Nos. 18-575 and 18-581

In the Supreme Court of the United States

YPF S.A., PETITIONER

v.

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

ARGENTINE REPUBLIC, PETITIONER

v.

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

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly held that the "commercial activity" exception to foreign sovereign immunity in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(2), applies to respondents' claims.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1602 *et seq.*, provides the sole basis for U.S. courts to exercise jurisdiction over civil lawsuits against foreign states and their agencies

or instrumentalities. It provides that foreign states, agencies, and instrumentalities "shall be immune" from the jurisdiction of U.S. courts, unless one of the statute's express exceptions to sovereign immunity applies. 28 U.S.C. 1604; see 28 U.S.C. 1603(a).

This case involves the exception to sovereign immunity for commercial activity. The exception provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the 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.

28 U.S.C. 1605(a)(2).

The Act defines "'commercial activity'" to mean "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. 1603(d). It further provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Ibid.*

2. YPF S.A. is a petroleum company in Argentina. Argentina Pet. 2. Argentina owned and operated YPF

until 1993, when it privatized the company through an initial public offering. Pet. App. 3a.[*]

In order to attract investors, YPF and Argentina (acting as the controlling shareholder) registered YPF's Class D shares with the U.S. Securities and Exchange Commission and listed them on the New York Stock Exchange. Pet. App. 74a. YPF and Argentina also amended YPF's bylaws to protect investors if Argentina renationalized (or another shareholder took control of) the company. *Id.* at 4a. The amended bylaws provide that no person may become the holder of more than a specified percentage of YPF's stock unless he makes a tender offer—an open invitation to all shareholders to buy their shares at a price calculated under a formula set out in the bylaws. *Id.* at 117a-126a. The amended bylaws further provide that this tender-offer requirement "shall apply to all acquisitions made by the National Government [of Argentina], whether directly or indirectly, by any means or instrument," "if, as a consequence of such acquisition, the National Government becomes the owner, or exercises the control of, the shares of the Corporation, which * * * represent, in the aggregate, at least 49% of the capital stock." *Id.* at 159a. The bylaws specify that shares acquired in violation of the tender-offer requirement "shall not grant any right to vote or collect dividends or other distributions." *Id.* at 130a. They further specify that (subject to certain exceptions) these penalties apply to improper acquisitions by Argentina. *Id.* at 160a.

Argentina and YPF advertised these protections in the prospectus for the initial public offering, stating: "Under the Company's By-laws, in order to acquire a

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[*] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 18-581.

majority of the Company's capital stock or a majority of the Class D Shares, the Argentine Government first would be required to make a cash tender offer to all holders of Class D Shares on terms and conditions specified in the By-laws." Pet App. 85a-86a (emphasis omitted). Argentina and YPF also assured potential investors in the prospectus that "[a]ny Control Acquisition carried out by the Argentine Government other than in accordance with th[at] procedure . . . will result in the suspension of the voting, dividend and other distribution rights of the shares so acquired." *Id.* at 86a (emphasis omitted; brackets in original).

The resulting initial public offering raised billions of dollars, including over $1.1 billion from the sale of shares on the New York Stock Exchange. Pet. App. 6a. Repsol S.A. emerged from the initial public offering as the majority shareholder in YPF. *Ibid.*

3. In April 2012, Argentina announced that it was retaking control of YPF. Pet. App. 10a. Argentina proposed legislation (the Expropriation Law) that would expropriate from Repsol 51% of the voting stock of YPF. *Ibid.* The National Executive Office of Argentina also issued an emergency decree under which an intervenor was appointed to seize the company while the expropriation legislation made its way through the Argentine Congress. *Ibid.* Acting under the decree, officials took over YPF's facilities, replaced YPF's senior management, and refused to make dividend payments. *Ibid.*

In May 2012, the Argentine Congress enacted the Expropriation Law. Pet. App. 10a. The law provided: "[T]o ensure the fulfillment of the objectives of this law, the fifty-one percent (51%) equity interest in YPF Sociedad Anónima represented by the same percentage of Class D shares of the said Company, held by Repsol

YPF S.A., its controlled or controlling entities, directly or indirectly, is hereby declared to be of public use and subject to expropriation." *Id.* at 11a (citation omitted). Argentina expropriated shares from Repsol as provided by the law, eventually paying Repsol $4.8 billion in compensation. *Ibid.*

In the meantime, Argentina refused to make a tender offer in accordance with YPF's bylaws. Pet. App. 10a. One government minister described the tender-offer requirement as "unfair" and a "bear trap." *Ibid.* (citation omitted).

4. In April 2015, respondents Petersen Energia Inversora S.A.U. and Petersen Energia S.A.U. (together Petersen), Spanish limited-liability companies, sued Argentina and YPF in the United States District Court for the Southern District of New York. Pet. App. 73a, 76a. Petersen had acquired around 25% of YPF's stock between 2008 and 2011. *Id.* at 6a. As relevant here, Petersen claimed that YPF's bylaws constitute a contract, that Argentina breached this contract by acquiring a controlling stake in the company but failing to extend a tender offer, and that YPF breached this contract by failing to enforce the penalties (such as loss of voting rights) for violation of the tender-offer requirement. *Id.* at 94a.

The district court denied Argentina's and YPF's motion to dismiss the lawsuit for lack of subject-matter jurisdiction under the FSIA. Pet. App. 34a-71a. The court relied on the exception to sovereign immunity that applies where a lawsuit is based "upon an act outside the 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.* at

43a (quoting 28 U.S.C. 1605(a)(2)). The court, examining "the particular conduct that constitutes the gravamen of the Complaint," concluded that this lawsuit is "'based upon'" "Argentina's failure to issue a tender offer and YPF's failure to enforce the tender offer requirements that are contained in the Bylaws"—not on "Argentina's sovereign acts of intervention and expropriation." *Id.* at 44a. The court further concluded that petitioners engaged in those acts "in connection with" commercial activity, and that the acts caused a "direct effect in the United States." *Id.* at 45a, 47a (citations omitted); see *id.* at 45a-49a.

5. Petitioners took an immediate appeal under the collateral-order doctrine, which, under the court of appeals' precedents, "allows an immediate appeal from an order denying immunity" under the FSIA. Pet. App. 12a (quoting *Kensington Int'l Ltd.* v. *Itoua*, 505 F.3d 147, 153 (2d Cir. 2007)).

The court of appeals affirmed the denial of immunity. Pet. App. 1a-30a. The primary issue in the appeal was whether petitioners' lawsuit was based on acts taken in connection with commercial activity, or was instead based on sovereign acts. *Id.* at 15a-16a. Relying on this Court's decisions in *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015), *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993), and *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992), the court of appeals explained that a lawsuit is "'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit"—*i.e.*, the "acts that actually injured [the plaintiffs]." Pet. App. 14a (quoting *Sachs*, 136 S. Ct. at 396). The court further explained that a state engages in "commercial activity" "only where it acts 'in the manner of a private player

within' the market," or, put differently, "where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" *Id.* at 15a (quoting *Nelson*, 507 U.S. at 360). The court observed that "a foreign state's repudiation of a contract is precisely the type of activity in which a private player within the market engages," whereas "expropriation is a decidedly sovereign—rather than commercial—activity." *Ibid.* (brackets and citations omitted).

Applying these principles, the court of appeals held that this lawsuit was "based upon" Argentina's and YPF's commercial acts of entering into and repudiating their contractual obligations, not on Argentina's sovereign act of expropriation. Pet. App. 16a-28a. The court reasoned that the "gravamen of Petersen's claim" against Argentina was that "Argentina denied Petersen the benefit of the bargain promised by YPF's bylaws when Argentina repudiated its obligation to tender for Petersen's shares." *Id.* at 20a. The "obligation and Argentina's subsequent repudiation of it were indisputably commercial," the court explained, because they are "'the *type* of actions by which a private party engages in trade and traffic or commerce.'" *Ibid.* (quoting *Weltover*, 504 U.S. at 614). The court likewise reasoned that the gravamen of Petersen's claim against YPF was that "YPF breached the bylaws" by "failing to enforce" the tender-offer provisions and associated penalties against Argentina. *Id.* at 26a. The court concluded that this breach was "commercial in nature—indeed, every corporation is obligated to abide by its bylaws." *Ibid.*

The court of appeals rejected petitioners' theory that the repudiation of the tender-offer requirement was not

commercial because of the connection between the repudiation and the sovereign act of expropriation. First, the court acknowledged that Argentina's obligation to extend a tender offer was "triggered by its sovereign act of expropriation," but observed that "there is nothing unusual about conditioning a commercial obligation on the occurrence of a sovereign act." Pet. App. 20a. The court also agreed with the district court that the commercial obligations at issue "could just as easily have been triggered by Argentina's acquisition of a controlling stake in YPF in open-market transactions." *Id.* at 21a (citation omitted). Second, the court of appeals rejected Argentina's contention that the repudiation of the tender-offer requirement was not commercial because it could not have complied with the requirement and the Expropriation Law at the same time. *Ibid.* The court found no conflict between the bylaws and the Expropriation Law, determining that "there is no provision in the YPF Expropriation Law" that "compelled Argentina to 'acquire *exactly* 51% ownership in YPF,'" and that the statute "says absolutely nothing" that precluded Argentina from extending a tender offer for "additional YPF shares." *Id.* at 22a-23a (citation omitted). Finally, the court rejected the contention that Petersen had engaged in "artful pleading" to "challeng[e] the expropriation." *Id.* at 27a-28a. The court explained that "Petersen does not challenge" the validity of Argentina's expropriation of shares from Repsol, but rather contends that a court should "award it the benefit of the bargain that Argentina and YPF struck with each shareholder who purchased YPF shares on the open market." *Id.* at 28a.

6. The court of appeals denied Argentina's and YPF's petitions for rehearing and rehearing en banc. Pet. App. 72a; see YPF Pet. App. 72a.

DISCUSSION

This Court should deny the petitions for writs of certiorari. The court of appeals correctly ruled that the FSIA's commercial-activity exception applies to this case. Contrary to petitioners' assertions, the court's decision does not conflict with any decision of another court of appeals. To be sure, the scope of the commercial-activity exception is an important issue, but this case would not be a suitable vehicle for addressing the scope of that exception, because it raises case-specific issues such as the interpretation of Argentine law and YPF's corporate bylaws.

1. a. The court of appeals correctly ruled that the commercial-activity exception applies to this case.

The FSIA provides that a foreign state is not immune from suit in any case that is "based" "upon an act outside the 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." 28 U.S.C. 1605(a)(2). The key terms for purposes of this case are "based upon" and "commercial." This Court has explained that "an action is 'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit." *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015) (citing *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993)). The inquiry "zeroe[s] in" on the "acts that actually injured" the plaintiff. *Ibid.*

This Court has also explained that a foreign state's act is "'commercial'" where the foreign state acts "in the manner of a private player within" a market—in

other words, where "the particular actions that the foreign state performs" "are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 614 (1992) (citation omitted). Because the FSIA expressly provides that "the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,'" the inquiry turns on the "outward form of the conduct" rather than on "the *reason* why the foreign state engages in the activity." *Id.* at 614, 617 (quoting 28 U.S.C. 1603(d)). In addition, the Court has observed that the commercial-activity exception refers separately to actions that are "based upon a commercial activity * * * in the United States" and actions that are "based upon an act * * * *in connection with* a commercial activity * * * elsewhere." *Nelson*, 507 U.S. at 356-357 (quoting 28 U.S.C. 1605(a)(2)) (emphasis added; ellipsis omitted). The Court has concluded that the phrase "based upon an act *in connection with* commercial activity" extends further than the phrase "based upon a commercial activity." See *id.* at 357-358.

Under these principles, Petersen's claims are "based upon" Argentina's and YPF's alleged breaches of the contractual obligations set out in YPF's bylaws. The "gravamen" of Petersen's claims against Argentina is that Argentina violated its promise to Petersen (and other purchasers of YPF's shares) by repudiating its obligation to extend a tender offer for those shares. And the "gravamen" of Petersen's claims against YPF is that YPF violated its promise to Petersen (and other purchasers of YPF's shares) by failing to enforce the bylaws' provisions and penalties concerning such tender offers.

These alleged breaches are themselves "commercial" —and, *a fortiori*, are acts performed "in connection

with a commercial activity." In making promises to induce investors to buy shares, and in later repudiating those promises, Argentina and YPF acted "in the manner of a private player" in a market, engaging in "the type of actions" in which private entities routinely engage. *Weltover*, 504 U.S. at 614 (emphasis omitted). The commercial character of the breach is also reflected in the fact that the bylaws' tender-offer requirement applied to *any* person who acquired a sufficiently large stake in the company, not just to Argentina. See p. 3, *supra*. A private party's failure to comply with the tender-offer requirement would plainly be commercial. Such a failure does not become any less commercial merely because the alleged violator is instead a foreign state.

b. Petitioners' contrary arguments are incorrect.

Petitioners first contend (Argentina Pet. 14; YPF Pet. 21) that this lawsuit falls outside the commercial-activity exception because their alleged violations of the bylaws were "inextricably intertwined with" the sovereign act of expropriating Repsol's shares—that they "directly followed from," were "the direct result of," and occurred "in connection with" the expropriation. Under this Court's cases, however, the "'based upon'" inquiry "zeroe[s] in on" the "acts that actually injured" the plaintiff. *Sachs*, 136 S. Ct. at 396 (quoting *Nelson*, 507 U.S. at 358). For example, in *Nelson*, an American citizen claimed that Saudi Arabia recruited him to work overseas, but then imprisoned and tortured him. 507 U.S. at 352-354. This Court held that the ensuing lawsuit for unlawful detention and torture was "'based upon'" the alleged detention and torture, not upon the preceding acts of recruitment and employment, even though "these activities led to the conduct that eventually injured" the

plaintiff. *Id.* at 358. Similarly, in *Sachs*, an American citizen bought a ticket in the United States for railway travel in Europe, and then suffered an accident while attempting to board a train in Austria. 136 S. Ct. at 393. This Court held that the ensuing personal-injury lawsuit was "'based upon'" the "episode in Austria," not upon the preceding sale of the ticket. *Id.* at 396. Similarly here, Petersen's breach-of-contract lawsuit is based upon the alleged violation of the tender-offer rules in YPF's bylaws. Argentina's sovereign act of expropriation led to that alleged violation, but that does not make the expropriation the basis of the lawsuit.

Petitioners also contend that a lawsuit for the violation of the tender-offer requirements amounts to a challenge to the expropriation itself, and that allowing this lawsuit to proceed would enable plaintiffs to "circumvent the requirements of the [separate] 'expropriation exception' to sovereign immunity" in 28 U.S.C. 1605(a)(3). Argentina Pet. 22; see YPF Pet. 18. That contention is mistaken. Petersen's lawsuit does not contest the validity of the expropriation. The bylaws' tender-offer requirements apply to private parties as well as to Argentina, and they come into play when either a private party or Argentina becomes the owner of more than a specified percentage of YPF's shares "by any means or instrument." Pet. App. 117a, 159a. For instance, if Argentina purchased a controlling stake of YPF on the open market, instead of expropriating the stake from Repsol, it would have been required to extend a tender offer for the remaining shares. *Id.* at 21a. The way in which Argentina acquired the shares and the legality of that action are thus irrelevant to the contractual obligation and to Petersen's breach-of-contract claim. For

this reason, this lawsuit is not based upon the expropriation, and it is not an indirect means of challenging the propriety of the expropriation.

Petitioners nonetheless insist that a lawsuit based upon the failure to extend a tender offer *does* amount to a challenge to the expropriation, because the Expropriation Law itself required Argentina to acquire "*exactly* 51% of the shares of YPF" and to vote those shares. Argentina Pet. 17; see YPF Pet. 17. This argument is flawed in two respects. First, a breach of a commercial obligation does not cease to be commercial simply because a statute or regulation commands the breach. For example, in *Weltover*, this Court held that the commercial-activity exception covered a lawsuit against Argentina for failing to make timely payments on its bonds, even though Argentina ceased making the payments "[p]ursuant to a Presidential Decree." 504 U.S. at 610; see *id.* at 615-617. The Court emphasized that the bonds were "in almost all respects garden-variety debt instruments: They [could] be held by private parties; they [were] negotiable and [could] be traded on the international market * * * ; and they promise[d] a future stream of cash income." *Id.* at 615. So too here, the commercial-activity exception covers Petersen's lawsuit against Argentina and YPF for failing to honor contractual promises, even though petitioners contend that they failed to honor those promises because of the Expropriation Law. Shares in YPF are garden-variety equity instruments, and petitioners' promises regarding those shares are garden-variety contractual commitments.

Second, the court of appeals in any event rejected petitioners' premise that the Expropriation Law required Argentina to acquire exactly 51% of the shares of YPF and prohibited it from extending a tender offer

for further shares. The court "s[aw] no reason why Argentina could not have complied with both the bylaws' tender offer requirements and the YPF Expropriation Law." Pet. App. 21a. And it determined that "no provision in the YPF Expropriation Law" "compelled Argentina to 'acquire *exactly* 51% ownership in YPF' and no greater ownership position." *Id.* at 22a (citation omitted); see *id.* at 21a-24a. Citing this Court's decision in *Animal Science Products, Inc.* v. *Hebei Welcome Pharmaceutical Co.*, 138 S. Ct. 1865 (2018), the court of appeals accorded "respectful consideration to Argentina's [contrary] views," but in the end the court was "not persuaded." Pet. App. 22a. Argentina now contests (Argentina Pet. 17-18) the court's interpretation of Argentine law, but a case-specific dispute regarding the meaning of Argentine law does not warrant this Court's review. Quite the opposite, such case-specific and fact-bound disputes make this case a poor vehicle for addressing the scope of the commercial-activity exception.

2. Contrary to petitioners' contentions (Argentina Pet. 12-15; YPF Pet. 9-13), the court of appeals' decision does not conflict with decisions of the D.C. Circuit. Petitioners' claim of a circuit conflict rests principally on *Rong* v. *Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006). In that case, a Chinese province expropriated the plaintiffs' ownership rights in a joint venture, put government officials in charge of the venture, and transferred shares in venture to a different company. *Id.* at 885-887. The plaintiffs sued the province in federal district court, claiming that the province had "wrongfully taken" and wrongfully exercised ownership rights. *Id.* at 889 (citation omitted). The D.C. Circuit held that the commercial-activity exception did not apply to the lawsuit, because it was "based" upon

the sovereign act of expropriating the plaintiffs' property. *Id.* at 888; see *id.* at 888-890. The court added that the province's "subsequent acts"—such as putting government officials in charge of the venture and transferring shares in the venture—"did not transform the Province's expropriation into commercial activity." *Id.* at 890.

The court of appeals' decision in this case is consistent with the D.C. Circuit's decision in *Rong*. *Rong* was based upon an expropriation, because the plaintiffs there challenged the expropriation of their shares. In contrast, this case is not based upon an expropriation, because Petersen does not challenge the expropriation of its own or anyone else's shares. Rather, it challenges only the alleged failure to comply with contractual tender-offer requirements.

The decision in this case is also consistent with the D.C. Circuit's treatment in *Rong* of the acts that occurred after the expropriation. The plaintiffs there challenged the post-expropriation acts—such as replacing the joint venture's management and transferring the joint venture's shares—on the ground that the initial expropriation was itself unlawful. They did not contend that the acts were unlawful for any reason apart from the alleged unlawfulness of the expropriation itself. It was thus clear in *Rong* that the expropriation was the gravamen of the lawsuit. In this case, by contrast, Petersen does not challenge Argentina's failure to extend a tender-offer and YPF's failure to enforce the tender-offer requirement on the ground that Argentina's expropriation of Repsol's shares was unlawful. Quite the contrary, Petersen accepts the validity of the expropriation, contesting only the failure to take further acts (such as extending a tender offer) in addition

to that expropriation. So in this case, unlike in *Rong*, the expropriation is not the gravamen of the lawsuit.

Indeed, *Rong* and this case are mirror images of one another. In both cases, the governing legal principle is that the court must focus on the character of "the specific activity upon which the claim is based," not "general activity related to the claim." *Rong*, 452 F.3d at 891 (citation omitted). In *Rong*, the lawsuit fell outside the commercial-activity exception because it was based upon an expropriation, and that result did not change merely because the expropriation had a relationship with commercial activities. Here, the lawsuit falls within the commercial-activity exception because it is based upon a breach of a commercial contractual obligation, and that result does not change merely because the breach has a relationship with an expropriation.

The D.C. Circuit's decision in *de Csepel* v. *Republic of Hungary*, 714 F.3d 591 (2013), which the Second Circuit cited here, Pet. App. 15a, 20a, confirms that the decision below does not conflict with the D.C. Circuit's decisions. In *de Csepel*, the D.C. Circuit held that the commercial-activity exception applied to Hungary's alleged breach of bailment agreements to care for artwork expropriated during the Holocaust. 714 F.3d at 599-600. The court reasoned that a "foreign state's repudiation of a contract is precisely the type of activity in which a 'private player within the market' engages." *Id.* at 599 (citation omitted). The court recognized that the initial expropriation was a sovereign act, *id.* at 600, but concluded that the suit was based upon the alleged breach of the bailment agreements rather than the preceding expropriation. The court explained that, by allegedly "entering into bailment agreements" "and later breaching those agreements by refusing to return the

artwork," the foreign state "took affirmative acts beyond the initial expropriation." *Ibid.* Likewise here, the lawsuit is based upon distinct conduct—Argentina's failure to extend a tender offer and YPF's failure to enforce the tender-offer requirement—that goes beyond and is separate from the initial expropriation.

Petitioners separately contend (Argentina Pet. 13; YPF Pet. 12) that the Ninth Circuit's 26-year-old decision in *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (1992), cert. denied, 507 U.S. 1017 (1993), conflicts with the D.C. Circuit's decision in *Rong*. As an initial matter, the claim that *Siderman* conflicts with *Rong* is not a basis for granting a writ of certiorari in *this* case, which does not conflict with *Rong*. In addition, petitioners overstate the conflict between *Siderman* and *Rong*. In *Siderman*, the Ninth Circuit applied the same legal test that the D.C. Circuit applied in *Rong* and that the Second Circuit applied here; the Ninth Circuit first identified the "activities that form[ed] the basis for the claims," and it asked whether those activities are "'of a kind in which a private party might engage.'" *Id.* at 708-709. Petitioners disagree (Argentina Pet. 13; YPF Pet. 12) with the Ninth Circuit's application of that legal standard to the facts of that case, but disagreement with the application of a legal standard in another case is not a reason for granting review in this case.

3. Petitioners contend (Argentina Pet. 27-32; YPF Pet. 19-22) that the scope of the commercial-activity exception involves important issues. This case, however, would be a poor vehicle for addressing the scope of the exception, because much of petitioners' argument rests on a disagreement with the court of appeals' interpretation of Argentine law and YPF's bylaws. Petitioners

contend that the alleged breaches of the bylaws are "inextricably intertwined" with the expropriation because the Expropriation Law itself required Argentina to acquire "*exactly* 51% of the shares of YPF" and to vote those shares. Argentina Pet. 17-18; see YPF Pet. 17. But as discussed above (pp. 13-14, *supra*), the court rejected that interpretation of Argentine law. Argentina maintains (Argentina Pet. 19 n.5) that this Court "need not address any factual disputes as to the meaning of the Expropriation Law or YPF's bylaws," but it is hard to see how that can be so, when its assertions that the commercial activities are inextricably intertwined with the expropriation rest on the premise (*id.* at 17) that "[m]aking a tender offer would have been incompatible with the Expropriation Law."

Petitioners contend that the decision below threatens to upset "exceptionally important and sensitive interests," Argentina Pet. 28, and to interfere with the United States' "foreign relations," on account of its effects on Argentina and "also countless other foreign states," YPF Pet. 22. The United States is sensitive to these concerns and agrees that the commercial-activity exception should not be applied in a manner that risks infringing on a foreign state's sovereignty or undermining the carefully calibrated scope of the FSIA's expropriation exception. But the decision below, which turns on the facts of this particular case and the character of Petersen's particular claims, is unlikely to lead to such results. In addition, the United States has a countervailing interest in ensuring that foreign states that enter U.S. markets as commercial actors do not enjoy immunity from lawsuits regarding violations of their commercial obligations. Here, Argentina conducted an ini-

tial public offering for YPF on the New York Stock Exchange, and it specifically advertised YPF's bylaws in order to attract investors. The FSIA provides for jurisdiction over Argentina and YPF to resolve this commercial dispute regarding alleged violations of those bylaws that caused a direct effect in the United States.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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