No. 18-581

IN THE
Supreme Court of the United States

ARGENTINE REPUBLIC,
Petitioner,

v.

PETERSEN ENERGÍA INVERSORA, 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

SUPPLEMENTAL BRIEF FOR PETITIONER

Maura Barry Grinalds
Counsel of Record
Boris Bershteyn
Jonathan J. Lerner
Timothy G. Nelson
Austin R. Winniford
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000
maurabarry.grinalds@skadden.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTRODUCTION

The United States does not contest that Argentina's petition presents an exceptionally important and recurring question implicating sensitive foreign policy and international comity interests.[1] Nor does the United States squarely dispute that circuits are conflicted on how this question should be resolved. A writ of certiorari is warranted for these reasons alone.

Further, while the United States argues that this case is not an appropriate vehicle for resolving the question presented and the Second Circuit correctly resolved that question, those arguments are wholly unpersuasive. The United States mischaracterizes Petersen's factual allegations, misconstrues the applicable law, and advances positions that would effectively eliminate sovereign immunity for acts of expropriation, dramatically expanding the jurisdiction of U.S. courts.

I. THE SECOND CIRCUIT'S DECISION IS INCORRECT

The United States spends the bulk of its argument defending the merits of the Second Circuit's decision. (Brief for the United States as Amicus Curiae ("Br.") 9-14.) That defense, however, falls short for numerous reasons.

First, the United States acknowledges but unduly minimizes the connection between Argentina's sovereign expropriation and the purported commercial activity—the alleged breaches of YPF's bylaws. The United States recites that the expropriation "led to"

---

[1] Capitalized terms have the same definitions as in Argentina's petition.

those alleged breaches, which had "a relationship" with the expropriation. (Br. 12, 16.) But *both lower courts* found a much closer and inextricable connection between the expropriation and the alleged breaches of YPF's bylaws—recognizing that Petersen's claims are based on the immediate "effects of [a] sovereign act[ ]" of expropriation (App. 44a) and that the purported commercial activity was "triggered" by that sovereign act (App. 20a). The Second Circuit also recognized that Argentina's voting of the expropriated shares of YPF—*mandated* by the Expropriation Law but in alleged violation of YPF's bylaws—purportedly caused Petersen's injury. (App. 11a-12a.) The United States disregards these findings, which establish that—even taking the Second Circuit's factual conclusions at face value—the purported bylaw violations are inextricably intertwined with sovereign activity.

This Court does not need to resolve the parties' disagreement about the precise interaction between the Expropriation Law and YPF's bylaws to address the question presented. Even accepting the Second Circuit's interpretation of the Expropriation Law, there is no meaningful dispute that (i) the purported commercial activity at issue is inextricably intertwined with Argentina's expropriation of a controlling stake in YPF; and (ii) the expropriation was a "quintessentially sovereign" act. *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 890 (D.C. Cir. 2006); *accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . ."). Accordingly, contrary to the United States' argument (Br. 14, 17-18), this case is

an ideal vehicle for resolving the question presented and an opportunity for this Court to finally address "a claim consist[ing] of both commercial and sovereign elements." *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 n.4 (1993).

Further, the United States' reliance on this Court's decisions in *Nelson* and *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), to oppose certiorari is misplaced. (Br. 11-12.) As Argentina explained (Reply 6-7), in both of those cases, this Court properly rejected attempts to predicate jurisdiction on attenuated commercial activity *long* predating, and entirely *separate* from, the acts that immediately injured the plaintiffs. Neither case addressed claims challenging purportedly commercial conduct that is inextricably intertwined with a sovereign act. Indeed, *Nelson* and *Sachs support Argentina* for the reasons described in its petition (Pet. 15-18), which the United States fails to address.

The United States' reliance on this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), is similarly misplaced. (Br. 13.) In *Weltover*, this Court held that a breach of contract claim arising from a unilateral extension of government bonds' maturity dates satisfied the commercial activity exception. *See* 504 U.S. at 610, 615-16. However, as Argentina explained (Reply 7 n.8), this Court subsequently made clear that it had deemed "unilateral refinancing of bonds . . . to be a commercial activity," not a sovereign one—and *Weltover* therefore involved no sovereign activity. *Nelson*, 507 U.S. at 359. Here, the alleged breaches of YPF's bylaws resulted directly from an expropriation, an indisputably sovereign act.

Moreover, the United States incorrectly contends that, because Argentina allegedly breached a contract, it "acted 'in the manner of a private player' in a market," and the commercial activity exception therefore applies. (Br. 10-11.) Like the Second Circuit (App. 20a), the United States' position resembles a bright-line rule that, in *all* cases, a breach of contract claim satisfies the commercial activity exception.[2] As Argentina explained, however (Pet. 19-20), such a *per se* rule has been properly rejected by several courts as inconsistent with the FSIA—decisions that the United States simply ignores. *See, e.g., Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988).

While a foreign state is not immune for strictly commercial conduct, states' sovereign acts through powers unique to sovereigns often implicate contractual obligations. To summarily deem these acts as commercial for purposes of sovereign immunity would dramatically undermine the structure and purpose of the FSIA. Indeed, the United States fails to meaningfully dispute that where, as here, an alleged breach of contract is inextricably intertwined with a sovereign expropriation, the bright-line rule

[2] The United States extends this bright-line rule even further than Petersen and the Second Circuit would do, asserting that "a breach of a commercial obligation does not cease to be commercial simply because a statute or regulation commands the breach." (Br. 13.) At the very least, where, as here, duly-adopted legislation implementing a sovereign power of expropriation commands conduct purportedly constituting a contractual breach, applying the commercial activity exception would dramatically expand the jurisdiction of U.S. courts to quintessential foreign sovereign activity. (Pet. 15-22, 30-32; *infra* pp. 9-12.)

advanced by the Second Circuit and the United States would render the FSIA's separate "expropriation exception" and its carefully-crafted limitations largely meaningless. (Pet. 22-26); *see Beg v. Islamic Republic of Pak.*, 353 F.3d 1323, 1327-28 (11th Cir. 2003) (declining to apply commercial activity exception to sovereign defendant's breach of agreement to compensate plaintiff for the expropriation of his property in part because "the FSIA has a separate exception for certain foreign government expropriations"). Moreover, applying the Second Circuit's rule would force the sovereign to "defend[ ] the propriety" of its sovereign act before a U.S. court—an outcome the FSIA sought to avoid. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 465 (4th Cir. 2000) (citation omitted).

Similarly unavailing is the United States' contention that Argentina could have "purchased a controlling stake of YPF on the open market, instead of expropriating the stake from Repsol." (Br. 12.) Had Argentina acquired its controlling stake that way, its conduct would have been commercial. But it did not. A sovereign's hypothetical ability to acquire an expropriated asset through commercial means does not transmogrify its sovereign act of expropriation into a commercial transaction. Because virtually *every* expropriation could be accomplished through a market purchase, the United States' reasoning effectively eliminates sovereign immunity for expropriations.

Furthermore, in asserting that "[t]he way in which Argentina acquired the shares and the legality of that action are thus irrelevant" (Br. 12), the United States ignores that "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.'" *Nelson*, 507 U.S. at 360 (emphasis added) (citation omitted).

II. THE SECOND CIRCUIT'S DECISION DEEPENS A CIRCUIT SPLIT

The United States' argument that Argentina "overstate[s] the conflict" between *Rong v. Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006) and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), is also unpersuasive. (Br. 17.) It contends that *Rong* is inapplicable because Petersen "challenges only the alleged failure to comply with contractual tender offer requirements," rather than the expropriation.[3] (Br. 15; *accord id.* at 16). But in accepting Petersen's characterization of its claims at face value (Br. 15-16), the United States disregards this Court's admonition against "allow[ing] plaintiffs to evade the [FSIA's] restrictions through artful pleading." *Sachs*, 136 S. Ct. at 396.

Indeed, in determining the scope of sovereign immunity by the legal *claim* asserted, rather than the actual *conduct* that triggered Petersen's alleged injury, the United States and Second Circuit flout this Court's instruction in *Sachs* that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit," an inquiry that must "zero[ ] in" on the "acts that actually injured" the plaintiff. *Id.* Given the inextricable interconnections between the Expropriation Law and Petersen's claims—evident from the face of the complaint—the "core" or

[3] The United States ignores that Petersen separately filed a notice under the bilateral investment treaty between Argentina and Spain for "wrongful expropriation"—based on the identical facts. (*See* Pet. 16 n.4.)

"gravamen" of those claims is manifestly the expropriation itself. *See id.*

In straining to distinguish *Rong*, the United States also misstates the D.C. Circuit's reasoning. The United States claims the plaintiffs in *Rong* "challenged the post-expropriation acts"—such as replacing the joint venture's management and transferring its shares—solely "on the ground that the initial expropriation was itself unlawful." (Br. 15.) But the United States cites nothing to support this assertion, which nowhere appears in *Rong*. In fact, *Rong* had included claims for conversion and unjust enrichment. *See Rong v. Liaoning Provincial Gov't*, 362 F. Supp. 2d 83, 86 (D.D.C. 2005), *aff'd*, 452 F.3d 883 (D.C. Cir. 2006).

Accordingly, the United States is unable to reconcile the Second Circuit's decision with *Rong*. In *Rong*, as here, the plaintiffs challenged conduct following directly from a sovereign expropriation. 452 F.3d at 889. While "seem[ingly] commercial," "all of the[ ] acts [relied on by the plaintiff] flow[ed]" from the expropriation—"an act that can be taken only by a sovereign." *Id.* Therefore, the Court in *Rong* declined jurisdiction and explicitly rejected the contrary decision in *Siderman*. *Id.* at 890. The Second Circuit reached the opposite result here.

Nor does the D.C. Circuit's decision in *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013), undermine the conflict. (Br. 16-17.) As Argentina explained (Reply 8-9), the plaintiffs' claims in *de Csepel* arose from an alleged breach of a bailment agreement created long after an unrelated expropriation. 714 F.3d at 599-600. Here (as in *Rong*), the purported commercial activity did not involve a sepa-

rate contract post-dating the expropriation—rather, the activity flowed immediately and directly from the expropriation itself.

As *Rong* acknowledged, *see* 452 F.3d at 890-91, and the United States cannot dispute (Br. 17), *Rong* cannot be reconciled with *Siderman*, where the Ninth Circuit applied the commercial activity exception to claims based on the expropriation's seemingly commercial consequences. *See Siderman*, 965 F.2d at 702, 708-09; *see contra Beg*, 353 F.3d at 1326 n.1 (rejecting the Ninth Circuit's holding in *Siderman* that an "expropriation was commercial activity . . . because the [defendant] continued to operate the [expropriated] hotel for profit."). The United States nonetheless contends that certiorari is unwarranted because "the Ninth Circuit applied the same legal test that the D.C. Circuit applied in *Rong* and that the Second Circuit applied here." (Br. 17.) But myopic reliance on different courts' recitation of "the same legal test" ignores the substance of those courts' disagreement: Where, as here, a plaintiff challenges activity inextricably intertwined with a sovereign expropriation, should the basis of the plaintiff's suit be deemed "commercial activity" within the scope of the commercial activity exception or sovereign activity beyond its scope? The D.C. Circuit in *Rong* answered this purely legal question differently from the Ninth Circuit in *Siderman* and the Second Circuit below, presenting a genuine conflict that warrants this Court's review.

III. THE SECOND CIRCUIT ADDRESSED AN EXCEPTIONALLY IMPORTANT AND RECURRING QUESTION THAT SHOULD BE RESOLVED BY THIS COURT

The United States cannot and does not dispute that the question presented is a vitally important and recurring one that should be resolved by this Court. Instead, the United States argues only that this case would be a poor vehicle for doing so. (Br. 14, 17.) That argument misses the mark for the reasons already described. (*See supra* pp. 2-3.)

That the Second Circuit's decision implicates—and threatens to disrupt—exceptionally important foreign policy and international comity interests is reinforced by the amicus briefs submitted by Chile, Mexico, and several professors of law and business. Mexico, for instance, describes the decision below as a "troubling" transgression against "the historical limits on U.S. judicial interference with sovereign acts." (Mexico Br. 6.) Chile observes that "the Second Circuit's decision fails to honor the internationally-recognized distinction between sovereign acts and commercial acts" and may reciprocally affect the United States in foreign jurisdictions. (Chile Br. 1, 11.) And the academic amici warn that the Second Circuit's decision could invite more frequent and deeper incursions into the internal affairs of foreign sovereigns. (Professors Br. 12-15.) The United States ignores these well-founded concerns altogether.[4]

---

[4] Nor does the United States dispute that this Court's guidance is needed to (a) resolve lower court confusion regarding the distinction between commercial and sovereign conduct (Pet. 31); (b) restore uniformity to avoid disparate treatment of cases,

The United States acknowledges that "the commercial-activity exception should not be applied in a manner that risks infringing on a foreign state's sovereignty or undermining the carefully calibrated scope of the FSIA's expropriation exception"—but fails to appreciate the extent to which the Second Circuit's decision poses those very risks. (Br. 18.) The Second Circuit's extension of the commercial activity exception to acts intertwined with sovereign activity has far-reaching implications for domestic and foreign courts. Because every expropriation of property inevitably has commercial implications, the Second Circuit's decision risks extending U.S. jurisdiction to a broad range of foreign expropriations or regulatory actions, provided an aggrieved plaintiff characterizes one consequence of those actions as "commercial."[5] As a result, the Second Circuit's deci-

---

which can have negative foreign relations consequences, *see Verlinden v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983); and (c) prevent forum shopping away from the FSIA's dedicated venue in D.C.

[5] The academic amici warn that the Second Circuit's decision may prompt claimants to forego foreign fora and consensual treaty arbitration and instead sue foreign sovereigns in the U.S. regarding sovereign acts. (Professors Br. 12-13, 19-21.) Past examples where sovereign acts could implicate private contractual rights and as a result now inundate U.S. courts include *Westwater Res., Inc. v. Republic of Turkey*, ICSID Case No. ARB/18/46 (filed Dec. 13, 2018) (challenging Turkish government's retroactive cancellation of mining and exploration licenses purportedly issued in contravention of Turkish monopoly over domestic uranium mining activities) and *Autopista Concesionada de Venez., C.A. v. Bolivarian Republic of Venez.*, ICSID Case No. ARB/00/5, Award (Sept. 23, 2003) (adjudicating claim that Venezuela breached Concession Agreement for construction and maintenance of domestic highways by declining to adjust highway tolls due to political protests).

sion not only vastly expands U.S. courts' jurisdiction over foreign sovereigns, but also undermines—and encourages artful pleading to evade—the FSIA's separate (and narrowly crafted) expropriation exception to sovereign immunity.

At the same time, the Second Circuit's holding risks exposing the United States to suits abroad arising out of its own sovereign acts that, too, carry arguably commercial implications. (Pet. 26-28.) This reciprocal risk is material because the United States is frequently targeted by foreign plaintiffs' takings claims. *See, e.g.*, *Gal-Or v. United States*, 113 Fed. Cl. 540 (2013) (acknowledging Israeli inventor's allegations of misappropriation of trade secrets by United States government constituted takings claim); *Paradissiotis v. United States*, 49 Fed. Cl. 16, 17 (2001) (examining takings claim of Cypriot citizen challenging Libyan Sanction Regulations, which prevented plaintiff's exercise of stock options in American company), *aff'd*, 304 F.3d 1271 (Fed. Cir. 2002). The United States is also often sued for regulatory actions allegedly impairing vested contractual rights. *See, e.g.*, *Mobil Oil Expl. & Producing Se., Inc. v. United States*, 530 U.S. 604 (2000) (challenging legislation imposing additional preconditions for approval of oil companies' exploration plan under leases with the United States); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008) (concluding governmental directive diverting water pursuant to Endangered Species Act constituted breach of contract, which was excused under sovereign acts doctrine); *see generally* Robert Meltz, Cong. Research Serv., R42635, *When Congressional Legislation Interferes with Existing Contracts: Legal Issues* 1 (2012) ("The range of factual settings in which legislative

interference with existing contracts may arise is unbounded, and the recompense sought by disappointed contract parties from the United States can be quite large."). While many of these cases against the United States are currently filed in the Federal Court of Claims, the United States may be forced to defend them in foreign courts that reciprocally open their doors to purportedly commercial claims intertwined with sovereign acts.

It is not enough to say that the United States' views of its reciprocal litigation risk should govern. The FSIA was enacted to "transfer[] from the Executive to the courts the principal responsibility for determining a foreign state's amenability to suit." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016). Argentina's petition "concerns interpretation of the FSIA's reach – a pure question of statutory construction . . . well within the province of the Judiciary." *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004) (citation omitted). The United States' views on such an issue—while doubtless of considerable interest to the Court—"merit no special deference," *id.*, and this Court has repeatedly rejected the Solicitor General's interpretations of the FSIA. *See, e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 26 (2015) (mem.); *OBB Personenverkehr AG v. Sachs*, 135 S. Ct. 1172, 1173 (2015) (mem.); *Altmann*, 541 U.S. at 701. The Court should do so here as well.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Maura Barry Grinalds
Counsel of Record
Boris Bershteyn
Jonathan J. Lerner
Timothy G. Nelson
Austin R. Winniford
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036
(212) 735-3000
maurabarry.grinalds@skadden.com

Counsel for Petitioner

June 3, 2019