Nos. 18-575 & 18-581

IN THE

Supreme Court of the United States

YPF S.A.,

Petitioner,

v.

PETERSEN ENERGÍA INVESORA S.A.U AND PETERSEN ENERGÍA, S.A.U.,

Respondents.

ARGENTINE REPUBLIC,

Petitioner,

v.

PETERSEN ENERGÍA INVESORA S.A.U AND PETERSEN ENERGÍA, S.A.U.,

Respondents.

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

BRIEF OF THE GOVERNMENT OF THE UNITED MEXICAN STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TREATY AND STATUTE

TABLE OF AUTHORITIES—continued

INTEREST OF *AMICUS CURIAE*[1]

The Government of the United Mexican States ("Mexico") is a foreign sovereign and an international partner of the United States. The roots of cooperation between Mexico and the U.S. run deep. Their executive and legislative branches, almost every federal agency, and dozens of state and local governments collaborate directly with their counterparts across the border constantly. The interaction of labor markets, tourism, business travel, and student migration is of great importance to the economies of both countries. To enhance economic trade, Mexico and the U.S. have pursued trade liberalization through multilateral, regional, and bilateral negotiations, resulting in multifaceted economic relationships. Foreign investment also plays a key role since the U.S. represents the largest source of foreign direct investment in Mexico,[2] and Mexico's investment in the U.S. has increased during last years to $34.4 billion.[3]

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[1] Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received notice of the Government of the United Mexican States' intention to file this brief. The parties have consented to the filing of this brief, each in a separate writing that is being filed concurrently with this brief.

[2] M. Angeles Villarreal, Cong. Research Serv., RL32934, *U.S.-Mexico Economic Relations: Trends, Issues, and Implications*, 1–2, 4 (2018), http://www.fas.org/sgp/crs/row/RL32934.pdf.

[3] SelectUSA, U.S. Dep't of Commerce, *Foreign Direct Investment (FDI): MEXICO* (2017), https://www.selectusa.gov/servlet/servlet.FileDownload?file=015t0000000LKNE.

Under the Vienna Convention on Diplomatic Relations ("VCDR"), to which both Mexico and the U.S. are signatories, Mexico has a right to protect its own interests within the limits of international law. See Vienna Convention on Diplomatic Relations art. 3, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. Consequently, it submits this brief to underscore the importance of ensuring that courts interpret the "commercial activity" exception to immunity in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2), in a uniform—and narrow—way.

Although Mexico has no interest in the dispute that gave rise to this lawsuit, Mexico has always—expressly and publicly—acknowledged the sovereign right of all countries to decide on the public policies that should apply in their territories. Consequently, Mexico has a substantial interest in the threshold question of immunity presented here, because that question deals with the paradigmatically sovereign act of expropriation. A nation's decisions about how to use, transfer, and dispose of domestic property are at the heart of its sovereignty, and are decisions that Congress has generally excluded from the jurisdiction of U.S. courts. Forcing foreign nations to defend such decisions in a hostile forum impermissibly meddles with their domestic affairs and ultimately harms the United States' interests. Not only do such suits risk embarrassing key allies and trade partners, but they also lead inexorably to a reciprocal expansion of suits against the United States.

Here, by ruling that the commercial activity exception to the FSIA is broad enough to encompass such sovereign acts of expropriation, the Second Circuit has upended the typically narrow exceptions to immunity. Indeed, its decision all but nullifies the FSIA's exist-

ing, narrow exception for expropriation, thereby potentially exposing Mexico and other sovereigns to suit in U.S. courts for decisions about use and ownership of property within their own borders.

In addition to its interest in protecting against a curtailment of its sovereign immunity, Mexico also has an interest in ensuring that U.S. courts understand the scope of that immunity in a uniform manner. The purpose of the FSIA is, in part, to encourage "a uniform body of law in this area," "[i]n view of the potential sensitivity of actions against foreign states" and the heightened risk of forum shopping. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (alteration in original) (quoting H.R. Rep. No. 94-1487, at 32 (1976)); see also *USX Corp.* v. *Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003) ("[U]niformity in decision . . . is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." (quoting H.R. Rep. No. 94-1487, at 13)); *Vencedora Oceanica Navigacion, S.A.* v. *Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195, 203 (5th Cir. 1984) (per curiam) ("[I]t is highly desirable to avoid circuit conflicts in the sensitive area of sovereign immunity.").

The Second Circuit's decision here, however, creates significant uncertainty about how broadly courts may interpret the "commercial activity" exception to immunity, and whether that exception may reach even activity that is inextricably intertwined with the sovereign act of expropriation. Such uncertainty undermines the development of a "uniform body of law" and will encourage forum shopping, making it harder for Mexico and other sovereigns to predict how, whether, and where their sovereign acts may subject them to jurisdiction in the United States.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION RAISES EXCEPTIONALLY IMPORTANT QUESTIONS ABOUT INTERNATIONAL COMITY.

This Court should grant review because the Second Circuit's decision implicates exceptionally important questions about foreign policy and international comity.

Principles of sovereign immunity, such as *par in parem non habet imperium*—between equals no power—long predate the FSIA. See Thomas Weatherall, Jus Cogens *and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 Geo. J. Int'l L. 1151, 1152 (2015). Those principles, which Congress incorporated into the Act, "recognize[] the 'absolute independence of every sovereign authority' and help[] to 'induc[e]' each nation state, as a matter of 'international comity,' to 'respect the independence and dignity of every other,' including our own." *Bolivarian Republic of Venez.* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319–20 (2017) (third alteration in original) (quoting *Berizzi Bros.* v. *S.S. Pesaro*, 271 U.S. 562, 575 (1926)). Maintaining respect for principles of international comity is imperative, because suits against sovereigns "might have serious foreign policy implications which courts are ill-equipped to anticipate or handle," *Sampson* v. *Fed. Republic of Ger.*, 250 F.3d 1145, 1155–56 (7th Cir. 2001) (quoting *Frolova* v. *USSR*, 761 F.2d 370, 375 (1985) (per curiam)); see also *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (addressing need "to protect against unintended clashes between our laws and those of other nations which could result in international discord" and harm to U.S. interests), *characterization of holding as "jurisdictional" superseded by Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006).

Concerns about "foreign policy implications" and "international discord" are at their highest when, as here, foreign sovereigns engage in the quintessentially sovereign act of expropriation. As the United States observed last term, "[g]overnmental decisions involving property . . . within a sovereign's own territorial jurisdiction are generally reserved to that sovereign free of interference by the courts of another nation." Brief for the United States as Amicus Curiae Supporting Petitioners at 17, *Helmerich*, 183 S. Ct. 1312 (No. 15-423), 2016 WL 4524346 (citing *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1520–24 (D.C. Cir. 1984)). Consequently, sovereigns generally are empowered to make (and to change) their own rules about when and whether to expropriate property. *Id.*; see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 400–01, 436–37 (1964) (expropriation of American property by Cuba is an act of state); *World Wide Minerals, Ltd.* v. *Republic of Kaz.*, 296 F.3d 1154, 1166 (D.C. Cir. 2002) (holding, under act of state doctrine, that where conduct resulting in breach was "accomplished pursuant to" a sovereign act of expropriation, "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government" (quoting *Sabbatino*, 376 U.S. at 428)); *Credit Suisse* v. *U.S. Dist. Court for the Cent. Dist. Of Cal.*, 130 F.3d 1342, 1347 (9th Cir. 1997) (expropriation of assets is "paradigmatically sovereign in nature" (quoting *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1116 (5th Cir. 1985))).

Recognizing this, Congress has authorized courts to exercise jurisdiction over a sovereign act of expropriation only where a plaintiff can validly claim that the taking violated international law. See 28 U.S.C. § 1605(a)(3). No such claim was made in this case, yet

the Second Circuit concluded that claims based on conduct that directly ensues from an expropriation can be reviewed in U.S. courts under the FSIA's commercial activity exception. The Second Circuit's decision transgresses the historical limits on U.S. judicial interference with sovereign acts. Without clarity and correction from this Court, that decision threatens to disrupt international comity in at least three, equally troubling ways.

First, subjecting sovereigns to suit for harms flowing from expropriative acts forces them to defend their internal deliberative processes in a potentially hostile forum. That is the sort of awkward spectacle that the FSIA aims to prevent. "One of the main concerns of the immunity framework adopted by the FSIA is to accommodate 'the interests of foreign states in avoiding the embarrassment of defending the propriety of [sovereign] acts before a foreign court.'" *Butters* v. *Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (quoting *Broadbent* v. *Org. of Am. States*, 628 F.2d 27, 33 (D.C. Cir. 1980)); see also Philippe Lieberman, Case Comment, *Expropriation, Torture, and* Jus Cogens *Under the Foreign Sovereign Immunities Act:* Siderman De Blake v. Republic of Argentina, 24 U. Miami Inter-Am. L. Rev. 503, 528–29 (1993) ("American courts taking jurisdiction because of post-expropriation commercial activities must review acts of governments which Congress intended to be reviewable only within the narrow confines of [the FSIA's expropriation exception].").

Instead, other, more-neutral, and more-convenient fora exist to resolve such disputes. *Cf. Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 254 & n.22 (1981) (discussing circumstances where "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all."). Indeed, the inter-

national community, over the last half-century, has relied successfully on alternative dispute resolution systems to prevent discrimination against the sovereign and the business entity. *E.g.*, *Gold Reserve Inc.* v. *Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 116 (D.D.C. 2015) (enforcing arbitration award obtained through International Centre for Settlement of Investment Disputes between Canadian mining company and nation of Venezuela).

This case highlights the potential for embarrassment in mounting a defense of a sovereign's exercise of its core powers in a foreign forum. Petitioner had attempted to demonstrate how its takeover complied with Argentine law by submitting testimony from an Argentine legal expert, but the district court and court of appeal both disregarded those views, relying instead on their own interpretations of Argentine law. See Argentine Republic Pet. Cert. at 18–19 n.5; App. to Argentine Republic Pet. Cert. 24a (court of appeal "conclud[ing] that [Argentina's expert's] opinion does not establish what Argentina says it does"); Joint Appendix at A-538, *Petersen Energía Inversora, S.A.U.* v. *Argentine Republic* (No. 16-3303-CV(L)), 895 F.3d 194 (2d Cir. 2018) (district court declaring that "I actually don't really care what the experts say"). *Contra Animal Sci. Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869, 1873 (2018) ("In the spirit of 'international comity,' . . . a federal court should carefully consider a foreign state's views about the meaning of its own laws" and "accord respectful consideration" to those views (quoting *Societe Nationale Industrielle Aerospatiale* v.*U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 543 & n.27 (1987))).

Second, subjecting a sovereign's governmental decision-making to scrutiny in a foreign forum necessarily thrusts courts into the realm of foreign affairs, an area

where they lack both expertise and constitutional responsibility. That is a result that Congress sought to avoid with respect to expropriative acts that do not violate international law. See *Spectrum Stores, Inc.* v. *Citgo Petroleum Corp.*, 632 F.3d 938, 955–56 (5th Cir. 2011) (affirming dismissal of antitrust claims under act of state doctrine because "[t]he granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories" and thereby "frustrate the longstanding foreign policy of the political branches by wading . . . brazenly into the sphere of foreign relations").

Third, as this Court has recognized on several occasions, expansions of FSIA jurisdiction that infringe on sovereignty tend to be reciprocated by other nations, and will increase the United States' exposure to suit in foreign forums. See *Nat'l City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity is derived from standards of "reciprocal self-interest"); see also *Verlinden*, 461 U.S. at 493 ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States."); *N.Y. Cent. R.R. v. Chisholm*, 268 U.S. 29, 31–32 (1925) (adjudicating foreign dispute risks "an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent" (quoting *Am. Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 356 (1909))). That is just the sort of result this Court sought to avoid in *Helmerich*. There, this Court accepted the Department of State's warning against interpreting the FSIA's expropriation exception in a manner that "would 'affron[t]' other nations, producing friction in our relations with those nations and leading some to

reciprocate by granting their courts permission to embroil the United States in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.'" 137 S. Ct. at 1322 (alteration in original) (quoting Brief for United States as Amicus Curiae Supporting Petitioners at 21–22, *Helmerich*, 137 S. Ct. 1312 (No. 15-423), 2016 WL 4524346).

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THOSE OF THIS COURT AND ANOTHER CIRCUIT.

Review is also warranted because the Second Circuit's decision departs from this Court's FSIA jurisprudence and directly conflicts with the decisions of the D.C. Circuit.

1. The Second Circuit's decision below cannot be reconciled with this Court's repeated instructions to interpret FSIA's exceptions narrowly. In light of the weighty foreign policy implications at play when a sovereign is sued, this Court has repeatedly emphasized that "[a] foreign state is normally immune." *Verlinden*, 461 U.S. at 488. Jurisdiction is permissible only where the FSIA "carves out certain exceptions to its general grant of immunity," *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004). Exceptions to immunity are "narrowly construed." *Haven* v. *Polska*, 215 F.3d 727, 731 (7th Cir. 2000).

This case involves only the commercial activity exception. Consistent with the general norms of FSIA jurisprudence, this Court has interpreted that exception narrowly. "[A] state engages in commercial activity . . . where it exercises '*only* those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" *Saudi Arabia* v. *Nel-*

son, 507 U.S. 349, 360 (1993) (emphasis added) (quoting *Republic of Arg.* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992)). Put differently, the commercial activity exception confers jurisdiction only in "cases 'arising out of a foreign state's *strictly* commercial acts.'" *Helmerich*, 137 S. Ct. at 1315 (emphasis added) (quoting *Verlinden*, 461 U.S. at 487). Here, because petitioner's takeover was not accomplished through "*only* those powers that can also be exercised by private citizens," *Nelson*, 507 U.S. at 360 (emphasis added) (quoting *Weltover, Inc.*, 504 U.S. at 614), nor through "*strictly* commercial acts," *Helmerich*, 137 S. Ct. at 1320 (emphasis added) (quoting *Verlinden*, 461 U.S. at 487), it cannot lead to jurisdiction under the commercial activity exception.

The Second Circuit's decision here departs from this Court's guidance by according the FSIA's commercial activity exception a sweepingly broad scope. Under the Second Circuit's logic, any sovereign act (like expropriation) that is alleged to occur in a commercial setting or that has commercial consequences (like the takeover of the state-owned energy company at issue here) can satisfy the exception to immunity for commercial activity. It is difficult to envision situations in which a sovereign could expropriate a commercial enterprise and not engage in subsequent "commercial activity." Thus, in the increasingly common scenario where commercial and sovereign activities are intertwined, an artfully pleaded complaint could evade immunity, flouting this Court's decisions to the contrary. See *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396–97 (2015) (cautioning against "allow[ing] plaintiffs to evade the [FSIA's] restrictions through artful pleading"); see also *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001) ("Where Congress explicitly enumerates cer-

tain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

The Second Circuit's expansive view of the commercial activity exception is particularly hard to square with this Court's interpretation of FSIA's existing exception for expropriation claims. See 28 U.S.C. § 1605(a)(3). In *Helmerich*, the Court emphasized that the expropriation exception is narrow: it "grants jurisdiction *only* where there is a valid claim that 'property' has been 'taken in violation of international law.'" 137 S. Ct. at 1318 (emphasis added) (quoting 28 U.S.C. § 1605(a)(3)); see also *de Sanchez* v. *Banco Cent. de Nicar.*, 770 F.2d 1385,1395 (5th Cir. 1985) ("In applying Section 1605(a)(3), our inquiry is narrowly circumscribed."); H.R. Rep. No. 94-1487, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618 (expropriation exception is limited to "two categories of cases . . . where 'rights in property taken in violation of international law are in issue'").

Given the narrow scope of the expropriation exception, it would make no sense for a plaintiff who could not meet it to nonetheless obtain jurisdiction by recasting her claims as "commercial." Indeed, the D.C. Circuit has observed that if this interpretation of the exception were the law, "almost any subsequent disposition of expropriated property could allow the sovereign to be haled into a federal court under [the] FSIA." *Rong* v. *Liaoning Province Gov't*, 452 F.3d 883, 890 (D.C. Cir. 2006). But that sort of nullification of the expropriation exception is just what the Second Circuit's decision permits. Congress could not have intended, and this Court's decisions preclude, such an absurd result. *Cf.* Brief for the United States as Amicus Curiae at 13, *Helmerich*, 183 S. Ct. 1312 (No. 15-423), 2016 WL 2997494 ("[T]he court of appeals' [decision] effectively

nullifies the expropriation exception's requirements. Congress would not have anticipated that foreign states would be subject to the burdens of suit for expropriation claims in every case in which the plaintiff makes merely a non-frivolous assertion that the state's conduct [was also commercial in nature].").

2. The Second Circuit's decision also deepens a conflict with the D.C. Circuit, which holds that the commercial activity exception does *not* apply to suits based upon actions that directly "flow from" a sovereign act such as expropriation. *Rong*, 452 F.3d at 889. In *Rong*, that court's most recent and clearest articulation of this rule, a Chinese province took a controlling interest in a Hong Kong corporation by deeming the shares to be "state assets," replacing the board, and arranging for a below-market purchase of the corporation by a new, state-owned company. *Id.* at 885–87. The D.C. Circuit held that, even though the province's methods for taking over the company "seem[ed] commercial," "all of these acts flow[ed] from the [Province's] 'state assets' declaration—an act that can be taken only by a sovereign," and thus, "did not transform the Province's expropriation into commercial activity." *Id.* at 889–90. Because the province did not take over the company in the way that "a private party would"—rather, it "declared [them] to be state assets and claimed them as does a sovereign"—the province did not act as "[a] private party in the market." *Id.* at 890. Instead, it acted as a sovereign, and remained immune from suit. *Id.*[4]

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[4] *Rong* is consistent with a long line of earlier decisions from the D.C. Circuit. *E.g.*, *Jungquist* v. *Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1030 (D.C. Cir. 1997) ("[T]he fact that . . . actions may relate in certain respects to commercial activity does not provide a basis for jurisdiction under [the commercial activity exception]."); *Millen Indus., Inc.* v. *Coordination Council for N.*

Here, it is not disputed that Argentina's alleged breach flows directly from its expropriation. Had this case arisen in the D.C. Circuit, there is no question that petitioners would have been immune from suit. See *Rong*, 452 F.3d at 890.

This Court's resolution of that split on a topic of such extraordinary international importance is therefore necessary. See *Verlinden*, 461 U.S. at 489 (observing need for "a uniform body of law" regarding immunity "[i]n view of the potential sensitivity of actions against foreign states" (alteration in original) (quoting H.R. Rep. No. 94-1487, at 32)). Foreign sovereigns are entitled to know the scope of the FSIA, and to be assured that they cannot be subject to the jurisdiction of U.S. courts at the behest of plaintiffs who engage in judicial forum-shopping and artful pleading to evade the Act's carefully delineated limitations.

Am. Affairs, 855 F.2d 879, 885 (D.C. Cir. 1988) ("Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on a sovereign activity.").

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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