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.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR COMPETITIVE ENTERPRISE INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Competitive Enterprise Institute (CEI) is a nonprofit educational and research institute headquartered in Washington, D.C., dedicated to promoting free markets, limited government, and the rule of law. Since its founding in 1984, CEI has worked to improve public understanding of the problems of overregulation through policy analysis, commentary, and litigation.

Functioning free markets depend on neutral forums to enforce agreements between parties. And when it comes to questions of law, courts should not defer to the late-breaking views of a litigant—especially a government with money at stake. Yet the decision below lets a sovereign that raised capital on the New York Stock Exchange walk away from the promises it made to acquire that capital. It does so by crediting the sovereign's own account of its law. Because the decision below disserves the rule of law and would cause uncertainties that undermine the market system, CEI has a significant interest in this case.*

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* Under Rule 37.2, the parties' counsel of record received timely notice of the intent to file this brief. Under Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

Efficient markets, whether capital markets or any other kind, depend on one party's ability to rely on the other's agreement. As this Court has recognized, "[t]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time." *Am. Airlines, Inc.* v. *Wolens*, 513 U.S. 219, 230 (1995).

The question in this case is whether Argentina should be able to negate the promises it made to investors when it sold shares of its state oil company (YPF) in the early 1990s. In YPF's bylaws, Argentina promised shareholders set compensation if the government ever retook control. Thanks to this promise, Argentina reaped over a billion dollars from selling shares. But a couple decades later, Argentina retook control of YPF—and declined to pay the compensation it had agreed on. The decision below recognized that this was a "knowing and flagrant violation of the promises it made to foreign investors," Pet. 39a, yet it overturned the judgment for the shareholders. It did so by applying a defense available only to a sovereign and by crediting Argentina's appellate account of its own law. This Court's review is needed.

I. The decision below threatens the enforcement of commitments on which capital markets depend. Sovereigns can raise money from investors only if those investors believe the sovereign will perform—and that if the sovereign does *not* perform, redress can be had. Congress provided a stable liability rule for such redress via the Foreign Sovereign Immunities Act (FSIA). FSIA makes a foreign state that

participates in commercial activity and lacks immunity "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Yet the majority below applied a defense available only to Argentina as sovereign—its expropriation law. A private shareholder that seized control of YPF and refused the required tender could not invoke that law, so the panel effectively granted Argentina the immunity FSIA denies for commercial acts. Nor is the panel's suggested alternative—suit in Argentina's own courts—a remedy: the district court found those courts inadequate. This legal distortion will have serious consequences for markets, including higher borrowing costs even for sovereigns that keep their word, less protection for American investors, and market inefficiencies resulting from uncertainties. And because the disputes that follow sovereign offerings in New York often land in the Second Circuit, the decision's effects will extend beyond this case.

II. The panel also gave Argentina's appellate account of its own law unwarranted deference. Our legal system does not let a party decide its own case, and this Court has refused to defer to a litigant's convenient legal positions—even those of the United States. A foreign government's interpretation of its laws—offered late in a controversy involving billions of dollars of potential liability for the government—deserves no more deference. Allowing a sovereign to rewrite its law on appeal destabilizes every contract that law governs and undermines the promise of neutral principles in adjudication.

The Court should grant certiorari.

REASONS FOR GRANTING THE WRIT

I. The decision below contravenes FSIA and will distort American markets.

Argentina raised more than $1.1 billion on the New York Stock Exchange by promising investors protection if it ever retook YPF, then broke that promise—as the panel acknowledged. Pet. 39a. By excusing the breach through a defense available only to a sovereign, the decision below contradicts FSIA's command that a non-immune foreign state be liable like a private party. The resulting uncertainty will raise borrowing costs, chill investment, and penalize sovereigns that keep their word.

A. Markets depend on enforceable promises, like the one Argentina made to investors.

Decisions to enter agreements—including capital exchanges—depend on whether those agreements can be enforced. If the consideration obtained by one party would be worthless due to enforcement failure, that party would not enter the agreement: "Who would knowingly roll the dice in a crooked crap game?" *Basic Inc.* v. *Levinson*, 485 U.S. 224, 247 (1988). Promises made in an agreement have meaning only to the extent that they can be enforced.

These principles are particularly important when the promisor is a sovereign. A sovereign writes, interprets, and administers the very law that would ordinarily hold it to its word. A government that can change the rules after the money arrives will soon find that the money stops arriving—or arrives only at a steep premium.

"For economic growth to occur the sovereign or government must not merely establish the relevant set of rights, but must make a credible commitment to them." D. North & B. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. Econ. Hist. 803, 803 (1989). England after the Glorious Revolution is one illustration: once new institutions constrained the Crown, "government borrowing increased by more than an order of magnitude" in under a decade, "reflect[ing] a substantial increase in the perceived commitment by the government to honor its agreements." *Id.* at 805.

Alexander Hamilton made a similar point in his report to Congress on the public credit: "States, like individuals, who observe their engagements, are respected and trusted: while the reverse is the fate of those, who pursue an opposite conduct." A. Hamilton, *Report Relative to a Provision for the Support of Public Credit* (Jan. 9, 1790), in Founders Online, National Archives, https://perma.cc/964P-MNSR. Hamilton emphasized that public credit could be "effected" by the "good faith" and "punctual performance of contracts." *Ibid.*

Argentina understood this when it privatized YPF in the early 1990s. Because of Argentina's and YPF's history, foreign investors were understandably skeptical that the government's newfound commitment to private ownership would last. So Argentina amended YPF's bylaws to protect minority investors against renationalization. See *Petersen Energia Inversora S.A.U.* v. *Argentine Republic*, 895 F.3d 194, 199 (CA2 2018) ("*Petersen II*").

Section 28(A) provided that if the "National Government" ever acquired control of 49% of YPF, it would first have to make a public tender offer to all other shareholders at an above-market price set by formula. Pet. 4a–5a. The tender had to comply with NYSE and SEC rules, and notice had to be published in New York City. *Ibid.*

"Argentina and YPF touted these protections in the prospectus filed with the SEC in connection with the IPO." *Petersen II*, 895 F.3d at 200. That prospectus assured investors that if Argentina retook control, it "first would be required to make a cash tender offer to all holders of Class D shares on specified terms and conditions." Pet. 6a. As the panel majority recognized, Argentina's "reason for doing so was plainly to assure private investors—many of whom were based in the United States—that they would be protected in the event the Republic decided to renationalize." Pet. 38a.

As the Second Circuit previously put it, "[b]y all accounts, Argentina's marketing efforts worked." *Petersen II*, 895 F.3d at 200. American depositary receipts were listed on the NYSE as part of the IPO itself, and their sale—"the largest portion of YPF's IPO"—"generated over $1.1 billion in revenue for the Republic." Pet. 6a & n.3. The majority agreed that "[i]t may well be that the Republic would not have been able to raise $1.1 billion . . . without these investor protections." Pet. 38a.

But a couple decades later, politics had changed in Argentina, and the government seized control of YPF. Its Secretary of Energy declared that "[t]he only way to go is expropriation." Pet. 7. And the Deputy Economy Minister described as "fools . . . those who

think that the State has to be stupid and buy everyone according to YPF's own law, respecting its by-law." *Petersen II*, 895 F.3d at 202. So Argentina never made the tender offer it had agreed to make. And even as the panel majority recognized the country's "knowing and flagrant violation," Pet. 39a, it reversed the judgment holding Argentina to its promises.

B. Letting Argentina disregard its promises negates FSIA.

FSIA does not let a sovereign that enters the private market escape liability because it is a sovereign. Before 1976, foreign sovereign immunity turned largely on case-by-case executive judgments. Congress replaced that regime with a "comprehensive statute that now supplies the ground rules for obtaining jurisdiction over a foreign state in the courts of this country." *Republic of Hungary* v. *Simon*, 604 U.S. 115, 121 (2025) (citation modified). When a foreign sovereign engages in "private, commercial conduct," it is not immune from liability under FSIA. *Id.* at 131. The Second Circuit has already held that Argentina is not immune. *Petersen II*, 895 F.3d at 212. And a foreign sovereign that is not immune "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

This statute makes the foreign sovereign "subject to the same rules of liability as a private party": "the substantive law applying to the latter also applies to the former." *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 114 (2022). "The provision thus ensures that a foreign state, if found

ineligible for immunity, must answer for its conduct just as any other actor would." *Ibid.*

By analogy, consider the Federal Tort Claims Act (FTCA), which "contains language identical to" FSIA's liability standard. *First Nat. City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983); see 28 U.S.C. § 2674. In the FTCA context, this Court recently reiterated that under the "general rule" of sovereign liability "to the same extent" as private liability, "uniquely" governmental defenses must be excluded. *Martin* v. *United States*, 605 U.S. 395, 413 (2025). "After all, no private individual could deploy [such defenses] to his advantage." *Id.* at 412; see *Rayonier Inc.* v. *United States*, 352 U.S. 315, 318–20 (1957); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64–69 (1955).

Yet the panel majority refused to approach this FSIA case as "a run-of-the-mill civil contract dispute between two private parties," instead considering the case in light of "foreign public law that governs actions performed by a sovereign"—namely, expropriation. Pet. 28a–29a & n.12. A private shareholder that seized control of YPF and refused the required tender could not invoke Argentina's General Expropriation Law. Only a sovereign expropriator can. See Pet. 25a–26a. And the statute's reference to "'like circumstances' do[es] not restrict a court's inquiry to the same circumstances, but require[s] it to look further afield" to analogize to a private defendant. *United States* v. *Olson*, 546 U.S. 43, 46 (2005) (citation modified).

The panel, however, used its sovereign-only rule to wipe out a judgment based on a commercial promise. The panel noted that "the tender offer requirement did

not literally bar the expropriation." Pet. 36a. But it applied "Argentine public law" and concluded that the lawsuits "have clearly 'impede[d]' the Republic's expropriation." Pet. 34a–36a; see Pet. 29a ("Plaintiffs' breach of contract claims for damages are precluded by the Republic's public law governing expropriation.").

Under FSIA's plain meaning, that sovereign-only law cannot be wielded as a defense against liability based on Argentina's private, commercial acts. A defense that exists only because the defendant is the sovereign does not treat Argentina "in the same manner" as a private individual.[1]

Trying to limit the breadth of its holding, the panel floated the possibility of a suit in Argentina's own courts. Pet. 39a. Yet the district court had already found those courts inadequate, in a ruling the panel left undisturbed. It found that "the facts as alleged give rise to a well-founded fear of prosecution of parties' counsel if the instant action were brought in Argentina," and it held that Argentina had not shown its courts to be an adequate alternative forum. Pet. 167a–168a; see Pet. 19a. Sending investors back to the courts of the sovereign that repudiated its promise—a sovereign whose officials derided investors as "fools" and compliance as "stupid"—is not a remedy.

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[1] Petitioners explain why the Second Circuit's alternative holding—focused on the enforceability of corporate bylaws under Argentine law—is likewise in tension with FSIA. Pet. 18–19. As explained in Part II, *infra*, that alternative holding also rests on unwarranted deference to Argentina's belated account of its domestic law.

C. The costs of the panel's approach will fall on investors, on American markets, and on sovereigns that keep their word.

The panel majority's decision will have significant ramifications in important financial markets. Foreign governments and the companies they control come to New York to raise capital from private investors. The disputes that follow often land in the Southern District of New York and the Second Circuit. Argentina's own history proves the point. See *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 609–10 (1992); *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134, 136–37 (2014). So the Second Circuit's holding about the enforceability of sovereign promises matters to the underwriters, investors, and sovereigns that do business there.

FSIA ensures that foreign sovereigns who engage in commercial exchanges "will be liable in the same way as a private party." *Cassirer*, 596 U.S. at 115. It provides a stable rule against which parties can contract with sovereigns: "the same choice-of-law rule," "the same substantive law," and "the same liability" as if the sovereign were private. *Id.* at 114.

By departing from FSIA, however, the decision below signals that a sovereign's commitments to investors in America are enforceable only if the sovereign's own law, as the sovereign describes it in litigation, permits. Beyond the obvious unfairness to investors here, that rule adds uncertainty to transactions—in investment terms, it adds risk. Some investors will demand a higher return to compensate for the risk that the promise will vanish when it comes due. Other investors, finding the risk too high relative

to the expected return, will stay away. Foreign sovereigns that would keep their word may be unable to credibly distinguish themselves from those that would not.

The effects of greater uncertainty and risk are unsurprising—and supported by empirical research on related issues.

Costs of borrowing will increase, depriving sovereigns of capital that would otherwise be available—thereby reducing infrastructure and development. See, *e.g.*, S. Saiegh & G. Biglaiser, *The Value of Legal Recourse in Sovereign Bond Markets: Evidence from Argentina*, 21 J. Empirical Legal Stud. 669, 669 (2024) (finding support for the proposition that "market participants price certain legal terms (e.g., governing law) in sovereign debt"); M. Bradley et al., *Risk, Contract Terms, and Maturity in the Sovereign Debt Market*, 10 J. Fin. Regul. 109, 109 (2024) (finding that "[i]nvestors are willing to pay a premium" for "contractual parameters" that "preclude[] the issuing sovereign from taking actions that would diminish the" investment value after issuance); J. Cruces & C. Trebesch, *Sovereign Defaults: The Price of Haircuts*, 5 Am. Econ. J.: Macroeconomics 85, 85 (2013) (restructurings with higher investor losses "are associated with significantly higher subsequent bond yield spreads and longer periods of capital market exclusion").

Facing these higher costs, sovereigns will offer less, leaving investors with fewer choices than they would have had without the uncertainty the decision below creates. See, *e.g.*, J. Bulow & K. Rogoff, *Sovereign Debt: Is to Forgive to Forget?*, 79 Am. Econ. Rev. 43, 43

(1989) (emphasizing the importance of "direct sanctions available to creditors," especially for small countries).

The costs of capital will increase, and the returns on investments will decrease. See, *e.g.*, B. Hébert & J. Schreger, *The Costs of Sovereign Default: Evidence from Argentina*, 107 Am. Econ. Rev. 3119, 3119 (2017) (finding that "a 10 percent increase in the probability of default causes a 6 percent decline in the value of Argentine equities"); M. Chamon et al., *Foreign-Law Bonds: Can They Reduce Sovereign Borrowing Costs?*, 114 J. Int'l Econ. 164, 166 (2018) ("In a high-risk environment, investors start valuing contractual terms, in particular the choice of jurisdiction.").

American markets overall will see less activity, with risks deterring both buyers and sellers from participating. The result "is a world with too little investment, and in the wrong things to boot." F. Easterbrook & D. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va. L. Rev. 669, 673 (1984); cf. *United States* v. *Naftalin*, 441 U.S. 768, 776 (1979) (noting the connection between "the welfare of investors and financial intermediaries" and "the economy as a whole").

In sum, the opportunities of American markets are why Argentina came to the New York Stock Exchange with YPF shares in the first place. Letting Argentina avoid its commitments undermines the stability and reliability that created those opportunities.

II. Courts should not defer to a sovereign litigant's self-serving, late-breaking account of its own law.

A party does not get to decide what the law means in its own case. That is why this Court has refused to credit a federal agency's convenient litigating position. A foreign sovereign facing a $16.1 billion judgment deserves no greater deference. Yet the panel credited Argentina's appellate account of its own law over a decade of adversarial testing in the district court. That approach invites sovereigns to rewrite their law whenever liability looms, injecting into every agreement they make the same instability and market distortion discussed above.

A. Litigants—including foreign sovereigns—should not act as judges in their own causes.

James Madison emphasized at the Founding that "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10. Early in the Republic's history, Justice Chase listed "a law that makes a man a Judge in his own cause" among the acts no legislature may legitimately pass. *Calder* v. *Bull*, 3 Dall. 386, 388 (1798) (opinion of Chase, J.). The principle is also embedded in due process. Every litigant is entitled to "an impartial and disinterested tribunal." *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "[N]o man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

These principles are in tension with deference to a party's legal views. Even before this Court ended deference to agencies' statutory interpretations in *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369 (2024), it recognized that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988). Nor will courts defer to an agency's "*post hoc* rationalizatio[ns]." *Kisor* v. *Wilkie*, 588 U.S. 558, 579 (2019).

The same logic governs foreign law. Federal Rule of Civil Procedure 44.1 provides that "[i]n determining foreign law, the court may consider any relevant material or source," "whether or not submitted by a party." So "a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials." *Animal Science Prods., Inc.* v. *Hebei Welcome Pharm. Co.*, 585 U.S. 33, 43 (2018). What weight to give the foreign government's characterization depends on several considerations, including the statement's "context and purpose" and its "consistency with the foreign government's past positions." *Ibid.* "[C]onflicting statements" "may be cause for caution." *Ibid.*

If anything, the case for caution is stronger for a foreign sovereign than for a federal agency. An agency is part of our own constitutional system, accountable to the President and bound by the Administrative Procedure Act. A foreign sovereign may have no similar checks. And when that sovereign is the defendant facing a $16.1 billion judgment, its interest could hardly be more direct.

B. The panel credited Argentina's new account of its law in place of a decade of adversarial testing.

Though the panel recited this Court's standards from *Animal Science*, it did not apply them. Pet. 21a. For instance, on the expropriation law, Argentina argued at summary judgment that the tender obligation itself would impede the expropriation. It offered four theories: the obligation would place an "encumbrance" on the expropriated shares, force Argentina to acquire more than 51% of YPF, threaten YPF's status as a publicly traded company, and upset the statutory division of the expropriated shares between the federal government and the provinces. D. Ct. Dkt. 373, at 34–37. The district court rejected each theory. Pet. 126a–129a. On appeal, Argentina raised the idea that later liability could be the impediment only in a parenthetical, invoking "the specter of uncapped potential liability . . . years in the future." Argentina CA2 Opening Br. 65. Yet that idea became the panel's holding: the litigation and the judgment themselves "impede[d]" the expropriation. Pet. 36a.

The panel adopted Argentina's views about its own law despite the caution signs that this Court identified in *Animal Science*. Argentina offered its account "in the context of litigation." Its account was in tension with Argentina's "past positions," including its arguments in the district court. See *Animal Science*, 585 U.S. at 43. And the stakes for Argentina were obvious. Yet the panel addressed the district court's contrary conclusions—reached after more than ten years of proceedings conducted "with meticulous care," expert reports from all sides, and live testimony—in a

passing footnote. Pet. 39a n.14; Pet. 44a–47a (Cabranes, J., dissenting).

Bad faith is not the issue; after all, every litigant's legal arguments are shaped by its interests. That is why our system tests legal arguments through adversarial presentation before a neutral decisionmaker, rather than accepting a party's word for what the law requires. The majority below inverted that process by treating the sovereign's appellate account as the starting point for its analysis.

C. Letting sovereigns rewrite their law destabilizes agreements and further distorts markets.

Letting foreign sovereigns put a thumb on the scale for their own self-interested legal interpretations will deter market exchanges. For instance, YPF's bylaws chose Argentine law. Pet. 21a–22a. Investors accepted that choice based on what Argentine law says—and on the understanding that United States courts would apply that law to Argentina just as they would to a private person. See 28 U.S.C. § 1606; cf. *Basic*, 485 U.S. at 246 (noting that "[r]ecent empirical studies have tended to confirm . . . that the market price of shares traded on well-developed markets reflects all publicly available information").

What they did not accept—what no investor could price—was Argentine law as Argentina would later describe it while defending a multibillion-dollar judgment. If a sovereign may revise its account of its own law after losing in the trial court, then every contract governed by that law carries a hidden risk:

the sovereign may reinterpret the law to escape its obligations.

As this Court has recognized in the agency context, deference to a litigant's legal interpretations may thus "foster[] unwarranted instability," creating "an eternal fog of uncertainty" for those who interact with the litigant. *Loper Bright*, 603 U.S. at 411. The concern is even greater when a reinterpretation arrives mid-case, after the trial court exhaustively explored the sovereign's earlier position. The instability caused by apparent deference to a sovereign's appellate litigation position will have many of the same negative consequences for markets that Part I.C describes: deterring investments, raising costs, and creating market inefficiencies. These consequences—in the Second Circuit, home of the world's most significant financial market—reinforce the need for this Court's review.

CONCLUSION

For these reasons, this Court should grant certiorari.

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