No. 24-1314

IN THE

Supreme Court of the United States

SBERBANK OF RUSSIA PJSC,

Petitioner,

v.

THOMAS SCHANSMAN, INDIVIDUALLY AND AS SURVIVING PARENT OF QUINN LUCAS SCHANSMAN AND AS THE LEGAL GUARDIAN ON BEHALF OF X.S., A MINOR, *et al.*,

Respondents.

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

REPLY BRIEF

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The decision below readily meets the criteria set forth in Rule 10(c) of the Rules of the Supreme Court of the United States, having both "decided an important question of federal law that has not been, but should be, settled by this Court" (the first question presented) and "decided an important federal question in a way that conflicts with relevant decisions of this Court" (the second question presented). While ultimate discretion lies with the Court, Respondents' opposition did not (and really *could* not) dispel the conclusion that both questions presented amply qualify for such relief under Rule 10(c).

Respondents' opposition, moreover, fails to show that this case is a "poor vehicle" (Opp. 19, 30) for this Court's review. Rather, Respondents gather together a group of legal issues decided in Sberbank's favor below (or not decided *at all*) and then attempt to tangle them up with the questions presented, even though they are entirely distinct. The intended impression is that of a much larger ball of wax than the questions presented alone would indicate, but because the questions presented are readily separable from the other issues identified by Respondents, they present no reason to deny review. On the contrary, had Respondents wished for this Court to address the issues on which the Second Circuit ruled in Sberbank's favor, they could have presented a conditional cross-petition, but they did not.

And Respondents' defense of the Second Circuit's reasoning falls far short of showing that it correctly answered the questions presented, such that no further review is warranted.

The Court should grant Sberbank's petition for a writ of certiorari.

I. RESPONDENTS DO NOT SHOW THAT EITHER QUESTION PRESENTED IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW

Relying largely on the absence of a circuit split, Respondents first argue that the questions presented are not sufficiently important questions of federal law to warrant Supreme Court review. (Opp. 17-19, 30-31).

It is true that there is no circuit split yet on the first question presented: whether the FSIA's general exceptions to foreign state immunity also abrogate immunity under Section 2337 of the Anti-Terrorism Act. *See* 18 U.S.C. § 2337. Sberbank has never argued otherwise, however. Rather, Sberbank's petition establishes under Rule 10(c) that—because the Second Circuit's holding expanded foreign state liability in a manner never before contemplated by the courts—this question is assuredly "an important question of federal law that has not been, but should be, settled by this Court." (Pet. 16).

Far from refuting that contention, Respondents' opposition indirectly affirms it. Attempting to explain away the scope of the Second Circuit's decision, Respondents maintain that "[o]nly where the support for terrorism comes from a governmental entity that is not a designated state sponsor of terrorism . . . will the Second Circuit's holding even be relevant." (Opp. 15).

Yes: and that is precisely why the question is so important—the Second Circuit's decision expands ATA liability to *all* foreign states *regardless* of where an attack occurs. As Respondents note (*see* Opp. 15), the FSIA's express terrorism exceptions include important limitations. 28 U.S.C. § 1605A, for instance, requires that the foreign state have been formally designated a state-sponsor of terror. In so doing, Congress ensured that the political branches—which remain both best suited to and constitutionally charged with the "delicate judgments" required in foreign affairs, *see, e.g., Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 145 S. Ct. 2090, 2106 (2025)—retain a measure of control over what foreign states might be subject to suit and liability.

JASTA took another step beyond this, permitting suits against any foreign state, regardless of its designation as a sponsor of terror, but only for injuries "occurring in" the United States. 28 U.S.C. 1605B(b).

Read together, the Second Circuit's rulings below eliminate *both* restrictions: First, the Court of Appeals' ruling effectively incorporates all of the FSIA's exceptions into the ATA, but in particular the commercial activity exception, which carries neither limitation. (App. 36a, 39a). Second, the court then ruled that a foreign state's use of a U.S.-based correspondent account constitutes the gravamen of an ATA claim, thereby triggering the commercial activity exception (App. 21a-22a), notwithstanding this Court's admonition in *OBB Personenverkehr AG v. Sachs,* 577 U.S. 27, 33 (2015) that only conduct that

"actually injured" a plaintiff constitutes the gravamen of a claim. With these holdings, the Court of Appeals mooted both the requirement of Section 1605A that a defendant be a state-sponsor of terror and the territorial limitation set forth in JASTA.

The notion that this new synthesis will reach only our adversaries and rivals is dangerously naïve. Any foreign state, worldwide, friend or foe, may now be sued under the ATA so long as the plaintiff can allege some commercial connection through the United States upstream of Respondents' actual injury. Respondents assert that few foreign states will find themselves thus challenged, but they do not rebut the far-reaching scope of the ruling, and indeed litigants in the lower courts are already taking advantage of this new reality. *See* Notice of New Authority, *Bartlett, et al. v. Baasiri, et al.*, No. 19-cv-00007 (CBA) (TAM) (ECF No. 458) (Feb. 7, 2025) ("[T]his Court should hold that (1) [defendant] is not an instrumentality of Lebanon and, even if it were, (2) [*Schansman*] mandates that [defendant] would not enjoy sovereign immunity because its conduct falls under the commercial activities exception . . . .")

Both the questions presented are therefore, undoubtedly, important questions of federal law. With respect to the first question, moreover (whether the FSIA exceptions apply under the ATA), that question "has not been, but should be, settled by this Court." S. Ct. R. 10(c). And with respect to the second question (the application of the commercial activity exception to the facts alleged), the Second Circuit answered "in a way that conflicts with relevant decisions of this

Court," *id.*—namely, *Sachs* and *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

Thus both of Sberbank's questions presented meet the standard under Rule 10(c) and qualify for further review.

II. RESPONDENTS DO NOT SHOW THAT THIS CASE IS AN INAPPROPRIATE VEHICLE TO ADDRESS THE QUESTIONS PRESENTED

Respondents then pivot to a strange plot twist, asserting that: "The Petition's First Question Is Not Actually Presented." (Opp. 19).

This would be news to the Court of Appeals, which spent the last six pages of its opinion examining that very question (App. 34a-39a), concluding that: "the commercial activity exception of the FSIA applies equally to an action brought under the ATA. . . ." (App. 40a). It would be news to Judge Walker as well, whose concurrence "disagree[d] that the FSIA's general applicability to civil claims overrides these specific textual differences in the ATA's immunity provision." (App. 45a).

Further examination reveals, however, that when Respondents say the question of whether the commercial activity exception applies under Section 2337 of the ATA, 18 U.S.C. § 2337, is "not presented," what they *really* mean is that they (not Sberbank) should have prevailed on distinct issues they say would have defeated Sberbank's immunity and thereby mooted the questions presented. (Opp. 20-25).

First, pointing to stray references in Sberbank's motion briefing, Respondents say Sberbank waived its immunity outright, thus "put[ting] the first question presented out of reach." (Opp. 21). Yet neither the district court nor the Second Circuit addressed Respondents' waiver argument (App. 10a), which fails in any event because Sberbank properly raised and preserved the defense in its answer, consistent with circuit law. *See generally Drexel Burnham Lambert Grp. Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 326 (2d Cir. 1993).

More significantly, Respondents never brought a cross-appeal below and thus never preserved this particular argument for appellate review. Even worse, Respondents' sub-argument that waiver is appropriate because "ATA immunity under Section 2337 is not a jurisdictional bar" (Opp. 21) is *entirely* new, appearing in none of Respondents' briefing in either court below. Consequently, it is hard to see how Respondents' continued insistence that Sberbank waived its immunity defense presents a bar to further review here.

Second, Respondents point to another of the Second Circuit's rulings, one that went in Sberbank's favor: that the definition of "foreign state" under the ATA carries the same definition as under the FSIA, and therefore immunizes state-owned enterprises. (Opp. 21-23). According to Respondents, that theory makes "little sense," (Opp. 22), even though it evidently made just enough sense to persuade the majority below: "As a matter of first impression, the ATA's immunity provisions apply not only to agencies,

but also to 'instrumentalities' of foreign states." (App. 40a).

After briefly rehashing their arguments on that point, Respondents maintain that (despite the Second Circuit's agreement with Sberbank on that issue) Sberbank is not immune. (Opp. 23). Therefore, say Respondents, the question of whether the commercial activity exception to the FSIA applies under the ATA "is academic." (Opp. 16).

Respectfully, this is neither academic nor a "fly in [the] ointment," (Opp. 23), it is an outlandish attempt to retroactively nullify Sberbank's questions presented by simply assuming that the Second Circuit answered a *different* question *incorrectly*. Yet if that is the case, then Respondents ought to have brought a conditional cross-petition under Rule 12, or perhaps argue that the definition of a "foreign state" under the ATA is a subsidiary question "fairly included" with the questions presented. *See* S. Ct. R. 14(1)(a). As things *actually stand*, however, Respondents lost on that issue and have not asked this Court to review it; accordingly, the issue presents no bar to further review by this Court.

Third, and perhaps more incredibly, Respondents assert that the Second Circuit's erroneous decision *in another case* makes review inappropriate here. (Opp. 23-24). That decision, *Bartlett v. Baasiri*, 81 F.4th 28, 30 (2d Cir. 2023), *cert. denied,* 144 S. Ct. 1456 (2024), determined that immunity can attach when a corporation is acquired by a foreign state during the pendency of the action, not merely when that corporation is state-owned at

the time of filing. Applying that holding, the Second Circuit in this case determined that Sberbank became immune when the Russian Ministry of Finance acquired majority ownership of Sberbank from the Russian Central Bank. (App. 17a).

Respondents contend that the Second Circuit wrongly decided *Bartlett*, that this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) required lower courts to ignore post-filing changes in ownership status (an over-reading of that decision, one the Second Circuit was right to reject in *Bartlett*), and that therefore—again—Sberbank is not presumptively immune in the first place, *unless* its past ownership by the Central Bank at the time of filing conferred immunity. (Opp. 24-25). Accordingly, say Respondents, the Court cannot grant review here without also reexamining and presumably abrogating *Bartlett*, then following Respondents down this "factbound" rabbit hole. (Opp. 25).

Again, this is (perhaps) a ground for a conditional cross-petition (though the Court denied certiorari in Bartlett itself). It is not an issue that this Court must necessarily reach in order to resolve the distinct questions presented here by Sberbank. Rather, although each of these three questions provided a separate, arguable basis to deny Sberbank immunity in the courts below, they are not logically entangled with each other (to the contrary, neither court felt obliged to address the waiver argument at all). Each is a different leg of the immunity table, so to speak, yet they are all aspects of immunity that are capable of being answered separately.

Fourth, with respect to the second question presented, Respondents erroneously maintain that the application of the commercial activity exception is also unduly fact-bound. (Opp. 32). Not so: the question primarily calls for an application of the rule of *Sachs* to the allegations of the Second Amended Complaint, deemed to be true for purposes of Sberbank's motion. (*See* App. 25a). And although evidence does matter under the commercial activity exception as well (because a foreign state may bring both facial and factual challenges to establish immunity, *see, e.g., Blecher v. Holy See*, 631 F. Supp. 3d 163, 169 n. 2 (S.D.N.Y. 2022)), here Respondents sought and received substantial jurisdictional discovery from the district court (App. 10a), without subsequently challenging the scope or completeness of that discovery by cross-appeal.

It is hardly unusual for the Court to grant certiorari over a sub-set of discrete questions, and the presence of additional issues in a wider controversy—even other jurisdictional issues—does not make a decision an inappropriate vehicle for further review. *See, e.g., Riley v. Bondi*, 145 S. Ct. 2190, 2206 (2025) (Thomas, J., concurring) ("In this case, we decide only the issue on which we granted certiorari: . . . We do not decide whether [the] case is otherwise free of jurisdictional defects.")

Here, the existence of other independent grounds on which Respondents possibly could have, but did not defeat Sberbank's immunity does not shield further review of the two questions presented.

III. RESPONDENTS DO NOT SHOW THAT THE SECOND CIRCUIT DECIDED THE QUESTIONS PRESENTED CORRECTLY

Next, Respondents capably restate their major counter-arguments in opposition to Sberbank's position on appeal, but they do not establish that the Second Circuit decided Sberbank's questions presented correctly. (Opp. 26-30, 33). Although determination of whether the Second Circuit was correct must ultimately await an examination of the merits, should the Court grant review, the petition amply demonstrates the reasons to conclude that the Second Circuit got it wrong.

On the first question presented—whether the commercial activity exception applies under the immunity provision of the ATA—the best reason to think the Second Circuit got it wrong was its own split decision on the issue. While the majority concluded that, yes, the commercial activity exception applies under the ATA, the concurring opinion determined that it did not. (App. 36a, 44a). When a panel of experienced judges sitting on one of the two circuits best known for deciding issues of foreign sovereign immunity (the Second and District of Columbia circuits) reaches the opposite conclusion on an issue of statutory interpretation, that alone is ample reason to doubt the majority's view. (Opp. 26).

Turning briefly to Respondents' primary counter-arguments, they first maintain that it is "untenable" to simultaneously conclude that the ATA and FSIA share a common definition of the term of

"foreign state" and that the ATA and FSIA are subject to different statutory exceptions.

Again, not so. Simply put, there is a world of difference between harmonizing identical terms in related statutes (here, "foreign state" under the FSIA and ATA, which does and should have a single consistent meaning) and engrafting entire sections of statutory text from one of those statutes to the other (here, copying the entirety of 28 U.S.C. § 1605's general exceptions over to Section 2337, the immunity provision of the ATA).

The former is a straightforward application of the canons of statutory construction: "This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes." *Azar v. Allina Health Servs.*, 587 U.S. 566, 574 (2019). The latter is a misguided application of this Court's past declarations that the FSIA is the "sole source" of civil jurisdiction, and the same mistake that had led the Second Circuit astray in *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264 (2023).

Next, Respondents argue that: "It is simply not plausible that a statute [JASTA] designed to curtail foreign sovereign immunity in fact" expanded it. (Opp. 27). Fundamentally, this misconstrues that part of the argument, which is not that JASTA stripped out the FSIA exceptions from underneath the ATA, but rather that (in summary) the ATA was never subject to the FSIA's exception in the first place, and that JASTA's existence as the only provision of the FSIA to expressly abrogate Section 2337 is a very clear

indication of that (as well as further guide to the interpretation of the term "foreign state"). Congress knows how to carve out exceptions to ATA immunity, in other words: JASTA is both of proof of that truth and the only statute in which Congress actually enacted such a carveout.

It is not at all "illogical," moreover, (or even especially surprising) to argue that, with JASTA, Congress indeed intended to "expand the circumstances in which foreign states could be held liable for supporting terrorism," (Opp. 27) but *without* blowing the barn doors off entirely (as the Second Circuit has now done by incorporating all FSIA exceptions into the ATA). To the contrary, that impression is *reinforced* by JASTA's carefully crafted text and its arduous passage through the political branches (*see* Pet. 24-25)—another delicate negotiation between Congress and the President that seems entirely superfluous if the Second Circuit is correct that the FSIA's exceptions already applied under the ATA, and did so the whole time.

Lastly, with respect to the second question presented—whether commercial conduct forms the gravamen of Respondents' claims—Respondents contend that Sberbank's "interpretation" of *Sachs* is not supported by the decision itself: "Nowhere in *Nelson* or *Sachs* did this Court hold, *or even suggest*, that the commercial activity exception applies only where the jurisdictionally relevant commercial activity 'actually injured' the Respondents." (Opp. 24) (emphasis added).

But that *is* the holding of *Nelson* (certainly no mere suggestion!), as reaffirmed by *Sachs* in black and white: "The suit [*in Nelson*] was instead based upon the Saudi sovereign acts that actually injured them. . . . we zeroed in on the core of their suit: the Saudi sovereign acts that actually injured them." 577 U.S. at 34-35.

That is the rule of *Nelson* and *Sachs* and the rule from which the Second Circuit departed so substantially that its decision merits certiorari. Respondents were not actually injured by payments transited through U.S. bank, they were actually injured by a missile. In focusing—explicitly—on those upstream payments rather than the fatal attack on MH-17, the Second Circuit did not simply misapply *Sachs*, it abandoned it.

CONCLUSION

This Court should grant Sberbank's petition for a writ of certiorari.

Respectfully submitted,

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