No. 26-442

In the Supreme Court of the United States

PETERSEN ENERGIA INVERSORA, S.A.U., ET AL.,
Petitioners,

v.

ARGENTINE REPUBLIC, ET AL.

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

Brief of Professor Kevin M. Clermont as *Amicus Curiae* in Support of Petitioners

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Kevin M. Clermont is the Ziff Professor of Law at Cornell Law School. He specializes in Civil Procedure. His relevant publications include *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 Cornell L. Rev. 243 (2018); *Signaling Deference to Another Sovereign's Law*, 59 Gonz. L. Rev. 207 (2024); and *Xenophilia in American Courts*, 109 Harv. L. Rev. 1120 (1996) (with Theodore Eisenberg). He has expertise in the rules governing the determination of foreign law in U.S. courts. He has a strong interest in the proper application of those rules and in the orderly development of the law. *Amicus* submits this brief to address the second question presented—the deference a federal court owes a foreign sovereign's litigation position about the content of its own law. *Amicus* takes no position on the first question presented.

SUMMARY OF ARGUMENT

When they are amenable to suit in United States courts, foreign sovereigns should be treated no better and no worse than domestic litigants. Litigation positions of foreign sovereigns regarding questions of foreign law should be treated like the views of the United States government concerning questions of federal law: with "respectful consideration." But those

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amicus* and his counsel made a financial contribution to its preparation or submission. Counsel of Record for Petitioners and Respondents received timely notice of *amicus*'s intent to file this brief.

views are authoritative only to the extent that they are persuasive. In practice, this means that the litigation positions of foreign sovereigns should receive *Skidmore* deference. And, consistent with *Skidmore* and even affording a sovereign "respectful consideration," courts are (and should be) particularly skeptical of self-serving, post-hoc rationalizations offered in litigation regardless of whether those rationalizations come from foreign or domestic sources. The alternative, reflexively adopting the litigation positions articulated by foreign sovereigns, would be inconsistent with international and foreign practice, including Argentina's own treatment of governmental views articulated in litigation.

Amicus's scholarship helps explain why. The "first principle of judging" is "to decide as correctly as you can" and to "not pass the buck." *Signaling Deference to Another Sovereign's Law*, 59 Gonz. L. Rev. 207, 221 (2024). Deference, tugging away at that principle, "requires a clear signal from on high"—whether from a constitution, treaty, legislature, or highest court. *Id.* 222. No such signal commands an American court to adopt a foreign sovereign's litigating position about the content of its own law. Deference, in other words, runs to the *law*, and not to any one *litigant*. Even a sovereign's position is only persuasive to the extent it is a correct description of the law.

Measured against these jurisprudential principles, the decision below cannot stand. The panel majority gave dispositive weight to Argentina's interpretation of its own law—an interpretation Argentina advanced for the first time on appeal, after its contrary position had failed adversarial testing and expert rebuttal in the district court—while setting aside in a footnote

the district court's decade of engagement with the same questions. That reflexive deference inverts *Animal Science* and, as the petition explains, implicates an acknowledged and entrenched conflict among the courts of appeals over whether ordinary principles of waiver and forfeiture apply to foreign-law arguments and materials raised for the first time on appeal. That question is recurring and important, and this case is an appropriate vehicle for resolving it. Indeed, had the Second Circuit applied the correct standard, it would have set Argentina's new, self-serving account aside and affirmed the judgment entered below. The petition should be granted.

ARGUMENT

I. Argentina's views of its laws should receive the same "respectful consideration" that the United States receives concerning questions of federal law: *Skidmore* deference.

Under this Court's precedents, "[a] federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements." *Animal Science Prod., Inc.* v. *Hebei Welcome Pharm. Co.*, 585 U.S. 33, 36 (2018); see also *Rhode Island* v. *Massachusetts*, 45 U.S. (4 How.) 591, 634 (1846) (decision of "king and council" circa 1740 concerning the colonial boundaries of Massachusetts, "if not regarded as authority in other cases, is entitled to respectful consideration"). Respectful consideration is a fluid inquiry, not a rigid rule, because "[g]iven the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will

fit all cases in which a foreign government describes its own law." *Animal Science*, 585 U.S. at 43. "Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions." *Ibid.* In particular, "[w]hen a foreign government * * * offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission." *Ibid.*

This set of considerations evokes a familiar standard from administrative law, *Skidmore* deference. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) ("The weight of [an agency's legal interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); see also Kristen E. Eichensehr, *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 113 AM. J. INT'L. L. 116, 121 (2019) ("Although the Court's opinion does not cite *Skidmore*, the relevance of domestic deference doctrines was clear at oral argument." (footnote omitted)); *id.* 122 ("Hitching the amount of deference due to foreign sovereigns to familiar administrative law doctrines provides a useful shortcut, not just for the justices but

for practitioners and academics faced with foreign government filings.").

That similarity should not be surprising as *Skidmore* deference, like *Animal Science*, requires federal courts to afford "respectful consideration" but not binding effect to the Executive Branch's views regarding the content of federal law. See *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 386 (2024) (describing historical practice where the federal judiciary "gave 'the most respectful consideration' to Executive Branch interpretations" but still exercised independent judicial judgment); *id.* 431–432 (Gorsuch, J., concurring) ("Echoing themes that had run throughout our law from its start, Justice Robert H. Jackson wrote for the Court in *Skidmore*. There, he said, courts may extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretations must always depend upon their thoroughness, the validity of their reasoning, their consistency with earlier and later pronouncements, and all those factors which give them power to persuade." (cleaned up)); *Kisor* v. *Wilkie*, 588 U.S. 558, 622 (2019) (Gorsuch, J., concurring in judgment) ("*Skidmore* * * * recognized * * * that, while courts should of course afford respectful consideration to the expert agency's views, they must remain open to competing expert and other evidence supplied in an adversarial setting.").

A. Under *Skidmore*, self-serving litigation positions receive little to no weight.

Courts applying *Skidmore* deference have reacted with "near indifference" to "interpretation[s] advanced for the first time in a litigation brief." *United*

States v. *Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988)). Likewise, "a court should decline to defer to a merely 'convenient litigating position' or '*post hoc* rationalization advanced' to 'defend past agency action against attack.'" *Kisor*, 588 U.S. at 579; see also *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action.").

That skepticism should apply with equal force when circumstances suggest that a legal interpretation offered by a foreign sovereign, although "entitled to respectful consideration" and "purport[ing] to be founded on a construction of" foreign law, is actually based "upon principles of expediency." *Rhode Island*, 45 U.S. (4 How.) at 634. After all, *Animal Science* directs courts to consider both "context and purpose" of a statement regarding the meaning of foreign law and "the role and authority of the entity or official offering the statement." 585 U.S. at 43. Here, for instance, the district court's $16.1 billion judgment should give courts over 16 billion reasons to be skeptical regarding Argentina's litigation position.

B. "Respectful consideration," rooted in international comity, requires no more than equal treatment.

Federal courts give respectful consideration to the views of foreign sovereigns "[i]n the spirit of 'international comity.'" *Animal Science*, 585 U.S. at 34. "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign

states." *Société Nationale Industrielle Aérospatiale* v. *U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 543–544 n.27 (1987). And comity, like sovereign immunity generally, is rooted in the equality of nations. See *The Antelope*, 23 U.S. 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations."); *The Schooner Exch.* v. *McFaddon*, 11 U.S. 116, 137 (1812) (recognizing the "perfect equality and absolute independence of sovereigns"); see also *Hilton* v. *Guyot*, 159 U.S. 113, 214 (1895) ("Mr. Justice Cooley said: 'True comity is equality. We should demand nothing more and concede nothing less.'").

But providing equal treatment to foreign sovereigns does not require United States courts to give the views of foreign sovereigns more deference than state governments or the United States itself would receive in like circumstances. See *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 114 (2022) ("[A] foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would."); see also *Animal Science*, 585 U.S. at 44 (commenting that, when addressing questions of state law, the "views of the State's attorney general, while attracting 'respectful consideration,' do not garner controlling weight"). International comity thus does not require federal courts to credit the self-serving litigation positions of foreign sovereigns.

C. Reflexive adoption of a foreign sovereign's view of its laws is inconsistent with foreign and international practice, including Argentina's own.

Giving reflexive deference to a foreign sovereign's interpretation of its own laws is problematic. But the Second Circuit below went beyond deference and mechanically adopted Argentina's views—a result that, as a matter of jurisprudence, is inconsistent with international norms and practices, including Argentina's own. The two most important international treaties on the interpretation of foreign law both recognize that the expressed views of a foreign sovereign are not entitled to reflexive deference. See European Convention on Information on Foreign Law (London Convention) art. 8, June 7, 1968, 720 U.N.T.S. 154 (when a state replies to a formal request for information about its laws, "[t]he information given in the reply shall not bind the judicial authority from which the request emanated"); Inter-American Convention on Proof of and Information on Foreign Law art. 6, May 8, 1979, 1439 U.N.T.S. 111 ("The State that receives [a governmental report regarding the meaning of foreign law] shall not be required to apply the law, or cause it to be applied, in accordance with the content of the reply received."). While the United States is not a signatory to either treaty, "the United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources," *Animal Science*, 585 U.S. at 45–46, and the Department of Justice "[is] not aware of any foreign-court decision holding that the [Department's] representations are entitled to * * * conclusive weight." Br. for

the United States as *Amicus Curiae, Animal Science*, No. 16-1220, 2018 WL 1181858, at *11–12 (U.S. Mar. 5, 2018).

Argentina itself does not give binding effect to foreign sovereigns' interpretations of their own laws. See Yuko Nishitani, *Treatment of Foreign Law: Dynamics Toward Convergence?—General Report, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARD CONVERGENCE? 26 & n.119 (Yuko Nishitani ed., 2017) ("Information obtained with respect to foreign law is not binding in most jurisdictions * * * . The judge needs to examine the quality of the obtained information in court proceedings, possibly by using additional materials. In light of this, it is sensible policy to exclude the binding force of any information provided in relation to foreign law."); Diego P. Fernandez & Paula Maria All, *Argentina: The Changing Character of Foreign Law in Argentinian Legal System, in* TREATMENT OF FOREIGN LAW: DYNAMICS TOWARD CONVERGENCE? 467-68 (Yuko Nishitani ed., 2017) (Argentine judges must seek to "penetrate the meaning of the foreign law," but foreign legal opinions "will not be binding on them.").

Indeed, under the express terms of the Inter-American Convention, signatories, including Argentina, are not themselves bound by the views they express to foreign courts. Inter-American Convention on Proof of and Information on Foreign Law art. 6 ("The State that provides the reports [about the meaning of its laws] shall not be held responsible for the opinion expressed nor shall it be required to apply the law, or cause it to be applied, in accordance with the content of [such reports].").

II. The court below deferred to a self-serving interpretation that Argentina raised for the first time on appeal, contravening *Animal Science* and deepening an acknowledged circuit conflict.

The panel majority improperly credited Argentina's account of its own law even though Argentina advanced that account for the first time on appeal—abandoning the categorical position it had pressed, and lost, in the district court after expert rebuttal and cross-examination. See Pet. 27–31; Pet.App. 29–38. The panel invoked its asserted "discretion to decide [a] question of Argentine law in the first instance" and treated itself as "not * * * limited to the record created in the district court." Pet.App. 46 (quoting *Bugliotti* v. *Republic of Argentina*, 952 F.3d 410, 413 (2d Cir. 2020)). And it set aside in a single footnote the district court's decade of engagement with the very same questions of Argentine law. See Pet.App. 39 n.14.

That is the opposite of what *Animal Science* requires. This Court instructed courts to weigh "the statement's consistency with the foreign government's past positions" and to exercise "caution" when a foreign government "offers an account in the context of litigation." *Animal Science*, 585 U.S. at 43. An interpretation that materially contradicts the sovereign's own prior litigating position—and that conveniently erases a multi-billion-dollar judgment—is the paradigm case for skepticism, not deference. By crediting Argentina's appellate submission while disregarding the contrary record and the district court's reasoning, the panel "rivet[ed] its attention on [the sovereign's] submission" in precisely the manner this Court has warned against. *Id.* 44.

The equal-treatment principle discussed above supplies the governing rule. A domestic litigant may not spring a new legal theory for the first time on appeal, and a foreign sovereign is entitled to no greater latitude. Rule 44.1 makes the content of foreign law a question of law subject to de novo review, but it does not convert the courts of appeals into courts of first instance. Appellate courts must give "due consideration to the first-instance decisionmaker's 'feel' for the overall case." *Weisgram* v. *Marley Co.*, 528 U.S. 440, 443 (2000). That is especially so for foreign law, whose content is often established through "fact-like procedures"—competing expert reports, live testimony, and translations—that a trial court is best positioned to manage. See Pet.App. 47 (Cabranes, J., dissenting).

Applying such an equal-treatment principle here would resolve the split identified by petitioners. Pet. 31–34. The rule in the Fifth and Ninth Circuits should prevail. Those circuits apply ordinary preservation principles to foreign-law arguments, holding that a party relying on foreign law must present its theories and materials to the district court and does not receive "a second chance to meet his burden of proof on appeal." See *Banque Libanaise Pour Le Com.* v. *Khreich*, 915 F.2d 1000, 1006–1007 (5th Cir. 1990); *G & G Prods. LLC* v. *Rusic*, 902 F.3d 940, 949–950 (9th Cir. 2018) (Rule 44.1 is not "a permission slip for unlimited do-overs."). That is the right result. The more permissive side of the split, including as articulated by the decision below, improperly hands foreign sovereigns a one-sided option to re-litigate the content of their own law on appeal—even as opposing litigants are bound by standard forfeiture rules to their submissions below. This is exactly the asymmetry the equal-

treatment principle forbids. This Court's review is warranted.

III. Respectful consideration does not relieve courts of their independent duty under Rule 44.1 to determine foreign law as the sovereign's highest court would.

Respectful consideration assigns weight to the sovereign's position, but it does not license abdication. Rule 44.1 makes the determination of foreign law "a ruling on a question of law" and authorizes the court to "consider any relevant material or source * * * whether or not submitted by a party." Fed. R. Civ. P. 44.1. Consistent with that charge, a court "is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials." *Animal Science*, 585 U.S. at 43.

Properly performed, the inquiry asks what the foreign sovereign's own highest court would hold—not what the sovereign's executive asserts in the course of litigation. A court applying another sovereign's law should "put itself into the shoes of the highest foreign court" and apply the law that court "would apply," accounting for the latest precedent and other authoritative sources. See Clermont, *Signaling Deference*, 59 Gonz. L. Rev. at 212–222 (2024); Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign's Law*, 103 Cornell L. Rev. 243, 279–293 (2018). On that approach, the sovereign's litigation position is one input—weighed for its persuasiveness—while the controlling question remains how the foreign sovereign's highest court would decide the issue. The panel majority collapsed that inquiry into deference to Argentina's appellate say-so,

and in doing so departed from both *Animal Science* and Rule 44.1.

And properly applied here, the correct standard would have changed the result. Had the panel afforded Argentina's appellate account only the respectful consideration *Animal Science* permits, and applied the ordinary preservation rules that bar a litigant from recasting its legal theory for the first time on appeal, it would have set that account aside and decided the case on the record developed below. On that record, the district court—after full expert discovery and a trial—had determined that YPF's bylaws created bilateral obligations enforceable against the Republic, remediable in damages, and not precluded by Argentina's expropriation law, a determination that even the concessions of Argentina's own expert supported. See Pet. 9–10, 27–30; Pet.App. 45–47 (Cabranes, J., dissenting). Giving Argentina's litigation position no more weight than its persuasiveness warranted, the court of appeals would have had no basis to displace those findings, and the judgment for petitioners would have been affirmed. The panel's error was not academic; it was outcome-determinative.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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