Nos. 26-442

In the Supreme Court of the United States

PETERSEN ENERGIA INVERSORA, S.A.U., PETERSEN ENERGIA S.A.U., ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK MASTER FUND, LTD., ETON PARK FUND, L.P.,
Petitioners,

v.

ARGENTINE REPUBLIC, YPF S.A.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE HEARTLAND INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Heartland Institute is a national nonprofit research and education organization based in Schaumberg, Illinois. Its mission since its founding in 1984 is to discover, develop, and promote free-market solutions to social and economic problems. This includes challenging government actions that disrupt the free market and that impose unnecessary costs and risks on investors and consumers.

This appeal presents a clear example of an unjustifiable capture of American capital by a foreign power that disrupts the free market and flouts the sovereign immunity laws of the United States. The Second Circuit's decision allows a foreign corporation that held itself out as a safe investment to United States citizens to break those promises without any meaningful remedy. The Second Circuit panel blessed that outcome despite the fact that it contradicted the principles codified in the Foreign Sovereign Immunity Act (FSIA) that foreign sovereigns lack sovereign immunity in commercial dealings. The Heartland Institute urges that this Court's review is warranted to protect free markets and United States investors from this unjustified expansion of immunity for foreign sovereigns raising capital in United States markets.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus* certifies that this brief was not authored in any part by counsel for any party and that no person or entity other than *amicus* or its counsel made a monetary contribution to fund its preparation or submission. *Amicus* timely notified the parties of this filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case warrants the Court's review because it is of vital importance to the legal protections within the federal court system for United States investors who invest in foreign countries. The Second Circuit unjustifiably reversed the district court's careful analysis and rendered toothless important protections contained in the FSIA and this Court's FSIA precedents. This Court's review is necessary to prevent the lower court's approach from engulfing bedrock immunity and *forum non conveniens* standards.

Contrary to the panel's assertion that "this is not a run-of-the-mill civil contract dispute between two private parties," Pet.App.28, Congress passed the FSIA to ensure that foreign powers that engaged in commercial activity would have to litigate on a level playing field within United States courts. The Act codifies a restrictive theory of foreign sovereign immunity longstanding in American law that treats foreign powers as private parties without immunity when they engage in commercial activity within the United States. Under these principles (and as the Second Circuit previously held in this very case), Argentina's activities here fell squarely within the FSIA's commercial activity exception to sovereign immunity.

In its merits analysis, the Second Circuit nonetheless allowed Argentina to avoid the FSIA's commercial exception by reading Argentine law to provide the country with immunity from any liability sounding in contract. It reached that holding despite the district

court's opposite conclusion after hearing extensive expert testimony concerning this exact topic. And the majority's suggestion that Plaintiffs should have brought this action in Argentina runs contrary to *forum non conveniens* principles and related strong protections for plaintiffs who are at home in their chosen jurisdiction from that type of dismissal.

ARGUMENT

I. The Decision Below Impedes Free Markets and the Security of Investments in Foreign Companies Listed in the United States.

This case merits the Court's review because the decision below improperly granted deference to a foreign sovereign defendant on the merits of (and proper venue for) the legal claims brought against it. That holding sits in tension with the FSIA and this Court's precedents interpreting it. The Second Circuit's approach allows bad-faith actors to make an end-run around provisions of federal law designed to hold foreign states to their commercial commitments. At bottom, the decision below smuggles additional sovereign immunity considerations into its analysis of the merits of Petitioners' claims in a way that harms free markets and threatens the security of United States investors' investments in foreign companies.

A. The Foreign Sovereign Immunity Act protects American investors who deal with foreign sovereigns.

The decision below attacks the very underpinnings of the Foreign Sovereign Immunities Act. Congress

passed the FSIA in 1976 to "codif[y] the restrictive theory of foreign sovereign immunity." *Jam v. Int'l Finance Corp.*, 586 U.S. 199, 204 (2019). Indeed, this Court has explained that "after the State Department endorsed the restrictive theory of foreign sovereign immunity in 1952, the lower courts consistently held that foreign sovereigns were not immune from the jurisdiction of American courts in cases 'arising out of purely commercial transactions.'" *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 613 (1992).

This Court held in *Alfred Dunhill* that this restrictive view of sovereign immunity does "not bar a suit based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation." *Id.* at 614 (citing *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) (plurality opinion)). Six months later, Congress passed the FSIA, and the first section of the Act confirmed that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. §1602.

The restrictive theory of sovereign immunity aimed to solve the specific and longstanding problem of a bait-and-switch occasioned by foreign sovereigns' increased participation in "the international commercial market." *Alfred Dunhill*, 425 U.S. at 703. Such participation raised the risk of foreign sovereigns reneging on their commercial undertakings on sovereign

immunity grounds and thus creating the "potential injury to private businessmen and ultimately to international trade itself from a system in which some of the participants in the international market"—*i.e.*, sovereign entities claiming absolute immunity—"are not subject to the rule of law." *Id.*

The restrictive theory also addressed a practical problem, as it was a "response to the . . . increasing involvement of national governments in commercial enterprises" that "resulted in an increase in occasions upon which private citizens require access to courts in order to resolve disputes involving their contacts with foreign states." William P. Holm, *Foreign Sovereign Immunity: Restrictive Immunity Up Against Constitutional Due Process (Notes)*, 1 N.Y.J. Int'l & Compar. L. 145, 148 (1980). Previously, questions of foreign sovereign immunity were determined through an executive process before the State Department, and "[t]he FSIA was enacted in part to remedy the legal defects of leaving the determination of sovereign immunity to the State Department." *Id.* at 149. This transition from the State Department to the federal courts was "meant to serve the interests of justice by assuring litigants that access to the courts will be granted or denied on consistently applied legal grounds." *Id.* at 150.

The restrictive theory is grounded in free market principles and has a long history in American law. *See* Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 Hastings L.J. 585, 596-600, 618-21 (2022). Indeed, Chief Justice Marshall articulated the need for something like a commercial-activity exception to absolute sovereign immunity in 1824:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transaction of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

Bank of the United States v. Planters' Bank of Georgia, 22 U.S. 904, 907 (1824).[2]

Increased foreign investment through the 1970's made "essential 'a practice which will enable persons doing business with [foreign sovereigns] to have their rights determined in the courts.'" *Alfred Dunhill*, 425 U.S. at 702. And by the time Congress passed the Act, it was "beyond cavil that part of the foreign relations law recognized by the United States is that the commercial obligations of a foreign government may be adjudicated in those courts otherwise having jurisdiction to enter such judgments." *Id.* at 705.

Congress thus adopted the FSIA against this backdrop of increased foreign involvement in trade and the need for codification to ensure market stability and

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[2] These ideas also feature in the Supreme Court's 1812 decision in *The Schooner Exchange*, also written by Chief Justice Marshall. *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 144 (1812).

predictability. *See* Jamshidi, *supra*, at 618 ("concerns with trade and commerce—particularly with the continuing rise of state trading companies and desire to facilitate and protect trade with those entities"—were at the "heart" of the Act); *id.* ("the main focus of and impetus for the bill was the commercial activity exception"); Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts like a Private Party, Treat It like One*, 5 Chi. J. Int'l L. 675, 675 (2005) ("The FSIA was designed to codify when sovereign immunity is *not* appliable"). In sum, the Act provided the clear framework the free market demanded. *See* Jamshidi, *supra*, at 618-21. The Act's "'commercial' exception" is consequently "[t]he most significant of the FSIA's exceptions" to general principles of foreign sovereign immunity. *Weltover*, 504 U.S. at 611.

The decision below undermines a core purpose of the FSIA—to ensure that "the commercial obligations of a foreign government may be adjudicated in those courts otherwise having jurisdiction to enter such judgments." *Alfred Dunhill*, 425 U.S. at 705; Jamshidi, *supra*, at 618. Even though the Second Circuit previously denied Defendants' asserted sovereign immunity based on the Act's commercial-activity exception in *Petersen II*,[3] the decision below effectively granted Defendants back-door sovereign immunity by

[3] Petersen Energia Inversora S.A.U. v. Argentine Republic, 895 F.3d 194 (2d Cir. 2018).

denying investors any meaningful remedy for a foreign sovereign's breach of its clear commercial obligations.

B. The Second Circuit's decision undermines the FSIA's protections.

Any immunity or venue questions in this case are properly considered within the FSIA or *forum non conveniens* framework. Indeed, over the course of this ten-year litigation, both the Second Circuit and the district court applied this doctrine and consistently rejected Argentina's argument that American courts lack jurisdiction under the FSIA. In 2018, the Second Circuit held that Argentina was not immune from the jurisdiction of United States courts because it fell within a FSIA provision reaching the "commercial activity of the foreign state" that "causes a direct effect in the United States." 28 U.S.C. §1605(a)(2). There, in another opinion authored by Judge Chin, it held that even though "Argentina's obligation to conduct a tender offer in this case was triggered by its sovereign act of expropriation," the bylaw's tender "obligation and Argentina's subsequent repudiation of it were indisputably commercial in nature in that they are 'the *type* of actions by which a private party engages in trade and traffic or commerce.'" *Petersen II*, 895 F.3d at 207. Accordingly, the Second Circuit held that "Argentina's breach of those obligations was a commercial act, not a sovereign one." *Id.*

The Second Circuit and the district court also rejected Argentina's invitations for the federal courts to decline jurisdiction on *forum non conveniens* grounds.

The district court denied Argentina's first motion on these grounds in 2016, holding that it had failed to demonstrate that plaintiffs could bring this action in Argentina given that the country had threatened and even filed criminal complaints against plaintiffs' counsel and other principals on plaintiffs' side of the case. *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, 2016 WL 4735367, at *11-12 (S.D.N.Y. Sept. 9, 2016). The district court likewise denied Argentina's renewed motion to dismiss on *forum non conveniens* grounds in 2020, concluding that the case for dismissal was even weaker in light of the addition of a New York-based plaintiff to whom Argentina sold YPF stock on the New York Stock Exchange. *Petersen Energia Inversora S.A.U. v. Argentine Republic*, 2020 WL 3034824, at *6-7 (S.D.N.Y. June 5, 2020).

In reaching this holding twice over, the district court applied the test laid out in the Second Circuit's en banc decision in *Iragorri v. United Technologies Corporation*, which is deferential to the choices of plaintiffs to sue in their home districts. 274 F.3d 65, 71-72 (2d Cir. 2001) ("[T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*."). On appeal, the Second Circuit emphasized the "'broad discretion of the district court'" to decide *forum non conveniens* motions in declining to reverse on these grounds. Pet.App.18.

1. Public law. The Second Circuit's holding on the merits cannot be reconciled with the FSIA and this Court's precedents regarding sovereign immunity. *See* Pet.15-16. The panel majority concluded that Argentina's General Expropriation Law "explicitly forecloses actions 'by third parties [that] impede the expropriation or its effects' while the expropriator and property owner determine the amount of compensation owed to the owner." Pet.App.35. The court accordingly held that Argentina's expropriation law quashed any contractual claim that Petitioners might have because Petitioners' claims "likely 'impede the expropriation or its effects,' and are thus barred under the text and purpose of the [expropriation law]." Pet.App.38. The court held that Petitioners were instead "channel[ed]…into" the "compensation-setting mechanism" that the expropriation law provides. Pet.App.37-38. The Second Circuit thus granted Argentina both immunity and its choice of venue in Argentina based on Argentine substantive law, all in contravention of the FSIA's role in keeping commercial disputes with foreign countries doing business in the United States in federal court.

This conclusion about the meaning of the public law at issue erroneously brushed aside the district court's careful analysis of the same question, which concluded after extensive expert testimony on Argentine law that "Argentina's General Expropriation Law does not bar plaintiffs' claims." Pet.App.46. The Second Circuit did not meaningfully explain why it reached a conclusion that was diametrically opposed to the district court's or explain where it thought the district court's comprehensive analysis went wrong.

The only explanation the court offered for its reversal on this point was to note that the panel majority could "'find and apply foreign law' in the first instance" and that it did so "on substantially the same factual record as was before the district court." Pet.App.39 n.14. As Judge Cabranes correctly emphasized in dissent, this holding flouts the rule that "'determinations of another sovereign's law frequently call for fact-like procedures that a district court is better situated to implement,'" as questions of foreign law are "'notoriously difficult.'" Pet.App.47, 44.

2. Private law. The court below likewise erred in determining that Argentina enjoyed protections similar to immunity under its private contractual and corporate laws that has the effect of stripping the United States federal courts of jurisdiction and vesting it in an Argentine corporate law procedure. The panel majority described the procedure for challenging a corporation's violation of its bylaws under Argentine corporate law. Pet.App.24. It then concluded that Petitioners could not enforce Argentina's commitments through a contractual claim and instead needed to "file[] suit in the Argentine courts to nullify shareholder resolutions …all in accordance with the [corporate law's] procedure for challenging actions that violate a company's bylaws." Pet. App.33. This again contradicted the district court's "fact-like" conclusion that "the Republic had bilateral obligations towards the plaintiffs, enforceable under the Argentina Civil Code, remediable by damages, and not precluded by the General Corporations Law." Pet.App.46; *see also* Pet.18-20.

In addition to improperly overturning the district court's careful consideration of this "fact-like" question of foreign law, the Second Circuit's holding also impermissibly injected an immunity question into the merits analysis. This holding, too, cannot be reconciled with FSIA principles or even prior holdings in this very case. *See* Pet.15-16. After the Second Circuit previously determined that "Argentina's breach of [the tender] obligations was a commercial act, not a sovereign one," *Petersen II*, 895 F.3d at 207, the decision below concluded that Argentine law allowed the country to avoid commercial liability altogether. And, after declining to disturb the district court's *forum non conveniens* holdings that the presence of a New York plaintiff "increased the deference warranted to Plaintiffs' choice of forum," and that "the public interests 'weigh[ed] heavily in favor of litigation in New York,'" Pet. App.18, the panel majority posited that "[p]erhaps Plaintiffs could have sought compensation by bringing a claim against the Republic under the [appropriation law's] procedures," Pet.App.38.

The upshot of the Second Circuit's holdings on the merits is to minimize important immunity and *forum non conveniens* doctrine. Worse still, by importing these immunity-like considerations into its consideration of the merits of the claims against Argentina, the decision below allowed Respondents to circumvent the protections for United States litigants built into the FSIA and this Court's precedents interpreting it.

The Second Circuit's message to international markets is clear: investors will be left without recourse on a foreign investment so long as a sovereign

can muster a *post hoc* rationalization for a breach of its contractual obligations that is allegedly grounded in a sovereign function. The decision below thus creates a gaping counter-exception that undermines the core purpose of the FSIA. *See* Jamshidi, *supra*, at 590 ("the commercial activity exception is at the center of the FSIA's immunity regime by design"). Indeed, the panel majority's admonition that Petitioners should have adequate "protections in Argentine court," Pet.App.39, subverts the very principles of the restrictive theory enshrined in the Act—that those who choose to do business in the United States ought to be subject to the jurisdiction of, and liability in, its courts. *Alfred Dunhill*, 425 U.S. at 705.

Because the decision below frustrates the sanctity of contract in the context of international finance, this Court should grant review to restore stability and predictability to "one of the most consequential legal regimes for foreign sovereign immunity worldwide." Jamshidi, *supra*, at 587. Properly construed, the Act does not allow Respondents to reap the benefit of exposure to and investment from international markets but refuse to uphold their end of the bargain. This type of gamesmanship erodes the stability the Act was meant to create in international trade and will doubtless chill international investment. *See* Pet.34-36.

II. The Second Circuit's Approach to Foreign Law Undermines Predictable Adjudication in United States Courts.

This case further merits the Court's review because the panel majority's acceptance of Argentina's novel, self-serving interpretation of its own laws usurps the district court's role in resolving questions of foreign law. As Petitioners ably explain, the decision below reached its interpretation of Argentine law by crediting a novel, self-serving account that Argentina advanced for the first time on appeal, while casting aside the district court's contrary conclusions—conclusions reached after a decade of litigation and a multi-day trial featuring competing expert testimony. Pet.27-31. That approach is irreconcilable with this Court's precedent on foreign law and forfeiture. It also undermines free markets, which depend on predictable adjudication, and nothing is less predictable than a rule that lets a sovereign rewrite the governing law after it has lost at trial.

Since Federal Rule of Civil Procedure 44.1 was adopted in 1966, federal courts approach questions of foreign law "as a ruling on a question of law" and "may consider any relevant material or source, including testimony" when interpreting it. This Rule was intended to allow the federal courts to weigh arguments concerning foreign law in the same manner in which they evaluate arguments based on federal law. Accordingly, this Court has held that 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 Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 585 U.S. 33, 36 (2018). A court is "neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials" and "[w]hen a foreign government … as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission." *Id.* at 43.

The weight owed to a foreign government's submission concerning its own law depends on, among other things, its "context and purpose" and its "consistency with the foreign government's past positions." *Id.* Both of those factors showed why Argentina's interpretations of its own laws should receive no deference here, since it advanced those interpretations opportunistically to escape a multi-billion-dollar judgment against it. Indeed, its positions were inconsistent with the ones it had advanced previously *in this very litigation*. On both the private-law question of whether Argentine corporate bylaws are bilateral and the public-law question of when parties must use a specific procedure for expropriation cases, Argentina advanced different positions on appeal than the ones that had failed before the district court. *See* Pet.27-31. An account offered to escape a $16.1 billion judgment, inconsistent with the sovereign's own prior litigation positions, is precisely the type of submission this Court has instructed warrants caution, not deference.

In addition, the Second Circuit's decision to rule on forfeited positions presented for the first time in Ar-

gentina's appellate briefs violates the "special consideration and respect [owed] to a District Court that has closely evaluated every aspect of the facts and, importantly, the governing law of Argentina." Pet.App.47 (Cabranes, J., dissenting). Under the proper "allocation of judicial resources" urged by Judge Cabranes, "Rule 44.1 preserves a district court's freedom to employ fact-like procedures, including by taking written and oral testimony, as sometimes may be required to adjudicate foreign legal questions." *Bugliotti v. Republic of Argentina*, 952 F.3d 410, 413 (2d Cir. 2020). In many cases, as here, the district courts "receive[] 'excellent briefing and analysis from the parties and their respective experts on the intricacies of [Argentine] law.'" *Petroleos De Venezuela S.A. v. MUFG Union Bank, N.A.*, 106 F.4th 263, 269 (2d Cir. 2024). In other words, this appropriate regard for the district court's determinations based on expert testimony "maintain[s] a district court's flexibility to tailor fact-like methods of inquiry to the needs of the case." *Bugliotti*, 952 F.3d at 413.

These questions of judicial resources and institutional competence underscore why this Court should grant review and side with the Fifth and Ninth Circuit in the second split that Petitioners identify. Pet.31-34. Those courts have explained that "[w]hile it is true that an appellate court is free to review questions of foreign law on appeal, this argument does not, however, negate the [party's] burden of proof of the foreign law at trial." *Banque Libanaise Pour Le Com. v. Khreich*, 915 F.2d 1000, 1006 (5th Cir. 1990). When a party fails to carry its burden before the district court, which is best positioned to hear expert testimony and

analyze extensive submissions of material expounding foreign law, that party "should not be entitled to a second chance to meet [its] burden of proof on appeal." *Id.* at 1007.

When a party submits "an entirely new argument" about the contents of foreign law for which there is no reason "why it could not have presented" that argument before the district court, Civil Rule 44.1 is not "a permission slip for unlimited do-overs." *G & G Prods. LLC v. Rusic*, 902 F.3d 940, 945-46 (9th Cir. 2018). The district court here presided over a decade of litigation and a multi-day trial, weighing competing expert reports and live testimony on the content of Argentine law. No appellate court reviewing a cold record could be better positioned than that court to resolve these difficult questions.

Permitting an appellate court to resolve these questions in the first instance, on a sovereign's say-so, invites exactly the gamesmanship the restrictive theory of sovereign immunity was meant to foreclose. A foreign state could litigate one theory of its law through trial and, having lost, supply a new one on appeal. The predictability on which investors depend cannot survive such a regime.

III. Fair Adjudication of Claims Against Sovereigns Is Vital to Free Markets and the United States Investors Who Sustain Them.

The decision below also has significant implications for the United States' status as a global market for raising capital and for the ability of other foreign

sovereigns to offer (and for investors to buy) public stock in the United States. To understand the importance of these issues, the Court need look no further than other recent decisions where this Court and the Second Circuit prevented Argentina from effectuating a bait-and-switch by accessing United States markets and then reneging on its commitments.

For instance, in *Weltover*, this Court held that the FSIA applied to disputes arising out of a refinancing scheme for Argentine sovereign debt because the dispute fell squarely within the FSIA's commercial exception. 504 U.S. at 609. This Court noted that the decision below in that case had emphasized "'New York's status as a world financial leader,'" and concluded that jurisdiction over Argentina was amply established because New York was "the place of performance for Argentina's ultimate contractual obligations…[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-19.

Given its holding that the FSIA's commercial exception applied, this Court declined to allow Argentina to avail itself of this country's financial markets and then plead immunity or lack of jurisdiction: "By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina 'purposefully avail[ed] itself of the privilege of conducting activities within the [United States].'" *Id.* at 619-20. The amicus brief the United States filed in that case in support of Argentina's creditors empha-

sized that Argentina's "issuance of dollar denominated debt in which New York was designated as the place of payment was a conscious and deliberate choice from which they obtained substantial benefits." Brief of the United States as *Amicus Curiae* Supporting Respondents, *Republic of Argentina v. Weltover*, 1992 WL 12012096, at *23 (Mar. 5, 1992).

In a previous group of lawsuits against Argentina to enforce a "series of promises to the purchasers" of sovereign debt, the Second Circuit properly affirmed "a proposition essential to the integrity of the capital markets: borrowers and lenders may, under New York law, negotiate mutually agreeable terms for their transactions, but they will be held to those terms." *NML Cap., Ltd. v. Republic of Argentina*, 727 F.3d 230, 237, 248 (2d Cir. 2013). That decision recognized "the interest—one widely shared in the financial community—in maintaining New York's status as one of the foremost commercial centers is advanced by requiring debtors, including foreign debtors, to pay their debts." *Id.* at 248. And this Court subsequently held in those cases that Argentina does not enjoy any sort of sovereign immunity from discovery directed at obtaining information about assets from which the plaintiffs could collect their judgments. *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 145-46 (2014).

This case is only the most recent example of Argentina's "diplomacy of default" in which it has established itself as "'the single most resistant debtor in international finance.'" *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). And the

novel arguments that it raised before the Second Circuit here are only the latest "innovative theories of international law in response to the world community's efforts to collect on defaulted sovereign obligations" propounded by Argentine jurists and diplomats. *Id.*

This Court's review is necessary to ensure that the latest of those "innovative theories" does not allow Argentina to evade liability to its investors. Equitable principles (and the FSIA) bar "permitting a foreign state to reap the benefits of our courts while avoiding the obligations" that accompany them. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 633-34 (1983). A sovereign that wants to employ "'our law, like any other litigant,'" may not demand "'our law free from the claims of justice.'" *Id.* at 632. A foreign state that enters United States markets as a private actor, and invokes United States law to raise capital, cannot escape the corresponding obligation to answer in federal court for its commercial breaches.

If the decision below stands, any rational investor would be less likely to credit a foreign sovereign's market promises or to devote the significant litigation resources needed to hold a sovereign to account. *See* Pet.4, 34. The result will be a higher cost of capital for sovereigns that keep their word, diminished protection for American investors, and the erosion of the predictability that makes United States markets the most trusted in the world. This Court's review is warranted to prevent that undesirable outcome.

CONCLUSION

The Court should grant the petition and reverse the decision below.

Respectfully submitted,

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