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

REPLY BRIEF OF 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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY BRIEF

Petersen's opposition only bolsters Argentina's arguments in support of granting certiorari to review the Second Circuit's erroneous extension of the FSIA's commercial activity exception to conduct inextricably intertwined with a sovereign act of expropriation.[1] Lacking any meritorious basis to oppose certiorari, Petersen mischaracterizes the decision below and reframes the question presented, and incorrectly contends that this case does not implicate that question. Petersen also diminishes the circuit split exacerbated by the decision below, advances a straw man that Argentina demands a "lower" standard of review as a sovereign, minimizes the serious foreign relations implications of this case, and gratuitously maligns Argentina based on wholly unrelated litigation involving prior Argentine administrations.

That the Second Circuit's decision implicates—and threatens to disrupt—exceptionally important foreign policy and international comity interests is reinforced by amicus briefs submitted by two allies of the United States—Chile and Mexico—and by several professors of law and business. Mexico regards the decision below as a "troubling" transgression against "the historical limits on U.S. judicial interference with sovereign acts." (Mexico Amicus Brief, 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 Amicus Brief, 1, 11.) The academic

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

amici express similar concerns. (Professors Amicus Brief, 13 ("Because many claims arising out of expropriations have commercial elements or implications, the Second Circuit's decision could lead to higher volumes and a broader range of investor-state disputes in United States courts, raising the kinds of foreign relations risks that the FSIA intended to avoid.").) Given the decision below's serious implications for U.S. foreign relations, this Court should grant certiorari now or seek the views of the Solicitor General.

I. THE SECOND CIRCUIT INCORRECTLY RESOLVED THE QUESTION PRESENTED

A. This Case Directly Implicates the Question Presented

Petersen incorrectly argues that this case does not implicate the question presented. Applying the FSIA's commercial activity exception, the Second Circuit concluded that Petersen's claims are "based upon" commercial (rather than sovereign) conduct. Petersen claims Argentina's petition fails to challenge that "antecedent" conclusion, triggering a "forfeiture." (Opp.10-15.) To the contrary, Argentina's petition specifically asks whether the FSIA's commercial activity exception applies where, as here, plaintiffs challenge conduct that is inextricably intertwined with a sovereign expropriation on the face of the complaint.[2] That question is substantively iden-

[2] Contrary to Petersen's argument (Opp.15-17), the question presented is not "fact-bound." As explained below, the lower courts necessarily recognized that the purportedly commercial

tical to Petersen's reframed question of whether such a suit is "based upon commercial activity" within the meaning of the commercial activity exception. The Second Circuit incorrectly answered that question in the affirmative. Far from "disclaim[ing] any challenge to that conclusion" (Opp.16), Argentina vigorously disputes it. (Pet.15-26.)

As Argentina demonstrates (Pet.16-18), the purported commercial conduct at issue here—Argentina's alleged failure to make a tender offer and exercise of shareholder voting rights in alleged breach of YPF's bylaws—simply *cannot* be disentangled from Argentina's sovereign expropriation of a controlling stake in YPF. Notwithstanding their strained efforts to divorce the allegedly commercial conduct from the sovereign acts, the lower courts repeatedly acknowledged that Petersen's claims were inextricably connected to the expropriation.

The lower courts, for instance, explicitly noted that Petersen's claims are based on the immediate "effects of [a] sovereign act[ ]" of expropriation (App.44a), and that the purported commercial conduct at issue was "triggered" by that sovereign act. App.20a ("Argentina's obligation to conduct a tender offer . . . was *triggered* by its sovereign act of expropriation."); *accord* App.47a (district court decision). Petersen echoes that view. (Opp.6, 13.)[3] The Second

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conduct at issue is inextricably intertwined with sovereign conduct, as shown by the face of the complaint.

[3] Like the Second Circuit, Petersen incorrectly reasons that the tender offer obligation "could just as easily have been triggered" by Argentina's "open market transactions." (Opp.15.) While every expropriation could "just as easily" be accomplished

Circuit also observed that Argentina's voting of the expropriated shares of YPF—as mandated by the Expropriation Law and in alleged violation of YPF's bylaws—purportedly caused Petersen's injury. [4] App.11a-12a. Thus, even though the court of appeals concluded (erroneously) that Argentina somehow could have complied with both the Expropriation Law and YPF's bylaws,[5] it also recognized that the expropriation was inextricably intertwined with both those requirements and Petersen's claims.

Recasting the decision below, Petersen wrongly asserts that the Second Circuit "held that petitioners' breach of YPF's bylaws did not 'flow' from Argentina's expropriation," and that Petersen's claims "are *not* intertwined with any sovereign activity." (Opp.17, 20.) Nowhere did the court actually express any of

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by a market purchase, that does not render expropriations commercial rather than sovereign.

[4] The Second Circuit recognized that (i) Section 7(h) of YPF's bylaws divested shares acquired in breach of the tender offer requirements of voting rights (ii) the Expropriation Law directed Argentina to vote expropriated shares without making a tender offer, "in [alleged] contravention of section 7(h) of the bylaws," and (iii) Argentina voted to cancel YPF's dividend payments, which allegedly precipitated Petersen's bankruptcy. App.5a, 11a-12a. Neither the Second Circuit nor Petersen explained how the direct conflict between the Expropriation Law and YPF's bylaws could be reconciled.

[5] Argentina never "disclaimed any challenge" to that erroneous conclusion (Opp.16.), and its experts *did* explicitly "opine that the [Expropriation Law] overrode the bylaws" (Opp.9.) (*See* Pet.n.5.) However, resolution of that issue is unnecessary to the petition because, even without a direct conflict, the challenged acts still directly flow from sovereign acts.

these conclusions.[6] Nor did it find that sovereign activity "does not form *any part* of the 'gravamen' of plaintiffs' claims" (Opp.3) or that Petersen challenges "purely commercial activity" (Opp.13-14), the predicate for Petersen's incorrect refrain that this case does not implicate "a claim consist[ing] of both commercial and sovereign elements." (Opp.13n.4) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 n.4 (1993)). It is thus Petersen, not Argentina and its *amici*, who "repeatedly mischaracterize[s] the Second Circuit's rulings." (Opp.14n.5.)

B. The Second Circuit's Decision Is Incorrect

Having misconstrued the question presented, Petersen fails to refute Argentina's showing that the Second Circuit resolved it incorrectly. Tellingly, while erroneously accusing Argentina of mischaracterizing the decision below (Opp.14n.5), Petersen makes no attempt to dispute—let alone defend—the Second Circuit's application of a discredited bright-line rule deeming, in *all* cases, the alleged repudiation of a contract "commercial activity" under the FSIA. (Pet.19-20.)

Nor does Petersen deny that the Second Circuit's decision effectively permits plaintiffs to circumvent the expropriation exception's narrow requirements, in contravention of congressional intent. (Pet.22-26; *accord* Mexico Amicus Brief, 2-3.) Asserting that there is "no basis" for this argument (Opp.17), Pe-

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[6] Although the Second Circuit adopted Petersen's conclusion that "Argentina's repudiation of [its] commercial obligation . . . was an act separate and apart from Argentina's expropriation of Repsol's shares," App.25a, it recited that the expropriation directly triggered the alleged breach. App.20a.

tersen simply ignores that other circuits have readily adopted it. (Pet.24-25.)[7]

Equally meritless is Petersen's suggestion that this Court's decisions in *Nelson* and *Sachs* foreclose the question presented. (Opp.11-12.) Both cases involved inapposite attempts to predicate jurisdiction on attenuated commercial activity *long* predating, and *separate* from, the acts immediately injuring the plaintiff. *See Nelson* 507 U.S. at 358 (plaintiff's claims were "based upon" sovereign exercise of police authority rather than defendants' prior and remote commercial activities in recruiting plaintiff to work at a hospital); *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015) (plaintiff's claims were "based upon" injuries sustained while boarding train in Austria rather than prior sale of train ticket to plaintiff in United States). *Nelson* and *Sachs* thus stand for the unremarkable proposition that, under the commercial activity exception, claims are not "based upon" antecedent commercial conduct entirely incidental to the acts that caused the plaintiff's injury. These cases nowhere address, much less foreclose, Argentina's argument that a plaintiff's claims are not "based upon" commercial activity where, as here,

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[7] Although Petersen contends, *ipse dixit*, that these cases are inapposite because its own property was not directly expropriated (Opp.16n.7), the expropriation exception may apply to indirect expropriations. *See Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804, 815 (D.C. Cir. 2015) (holding that a corporation may bring claims under the expropriation exception in connection with the alleged expropriation of a subsidiary's assets), *vacated and remanded on other grounds*, 137 S. Ct. 1312 (2017). Further, Petersen does not dispute that it claimed under a bilateral investment treaty that Argentina's expropriation of Repsol's shares operated as a wrongful expropriation of *Petersen's* property. (Pet.16n.4.)

they challenge conduct inextricably intertwined with a sovereign act. Indeed, these decisions support Argentina for the reasons described in its petition (Pet.15-18), which Petersen fails to address. *See, e.g., Nelson*, 507 U.S. at 360 ("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.'" (emphasis added) (citation omitted)).[8]

II. PETERSEN CANNOT DENY THAT THE SECOND CIRCUIT'S DECISION DEEPENS A CIRCUIT SPLIT

Petersen's attempt to minimize the circuit split described in Argentina's petition is unpersuasive. While the D.C. Circuit has unequivocally held that the commercial activity exception is inapplicable to purportedly commercial acts that "flow" directly from a sovereign act of expropriation, *see Rong v. Liaoning Province Gov't*, 452 F.3d 883, 889 (D.C. Cir. 2006), the Ninth Circuit has adopted the opposite view. *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 708-09 (9th Cir. 1992). The Second Circuit has now exacerbated this split.

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[8] Petersen incorrectly suggests that, in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), this Court applied the commercial activity exception to a breach of contract accomplished through sovereign conduct. (Opp.12.) While *Weltover* involved an executive decree unilaterally extending the maturity dates of government bonds, 504 U.S. at 610, 615-16, this Court subsequently made clear that it had deemed "Argentina's unilateral refinancing of [its] bonds . . . to be a commercial activity," not a sovereign one. *Nelson*, 507 U.S. at 359. Here, by contrast, the expropriation through duly enacted legislation constitutes indisputably sovereign activity.

Petersen's focus on these courts' analyses of the basis or "gravamen" of the plaintiffs' claims (Opp.19-22) misses the point. To be sure, determining whether an "action is based upon a commercial activity," 28 U.S.C. § 1605(a)(2), requires identifying "the 'particular conduct' that constitutes the 'gravamen' of the suit" or the "acts that actually injured" the plaintiff. *Sachs*, 136 S. Ct. at 396. That exercise, however, does not resolve whether the "gravamen" of an action challenging conduct inextricably intertwined with a sovereign expropriation should be deemed "commercial activity" (as the Second Circuit held below) or sovereign activity (as the D.C. Circuit held in *Rong*).[9]

The Second Circuit's citation to *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013), does not negate the split. (Opp.18-19.) *De Csepel* is readily distinguishable from both this case and *Rong*. In *de Csepel*, the Hungarian government expropriated art belonging to the plaintiffs' ancestors during World War II. 714 F.3d at 594-95. Years later, government-controlled entities took custody of that art under a bailment agreement requiring them to return it to the plaintiffs upon demand. *Id.* at 596. In 2008, Hungary breached that bailment agreement. *Id.* Applying the commercial activity exception, the D.C. Circuit concluded that the plaintiffs' claims arose out of the alleged breach of the bailment agreement, a contractual relationship created and breached long after the unrelated expropriation. *Id.*

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[9] This Court's guidance is also needed to resolve lower court confusion regarding the distinction between commercial and sovereign conduct. (Pet.31.) Contrary to Petersen's argument (Opp.24), the mere fact that courts must ultimately decide this issue does not resolve confusion.

at 599-600. By contrast, here, as in *Rong*, the purported commercial conduct followed immediately, directly, and inextricably from an expropriation.

Petersen's other attempts to distinguish *Rong* are unavailing. (Opp.19.) In declining to apply the commercial activity exception in *Rong*, the D.C. Circuit emphasized that the purportedly commercial conduct challenged by the plaintiff "flow[ed]" from a sovereign act of expropriation. 452 F.3d at 889. The fact that, unlike here, the plaintiff's shares were directly expropriated was immaterial to that analysis. The justifications for not extending the commercial activity exception to acts in furtherance of an expropriation apply regardless of whether a plaintiff's property rights were themselves expropriated. (Pet.20-26.)

Moreover, the *Rong* court's distinction of its prior decision in *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990), supports Argentina, not Petersen. (Opp.20.) The D.C. Circuit specifically noted that the allegations in *Foremost-McKesson* "sound[ed] in the nature of a corporate dispute between majority and minority shareholders," in contrast to the "quintessentially sovereign act" of expropriation at issue in *Rong*. *Rong*, 452 F.3d at 890. Petersen's characterization of this case as a mere corporate dispute between majority and minority shareholders (Opp.20) ignores that Argentina seized corporate control by deploying quintessentially sovereign powers of expropriation, while the majority shareholders in *Foremost-McKesson* did not.[10]

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[10] Indeed, the court in *Foremost-McKesson* explicitly found "no indication that Iran nationalized [the company at issue] by

Petersen similarly fails to dispute that the Second Circuit endorsed Ninth Circuit's reasoning in *Siderman*.[11] There, as below, the court held that claims "arising out of . . . [an] expropriation" satisfied the commercial activity exception solely because they had seemingly commercial consequences (in that case, the operation of the expropriated hotel).[12] *See Siderman*, 965 F.2d at 702, 708-09.

Petersen's assertion that no other court has recognized the conflict at issue is flatly belied by *Rong* itself. (Opp.18.) There, the D.C. Circuit acknowledged that *Siderman* was inconsistent with its conclusion that the consequences of a sovereign act of expropriation do not fall within the commercial activity exception simply because they "seem commercial." *Rong*, 452 F.3d at 889, 890-91. By rejecting the hold-

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taking it over through a process of law," and Iran disclaimed having any control over the company. 905 F.2d at 450. The court underscored that the relevant commercial activity was not "subsumed within a sovereign activity." *Id*.

Misconstruing *Rong*, Petersen also incorrectly suggests *Rong* turned on the absence of a contract. (Opp.20-21.) In fact, the court in *Rong* distinguished *Foremost-McKesson* because the sovereign defendant in that case acquired corporate control through a "formal contract." 452 F.3d at 890. By contrast, in *Rong*, as here, the sovereign defendant acquired corporate control through a "quintessentially sovereign act." *Id*. This distinction supports Argentina, not Petersen.

[11] Petersen makes much of the fact that the Second Circuit did not reference *Rong* or *Siderman* in its decision. (Opp.19, 21-23.) But a court need not explicitly cite a case to endorse or repudiate its reasoning.

[12] The Ninth Circuit's citation of the D.C. Circuit's decision in *Foremost-McKesson* does not demonstrate conformity with *Rong*. (Opp.22.) *Rong* explicitly distinguished *Foremost-McKesson* as factually inapposite. *Rong*, 452 F.3d at 889-90.

ing of *Rong* and embracing the contrary reasoning of *Siderman*, the Second Circuit has now deepened this split.[13]

III. THE SECOND CIRCUIT'S DECISION RAISES AN EXCEPTIONALLY IMPORTANT AND RECURRING QUESTION THAT SHOULD BE ADDRESSED BY THIS COURT

Petersen cannot dispute that the question presented is a vitally important and oft-recurring one that should be resolved by this Court. As detailed in Argentina's petition (Pet.27-32), "foreign sovereign immunity is a matter of grace and comity on the part of the United States," and "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486, 493 (1983). Nor can Petersen dispute that these sensitivities are heightened here, where a U.S. court asserts jurisdiction over conduct inextricably intertwined with a foreign state's quintessentially sovereign act of expropriating control over its largest oil company to avert a domestic energy crisis and ensure national energy independence. Indeed, *amici* Chile and Mexico consider it an affront to foreign sovereignty for U.S. courts to exercise jurisdiction over a foreign state in these circumstances. (*See* Chile Amicus Brief, 6-8; Mexico Amicus Brief, 6-7.) And *amici* international law and business scholars

[13] While this case implicates a clear circuit split, this Court has granted certiorari in FSIA cases that lack such a split, *see, e.g., Republic of Philippines v. Pimentel*, 553 U.S. 851 (2008), or only implicitly implicate one, *see, e.g., Helmerich*, 136 S. Ct. at 1312.

predict that such expansive jurisdiction for U.S. courts will invite more frequent—and deeper—incursions into the internal affairs of foreign sovereigns. (*See* Professors Amicus Brief, 10-11.) Petersen simply ignores these well-founded concerns.

Argentina nowhere asks for a "lower standard for certiorari" in invoking the above foreign policy interests. (Opp.25.) Given the serious sovereign immunity and foreign policy interests implicated here and the recurring nature of challenges under the commercial activity exception, the petition raises a question with significant implications for U.S. courts, U.S. foreign relations, and foreign nations that warrants review. A writ of certiorari is warranted for this reason alone. *See* Sup. Ct. R. 10(c).

IV. PETERSEN'S ATTEMPT TO MALIGN ARGENTINA BASED ON UNRELATED CASES DOES NOT WEIGH AGAINST GRANTING CERTIORARI

Bereft of genuine legal grounds to oppose certiorari, Petersen dredges up unrelated and long-resolved cases involving prior Argentine administrations to cast aspersions on Argentina. (Opp.26-29.) Of course, such irrelevant and baseless distractions cannot deprive Argentina of sovereign immunity or weigh against granting certiorari.[14] If anything, the

[14] Indeed, the Southern District of New York has recognized that Argentina's new and current administration has "consistently declared its desire to resolve . . . disputes," "mark[ing] a turning point in [Argentina's] attitude and actions." *White Hawthorne, LLC v. Republic of Argentina*, 2016 WL 7441699, at *2–3 (S.D.N.Y. Dec. 22, 2016) (criticizing plaintiffs for relying on "ancient history" and "conduct that this court has recognized is no longer occurring").

litany of gratuitous criticism by the Second Circuit only underscores the need for this Court's objective review.

CONCLUSION

For the foregoing reasons, 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

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