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

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BRIEF OF U.S. SENATOR ERIC SCHMITT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae is U.S. Senator Eric Schmitt from Missouri.[1] As a federal lawmaker, Senator Schmitt has a significant interest in how courts interpret and apply the Foreign Sovereign Immunities Act (FSIA) because it is for Congress alone to decide whether to "abrogate the foreign sovereign immunity of" foreign defendants. *Exxon Mobil Corp. v. Corporación Cimex, S. A. (Cuba)*, 609 U.S. 108, 117 (2026). Congress expresses that policy choice through the text of legislation. *See, e.g.*, *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141-42 (2014). Senator Schmitt therefore is deeply concerned whenever courts misapply the FSIA's text, especially if doing so threatens Congress's judgment that foreign states must be held liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §1606. Senator Schmitt's interest is also significant where, as here, the consequence of misapplying federal law threatens to harm U.S. financial interests. Investors will be much

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amicus*, counsel, or counsel's employer has made a monetary contribution toward its preparation or submission. The University of Texas supports faculty members' scholarly interests, but the views herein are *amicus*'. All parties received notice of the intention to file this brief. Counsel provided timely notice to petitioner and a respondent on the mistaken belief that respondents shared counsel. Counsel for the other respondent does not oppose this filing but asks that it be noted that notice was provided to it on October 31. The Court has accepted for filing *amicus* briefs in analogous circumstances. *See, e.g.*, Br. of GWU Law School Immigration Clinic, No. 25-363, at 1 n.1; Br. of N.C. Advocates For Justice, No. 22-7784, at 1 n.1.

less willing to invest if they cannot depend on the predictability that should characterize the FSIA.

Furthermore, as Attorney General of Missouri, Senator Schmitt successfully sued China on behalf of Missouri regarding Covid-19. *See State ex rel. Schmitt v. People's Republic of China*, 610 F. Supp. 3d 1174 (E.D. Mo. 2022), *rev'd in part*, 90 F.4th 930 (8th Cir. 2024). He thus has particular interest in how the FSIA is interpreted and applied.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Constitution, it is for Congress, not courts, to determine the scope of foreign sovereign immunity. The Constitution tasks Congress with that determination because lawmakers are best positioned to balance the many considerations that inform whether and under what circumstances a foreign nation may be sued in the United States. Because foreign sovereign immunity results from the United States's "grace and comity," *Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004) (citing, *inter alia*, *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.)), it "remains Congress' prerogative to alter a foreign state's immunity," *Exxon*, 609 U.S. at 117 (quoting *Bank Markazi v. Peterson*, 578 U.S. 212, 236 (2016)).

Exercising that authority, Congress enacted the FSIA as a "carefully calibrated scheme," *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 273 (2023), to bring order to the "disarray" and even "bedlam" that had been the law of foreign sovereign immunity, *NML*, 573 U.S. at 140-41 (citation omitted). To that end, the FSIA mandates that if a foreign

nation lacks immunity, it "shall be liable" in a U.S. court "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. §1606. In other words, Congress has determined that once foreign sovereign immunity is unavailable, such as when a foreign state chooses to engage in commercial activity, courts are not to consider the fact that the defendant is a foreign government. Instead, the defendant is to be treated like a private person. That bright-line rule provides clarity to everyone who does business with foreign nations—thus encouraging more confident international cooperation and greater economic growth—and prevents courts from becoming mired in policy matters beyond their ken.

Here, however, the U.S. Court of Appeals for the Second Circuit has returned to the "disarray," *NML*, 573 U.S. at 141, that Congress enacted the FSIA to prevent. As the petition explains, the decision below reasons that "Argentine law required petitioners to pursue their claims in Argentine court." Pet.2. Yet that rule, if accepted, would "depriv[e] petitioners of the U.S. forum that the FSIA provides and allow[] Argentina's own forum-allocation rules to control." *Id.* No "private individual," 28 U.S.C. §1606, could do what the court allowed in this case. Foreign nations who choose to engage in conduct that precludes sovereign immunity on the front end are not entitled to special treatment on the back end.

In short, whatever Argentine law may say about the forum for litigation against Argentina, this case was brought in a *United States* court, and *United States* law governs the question. *Amicus* thus

respectfully urges the Court to grant review and reiterate the bedrock principle that when it comes to foreign sovereign immunity, Congress makes the rules and that the FSIA does not contain an escape hatch from suit in the United States for foreign nations who choose to engage in commercial activities that affect the United States.

ARGUMENT

I. Congress Determines the Scope of Foreign Sovereign Immunity.

At the outset, it is important to ground the Court's analysis in a fundamental point: Congress alone determines the scope of foreign sovereign immunity. And Congress communicates that determination through statutory language. Foreign nations thus must base their arguments on what Congress said.

As Chief Justice Marshall explained more than two centuries ago, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *Schooner*, 7 Cranch at 136. The principle that one nation's law cannot cancel another nation's law explains why nations often engage in diplomacy about disputes and lawmakers must make difficult policy judgments. But the rule is plain: "foreign sovereigns have no right to immunity in our courts." *Altmann*, 541 U.S. at 688.

Because "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution," *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983), it follows that "nothing in the Constitution limits *congressional authority* to modify

or remove the sovereign immunity that foreign states otherwise enjoy," *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99 (D.C. Cir. 2002) (emphasis added).

That last point is important—the power belongs to Congress. "By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden*, 461 U.S. at 493; *see also* Anthony J. Bellia Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 Va. L. Rev. 729, 828 n.454 (2012) ("Congress could make exceptions to head of state immunity just as it has made exceptions to foreign sovereign immunity in the FSIA[.]"). As the Court explained in *Bank Markazi*, Congress decides who carries "the principal responsibility for determining a foreign state's amenability to suit," and "it remains Congress' prerogative to alter a foreign state's immunity[.]" 578 U.S. at 236; *see also id.* (concluding that "Congress acted comfortably within the political branches' authority over foreign sovereign immunity and foreign-state assets").

Nor is it a secret why the Constitution vests Congress with such authority: "Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States" that Congress can best resolve. *Verlinden*, 461 U.S. at 493; *see also id.* at n.19 (identifying constitutional provisions, including Congress's "powers to prescribe the jurisdiction of Federal courts, Art. I, § 8, cl. 9; to define offenses against the 'Law of Nations,' Art. I, § 8,

cl. 10; to regulate commerce with foreign nations, Art. I, § 8, cl. 3; and to make all laws necessary and proper to execute the Government's powers, Art. I, § 8, cl. 18."). And Congress certainly is better able than courts to balance the innumerable policy considerations inherent in managing foreign affairs. After all, "the political branches are well situated to consider sensitive foreign policy issues" precisely because they "possess significant diplomatic tools and leverage the judiciary lacks." *Munaf v. Geren*, 553 U.S. 674, 702-03 (2008) (internal quotation marks omitted).

The only question, therefore, is how Congress communicates its policy determinations about when litigation can proceed against a foreign nation in a U.S. court. The answer again is found in fundamental principles: Congress speaks through statutes. The focus, therefore, must be on the text that Congress wrote. "[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *NML*, 573 U.S. at 141-42. In short, "Congress delineated the area of immunity and the exception to the immunity[.]" *Owens v. Republic of Sudan*, 531 F.3d 884, 889 (D.C. Cir. 2008).

II. The FSIA Requires Equal Treatment.

Congress enacted the FSIA in 1976 as a "comprehensive framework for resolving any claim of sovereign immunity." *Altmann*, 541 U.S. at 699. In the FSIA, Congress made many determinations about litigation against foreign sovereigns in U.S. courts, at least two of which are relevant here.

First, Congress determined that a foreign nation is not entitled to sovereign immunity when it engages

in commercial activities affecting the United States. That rule provides foreign nations with a great deal of sovereign autonomy; nothing forces them to engage in the sort of conduct that, by U.S. law, exceeds the protections of sovereign immunity.

And second, if a foreign nation has engaged in conduct that deprives it of immunity, that defendant shall be "'liable in the same manner and to the same extent as a private individual under like circumstances,' regardless of any special rules that might benefit the sovereign back home." Pet.3 (quoting 28 U.S.C. §1606). That rule—in many ways the heart of the FSIA—ensures that if a foreign nation does engage in commercial activities, a court in the United States can resolve the claim.

A. Congress's Equal Treatment Rule.

As with any statute, this Court's interpretation of the FSIA must begin with the text that Congress enacted. *See, e.g.*, *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022) ("As always, we begin with the text."). Or as Justice Scalia once colorfully put it for the Court, "[t]he question … is not what Congress 'would have wanted'"—as intuited by a judge—"but what Congress enacted in the FSIA." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

1. The FSIA's language is straightforward. Congress provided that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. §1604. The FSIA, in other words, creates a default rule in favor of sovereign immunity. This default is important; it means a foreign state as a rule can

conduct sovereign affairs without fear of liability. Only by *choosing* to engage in certain conduct does a foreign state lose the protection of sovereign immunity.

Sections 1605 to 1607 then explain the circumstances under which sovereign immunity is lost and what follows from that loss. For example, "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … in which the foreign state has waived its immunity either explicitly or by implication," or "in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue." 28 U.S.C. §1605(a)(1), (a)(4). Likewise, if there is a sufficient connection to the United States, a foreign state is not protected by sovereign immunity for injury "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment[.]" *Id.* §1605(a)(5).[2]

Especially relevant here, Congress also determined that the default rule in favor of foreign sovereign immunity shall not apply "in any case … in which the action is based upon a commercial activity carried on in the United States by the foreign state," which concerns "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or which concerns "an act outside the

[2] Of course, "[a] foreign state [also] shall not be immune from the jurisdiction of courts of the United States … in any case … in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture" or other forms of terrorism. 28 U.S.C. §1605A(a)(1).

territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Id.* §1605(a)(2).

This exception, sometimes called the commercial activity exception, is deliberately expansive. For one thing, it applies to "any case," and "any" is broad. *See, e.g.*, *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))). For another, the conduct captured by the statute is also "broad." *See, e.g.*, *Jam v. Int'l Finance Corp.*, 586 U.S. 199, 226 (2019) (Breyer, J., dissenting) ("The 'commercial activity' exception to the sovereign immunity of foreign nations is broad."); *Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) ("The commercial activity exception … has been interpreted broadly."); *Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1217-18 (10th Cir. 1999) ("Congress intended the FSIA's commercial activity exception to encompass a 'broad spectrum of endeavor.'" (quoting H.R. Rep. No. 94-1487, at 16 (1976))).

2. If a foreign state chooses to engage in conduct falling within one of the FSIA's exceptions, including (as here) engaging in commercial activity, then certain consequences follow.

To begin, "[a] foreign state *shall not be immune* from the jurisdiction of courts of the United States[.]" 28 U.S.C. §1605(a) (emphasis added). And federal courts have subject-matter jurisdiction over "any claim for relief in personam with respect to which the

foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement." *Id.* §1330(a).

As with any other grant of jurisdiction, federal courts thus have a "virtually unflagging obligation," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), to resolve such claims. After all, Congress's use of the "shall" speaks volumes. *See, e.g.*, *Smith v. Spizzirri*, 601 U.S. 472, 476 (2024) ("[T]he use of the word 'shall' 'creates an obligation impervious to judicial discretion.'" (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998))); *SAS Institute Inc. v. Iancu*, 584 U.S. 357, 362 (2018) ("The word 'shall' generally imposes a nondiscretionary duty."). And if there were any question, Congress also expressly provided that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. §1602.

Next, federal courts must resolve claims falling in the category for which there can be no sovereign immunity by applying certain requirements, also set by Congress. Perhaps the most significant of these requirements is found in Section 1606:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for

> an agency or instrumentality thereof shall not be liable for punitive damages[.]

28 U.S.C. §1606.

Several features of Section 1606 should stand out. First, this language too is deliberately expansive. It applies to "*any* claim for relief with respect to which a foreign state is not entitled to immunity"—and, again, any means any. Second, Section 1606 contains one of the core requirements of the entire FSIA: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." In other words, the FSIA protects sovereign immunity by firmly establishing immunity as a default, but once a foreign state chooses to engage in conduct that causes sovereign immunity to be lost, that foreign state's character as a sovereign largely is irrelevant to any further judicial analysis, and the foreign state must be treated the same as any "private individual." And third, reflecting the principle that "[n]o statute pursues a single policy at all costs," *Bartenwerfer v. Buckley*, 598 U.S. 69, 81 (2023), Congress created a specific carveout from the FSIA's general equal treatment rule for punitive damages. That carveout confirms that Congress has balanced competing interests and landed on a textual compromise that, in Congress's judgment, best accommodates competing policy concerns.[3]

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[3] Section 1606 goes on to provide a rule for cases in which "the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature." 28 U.S.C. §1606. In such cases, "the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were

Section 1606's equal treatment rule is key to the FSIA. It directs courts how to address foreign states who, because of their own choices, no longer are protected by sovereign immunity. Such defendants are not entitled to any special protection. Instead, Section 1606 "ensures that a foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 114 (2022). In other words, the statute creates an "identity of liability between [a foreign state] and a private defendant[.]" *Barkanic v. Gen. Admin. of Civ. Aviation of the People's Republic of China*, 923 F.2d 957, 960 (2d Cir. 1991). Thus, "if an FSIA exception abrogates immunity, plaintiffs may bring state law claims that they could have brought if the defendant were a private individual." *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n. 11 (1983)). In short, because "states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned," 28 U.S.C. §1602, U.S. courts should hold "the foreign state … liable in the same manner and to the same extent as a private individual," *id.* §1606.

B. Congress Enacted the Equal Treatment Rule to Bring Order to Chaos.

Because the FSIA's text is plain, the Court's analysis can and should end with the text alone. To

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incurred by the persons for whose benefit the action was brought." *Id.* This confirms that Congress intends to provide a remedy for injured parties.

understand the FSIA's significance, however, it is worthwhile to recall the chaos that existed before the FSIA. This history confirms that Congress does not want a disjointed scheme in which courts—after concluding that Congress has chosen not to provide a foreign state with immunity—nonetheless still put a thumb on the scale in favor of a foreign state. Instead, under the FSIA, foreign states who chose to engage in acts depriving them of immunity must be treated no better and no worse than a private individual. Among other things, this rule means that such foreign states can be sued in a court in the United States.

Foreign sovereign immunity before Congress enacted the FSIA was chaotic—or, as the Court has described it, "bedlam." *NML*, 573 U.S. at 141. Until the 1950s, courts largely "resolved questions of foreign sovereign immunity by deferring to the decisions of the political branches," which often meant asking for the Executive Branch's views that reflected a "policy of requesting immunity in all actions against friendly sovereigns." *Altmann,* 541 U.S. at 689, 696. The Executive Branch changed its approach, however, and eventually "suggestions of immunity" largely came to be seen as subject to political "pressure" from "foreign nations." *Verlinden*, 461 U.S. at 487. The result was unpredictability about whether immunity was available because "the governing standards were neither clear nor uniformly applied." *Id.* at 488.

Legal uncertainty benefits no one. It makes it harder for investors to invest with confidence. *See, e.g.*, H.R. Rep. No. 94-1487, at 8-9 ("From the standpoint of the private litigant, considerable uncertainty results. A private party … cannot be

certain that this legal dispute with a foreign state will not be decided on the basis of nonlegal considerations[.]"). Uncertainty also makes it harder for foreign states to know what they can do without subjecting themselves to litigation. *E.g.*, 28 U.S.C. §1602 (emphasizing that the FSIA would also "protect the rights of … foreign states" because courts would decide cases "in conformity" with the statute). And uncertainty puts courts in the awkward position of trying to manage complicated litigation without a clear understanding of what rules to apply. *See, e.g.*, H.R. Rep. No. 94-1487, at 12 (describing the FSIA as "setting forth comprehensive rules governing sovereign immunity," including by "prescrib[ing] … the jurisdiction of U.S. district courts" and "procedures for commencing a lawsuit against foreign states").

Congress enacted the FSIA to bring needed clarity to this muddle. Lawmakers swapped the "old" messy, "factor-intensive, loosely common-law-based immunity regime" with a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *NML*, 573 U.S. at 141 (citation omitted). Under the FSIA, everyone—foreign states, private investors, and courts—understands what will happen if a foreign state engages in specified conduct that deprives foreign states of sovereign immunity. All involved thus "clear[ly]" know upfront that "if the foreign state … is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances." H.R. Rep. No. 94-1487, at 22. Finally, "[t]he language and history of the FSIA clearly establish that the Act was not intended to affect the *substantive* law determining the liability of a foreign state or instrumentality, or

the attribution of liability among instrumentalities of a foreign state." *First Nat'l City Bank*, 462 U.S. at 620 (emphasis added). But in terms of the *forum* and *procedures* for applying substantive law, U.S. courts "shall" hold "the foreign state … liable in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C. §1606. There is no special benefit beyond sovereign immunity itself for foreign states.

III. The Court Should Reiterate the Equal Treatment Rule.

The FSIA's equal treatment rule reflects Congress's judgment about how best to balance competing policy concerns and provide necessary clarity—and thus stability—to the law. Where, as here, a foreign state has engaged in conduct that falls outside of the FSIA's grant of sovereign immunity, courts must treat that defendant like a private individual. That a defendant in a U.S. court is a foreign state does not entitle that defendant to additional protection after a court determines that sovereign immunity does not apply. A U.S. court, confronted with a foreign state that has engaged in conduct triggering the commercial activity exception therefore should not hold that claims against that state must be heard in a foreign court. The text and structure of Section 1606 confirm that a U.S. court must treat a foreign state like a private individual as part of litigation occurring in the United States.

Here, however, "[t]he panel majority … allowed Argentina to rely on its own procedural rules limiting certain claims to certain Argentine courts to prevent petitioners from bringing their claims in federal court

in the United States[.]" Pet.17 (citing App.35-38). The court did not do so because Argentina is entitled to sovereign immunity. On the contrary, the Second Circuit has already held that the commercial activity exception applies, and that issue is not before the Court. Nor is this a case where forum non conveniens would be permissible. Under the FSIA, then, the defendants must be treated like private individuals who find themselves defendants in federal court.

In suits against private individuals, an injured plaintiff needs a court with subject matter jurisdiction and a cause of action. *See, e.g., Davis v. Passman*, 442 U.S. 228, 239 (1979). Congress has granted courts subject-matter jurisdiction for claims that fall outside of the FSIA's grant of sovereign immunity. *See* 28 U.S.C. §1330(a). The FSIA, however, is not the source of any substantive claims that a party may bring against a foreign state. Instead, "substantive law" must come from a different source. *First Nat'l City Bank*, 462 U.S. at 620; *see also Cassirer*, 596 U.S. at 114. But if a private party could be liable under some substantive law, a foreign state defendant can be, too. "[W]hen a foreign state is not immune from suit, it is subject to the same rules of liability as a private party. Which is just to say that the substantive law applying to the latter also applies to the former." *Cassirer*, 596 U.S. at 114. Section 1606 "thus ensures that a foreign state, if found ineligible for immunity, must answer for its conduct just as any other actor would." *Id.*

Whatever the substantive law, moreover, the *forum* for the claim must be a court in the United States. *See, e.g.*, 28 U.S.C. §1604 ("[A] foreign state shall be immune from the jurisdiction of the courts of

the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). To conclude otherwise inverts the FSIA; the point of granting sovereign immunity against suits in U.S. courts—coupled with exceptions from that grant, such as the commercial activity exception—is that if sovereign immunity does not exist, then a U.S. court can decide the claim, and in doing so, must treat "the foreign state" no better or worse than "a private individual under like circumstances." *Id.* §1606.

The panel below reasoned that Argentine law "channels [certain] disputes into the compensation-setting mechanism set forth elsewhere," and concluded that "Plaintiffs could have sought, and indeed other shareholders did seek, to enforce the Bylaws' protections in Argentine court through causes of action recognized under Argentine law." App.37-38, 39; *see also* App.33 (explaining that "YPF's other minority shareholders objected [and] … then filed suit in the Argentine courts"). Yet if claims exist, nothing in the FSIA allows a federal court to require a plaintiff to pursue such claims in another country's courts. Once more, the FSIA controls when claims can be brought against foreign states in U.S. courts, and what rules U.S. courts apply when adjudicating such claims where, as here, sovereign immunity is lost because a foreign state has chosen to engage in conduct that Congress has deemed ineligible for sovereign immunity. As the Court has explained in an analogous context, although "[f]ederal courts" must "apply state substantive law," "federal law … cover[s] the rest." *Berk v. Choy*, 607 U.S. 187, 192 (2026). By any measure, a foreign state cannot "escape a U.S.

judgment by invoking its own law relegating claims to a specialized forum in Argentina." Pet.12.

It is important to step back and recognize that no private party could do what Argentina seeks to do here: create a law channeling claims against it to a specialized tribunal outside of the United States. Instead, a private person properly sued in federal court would raise substantive defenses to the plaintiff's substantive claims, even if those substantive claims arise from non-federal sources of law. But a private person could not also rightly argue that such claims could only be brought in another tribunal. Instead, the very fact that Congress empowered the federal court with subject-matter jurisdiction to decide the case means that whatever may be said about substantive law, the question of forum is resolved. *Cf. Randall v. Arabian Am. Oil Co.*, 778 F.2d 1146, 1150 (5th Cir. 1985) ("We reject outright the notion that the law of a foreign country can unilaterally curtail the power of our federal courts to hear a dispute even though the dispute involves rights fixed by the laws of another nation."); *accord Emigrant Mortg. Co., Inc. v. Bourke*, 127 F.4th 385, 389 (1st Cir. 2025) (holding that "[t]he Massachusetts Land Court statute does not divest the federal district court of diversity jurisdiction under 28 U.S.C. § 1332" because "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction" (quoting *Kontrick v. Ryan*, 540 U.S. 443, 452, (2004))).

None of this should be controversial. That Congress both has (i) barred sovereign immunity for cases like this and (ii) empowered federal courts with subject-matter jurisdiction over such cases means that

a plaintiff is entitled to a forum in the United States. That the panel here reasoned that any claim must be brought overseas should have triggered alarm bells that something had gone awry. One cannot help but suspect that the reason why the panel failed to recognize its error was a sense that, whatever the status of sovereign immunity, foreign states should be treated differently, and that if a foreign state has channeled certain claims to a foreign tribunal, that channeling decision should be entitled to some respect. Congress, however, enacted the FSIA to combat such instincts. The only protection that a foreign state receives is at the threshold; the state can freely decide whether to engage in conduct that is protected by foreign sovereign immunity. But if a state decides to plow forward with unprotected conduct, Congress has spoken: That state is to be treated like a "private individual." 28 U.S.C. §1606.

If the instinct to grant some deference to a foreign state even when the FSIA does not provide for immunity goes unchecked, the judiciary risks returning to the sort of mess that prompted Congress to enact the FSIA in the first place. The FSIA exists to increase predictability for all involved. If deference is allowed into the analysis, the law will become a moving target, with consequences that benefit no one. Obviously, U.S. investors would be harmed; they make high-stakes economic decisions against the backdrop of a clear statute providing that foreign states who engage in commercial activities will not receive special treatment from U.S. courts. But foreign states also will suffer. If investors cannot be confident that U.S. courts will hold foreign states liable just as those courts would any private individual liable, then the

ability of foreign states to obtain investment will suffer. The FSIA, after all, is an important credible commitment mechanism that allows foreign states to plausibly reassure investors that it is safe to invest. Courts should not undermine that credibility.

The stakes are significant. The Court should grant review to reiterate that when Congress has not granted sovereign immunity, the equal treatment rule requires treating a foreign state like anyone else. Nothing in the FSIA empowers a U.S. court, vested with jurisdiction, to conclude that plaintiffs must seek relief in the courts of a foreign nation. On the contrary, Congress—the constitutional decisionmaker—has decreed that courts should not grant foreign states protections beyond those Congress provided.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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