No. 18-575

IN THE

Supreme Court of the United States

YPF S.A.,

Petitioner,

v.

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

Respondents.

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

PETITIONER'S REPLY BRIEF

CHRISTOPHER LANDAU, P.C.
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street, N.W.
Suite 900
Washington, DC 20005
(202) 538-8000

KATHLEEN M. SULLIVAN
Counsel of Record
MICHAEL B. CARLINSKY
WILLIAM B. ADAMS
LISA M. GEARY
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Petitioner

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INTRODUCTION

This case challenges the manner in which the former government of Argentina carried out a sovereign act of expropriation pursuant to a declared national objective to achieve energy independence. It is an affront to foreign sovereignty for U.S. courts to exercise jurisdiction over a foreign state in such circumstances, as two of the Nation's close allies, Mexico and Chile, attest in their amicus briefs in support of the petition. And such expansive jurisdiction for U.S. courts will lead to greater incursions into the internal affairs of foreign sovereigns, as amici international law and business scholars explain.

Petersen's brief in opposition ignores these concerns, seeking instead to avoid review by raising non-existent vehicle issues and inapplicable precedent. This line of attack is unpersuasive. The question presented is critically important to U.S. foreign relations and squarely implicated by the decision below. It is also the subject of a circuit split that Petersen fails to dispel. Absent this Court's intervention, foreign states may be sued in U.S. courts for acts that are inextricably tied to their sovereign decisions—a radical departure from this Court's precedent and customary international law. Given the serious implications for U.S. foreign relations raised by the decision below, this Court should grant certiorari now or, at the very least, call for the views of the Solicitor General.

ARGUMENT

I. This Case Raises An Important Issue Of Federal Law And Foreign Relations

The court of appeals' decision in this case represents a clear affront to foreign sovereignty. If left undisturbed, it will require foreign states to defend suits in U.S. courts for allegedly commercial activities that are inextricably intertwined with sovereign acts. In equal measure, it will threaten the United States' sovereign immunity from suits in other countries. Petersen does not address, much less dispel, these concerns, which are squarely implicated by the decision below, properly presented in the petition, and warrant this Court's review.

A. Petersen Ignores The Exceptional Importance Of The Question Presented

Mexico and Chile—two of the Nation's strong allies and key partners in international and economic affairs—have filed amicus briefs in support of the petition describing the decision below as a "troubling" transgression on "the historical limits on U.S. judicial interference with sovereign acts," Br. of United Mexican States at 6, and "at variance with … international standards," Br. of Republic of Chile at 8. As the sovereign amici further explain, the decision below "threatens to disrupt international comity" by forcing foreign states to defend quintessentially sovereign decisions in U.S. courts, Br. of United Mexican States at 6, and undermines the "basic principles of international law" embodied in the FSIA, including respect for the "absolute independence" of every sovereign, Br. of Republic of Chile at 4, 6 (internal quotations omitted). Petersen ignores these arguments in its brief in opposition.

Instead, Petersen argues (BIO 1-2, 15) that the issue here is narrow and fact-bound because Argentina decided not to expropriate *all* of YPF's shares. That argument is specious. Petersen does not dispute that Argentina's decision in 2012 to nationalize 51%—and only 51%—of YPF's shares is itself a sovereign act. It follows that Argentina's decision not to honor its alleged contractual commitment to buy out minority shareholders is likewise "sovereign" and not "commercial" in nature. A sovereign has the right not only to expropriate property, but also to set the metes and bounds of any such expropriation as it sees fit, and thereby limit its financial exposure under domestic and international law.

Petersen is saying, in essence, that Argentina's exercise of sovereignty stopped where its expropriation stopped. But of course the decisions of how to accomplish an expropriation and what *not* to expropriate are just as sovereign as the decision of what to expropriate. Whether Argentina's sovereign decision to expropriate only 51% of YPF's shares was good or bad is beside the point. What matters here is only that it was a sovereign decision, which Congress has stripped U.S. courts of jurisdiction to review. As the amici law and business professors explain, an expansion of U.S. courts' jurisdiction to include disputes over such sovereign decisions runs afoul of settled principles of international law, may "lead to higher volumes and a broader range of investor-state disputes in United States courts," and will entangle the United States in exactly the "kind of foreign relations risks the FSIA intended to avoid." Br. of Professors at Law and Business Schools at 8, 12-14; *see* George K. Foster, *When Commercial Meets*

Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases, 52 Hous. L. Rev. 361, 414 (2014) ("In crafting the commercial activity exception, the political branches deliberately sought to exclude claims challenging sovereign acts because, in their view, they are generally too fraught with foreign relations risks.").

Expanding the commercial activity exception to reach acts flowing from sovereign decisions like the partial expropriation of YPF also threatens the "reciprocal self-interest" of the United States. Br. of Republic of Chile at 11. The amicus briefs of Mexico and Chile illustrate this clearly. Both nations view the decision below as an "affront" to foreign sovereignty that will "necessarily" bring sensitive governmental acts within the purview of U.S. courts and "lead[] other countries to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation." Br. of Republic of Chile at 7, 11 (internal quotations omitted); *see* Br. of United Mexican States at 2 (the decision below "risk[s] embarrassing key allies and trade partners" and "lead[s] inexorably to a reciprocal expansion of suits against the United States"). Absent this Court's intervention, the Second Circuit's decision will create "significant uncertainty" for foreign nations, including our allies, as to "how, whether, and where their sovereign acts may subject them to jurisdiction in the United States," leading to similar uncertainty for the United States regarding the treatment of its actions abroad. Br. of United Mexican States at 3.

Ignoring these concerns, Petersen portrays (BIO 15) this case as a simple breach of contract action

"seek[ing] compensation for petitioners' refusal to make [a] tender offer once Argentina attained control of YPF." But that characterization overlooks that YPF's alleged breaches of the bylaws flowed directly from, and were inextricably intertwined with, Argentina's sovereign choice to effect a partial re-nationalization of YPF. *See* Pet. 16-19. Indeed, once Argentina assumed control of YPF's operations and exercised voting rights pursuant to its temporary emergency powers, YPF's alleged breaches were no longer "strictly commercial" actions of the type that private parties perform. Allowing Petersen's claim to proceed against YPF in U.S. courts is thus just as much an affront to foreign sovereignty as a lawsuit directly challenging the validity of the expropriation itself. *Cf. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (the commercial activity exception is intended to "subject[] foreign governments to the rule of law in their commercial dealings," not to allow courts "to pass on the legality of their governmental acts"). And while there may be other fora in which Petersen could pursue claims against Argentina and YPF for their alleged actions or inactions in connection with the partial re-nationalization of YPF, *see* Br. of Professors at Law and Business Schools at 14-19 (describing the "well-established and highly active international system for investor-state dispute settlement"), they cannot be subject to the jurisdiction of U.S. courts on that basis.[1]

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[1] Petersen also has no answer for amicus Mexico's concern that the Second Circuit's expansive interpretation of the commercial activity exception nullifies the careful limits that Congress

B. This Case Squarely Implicates The Question Presented

Unable to dispute the importance of the question presented, Petersen seeks to dodge it entirely by wrongly suggesting that the question is not implicated by the decision below. According to Petersen (BIO 10), the Second Circuit purportedly ruled against YPF on an "antecedent question" of whether Petersen's claims are based upon "purely commercial conduct." In fact, the sole question the court of appeals addressed is whether the commercial activity exception applies to Petersen's suit against Argentina and YPF. Pet. App. 15a-16a. Its erroneous answer to that question—that the exception applies because Petersen's allegations against YPF are supposedly "commercial in nature" and "implicate[] the commercial affairs of YPF," Pet. App. 26a—is precisely what this Court should review.

Petersen's reliance (BIO 11) on *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), is misplaced. The plaintiff in *Sachs* alleged that her negligence claim for unsafe conditions at an Austrian train station was based upon commercial activity in the United States because she purchased a Eurail

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imposed for the FSIA's expropriation exception, which grants U.S. courts jurisdiction over actions involving the expropriation of property "*only* where there is a valid claim that [the] 'property' has been 'taken in violation of international law,'" *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318 (2017) (emphasis added) (quoting 28 U.S.C. 1605(a)(3)). *See* Br. of United Mexican States at 11-12; *see also* Pet. 18.

pass from a travel agent in Massachusetts. *See id.* at 393. This Court rejected the plaintiff's artful pleading, concluding that the "core" of her claim was based upon allegedly dangerous conditions in Austria, not the unrelated purchase of a Eurail pass in the United States. *Id.* at 396.

Petersen cannot expand the commercial activity exception through similarly artful pleading. At bottom, Petersen's claims against YPF are based upon actions YPF allegedly took or failed to take in connection with Argentina's sovereign takeover of YPF's operations and a majority of YPF's shares. The expropriation was part and parcel of YPF's alleged breach, unlike the unrelated sale of a Eurail pass in *Sachs*.[2] Extending the commercial activity exception to suits like this one would thus leave Argentina and YPF, as well as countless other foreign states and their instrumentalities, to answer in U.S. courts for actions inextricably intertwined with sovereign acts, risking serious interference with U.S. foreign relations and reciprocal treatment of the United States abroad.

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[2] Petersen's reliance (BIO 11-12) on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), and *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), is similarly misplaced. *Nelson* makes clear that even acts with commercial characteristics will not support jurisdiction where, as here, they derive from acts that are "peculiarly sovereign in nature." 507 U.S. at 362-63. And the commercial activity exception applied in *Weltover* because there, unlike here, Argentina had *not* performed acts that were unique to a sovereign—it participated in the bond market in the same way any private party could have done. *See* 504 U.S. at 614, 617.

This Court's intervention is warranted. At the very least, however, this Court should call for the views of the Solicitor General, as it regularly does when a petition involves the interpretation and application of the FSIA and thus raises "sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983).[3]

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[3] *See, e.g.*, *Bank Markazi v. Peterson*, 139 S. Ct. 306 (mem.) (2018); *de Csepel v. Republic of Hungary*, 138 S. Ct. 2696 (mem.) (2018); *Republic of Sudan v. Harrison*, 138 S. Ct. 293 (mem.) (2017); *Rubin v. Islamic Republic of Iran*, 137 S. Ct. 708 (mem.) (2017); *Bank Melli v. Bennett*, 137 S. Ct. 707 (mem.) (2017); *Ali v. Warfaa*, 137 S. Ct. 267 (mem.) (2016); *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 136 S. Ct. 1242 (mem.) (2016); *Odhiambo v. Republic of Kenya*, 136 S. Ct. 290 (mem.) (2015); *Bank Markazi v. Peterson*, 135 S. Ct. 1753 (mem.) (2015); *OBB Personenverkehr AG v. Sachs*, 572 U.S. 1113 (mem.) (2014); *Republic of Argentina v. NML Capital, Ltd.*, 569 U.S. 916 (mem.) (2013); *Bank Melli Iran N.Y. Representative Office v. Weinstein*, 564 U.S. 1003 (mem.) (2011); *Republica Bolivariana de Venez. v. DRFP L.L.C.*, 563 U.S. 986 (mem.) (2011); *Kingdom of Spain v. Estate of Cassirer*, 562 U.S. 1285 (mem.) (2011); *Holy See v. Doe*, 558 U.S. 1022 (mem.) (2009); *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 555 U.S. 1168 (mem.) (2009); *Republic of Philippines v. Pimentel*, 550 U.S. 932 (mem.) (2007); *Permanent Mission of India to United Nations v. City of N.Y.*, 549 U.S. 807 (mem.) (2006); *Powerex Corp. v. Reliant Energy Servs., Inc.*, 547 U.S. 1067 (mem.) (2006); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 544 U.S. 998 (mem.) (2005); *Dole Food Co. v. Patrickson*, 534 U.S. 1064 (mem.) (2001).

II. Petersen Fails To Dispel The Conflict Deepened By The Decision Below

Petersen's attempts to defuse the circuit conflict on this important issue are also unpersuasive. Petersen wrongly asserts (BIO 14 n.6) that "[b]oth lower courts agreed with Petersen that petitioners' breach does *not* flow from the expropriation." In fact, the Second Circuit *expressly* acknowledged that the expropriation "triggered" the alleged breach. Pet. App. 20a. The court nevertheless concluded that YPF is subject to suit in U.S. courts because "every corporation is obligated to abide by its bylaws." Pet. App. 26a. That is directly contrary to the D.C. Circuit's decision in *Rong v. Lioaning Province Government*, 452 F.3d 883 (D.C. Cir. 2006), which held, upon similar facts, that the commercial activity exception did not apply. *See id.* at 889 (holding that commercial activity exception did not apply to claim against a national province because, although its takeover and ownership of shares "seem commercial … all of these acts flow[ed] from the [province's] 'state assets' declaration—an act that can be taken only by a sovereign").[4]

Rong is not a one-off case; it follows a line of D.C. Circuit decisions holding that the FSIA precludes

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[4] *Rong* did not "distinguish[] the present situation," as Petersen contends (BIO 20). To the contrary, the distinction highlighted in *Rong* involved a situation where a governmental entity controlled a company but had not "tak[en] it over through a process of law" as the government did in *Rong* and as Argentina did here. *See Rong*, 452 F.3d at 890 (quoting and distinguishing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450 (D.C. Cir. 1990)).

jurisdiction over actions based upon commercial activities that are related to or inextricably linked with sovereign acts. *See, 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 Counsel for N. 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."). These decisions thus faithfully adhere to this Court's teaching that the commercial activity exception applies only in "cases 'arising out of a foreign state's *strictly* commercial acts.'" *Helmerich & Payne*, 137 S. Ct. at 1320 (emphasis added) (quoting *Verlinden*, 461 U.S. at 487).

Contrary to Petersen's suggestion (BIO 18-19), *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013), does not undermine this conflict. As YPF explained (Pet. 11 n.1), that case involved an action based on *purely* commercial activity, and therefore the D.C. Circuit properly concluded that the commercial activity exception applied. *See de Csepel*, 714 F.3d at 599-600 (action based on foreign state's failure to comply with contractual obligations that arose years after, and were entirely independent of, a sovereign act). But here, as in *Rong*, the claims "consist[] of *both* commercial and sovereign elements." *Nelson*, 507 U.S. at 358 n.4 (emphasis added). And in that context, there is no question the D.C. Circuit would have held that YPF is immune from suit.

The Ninth Circuit and now the Second Circuit, however, have held—in conflict with the D.C. Circuit—that foreign states can be required to answer, in U.S. courts, for commercial activities that flow from indisputably sovereign acts. *See* Pet. App. 20a, 26a; *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 708-09 (9th Cir. 1992) (commercial activity exception applied to government's operation of expropriated hotel based solely on the direct commercial consequences of the expropriation); *see also Adler v. Fed. Republic of Nigeria*, 107 F.3d 720, 725 (9th Cir. 1997) (commercial activity exception applied to indisputably "sovereign" acts of Nigerian government because they were related to certain commercial acts and the FSIA "does not require that every act by the foreign state be commercial" for the exception to apply) (citing *Siderman*, 965 F.2d at 709 n.10). Indeed, under the Second and Ninth Circuits' expansive interpretation of the commercial activity exception, any sovereign act that occurs in a commercial setting or that carries commercial consequences would give rise to jurisdiction over foreign states in U.S. courts. Thus, unlike the D.C. Circuit, the Second and Ninth Circuits would "allow [a] sovereign to be haled into a federal court under [the] FSIA" for "almost any subsequent disposition of expropriated property." *Rong*, 452 F.3d at 890.

The fact that this conflict is with decisions of the D.C. Circuit is particularly important. Although D.C. federal court is the "dedicated venue for actions against foreign states," *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 332 (D.C. Cir. 2003) (citing 28 U.S.C. 1391(f)(4)), plaintiffs like Petersen may seek to establish venue in other districts by invoking the commercial activity exception, *see* 28 U.S.C.

1391(f)(1)-(3). Amicus Chile is thus right to express concern that the decision below will encourage forum shopping, such that "plaintiffs wishing to sue foreign states under the commercial activity exception may [] try to avoid the District Court for the District of Columbia and establish venue instead in a District Court within the Second Circuit." Br. of Republic of Chile at 15.

For all these reasons, this Court's intervention is needed to ensure "a uniform body of law" for foreign sovereign immunity. *Verlinden*, 461 U.S. at 489 (quoting H.R. Rep. No. 94-1487, at 32 (1976)).

CONCLUSION

The petition should be granted.

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street, N.W.
Suite 900
Washington, DC 20005
(202) 538-8000

KATHLEEN M. SULLIVAN
Counsel of Record
MICHAEL B. CARLINSKY
WILLIAM B. ADAMS
LISA M. GEARY
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Petitioner

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