

No. 21-448

IN THE
Supreme Court of the United States

FRANCE.COM, INC.,

Petitioner,

v.

THE FRENCH REPUBLIC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly determined that the “gravamen” of Petitioner’s lawsuit is the French court judgment transferring the domain name <france.com> to Respondents.

RULE 29.6 STATEMENT

Respondents have no parent corporations, are not publicly held corporations, and no publicly traded corporation owns 10% or more of their stock.

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BRIEF IN OPPOSITION

Respondents The French Republic, Atout France, The Ministry for Europe and Foreign Affairs, and <france.com>, a domain name (“Respondents”) submit this brief in opposition to the petition for a writ of certiorari filed by France.com, Inc. (“Petitioner”).

STATEMENT OF THE CASE

Petitioner filed suit against Respondents in the United States District Court for the Eastern District of Virginia, seeking to overturn the adverse results of protracted litigation in the French courts regarding the ownership of the domain name <france.com> (“Domain Name”). Respondents moved to dismiss under Rule 12(b)(1) based on the Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1602, *et seq.* and on comity grounds. After the district court declined to address the Respondents’ dismissal arguments, Respondents appealed.

The court of appeals unanimously held that Respondents were entitled to sovereign immunity and ordered the district court to dismiss the action. The court of appeals found that neither the “commercial activity” nor the “expropriation” exception to sovereign immunity applied. The court of appeals carefully considered the allegations in the Amended Complaint and concluded that the gravamen of Petitioner’s claims was the French court judgment directing transfer of the Domain Name, which is not commercial activity. The court of appeals also concluded that the French court judgment was not an act of expropriation in violation of international law. Petitioner filed a petition for rehearing en banc that was denied.

Petitioner’s question presented to this Court pertains solely to the court of appeals’ analysis of the commercial activity exception. Petitioner maintains that the court of appeals misapplied the Court’s decisions in *OBB Personenverkehr v. Sachs*, 577 U.S. 27 (2015), and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), to erroneously conclude that the French court judgment transferring the Domain Name was the basis of Petitioner’s action—the “gravamen” of the action in the Court’s parlance. Petitioner now contends that the court of appeals should have conducted a “claim-by-claim” analysis, purportedly in accordance with *Sachs*, and that if it had, it should have recognized that the lawsuit has multiple “gravamina,” and then found that some of Petitioner’s claims were really based on allegedly commercial use of the Domain Name following its transfer.

The legal arguments Petitioner now makes about how *Sachs* ought to be interpreted and applied to this case were not made in Petitioner’s appellate brief below. Petitioner did not cite to either *Sachs* or *Nelson* or advance the sort of claim-by-claim gravamen analysis it now argues is crucial to the proper administration of the FSIA. Petitioner argued instead that “this case is about a relatively simple act – the taking of U.S. property” (Brief of Appellee, Dkt. No. 24 at 27¹), which no party now argues is a commercial act. The lower court properly applied *Sachs* and *Nelson*, agreeing with Respondents that the French court judgment was the gravamen of the lawsuit.

1. Except where it is expressly indicated otherwise, citations to the docket refer to the docket of the court of appeals. *France.com v. The French Republic*, No. 20-1016 (4th Cir.).

Dkt. No. 20 at 31, 43-46. Petitioner now asks this Court to reverse the court below on an issue it did not raise in its appellate brief.

Furthermore, there is not a circuit split. Petitioner attempts to read between the lines of decisions from two other circuit courts of appeals, and submits that the court below, without stating so explicitly, adopted an approach to the gravamen analysis that conflicts with its sister circuits. At best, the supposed conflict involves an abstract tension between the way general principles have been stated by courts. But there is no conflict over precise legal rules and no showing that the courts have reached different results when addressing the very same issues. As such, even assuming *arguendo* there were a circuit split, this case would not be the appropriate vehicle for resolving it.

The court of appeals correctly held that the commercial activity exception is not a basis for federal subject matter jurisdiction under the FSIA where a United States court is being asked to effectively relitigate a foreign judgment. There is no reason for this Court to review that context specific determination.

I. STATUTORY BACKGROUND.

The FSIA renders foreign states immune from the jurisdiction of United States courts unless one of its statutory exceptions applies to the plaintiff's claim. *See* 28 U.S.C. §§ 1604-1605; *see also Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 611-12 (1992). Petitioner argued below that this case involves two of the FSIA's statutory exceptions: the commercial activity exception, 28 U.S.C. § 1605(a)(2), and the expropriation exception, 28 U.S.C. § 1605(a)(3).

Only the commercial activity exception is pertinent to Petitioner’s question presented to this Court. The commercial activity exception provides for jurisdiction over foreign sovereigns when at least one of its three clauses applies:

the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2).

The commercial activity exception’s three clauses apply only when the action is “based upon” the conduct that the exception describes. *Nelson*, 507 U.S. at 356-58. Thus, the first step in a commercial activity exception analysis requires that the court identify the conduct upon which the suit is based. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 33 (2015). This requires the court to look at “the ‘particular conduct’ that constitutes the ‘gravamen’ of the suit.” *Id.* In other words, the court must focus on the “core” of the suit—the foreign sovereign’s “acts that actually injured” the plaintiff. *Id.* at 33-34. Here, Petitioner contends that the court of appeals misapplied the Court’s precedent and then incorrectly identified the gravamen of the suit.

II. FACTUAL BACKGROUND.

Petitioner operated a business and website located at <france.com> that sold package tours to various destinations in France to American tourists. Joint Appendix (“JA”) at 89-90.² In May 2014, Petitioner commenced an action in the Paris District Court (the “French Action”) seeking the transfer of certain trademarks containing the words “france.com” from a Dutch company. JA 92, 438. In April 2015, the French Republic and France’s official tourism development agency, Atout France (collectively, the “French State”) filed a motion to intervene in the French Action on the basis that the term “France,” without modification, under French law should not be used commercially by a private enterprise as it is the name by which the French State expresses its geographic, historical, economic, and cultural identity. JA 306 (¶4), 325-326. The French State also argued that Petitioner’s real goal in registering the Domain Name was to capitalize on goodwill created by the French State in the term “France” and to sell the Domain Name to the highest bidder. JA 327. Petitioner opposed the motion to intervene, raising various procedural and substantive arguments. JA 306(¶ 5), 307(¶ 11), 365-66.

On November 27, 2015, the Paris District Court granted the French State’s motion to intervene, ordered the transfer of the Domain Name to the French State and denied Petitioner’s requests for damages. JA 436-56. In granting the motion to intervene, the Paris District

2. Citations to the Joint Appendix refer to the two-volume Joint Appendix filed in the court of appeals at Dkt. Nos. 19-1 and 19-2, *France.com v. The French Republic*, No. 20-1016 (4th Cir.).

Court rejected Petitioner’s procedural and substantive arguments and held that the use of the Domain Name by Petitioner infringes the French State’s “rights to its name, its identity and its sovereignty.” JA 453. On September 22, 2017, the Court of Appeals of Paris affirmed the Paris District Court’s order regarding the transfer of the Domain Name, finding that the “designation ‘France’ constitutes for the French State an element of identity akin to the family name of a natural person; that this term designates the national territory of its economic, geographical, historical, political and cultural identity.” JA 458, 467. Petitioner appealed to the French Supreme Court, and that appeal remains pending. JA 519-24.

In a letter dated November 8, 2017, attorneys for the French State informed Network Solutions LLC, a subsidiary of Web.com (the Registrar with which <france.com> was registered at the time), of the judgments of the French courts ordering the transfer of the Domain Name. JA 536-37. The letter annexed copies of both judgments. JA 537. Thereafter, Web.com transferred the Domain Name to the Minister for Europe and Foreign Affairs as directed by the French Court’s decision and as contemplated in the Domain Name Registration Services Agreement the Petitioner entered into when registering the Domain Name. JA 93, 527-28, 533(§ 11), 536-37. In the Domain Name Registration Services Agreement (“Agreement”) between Jean-Noel Frydman (Plaintiff’s sole owner) and Web.com, Mr. Frydman “acknowledge[d] and agree[d]” that Web.com retained the:

absolute right and power, in its sole discretion . . .
to suspend the [registration], close Registrant’s
account, terminate provisioning of [the

registration], . . . or to take any other action which Web.com deems necessary, in the event that . . . the Domain Name *is alleged to violate or infringe* a third party's trademark, trade name, copyright interests or other *legal rights of third parties*.

JA 533(§ 11) (emphasis added). The Agreement was in effect when the Domain Name was transferred. JA 527-28.

The Domain Name remains property of the French State and is currently registered to Jean-Yves Le Drian, the Minister for Europe and Foreign Affairs (“Minister Le Drian”), in his official capacity. JA 89. The Domain Name contains no content or information and cannot be visited. Rather, web users who attempt to visit <france.com> are automatically redirected to the domain <france.fr/en>, the English language version of the website <france.fr> which Atout France operates from France as the official French tourism website. JA 195-98.

III. PROCEEDINGS BELOW.

The Complaint. In 2018, Petitioner filed a complaint in federal district court asserting causes of action for cybersquatting, reverse domain name hijacking, expropriation, trademark infringement, and unfair competition. JA 3, 9-21. In May 2019, Respondents, and defendant Minister Le Drian separately, timely filed motions to dismiss pursuant to Rule 12(b)(1) and 12(b)(6). JA 22, 57. About a month later, the district court issued a two-page order (1) denying Respondents' Rule 12(b)(1) motion, (2) granting Respondents' Rule 12(b)(6) motion and giving Plaintiff leave to file an amended complaint,

and (3) denying Minister Le Drian's motion to dismiss. App.20a-21a.

The Amended Complaint. On July 1, 2019, Petitioner filed an Amended Complaint asserting the same causes of action as the original complaint. JA 84. The Amended Complaint repeatedly alleged that Respondents' use of the Domain Name and "any commercial revenue flowing from" that use are a "direct result of [Respondents] illegally seizing the <france.com> website domain from plaintiff;" that Respondents "misused the French judicial system to seize the domain from Plaintiff"; that Respondents "lack[ed] . . . authority to seize property"; and that Respondents "usurp[ed]" and "expropriated" the Domain Name. JA 87-88, 92-94. As a result, Petitioner alleged that it "lost, and continues to lose at an ever-increasing rate, significant revenue due to the ongoing unavailability of Plaintiff's commercial website and email accounts[,] and that it "brings this action to recover Plaintiff's domain name and associated email accounts, to mitigate the continuing damage caused by Defendants' taking, and to seek fair compensation for the damages already incurred." JA 94.

The Motions to Dismiss the Amended Complaint Under Rule 12(b)(1). Respondents and Minister Le Drian separately filed motions to dismiss the Amended Complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction under the FSIA. JA 150, 160. Prior to the district court's ruling, the United States filed a "Suggestion of Immunity" informing the district court of its position that Minister Le Drian was immune from suit. JA 581. On December 6, 2019, the district court issued a two-page order granting Minister Le Drian's motion to

dismiss and denying Respondents' motion to dismiss. App. 17a-18a. With respect to Respondents' claim to sovereign immunity under the FSIA, the district court held, without further explanation, that it "does not find that these issues call for dismissal at this time; as noted in the Court's Order of May 31, 2019, they 'would best be raised after discovery has concluded.'" *Id.* Respondents appealed.

Arguments Before the Court of Appeals. In their opening brief below, Respondents argued both that the commercial activity and expropriation exceptions do not provide a basis for federal subject matter jurisdiction and that principles of international comity weigh decisively in favor of the district court declining jurisdiction. As to the question presented to this Court, Respondents argued, citing *Nelson* and *Sachs*, that for the commercial activity exception to apply, the instant litigation must be "based upon" the alleged commercial activity, which this Court has held must be the thing that actually injured the plaintiff: it must be the "core" or "gravamen" of the action. Dkt. No. 20 at 31, 43-46. That is not the case here, where Petitioner's alleged injuries flow from the French court order transferring the Domain Name, rather than from Respondents' allegedly commercial promotion of tourism via <france.fr>.

Petitioner reinforced Respondents' contentions about what the gravamen of the suit is: it argued in its brief to the court of appeals that this case is "an effort to reclaim its stolen property" and "this case is about a relatively simple act—the taking of U.S. property." Dkt. 24 at 17. Petitioner acknowledged that to the extent that Respondents are engaged in any alleged commercial activities, such activities "are a direct result of [Respondents] illegally

seizing” the Domain Name. Dkt. No. 24 at 37. Petitioner did not cite to *Sachs* or *Nelson* or any of the other circuit court decisions Petitioner now cites to as creating a circuit split. It did not make any of the arguments that it now makes in its Petition regarding the court of appeals’ gravamen analysis under *Sachs*. Instead, Petitioner advanced a tangle of confusing arguments, centering upon a theory Petitioner invented called “negative commercial activity,” so that it could argue that “the taking of the domain name was itself a commercial activity.” Dkt. No. 24 at 28-32. Petitioner put forth no argument bearing on the question presented to this Court or on the proper mode of gravamen analysis.

The Court of Appeals Decision. On March 25, 2021, the court of appeals unanimously reversed the judgment of the district court and remanded the case with instructions to dismiss the case with prejudice for lack of subject matter jurisdiction under the FSIA. App.1a-14a. In considering Petitioner’s reliance on the commercial activity exception, the court explained that the first step was to identify the act of Respondents on which the action is based or what this Court has referred to as the “gravamen of the complaint.” App.8a. “We examine the ‘core of [the] suit,’ that is, the ‘acts that actually injured’ the plaintiff.” *Id.* (quoting *Sachs*, 577 U.S. at 35.). Upon careful study of the complaint, the court found that “the conduct that [Petitioner] asserts ‘actually injured’ it is not subsequent use of the website, but the adverse French judgment holding that <France.com> properly belongs to the French State. All asserted injuries alleged in the complaint flow from that judgment.” *Id.* The court held that Respondents’ actions in obtaining the Domain Name in a judicial proceeding was not commercial activity.

App.9a. Finally, the court determined that any “attempt to reframe this case as one about competitive harm”—e.g., via Petitioner’s claims of cybersquatting, trademark infringement, or unfair competition—was nothing more than “artful pleading” that the *Sachs* court expressly warned should not be permitted to evade the FSIA’s jurisdictional limitations. App.10a. (quoting *Sachs*, 577 U.S. at 36).

Petitioner filed a petition for rehearing en banc. App.25a-40a. In its petition, Petitioner for the first time made arguments about how *Nelson* and *Sachs* should be interpreted and applied to the facts here. The petition was denied. App.22a-23a.

REASONS FOR DENYING THE PETITION

There is no legal issue warranting this Court’s review. Petitioner’s question presented is fact-bound and does not merit this Court’s attention. Petitioner suggests that there is a circuit split—a shallow one—based on a meritless contention that the court of appeals here misapplied *Nelson* and *Sachs* and is thus somehow at odds with two circuits that Petitioner says has correctly applied those decisions on quite different facts. To the contrary, the court of appeals’ analysis of the commercial activity exception was straightforward, correct, in line with its sister circuits, and in keeping with *Nelson* and *Sachs*. Moreover, even if the issue merited this Court’s attention, this case is the wrong vehicle because Petitioner did not articulate its current argument to the court of appeals.

I. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT’S PRECEDENTS.

In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the Court explained that to identify what conduct an action is “based upon”—its “gravamen”—courts should consider “those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case.” *Id.* at 357. There, the plaintiff had been hired to work in a government-owned Saudi Arabian hospital. *Id.* at 351–52. The plaintiff alleged that after he reported safety defects at the hospital, Saudi authorities detained and tortured him. *Id.* at 352–53. The Court held that the lawsuit was not based upon domestic commercial activity as required under the FSIA. The Court concluded that the plaintiff’s allegations that Saudi Arabia had tortiously failed to warn the plaintiff of the risks when it recruited him in the United States were not the gravamen of his claims. *Id.* at 358, 363.

In *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), the Court clarified that the gravamen analysis does not require courts to undertake a “claim-by-claim, element-by-element analysis,” but instead to “zero[] in on the core of [the] suit.” *Id.* at 34–35. In *Sachs*, the plaintiff had purchased a Eurail pass from a travel agent in the United States and was later injured by a rail car in Austria. *Id.* at 30. The plaintiff filed suit against the railway company, wholly-owned by the Austrian government, for, among other things, failure to warn that the train and boarding platform were defectively designed. *Id.* The Court concluded that the gravamen of the suit was tortious activity abroad, because the plaintiff’s claims all “turn[ed] on the same tragic episode

in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria.” *Id.* at 35. The domestic sale of the Eurorail pass did not change the result because there was “nothing wrongful about the sale of the Eurail pass standing alone. Without the existence of the unsafe boarding conditions in [Austria], there would have been nothing to warn Sachs about when she bought the Eurail pass.” *Id.* at 35–36. However, the suit was “fram[ed],” “the incident in [Austria] remain[ed] at its foundation.” *Id.* at 36. Any other approach, the Court observed, “would allow plaintiffs to evade the [FSIA’s] restrictions through artful pleading.” *Id.* at 36; *see Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017) (“What matters is the crux — or, in legal-speak, the gravamen — of the plaintiff’s complaint, setting aside any attempts at artful pleading.”). The *Sachs* court cautioned that it “consider[ed] here only a case in which the gravamen of each claim is found in the same place,” *id.* at 36 n.2, leaving open the possibility that a suit may allege multiple injurious acts of the sovereign, and thus have multiple “gravamina.” *Devengoechea v. Bolivarian Republic of Venez.*, 889 F.3d 1213, 1223 (11th Cir. 2018).

Here, the court of appeals “properly stated [the] rule of law” as enunciated in *Sachs* and *Nelson*, and carefully applied the rule to the facts before it. U.S. Sup. Ct. R. 10. The court of appeals focused its gravamen analysis on the “acts that actually injured” Petitioner, mindful that there could be multiple “acts” that injured Petitioner but careful to not let “artful pleading” or “fram[ing],” circumvent the FSIA’s jurisdictional limits. App.8a (quoting *Sachs*, 577 U.S. at 36) (emphasis added). After a “study of the complaint,” the court of appeals concluded that “all asserted injuries flow from the French judgment” rather

than from “the French State’s use of the <France.com> to offer links to tours, accommodations, restaurants and other tourism resources and to sell advertisements.” App.8a, 10a. The court of appeals expressly noted that:

the complaint repeatedly alleges that the French State’s use of the website and “any commercial revenue flowing from” that use are a “direct result of [the French State] illegally seizing the <[F]rance.com> website domain from plaintiff.” It further alleges that the French State “illegally seiz[ed] the <[F]rance.com> website domain”; that the French State “misused the French judicial system to seize the domain from Plaintiff”; that the French State “lack[ed] [] authority to seize property”; and that the French State “usurp[ed]” and “expropriated” the domain name.

App.9a. The court of appeals’ finding that “all asserted injuries” flow from the French court judgment and resulting transfer—not from Respondents’ subsequent use of the Domain Name—is further supported by the Amended Complaint which alleges that it was the transfer of the Domain Name that “immediately stopped all internet traffic to Plaintiff’s business, effectively shutting down plaintiff’s operations.” JA 93-94 (“Plaintiff has lost, and continues to lose at an ever-increasing rate, significant revenue due to the ongoing unavailability of Plaintiff’s commercial website and email accounts.”). The court of appeals plainly did not err when it concluded that Petitioner’s “claims,” *plural*, “arise from an adverse judgment of a foreign court—in a proceeding initiated by [the Petitioner] itself—resulting in the transfer of the

domain name, not any commercial activity that may have followed that transfer.” App. 11a.

II. THIS CASE IS NOT THE PROPER VEHICLE FOR ANSWERING PETITIONER’S QUESTION PRESENTED.

Petitioner argues that the court of appeals below and other circuit courts have incorrectly “underst[ood] this Court’s statement in *Sachs* that the ‘analysis in *Nelson* . . . did not undertake such an exhaustive claim-by-claim, element-by-element analysis of the Nelsons’ 16 causes of action . . .’ as meaning that Courts do not need to analyze the actual claims [Petitioner] presented when determining the gravamen or gravamina of a suit with multiple distinct claims.” Petition at 14. The court of appeals made no such error.

To the extent that courts have misunderstood that language, this case is a poor vehicle for clarifying it. The court of appeals did not refer, quote, or even cite to the language from *Sachs* that Petitioner now argues the court misunderstood. Indeed, the court of appeals had no occasion to grapple with exactly what the *Sachs* court meant by those words, primarily because the Petitioner made no mention of *Sachs* (or *Nelson*) in its appellate brief below and did not argue that Respondents’ gravamen analysis was flawed for not giving sufficient attention to Petitioner’s “multiple distinct claims.” Petitioner never advanced a “claim-by-claim” analysis in its appellate brief to the court of appeals or took a discernible position on the issue. Petitioner did not address how *Nelson* and *Sachs* should be interpreted and applied to the facts here, until it filed its petition for en banc rehearing, which was denied. App. 22a-23a.

Because the court of appeals did not address the supposedly misunderstood language from *Sachs*, Petitioner cannot, and does not, argue that the court of appeals *expressly* adopted a rule that deviates from this Court's precedents or those of its sister circuits on the question it presents. *See id.* at 14 n.9 ("The Fourth Circuit did not directly assert that they were free from the constraints of assessing France.com's individual claims."). For this reason alone, the Court should decline to grant certiorari.

III. THERE IS NO CIRCUIT SPLIT.

Petitioner argues that the court of appeals' decision has created a shallow circuit split between the Fourth Circuit and the Second and Eleventh Circuits. Petition at 26-30. Petitioner's actual claim appears to be that the court of appeals failed to adequately consider the distinct claims in its complaint when conducting its gravamen analysis, and that other Circuits have reached different conclusions on different facts.

Even assuming *arguendo* that the court of appeals' gravamen analysis disregarded the distinct claims in the complaint, and that it only examined the factual allegations in the complaint for the act or acts that actually caused injury, this would still not create a circuit split. Such a supposed conflict would involve an abstract, mostly semantic, disagreement over whether the gravamen of a suit is to be found by identifying the conduct that caused the injuries asserted in the complaint, or by considering the distinct claims and then identifying the conduct giving rise to the injuries asserted in each distinct claim. There would be no conflict over essential legal rules, and no

showing that the courts have reached different rules when addressing the very same issue.

Similarly, the Eleventh and Second Circuit cases that Petitioner argues make up the split do not state a clear rule on gravamen analysis. These cases also both involved very different facts. Even if one reads between the lines of these decisions, as Petitioner tries to do, a circuit split does not surface.

Petitioner first cites to *Devengoechea v. Bolivarian Republic of Venezuela*, 889 F.3d 1213 (11th Cir. 2018). The Respondents cited *Devengoechea* in their opening brief below for a proposition well-established in FSIA jurisprudence: “expropriation is a uniquely sovereign act, as opposed to a private act,” even if the transferred property is subsequently used for allegedly commercial purposes. *Id.* at 1228; see *Garb v. Rep. of Poland*, 440 F.3d 579, 587 (2d Cir. 2006) (“Our reasoning—that subsequent commercial transactions involving expropriated property do not give rise to subject matter jurisdiction over claims arising from the original expropriation—is consistent with Congress’s intention to deny sovereign immunity to foreign States only with respect to commercial, and not sovereign, acts.”). Petitioner neglected to cite to *Devengoechea* in its brief below, and for reasons that become clear after reading the case, did not argue that the decision is somehow inconsistent with Respondents’ gravamen analysis or the conclusion that the gravamen of this lawsuit is the French court judgment and the resulting transfer of the Domain Name.

In *Devengoechea*, the plaintiff, who had inherited certain papers and effects of the statesman and

revolutionary Simon Bolivar, entered into negotiations with the Republic of Venezuela for the sale of the historically significant artifacts. *Id.* at 1218-19. Government officials persuaded plaintiff to travel back to Venezuela with the artifacts, so that Venezuelan government experts could evaluate them. *Id.* at 1219. Devengoechea agreed and left the artifacts in Venezuela. *Id.* Several years later, Venezuela had neither returned nor paid for the Bolívar Collection, despite plaintiff’s repeated inquiries about obtaining payment or return. *Id.* In a straightforward application of *Sachs*, the Eleventh Circuit held that, “[t]he conduct that actually injured [the plaintiff]—and therefore that makes up the gravamen of [the plaintiff’s] lawsuit—is Venezuela’s failure to return the Bolívar Collection to [the plaintiff] or to pay him for it.” *Id.* at 1223.

Petitioner argues that the *Devengoechea* decision creates a split because the Eleventh Circuit “proceeded to examine plaintiff’s two separate claims.” Petition at 27. Petitioner is referring to the following two sentences of the Eleventh Circuit decision:

And both of [plaintiff’s] causes of action—breach of contract and unjust enrichment—turn on this circumstance. In the breach-of-contract claim, Venezuela’s failure to return the Collection constitutes the alleged breach, and in the unjust-enrichment claim, Venezuela’s failure to pay for or return the Collection to [plaintiff] has allegedly caused Venezuela’s unjust enrichment.

Devengoechea, 889 F.3d at 1223. There is nothing inconsistent between the Eleventh Circuit’s analysis and

the court of appeals decision here that the conduct that actually injured Petitioner was the French judgment and transfer of the Domain Name. As the court of appeals here explained, and Petitioner itself conceded, all of the other asserted injuries were subordinate to and a direct result of Petitioner's loss of the Domain Name. And, Petitioner's claims of competitive harm were nothing more than "artful pleading." Both courts of appeals considered the actual claims pleaded within the framework of *Sachs* and made findings based on the specific facts before them.

Next, Petitioner relies on the Second Circuit's decision in *Pablo Star Ltd. v. Welsh Government*, 961 F.3d 555 (2d Cir. 2020). There, the Second Circuit held that a lawsuit against Wales could proceed because the action was "based upon" allegations of copyright infringement in connection with pictures used in brochures and materials distributed by Wales in New York City to promote tourism. But the Second Circuit in *Pablo Star* did not actually address Petitioner's question presented here. The question of how to address multiple distinct claims in a gravamen analysis was not before the court because the plaintiff had only plead copyright infringement. Thus, it is unremarkable that the Second Circuit found that the infringement was the gravamen of the suit, and the cause of plaintiff's actual injuries. *Id.* at 560-61.

Here, the court of appeals determined that the French court judgment and transfer of the Domain Name actually injured Petitioner, and follow-on claims of infringement were "artful pleading" and supposed injuries entirely derived from and inseparable from the loss of the Domain Name. Given these different facts and the lack of any explicit ruling in *Pablo Star* on Petitioner's

question presented here, there is no circuit split between the Second and Fourth Circuits requiring resolution by this Court.

Petitioner fares no better by relying on the Second Circuit's unpublished decision in *Everhard Findlay Consulting, LLC v. Republic of Surin*, 831 F. App'x 599 (2d Cir. 2020), which does not address the question presented by Petitioner, cite to *Sachs*, or contain any discussion of how a court should undertake the "based upon" analysis.

IV. THE COURT OF APPEALS DECISION WILL NOT HAVE RAMIFICATIONS BEYOND THE PARTIES.

In a final footnote, Petitioner contends that the court of appeals' decision will have "potential ramifications." Petition at 30 n.19. Petitioner's apparent concern is that the court of appeals' decision will prevent litigants from bringing trademark infringement claims in United States courts against sovereigns who have used their own judicial process to obtain rights to a domain name that is also a trademarked term in the United States. Petitioner gives no reason to believe that this is a common occurrence, nor did the court of appeals decision make such a categorical ruling. If the court of appeals decision stands for anything more than its straightforward application of the FSIA and this Court's precedents, it is that neither the commercial activity nor expropriation exception allows a foreign sovereign to be haled into an American court simply because a court in that foreign nation, after providing due process to an American corporation that selected that venue, rendered a judgment adverse to that American corporation and in favor of the foreign sovereign. Another domain name dispute may present different injuries,

gravamen/gravamina, and thus different jurisdictional considerations under the FSIA. But on the atypical facts before it, the court of appeals correctly found that the federal courts lacked subject matter jurisdiction over Petitioner's claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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