Nos. 11-1067, 11-1068, & 11-1070

In the Supreme Court of the United States

ODYSSEY MARINE EXPLORATION, INC.,
Petitioner,
v.
THE KINGDOM OF SPAIN,
Respondent.

THE REPUBLIC OF PERU,
Petitioner,
v.
THE KINGDOM OF SPAIN,
Respondent.

GONZALO DE ALIAGA, *et al.*,
Petitioners,
v.
THE KINGDOM OF SPAIN,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S CONSOLIDATED BRIEF IN OPPOSITION

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April 2012

QUESTION PRESENTED

Whether the court below correctly found that the *res* in this case, the Spanish Navy Frigate of War *Nuestra Señora de las Mercedes* and her "appurtenances, tackle and cargo," is immune from *in rem* arrest and from subject matter jurisdiction in the United States under the Foreign Sovereign Immunities Act, the 1958 Geneva Convention on the High Seas, the 1902 Treaty of Friendship and General Relations Between the United States and Spain, the Sunken Military Craft Act, and long-standing domestic and international law and state practice concerning warships.

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CONSOLIDATED BRIEF IN OPPOSITION OF THE KINGDOM OF SPAIN

INTRODUCTION

The court below affirmed vacatur of the arrest and dismissal of Petitioners' claims against the *res* in this case — the Spanish Navy Frigate of War *Nuestra Señora de las Mercedes* ("*Mercedes*") — because the *res* is immune under U.S. and international law from arrest and from Petitioners' claims. App. 7.[1] The decision does not conflict with the decisions of this Court or of any Circuit Court of Appeals, and it faithfully follows and applies long-governing treaties and statutes. Review by this Court is thus unwarranted.

The *Mercedes* sank with 280 or more of her crew in the October 5, 1804 Battle of Cape Saint Mary against a British Navy squadron a day's sail west of Cádiz, Spain. Without Spain's knowledge or consent, Petitioner Odyssey Marine Exploration, Inc. ("Odyssey"), a Tampa, Florida-based treasure hunting company, "irreparably disturbed" (App. 56) the *Mercedes*'s gravesite by removing from it coins and other artifacts, which Odyssey landed in Gibraltar, and then transporting the bulk of the recovered *res* to the Middle District of Florida, where it filed an *in rem* admiralty claim under the law of

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[1] "App." refers to the Appendix to Odyssey's petition for writ of certiorari in Case No. 11-1067. "D. Ct. Doc. No." identifies documents in the district court record below.

finds and for salvage against an "Unidentified Shipwrecked Vessel, its apparel, tackle, appurtenances and cargo." App. 9. On Odyssey's motion, the allegedly "unidentified" *res* was then arrested by the district court and placed *in custodia legis* until further order of the court.

Anticipating — correctly — that the "unidentified vessel" was in fact a Spanish ship, Spain filed a Verified Claim "to the vessel(s) and/or contents, artifacts and/or cargo that are or may become the subject of this proceeding," with express reservation of sovereign immunity. D. Ct. Doc. No. 13. After district court-ordered disclosure of Odyssey's underwater photographs and videotapes of the site, and inspection of *res* taken from the site, all of which confirmed that the *res* is the *Mercedes*, Spain invoked sovereign immunity and moved for vacatur of the arrest, for dismissal of the Petitioners' claims for lack of subject matter jurisdiction, and for release of the *res*.

Upon identification of the *res* as the *Mercedes*, Verified Claims were filed by Petitioners De Aliaga, *et al.*, individuals who claim that their Spanish ancestors owned specie that was on the *Mercedes*. The Republic of Peru also filed a "Conditional Claim," asserting "sovereign and other rights in property that originated in its territory or was produced by its people." App. 13; D. Ct. Doc. No. 120, at p. 2 (Peru Conditional Claim).

The district court granted Spain's motions but stayed vacatur of the arrest and release of the *res* pending appeal. The Eleventh Circuit affirmed

vacatur and dismissal, holding that the *Mercedes* is entitled to the express immunity from arrest and jurisdiction conferred by Section 1609 of the Foreign Sovereign Immunities Act ("FSIA"), reinforced by and reflected in multilateral and bilateral treaties, state practice, international comity, and the Sunken Military Craft Act ("SMCA"). In accordance with these principles, *res* taken from the *Mercedes* and held by the district court *in custodia legis* was ordered released to Spain. Following issuance of the Eleventh Circuit's mandate, the recovered *res* located in the Middle District of Florida was released to Spain's custody on February 23, 2012, and transported by Spanish Air Force aircraft to Madrid, where it is now being inventoried and conserved by the Spanish National Museum of Archaeology.[2]

The Eleventh Circuit's decision rests on the long-standing and vital principles of sovereign immunity for warships, including bilateral protections agreed to by the United States and Spain for "cases of shipwreck" in their 1902 Treaty of Friendship and General Relations, the 1958 Geneva Convention on the High Seas, foreign sovereign immunity from "arrest attachment and execution" under the FSIA's Section 1609, the SMCA, and centuries-old state

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[2] Petitioner Odyssey has so far failed, however, to comply with the Eleventh Circuit mandate and post-mandate district court orders to release to Spain's custody *res* in the "actual and/or constructive possession" of the district court that Odyssey landed in Gibraltar and had not transported to the United States. *See, e.g.*, D. Ct. Doc. No. 311, at p. 2 (reordering release). This portion of the *res* remains the subject of continuing proceedings in the district court.

practice. Release to Spain, the Flag state, of *res* illicitly taken from its warship was compelled by the same principles and the Supplemental Rule For Admiralty Claims E(5)(d), which provides for release of wrongly arrested *res*.

Petitioners seek to rewrite the FSIA, international treaties, and the SMCA to conjure up exceptions to foreign sovereign immunity that do not exist or were shown by the extensive factual and historical record below not to apply, and to have this Court engage in *de novo* review of that record. Petitioner Republic of Peru urges the Court to embark on a non-justiciable exercise in "equitable allocation" between Peru and Spain that has never been adopted in any treaty, statute or other source of judicial authority.

The long-settled principle of sovereign immunity for warships in U.S. law dates from the seminal 1812 decision in *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812), in which Chief Justice Marshall wrote that a "public armed ship" "commissioned by and in the service of" another nation has sovereign immunity — a vital principle of international law carried forward and enforced in the case law, statutes, and treaties applied by the Eleventh Circuit in this case. *Id.* at 146-47. The decision below presents no basis for this Court to revisit this principle.

COUNTERSTATEMENT OF THE CASE

A. Historical Background

1. The 34-gun Frigate of War *Mercedes* was constructed at the Spanish Royal Navy shipyard in Havana in 1788 and began active service in 1789, manned by more than 300 Spanish Navy sailors and a detachment of Royal Marines. The *Mercedes* had a distinguished record of military service from her commissioning in 1789 to her sinking in battle in 1804, and she remains on the Spanish Navy register of its warships.[3]

The *Mercedes'*s wartime service began in the 1793-1795 Anglo-Spanish War of the Convention against Revolutionary France. On the conclusion of that conflict, Spain, fearing French expansionism, entered into the 1796 Treaty of San Ildefonso with France. By that Treaty, Spain became allied in war with France against Great Britain from 1796 to 1802 and granted France a series of concessions that included the cession in 1800 of Louisiana. The *Mercedes'*s service during these years included participation in major naval engagements against the British Navy at the Battles of Cape St. Vincent and El Ferrol, as well as protection of Spanish interests in transatlantic voyages from the Americas to Spain.

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[3] As the Eleventh Circuit found, the historical background and the facts of *Mercedes*'s service were all in the district court record. *See* App. 21 n.5.

In March 1802, the Treaty of Amiens effected a short-lived ceasefire in the conflict. Spain remained allied with France, but sought to avoid becoming re-engaged when war resumed by entering into a secret agreement to pay a monthly subsidy in lieu of maintaining Spanish military forces on call to support France. Great Britain learned of the agreement, however, and gave notice that it considered financial support for France grounds for attacking Spain. Faced with the French Army on its northern border and the British Navy at sea, Spain's commander of land and sea forces ordered warships to sail to Spain's Viceroyalties in the Americas in hopes of marshaling resources in peninsular Spain during the fragile ceasefire.

2. Amidst this geopolitical setting, the final mission of the *Mercedes* began on February 27, 1803, when she was ordered by the Minister of the Navy to sail from the Spanish Navy base at El Ferrol, Spain to Lima, capital of the Viceroyalty of Peru, with "the objective of bringing back the specie and effects of the Royal Treasury." D. Ct. Doc. No. 131-2:9.

Providing safe passage and military protection for the interests of Spain and its citizens was an official duty of the Spanish Navy, then as now. *Id.* at 131-2:4. It was also common military duty of the navies of sea-going nations, as reflected in the case of the United States by an 1800 Act of Congress authorizing U.S. Navy ships to transport "gold, silver and jewels" of U.S. citizens (*id.* at 131-9.5) and standing U.S. Secretary of the Navy orders "to provide protection to the persons and property of our

citizens and for the transportation of specie to the United States." *Id.* at 131-8:7.

The *Mercedes*'s voyage to Lima was delayed by repairs en route. By August 1803, when she reached El Callao in Lima, Britain and France were again at war. Spanish Navy vessels were ordered to prepare for war. At El Callao, the *Mercedes* took on board Royal property, including more than 2,000 copper and tin ingots, obsolete cannons, a military payroll and other state funds, and specie and other articles of Spanish citizens. The *Mercedes* was ordered to sail to Montevideo to join a squadron with three other Frigates of War for the transatlantic voyage to Cádiz, Spain.

As feared, a British Navy squadron lay in wait west of Cádiz and south of Cape Saint Mary, Portugal, under orders to intercept and detain "Spanish home-ward bound ships of war." D. Ct. Doc. No. 131-8:6-7. The British squadron sighted and intercepted the *Mercedes*'s squadron, moved into battle formation, and demanded that the Spanish warships yield. When the order was refused, what became known as the Battle of Cape Saint Mary began. The *Mercedes* suffered a catastrophic explosion and sank with all but 50 of her crew. The three surviving Spanish frigates surrendered and were taken to England.

Citing the "sad loss of the Frigate *Mercedes*," King Carlos IV declared war on Great Britain. D. Ct. Doc. No. 131-2:15-16. Spain entered the Napoleonic Wars as an ally of France, launching a decade of conflict that included destruction of the Spanish Navy at the

Battle of Trafalgar, French invasion of Spain and installation of Napoleon's brother Joseph as King of Spain, war within Spain, and interdiction of Spain's links to its overseas viceroyalties. As one of Odyssey's experts put it, "the loss of the *Mercedes* on October 5, 1804 was a pivotal event in the history of Spain and of the Spanish Empire more broadly." D. Ct. Doc. No. 138-30:8.

Following the restoration of peace in Europe, Spain sought reparations from Great Britain for the loss of the *Mercedes* and other casualties in engagements with the British Navy during 1804 and 1805. When that effort failed, the Spanish government decided to indemnify its citizens for losses on the *Mercedes* and other Spanish ships captured or sunk by the British Navy. An April 24, 1824 Royal order decreed payment by the Spanish Royal Treasury for those who suffered losses in "ships and property of any nature" due to British 1804-1805 naval activity, including the *Mercedes*. Claimants who submitted proof of loss were issued interest-bearing Public Debt of Spain. D. Ct. Doc. No. 163-9:3-4.

3. Present-day Peru became Spanish territory in 1543 as part of the Spanish Viceroyalty of Peru, which at its height encompassed nearly all of Spanish-ruled South America. In 1821, Peru proclaimed independence, which Spain contested. Spanish opposition to the Peruvian *independentistas* ended in 1824, when the Spanish Royal Army was defeated at Ayacucho by the United Liberator Army. On December 8, 1824, the Spanish Viceroy and the Commander of Peruvian independence forces

executed the Capitulation of Ayacucho, which ceded territory and Spanish Royal property within it to Peru. App. 94-95. Spain ceded public property such as "garrison," "parks," "naval yards," and "military warehouses." The Capitulation agreement provided for "war and Spanish merchant ships … to restock provisions in the ports of Peru … to make themselves fit and leave from the Pacific Ocean." Spanish ships were also given "passport … so they can leave from the Pacific to the ports of Europe." No rights were ceded in or to ships or anything else that had left the Viceroyalty of Peru under Spanish rule. D. Ct. Doc. No. 161-1:17-20.

B. Procedural Background

1. *Petitioners.* Petitioner Odyssey is a Tampa, Florida-based treasure-hunting company that targeted and "irreparably disturbed" the *Mercedes* in April-May 2007 without authorization from Spain and knowing it was a Spanish Navy warship of great historical importance. App. 56; D. Ct. Doc. No. 131-16. After landing artifacts taken from the *Mercedes* in Gibraltar, Odyssey flew approximately 600,000 coins and other artifacts to the Middle District of Florida, where it had filed an *in rem* complaint in admiralty styled *Odyssey Marine Exploration, Inc.* v. *The Unidentified Shipwrecked Vessel*, Case No. 8:07-cv-00614 (M.D. Fla.). Odyssey's complaint asserted claims under the "law of finds" and the "law of salvage" against an allegedly unidentified vessel "located approximately 100 miles west of the Straits of Gibraltar."

At Odyssey's request upon the filing of the complaint, the district court issued a Warrant of Arrest *In Rem* against "the Shipwrecked vessel and its apparel, tackle, appurtenances and cargo." App. 9. The Warrant of Arrest commanded the U.S. Marshal to take possession of "artifacts recovered from the Shipwrecked Vessel" (D. Ct. Doc. No. 24), where the *res* became *in custodia legis*, "within the actual or constructive possession of this Court or its duly-appointed substitute custodian during the [pendency] of this action," "until further order" of the court. App. 50.

Petitioners Gonzalo de Aliaga, *et al.* filed Verified Claims in the district court alleging that they are descendants of Spanish ancestors who placed specie on the *Mercedes*. Apart from their claims alleging a present-day ownership interest, these Petitioners submitted no evidence in support of any hereditary or other legal right more than 200 years and ten or more generations after the sinking of the *Mercedes*.

Petitioner the Republic of Peru is comprised of territory that, prior to its independence, was within the Spanish Viceroyalty of Peru. In the district court, Peru filed a "Conditional Claim" alleging "sovereign and other rights in property that originated in its territory or was produced by its people." D. Ct. Doc. No. 120. Peru did not dispute that it was Spanish territory as of the *Mercedes*'s sinking in 1804 and until it later declared and achieved independence. Like the De Aliaga Petitioners, Peru submitted no factual evidence below in support of its Conditional Claim.

2. *Proceedings Below.* Following the filing of its Verified Claim, Spain brought a series of motions seeking disclosure by Odyssey of information to identify the allegedly unidentified shipwreck.[4] Odyssey maintained that it had "found no evidence which would confirm the identity of a ship or an interest of Spain or any other third party." App. 11. District court orders directed Odyssey to provide Spain with access to Odyssey's underwater photographs and videotapes of the site, to disclose the exact location of the site, and to permit Spain to examine the recovered artifacts.

The evidence ultimately wrested from Odyssey established, as the district court found and the Eleventh Circuit affirmed, that the *res* was "indisputably the *Mercedes*." App. 12. At a location which matches the contemporaneous ships' logs and other battle reports, the shipwreck site contains the *Mercedes*'s hull remains, cannons and other Spanish Navy equipment and appurtenances, as well as distinctive artifacts showing blast damage, and the obsolete cannons and copper and tin ingots specifically identified on the *Mercedes*'s manifest. The recovered coins and other artifacts were equally

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[4] Odyssey's claims in its petition that the arrested *res* was limited to "the coins and artifacts" aboard the *Mercedes* and that Spain never brought a claim as to the contents of the *Mercedes* (Odyssey Pet. 2-3) are false. *See* App. 7 ("Odyssey filed a verified admiralty complaint *in rem against the shipwrecked vessel* and its cargo") (emphasis added). Spain's Verified Claim is to "the vessel(s) and/or contents, artifacts, and/or cargo that are or may become the subject of this proceeding." D. Ct. Doc. No. 13.

distinctive and dispositive, with dates, origins and other features that identified the shipwreck as the *Mercedes*.

Spain moved to dismiss all claims against the *res*, to vacate the arrest, and to secure release of the recovered *res* on grounds, *inter alia*, that the *res* is immune from "attachment arrest and execution" under the FSIA, 28 U.S.C. § 1609, Article 8 of the 1958 Geneva Convention on the High Seas, which provides warships with "complete immunity from the jurisdiction of any State other than the flag State," 13 U.S.T. 2312, 450 U.N.T.S. 81, Art. 8(1), and Article X of the 1902 Treaty of Friendship and General Relations between the United States and Spain, which specifically requires each nation "[i]n cases of shipwreck" to provide the "same immunities which would have been granted to its own vessels in similar cases." 33 Stat. 2105, 2110-11 (July 3, 1902). Spain also invoked *Republic of Philippines* v. *Pimentel*, 553 U.S. 851 (2008), in which this Court noted that "[g]iving full effect to sovereign immunity promotes the comity interests that have contributed to the immunity doctrine." *Id.* at 866, citing, *inter alia*, *Schooner Exchange*.

In its motion Spain presented a detailed history of the *Mercedes*, her historical setting and the far-reaching historical consequences of her sinking. The evidentiary record constituted an "encyclopedic treatment of the issues attendant to this controversy" (App. 53, 18) that included the official records documenting the *Mercedes*'s commissioning and military service, the military orders for her final mission, and archaeological and historical analyses

conclusively identifying the *res* and its importance to Spanish and European history. Spain's showing also included declarations of the Spanish Ministry of Defense and Navy, the Ministry of the Economy and Treasury, the Ministry of Culture, the National Museum of Archaeology, and the Royal Academy of History. D. Ct. Doc. Nos. 131-2, 131-7, 131-15, 131-17, 163-2, 163-9. These declarations detailed Spain's interest in "our warship, its contents and the resting place of those who perished when the ship was attacked in what represented a critical moment in our history." D. Ct. Doc. No. 131-12:22.

In the district court, the United States submitted a Statement of Interest and Brief as *Amicus Curiae* in support of Spain. D. Ct. Doc. No. 247. The United States informed the court of the United States' "strong foreign policy interest in adherence to its treaty obligations," including the specific obligations of Article X of the Treaty of Friendship and General Relations and the 1958 Geneva Convention of the High Seas. The United States also informed the Court of its interest as owner of thousands of sunken military vessels and aircraft and the gravesites of military personnel lost at sea, to "ensure that its own sunken vessels, as well as their contents, and debris sites are protected from unauthorized exploration or exploitation and treated with respect and sensitivity." *Id.* at pp. 2-4.

The district court granted Spain's motion to dismiss as against all Petitioners. In doing so, it rejected Odyssey's "scattershot" arguments that "the *res* is not a shipwreck at all; the *res* is not the *Mercedes*; the *res* is an amalgamation of shipwrecks

none of which is the *Mercedes*; and if it is the *Mercedes*, the FSIA does not apply for a variety of reasons." App. 62.[5] Furthermore, Peru's claim was "an equitable one grounded on claims of exploitation by its former colonial ruler," and the authorities Peru cited "are not the governing tools of decision in this case in a United States District Court." App. 96-99, 55. The district court ordered dismissal of all claims against the *Mercedes* and her contents and release to Spain of all *res* taken from the *Mercedes*, but it stayed vacatur of the arrest and release of the *res* pending appeal(s), which Odyssey and the other claimants timely filed.

In the Eleventh Circuit, the United States also submitted an *amicus curiae* brief in support of Spain, reiterating its position that "the 1958 Convention on the High Seas and the 1902 Treaty of Friendship and General Relations foreclose Odyssey's claims" and "fidelity to these obligations is a substantial foreign policy interest of the United States." As in the district court, the United States informed the Eleventh Circuit that "[a]biding by such provisions also helps to ensure that the United States' own sunken vessels, their contents and their debris sites are likewise protected from unauthorized exploration or exploitation in the future." *Amicus* Br. of United

[5] The district court decision adopted a Magistrate Judge Report and Recommendation in favor of granting Spain's motions.

States, Case No. 10-10269 *et al.* (11th Cir., filed Aug. 3, 2010), at pp. 2-9.[6]

The Eleventh Circuit unanimously affirmed the district court decision. It affirmed the district court's factual findings, including identification of the arrested *res* as the *Mercedes* and her contents resting, until they were "irreparably disturbed" by Odyssey, on the seabed at the site of her sinking at the Battle of Cape Saint Mary. Applying the factual record, the Eleventh Circuit affirmed that the *res* is immune from arrest and from U.S. jurisdiction under Section 1609 of the FSIA, which also incorporates international agreements to which the United States was a party as of the 1976 enactment of the FSIA, notably the 1958 Geneva Convention on the High Seas and the 1902 U.S.-Spain Treaty of Friendship and General Relations. The Eleventh Circuit also affirmed that the exceptions to sovereign immunity argued by the Petitioners were not applicable on the factual record and do not apply by the express terms of the FSIA to this *in rem* case.

The Eleventh Circuit found that the arrested *res* is "interlinked for immunity purposes," including under the 1902 Treaty of Friendship and General Relations, obligating the United States to provide the

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[6] Spain is aware that the usual practice of the United States is not to file an *amicus* brief at the petition stage without an invitation from the Court. In view of the foreign policy and military implications of this case, Spain respectfully requests that if the Court may be inclined to grant the petitions, it invite the Solicitor General to file a brief expressing the views of the United States before granting review.

Mercedes with the same protections and immunities that the United States provides its own sunken military vessels. The decision also found that the SMCA expressly provides such protection to sunken warships as well as "all or any portion of … the associated contents … ." SMCA § 1408(3), 118 Stat. at 2097; App. 42-43. Severing the contents of the *Mercedes* from the *res* and leaving in place an arrest and U.S. judicial proceedings against *res* taken from a warship were rejected as contrary to the express terms of the SMCA and the Treaty of Friendship and General Relations, and without support in case law or any other source of authority.

Release to Spain of the *res* that had been taken from the *Mercedes* and placed *in custodia legis* until further order of the district court was affirmed as also mandated by the Treaty of Friendship and General Relations, the SMCA, the sovereign immunity and international comity obligations set forth in this Court's decision in *Pimentel*, and by Supplemental Admiralty Rule E(5)(d), which provides for release of wrongly arrested *res* "according to the 'terms and conditions' best seen fit by the Court."[7]

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[7] Petitions for Rehearing and for Rehearing En Banc of the decision were denied on November 29, 2011, with no Circuit Judge requesting an *en banc* poll. Odyssey then filed a Motion for Stay of the Mandate Pending Petition for Certiorari, which was denied on January 31, 2012. On February 3, 2012, Odyssey applied to Justice Thomas in his capacity as Circuit Justice for an emergency stay of the Eleventh Circuit's mandate. Justice Thomas denied that application on February 9, 2012. *See* Sup. Ct. Dkt. No. 11A745. Justice Thomas also (...continued)

REASONS FOR DENYING THE WRIT

I. There Is No Split In Authority Warranting This Court's Intervention.

The Eleventh Circuit's determination that the *Mercedes* is immune from *in rem* arrest and suit, and its straightforward application of established legal principles to the *res*, implicates no conflict in authority.

A. The Decision Below Correctly Applied This Court's Precedents.

Petitioners strain to argue that review of the decision below is merited because the Eleventh Circuit misapplied this Court's decisions concerning a myriad of issues, including whether a foreign sovereign must possess the *res* in order to assert immunity over it (Odyssey Pet. 8-12, De Aliaga Pet. 17-19, Peru Pet. 18-20), whether the *res* can be severed into sovereign immune and non-immune parts (Odyssey Pet. 17-19, De Aliaga Pet. 10-17, Peru Pet. 21-24), whether the *Mercedes*'s mission was a sovereign activity and thus no "commercial activity" exception to the FSIA could apply (De Aliaga Pet. 19-25), and whether the district court had authority to order release of the *res* to Spain (Odyssey Pet. 13-16). Despite Petitioners' many claims of error, however, the decision below is entirely consistent with this

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denied two other applications for stay or recall of the mandate from Peru and another appellant below. *See* Sup. Ct. Dkt. Nos. 11A769; 11A795.

Court's decisions and the controlling treaties, statutes, and other authorities.

1. The Decision Below Correctly Found That There Is No Physical Possession Pre-Condition To Sovereign Immunity.

As the district court below found, "[n]o section of the FSIA imposes the possessory requirement Odyssey advances," and thus it "refuse[d] to read one into the statute." App. 85. The Eleventh Circuit correctly agreed.

a. Petitioners argue that a conflict exists between the Eleventh Circuit's straightforward application of the FSIA's Section 1609 and this Court's Eleventh Amendment decision in *California* v. *Deep Sea Research, Inc.*, 523 U.S. 491 (1998), which held that physical possession of a sunken *res* may be a pre-condition for a state to have Eleventh Amendment immunity from federal court jurisdiction. As the district court below found, however, "[n]o section of the FSIA imposes the possessory requirement Odyssey advances," and thus it "refuse[d] to read one into the statute." App. 85. The Eleventh Circuit agreed, noting that "it is clear we look only to the FSIA to determine if any possession requirement exists" and "no possession requirement exists in any part of the statute." App. 39-40.

The Eleventh Circuit's decision does not conflict with *Deep Sea Research* in any way. *Deep Sea Research* contains no holding regarding foreign sovereign immunity, much less any basis to read a

"possession" requirement into the FSIA that Congress chose not to enact. Rather, as the Eleventh Circuit observed, *Deep Sea Research* concerned "the sovereign immunity of a state's property under the Eleventh Amendment" and "the interaction between the Eleventh Amendment and the *in rem* admiralty jurisdiction of the Federal Courts." App. 38-39; *see also Deep Sea Research*, 532 U.S. at 494. Nowhere in *Deep Sea Research* did this Court cite or even mention the FSIA, much less hold that foreign sovereign immunity is governed by Eleventh Amendment rules of decision. Accordingly, the Eleventh Circuit appropriately found that "[r]egardless of any possession requirement the courts have imposed on a U.S. state claiming immunity of its property, there is no support to conclude these cases alter the immunity Congress specifically provided to property of foreign states under the FSIA." App. 39.

In doing so, the Eleventh Circuit faithfully followed this Court's consistent teachings. This Court has repeatedly instructed that "the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007) (quoting *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)). "Under the FSIA, a foreign state is presumptively immune from suit unless a specific [FSIA] exception applies." *Id.* Foreign sovereign immunity is governed by "the substantive terms of the Act to determine whether one of the *specified* exceptions to immunity applies." App. 39-40

(quoting *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 497-98 (1983) (emphasis in original)).

Section 1609 of the FSIA contains no condition that a foreign sovereign must be in physical possession of the *res* in order for sovereign immunity to be available, and this Court's FSIA decisions make clear that no such condition may be read into it.[8] "After the enactment of the FSIA, the Act — and not pre-existing common law — indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2285 (2010).

b. Petitioners read far too much into this Court's decisions in *The Pesaro*, 255 U.S. 216 (1921) and *Compania Espanola de Navegacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68 (1938). Odyssey Pet. 8-9; De Aliaga Pet. 9-10; Peru Pet. 18. Both decisions long predate the FSIA, and neither is inconsistent with the FSIA. *The Pesaro* merely held that sovereign immunity should not have been granted to

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[8] "Reading the FSIA as a whole," as this Court instructs, (*Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2289 (2010)), also confirms that no "possession" requirement may be read into Section 1609. Where Congress chose to include a reference to possession in the FSIA, it did so for a specific and limited purpose in Section 1605(b)(1). That subsection requires only that notice of an *in personam* suit asserting a maritime lien be given to the person "having possession of the vessel or cargo against which the maritime lien is asserted." 28 U.S.C. § 1605(b)(1). Section 1605 provides exceptions only to certain *in personam* claims against foreign sovereigns, not exceptions to the *in rem* claims in this case, which are governed by Section 1609. The only exceptions to Section 1609 immunity are provided in Sections 1610 and 1611.

an Italian merchant vessel upon a "respectful suggestion" by the Ambassador of Italy with no supporting evidence. *The Pesaro*, 255 U.S. at 218-219. *The Navemar* likewise held that a suggestion of immunity submitted by the Spanish Embassy without supporting evidence was not sufficient to establish ownership and right to possession of a merchant ship "manned by officers and crew in the employ of [the] petitioner," a private shipping company. *The Navemar*, 303 U.S. at 72-73.[9]

These decisions merely held that a foreign sovereign must do more than simply assert immunity. They are also consistent with the later-enacted FSIA requirement that a foreign sovereign must make an evidentiary showing of its interest to claim immunity, as Spain did in its "encyclopedic" showing that the *Mercedes* was a Spanish Navy Frigate of War, manned by Spanish Navy officers and crew, and carrying out military orders on a mission of vital national importance when it sank in battle.[10] App. 18.

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[9] In *The Navemar*, the vessel at issue was a private merchant ship of which the Government of Spain was "never in possession." *The Navemar*, 303 U.S. at 72-76. The vessel was requisitioned while at sea, and its crew was unaware that "they were controlling the vessel and crew on behalf of their government." *Id.* at 75-76. That is the opposite of the present case, which involves the arrest of a Spanish warship "commanded by officers and crewed by sailors of the Royal Spanish Navy throughout its service." App. 81.

[10] Odyssey's claim that the decision below would bar "a party in a federal court action [from] obtain[ing] jurisdiction in a salvage case where a foreign sovereign intervenes and merely claims an (...continued)

c. There is nothing in the decision below that conflicts with pre-FSIA case law in any event. As this Court recently noted in *Samantar*, the doctrine of foreign sovereign immunity was developed "before the FSIA was enacted in 1976," beginning with the *Schooner Exchange* v. *McFaddon* decision holding that "a federal court lacked jurisdiction over a national armed vessel … of the [E]mperor of France." *Samantar*, 130 S. Ct. at 2284-85 (quoting *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 146, 3 L.Ed. 287 (1812)). The *Schooner Exchange* decision is "generally viewed as the source of our foreign sovereign immunity jurisprudence." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688 (2004).

d. FSIA Section 1609 also expressly incorporates "existing international agreements to which the United States is a party at the time of enactment of this Act." 28 U.S.C. § 1609. The 1958 Geneva Convention on the High Seas, to which the United States and Spain were (and remain) parties, provides that "Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State." Art. 8(1), Apr. 29, 1958, 13 U.S.T. 2312, 2315-16, 450 U.N.T.S. 81, 82, *entered into force* Sept. 30, 1962, 13 U.S.T. 7, 450 U.N.T.S. 11.[11]

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interest" (Odyssey Pet. 11) is the opposite of the record in this case. As both courts below found, Spain's "encyclopedic" factual showing in this case did far more than merely "claim an interest."

[11] Article 8 of the Geneva Convention is also carried forward *verbatim* in Article 95 of the 1982 U.N. Convention on the Law (...continued)

Another "existing international agreement" thus incorporated in Section 1609 is the 1902 Treaty of Friendship and General Relations Between the United States and Spain. Article X of the Treaty provides that "[i]n cases of shipwreck … each party shall afford to the vessels of the other … the same assistance and protection and the same immunities which would have been granted to its own vessels in similar cases." Art. X, 33 Stat. 2105. The Treaty thus entitles sunken Spanish Navy vessels to the same protection and immunities that are granted U.S. Navy vessels by the SMCA, which contains no possession requirement. Requiring physical possession as a precondition for protecting military vessels and aircraft lost at sea would negate the Act and its manifest purpose.

As demonstrated by the record below, the United States and Spain agree that the Treaty of Friendship and General Relations and the Geneva Convention on the High Seas mandate immunity for the *Mercedes* and her contents. As this Court has held, "the meaning attributed to treaty provisions by the [g]overnment agencies charged with their negotiation and enforcement is entitled to great weight," and "we must, absent extraordinarily strong contrary evidence, defer to that interpretation."

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of the Sea. 1833 U.N.T.S. 396, 435, 21 I.L.M. 1261, 1288. The President has informed the Senate that the "key principle of sovereign immunity for warships and military aircraft" is "of vital importance to the United States." President's Transmittal of UNCLOS to the Senate, 34 I.L.M. 1393, 1995 WL 655157, at *1412 (Oct. 7, 1994); *see also* U.S. Statement of Interest in the district court, *at* D. Ct. Doc. 247:9.

Sumitomo Shoji Am., Inc. v. *Avagliano*, 457 U.S. 176, 184-85 (1982).

e. Moreover, this Court has previously declined to review whether *Deep Sea Research* requires Spain to have possession of its sunken warships in order to invoke sovereign immunity.

In a prior case involving two sunken Spanish Navy Frigates of the same era as the *Mercedes*, *Sea Hunt, Inc.* v. *Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), petitioners/appellants sought certiorari on the issue of whether *Deep Sea Research* precluded sovereign immunity for two Spanish Navy Frigates that sank in 1750 and 1802 and were thus not in Spain's possession. *See* Petition for A Writ of Certiorari in *Sea Hunt, Inc.* v. *Kingdom of Spain*, No. 00-652, 2000 WL 34000314, at *8-*14 (filed Oct. 19, 2000) (arguing Fourth Circuit erred in not finding, as per *Deep Sea Research*, that Spain's sovereign immunity "turn[ed] on the sovereign's possession of the *res*"). This Court denied certiorari. 531 U.S. 1144 (2001). There is no reason to change course and grant review of this issue now. *Cf. South Park Indep. Sch. Dist.* v. *United States*, 453 U.S. 1301, 1303-05 (1981) (Powell, J., in chambers) (denying motion for stay of mandate because no "reasonable probability" that Court would grant certiorari given fact certiorari was previously denied to earlier case presenting "almost identical" issues).

2. The Decision Below Correctly Found That The "Commercial Activity" Exception Has No

Factual Or Legal Bearing On This Case.

After a rigorous review of the factual record, the district court found that the *Mercedes* was in active military service and "clearly was not engaged in any commercial activity at the time of her demise." App. 94. The Eleventh Circuit affirmed this finding. App. 34-37. The De Aliaga Petitioners nevertheless contend that the Eleventh Circuit wrongly failed to apply the "commercial activity" exception to foreign sovereign immunity in this case, citing *Republic of Argentina* v. *Weltover*, 504 U.S. 607 (1992). De Aliaga Pet. 19-25. The Eleventh Circuit correctly rejected this contention on multiple grounds. This Court should not review that decision.

As the Eleventh Circuit correctly noted, no claim was made below that the commercial activity exception to Section 1609 immunity, which is contained in Section 1610(a) of FSIA, applied to this case. App. 33 n.10. Even if such a claim had been made, moreover, the Section 1610(a) exception to Section 1609 applies only to property "used for a commercial activity *in the United States*" (emphasis added). It was undisputed below that the *Mercedes* had nothing to do with the United States (App. 54), and no such claim is made in the petitions before this Court. Moreover, on a thorough review of the "encyclopedic" evidentiary record, the Eleventh Circuit affirmed that the *Mercedes* was engaged in military service of a quintessentially "sovereign nature," protecting the interests of Spain and its citizens at a time of threatened war. App. 34-37. Accordingly, this Court's definition of "commercial

activity" as set forth in *Republic of Argentina* v. *Weltover* could not apply as a matter of fact or law.

3. The Decision Below Correctly Held That All Of The *Res* Was Immune From Arrest And Suit.

Petitioners argue that the courts below should have divided the *res* into sovereign immune and non-immune parts to serve their purposes. The lower courts' refusal to do so was wholly consistent with settled law and does not merit review by this Court. The *res* here is the warship *Mercedes*, and U.S. law applicable to Spanish vessels under the Treaty of Friendship and General Relations explicitly protects sunken warships *and their contents* from unauthorized disturbance and from claims under the law of finds and the law of salvage — precisely the claims asserted against the *res* in this case.

a. The Eleventh Circuit correctly applied the SMCA to hold that the *Mercedes* and her contents are "interlinked" for immunity purposes. App. 42. The SMCA protects U.S. sunken military craft from unauthorized disturbance and claims under the law of finds and of salvage, the very claims asserted against the *Mercedes*. SMCA §§ 1402(a)-(b), 1406(c)-(d), 118 Stat. 1811, 2094-98. The Act defines "sunken military craft" to include "all or any portion[s] of … any sunken warship … *and [its] associated contents* … ." *Id.* § 1408(3) (emphasis added). The definition of "associated contents" expressly includes "the equipment, *cargo*, and contents … and [] the remains and personal effects of

the crew and passengers of a sunken military craft that are within its debris field." *Id.* § 1408(1) (emphasis added).

b. The Eleventh Circuit correctly held that the reciprocal obligations of Spain and the United States under Article X of the 1902 Treaty of Friendship and General Relations mandate that the *Mercedes* and her "associated contents" receive the same protections and immunities as the United States provides its own vessels: "Thus, under the 1902 treaty, the *Mercedes* and its cargo are entitled to the same immunities provided by the SMCA." App. 43.[12]

The United States and Spain agree that the plain terms of Article X of the Treaty of Friendship and General Relations and the SMCA mandate protection for the *Mercedes* and her contents, as did the Eleventh Circuit. The Fourth Circuit held likewise in *Sea Hunt*, holding that two Spanish frigates were entitled to the same protections in a case decided under long-standing executive branch

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[12] The DeAliaga Petitioners' argument that the Eleventh Circuit's decision conflicts with the Fourth Circuit's decision in *Columbus-America Discovery Group, et al.* v. *Atlantic Mutual Insurance Company*, 974 F.2d 450 (4th Cir. 1992) (DeAliaga Pet. 12-15) is misguided. In *Columbus-America*, the shipwrecked privately-owned merchant vessel was abandoned by its owners. The issue before the Fourth Circuit was whether insurers of cargo had abandoned subrogation rights. *Id.* at 465. Foreign sovereign immunity was not involved in any way. Petitioner Odyssey's citation to *The Nereide*, 13 U.S. 388 (1815) (Odyssey Pet. 18) is equally misplaced. The *Nereide* was decided under the now-extinct "law of nations as to prize of war." *Id.* at 396.

and military policies before Congress codified them in the SMCA in 2004. *Sea Hunt*, 221 F.3d at 646-48.

Severing the "associated contents" of the *Mercedes* from the immunity to which she is entitled and leaving in place an arrest and U.S. judicial proceeding against *res* taken from a Spanish Navy warship, as Petitioners urge, were rejected by the Eleventh Circuit as expressly contrary to the SMCA,[13] and is without support in case law or logic. Petitioners present no authority that would merit further review, much less the "extraordinarily strong contrary evidence" this Court requires to set aside understandings between nations as to the meaning and effect of their treaties. *Sumitomo Shoji Am., Inc*, 457 U.S. at 184-85.

As the Eleventh Circuit noted, "[n]one of the cases cited by Odyssey in support of its argument that cargo is separate from a vessel concern cargo aboard a sunken military vessel." App. 42. Neither do Petitioners now. The SMCA certainly does, however, and it is express and clear that the

[13] Odyssey mischaracterizes the SMCA as "specifically requir[ing] that the government have title to the associated contents for the contents to be assimilated to the ship." Odyssey Pet. 17. The SMCA provides that it does not apply where title has "been abandoned or transferred by the government concerned." SMCA § 1408(3). It is undisputed that Spain has never abandoned or transferred title or any other interest in the *Mercedes*.

"associated contents" — including "cargo" — may not be severed from a sunken military vessel.[14]

B. Peru Presents No Justiciable Or Certiorari-Worthy Issue.

The Peru petition presents no grounds for this Court to embark on a nonjusticiable exercise in "equitable allocation" between Spain and Peru. As the lower courts found, adjudicating Peru's claim — which alleges that Peru gained rights in the *res* upon Peruvian independence nearly twenty years after the *Mercedes* sailed from undisputedly Spanish territory in 1804 — would also "undermine the traditional notions of international comity," whereby U.S. courts "have not normally adjudicated claims of one state against another." App. 100 (citing Restatement (Third) of Foreign Relations Law § 451 cmt. e (1987)). These same reasons compel denial of Peru's petition.[15]

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[14] *See also* the Abandoned Shipwreck Act, Pub. L. No. 100-298, § 2102(d), 102 Stat. 432 (1988), in which Congress also defined "shipwreck" as "a vessel or wreck, its cargo or other contents."

[15] Pursuant to Sup. Ct. R. 15, Spain here points out two misstatements of fact in Peru's petition: *contra* Peru's Statement of the Case, (1) Spain demonstrably *did* "address Peru's contrary ownership claim to the Treasure" (Peru Pet. 4), and did so at length, *see* D. Ct. Doc. No. 161 (Spain Reply to Peru Response to Motion to Dismiss); and (2) the Eleventh Circuit demonstrably *did* "address Peru's ownership claim" to the *res* (Peru Pet. 5). *See* App. 47.

1. Peru Made No Factual Showing Of Any Ownership Or Other Interest.

Peru's petition acknowledges that in 1804, what is now Peru was Spanish territory, the Peruvian people were Spanish subjects, and the *Mercedes* is a Spanish Navy vessel. Peru submitted no factual evidence at all below to dispute, much less refute, Spain's evidentiary showing. Peru also made no showing that its claim to "property that originated in its territory or was produced by its people" was based on any cession or other conveyance by Spain of any right or interest in the *Mercedes* or anything else that left the Viceroyalty of Peru before Peruvian independence.

To even try to do so would be to rewrite historical fact: Peru did not exist as a sovereign in 1804. Upon independence from Spain, Peru became the sovereign of its territory, of its people and of the Spanish Royal Property within the territory that Spain ceded in the Capitulation of Ayacucho. But in the Capitulation, Spain and Peru expressly agreed that Spanish ships were not affected by Spain's capitulation: they remained free to leave for "the ports of Europe." *See* Capitulation of Ayacucho, D. Ct. Doc. No. 161-1:13-17. Where an agreement between two sovereigns "specifically catalogues items other than territory intended to be conveyed" with "great particularity," no cession or abandonment of other property, including sunken vessels or their contents, can be deemed to have occurred. *Sea Hunt*, 221 F.3d at 644.

2. Article 149 Of UNCLOS Is Expressly Inapplicable To This Case.

In light of this undisputed history, Peru's petition contends that the Eleventh Circuit erred in failing to recognize what Peru claims to be "customary international law" under Article 149 of the 1982 United Nations Convention On The Law Of The Sea. Peru, however, has not ratified UNCLOS, nor has the United States.[16] Article 149 of UNCLOS is also inapplicable by its own terms. Article 149 refers to "preferential rights" in "archaeological and historical [objects] found in the Area" for the "country of origin, or the State of cultural origin, or the State of historical and archaeological origin." UNCLOS, 21 I.L.M. 1245 (Dec. 10, 1982), Art. 149. The historical fact is that the *Mercedes* is a Spanish Navy vessel that sank while en route from Spain's overseas territories to its homeland. Additionally, Peru conceded below that the *Mercedes* was not found in the "Area," as defined in UNCLOS. *See* UNCLOS, Art. 1 (defining "Area" as ocean floor, and subsoil that is "beyond the limits of national jurisdiction").[17] Though Peru and its expert acknowledged this fact in the district court (*see* App. 98; D. Ct. Doc. Nos. 206:11-12; 206-1:8-11; 270:35-36), Peru's petition to

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[16] *See* List of UNCLOS Ratifying Countries (updated July 12, 2011), *at* http://www.un.org/depts/los/convention_agreements/convention_declarations.htm.

[17] The exact location of the *Mercedes* was filed under seal in the record below to protect the site from further disturbance. *See* D. Ct. Doc. No. 135.

this Court makes no mention of it. Article 149 is thus irrelevant to this case. *See Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 699 (1989).

No court has applied Article 149 or found it to be customary international law in any decision located by the parties or the courts below, much less made it a basis to "venture[] into waters far beyond its jurisdictional boundaries to resolve a dispute between two sovereigns over the remnants of one of the sovereign's sunken warships." App. 99. The district court and the Eleventh Circuit judiciously declined to be the first.

3. The 1983 Vienna Convention On The Succession Of States Is Inapplicable To This Case.

Peru also claims that the decision below erred in failing to apply "the customary international law applicable to changes in sovereignty," citing the 1983 Vienna Convention on the Succession of States in Respect of State Property, Archives, and Debts. Peru Pet. 9. That draft Convention, however, has been met with worldwide rejection and is not in force anywhere in the world.

In the twenty-nine years since it was drafted, the Convention has been ratified by only seven states, none of which is the United States, Spain, or even

Peru.[18] The United States was adamantly opposed to the Convention, explicitly stating its position that "the draft convention contained much that was neither existing law nor acceptable as a formulation *de lege ferenda*."[19] International law scholars, including those cited in Peru's petition, have thus cautioned that the Convention is "not generally considered to be a codification of customary international law." Williams & Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 Harv. Int'l L.J. 355, 360 (2001) (cited at Peru Pet. 9, 10, 23).[20] The draft provision upon which Peru seeks to rely for the proposition that a territory which becomes independent can retroactively acquire an extraterritorial right to resources or other property that left the territory

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[18] The draft Convention requires ratification by twenty states before it can come into force in ratifying states. The seven ratifying states are Croatia, Estonia, Georgia, Ukraine, Liberia, Slovenia, Macedonia, and Ukraine. *See* List of Ratifying Countries, Vienna Convention on the Succession of States in Respect of State Property, Archives, and Debts (updated Apr. 11, 2012), *at* http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-12&chapter=3&lang=en.

[19] *See* D. Ct. Doc. No. 161-2, Official Records, U.N. Conference on Succession of States in Respect of State Property, Archives, and Debts, Summary records of plenary meetings and meetings of the Committee of the Whole, Vienna (Apr. 7, 1983), ¶¶ 20-23.

[20] *See also* Nathan, *The Vienna Convention of Succession of States in Respect of State Property, Archives, and Debts, in* International Law at a Time of Perplexity 489, 493 (Dinstein, ed. 1989) (Convention "has been objected to by such an unprecedentedly large number of states" that it "can hardly serve as a basis for the crystallization of norms of customary international law").

prior to independence was singled out by the United States as particularly ill-founded and unacceptable.[21]

Accordingly, adoption of Peru's theory as "law" by any United States court would place it in direct conflict with the Executive Branch. *See Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 319-20 (2d Cir. 2007). And even if an unratified Convention that is not in force in the United States or anywhere else could somehow be deemed to be "law," the text of the Convention does not "confer individual enforceable rights" and thus cannot "create obligations enforceable in the federal courts." *Medellin* v. *Texas*, 552 U.S. 491, 503-05 (2008).

Peru's petition attempts to portray the United States as having adopted this principle into law by citing cases in which this Court adjudicated disputes between States of the Union and claiming that the Eleventh Circuit's decision conflicts with those cases. Peru Pet. 8-9, 13. The irrelevance of those cases adjudicating disputes between states is self-evident, and the courts below correctly declined to apply them. *Virginia* v. *West Virginia*, 220 U.S. 1 (1911), was brought pursuant to this Court's original jurisdiction over a dispute arising from "the original contract between the two states" concerning "the public debt of the Commonwealth of Virginia."[22] 220

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[21] *See supra* n. 19 (March 10, 1983), ¶ 2 (U.S. Representative to Drafting Conference stating that successor state principle upon which Peru's petition relies "created distinctions which were not well founded in logic, law or inherent justice").

[22] *Hartman* v. *Greenhow*, 102 U.S. 672 (1880) (cited at Peru Pet. 9), is even further removed, as it addressed the effect of the (...continued)

U.S. at 6, 26-31. Foreign states' efforts to use *Virginia* v. *West Virginia* to support a claim in the U.S. courts against another sovereign have rightly failed. *See 767 Third Ave. Assocs.* v. *Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152, 161-62 & n.7 (2d Cir. 2000) (*Virginia* v. *West Virginia* cannot stand for the proposition that "courts are able to equitably allocate debt among sovereigns," and "federal courts do not have the authority or the means to determine the equitable distribution of the public debt of a foreign state among several successor states").

4. Succession Of State-Based Claims Against Foreign Nations Are Not Justiciable In U.S. Courts.

Peru's petition raises nonjusticiable political questions that the courts below correctly declined to decide. In *Can* v. *United States*, 14 F.3d 160, 162-63 (2d Cir. 1994), the Second Circuit applied this Court's decision in *Baker* v. *Carr*, 369 U.S. 186 (1962), to find that "determination of title" to assets of the former Republic of South Vietnam "would require a resolution of issues related to state succession," based on "political theories that incorporate no statutory, constitutional or common-law basis" and are thus "beyond judicial competence." *Can*, 14 F.3d at 162-63.

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allocation of debt between Virginia and West Virginia upon the tax liabilities of a Virginia resident.

In recognition of this principle, United States courts have long held that succession-based claims against or between foreign sovereigns are "inherently political" and lack "judicial or manageable standards … for … determination." *Occidental of Umm al Qaywayn, Inc.* v. *Certain Cargo*, 577 F.2d 1196, 1204 (5th Cir. 1978); *see also Yucyco, Ltd.* v. *Republic of Slovenia*, 984 F. Supp. 209, 218 (S.D.N.Y. 1997) (same). Peru's petition provides no basis for concluding that the courts below erred by declining to venture into "judicial no-man's land," or that this Court should do so. *Occidental of Umm al Qaywayn, Inc.*, 577 F.2d at 1205.

Spain, as the Flag state of the *Mercedes*, established entitlement to sovereign immunity under treaties in force and statutes that are binding law. The Eleventh Circuit rightly held that these authorities "preclude Peru's attempt to institute an action in the United States courts against the *Mercedes* or any cargo it was carrying when it sank." App. 47.

C. Release Of The *Res* To The Flag State Spain Was Not Error And Presents No Issue Worthy of Review.

Finally, Petitioners contend that the Eleventh Circuit erred in affirming that *res* taken without authorization from the *Mercedes* must be released to Spain, the party that had established "a sovereign interest in it." App. 50. According to Petitioners' argument, upon finding Spain had established sovereign immunity for the *res*, the district court was

not only precluded from taking any action whatsoever to release *res* held *in custodia legis*, but it should have released the recovered *res* to Odyssey, the wrongful arrestor. Odyssey Pet. 4-5; *see also* App 159-62 (reproducing Br. of Appellant Odyssey (11th Cir.)). This defies both law and logic, as it would invalidate Spain's immunity and reward the wrongdoer.

1. Petitioners' arguments omit the critical facts that, as discussed in the Counterstatement Part B.1 *supra*, the recovered *res* was placed "in actual and/or constructive possession" of the district court and held *in custodia legis* "until further order of th[e] [district] court." As the Eleventh Circuit pointedly noted, Petitioners' argument that the district court ceased to have authority to take any action with respect to the *res* upon granting Spain's motion to dismiss "would lead inexorably to court custody in perpetuity." App. 48-49.

2. This Court has repeatedly held that the district courts retain authority to deal with collateral matters after granting a motion to dismiss for lack of subject matter jurisdiction. "It is well established that a federal court may consider collateral issues after an action is no longer pending." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 395 (1990). In *Willy* v. *Coastal Corporation*, 503 U.S. 131 (1992), this Court reaffirmed that after a determination that subject matter jurisdiction is lacking, the district courts retain authority to consider collateral issues and enter orders that are "collateral to the merits." The Court in *Willy* reviewed decisions since at least 1940 that have recognized that the courts' interest in

and authority for "the maintenance of orderly procedure" continues after dismissal of the underlying cause of action. *Id.* at 137-38.

3. Supplemental Admiralty Rule E(5)(d), authorizing release of arrested property according to the "terms and conditions best seen fit by the court," contains precisely the kind of authority that the courts must be able to apply in an *in rem* case upon dismissal of the claim and vacatur of the arrest.[23] App. 48-49. As the Eleventh Circuit noted, "the court, after determining the *res* was immune from arrest, must have the ability to release the *res* from its custody" (App. 48), just as Supplemental Admiralty Rule E(5)(d) provides. By Petitioners' logic, moreover, releasing the *res* to Odyssey, the wrongful arrestor, would void the FSIA by "forcing Spain to file suit against Odyssey to retrieve property that is protected by Spain's sovereign immunity." App. 48.

[23] There is no conflict with this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998) (cited at Odyssey Pet. 13). *Citizens for a Better Environment* held that a lack of subject matter jurisdiction requires that a plaintiff's claim be dismissed — just as the decision below did here. *Steel Co.* did not involve an *in rem* arrest and thus did not address, much less cast doubt upon, a court's authority under Supplemental Rule E (5)(d) to release an arrested *res* held *in custodia legis.*

II. The Foreign Policy And Separation-Of-Powers Implications Of This Case Weigh Against Further Review.

"Our Constitution charges the political branches with the conduct of foreign affairs." *Sea Hunt*, 221 F.3d at 643 (citing *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109-10 (1948)). This case involves compelling national and international policy considerations concerning the sovereign immunity of warships, the shared understanding of the United States and Spain concerning the intent and effect of their Treaty of Friendship and General Relations, and the international interest in respect and protection for the resting place of sunken warships and their crews. Recognizing these longstanding principles, the Eleventh Circuit appropriately noted concerns about the "specific affront" that could result if the *res* were not released to Spain. App. 50-51 (quoting *Pimentel*).

Petitioner Odyssey's claim that the decision below would "encourage the end of historical marine salvage as now practiced" (Odyssey Pet. 7) rings hollow, to say the least, in light of Odyssey's own representations to Spanish authorities in September 2006, just five months before it "irreparably disturbed" the *Mercedes*. In a submission seeking relief from a fine imposed against Odyssey for unauthorized operations in Spanish waters, Odyssey pledged that it recognized "that the wreckages of ships belong, for all proprietary and other purposes, to the flag state, regardless of the waters in which they are found." In Odyssey's words then, "[t]he sunken warships of various countries are also the

graveyards of marines who died while serving their homelands, and they should be properly handled by the state they served, which must take steps to prevent interference from foreign elements in that relationship." D. Ct. Doc. No. 131-15:3. The Eleventh Circuit agreed with that principle, and Petitioners provide no basis warranting review of that decision.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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April 2012