No. 19-789

In The Supreme Court of the United States

MAGHREB PETROLEUM EXPLORATION, S.A. AND MIDEAST FUND FOR MOROCCO LIMITED,
Petitioners,

v.

JOHN PAUL DEJORIA,
Respondent.

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

BRIEF FOR MIRIEM BENSALAH-CHAQROUN AND OTHMAN BENJELLOUN AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Miriem Bensalah-Chaqroun and Othman Benjelloun are prominent Moroccan businesspeople with extensive experience in international trade, including with the United States.

Bensalah-Chaqruoun served as the president of the Confédération générale des entreprises du Maroc from 2012 to 2018, the first woman to hold that post. She studied business and finance at the École Supérieure de Commerce de Paris and at the University of Dallas, where she received an MBA. She sits on the board of directors of Groupe Renault. She also serves as a director of Holmarcom, a family business with extensive investments in finance, agro-business, distribution and logistics, and real estate.

Othman Benjelloun has a lifetime of business experience in banking, insurance, and technology. During the 1960s and 1970s, he formed a network of international alliances with major global groups such as Volvo, General Motors, Goodyear and especially Westinghouse. He is now the CEO of BMCE Bank of Africa, which has a presence in more than 20 African countries. Through his holding company, FinanceCom, he has a large stake in the Moroccan arm of the French telecom firm Orange.

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[1] Counsel of record for the parties received timely notice of Amici's intent to file this brief. The parties have filed blanket consents to the filing of amicus briefs, which consents are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person, other than the amici curiae or their counsel made any monetary contribution to the preparation or submission of this brief.

He also is involved in a plan to build a multibillion-dollar tech city in Tangier, and a plan to build a 55-story tower in Rabat. He is listed on the Forbes 2020 list of African Billionaires.

Amici understand the critical importance of the rule of law in facilitating commerce. The ability to reliably and predictably enforce lawfully obtained judgments, in particular, is vital to business relations. The Fifth Circuit's opinion has called into question the ability of Moroccan businesses to reliably enforce lawfully obtained Moroccan judgments against American counterparties in American courts. Left uncorrected, this decision will incentivize Moroccan companies to trade with countries having a more reliable foreign-judgment-enforcement system. This will harm the economic interests of both Morocco and the United States.

BACKGROUND

Petitioners—Maghreb Petroleum Exploration, S.A., and Mideast Fund for Morocco (collectively "Maghreb")—sued John Paul DeJoria in Morocco, claiming that that he had defrauded Maghreb and other investors in an ill-fated project to develop oil reserves in Morocco. *DeJoria v. Maghreb Petroleum Exploration, S.A.*, 935 F.3d 381, 385 (5th Cir. 2019) ("DeJoria II"). Although served with process at his home, DeJoria declined to participate in the Moroccan proceedings. *DeJoria v. Maghreb Petroleum Expl., S.A.*, 804 F.3d 373, 387-88 (5th Cir. 2015) ("*DeJoria I*"). The Moroccan court heard evidence on damages and entered a judgment for Maghreb in the amount of 969,832,062.22 Moroccan dirhams, approximately $123 million. *DeJoria II*, 935 F.3d at 385.

Maghreb attempted to enforce its judgment in the Western District of Texas. The District Court, however, refused to recognize the Moroccan judgment, crediting DeJoria's speculation that Morocco's King, Mohammed VI, had pressured the Morocco court to render judgment in Maghreb's favor. *DeJoria v. Maghreb Petroleum Expl. S.A.*, 38 F. Supp. 3d 805, 818 (W.D. Tex. 2014).

On appeal, the Fifth Circuit initially reversed. *DeJoria I*, 804 F.3d at 377. Its 2015 opinion in *DeJoria I* systematically eliminated all five of DeJoria's asserted grounds for non-recognition, rejecting three grounds on the merits, and finding that DeJoria had waived the remaining two grounds by not raising them on appeal. 804 F.3d at 380-89. The Fifth Circuit denied DeJoria's petition for rehearing, and this Court denied DeJoria's subsequent petition for writ of certiorari. *DeJoria v. Maghreb Petroleum Expl., S.A.*, 136 S. Ct. 2486 (2016). The case appeared to be over.

Before judgment was entered, however, DeJoria—a multi-billionaire—used his resources and influence to lobby the Texas Legislature to retroactively change the law relevant to the case (the "2017 Texas Act"). *See* Emma Platoff, "How the Texas Legislature saved billionaire John Paul DeJoria $123 million," TEXAS TRIBUNE (Dec. 19, 2019).[2] Hiring one of Austin's premiere lobbying firms, Focused Advocacy, he spent hundreds of thousands of dollars to change Texas's law governing

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[2] *See* https://www.texastribune.org/2019/12/19/John-paul-dejoria-morocco-oil-deal-texas-legislature-morocco/ (last accessed on Jan. 16, 2020).

recognition of foreign judgments. *Id.* The 2017 Texas Act adopted the 2005 Uniform Foreign-Country Money Judgments Recognition Act. Unlike Texas's prior law governing recognition of foreign judgments, which evaluated the foreign country's legal system as a whole, the 2017 Texas Act allowed a judgment debtor to oppose recognition because of alleged irregularities in his or her particular case. The 2017 Texas Act differed from the 2005 Uniform Act in one critical way: it applied retroactively—even to pending cases:

> This Act applies to a pending suit in which the issue of recognition of a foreign-country money judgment is or has been raised without regard to whether the suit was commenced before, on, or after the effective date of this Act.

ADOPTION OF THE UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, 2017 Tex. Sess. Law Serv. Ch. 390 (S.B. 944).

The only pending case the Texas Legislature was aware of was DeJoria's. *See Platoff*, TEXAS TRIBUNE. The Act's sponsors acknowledged that it was DeJoria's case that had prompted them to seek the legislation. *Id.* Over Maghreb's objections, the District Court and the Fifth Circuit applied the new law retroactively to the present case, and refused to enforce Maghreb's judgment. *Dejoria v. Maghreb Petroleum Expl., S.A.*, No. 1:13-CV-654-RP, 2018 WL 1830789 (W.D. Tex. Mar. 28, 2018), *aff'd*, *DeJoria II*, 935 F.3d at 396.

SUMMARY OF ARGUMENT

The enforcement of lawfully obtained foreign judgments is essential to healthy commercial and political relations between the United States and other countries. If foreign companies see that enforcement of foreign judgments in American courts is sporadic or selective, they will hesitate to do business with American companies. Without the power to enforce a judgment against a breaching party, a contract is just a piece of paper.

The decision below undermines American interests by creating doubt and uncertainty about whether lawfully obtained foreign judgments will be enforced in American courts. It does so in two ways. First, the Fifth Circuit's retroactive application of Texas's foreign-judgment-recognition statute means that foreign companies cannot rely on the law as it is written. Second, the Fifth Circuit's ever-shifting handling of the facts and the law of this case create the appearance that American courts will bend their own rules in cases involving enforcement of foreign judgments.

Foreign-judgment recognition is governed by state law. But the federal courts in general, and this Court in particular, play a key role in administering America's foreign-judgment-recognition system. The Founders of the Constitution created diversity jurisdiction to prevent foreign citizens and subjects from getting "home cooked" in state court. And this Court, in its supervisory role, has the duty to ensure that all federal-court litigants—regardless of citizenship or nationality—receive justice.

This Court should grant certiorari for three reasons: (1) to prevent the harm to international business that the ruling below will cause, if left

uncorrected, (2) to restore consistency in the federal courts' handling of foreign-judgment-recognition cases, and (3) to correct the injustice that has been done to Petitioner.

ARGUMENT

I. Enforcing foreign judgments fosters international trade and improves relations between nations.

This Court has long recognized that the "expansion of overseas commercial activities by business enterprises based in the United States" carries with it a concomitant need to recognize the legitimacy of foreign judgments. *M/S Bremen v. Zapata Off-Shore Co.*: 407 U.S. 1, 9 (1972). After all, "[t]he expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Id.* If we wish to "have trade and commerce in world markets and international waters," we cannot insist that trade be "exclusively on our terms, governed by our laws, and resolved in our courts." *Id. See also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context").

Recognizing and enforcing foreign judgments is good for America. To begin with, the consistent recognition and enforcement of foreign judgments

fosters trade with foreign countries: "[T]he U.S. business community is coming to recognize that a predictable and uniform method of recognizing and enforcing foreign judgments actually works to the advantage of U.S. companies and individuals." S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 Rev. Litig. 45, 143-44 (2014). The need for consistent and predictable recognition and enforcement of foreign judgments has increased with the rise in international commerce. *Id.* at 50 ("Experts forecast a significant increase in the number of foreign judgments that will be brought to the United States for recognition and enforcement in the coming years").

Conversely, a faulty foreign-judgment-recognition system imposes costs on Americans attempting to do business abroad. As one commentator notes, "a U.S.-based commercial entity can either lose international business (due to a foreign party's fears about its ability to recover damages against the U.S. party in an economically efficient manner) or be made subject to a 'litigation premium' that increases the price the U.S. party must pay to complete the transaction." Strong, *supra,* at 51. Moreover, if American courts do not consistently recognize and enforce foreign judgments, foreign courts likely will reciprocate—refusing to recognize and enforce judgments obtained in American courts.

Mutual recognition of foreign judgments also improves relations between countries. "When one state's legal system respects the legal system of another state, the likelihood of tension between the two countries diminishes, and contentious political

interaction becomes unnecessary." Steven R. Swanson, *The Vexatiousness of a Vexation Rule: International Comity and Antisuit Injunctions*, 30 Geo. Wash. J. Int'l L. & Econ. 1, 10–11 (1996). "[C]ooperation and reciprocal acts of goodwill not only prevent international friction in specific instances but, more importantly, are essential to the long-term functioning of the international legal system." Harold G. Maier, *Extraterritorial Discovery: Cooperation, Coercion and the Hague Evidence Convention*, 19 Vand. J. Transnat'l L. 239, 253 (1986). Where such cooperation and mutual respect are lacking, mistrust and skepticism take root, threatening diplomatic and political relationships.

II. The federal courts play an important role in foreign-judgment recognition.

"[P]redictability in the resolution of disputes" is the lifeblood of "the international commercial system." *Mitsubishi Motors Corp.*, 473 U.S. at 629. Just as the "free flow of judgments is essential in creating more efficient markets" within America, the "predictable enforcement of fairly obtained foreign judgments is essential to international business." Swanson, *supra*, at 11. Inconsistent recognition of foreign judgments, on the other hand, corrodes commercial and political relations between countries. Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 Chi. J. Int'l L. 505, 516 (2010) ("[T]he real fear that undermines cooperation between countries concerns the possibility that the foreign country would recognize the forum's judgments only sporadically or selectively").

The Founders of the Constitution recognized the importance of predictable enforcement of judgments from other jurisdictions—at least as between sister States. The Full Faith and Credit clause makes enforcing a judgment obtained in another State nearly automatic. U.S. Const. art. IV, § 1. Not so for foreign-country judgments, however. Before such judgments can be enforced, they must be "recognized." State law governs the standards for recognizing foreign judgments—though most states have adopted one version or another of the Uniform Foreign Money Judgments Recognition Act.

The judgment-recognition step allows courts to screen out illegitimate or corruptly obtained foreign judgments. But it also invites abuse by foreign-judgment debtors, who may seek to use the recognition process as a way to relitigate the merits of their case in a friendlier venue. The judgment debtor may be able to persuade a local court that the foreign case was somehow unfairly or wrongly decided. And the local court—forced to choose between upholding the integrity of the foreign-judgment-recognition system as a whole and protecting the interests of a local and prominent citizen from the workings of an alien legal system—will be tempted not to recognize the judgment. Strong, *supra*, at 87-88 ("[S]everal commentators have suggested that the current U.S. approach to recognition and enforcement may be tilted in favor of defendants, who are predominantly U.S. parties").

The federal courts play a vital role in ensuring the predictability and integrity of the foreign-judgment-recognition system. Because foreign litigants are vulnerable to local prejudice, the Constitution authorized—and Congress conferred—

subject matter jurisdiction on federal courts to resolve disputes between a citizen of a state and a citizen or subject of a foreign country. *See* U.S. Const. art. III, § 2, cl. 1, 28 U.S.C. § 1332(a)(2). *See also Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) ("[T]here was fear that parochial prejudice by the citizens of one State toward those of another, as well as toward aliens, would lead to unjust treatment of citizens of other States and foreign countries"). Thus, although governed by state law, foreign-judgment-recognition proceedings are regularly initiated in—or, as here, removed to—federal courts. Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 Wm. & Mary L. Rev. 1159, 1191 (2007) ("[F]ederal courts sitting in diversity are the usual forums for foreign judgment recognition cases").

This Court plays an important role in upholding the integrity of the foreign-judgment-recognition system by virtue of its power to supervise the actions of the lower federal courts:

> [T]his Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity.

Mesarosh v. United States, 352 U.S. 1, 14 (1956). *See also Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 639 (1949) (reinstating vacated lower court judgment and holding that "[o]ur supervisory appellate jurisdiction would be of little value if the

injustice caused by the decision below were to stand uncorrected. We are not so constricted"). Thus, this Court has the power—indeed, the duty—to review whether the lower courts have not been impartial as between a foreign citizen and an American citizen. Exercise of supervisory jurisdiction is appropriate in an extraordinary case like the present case, which touches on important issues relating to international commerce and foreign policy.

III. *DeJoria II* undermines confidence that America's federal courts consistently and reliably recognize and enforce lawfully obtained foreign judgments.

Left uncorrected, the Fifth Circuit's erratic, unpredictable, and inconsistent handling of this case will damage international confidence that foreign judgments can reliably be enforced in American federal courts.

A. Retroactively applying laws governing recognition of foreign judgments makes it impossible *ex ante* to determine whether a foreign judgment will be recognized.

The biggest threat that *DeJoria II* poses to the foreign-judgment-recognition system lies in the Fifth Circuit's willingness to apply the 2017 Texas Act retroactively. Given the various states' differing approaches to foreign-judgment recognition, it was already difficult enough for foreign parties to anticipate whether a foreign judgment would be recognized. Now it is impossible. The lesson of *DeJoria II* is that, until an American court actually enters judgment in a recognition case, a foreign-judgment creditor cannot know whether its judgment will be recognized. Even when

enforcement seems a foregone conclusion—as it did in this case right after *DeJoria I*—an influential judgment debtor can press for the local State legislature to amend its judgment-recognition statute in ways that benefit the foreign-judgment debtor. If *DeJoria II* is allowed to stand, foreign-judgment debtors will know that the federal courts will accede to this kind of home cooking.

The circumstances surrounding the enactment of the 2017 Texas Act fuel cynicism about the American legal system, and skepticism about whether foreign judgments can fairly be enforced in American courts. This case is unlike most retroactivity cases inasmuch as one of the litigants, DeJoria, was intimately involved in the passage of the very law whose retroactive application is at issue. It is clear that DeJoria used his money and influence to convince the Texas Legislature to adopt, retroactively, the 2017 Texas Act. And it is equally clear that DeJoria did this to change the law applied to his own pending case—rewriting the rulebook during the progress of the game. To foreign observers, it looks like DeJoria bought his way out of an unfavorable foreign-country judgment.

That a United States Court of Appeals condoned the practice will lead many foreign observers to conclude that they cannot obtain a fair hearing in *any* American court. This Court should correct that appearance of impropriety by granting certiorari and reversing.

B. The Fifth Circuit's inconsistent and incorrect application of the mandate rule, choice-of-law principles, and law of the case suggests that large foreign judgments will be recognized sporadically, if at all, in American courts.

The Fifth Circuit's inconsistent application of the law, facts, and appellate procedures is as worrisome as the enactment of the 2017 Texas Act itself. *DeJoria I* made several factual findings and legal rulings that, at first blush, appeared to doom DeJoria's prospects to avoid Maghreb's judgment—even under the 2017 Texas Act. *DeJoria II* gets around these obstacles by ignoring or mischaracterizing *DeJoria I*'s findings and holdings.

1. After *DeJoria I*, Maghreb had a settled expectation that it would be able to enforce its judgment.

Take, *DeJoria II*'s handling of the retroactivity issue. To circumvent the rule against retroactive enforcement of laws, the court observed that the rule did not apply where a party lacked a settled expectation under the prior version of the law. 935 F.3d at 388. It then opined that, even after remand from *DeJoria I*, Maghreb did not have a settled expectation that it would be able to enforce its judgment. *Id.* ("Maghreb's expectation that it would prevail was…not yet settled"). Accordingly, it held that retroactive application of the 2017 Texas law was appropriate.[3] *Id.*

[3] Citing nothing to support this assertion, the Fifth Circuit also claims that retroactive application was permissible because it did not *automatically* abrogate Maghreb's judgment—DeJoria

DeJoria II's assertion that Maghreb's expectation of prevailing was "not yet settled" is inexplicable. As noted above, *DeJoria I* gutted DeJoria's case, rejecting all five of DeJoria's asserted bases for nonrecognition. It rejected three of his arguments on the merits and held that DeJoria had waived the other two—his public-policy and inconvenient-forum arguments—by not asserting them as alternate grounds for affirmance. With all five of DeJoria's non-recognition grounds knocked out of the case, all that remained to be done on remand was entering judgment for Maghreb. The $123 million judgment was, it seemed, money in the bank.

In *DeJoria II*, however, the Fifth Circuit justified its "no settled expectation" ruling by noting that, after remand, the District Court had allowed DeJoria to reassert his public-policy and

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still had to prove his case under the altered law. *DeJoria II*, 935 F.3d at 389 ("[T]he retroactive law does not abrogate Maghreb's claim. It does not strip Maghreb of the ability to seek recognition of the Moroccan judgment").

This argument is groundless. The focus of the retroactivity analysis is whether a party has a settled expectation under the old law, not whether it was doomed to failure under the new law. The Fifth's Circuit's reasoning is akin to saying—in a basketball game with one second left and one team having a 10 point lead—that it is fine to change the rules to add another 10-minute period because the party who was ahead might still win under the changed rules. It is the *deprivation of Maghreb's sure win* under the old statute—not the certainty, vel non, of Maghreb's loss under the new statute—that makes retroactive application of the law inappropriate in the present case.

inconvenient-forum arguments.[4] 935 F.3d at 388. But the District Court's allowing DeJoria to resurrect those arguments violated *DeJoria I*'s mandate. When the case returned to the District Court after *DeJoria I*, those arguments were no longer part of the case—the Fifth Circuit had expressly held that DeJoria had waived them. 804 F.3d at 384 n.12 ("These arguments were not raised on appeal and are thus waived").

A district court may not revisit issues previously decided by a court of appeals. *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004). So DeJoria did not "retain[] the ability" to raise those issues on remand. The District Court's allowing him to do so was irregular and highly improper.[5] By basing its "no settled expectations" ruling on the District Court's (improperly) allowing DeJoria to re-raise his public-policy and inconvenient-forum

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[4] DeJoria ultimately dropped these arguments. But they kept the case alive while DeJoria was lobbying for changes to the statute.

[5] The District Court opined that *DeJoria I*'s "waiver" holding was ambiguous and could be construed to mean only that DeJoria had waived those arguments only for purposes of that appeal, leaving it open for DeJoria to re-assert the arguments again on remand. *DeJoria v. Maghreb Petroleum Expl.,* No. A-13-CV-654-JRN-AWA, 2016 WL 4250488, at *7-*9 (W.D. Tex. Aug. 11, 2016), report and recommendation adopted at No. A-13-CV-654-JRN, 2016 WL 11120939 (W.D. Tex. Sept. 7, 2016). To support this novel "interpretation," the District Court cited authority to the effect that an appellee does not waive alternate arguments by failing to assert them on appeal. *Id.* Its reliance on that authority shows that its decision was not an "interpretation;" it was a disagreement with—and refusal to apply—*DeJoria I*'s waiver holding.

arguments, *DeJoria II* tacitly condones the District Court's defiance of *DeJoria I*'s mandate.

2. *DeJoria I* made key factual findings that precluded relief under the 2017 Texas Act.

In *DeJoria II*, the Fifth Circuit also disregarded certain of *DeJoria I*'s key factual findings. DeJoria predicated his claim under the 2017 Texas Act on factual assertions that: (1) the King exercised influence over the judges in the case such that it was impossible for DeJoria to obtain a fair trial, and (2) DeJoria could not fairly defend himself because he could neither travel to Morocco (it was, he claimed, too unsafe) nor obtain counsel to represent him there.

Yet the Fifth Circuit had previously *addressed and rejected* those claims in *DeJoria I*. To begin with, *DeJoria I* rejected DeJoria's assertion that the King influenced the Moroccan case's outcome, stating that **"the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case."** 804 F.3d at 382 n.9. And it rejected DeJoria's argument that he could not secure counsel to represent him at trial, stating that **"DeJoria could have litigated entirely through counsel without returning to Morocco."** *Id.* at 389. In remanding the case, *DeJoria I* did not invite the District Court to revisit those issues. Nor, on remand, was any new evidence presented that called into question *DeJoria I*'s findings on these matters.

As the Fifth Circuit acknowledged in *DeJoria II*, the mandate rule applies to both legal and factual rulings. 935 F.3d at 394. Thus, even if it

were proper for the District Court to have applied the 2017 Texas act retroactively—and it was not—the factual determinations in *DeJoria I* should have precluded DeJoria's arguments even under the new statute. Once again, however, *DeJoria II* departs from rulings it made in *DeJoria I*. This time, the Fifth Circuit tries to justify the shift. It notes that there had been an intervening change in the law, stating that "[t]he fact-intensive inquiry demanded by Texas's updated Recognition Act put the case on a new playing field." *DeJoria II*, 905 F.3d at 394-95. This argument is a non sequitur. Facts are facts. That the Fifth Circuit made its earlier determinations in a different *legal* context does not affect the validity of its prior *factual* findings. The issues were raised and fully litigated in *DeJoria I*. No new facts were introduced on remand—the record before the Fifth Circuit in *DeJoria II* was the same as the Record in *DeJoria I*. So there was no sound basis for *DeJoria II* to disregard the factual conclusions made in *DeJoria I*.

The Fifth Circuit also contends that the *DeJoria I* panel "had no cause to determine whether DeJoria could in fact safely return to Morocco or whether DeJoria could in fact retain representation." 935 F.3d at 390. This misstates the record. Such due-process considerations were directly relevant to *DeJoria I*'s analysis of DeJoria's personal-jurisdiction arguments. As *DeJoria I* noted, "due process requires the exercise of personal jurisdiction to comply with traditional notions of fair play and substantial justice." 804 F.3d at 373. Rejecting DeJoria's arguments that he could not obtain representation in Morocco, *DeJoria I* held that the burden on DeJoria of defending the case in Morocco "would not be so heavy as to render jurisdiction

unreasonable." *Id.* at 389. In so doing, it found that **"Moroccan courts do not require that the defendant appear personally, and *DeJoria could have litigated entirely through counsel without returning to Morocco*."** *Id.* (emphasis added). DeJoria's ability to mount a fair defense in Morocco was squarely raised, and resolved, in *DeJoria I*.

Finally, *DeJoria II* brushes aside *DeJoria I*'s ruling that "the record does not establish that the king actually exerted any improper influence on the Moroccan court in this case," characterizing it as mere "dicta." 905 F.3d at 395. But the ruling about the King's non-influence over the proceedings is not a dictum. It bore directly on the due-process arguments that DeJoria had presented in his appeal. *DeJoria I*'s finding on this issue was an alternate basis for rejecting DeJoria's due-process arguments. It demonstrated that—in addition to being legally irrelevant—DeJoria's allegations about the King's influence in his particular case had no factual support. That *DeJoria I* rejected DeJoria's due-process argument for both legal and factual reasons does not mean that the factual reason for rejecting it was a "dictum."

Like its abandonment of *DeJoria I*'s waiver holding, the Fifth Circuit's abandonment of *DeJoria I*'s factual findings is troubling. Under the mandate rule, the Fifth Circuit should have adhered to rulings on factual issues that it had earlier reviewed and resolved.

3. The Fifth Circuit contradicted itself on questions relating to the standard-of-review.

The third major inconsistency between *DeJoria I* and *DeJoria II* concerns whether state or federal law governs the standard for reviewing trial-court foreign-judgment-recognition decisions. In *DeJoria I*, The Fifth Circuit applied state law to this question. Looking to Texas appellate decisions, which applied a *de novo* standard in cases involving recognition of foreign-country judgments, it ruled that a *de novo* standard of review was appropriate in the present case. Throughout its analysis, the *DeJoria I* panel reviewed the underlying facts *de novo*, rejecting the District Court's key factual conclusions regarding the King's influence and DeJoria's ability to defend himself in a Moroccan court (see *supra*).

Once again, *DeJoria II* turns *DeJoria I* on its head, holding that the appropriate standard of review was a question of federal, not state, law. 905 F.3d at 391 ("[T]he standard of review is a federal issue"). *DeJoria II* further states that, while the District Court's legal conclusions are reviewed *de novo*, its factual conclusions are reviewed only for clear error. *Id.* On its face, the analysis in *DeJoria II* is antithetical to how the Fifth Circuit analyzed and applied the standard-of-review issue in *DeJoria I*.

Protesting too much, *DeJoria II* opines that its treatment of the standard of review is consistent with *DeJoria I*. As to whether "appellate review is a question of federal law," for example, *DeJoria II* states that "we do not read this court's 2015 opinion as out of step with that conclusion." 905 F.3d at 391,

n.14. It claims that *DeJoria I* "may" have looked to Texas law only to determine "whether recognition was a legal or factual question," a "different question" from how an appellate court should review a District Court's factual findings. *Id.*

That is not a fair characterization of *DeJoria I*. In *DeJoria I*, the Fifth Circuit expressly rejected a clear-error standard for appellate review. 804 F.3d at 379 n.2 ("At oral argument, DeJoria claimed that the district court proceedings 'most closely resemble a bench trial on documentary evidence' and that standard of review is thus clear error. We disagree"). In so doing, it emphasized that Texas courts treated recognition decisions differently from bench trials. 804 F.3d at 379, n.2 ("Texas courts have not treated this procedure as establishing a bench trial"). So *DeJoria I* was following Texas law on the standard for an appellate court to review a district court's findings in foreign-judgment-recognition cases.

Furthermore, there is nothing in *DeJoria I* suggesting that the court was looking to state law solely for guidance on how to distinguish between legal and factual questions in the foreign-judgment-recognition context. Although the analysis in *DeJoria I* required the Fifth Circuit to assess, and to resolve, both factual and legal issues, it applied a unitary—state law—standard of review to both: "we…look to Texas law to determine the applicable standard of review here." *DeJoria II*'s revisionist attempts to explain away *DeJoria I*'s standard-of-review holdings are baseless.

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To summarize: *DeJoria II* directly contradicts *DeJoria I* in at least three important ways:

(1) *DeJoria II*'s retroactivity analysis relies on arguments that *DeJoria I* held had been waived, (2) *DeJoria II* disregards key factual determinations made in *DeJoria I*, and (3) *DeJoria II* uses a standard of review at odds with the standard of review employed in *DeJoria I*.

Procedural issues such as waiver, the mandate rule, and standard of review often determine an appeal's outcome. Because of their potential to decide a case, the doctrines must be applied consistently and transparently. Failure to do so creates the appearance that an appellate decision is results-driven, with the case's outcome being determined by extrajudicial considerations. The decision in *DeJoria II* is troubling for exactly this reason. In ruling in DeJoria's favor on these issues, the Fifth Circuit misapplied appellate doctrines that, in any other case, would have been fatal to a litigant in DeJoria's circumstances.

DeJoria II's repeated misapplication or disregard of these doctrines signals to the world that foreign-judgment creditors cannot expect a fair hearing in American courts—even in a United States Court of Appeals. This Court should exercise its supervisory jurisdiction to correct the Fifth Circuit's inconsistent, unjust, and unfair treatment of Maghreb.

IV. Left uncorrected, the unfair treatment of Maghreb will impair commercial and political interests of the United States.

A. *DeJoria II* likely will affect commercial and political relations between the United States and Morocco.

If left uncorrected, *DeJoria II* will injure commercial and political relations with many different countries. In Morocco, where the case's history is already well known, the decision likely will reduce the willingness of Moroccans to trade with American companies. The economic effects could be significant. The United States is one of Morocco's largest trading partners. The two countries entered into a free-trade agreement in 2004. *See* U.S.-MOROCCO FREE TRADE AGREEMENT, June 15, 2004, 44 I.L.M. 544 (2005). Currently, the United States is one of the top five purchasers of Moroccan goods. *Morocco's Top Ten Exports*, http://www.worldstopexports.com/moroccos-top-10-exports/ (last accessed Jan. 20, 2020). And it is one of Morocco's top ten suppliers of foreign goods. *OEC-Morocco (MAR) Exports, Imports and Trade Partners,* https://oec.world/en/profile/country/mar/#Imports (last accessed Jan. 20, 2020). In addition, American firms have invested over $400 million in projects throughout Morocco. *See Bureau of Economic Analysis Factsheet*, https://apps.bea.gov/international/factsheet/factsheet.cfm (last accessed Jan. 16, 2020). The Fifth Circuit's ruling in *DeJoria II* is likely to impair this thriving and mutually beneficial commercial relationship. At a minimum, it will drive up American companies' cost of doing business in Morocco.

The Fifth Circuit's refusal to enforce the judgment against DeJoria is also a slight to one of America's oldest friends. The Kingdom was among the first countries to recognize the nascent United States (in 1777), and its Treaty of Peace and Friendship with Morocco (signed in 1786) remains the United States' longest unbroken diplomatic relationship. *See* TREATY OF PEACE AND FRIENDSHIP BETWEEN THE UNITED STATES OF AMERICA, AND HIS IMPERIAL MAJESTY THE EMPEROR OF MOROCCO, 8 Stat 100 (1787). The two nations' cooperation and friendship continues to this day on a variety of fronts. This includes coordination of military and intelligence efforts to combat terrorism. *Secretary Pompeo's Visit to Morocco: Enhancing Economic and Security Cooperation*, https://www.state.gov/secretary-pompeos-visit-to-morocco-enhancing-economic-and-security-cooperation/ (last accessed Jan. 20, 2020). The United States also assists Moroccan efforts to combat human trafficking. *International Programs to Combat Trafficking in Persons*, https://www.state.gov/ international-programs-to-combat-trafficking-in-persons-2/ (last accessed Jan. 20, 2020). And each year, approximately 1000 United States service members deploy to Morocco to participate in "African Lion," a joint military exercise with Moroccan troops. *See, e.g.*, *United States Africa Command*, https://www.africom.mil/what-we-do/exercises/african-lion (last accessed Jan. 20, 2020). The Fifth Circuit's handling of the DeJoria matter threatens to fray these ties of friendship between the two countries.

B. *DeJoria II* will affect the United States' commercial and political relations with other countries.

The economic and political fallout from *DeJoria II* will not be limited to Morocco. That a United States Court of Appeals was willing to condone and reward DeJoria's legislative manipulation, disregard prior factual findings and legal conclusions, and refuse to enforce a lawfully obtained $123 million foreign judgment will worry any foreign company doing substantial business with America. It will set off alarm bells regardless of whether the business is from Morocco, Germany, or Australia.

Worse, *DeJoria II* provides a template and a precedent for other American judgment debtors who wish to evade lawfully obtained foreign judgments. Among other things, it creates the prospect of forum- and judge-shopping, with litigants bringing suit in those jurisdictions where they think they will receive favorable treatment. This is exacerbated by *DeJoria II's* adoption of a deferential, clear-error, review of district-court findings in foreign-judgment-enforcement cases. If a district court's factual findings become effectively unreviewable on appeal, with only a scintilla of evidence needed to uphold them, forum- and judge-shopping will become the order of the day.

DeJoria II also is likely to hurt Americans seeking to enforce their judgments in foreign courts. The obverse of comity is retaliation. The readily accessible decisions in this case will give ample cover to a foreign judicial officer disinclined to enforce an American judgment. Where Americans are parties, *DeJoria II* risks turning the routine domestication of

foreign judgments into a legal and tactical battle as complicated and prolonged as the underlying litigation.

In a related context, this Court has cautioned against inviting such potentially destructive influences. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974) ("A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes [i.e., "the orderliness and predictability essential to any international business transaction"], but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages"). This Court's review and reversal is necessary to shut down the "mutually destructive jockeying" that the Fifth Circuit's decision in *DeJoria II* may precipitate.

C. The irregular proceedings in this case will harm relations between the United States and the rest of the world.

In addition to harming America's commercial interests, the lower-court rulings threaten to undermine America's "soft power" and its ability to foster its values worldwide. To begin with, the lower courts' rulings will damage America's credibility in promoting the rule of law abroad. It is frequently said that the United States' most important export is the rule of law. And promotion of the rule of law is central to American identity; from the time of John Adams to the present day, Americans have described their Government as one of laws, not men. Unfortunately, the history of this case—both in the lower courts and in the Texas Legislature—belies that ideal.

In reviewing the DeJoria matter, foreign countries would be forgiven for concluding that, with respect to the "rule of law," the United States is no better than the countries it criticizes. There is a dark irony in the fact that—in a case concerning the alleged bias in another country's legal system—there were so many irregularities in the proceedings below. *DeJoria II* is a gift to any country looking for an excuse not to reform its own judicial system.

CONCLUSION

For all the foregoing reasons, Amici urge the Court to grant Maghreb's Petition, reverse the Fifth Circuit's decision in *DeJoria II*, and remand with instructions that the Fifth Circuit order the District Court to enter judgment granting recognition of Maghreb's $123 million judgment.

Respectfully submitted,

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