No. 16-_____

IN THE
Supreme Court of the United States

PEMEX-EXPLORACIÓN Y PRODUCCIÓN,
Petitioner,

v.

CORPORACIÓN MEXICANA DE MANTENIMIENTO INTEGRAL, S. DE R.L. DE C.V.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court may confirm a foreign arbitral award annulled at the seat of arbitration on the ground that the foreign court annulling the award misapplied its own law and deviated in some respects from U.S. law.

2. Whether a court confirming an arbitration award may "interpret" the award to include an additional component of damages that the award does not mention.

3. Whether a party on appeal forfeits any jurisdictional objections by seeking remand to a district court after an intervening event negates the basis for the underlying decision.

RULE 29.6 DISCLOSURE STATEMENT

Pemex-Exploración y Producción ("PEP") is a corporation organized under the laws of Mexico. It is wholly owned by Petróleos Mexicanos, a corporation organized under the laws of Mexico and wholly owned by the United Mexican States. No publicly held company owns ten percent or more of PEP's stock.

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Pemex-Exploración y Producción respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Pet. App. 1a-54a) is reported at 832 F.3d 92. The District Court's opinion (Pet. App. 55a-98a) is reported at 962 F. Supp. 2d 642. The District Court's order and final judgment (Pet. App. 99a-101a) is unreported.

JURISDICTION

The judgment of the Second Circuit was entered on August 2, 2016, and a timely petition for panel

rehearing and rehearing en banc was denied on November 1, 2016. Pet. App. 107a-108a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Article 5(1)(e) of the Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12 (1981) ("Panama Convention") provides:

> 1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
>
> * * *
>
> e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

INTRODUCTION

This case arose after two Mexican corporations—Pemex-Exploración y Producción ("PEP") and Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. ("COMMISA")—entered into a contract in Mexico that they agreed would be governed by Mexican law. When the parties reached a contractual dispute, COMMISA sought arbitration in Mexico. An arbitral panel initially issued an award against PEP. But PEP sought review in Mexico's second-

highest court, and it annulled the award—concluding, based on Mexico's long-established limits on arbitrability, that the subject matter of the dispute was not amenable to arbitration.

That should have been the end of the matter. But before the Mexican proceedings had concluded, COMMISA "raced" to New York—a State, in a country, with no connection to the contract or the arbitration—and obtained confirmation of the award. Pet. App. 8a. And even after the Mexican court nullified that award, and the Second Circuit vacated and remanded the confirmation decision, COMMISA forged on. It asked the District Court not only to ignore the Mexican court's nullification decision and again confirm the defunct award, but also to augment it by $106 million in damages that had not even "occurred" before the award was issued. *Id.* at 36a. After conducting a three-day hearing on Mexican law, the District Court obliged. *Id.* at 58a.

On appeal, the United States filed a brief explaining that the District Court had erred by "effectively act[ing] as a Mexican appellate court" and "'enlarg[ing]' upon the terms of" the underlying award. U.S. Letter Br. 15, 18, *COMMISA* v. *PEP* (No. 13-4022) ("U.S. Br."). The Second Circuit nonetheless affirmed: Like the District Court, it concluded that the Mexican court's decision could be ignored, and the arbitral award "interpret[ed]" to contain $106 million it nowhere mentioned. Pet. App. 37a. Moreover, the Second Circuit concluded that PEP had "forfeited" any defense to the U.S. courts' assertion of jurisdiction by seeking vacatur of the District Court's initial confirmation decision in light of the Mexican annulment. *Id.* at 12a, 19a.

Each of these holdings is a first, and sharply conflicts with the rules applied by other circuits. No Court of Appeals has ever confirmed a foreign arbitral award annulled at the seat of arbitration; before now, every leading authority agreed that confirmation of a nullified award is proper only when the foreign annulment decision is "tainted," "other than authentic," or "violat[ive] [of] the [United States'] most basic notions of morality and justice." *Termo-Rio S.A. E.S.P.* v. *Electranta S.P.*, 487 F.3d 928, 930, 938 (D.C. Cir. 2007). Nor has any U.S. court ever "interpret[ed]" an arbitration award to contain damages plainly absent from its text; other circuits make clear that an award must be confirmed "as written." *Wartsila Finland OY* v. *Duke Capital LLC*, 518 F.3d 287, 292 (5th Cir. 2008). And "no case" has ever suggested that a party forfeits the right to press a jurisdictional defense simply by asking that a merits decision be vacated in light of new developments that render it nonviable. Pet. App. 43a (Winter, J., concurring).

Each of these holdings is also profoundly incorrect, and will, if left in place, have dire consequences for the international arbitration system. The decision below establishes New York—the principal site for confirming foreign arbitral awards—as a haven for disappointed foreign litigants seeking to enforce (and enlarge) awards that their own courts have invalidated. It invites foreign courts to demonstrate reciprocal disrespect for the judgments of U.S. courts. And it undermines the "principal purpose" of the New York Convention and the Panama Convention: to "unify" the treatment of foreign arbitral awards. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

If these grave costs are to be incurred, it should not be at the behest of three judges on a single Court of Appeals. The Court should grant certiorari and reverse the decision below.

STATEMENT

A. The New York Convention And The Panama Convention

The United States and Mexico are parties to the New York Convention and the Panama Convention—materially identical treaties that, collectively, over 150 nations have joined. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 ("New York Convention"); Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, S. Treaty Doc. No. 97-12 (1981) ("Panama Convention").[1] These agreements aim to establish a "unif[orm]" system for the "recognition and enforcement" of foreign arbitral awards. *Scherk*, 417 U.S. at 520 n.15; *see* H.R. Rep. No. 101-501, at 5 (1990). The cornerstone of that system is a division of authority between the courts of two jurisdictions: the nation in which an arbitration takes place (known as the "primary jurisdiction" or the "seat of arbitration") and the nation in which a party seeks judicial enforcement of an arbitral award (known as the "secondary jurisdiction").

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[1] The Panama Convention governs if "a majority of the parties to the arbitration agreement" are citizens of states that have ratified that treaty; otherwise, the New York Convention applies. 9 U.S.C. § 305; *see* Pet. App. 21a & n.9 (noting that the treaties' terms are substantively identical).

Under each Convention, courts in the *primary* jurisdiction retain broad authority to review and annul arbitral awards in accordance with "exceptions to arbitrability grounded in domestic law." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985); *see* Restatement (Third) of International Commercial Arbitration § 4-16 cmt. a (Tentative Draft No. 2, 2012) ("Draft Restatement"). Thus, U.S. courts may annul U.S. arbitration awards on any ground set forth in federal law. *See, e.g.*, 9 U.S.C. § 10. Mexican courts may likewise annul Mexican awards that violate the limits on arbitrability set forth in section 1457 of the Mexican Commercial Code. *See* Pet. App. 70a n.11.

Courts in a *secondary* jurisdiction, in contrast, have a tightly circumscribed role. *See Mitsubishi*, 473 U.S. at 639 n.21; *Scherk*, 417 U.S. at 520 n.15. Upon receiving a petition for enforcement of a foreign arbitral award, courts generally must confirm the award "as written." *Wartsila*, 518 F.3d at 292; *see* 9 U.S.C. §§ 207, 302. Confirmation proceedings are "summary" in nature; barring some lawful ground for non-enforcement, a confirming court's role is to convert the arbitral award into a domestic judgment. *See* Draft Restatement § 4-1 cmt. d.

Enforcement of a foreign award "may be refused" in certain circumstances. Panama Convention art. 5(1); New York Convention art. V(1). In particular, courts "may" decline to confirm an award that has been "annulled or suspended by a competent authority of" the primary jurisdiction. Panama Convention art. 5(1)(e); *see* New York Convention, art. V(1)(e). Although this language is framed permissively, it is widely agreed that courts may properly enforce a

nullified foreign award "only in rare circumstances," Draft Restatement § 4-16 reporters' note c, where the annulment decision is "repugnant to fundamental notions of what is decent and just in the United States," *TermoRio*, 487 F.3d at 939; *see* U.S. Br. 14-15; Pet. App. 24a-25a. Accordingly, courts grant comity to annulment decisions made at the seat of arbitration—and decline to confirm nullified arbitral awards—unless those decisions are "tainted," "other than authentic," or "violat[ive] [of] the [United States'] most basic notions of morality and justice." *TermoRio*, 487 F.3d at 930, 938.

B. Proceedings In Mexico

1. In 1997, PEP, a subsidiary of Petróleos Mexicanos—Mexico's state-owned oil and gas company—entered a "public works contract" with COMMISA, a Mexican subsidiary of KBR, Inc. Pet. App. 4a; J.A. 44-45. Pursuant to that contract, COMMISA agreed to construct two offshore natural gas platforms in Mexican waters. Pet. App. 58a. The contract stated that it would be governed by Mexican law, and that any dispute arising under it would be resolved by arbitration before a three-member panel in Mexico City. *Id.* at 58a-59a nn.1-2.

The contract also set forth a procedure for "administrative rescission." Pet. App. 59a & n.3. In Mexico, administrative rescission is an authority vested by statute in entities that oversee public works contracts; it authorizes them to unilaterally cancel such contracts to preserve the public fisc or protect the public interest. *Id.* at 521a-522a. The parties agreed that PEP could administratively rescind their contract if COMMISA "abandon[ed]" its work. *Id.* at 59a n.3. They also agreed that, in the event of a breach,

PEP could collect performance bonds from COMMISA that equaled 10% of the contract amount. *Id.* at 59a-60a & n.4.

2. From the start, COMMISA's work was plagued by delays and cost overruns. In 2003—three years after COMMISA had initially promised to *finish* its work—the parties executed a supplemental contract that extended the deadline until early 2004. J.A. 96, 99. COMMISA failed to meet that deadline, too.

In March 2004, PEP concluded that COMMISA had abandoned the project, and gave notice of its intent to administratively rescind the contract. Pet. App. 61a. Months of conciliation efforts proved fruitless. *Id.* In December 2004, PEP made its rescission final. *Id.*

3. COMMISA challenged the rescission nearly simultaneously in arbitration and Mexican court. Pet. App. 61a-62a. In the courts, COMMISA argued that the statutes authorizing administrative rescission violate the Mexican constitution. *Id.* at 62a. The Mexican Supreme Court rejected that challenge in 2006. *Id.* It explained that administrative rescission is an "act of authority" properly vested in entities like PEP, and that the statutes authorizing rescission do not infringe COMMISA's constitutional right of access to the courts because PEP's rescission "can be challenged" in the Federal District Courts for Administrative Matters. *Id.* at 437a (quoting 2006 decision); *see id.* at 62a-63a.

Having failed in the Mexican courts, COMMISA challenged PEP's rescission in arbitration as a breach of contract. Pet. App. 64a, 455a-456a. PEP responded that arbitration of this issue was improper because (among other things) rescission is an "act of

authority" that can be challenged only in a Mexican court. J.A. 181-183; Pet. App. 65a. In 2009, a divided arbitral panel disagreed; it found PEP's rescission unlawful and awarded COMMISA $286 million in damages, plus interest, fees, and expenses. Pet. App. 68a-69a; *see id.* at 475a-476a, 480a. The only Mexican lawyer on the panel dissented. He explained that Mexican law gives Mexican courts "exclusive jurisdiction" to review public acts of authority. J.A. 969-971.

4. PEP petitioned the Mexican courts to set aside the award. Pet. App. 70a. The case eventually reached the Eleventh Collegiate Court for the Federal District, Mexico's analogue to the Court of Appeals for the D.C. Circuit. *Id.* at 72a; *see id.* at 8a. In 2011, it issued a 486-page decision annulling the award. *Id.* at 72a.

The court began its analysis[2] by explaining that, "under section 1457(II) of the Commercial Code * * * [a] controversy may not be submitted to arbitration * * * when it violates the public order." Pet. App. 375a. The court found it clear—and COMMISA has never disputed—that this provision prohibits parties from agreeing to arbitrate public "acts of authority." *Id.* at 379a, 405a-406a, 412a-414a; *see id.* at 333a-335a (summarizing COMMISA's arguments). Mexican law, it explained, grants courts "exclusive[]" jurisdiction to review acts of authority, which are by definition entrusted to public officials rather than

[2] As is customary in civil-law jurisdictions, the court began by extensively summarizing the lower-court opinions and the parties' arguments. The court's analysis begins at Pet. App. 354a.

private individuals. *Id.* at 405a; *see id.* at 379a, 405a-412a, 501a.

The court then concluded that it was "clear," and "unquestionable" that administrative rescission is an act of authority. Pet. App. 497a, 522a. Among other things, the Mexican Supreme Court had expressly held as much in a 1994 decision. *Id.* at 514a (quoting 1994 decision holding that administrative rescission "constitutes an administrative act of authority"). And the Mexican Supreme Court had reaffirmed that holding in its 2006 ruling on COMMISA's constitutional challenge. *Id.* at 437a (quoting 2006 decision). Moreover, the purpose of administrative rescission is to ensure that "the financial resources of the Mexican State [are] allocated to the construction of public works for the benefit of society"; it would contradict that purpose to allow a private arbitrator to invalidate such decisions. *Id.* at 521a-522a; *see id.* at 495a-497a.

More than 150 pages into its analysis, the court noted that its conclusion was "strengthened" by the fact that, in 2009, the Mexican legislature had amended Section 98 of the Law of Public Works and Related Services to explicitly prohibit arbitration of administrative rescission. Pet. App. 506a-507a. The court made clear that it was not engaging in "retroactive application" of this 2009 law. *Id.* at 511a. It was simply citing it as a "guiding principle" to demonstrate that the "current trend" in the legislature mirrored what the precedents and underlying principles otherwise dictated. *Id.* at 510a-511a.

Applying its analysis to the parties' dispute, the court ruled that "pursuant to section 1457 of the Commercial Code," the arbitral award against PEP

was "null and void." Pet. App. 528a. The court repeatedly emphasized that its holding did not leave COMMISA without a forum to challenge the rescission. As the Mexican Supreme Court had held in 2006, COMMISA could bring a claim for damages before the Federal District Courts for Administrative Matters. *Id.* at 500a, 504a, 512a, 513a, 527a.

5. After the Eleventh Collegiate Court issued its decision, PEP filed claims in Mexican court to collect on the performance bonds COMMISA had posted. Pet. App. 75a. Consistent with the basis for its rescission, PEP argued that COMMISA had breached the contract by abandoning its work. *Id.* The courts agreed, and awarded PEP the full amount of the performance bonds, which totaled $106 million. *Id.* at 75a-76a.

C. Proceedings Below

1. Before the review process in Mexico even began, COMMISA "raced" to New York to confirm its arbitral award under the Panama Convention. Pet. App. 8a; *see* 9 U.S.C. §§ 207, 302. Because PEP is not incorporated in New York, does not have its principal place of business in New York, and did not negotiate or perform the contract in New York, it asked that the petition be dismissed for lack of personal jurisdiction and *forum non conveniens*. Pet. App. 105a. In 2010, the District Court issued a summary ruling rejecting PEP's defenses and confirming the award—which, including interest, now totaled $356 million. *Id.* at 106a, 69a n.10. The District Court required PEP to deposit the full amount of the award with the court while it pursued any appeal. *Id.* at 69a-70a.

PEP appealed to the Second Circuit, reasserting its jurisdictional defenses and contesting the confirma-

tion. Pet. App. 12a. While the appeal was pending, the Eleventh Collegiate Court annulled the award. Because the fundamental predicate for the District Court's decision had been extinguished, PEP asked the Court of Appeals to either vacate the decision and remand the case or hold the appeal in abeyance while the District Court reconsidered its decision. *Id.* at 103a; *see* Mot. of PEP for Remand to the D. Ct. at 18, *COMMISA*, *supra*. The Second Circuit opted to vacate and remand, instructing the District Court to consider whether "enforcement of the award should be denied because it 'has been set aside or suspended.'" Pet. App. 103a.

2. On remand, the District Court held a three-day evidentiary hearing to assess the merits of the Eleventh Collegiate Court's decision. Pet. App. 78a. An expert for COMMISA testified that he thought the Mexican court's decision was poorly reasoned and "contrary to Mexican law." *Id.* Another COMMISA witness testified that, in his view, the Mexican decision "left COMMISA without a remedy to obtain a hearing on the merits of its claims." *Id.* PEP introduced experts who rebutted both points. *Id.*

Following the hearing, the District Court refused to defer to the annulment decision and confirmed the nullified award. Pet. App. 89a. In the court's view, the Eleventh Collegiate Court had "retroactive[ly] appli[ed]" Section 98 to hold PEP's rescission non-arbitrable. *Id.* at 93a. True, the Mexican court had expressly "stated that it was not" applying the law retroactively; but the District Court deemed the Mexican court's support for that holding "so marginal" that Section 98 *must* have been "critical to its decision." *Id.* at 91a-92a. The District Court also

concluded that the Mexican decision "left COMMISA without a remedy to litigate the merits of the dispute." *Id.* at 94a. Again, the Eleventh Collegiate Court had expressly held otherwise, but (in the District Court's view) COMMISA's expert made a "more convincing" case that COMMISA was required to challenge the actions in tax court subject to a short statute of limitations. *Id.* at 95a & n.24. The District Court thus concluded the Mexican decision "violated basic notions of justice" and could be ignored. *Id.* at 97a.

In a summary order issued shortly thereafter, the District Court ordered PEP to pay COMMISA an additional $106 million. *See* Pet. App. 100a. The arbitral award made no provision for that amount. But the District Court said the additional payment was justified to reflect "the amount that PEP collected on the performance bonds." *Id.*

3. On appeal, PEP renewed its jurisdictional defenses and challenged the merits of the District Court's decision. At the Second Circuit's request, the United States also filed a lengthy letter brief. The Government explained that the District Court had improperly assumed the role of a "Mexican appellate court" and failed to "articulate [any] overriding principles of fairness" sufficient to deny recognition to the Mexican annulment decision. U.S. Br. 15-16. Moreover, the Government explained that the court had "exceeded its authority" by augmenting the award by $106 million, rather than simply "enforc[ing] [it] 'as written.'" *Id.* at 18.

The Second Circuit filed its opinion nearly two years after oral argument. It did not address the Government's arguments; indeed, it did not

acknowledge the Government's submission at all. Instead, it affirmed the District Court on all counts.

a. The panel first held that it did not need to address PEP's jurisdiction and venue defenses. Pet. App. 12a, 19a. In its view, PEP abandoned these arguments when it asked the court to vacate and remand the case in light of the Eleventh Collegiate Court's decision. *Id.* at 12a. "Because PEP affirmatively and successfully sought relief from this Court remanding for a new merits determination," it reasoned, PEP "forfeited its argument that personal jurisdiction [or venue] is lacking." *Id.*; *see id.* at 19a. The court added that PEP also could not raise a personal jurisdiction defense because it is "a corporation owned by a foreign sovereign," and thus not a "person" within the meaning of the Due Process Clause. *Id.* at 16a.

b. The panel then turned to the merits. It recited the principle that courts may enforce a nullified foreign arbitral award "only to vindicate 'fundamental notions of what is decent and just' in the United States." Pet. App. 25a. But the court identified four considerations that it thought satisfied that "high, and infrequently met" standard. *Id.* at 24a-25a.

First, the court opined that the Eleventh Collegiate Court's decision contravened "settled domestic law" that "valid waivers must be enforced." Pet. App. 26a. PEP had agreed to arbitrate any dispute in its contract with COMMISA, and had not immediately argued that administrative rescission was non-arbitrable. *Id.* Thus, the panel took the view that PEP had "waived" any defense to arbitration; by nonetheless deeming the rescission non-arbitrable, the Eleventh Collegiate Court "shatter[ed]

COMMISA's investment-backed expectation." *Id.* at 26a-27a.

Second, the Second Circuit held that the Mexican decision "impair[ed]" the "concept" that "retroactive application of laws" is disfavored. Pet. App. 27a. In the panel's view, it was "incontestable" that, "[p]rior to the enactment of Section 98" in 2009, "PEP was authorized to arbitrate" the validity of administrative rescission. *Id.* at 29a. The court thought the 1994 Mexican Supreme Court decision describing rescission as an "act of authority" supplied a "weak premise" for the Eleventh Collegiate Court's contrary conclusion, given that "the word 'arbitration' does not appear in" that decision and there were supposedly a "number of other cases going the other way." *Id.* at 30a. In its view, the Mexican court "relie[d] heavily on Section 98," and—notwithstanding its express statement to the contrary—engaged in "retroactive application of" that statute. *Id.* at 29a-30a.

Third, the Second Circuit concluded that the Mexican decision violated the principle that "litigants with legal claims should have an opportunity to bring those claims somewhere." Pet. App. 32a. The court said this rule was "firmly embedded in legal doctrine," as evidenced by exceptions to the rules of *forum non conveniens*, mootness, and procedural default in federal habeas law. *Id.* at 31a. Like the District Court, the Second Circuit found that COMMISA "had no sure forum in which to bring its contract claims," because a 2007 statute never cited by the Mexican court ostensibly required COMMISA to file any challenge to the rescission in tax court, subject to a short statute of limitations. *Id.* at 32a-33a.

Fourth, the court concluded that the Mexican decision "amounted to a taking of private property without compensation." Pet. App. 33a. Just as the Mexican court had (purportedly) denied COMMISA a forum in which to challenge the administrative rescission, the panel reasoned, it had also deprived COMMISA of a forum in which to seek compensation for its losses. *Id.* In a single sentence, the court opined that the decision amounted to a violation of the North American Free Trade Agreement, too. *Id.* at 34a.

c. Last, the Second Circuit upheld the District Court's tack-on of $106 million to COMMISA's arbitral award. The panel acknowledged that a confirming court's power is limited to enforcing the "final arbitration award." Pet. App. 35a. But, it contended, the arbitral panel had issued a preliminary order directing PEP not to collect on COMMISA's performance bonds, and PEP had done so "*after* the Final Award had already issued," leaving "no occasion for the Final Award to specify damages stemming from" that conduct. *Id.* at 35a-36a. Accordingly, the District Court had properly "interpret[ed]" the award to include that amount. *Id.* at 36a-37a.

4. Judge Winter concurred separately, but parted ways with the panel on its jurisdictional holding. Pet. App. 37a-54a. He explained that the panel's conclusion that PEP had forfeited its jurisdictional defenses by seeking vacatur and remand was "unprecedented." *Id.* at 40a. "[M]any courts have declined to find forfeiture" based on far more compelling conduct, while "no case" had "impos[ed] forfeiture in circumstances" like these. *Id.* at 42a-43a.

5. PEP unsuccessfully sought rehearing and rehearing en banc. Pet. App. 107a-108a. This petition followed.

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to reverse a trifecta of unprecedented holdings that threaten grave damage to the Nation's foreign affairs. In the decision below, the Second Circuit denied comity to a foreign court's annulment decision based on disagreements with its application of foreign law; "interpret[ed]" the annulled award to contain millions of dollars its terms plainly do not include; and denied PEP the opportunity to challenge the court's jurisdiction because it sought vacatur of a merits decision that was no longer valid. Each of these rulings sharply conflicts with the rules applied by other circuits. And together, they can be expected to foster reciprocal disrespect for U.S. judgments abroad, undermine the international arbitration system, and destabilize U.S. confirmation proceedings.

I. THERE IS A STARK CONFLICT ON THE STANDARD FOR ENFORCING ARBITRAL AWARDS ANNULLED AT THE SEAT OF ARBITRATION.

The decision below creates a sharp conflict between the Second and D.C. Circuits—two of the Nation's most important jurisdictions for enforcing foreign arbitral awards—on the scope of courts' discretion to enforce arbitral awards annulled at the seat of arbitration. The Second Circuit's rule is wrong. It abandons background principles of comity, under-

mines the structure of the Conventions, and reflects a shocking lack of respect for the Mexican courts.

A. The Second Circuit's Decision Conflicts With The Rule Adopted By The D.C. Circuit, The Restatement, And The Government.

1. Prior to the decision below, every leading authority to consider the question agreed that courts may enforce a nullified foreign arbitral award only if the annulment decision is tainted, inauthentic, or contrary to some bedrock norm of U.S. jurisprudence. Mere errors in applying foreign law or deviations from U.S. procedures do not suffice.

a. The D.C. Circuit was the first to articulate this position. In *TermoRio*, a Colombian corporation petitioned the district court to confirm a Colombian arbitral award that had been annulled by Colombia's highest administrative court, the Consejo de Estado. 487 F.3d at 930. TermoRio argued that the annulment decision could be ignored because, according to an "independent expert in Colombian law," it was "replete with serious errors in its application of Colombian law" and "stripped [TermoRio] of the benefits of [its] bargained-for arbitration clause." TermoRio Br. 26-27, 29, *TermoRio*, *supra* (No. 06-7058).

The D.C. Circuit denied confirmation. It explained that because "the proceedings before the Consejo de Estado" were not "tainted" and the court's judgment was not "other than authentic," it was "obliged to respect" the Colombian court's decision. *TermoRio*, 487 F.3d at 930. The D.C. Circuit acknowledged that a "narrow public policy gloss" would allow it to confirm an annulled award if the annulment decision

were "repugnant to fundamental notions of what is decent and just." *Id.* at 939. But it explained that this exception "does not endorse a regime in which secondary States * * * routinely second-guess the judgment of a court in a primary State." *Id.* at 937. Nor may courts enforce an award "solely because a foreign court's grounds for nullifying the award would not be recognized under domestic United States law." *Id.* at 936. Rather, the exception "is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." *Id.* at 938.

Applying this standard, the court made quick work of TermoRio's arguments. It said that the Colombian court's refusal to enforce the award did not "violate[] any basic notions of justice to which we subscribe." *Id.* at 939. And the D.C. Circuit could not vacate the award "based upon [its] construction of the law of the primary State." *Id.* at 938. "The Consejo de Estado * * * is the final expositor of Colombian law," the D.C. Circuit explained, "and we are in no position to pronounce the decision of that court wrong." *Id.* at 939.

b. The Draft Restatement takes a similar approach. *See generally BG Grp. PLC* v. *Republic of Argentina*, 134 S. Ct. 1198, 1221-22 (2014) (Roberts, C.J., dissenting) (consulting the Draft Restatement to determine what "the law of international commercial arbitration" requires). It says that in determining whether to grant comity to a foreign annulment decision, courts should typically "take[] as [their] point of departure the law of judgments." Draft Restatement § 4-16 reporters' note d. In most jurisdictions, including New York, that law is the Uni-

form Foreign Money-Judgments Recognition Act ("UFMJRA"). *Id.* Consistent with the UFMJRA, courts may thus deny comity because of "fraud," lack of "impartial[ity]," or "repugnan[cy] to [U.S.] public policy." *Id.* They may not, however, refuse to recognize an annulment decision based on "a mere difference in the procedural system"; rather, "[a] case of *serious injustice* must be involved." UFMJRA § 4 cmt (emphasis added).

The Draft Restatement adds that there may be "other extraordinary circumstances" in which a court may properly deny comity to an annulment decision. Draft Restatement § 4-16 reporters' note d. But it makes clear that this exception "focus[es]" on cases in which the annulment court "*knowingly* and *egregiously* departed from the rules ordinarily applied to such actions in the jurisdiction." *Id.* (emphases added).

c. The Government has expressly adopted the approach taken in *TermoRio* and the Draft Restatement. *See generally Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (Executive Branch's views on treaty interpretation entitled to "great weight"). In is briefing below, the Government explained that the Draft Restatement sets out the "appropriate standard," one "consistent with" *TermoRio*. U.S. Br. 12-14. Just like those authorities, the Government takes the view that it is "not * * * appropriate" for a court to conduct "an extensive inquiry into the soundness of a foreign court's legal reasoning, particularly when that inquiry involves consideration of issues of foreign law that were already considered by the foreign court." *Id.* at 15. Nor can a court deny recognition merely because a foreign court has

departed from "principles of U.S. law," let alone because it has issued rulings that "could also occur in U.S. courts." *Id.* at 16-17. Rather, the court must find that the foreign tribunal has violated "*overriding* principles of fairness that *must* apply in" the context of the parties' dispute. *Id.* at 16 (emphases added).

2. In the decision below, the Second Circuit departed from this consensus approach. Although it purported to analyze the Mexican annulment decision under the same "repugnan[cy]" standard that the D.C. Circuit, the Draft Restatement, and the Government have embraced, Pet. App. 25a, it rejected the limits those authorities have adopted and engaged in analysis they categorically prohibit.

a. First, the Second Circuit second-guessed—and, worse, rejected—the Eleventh Collegiate Court's interpretation of Mexican law. As described above, the Collegiate Court concluded that it was "clear" and "unquestionable" that COMMISA's arbitral award was invalid "pursuant to section 1457 of the Commercial Code." Pet. App. 505a, 522a, 528a. The Second Circuit disagreed: It thought the Eleventh Collegiate Court had overlooked a "number of other [Mexican] cases going the other way," and that "the capacity of PEP to arbitrate" under Mexican law, despite being hotly litigated, was in fact "*incontestable*." *Id.* at 29a-30a (emphasis added). Moreover, dismissing the Mexican court's insistence that it was *not* engaging in "retroactive application" of Section 98, and instead citing it simply as a "guiding principle," *id.* at 511a, the Second Circuit opined that the decision "relie[d] heavily on Section 98" and resulted

in "retroactive application of that law," *id.* at 29a-30a.

The Second Circuit also second-guessed the Mexican court's holding as to the proper forum in which to challenge PEP's administrative rescission. The Eleventh Collegiate Court held no fewer than five times that COMMISA could bring a claim challenging the rescission in the Federal District Court for Administrative Matters, one of Mexico's four regular federal district courts. Pet. App. 500a, 504a, 512a, 513a, 527a; *see id.* at 62a n.6. Yet the court below concluded—on the basis of a Mexican statute the Mexican court never mentioned—that COMMISA could only bring its claims in tax court subject to a short statute of limitations. *Id.* at 32a.

This approach is irreconcilable with the majority standard. The Second Circuit did not treat the Eleventh Collegiate Court as "the final expositor of [Mexican] law," *TermoRio*, 487 F.3d at 939, or purport to find that it had "*knowingly* and *egregiously* departed from" Mexican law, Draft Restatement § 4-16 reporters' note d (emphases added). Rather—like the District Court before it—the Second Circuit "effectively acted as a Mexican appellate court," focusing on "whether the Mexican court's decision was correct." U.S. Br. 15.

b. The Second Circuit also broke with the other authorities by deeming the Mexican court's decision "repugnant" to basic notions of justice based on minor or non-existent departures from U.S. law. Of the four considerations the court said rendered the annulment inconsistent with U.S. public policy, *all* are consistent with U.S. law or amount to "mere difference[s] in * * * procedur[e]." UFMJRA § 4 cmt.

First, the panel held that, by refusing to enforce PEP's agreement to arbitrate, the Eleventh Collegiate Court violated the "settled" rule that "valid waivers must be enforced." Pet. App. 26a. U.S. courts, however, *also* refuse to enforce arbitration agreements where they exceed limits on arbitrability. *See, e.g.*, *Mitsubishi*, 473 U.S. at 627-628; 18 U.S.C. § 1514A(e); 7 U.S.C. § 26(n). Indeed, the Conventions expressly authorize courts to do so. *See* New York Convention art. V(2)(a); Panama Convention art. 5(2)(a). Perhaps that is why the D.C. Circuit summarily rejected TermoRio's almost identical complaint that a Colombian court violated U.S. public policy by "stripp[ing] [TermoRio] of the benefits of [its] bargained-for arbitration clause," TermoRio Br. 29, *TermoRio*, *supra*; *see TermoRio*, 487 F.3d at 939.

Second, the panel said that the Eleventh Collegiate Court's decision violated a norm against "[r]etroactive legislation that cancels existing contract rights." Pet. App. 28a. As just discussed, the notion that the Mexican court applied a law retroactively rests on a gross misreading of its decision. *See supra* pp. 21-22. But even putting that aside, this Court has expressly held that Congress *can* generally enact legislation retroactively affecting contract rights, so long as it speaks clearly. *See Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 272-273 (1994). It is inconceivable that a practice this Court has expressly sanctioned somehow violates the Nation's basic notions of justice. *Cf.* U.S. Br. 17.

Third, the panel said that by (allegedly) denying COMMISA a "sure forum" in which to challenge PEP's rescission, the Eleventh Collegiate Court

contravened the "imperative of having cases heard * * * somewhere." Pet. App. 31a. There is no such "imperative." U.S. courts regularly deny litigants a forum if they fail to comply with procedural requirements. As the Government observed, the precise sequence of events the Second Circuit complained of—a party files in the wrong forum, its claim is denied, and by that time the statute of limitations in the proper forum has run—"could also occur in U.S. courts." U.S. Br. 17. It is thus difficult to comprehend how such a violation could rise to the level of an "overriding principle[] of fairness," *id.* at 16, particularly as the Mexican Supreme Court explicitly told COMMISA to file in district court in 2006, *see* Pet. App. 63a, 74a.

Last, and relatedly, the court below said that the Eleventh Collegiate Court effected an "unconstitutional taking" and a NAFTA violation by denying COMMISA a clear forum in which to seek compensation for PEP's rescission. Pet. App. 33a. U.S. law also sets procedural limits, however, regarding when and how parties may file claims to recover assets allegedly taken by the government. *See* 28 U.S.C. § 2501. It is neither credible nor possible that the application of similar rules in Mexico amounts to a "serious injustice." UFMJRA § 4 cmt.

c. In sum, every element of the Second Circuit's analysis—from its freewheeling inquiry into Mexican law to its quibbles concerning Mexico's differences with U.S. law—is inconsistent with the basic precepts of comity adopted by the D.C. Circuit, the Government, and the Draft Restatement. Under the test applied by any one of those authorities,

COMMISA's petition for confirmation would have been denied.

This conflict of authority is highly significant. The Second Circuit and the D.C. Circuit are two of the Nation's principal jurisdictions for confirming foreign arbitral awards. Courts in the Second Circuit adjudicated over one-quarter of the confirmation petitions brought in the United States under the New York Convention between 2005 and 2014. *See* N.Y. Arbitration Convention, *Court Decisions—Decisions per Country*, http://www.newyorkconvention.org/court+decisions/decisions+per+country (last visited Jan. 30, 2017). The District Court of the District of Columbia, for its part, handled more confirmation petitions than any district save the Southern Districts of New York and Florida. *See id.* And because foreign assets—and, in particular, foreign sovereign assets—are often located in these jurisdictions, it is particularly easy for entities to seek confirmation in either location if they wish.

The decision below thus carves a divide between two of the Nation's most important confirmation jurisdictions, and makes an entity's amenability to potentially enormous liability contingent on which forum a litigant happens (or strategically chooses) to petition for confirmation. In doing so, it substantially undermines the Conventions' aim of "unify[ing] the standards by which *** arbitral awards are enforced." *Scherk*, 417 U.S. at 520 n.15. That division cannot be allowed to persist.

B. The Second Circuit's Decision Is Wrong.

Certiorari is also warranted because the Second Circuit's novel rule is plainly wrong.

1. For over a century, this Court has held that courts must, absent compelling considerations, grant comity to the judgments of foreign sovereigns. *See Hilton* v. *Guyot*, 159 U.S. 113 (1895). It has long made clear that comity may not be denied because of a perceived "erro[r]" of foreign law, *id.* at 203, or a difference in policy that falls within the range of "civilized jurisprudence," *id.* at 205-206; *see, e.g.*, *Ingenohl* v. *Walter E. Olsen & Co.*, 273 U.S. 541, 544 (1927) (Holmes, J.) (where "the final exponent of th[e] law[] authoritatively declares" its meaning, "we do not see how it is possible for a foreign Court to pronounce [that] decision wrong"); *Medellin* v. *Dretke*, 544 U.S. 660, 670 (2005) (per curiam) (Ginsburg, J., concurring). Courts have consistently applied those limits for decades. *See, e.g.*, *Soc'y of Lloyd's* v. *Siemon-Netto*, 457 F.3d 94, 102 (D.C. Cir. 2006) (stating that where "the English courts have already answered" a "question of English *** law," U.S. courts "cannot reconsider that decision"); *Soc'y of Lloyd's* v. *Ashenden*, 233 F.3d 473, 478 (7th Cir. 2000) (foreign courts need not "adopt[] every jot and tittle of American due process" to merit comity).

Those longstanding principles of comity govern the recognition of foreign annulment decisions. Each Convention provides, without elaboration, that recognition of an award annulled by the primary jurisdiction "may be refused." Panama Convention art. 5(1)(e); New York Convention art. V(1)(e). Absent some indication to the contrary, that discretion is presumably cabined by established rules of comity. *See, e.g.*, *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 543 (1987) (analyzing treaty in light of "the concept of international comity").

2. This reading of the Conventions is reinforced by their structure. As noted above, the international arbitration system divides authority between courts in the primary jurisdiction—which retain plenary authority to set "standards for nullification," U.S. Br. 13—and courts in the secondary jurisdiction, which must enforce valid foreign awards as written, Draft Restatement § 4-1 cmt. d.

The Second Circuit's approach undermines both halves of this system. It diminishes the privileged role assigned to primary jurisdiction courts, by subjecting their decisions to invasive review abroad. And it undercuts the predictability and uniformity of secondary-jurisdiction proceedings, by authorizing each of the Conventions' 150-plus signatories to conduct its own independent review of foreign annulment decisions, measured against the peculiarities of domestic law. As a result, the decision below provides litigants "every reason to pursue [their] adversar[ies] 'with enforcement actions from country to country until a court is found, if any, which grants the enforcement." *TermoRio*, 487 F.3d at 936 (citation omitted). Such a haphazard system is assuredly not the one the drafters intended.

3. The Second Circuit's invention of a new, skim-milk version of comity is also unworkable in practice. As the United States has explained, comity "gives courts the benefit of guidance from well-developed precedents on the recognition of judgments." U.S. Br. 13. It also appropriately constrains the review of generalist courts over questions of foreign law with which they have little expertise.

This case illustrates the hazards of abandoning that settled approach. The Second Circuit expressed

bafflement as to why the Eleventh Collegiate Court relied on a 1994 Mexican Supreme Court decision that declared rescission to be an "act of authority" but did not use "the word 'arbitration' "—even though the Collegiate Court explained at length that "acts of authority" are generally non-arbitrable in Mexico. Pet. App. 30a; *see id.* at 379a, 405a-406a, 412a-414a. The panel also assumed that a 2007 statute would require COMMISA to file any challenge to PEP's rescission in tax court, subject to a short statute of limitations, notwithstanding that Mexican statutes (like U.S. ones) are presumed not to apply retroactively. *Id.* at 32a, 95a n.24. Errors of this kind are inherent in a freewheeling analysis of foreign law, and further counsel against rejecting the deferential comity rules courts have long applied.

II. THE SECOND CIRCUIT DEPARTED FROM OTHER CIRCUITS BY AUGMENTING COMMISA'S AWARD.

The Court should also grant certiorari to review the Second Circuit's equally unprecedented decision to augment COMMISA's award. Every other circuit to consider the question, as well as the Government, has explained that a confirming court must enforce a valid arbitral award "as written." The Second Circuit, in contrast, awarded COMMISA $106 million in damages that the arbitrators had "no occasion * * * to specify." Pet. App. 36a. That decision is indefensible.

1. Confirmation is a "summary proceeding[]"; it serves simply to convert an arbitral award into a domestic judgment. Draft Restatement § 4-1 cmt. d. Accordingly, until the decision below, courts were unanimous in the view that once an arbitral award

has been found valid, courts must confirm it "as written." *Wartsila*, 518 F.3d at 292. "[T]o do anything more or less," the Fifth Circuit explained, "would usurp the [arbitral] tribunal's power to finally resolve disputes." *Id.*; *see United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, CLC* v. *PPG Indus., Inc.*, 751 F.3d 580, 585 (7th Cir. 2014) (similar); *M&C Corp.* v. *Erwin Behr GmbH & Co.*, 289 F. App'x 927, 934 (6th Cir. 2008) (similar).

Applying this rule, courts have repeatedly held that a confirming court cannot augment an arbitral award to grant relief that the award does not mention. In *Wartsila*, for instance, the Fifth Circuit concluded that it could not allow a party to "set off" the value of a foreign arbitral award against "any future arbitration claims." 518 F.3d at 292. Although the arbitration panel had included language approving of such a set-off in its preliminary rulings, the final award contained the "unambiguous mandate that 'Duke pay Wartsila' * * * with no strings attached." *Id.* at 294. Likewise, in *United Steel*, the Seventh Circuit declined to read an arbitration award that plainly covered *all* employees as if it excluded "existing employees"; even if the "arbitration record" suggested the arbitrator "could not possibly" have meant the award to sweep so broadly, the court refused to award relief "that the arbitrator did not grant." 751 F.3d at 585-586. In *M&C Corp.*, the Sixth Circuit categorically rejected the notion that it could award damages "that occurred *after* the * * * arbitration and award," explaining that a party's entitlement to that relief was "a new question that an arbitrator, not [a] district court, should address in this first instance." 289 F. App'x at 934.

The Government endorsed the same approach in its filing below. *See* U.S. Br. 17-18 (explaining that "when a U.S. court is asked to enforce an international arbitral award, it lacks authority to modify that award").

2. The Second Circuit abandoned this approach. Like the District Court, it ordered PEP to pay COMMISA $106 million more than the arbitrators awarded, as compensation for performance bonds that PEP allegedly collected after the award was issued. Pet. App. 35a-37a. But as the panel acknowledged, the arbitral award did not contain "*any* reference to the performance bonds," let alone "specify damages stemming from" PEP's collection of them. *Id.* at 36a (emphasis added). In other circuits, that would have ended the matter: The award "as written" did not contain the $106 million, and so the panel could not "enlarge" the award to include it. U.S. Br. 18.

The Second Circuit nonetheless held that it could "interpret" the award to contain that amount for two reasons—both directly in conflict with the positions taken by other circuits. Pet. App. 37a. First, the panel noted that the arbitral tribunal had issued a *preliminary* order enjoining PEP from collecting performance bonds, and asserted that injunction became "part of the Final Award" when PEP collected the bonds anyway. *Id.* at 36a. But the final award superseded any preliminary order, and does not contain a word about such an injunction. *See* J.A. 866-869. And even if it did, that injunction still would not have constituted an award of $106 million; at best, it would have enabled COMMISA to argue in a separate *contempt* proceeding—after the award

had been entered as an enforceable domestic judgment—that PEP should pay damages for violating the order. *See, e.g.*, *Barrientos* v. *Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1190 (9th Cir. 2011); *M&C Corp.*, 289 F. App'x at 936. Neither the Fifth nor the Seventh Circuit would have allowed courts to mine the "arbitration record" in this manner, *United Steel*, 751 F.3d at 585, to impose obligations that the award "as written" never specified, *Wartsila*, 518 F.3d at 292.

Second, the Second Circuit reasoned that it could overlook the award's "omission of any reference to the performance bonds" because PEP collected on those bonds "*after* the Final Award had already issued," leaving the arbitrators "no occasion * * * to specify damages stemming from conduct that had not yet occurred." Pet. App. 36a. In *M&C Corp.*, however, the Sixth Circuit rejected a nearly identical line of argument. It explained that where a party was "seeking damages for [conduct] that occurred *after* [an] arbitration and award," the proper course was to allow an "arbitrator, not the district court" to address the question "in th[e] first instance." 289 F. App'x at 934.

3. The Second Circuit's novel rule is wholly without merit. The statute implementing the Conventions expressly distinguishes between a court's authority to "confirm" an award, 9 U.S.C. § 207, and to "modify" it, *id.* § 11, sharply limiting the latter authority to technical and jurisdictional errors, *see id.* Inferring some additional modification authority beyond that is antithetical to the Conventions' policy of giving effect to parties' agreements to let *arbitrators* decide all contested questions, subject to the primary juris-

diction's law of arbitrability. *See, e.g.*, *Scherk*, 417 U.S. at 519 & n.14. The Second Circuit offered no justification for its departure from that fundamental principle, and none exists.

III. THE SECOND CIRCUIT'S FORFEITURE RULE IS UNPRECEDENTED AND INCORRECT.

Finally, the Court should grant certiorari to review a third "unprecedented" decision, Pet. App. 40a (Winter, J., concurring), this time on an issue that should have disposed of this litigation at the outset: the courts' manifest lack of personal jurisdiction over PEP.

1. There is no serious question that PEP lacks the minimum contacts with New York necessary to satisfy the requirements of due process. PEP is incorporated in Mexico. Its principal place of business is Mexico. The present dispute concerns a contract between two Mexican corporations negotiated and performed in Mexico and governed by Mexican law. By any standard, the District Court lacked general or specific personal jurisdiction over PEP. *See Daimler AG* v. *Bauman*, 134 S. Ct. 746, 754-755 (2014).

2. The Second Circuit refused to reach this issue, however, because it found that PEP had "forfeited" its jurisdictional defense by proposing a vacatur and remand in light of the Eleventh Collegiate Court's decision. Pet. App. 12a. By the Second Circuit's reasoning, PEP's remand motion amounted to a request for "affirmative relief" that implicitly consented to the court's jurisdiction. *Id.* at 11a-12a.

That is simply not so. As the cases cited by the Second Circuit indicate, plaintiffs are often deemed to waive a jurisdictional defense if they seek "affirmative relief" that *invokes* a court's authority in the first instance. *See, e.g.*, *Bel-Ray Co.* v. *Chemrite (Pty) Ltd.*, 181 F.3d 435, 443-444 (3d Cir. 1999) (motion for summary judgment); *Hunger U.S. Special Hydraulics Cylinders Corp.* v. *Hardie-Tynes Mfg. Co.*, 203 F.3d 835 (Table), 2000 WL 147392, at *3 (10th Cir. 2000) (motion for writ of attachment); *Gerber* v. *Riordan*, 649 F.3d 514, 520 (6th Cir. 2011) (entry of general appearance). As Judge Winter observed, however, "no case" before this one held that a party waives a jurisdictional defense by asking the court to *vacate* a prior exercise of its authority. Pet. App. 43a. That is because when a party asks a court to cease exercising authority over a question, it is not tacitly conceding that the court has jurisdiction; it is adhering to its view that the court should not be exercising authority at all. *See, e.g.*, *Gerber*, 649 F.3d at 519 (motion to stay does not waive jurisdictional defense because it "signals only that a defendant wishes to postpone the court's disposition of a case"); *Precision Etchings & Findings, Inc.* v. *LGP Gem, Ltd.*, 953 F.2d 21, 25-26 (1st Cir. 1992) (party does not waive jurisdictional defense by "filing objections * * * in order to preserve his right to *de novo* review").

The Second Circuit's contrary rule defies reason. It prohibits a defendant from asking the court to withdraw an order that has become plainly unlawful without first waiving every jurisdictional defense. Here, that ruling meant that even after the basis for the District Court's confirmation judgment had evaporated, PEP was required to leave nearly $400

million deposited in a court account unless it waived its jurisdictional objections. That cannot be the law. *Cf. Sec'y of Navy* v. *Avrech*, 418 U.S. 676, (1974) (per curiam) (declining to "decide [a] difficult jurisdictional issue" where an intervening development "foreordained" the "reversal of the [lower court's] decision on the merits").

This rule should be reversed promptly. Going forward, "any diligent attorney" will litigate jurisdictional defenses to completion before seeking vacatur of an order, so as to avoid subjecting her client to inadvertent waiver. *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 556 (2014). As a result, the likelihood that "a later case will arise" presenting the issue is "slim." *Id.* (explaining that prompt review of a jurisdictional issue was critical for this reason).

3. The Second Circuit attempted to shore up its "forfeiture" ruling by finding that PEP was a state instrumentality entirely outside the protections of the Due Process Clause. Pet. App. 17a-18a. Again, no. As this Court held in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), "juridical entities distinct and independent from their sovereign should normally be treated as such," unless they are fraudulent or so extensively controlled by the sovereign that the corporate veil should be pierced. *Id.* at 627, 629. There is no evidence of such control or fraud in this case, and the Second Circuit identified none. PEP is therefore a separate entity from the state, and entitled to the protections of the Due Process Clause. *See GSS Grp. Ltd.* v. *Nat'l Port Auth.*, 680 F.3d 805, 808-810 (D.C. Cir. 2012); *First Inv. Corp. of Marshall Islands* v.

Fujian Mawei Shipbuilding, Ltd., 703 F.3d 742, 744-745 (5th Cir. 2012).

IV. THIS COURT'S PROMPT REVIEW IS WARRANTED.

It is important that the Court act now to review and reverse the Second Circuit.

The Second Circuit's decision shows enormous disrespect to foreign courts, particularly the courts of Mexico, and will significantly impact U.S. foreign relations. Many nations consider reciprocity in deciding whether to afford comity to foreign judgments. *See, e.g.*, *Hilton*, 159 U.S. at 210, 226-227; *DeJoria* v. *Maghreb Petroleum Expl., S.A.*, 804 F.3d 373, 384-386 (5th Cir. 2015). It is thus probable that some foreign courts will respond to the decision below by engaging in just the sort of second-guessing of U.S. judicial reasoning and legal rules that the panel below employed toward Mexico. *See, e.g.*, Caroline Simson, *2nd Circ. Goes Against The Grain in Pemex Ruling,* Law360 (Aug. 3, 2016)[3] (predicting that the decision will "do harm to international comity and harmony amongst the 156 contracting states"); Tom Jones, *GAR Live New York looks at Commisa v Pemex*, Global Arbitration Review (Sept. 20, 2016)[4] (stating that some nations will view the decision as "akin to 'gunboat diplomacy' "). The Government warned the Second Circuit of these regrettable consequences: "It would be wholly un-

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[3] *See* https://www.law360.com/articles/824202/2nd-circ-goes-against-the-grain-in-pemex-ruling.

[4] *See* http://globalarbitrationreview.com/article/1068555/gar-live-new-york-looks-at-commisa-v-pemex.

warranted for a foreign court to refuse to recognize a U.S. judgment nullifying an award against the U.S. government" on grounds like those adopted by the Second Circuit. U.S. Br. 16.

The court's decision is also likely to undermine the international arbitration system more broadly. That system "depends upon the willingness of national courts to let go of matters they normally would think of as their own." *Mitsubishi*, 473 U.S. at 639 n.21. It cannot function properly if U.S. courts consider anew every foreign annulment decision or refuse to enforce valid arbitral awards "as written." Such a parochial and unpredictable system is likely to splinter nations into 156 different enforcement regimes, lead litigants to shop around arbitral awards until they are confirmed to their liking, and deter parties from entering arbitration agreements in the first place.

Finally, the decision below will have harmful consequences for wholly domestic suits. Private arbitrators in the United States issue thousands of awards each year. It would be extraordinarily damaging to the predictability and stability of the arbitration system if courts in the Second Circuit could not be relied upon to enforce such awards "as written." And it would be particularly destabilizing if parties who won such awards could take them abroad—even after they had been set aside by U.S. courts—and seek to enforce them in foreign courts in defiance of U.S. judgments.

CONCLUSION

The petition for a writ of certiorari should be granted.

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