from using the TPA to raise an abstention "defense." *See Texas Cmty. Bank, N.A. v. Missouri Dep't of Soc. Servs.*, 232 F.3d 942, 943 (8th Cir. 2000) ("abstention doctrine" is an "affirmative defense[ ]"). As President Bush stated, "private part[ies]" may not "defend a suit . . . on grounds of consistency (or inconsistency) with the Agreement." SAA at 5. Yet Defendants seek to do just that.

Third, Congress gave the TPA no retroactive effect. The TPA did not "ent[er] into force" until 2009 – after Plaintiffs filed suit. Act § 101(b); *see* Proclamation No. 8341, 74 Fed. Reg. 4105 (Jan. 16, 2009). And the Act does not extend the TPA to earlier claims based on conduct preceding its effective date. *See Landgraf v. USI Film Prods*., 511 U.S. 244, 265 (1994) (presumption against retroactivity); *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366, 373 (2d Cir. 2004) (same for treaties). The TPA therefore cannot mandate dismissal of such claims.

c. If any doubts remained, basic interpretive principles would dispel them. In construing the TPA and its implementing statute, the Court "presume[s]" that the political branches did not mean to "preempt state law." *Bond v. United States*, 572 U.S. 844, 858 (2014). When a provision may be read multiple ways, moreover, federalism concerns compel the Court to "accept the reading that disfavors pre-emption." *R.J. Reynolds Tobacco Co. v. City of Edina*, 60 F.4th 1170, 1176 (8th Cir. 2023) (per curiam). The Court similarly presumes that Congress did not intend to strip U.S. courts' "adjudicatory authority" unless a statute "clearly states" such intent. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010). Under those traditional principles, the TPA can displace Plaintiffs' state-law claims from U.S. courts only if Defendants "point specifically" to a textual command "that does the displacing or conflicts with state law." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (Gorsuch, J., lead op.).

Defendants cannot point to any such preemptive text because none exists. That is fatal to Defendants' position, just as it would be in a conflict-preemption case. Foreign-policy abstention asks whether a lawsuit offends "U.S. interests." *Mujica*, 771 F.3d at 604. As with preemption, "the text of the statute" supplies the best evidence of those interests. *R.J. Reynolds*, 60 F.4th at 1178. And here, as elsewhere, extinguishing Plaintiffs' state-law claims without "a clear congressional command" would "represent a significant judicial intrusion into Congress's

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authority." *Virginia Uranium*, 139 S. Ct. at 1905 (Gorsuch, J., lead op.). If the Court demands clear statutory text before finding preemption – a historic doctrine rooted in the Supremacy Clause – it should demand at least the same showing before using a novel abstention doctrine to achieve the same result. *Infra* Part II.

2. Defendants' textual arguments are unpersuasive

Defendants' textual arguments falter at the threshold. Their position lacks mooring in any of the TPA's duty-creating provisions, so they lean heavily (at 23-24) on two prefatory clauses "Recognizing" both governments' general "sovereign right[]" to make environmental policy. Art.18 (Objectives); Art.18.1. Such hortatory language merits little weight. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) (discounting "prefatory clauses or preambles" in construing text). To justify abstention's harsh medicine, the TPA must at least impose some legal mandate barring Plaintiffs' lawsuit. Mere prefatory words – announcing aspirations, not obligations – come nowhere close. *See Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 11 (1st Cir. 2010) ("hortatory" declarations in statute did not support foreign-affairs preemption).

In any event, Plaintiffs' claims do not impinge on the recognitions Defendants cite. Those clauses never say that Peruvian courts should be the sole (or even primary) forum for resolving tort litigation involving emissions in Peru. Rather, they merely recognize that Peru retains "sovereign rights" over its "natural

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resources," Art.18 (Objectives), including the right "to establish its own levels of domestic environmental protection," Art.18.1. This lawsuit interferes with neither. Plaintiffs seek damages under Missouri law against U.S. companies for negligence in directing the smelter "to emit excessive levels of toxic substances." Add.3. Those "claims do not hinder Peru's ability" "to set its own environmental standards and priorities." Add.73. In fact, except for the Article 1971 defense, Missouri and Peruvian law do not even conflict. Add.19-31. Applying Missouri law thus cannot be an "attack on Peruvian environmental policy." Defs.Br.37.

Defendants also fail (at 27) to conjure conflict with the TPA's caveat that "[n]othing in [Article 18] shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party." Art.18.3(5). Civil juries are not "law enforcement," so civil lawsuits cannot be "law enforcement activities." *See Law Enforcement*, *Merriam-Webster Dictionary* ("law enforcement" is "the department of people who enforce laws, investigate crimes, and make arrests: the police"), https://tinyurl.com/2p5uzvka; *see also* Art.18.14 ("environmental law" is a "statute or regulation"). Nor would a Missouri trial occur "in the territory" of Peru. Art.18.3(5). Besides, the TPA never forbids law-enforcement activities; it just does not itself "empower" them. Non-empowerment, the district court correctly noted, "is not an interdiction." Add.61.

Defendants' reading (at 27) of Article 18.4 is even less persuasive. That Article's plain language supports Plaintiffs' claims. *Supra* pp. 23-24. So Defendants rewrite it, morphing Peru's duty to "provide . . . appropriate and effective access to remedies for violations of [its] environmental laws," Art.18.4(4), into an exclusive-venue clause supposedly rerouting all such claims into Peruvian courts. But the text says nothing about forum selection. Perhaps Article 18.4 requires Peru to make its courts *available* for private tort claims under Peruvian law: that is one plausible reading of Peru's duty to offer adequate "remedies" for violations of "that Party's environmental laws." Art.18.4(5). The text does not, however, make those remedies exclusive. And this Court ordinarily does not infer venue "exclusivity" without some "plain language" commanding it. *Dunne v. Libbra*, 330 F.3d 1062, 1064 (8th Cir. 2003). No such language exists here.

3. Defendants' policy arguments lack merit

Lacking support in the TPA's text, Defendants are left to argue (at 21) about its "central objective." But the TPA's asserted objectives cannot justify abstention. Intuiting "some brooding federal interest" or "judicial policy preference" "should never be enough to win preemption of a state law." *Virginia Uranium*, 139 S. Ct. at 1901 (Gorsuch, J., lead op.). And a traditional "preemption analysis," this Court stressed, "does not justify a freewheeling judicial inquiry into whether a state [law] is in tension with federal objectives." *R.J. Reynolds*, 60 F.4th at 1178. If free-

floating policy analysis cannot support preemption, it even less warrants the "exceptional" abstention remedy Defendants seek. *GDG*, 749 F.3d at 1026.

At any rate, Defendants fail to show that the TPA was meant to shield U.S. polluters from lawsuits in U.S. courts. Quite the opposite: Chapter 18 commands *both* parties – including the United States – to offer "remedies for violations of that Party's environmental laws." Art.18.4(5). It also "recognize[s]" that neither party may "encourage trade or investment by weakening or reducing the protections afforded in their respective environmental laws." Art.18.3(2). And it states the provisions' core purpose: to spur mutually "high levels of environmental protection." Art.18.1. This lawsuit, seeking to remedy Defendants' toxic emissions, supports those aims. *See also* H.R. Rep. No. 110-421, at 3 (2007) (noting "commitment that prohibits Peru from lowering environmental standards").

B. The District Court Correctly Balanced The Other Comity Factors

Without the TPA, Defendants' abstention argument crumbles. They articulate no convincing reason for this Court to disturb the district court's careful balancing of "the interests of each sovereign" implicated here. Add.44-46; *see Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193, 1209 (9th Cir. 2017) ("*Cooper I*") (affirming non-abstention because comity "require[s] the district court to weigh a number of complex policy considerations"). Indeed, Defendants can cite only

one appellate decision ever to *reverse* a court for *declining* to abstain without a parallel foreign proceeding. *See Mujica*, 771 F.3d at 609-15.

Mujica demonstrates the high bar for obtaining such abstention. That case arose from the "bombing of a Colombian village by members of the Colombian Air Force." *Id*. at 584. The bombing prompted major litigation in Colombian courts, including criminal prosecutions of the bombers and civil claims (including by the *Mujica* plaintiffs) against Colombia's government. *Id*. at 585-88. Through those proceedings, the "Colombian courts" showed "themselves willing to vindicate Plaintiffs' legitimate claims" about the bombing. *Id*. at 615.

The Ninth Circuit abstained because "[b]oth nations . . . explicitly requested that our courts abstain from adjudicating a matter that was already litigated in Plaintiffs' favor in an adequate alternative forum." *Id*. Critically, the State Department had filed a Statement of Interest below and a brief on appeal "ask[ing] for the case to be dismissed." *Id*. at 610. It also attached "two démarches" from Colombia's Ministry of Foreign Affairs, warning that the litigation "show[ed] disrespect for the 'legitimacy of Colombian judicial institutions.'" *Id*. at 611. Given "the forcefully expressed views of the State Department," the Ninth Circuit took the extraordinary step of reversing the district court. *Id*.

This case is different. Analyzing the *Mujica* factors, the district court correctly determined they cut against abstention here. Add.48-68. The court was

correct that this is not the "rare," "calamitous" case "in which powerful diplomatic interests" might compel dismissal. *GDG*, 749 F.3d at 1034.

1. U.S. interests

a. The United States "does not have a significant interest in the foreign adjudication of this matter." *GDG*, 749 F.3d at 1032. When U.S. foreign-policy interests are strong enough to warrant dismissal, the State Department typically files an amicus brief or Statement of Interest saying so. *See*, *e.g.*, *Mujica*, 771 F.3d at 609-10 (State Department filed both); *Ungaro-Benages*, 379 F.3d at 1231 n.6 (same). In *Ungaro-Benages*, the United States even negotiated an international agreement promising that it would "file a Statement of Interest in any lawsuit dealing with WWII restitution" to inform courts "that it is in the foreign policy interests of the United States for the case to be dismissed." *Id*. at 1231-32.

The State Department has made no such statement here. In fact, despite 15-plus years of litigation, "the State Department has thus far remained silent." Add.66. That prolonged silence weighs against abstention. *See GDG*, 749 F.3d at 1032 (lack of "statement of foreign policy interest from the United States . . . weighs against dismissal"); *Gross*, 456 F.3d at 389-90 (similar). *Mujica* itself recognized that the balance of interests would differ in a case when "the State Department has issued no [Statement of Interest]." 771 F.3d at 610.

Defendants respond (at 41) that it is "unusual" for the State Department to weigh in without invitation. True enough. But international-comity abstention is unusual – "exceptional" in fact – and should be reserved for cases so "calamitous" they compel State Department intervention. *GDG*, 749 F.3d at 1034. After all, the Executive Branch can express its views without solicitation. *See* 28 U.S.C. § 517; *Alperin v. Vatican Bank*, 410 F.3d 532, 556 (9th Cir. 2005) ("[C]ase-specific intervention is not uncommon in cases involving foreign affairs."). The United States thus has recognized the "'critical'" role played by an "'*explicit* request for dismissal on foreign policy grounds by the Executive Branch.'" *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 61 (D.C. Cir. 2011) (quoting Brief for the United States as Amicus Curiae at 11, *Balintulo v. Daimler AG*, No. 09-2778-cv (2d Cir. Nov. 30, 2009)) (emphasis in brief). The State Department made no such request here, even though a Peruvian official (at Defendants' behest) urged it to in 2007. Defs.App.223-24; R.Doc.545-13 at 2-3. Its continued silence speaks volumes.

b. The Executive Branch has not determined that this lawsuit threatens U.S. interests, so Defendants take up the task themselves. They predict (at 39) "foreign policy tensions" and invent a threat to "billions of dollars" in bilateral "trade and investment." Those assertions are misdirected. The "Executive," not the judiciary, "is institutionally well-positioned to understand" a lawsuit's "foreign policy ramifications." *Al-Tamimi v. Adelson*, 916 F.3d 1, 13 (D.C. Cir. 2019). If

this lawsuit's "foreign policy stakes" were as grave as Defendants pretend (at 40), the political branches have ample tools to address them.

Defendants' concerns are unfounded in all events. They offer no evidence to back up their speculation that "plaintiffs' claims will 'disturb foreign relations.'" Add.74. As the district court observed, this litigation has been pending "for more than 15 years; such disruption would have become apparent by now." *Id*. But no disruption has occurred. On the contrary: Defendants' own source (cited at 23, 39) says that the "United States and Peru" today "enjoy a strong, mutually beneficial partnership."[13] If 15 years of litigation has not jeopardized that partnership, neither will the decision below. *See Cooper I*, 860 F.3d at 1206 (deferring to district court's assessment that "no evidence" showed that "maintaining jurisdiction would create friction" with foreign country).

c. Missouri's interests likewise cut against abstention. Defendants include Missouri citizens who committed tortious conduct in Missouri, and a State "always has a strong interest in providing a forum for redress of injuries caused by its citizens." *Reid-Walen v. Hansen*, 933 F.2d 1390, 1400 (8th Cir. 1991); *see Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1232 (9th Cir. 2011) (similar). Further, Missouri's connections to this case are substantial: "pivotal

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[13] U.S. Dep't of State, *U.S. Relations With Peru* (Aug. 8, 2023), https://tinyurl.com/yexx5b8p.

decisions regarding [Doe Run Peru's] capitalization were made in Missouri," Defendants "controlled [Doe Run Peru] from Missouri," and Defendants "lived and conducted business in Missouri during the relevant time." Add.33-34, 40. Given those "significant contacts," the district court found that Missouri law largely governs Plaintiffs' claims. Add.31. The applicability of Missouri law heightens Missouri's interests, as a State "has a legitimate interest in the continued enforceability of" its law. *Maine v. Taylor*, 477 U.S. 131, 137 (1986).[14]

Defendants' efforts to downplay (at 44-47) their Missouri contacts fail. Plaintiffs' injuries may have been felt in Peru, but the resolution of Missouri common-law tort claims against Missouri companies remains within Missouri's traditional police power. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (state "police powers" extend to "the protection of the lives, limbs, health, comfort, and quiet of all persons"); *Wilson v. Zoellner*, 114 F.3d 713, 720 (8th Cir. 1997) ("Missouri exercises a 'traditional state power' in adjudicating" common-law tort claims). The district court also properly discerned substantial evidence "show[ing] relevant aggregate contacts with Missouri." Add.32. This Court should not reweigh the evidence in Defendants' favor now. *See Harry Stephens Farms, Inc. v. Wormald*

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[14] *Acapolon Corp. v. Ralston Purina Co.*, 827 S.W.2d 189 (Mo. 1992), which Defendants cite (at 42), is inapposite because it was a forum-non-conveniens case applying Guatemalan law. 827 S.W.2d at 194. Defendants' other cited cases (at 42-44) similarly applied a law other than that of the defendant's home forum. *Cf. In re Derailment Cases*, 416 F.3d 787, 794-95 (8th Cir. 2005).

Am., Inc., 571 F.3d 820, 821 (8th Cir. 2009) (per curiam) (summary-judgment courts cannot "weigh[] evidence" or "draw[] inferences against the non-moving party"); *see also infra* Part I.C.2 (refuting Defendants' fact assertions).

Defendants' contention (at 45-47) that their forum conduct "bears only on the question of *remedy*" is similarly unavailing. A reasonable jury "could conclude that defendants exerted control over [Doe Run Peru] to such a degree that the tortious conduct committed at the [smelter] was the act of defendants themselves." Add.59. Such control supports Defendants' direct liability for their own Missouri-based conduct. *See State ex rel. Doe Run Res. Corp. v. Neill*, 128 S.W.3d 502, 505 (Mo. 2004) ("[A] corporate officer may be held individually liable for tortious corporate conduct if he or she had actual or constructive knowledge of, and participated in, an actionable wrong.") (cleaned up); *United States v. Bestfoods*, 524 U.S. 51, 65 (1998) ("parent corporation is itself responsible for the wrongs committed by its agents in the course of its business") (cleaned up).

The Missouri Attorney General's seven-page amicus brief does not show otherwise. That brief simply recites Defendants' skewed version of the facts, mischaracterizing (at 5) this case as involving merely "some capital investments." The district court properly rejected that distortion of the record, Add.31-41, 52-60, and so should this Court. The Attorney General's narrow description of Missouri's interests also conflicts with the expansive view of Missouri law he has expressed

elsewhere, including in asserting common-law tort claims against the Chinese government over the COVID-19 pandemic, *see* Compl., *Missouri ex rel. Schmitt v. The People's Republic of China*, No. 1:20-CV-99-SNLJ, ECF #1 (E.D. Mo. Apr. 21, 2020). At any rate, Missouri's Supreme Court, not its Attorney General, is the authority on Missouri law. *See Animal Sci. Prods, Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1874 (2018) ("views of the State's attorney general" "do not garner controlling weight"). The district court correctly applied that law in discerning "the State's significant contacts" here. Add.31.

2. Peru's interests

Peru's interests do not support dismissal either. To warrant abstention, a lawsuit must offend a foreign interest "strong enough to outweigh the interest of the United States" in adjudicating it. *GDG*, 749 F.3d at 1032. In three of the four appellate cases to apply foreign-policy abstention, the foreign sovereign conveyed that interest through an amicus brief. *See Cooper II*, 960 F.3d at 568; *Ungaro-Benages*, 379 F.3d at 1232 n.6; *Torres*, 113 F.3d at 542.[15] Indeed, Peru itself – in a case Defendants say (at 32) bears an "uncanny similarity" to this one – "submitt[ed] an amicus brief" demanding dismissal. *Torres*, 113 F.3d at 542.[16]

[15] The only exception is *Mujica*, where the State Department registered Colombia's objection through its own Statement of Interest. 771 F.3d at 586, 611.

[16] *Torres* is actually dissimilar. It was a forum-non-conveniens case with a cursory discussion of abstention. *See Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899, 908-09 (S.D. Tex. 1996), *aff'd*, 113 F.3d 540 (5th Cir. 1997).

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In 2017, Defendants pressed Peru to file a similar brief with the district court. App.70-72; R.Doc.583 (Dep.5:22-7:7). But despite Defendants' efforts to persuade Peru that this case was like *Torres*, Peru declined to file anything below. *See Cooper I*, 860 F.3d at 1206 (affirming non-abstention when foreign sovereign "took no position in the district court"). Nor did it submit a brief to this Court. Instead, the parties have adduced "competing letters" from four Peruvian officials "purporting to reflect the views of the Peruvian government." Add.63. Defendants cite (at 35-36) the two letters they engineered but omit that two members of Peru's Congress objected to Defendants' letters and expressed "deep[] concern[]" that the author of one had overstepped his authority by "interfering" in a U.S. "judicial process." App.138-39; R.Doc.640-85 at 1-2; *see* App.143-46; R.Doc.640-86.

A disputed letter is not an authoritative expression of Peru's sovereign interests. Add.62-66. That is especially true because Defendants "obtained" their letters "for the purpose of supporting their positions in this litigation" – something they tried to hide below. App.58; R.Doc.949 at 58 & n.12; *see Animal Sci.*, 138 S. Ct. at 1873 ("litigation" context merits "caution" in weighing foreign-government statement). And even taking Defendants' 2017 letter at face value, its tentative tone – that this case "might require a court . . . to pass judgment" on Peru's

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Unlike here, the lead defendant was headquartered "in Peru," *id.* at 907, and "the Peruvian government ha[d] participated substantially" in the tort, 113 F.3d at 543.

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policies, which "could affect" certain remedies, Defs.App.198, R.Doc.545-3 at 7 – is far from the "strenuous objection" Peru conveyed in *Torres*, 965 F. Supp. at 909. Indeed, the 2017 letter is more cautious than Defendants' outdated 2007 letter and focuses mostly on refusing Renco's demand that Peru "appear in U.S. court or assume liability" for Plaintiffs' claims. Defs.App.195, R.Doc.545-3 at 4. As Peru explained in rejecting that demand, Peru retains sovereign immunity and so "cannot be required to intervene in claims brought in U.S. courts against Renco and its U.S.-based affiliates." *Id*. Defendants' attempt to override those principles and compel Peru's participation – by threatening Peru in an acrimonious arbitration – is far more likely to spawn foreign-policy friction than this lawsuit.

Peru's refusal to intervene belies Defendants' portrayal (at 37-38) of Plaintiffs' claims as an "attack" on "Peru itself." Peru rebuffed that very assertion in the Renco arbitration, criticizing Defendants' "strategic[]" efforts to "use[] the Renco international arbitrations to orchestrate ostensible conflicts with the Missouri Litigations."[17] As Peru's arbitration brief detailed, Peru is not "responsible for lawsuits based on [Defendants'] own corporate decisions."[18] Peru's position tracks the district court's view that Plaintiffs' claims do not "ask[] [it] to decide the

[17] Respondent's Counter-Memorial ¶ 328, *Renco Group, Inc. v. Republic of Peru*, PCA Case No. 219-46 (Apr. 1, 2022), https://tinyurl.com/4h64hfxw.

[18] *Id*. at 132 (boldface omitted).

legality of . . . any Peruvian law." Add.71; *see Reid*, 701 F.3d at 847 (similar). After all, the court has allowed Defendants to claim "immunity" if they "complied with their obligations under the PAMA." Add.21. A court applying Peruvian law as a defense cannot be "second-guess[ing] Peru's policy choices." Defs.Br.14; *see GDG*, 749 F.3d at 1034 ("[C]ourts regularly interpret and apply foreign law without offending international interests.").

This case thus differs from other abstention cases in which the foreign sovereign participated directly in the misconduct. *See Mujica*, 771 F.3d at 584 (Columbian soldiers murdered civilians); *Torres*, 113 F.3d at 543 (Peru "participated substantially" in tort). It also differs from the cases in which the sovereign had created a special claims process to redress the injuries at issue. *See Cooper II*, 960 F.3d at 555, 568; *Ungaro-Benages*, 379 F.3d at 1237-38. No such process exists here. Rather, as the Peruvian legislators' letters explain, Peru has a strong interest in allowing its injured citizens access "to the federal court of Missouri," where Defendants are based. App.143; R.Doc.640-86 at 1. The district court did not abuse its discretion in weighing those letters. Add.64-66.[19]

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[19] Defendants forfeited their argument (at 38) about alleged recruitment irregularities by failing to raise it below. *See Northern Bottling Co. v. PepsiCo, Inc.*, 5 F.4th 917, 922 (8th Cir. 2021). In any case, those baseless accusations (at 9, 38) rest on unreliable hearsay from paid informants. R.Doc.1203-2.

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3. Forum adequacy and judicial economy

Mujica's third factor examines "the adequacy of the foreign forum." 771 F.3d at 612. The district court ruled at the pleading stage that "Peru was not an adequate alternative forum because it was likely unable to exercise jurisdiction." Add.47. The individual Defendants had refused to consent to suit in Peru, which rendered "illusory" Defendants' then-proposed "agreement to submit to [Peruvian] jurisdiction." App.62; R.Doc.949 at 62 n.13. Defendants never changed position below, failing to raise forum adequacy as a comity factor at summary judgment. Yet they raise it now, stating (at 48 n.9) "all Defendants consent to personal jurisdiction in Peru." That about-face is too late to show any abuse of discretion.

Regardless, "adequacy is not enough" to justify abstention. *GDG*, 749 F.3d at 1033. Even if Peru were an adequate forum, so is the United States. And the district court reasonably determined that keeping the case promotes "judicial economy and fairness." Add.67. Those considerations are important to international comity. *See Royal & Sun*, 466 F.3d at 94 (identifying "fairness" and "judicial efficiency" as international-comity "principles").

Forcing Plaintiffs to start over in Peru after 15-plus years of litigation would thwart those principles. "Plaintiffs have pursued their claims in [the United States] for more than a decade," devoting many resources to advance the claims through discovery. Add.67. Dismissing them now would "be unfair to plaintiffs and

substantially postpone resolution of their claims." *Id.* That is especially true because Defendants and their documents are here, not in Peru.

Defendants (at 49-50) and the Missouri Attorney General (at 4) downplay those concerns by portraying Plaintiffs' claims as burdensome for Missouri courts. But the district court has ably managed the docket for 15-plus years. *See Griffin v. Super Valu*, 218 F.3d 869, 870 (8th Cir. 2000) (court's docket management merits deference). And if Plaintiffs' claims were as burdensome as Defendants say, shunting them into Peruvian courts hardly serves Peru's sovereign interests.

4. True conflict

The absence of a true conflict between Missouri and Peruvian law further weakens the case for abstention. Add.48-52. No true conflict exists "where a person subject to regulation by two states can comply with the laws of both." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798-99 (1993). In *Hartford Fire*, the Supreme Court addressed whether the courts below should have "declined to exercise . . . jurisdiction" over antitrust claims against British reinsurers under "international comity." *Id.* at 797. "The only substantial question," the Court held, was "whether there is in fact a true conflict between domestic and foreign law." *Id.* at 798 (cleaned up). The Court found no such conflict because British law did not "require[]" the defendants "to act in some fashion prohibited by the law of the United States." *Id.* at 799.

Defendants do not argue that Peruvian law required them to do anything Missouri law proscribes. Nor was it impossible to comply with both sovereigns' laws. "Under *Hartford Fire*, therefore, there is no true conflict for international comity purposes." Add.51-52. According to Defendants' own cases, that supplies at least some evidence that abstention is unwarranted. *See Mujica*, 771 F.3d at 602 (true conflict is "one factor in" adjudicatory comity); *Torres*, 965 F. Supp. at 908 (factors include "likelihood of conflict with regulation by another state").

Defendants attack (at 53) the district court for even conducting a "true-conflict inquiry." If that was error, Defendants invited it by urging the court below to abstain because "conflicts now exist between Peruvian and Missouri law." R.Doc.1231 at 37. Regardless, the court did not use its true-conflict analysis to "outright preclude[]" dismissal. Defs.Br.50. It *declined* to decide whether "a true conflict is an absolute requirement or merely a factor," Add.51, instead weighing the lack of conflict alongside many other factors, Add.67.

But the district court would not have erred if it had required a true conflict. Without "a clash of foreign and domestic law, American courts may press forward free from worry that their rulings will threaten the international legal ties that advance the rule of law within and among nations." *In re Sealed Case*, 932 F.3d 915, 931 (D.C. Cir. 2019) (cleaned up). A lack of a true conflict thus forecloses the foreign-policy calamity abstention demands. *See Gross*, 456 F.3d at 393-94

(without "foreign judgment or ongoing proceeding," abstention "requires" a "true conflict"); *Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 58 F.4th 429, 475-76 (10th Cir. 2023) (similar).

Defendants err (at 52) in limiting that principle to "prescriptive comity." Adjudicatory comity requires interest balancing, and the absence (or presence) of a conflict between the relevant sovereigns' laws should weigh heavily in that balance. *See Gross*, 456 F.3d at 393-94 (conveying "skeptic[ism]" of "broader abstention doctrine" untethered from true-conflict requirement). With no true legal conflict, keeping this lawsuit in U.S. courts poses no threat to any "strong interest" in foreign adjudication. *GDG*, 749 F.3d at 1032.

C. Extraterritoriality Principles Do Not Warrant Abstention

In one last try for abstention, Defendants invoke (at 53-64) the federal statutory presumption against extraterritoriality. The district court did not abuse its discretion in declining to abstain on that basis. Add.52-60, 68-70.

1. Missouri common law carries no presumption against extraterritoriality

Whether Plaintiffs' claims apply extraterritorially is a question of Missouri law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); *Capers v. National R.R. Passenger Corp.*, 673 F. App'x 591, 594 (8th Cir. 2016) (per curiam). Missouri common law carries no presumption against extraterritoriality. True, courts presume that "Missouri *statutes*, absent express text to the contrary, apply only

within the boundaries of th[e] state." *Tuttle v. Dobbs Tire & Auto Ctrs., Inc.*, 590 S.W.3d 307, 311 (Mo. 2019) (emphasis added). But no Missouri court has extended that presumption to common-law claims. To the contrary, Missouri courts long have applied state common law beyond state lines. *See*, *e.g.*, *Kennedy v. Dixon*, 439 S.W.2d 173, 184-85 (Mo. 1969) (applying Missouri law to Indiana car accident); *Rider v. The Young Men's Christian Ass'n of Greater Kansas City*, 460 S.W.3d 378, 388 (Mo. Ct. App. 2015) (slip-and-fall in Kansas).

Missouri is no outlier in that approach. Other courts often distinguish statutes from common law when considering extraterritoriality arguments. *See*, *e.g.*, *Armada (Singapore) Pte Ltd. v. Amcol Int'l Corp.*, 244 F. Supp. 3d 750, 758 (N.D. Ill. 2017) ("no authority to suggest that the principle should apply to claims fashioned through common-law adjudication"), *aff'd*, 885 F.3d 1090 (7th Cir. 2018); *Goodwin v. Raytheon Co.*, 2016 WL 11826492, at *5 (D. Mass. Sept. 6, 2016) ("[T]he presumption against extraterritorial application does not apply to common law claims."). To Plaintiffs' knowledge, no state court of last resort has ever "applied a presumption against extraterritoriality to common law claims." William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. Davis L. Rev. 1389, 1412 (2020) (conducting 50-state survey).[20]

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[20] Defendants misread (at 58) *New York Life Insurance Co. v. Head*, 234 U.S. 149 (1914), which held that applying Missouri law to a New York insurance contract violated constitutional "freedom of contract." *Id.* at 161. If that concept is

Defendants elsewhere advance that very distinction. In downplaying the absence of a true conflict (at 52), Defendants confine "the true-conflict requirement" to cases "involv[ing] prescriptive comity (where the question is whether and how much Congress intended to apply a statute extraterritorially)." The latter extraterritoriality concern is irrelevant, Defendants insist (at 53), because this "is not a prescriptive comity case." They cannot have it both ways. If this is not a prescriptive-comity case, statutory presumptions should play no role.

Missouri's choice-of-law rules, not statutory canons, determine the reach of Missouri common law. Applying those rules, the district court twice determined that Missouri law applies because it tracks Peruvian law – meaning that it makes no difference whether Missouri law applies extraterritorially. Add.17-31. And on the sole issue where those laws conflict for choice-of-law purposes (though not in abstention's "true conflict" sense), the court already is applying Peruvian law. Add.17. There is thus no problem for a territorial presumption to solve.

2. Plaintiffs' claims are not extraterritorial

a. If extraterritoriality principles were relevant, they would not compel abstention. In assessing the U.S. "nexus" for international-comity purposes, *Mujica* focused on "whether any of the parties are United States citizens" and

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still good law, *but see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985), it does not bar applying state tort law to in-state conduct with out-of-state effects.

"where the conduct in question took place." 771 F.3d at 604-06. Both factors disfavor abstention here. *First*, all Defendants are U.S. citizens. Some also are Missouri citizens, including Doe Run Resources and Zelms. Add.11-15. The presence of in-forum defendants "contribute[s] to a finding that there is a 'nexus'" with the United States. *Mujica*, 771 F.3d at 605.

Second, as the district court detailed, Add.52-59, a jury could find Defendants liable based substantially on domestic conduct:

U.S. Control. Defendants micromanaged Doe Run Peru from Missouri and New York. Add.34-39. Rennert did not run his corporate empire like a public company; he created unusual procedures to ensure that "Doe Run Peru" was "controlled in a manner similar to other Renco companies" – that is, "normally by myself." App.122; R.Doc.640-10 at 1. Thus, Rennert, Zelms, and Kaiser retained veto power over Doe Run Peru's activities by requiring it to submit expense requests "to St. Louis for review and approval." App.131; R.Doc.640-22 at 6. Defendants also issued directives to Doe Run Peru during monthly St. Louis meetings. App.234-35; R.Doc.871-S-71 at 4-5; R.Doc.1279-S-36; R.Doc.640-5 (Dep.201:12-24).

That control extended to the smelter. Defendants (not Doe Run Peru) decided to ramp up lead production while keeping environmental spending to "the minimum amount permitted." R.Doc.909-24 at 14, 16. They also wielded day-to-day control over those projects. Add.37-38, 55-58. Renco, for example,

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line-edited Doe Run Peru's 2005 PAMA proposal. R.Doc.1279-S-44. Zelms also installed Doe Run Resources executives to oversee Doe Run Peru's environmental measures. App.229; R.Doc.640-2 (Dep.85:16-86:4); R.Doc.871-3 (Dep.115:7-116:21); R.Doc.1277-60 (Dep.53:14-19). In Zelms' words, he was "instrumental" in the smelter's "environmental improvements." R.Doc.871-3 (Dep.132:14-23). As the district court thus concluded, "defendants exerted complete control over [Doe Run Peru] from their offices in Missouri and New York." Add.54.

U.S. Capital Deprivation. Defendants also took steps in Missouri to obstruct Doe Run Peru from reducing emissions. *Supra* pp. 8-11. One way was by depriving Doe Run Peru of the capital needed to fund emission-control measures. Add.32-34, 56-57. In doing so, Defendants overrode repeated warnings from Doe Run Peru that U.S-driven capital shortfalls imperiled its ability "to undertake additional environmental remediation." Add.34. Defendants orchestrated that undercapitalization from inception, immediately siphoning off for themselves $100 million in capital Doe Run Peru was supposed to have for environmental remediation. R.Doc.1229-16 at 58-61. Defendants further hamstrung Doe Run Peru's remediation efforts by vetoing its expenses. *Supra* p. 9.

U.S. Omissions. Defendants also failed to take reasonable steps in St. Louis to curb the smelter's toxic emissions. Instead, they deflected by sending Vornberg from the United States to lobby for an ineffective "community intervention program."

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App.149; R.Doc.871-65 at 1. While staving off broader emissions-control measures, Defendants failed even to inventory the smelter's fugitive emissions until 2004. R.Doc.871-48 (Dep.152:9-14). And Rennert waited until 2005 to order his team "to develop a long term plan regarding lead abatement." App.235; R.Doc.871-71 at 5. By then, it was too late. R.Doc.1277-34 at 135, 148-55. Those failures occurred in the United States and further caused the smelter's emissions. *See* Add.22 ("defendants did not exercise reasonable care when they failed to apply practices and implement controls . . . to reduce emissions").

b. Defendants' evidentiary nitpicks (at 58-65) are improper on interlocutory review. *See Northwestern Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1023 (6th Cir. 2001) (refusing to review "district court's findings of fact" in interlocutory posture). In qualified-immunity cases, for instance, this Court often refuses to "reassess [a] factual dispute in the context of an interlocutory appeal." *Mallak v. City of Baxter*, 823 F.3d 441, 448 (8th Cir. 2016). Similar restraint is warranted here. The Court granted review to decide "controlling questions of law" about "adjudicatory comity." Add.75-76. It should not also reweigh the factual record, especially while Defendants' veil-piercing and other summary-judgment motions "remain pending" below. Add.7.

In any event, Defendants' factual recitation improperly draws inferences against Plaintiffs, *see Harry Stephens Farms*, 571 F.3d at 821, and misstates the

evidence. For example, Defendants err in downplaying (at 62-64) the role "U.S. personnel" played "in environmental remediation." Zelms was U.S.-based and considered himself to be "in charge" of the smelter. App.230; R.Doc.640-2 (Dep.222:9-16). According to Buckley – Doe Run Peru's president, who was also a Doe Run Resources employee paid exclusively by the latter, *see* R.Doc.1229-16 at 81-83 – Zelms was "the only person who could decide on what to do in the operations in Peru." R.Doc.640-15 (Dep.193:24-195:10). The U.S.-based Vornberg further managed the smelter's environmental affairs, R.Doc.909-35, meeting with Peruvian agencies about PAMA and directing the consultants Defendants hired to assess emissions. App.149; Doc.871-65 at 1; R.Doc.871-125 at 3-4; R.Doc.871-78.

Defendants likewise err in downplaying their capital-deprivation measures. They say (at 60) they "never denied a single expenditure request for environmental remediation," but their documents show otherwise. *See* App.255; R.Doc.1279-S-57 at 8 (bag-house upgrade); App.258; R.Doc.1279-S-60 at 13 (fugitive dust emissions). Moreover, the undercapitalization was meaningful because Doe Run Peru lacked enough money to control pollution. R.Doc.871-54; R.Doc.871-38 at 2; R.Doc.871-42 at 2; R.Doc.1279-S-38. Peru itself recognized that problem by barring upstream payments to Defendants when granting Doe Run Peru a PAMA extension. App.219; R.Doc.1277-75 at 11. At any rate, Defendants' negligence was "not limited" to the four projects they cite. Add.22; *see* R.Doc.1277-51 (Dep.158:3-159:24). Defendants'

claim (at 61) that Doe Run Peru had money to "finish [those projects] earlier" – which itself is disputed – thus is not dispositive.

3. Defendants' reliance on *Nestlé* is misplaced

Defendants' analogy (at 54-58) to *Nestlé* is inapt. *Nestlé* was not an abstention case. It addressed whether the Alien Tort Statute authorizes federal courts to "creat[e] a cause of action" under the statute to remedy "child slavery" in Ivory Coast. 141 S. Ct. at 1935-37. The presumption *Nestlé* applied was "a canon of statutory construction." *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016). It has no bearing here because there is no statute to construe here. Regardless, the presumption supplies a federal rule for federal-law claims. It would defy basic federalism principles to use a *federal* canon about *federal* statutes to override Missouri's choice-of-law rules when interpreting Missouri state law. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

Nestlé is also factually off-point. "Nearly all the conduct" there "occurred in Ivory Coast." *Nestlé*, 141 S. Ct. at 1937. The only U.S. nexus was that "respondents pleaded as a general matter that every major operational decision by [the defendants] is made in or approved in the U.S." *Id.* (cleaned up). Defendants try to make those bare-bones allegations sound stronger by portraying (at 54-55, 57, 61-62) them as the Ninth Circuit did. But the Supreme Court reversed the

Ninth Circuit and construed the complaint as raising only "generic allegations" of Nestlé's abstract "corporate activity." *Nestlé*, 141 S. Ct. at 1937.

This case involves far more. Plaintiffs do not allege generically that Defendants approved "every major operational decision." *Id.* Rather, Plaintiffs have compiled specific evidence tethering Defendants' U.S. conduct to the toxic emissions that harmed them. *Supra* Part I.C.2. Defendants' direct involvement in the tortious conduct – engineered through Rennert's unusual operating procedures, *see* App.122-24; R.Doc.640-10 – is not activity "common to most corporations." *Nestlé*, 141 S. Ct. at 1937. Instead, "the specific decisions to engage in the conduct that forms the bases of [the] claims were made in the United States." Add.55.

II. ALTERNATIVELY, THE COURT SHOULD REJECT FOREIGN-POLICY ABSTENTION

Because this case does not warrant foreign-policy abstention, the Court need not decide whether a future case might. But if the Court reaches that question, it should reject Defendants' proposed abstention doctrine altogether.

A. International-comity abstention asks courts to disregard their "virtually unflagging" "obligation to hear and decide a case." *Sprint*, 571 U.S. at 77 (cleaned up). That duty wavers only in "extraordinary and narrow" – and carefully delineated – circumstances. *In re Otter Tail Power Co.*, 116 F.3d 1207, 1215 (8th Cir. 1997). The Supreme Court has identified only a few "exceptional" situations that qualify. *See Colorado River*, 424 U.S. at 813-19.

International comity is not among them. Comity is not its own doctrine, but a principle of deference embedded in other doctrines. *See* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2099-2119 (2015) (surveying doctrines). That principle no doubt influences a range of other legal doctrines, including statutory interpretive canons. *See Hartford Fire*, 509 U.S. at 798-99; *id.* at 813-18 (Scalia, J., dissenting). But the Supreme Court has never fashioned it into a standalone basis for prudential abstention.

Doing so now would transgress abstention's settled limits. One limit grants "the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996). Dismissing Plaintiffs' non-discretionary damages claims would exercise the very power *Quackenbush* denies. It also would conflict with the Supreme Court's refusal to convert the act-of-state doctrine into a "vague doctrine of abstention," enabling courts to dismiss cases whenever they risk "embarrass[ing] foreign governments." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406, 409 (1990).

The few circuits to bless foreign-policy abstention were thus mistaken. The first to analyze the doctrine in any detail, the Eleventh Circuit in 2004, derived it from "only three cases, all from the Second Circuit," none of which actually abstained on comity grounds. *GDG*, 749 F.3d at 1030-31 (discussing

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Ungaro-Benages, 379 F.3d at 1237-39). That dubious foundation is reason enough to "declin[e] to follow the Eleventh Circuit down [its] comity path." *Mujica*, 771 F.3d at 622 (Zilly, J., dissenting in part); *see Gross*, 456 F.3d at 393-94 (conveying "skeptic[ism]" of *Ungaro-Benages*'s approach). Indeed, the Eleventh Circuit itself has cast doubt on *Ungaro-Benages* and conveyed a reluctance to follow it ever again. *See GDG*, 749 F.3d at 1031-32. This Court should start where the Eleventh Circuit ended. The "broad application of the international comity doctrine" Defendants urge would flout courts' "virtually unflagging obligation to exercise the jurisdiction granted" them. *Gross*, 456 F.3d at 393-94 (cleaned up).

B. Defendants' abstention doctrine also upsets the separation of powers. The Constitution vests Congress, not courts, with the power to "defin[e] the scope of federal jurisdiction." *New Orleans Pub. Serv.*, 491 U.S. at 359. It likewise empowers the political branches, not courts, to "conduct . . . foreign relations." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Foreign-policy abstention offends both principles. It lets courts choose cases based on their own predictions of how a lawsuit might affect "the respective interests of the United States and [a] foreign country." *Mujica*, 771 F.3d at 603. Courts are ill-equipped to make such predictions. The judicial task is to interpret and apply the law, not to guess about the international-relations ramifications of doing so. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 229-30 (1986).

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Defendants compound that problem by proposing an unworkable balancing test. Rules about when courts will hear cases should be "clear[ ]" and "simple to apply." *Hertz Corp. v. Friend*, 559 U.S. 77, 95-96 (2010). Foreign-policy abstention is the opposite. Indeed, *Mujica* admits that "courts have struggled to apply a consistent set of factors in their comity analyses." 771 F.3d at 603. The Eleventh Circuit, for example, proposed a three-factor test but "offer[ed] no substantive standards for assessing" them. *Id.* *Mujica* then filled the gap by inventing a "list of indicia" comprising no less than 13 subfactors. *Id*. at 603-08. And *Torres* just adds to the confusion, with the district court citing yet another eight-part test drawn from a Restatement section about prescriptive comity. *See Torres*, 965 F. Supp. at 908. The resulting jumble of factors offers "no sort of guidance" at all. *Medellin*, 552 U.S. at 516; *see id.* at 514-15 (spurning "multifactor, judgment-by-judgment analysis" for self-executing treaties).

The Supreme Court often rejects balancing tests so abstruse. For example, it refused to let courts determine the reach of federal antitrust laws on a "case by case" basis by "abstaining where comity considerations so dictate," calling such a test "too complex to prove workable." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 168 (2004). It similarly refused to tether treaty enforcement to the "ad hoc judgment of the judiciary," shunning the dissent's multifactor test for a "time-honored textual approach" instead. *Medellin*, 552 U.S. at 514-15. This Court

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should do the same. Defendants urge a convoluted test asking the Court to weigh a grab bag of policy considerations ranging (at 22, 27) from U.S. trade objectives to Peruvian efforts to "grow its economy." Such unbounded policy analysis "vest[s] with the judiciary [a] power" it does not have. *Medellin*, 515 U.S. at 516.

C. Foreign-policy abstention is also unnecessary. Courts already have established tools for dismissing claims that belong elsewhere, including forum non conveniens, the act-of-state doctrine, and conflict preemption. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (forum non conveniens); Add.70-71 (act-of-state doctrine); Add.71-72 (preemption). For example, if Plaintiffs' claims were a "direct attack" on Peru's "policy choices," Defs.Br.15, the act-of-state doctrine could well bar the attack. *See W.S. Kirkpatrick*, 493 U.S. at 404-05. But Defendants lost that defense below and do not appeal it now. Add.70-72. Allowing them to repackage their act-of-state arguments as foreign-policy abstention would flout the limits the Supreme Court has imposed on the former. *See W.S. Kirkpatrick*, 493 U.S. at 406 (rejecting "vague doctrine of abstention").

Forum non conveniens solves the other concerns Defendants identify. If this case truly belonged "in [an] alternative forum," *Piper*, 454 U.S. at 255, Defendants could have pursued their forum-non-conveniens defense. But that doctrine demands an "exceptional" showing Defendants cannot make. *K-V Pharm. Co. v. J. Uriach & CIA, S.A.*, 648 F.3d 588, 598 (8th Cir. 2011). So they omitted it from their

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motions below and now have forfeited it. *See Estate of I.E.H. v. CKE Rests., Holdings, Inc.*, 995 F.3d 659, 664 (8th Cir. 2021). The Court should not invent a new abstention doctrine to accomplish what those other defenses cannot.

CONCLUSION

The Court should affirm.

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Respectfully submitted,

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This brief complies with the type-volume limits of Federal Rule of Appellate Procedure 32(a)(7) because, according to the word-processing system used to prepare it (Microsoft Word 2016), it contains 13,000 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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I hereby certify that on August 31, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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