From: Paul A Holmes <paul@fgsglobal.com>
Date: Monday, July 14, 2025 at 4:17 PM
To: [redacted]
Cc: [redacted]
Subject: Follow-up materials

Dear all,

Thanks for giving us some of your precious time today to join the briefing with [redacted] and [redacted]. We hope it was helpful and look forward to staying in touch.

As discussed on the call, attached are the following, which we thought you might find helpful:

1. USG's second filing with the District Court, reiterating its opposition the Burford turnover motion in response to a ruling in a separate case (*Peterson* with an O). It concludes that the *Petersen* (with an E) turnover motion "conflicts with federal common law, customary international law, and principles of prescriptive comity" and should be denied. This one was filed on January 10 this year by the then acting US Attorney for the Southern District of New York, Edward Kim.

2. The transcript of Burford Capital's November 2024 earnings call, where (on page 9) Chris Bogart characterized the purpose of Burford's ex-US enforcement "gambits" (his word) as to be "sand in the gears" of Argentina's efforts to return to the international capital markets.

3. The sovereign amicus briefs filed in the appeal of Judge Preska's underlying judgment by Brazil/Uruguay and Ecuador/Chile. I'm aware that [redacted] and [redacted] reported these when filed but for those of you interested in seeing them, they're attached.

Bests, Paul

Paul A Holmes
Partner & Vice Chair
New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETERSEN ENERGÍA INVERSORA, S.A.U. and PETERSEN ENERGÍA, S.A.U., Plaintiffs, v. ARGENTINE REPUBLIC and YPF S.A., Defendants.	No. 15 Civ. 2739 (LAP)
ETON PARK CAPITAL MANAGEMENT, L.P., ETON PARK MASTER FUND, LTD., and ETON PARK FUND, L.P., Plaintiffs, v. ARGENTINE REPUBLIC and YPF S.A., Defendants.	No. 16 Civ. 8569 (LAP)

MEMORANDUM OF THE UNITED STATES OF AMERICA CONCERNING THE SECOND CIRCUIT'S DECISION IN *PETERSON V. BANK MARKAZI*

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PRELIMINARY STATEMENT

The United States of America (the "United States" or the "Government"), by and through its attorney, Edward Y. Kim, Acting United States Attorney for the Southern District of New York, submits this memorandum in accordance with 28 U.S.C. §§ 517, 518, and in response to the Court's November 15, 2024 Order (ECF No. 685), requesting briefing addressing the impact of the Second Circuit's decision in *Peterson v. Bank Markazi*, 121 F.4th 983 (2d Cir. 2024) ("*Bank Markazi*"), on Plaintiffs' motion for an injunction and turnover of the Argentine Republic's ("Argentina's") foreign state property (ECF Nos. 555-556 (the "Turnover Motion")).[1]

In *Bank Markazi*, the Second Circuit vacated and remanded a summary judgment order directing Bank Markazi, Iran's central bank, and Clearstream Banking ("Clearstream"), to turn over the contents of a blocked account to judgment creditors seeking to enforce a judgment against Iran. 121 F.4th at 990. The turnover order in *Bank Markazi* was issued pursuant to 22 U.S.C. § 8772, as amended in 2019, which specifically strips execution immunity from certain Iranian assets outside the United States and subjects those assets to a turnover order without regard to concerns relating to international comity. *See* 22 U.S.C. § 8772(a)(1).

The United States agrees with Plaintiffs (ECF No. 695 at 12), and Argentina (ECF No. 698 at 6), that the Second Circuit's decision in *Bank Markazi* does not impact this Court's determination of Plaintiffs' Turnover Motion, which should be denied. As the Government asserted in its Statement of Interest (ECF No. 679 ("Statement of Interest"), at 5-8), principles of prescriptive comity must limit the New York turnover statute, CPLR 5225, from reaching the property of a foreign sovereign located outside of the United States, and the *Bank Markazi* decision

[1] References to ECF entries refer to the docket in Case No. 15 Civ. 2739. This supplemental memorandum does not address the implications of the *Bank Markazi* decision on YPF S.A.'s motion to intervene or Plaintiffs' requests for alter ego discovery. *See* ECF No. 685 at 1-2.

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only reinforces the need to conduct that comity analysis. In contrast to Section 8772, which specifically subjects certain Iranian assets abroad to turnover without consideration of international comity concerns, there is nothing in the Foreign Sovereign Immunities Act ("FSIA"), or any other law, which would obviate the requirement that the Court conduct a comity analysis with respect to the reach of the New York turnover statute in this matter.

Similarly, the *Bank Markazi* decision does not address whether the FSIA abrogated common law principles of sovereign immunity from execution with respect to foreign sovereign property located abroad. To the extent the panel in *Bank Markazi* suggested in a footnote that Iran's foreign state property abroad possesses no execution immunity by virtue of the limited application of the FSIA to "*the property located in the United States* of a foreign state," 121 F.4th at 996 n.3 (quoting 28 U.S.C. § 1609) (emphasis in original), its suggestion is dicta—warranting careful consideration, but ultimately unpersuasive. As the Government has previously asserted (Statement of Interest, at 3-5), the FSIA did not abrogate foreign sovereigns' longstanding common law execution immunity for property located abroad.

THE SECOND CIRCUIT'S DECISION IN *BANK MARKAZI*

In the *Bank Markazi* matter, judgment creditors of the Islamic Republic of Iran sought to enforce their judgment by seeking turnover of a $1.68 billion right to payment held by Clearstream, a Luxembourg-based securities intermediary, representing the principal and interest of bond investments that Clearstream made in New York on behalf of Bank Markazi. *See Bank Markazi*, 121 F.4th at 990. This Court granted the judgment creditors' request for summary judgment and a turnover order of the assets held by Clearstream, relying in part on 22 U.S.C. § 8772, as amended in 2019, which specifically makes certain assets held abroad by Clearstream on behalf of Bank Markazi (i) subject to execution "notwithstanding any other provision of law, including any provision of law relating to sovereign immunity, and preempting any inconsistent provision of

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State law," and (ii) subject to "an order directing that such assets be brought" into the jurisdiction "without regard to concerns relating to international comity." *Id.* at 992-993 (citing 22 U.S.C. § 8772(a)(1)). On appeal, the Second Circuit vacated the turnover order and remanded to this Court. *Id.* at 990.

As relevant to Plaintiffs' Turnover Motion, the Second Circuit agreed with Bank Markazi's argument that Section 8772's "notwithstanding clause" only strips the execution immunity of assets held on behalf of Bank Markazi, but not Bank Markazi's jurisdictional immunity conferred by the FSIA. *Id.* at 995-96. As explained by the Second Circuit:

> In the absence of an explicit reference to jurisdictional immunity, we find nothing else in the statute to suggest that the notwithstanding clause's reference to "sovereign immunity" was intended to go beyond the execution immunity provided to the assets under the FSIA and reach the jurisdictional immunity provided by the same statute to Iran and its instrumentalities.

Id. The Second Circuit panel noted in dicta that it may seem "counterintuitive" that the statute only abrogates execution immunity when such assets abroad do not possess execution immunity under the FSIA. *Id.* at 996 n.3 (citing 28 U.S.C. § 1609). The panel explained that in its previous (and vacated) decision in *Peterson v. Islamic Republic of Iran (Peterson II)*, they "noted that if the Assets were brought into the United States pursuant to a turnover order it would then be necessary to conduct an execution immunity analysis under the FSIA because they would become assets 'in the United States.'" *Id.* (citing *Peterson II*, 876 F.3d 63, 94 (2d Cir. 2017)). However, the 2019 amendments to Section 8772 "eliminat[e] the need to conduct this analysis if the Assets are delivered to the United States pursuant to a turnover order." *Id.*

Similarly relevant to Plaintiffs' Turnover Motion, the Second Circuit rejected separate constitutional due process arguments concerning the exercise of personal jurisdiction raised by Clearstream, which argued that such an exercise of jurisdiction was unreasonable because allowing

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a judgment to be enforced using property located abroad would go beyond U.S. courts' traditional limits. *Id.* at 1006. The Second Circuit held that while execution against property abroad was uncommon "because U.S. courts 'generally lack authority in the first place to execute against property in other countries,'" *id.* (quoting *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 144 (2014)), the New York turnover statute at CPLR 5225(b) was "one exception to the general principle that courts cannot reach extraterritorial property," and allows a court "with personal jurisdiction over a non-sovereign third party to order that third-party garnishee to produce in New York an extraterritorial asset." *Id.* (citing *Peterson II,* 876 F.3d at 91).

DISCUSSION

I. Principles of Prescriptive Comity Preclude the New York Turnover Statute from Reaching Foreign Sovereign Property Located Abroad.

The *Bank Markazi* decision does not alter the prescriptive comity analysis that this Court must undertake—which precludes application of the New York turnover statute to Argentina's foreign state property located abroad.

The turnover motion at issue in *Bank Markazi* arose from Section 8772, as amended, which is a unique statute authorizing turnover of certain Iranian assets held abroad "without regard to concerns relating to international comity." 22 U.S.C. § 8772(a)(1); *see also Bank Markazi,* 121 F.4th at 1013 (Lohier, J., concurring) (Section 8772's "provisions apply 'without regard to concerns relating to international comity'"). Here, there is no statutory directive that international comity concerns do not apply to limit the reach of the New York turnover statute.

That the *Bank Markazi* panel reiterated that the New York turnover statute may be applied extraterritorially to "a non-sovereign third party," 121 F.4th at 1006, does not alter the requirement that this Court must conduct a separate analysis of international comity prior to issuing turnover of a foreign sovereign's assets located abroad. A statute with extraterritorial reach may still be

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subject to constraints imposed by principles of prescriptive comity where the interests of foreign sovereigns are involved. *See* Statement of Interest at 5. And the Court must undertake an analysis of whether application of the New York turnover statute conflicts with these principles (it does) before ordering turnover of Argentina's assets located abroad.

Indeed, the same panel of the Second Circuit that decided *Bank Markazi* previously determined that this Court should undertake just such an analysis prior to issuing a turnover order concerning foreign sovereign property abroad. In *Peterson II*, the same panel noted—prior to the 2019 amendments to Section 8772—that "the court should determine if a barrier exists to an exercise of *in personam* jurisdiction to recall to New York State the right to payment held by Clearstream in Luxembourg, whether for reasons of, *inter alia*, state law, federal law, international comity, or for any other reason." 876 F.3d at 94. Accordingly, this Court must conduct an analysis of whether such concerns preclude application of the turnover statute to Argentina's foreign state property held abroad. *See also id.* n.23 (noting that the district court may conduct a comity analysis based on the framework provided by the Restatement (Third) of Foreign Relations Law (citing *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 138-39 (2d Cir. 2010))).[2] As the Government explained in its Statement of Interest (at 5, 7-8), common law immunity from execution, customary international law, and principles of prescriptive comity preclude the requested turnover order here.

[2] The factors set out at Section 403 of the Restatement (Third) of Foreign Relations Law apply with respect to an analysis of prescriptive comity. *See* Statement of Interest at 4; *see also* Restatement (Fourth) of Foreign Relations Law § 402(2) (2018) ("In exercising jurisdiction to prescribe, the United States takes account of the legitimate interests of other nations as a matter of prescriptive comity."); *id.* § 402, note 13 ("The principle of reasonableness expressed in § 403 of the Restatement Third is reflected in § 402(2) with respect to the exercise of jurisdiction to prescribe.").

II. The FSIA Did Not Abrogate Common Law Execution Immunity for Foreign State Property Located Abroad.

The *Bank Markazi* decision similarly does not alter the analysis that common law execution immunity prevents this Court from issuing a turnover order of Argentina's property located abroad.

The FSIA did not abrogate the longstanding common law immunity from execution for foreign sovereign property located abroad. *See* Statement of Interest at 3-5. And the *Bank Markazi* panel did not reinstate their analysis to the contrary in their prior opinion in *Peterson II*. *See Peterson II*, 876 F.3d at 90-93; *see also Peterson v. Islamic Republic of Iran*, 963 F.3d 192, 196 (2d Cir. 2020) (declining to reinstate analysis in *Peterson II* as to common law execution immunity). Rather, the panel simply relied on Section 1609 of the FSIA, which grants execution immunity to "the *property in the United States* of a foreign state," in suggesting that the assets in Luxembourg possess no execution immunity. *Bank Markazi*, 121 F.4th at 996 n.3 (emphasis in original).[3] The panel's statement in a footnote is assuredly dicta—not necessary to support the judgment reached and therefore "not binding on lower courts." *United States v. Donziger*, No. 11 Civ. 691 (LAP), 2021 WL 3141893, at *55 n.519 (S.D.N.Y. July 26, 2021). And while dicta may "deserve close consideration," *Jimenez v. Walker*, 458 F.3d 130, 142-43 (2d Cir. 2006), the notion that the FSIA abrogated, *sub silentio*, the longstanding common law execution immunity for foreign sovereign property located abroad is simply unpersuasive. *See* Statement of Interest at 3-5. Among other things, it would make no sense to conclude that Congress meticulously delineated the circumstances under which execution on foreign-state-owned assets in the United States would be allowed, but, through its silence, abandoned all such limits for assets located abroad. *Id.* at 4. Likewise, it would be particularly anomalous, as the panel's dicta would have it,

[3] The *Bank Markazi* panel also referenced its holding in *Peterson II* in its discussion of the procedural history of the case, *see Bank Markazi*, 121 F.4th at 992, however, it did not otherwise address the issue in its discussion except for this single sentence in footnote 3.

that a foreign sovereign's property enjoys *less* protection when it is located in the sovereign's own territory than when it is located in the United States. *Id.* at 5.

The FSIA contains no explicit reference to abrogation of execution immunity for foreign sovereign property located abroad, and the Supreme Court has made clear that "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citations omitted); *see also* Statement of Interest at 4-5. The *Bank Markazi* panel did not address this statutory silence in its dicta suggesting that the FSIA stripped foreign state property abroad of its execution immunity. Indeed, this dicta is hard to square with the panel's own holding that they would not extend the immunity stripping provision of Section 8772's "notwithstanding clause" to Bank Markazi's jurisdictional immunity "in the absence of an explicit reference" in the statute. 121 F.4th at 995-96.

Furthermore, the panel's suggestion that foreign sovereign property located abroad "possesses no execution immunity," *id.* at 996 n.3, is belied by the fact that the 2019 amendments to Section 8772 specifically struck the requirement that the assets at issue be held "in the United States" to be subject to execution, and further provided that such assets may be subject "to an order directing that the asset[s] be brought to the State in which the court is located and subsequently to execution." National Defense Authorization Act for Fiscal Year 2020, § 1226, Pub. L. No. 116-92, 133 Stat. 1198, at 1645-46 (2019). The fact that Congress found it necessary to include this new authority in a statute that specifically abrogates the immunity from execution for Iran's property located outside the United States is further indication that foreign state property abroad would not otherwise be subject to execution by U.S. courts in the normal course.

Finally, the *Bank Markazi* panel did not have occasion to address any of the arguments raised by the Government in its Statement of Interest and attached amicus briefs, which all counsel

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against reading into the FSIA an abrogation of common law immunity from execution for foreign state property abroad. *See* Statement of Interest at 3-5; ECF No. 679-1, *Clearstream* amicus brief at 11-15; ECF No. 679-2, *Levin* amicus brief at 2-5 & 16-29. Nor did the Second Circuit address the argument that application of the New York turnover statute to bring foreign sovereign property into the jurisdiction would render the FSIA's prerequisite that foreign sovereign property be located in the United States a nullity. *See* Statement of Interest, at 8-9. For all these reasons, Plaintiffs' Turnover Motion must be denied.

CONCLUSION

The Second Circuit's *Bank Markazi* decision does not impact this Court's determination of the Turnover Motion, which conflicts with federal common law, customary international law, and principles of prescriptive comity. Accordingly, the Turnover Motion must be denied.

Dated: New York, New York
January 10, 2025

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Civil Rule 7.1(c), the undersigned counsel hereby certifies that this memorandum complies with the word-count limitation of this Court's Local Civil Rules. As measured by the word processing system used to prepare it, this memorandum contains 2,501 words.

/s/ David E. Farber
Assistant United States Attorney

Transcripts

Burford Capital Limited (BUR) Q3 2024 Earnings Call Transcript

Nov. 09, 2024 9:50 PM ET | **Burford Capital Limited (BUR) Stock**

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Q3: 2024-11-07 Earnings Summary

Play Call | Press Release

EPS of $0.61 beats by $0.31 | Revenue of $249.11M (-32.47% Y/Y) beats by $112.11M

Burford Capital Limited (NYSE:BUR) Q3 2024 Earnings Conference Call November 7, 2024 10:00 AM ET

Company Participants

Christopher Bogart - Chief Executive Officer
Jonathan Molot - Chief Investment Officer
Jordan Licht - Chief Financial Officer

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Conference Call Participants

Mark DeVries - Deutsche Bank AG
Alexander Bowers - Barenberg
Julian Roberts - Jefferies

Operator

Thank you for standing by and welcome to the Burford Capital's Third Quarter 2024 Financial Results Conference call. All lines have been placed on mute to prevent any background noise. After the speaker's remarks, there will be a question-and-answer session. [Operator Instructions] Thank you.

I'd now like to turn the call over to Christopher Bogart, Chief Executive Officer. You may begin.

Christopher Bogart

Thanks very much and hello everybody. Thank you for joining us today. As usual, with me on the call is: Jon Molot, Burford's Chief Investment Officer; and Jordan Licht, Burford's Chief Financial Officer. And the three of us will take you through the slides that have been put up on the website.

I'm going to start on Slide 4, and it's obviously very nice when a strong quarter like this comes along and we can show you how the business is performing. Our business doesn't really fit neatly into quarters and the third quarter is often slow, given the summer. So it's particularly nice to have this kind of result, even though we like to look at the business over a longer term than just on a quarter-by-quarter basis. But this slide is purely about the quarter.

And so, what you can see here are some real indications of activity, realizations more than doubled compared to the comparative quarter. Net realized gains almost doubled. We brought in a ton of cash during the quarter, decent income, and our deployments and commitment activity was certainly consistent with this kind of period. In fact, new commitments went up more than 5x over the comparative period. But because courts and lawyers are often slow in the summer, the third quarter is never what we look to for new business as some sort of bellwether of anything.

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I'm going to turn to Slide 5, which lets us talk a little bit more about the year-to-date. And I will say, just as we start going through these slides, we're going to try to do this at a reasonable pace for you because it was our intention on this call to give you a little bit more fulsome of an update when we come to talk about the YPF-Petersen cases. So we prepared some material for that, including a new slide, and we're going to spend some time talking through that. So we're going to -- while not giving short shrift to the quarter, I'm going to dwell on some of these points a little bit less than I might ordinarily.

So on Slide 5, which is really more about year-to-date. The fundamental message here is that, we're having a very strong year. We're seeing real portfolio activity, and Jon's going to talk in some more detail about that. That's driving cases forward. It's creating realizations. You'll see sort of record cases here, not only are the realizations on a record pace, but net realized gains just through three quarters are already basically hitting a record annual level.

In addition to the cash that we brought in during the third quarter, we've now brought in, during the course of the year, well over $0.5 billion. And so, we're sitting on some meaningful liquidity that Jordan will talk about in a moment. And we continue to be able to write a nice amount of new business in the market, notwithstanding the fact that the team is certainly also occupied by the fairly significant level of portfolio activity that we've got going on.

So with those sort of opening remarks, let me turn you over to Jordan.

Jordan Licht

Thank you, Chris. Good morning and good afternoon to everyone on the call today. I'm on Page 6. This is just a quick summary of the financials for Burford-only. As we talked about earlier this year, it's obviously difficult to make comparisons to the prior year periods. 2023, of course, included the positive news regarding summary judgment on the YPF cases that drove a good portion of the 23 years overall results.

But let's start first looking at the quarter and some of the totals. Overall, we had $136 million of net income for the second quarter, resulting in $0.61 per share. Net income was just over 60% of total revenues. On the asset side, we are slightly over $3.6 billion of capital provision assets. Of that, our non-YPF assets represent approximately $2.2 billion in which there's approximately a 35% fair value uplift to deployed cost. Tangible book values over -- excuse me, book value per share is over $11 now and tangible book value is just shy of $10.5.

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I'm going to go into more details about revenue, expense and some of the other key metrics now. So why don't we switch to Page 7? On Page 7, breaking down the various components to capital provision income, a couple of headlines to focus. If you exclude YPF, our net realized and unrealized gains were up 200% quarter-over-quarter and 17% when looking at the year-to-date figures. I also want to highlight the net realized gains in the third quarter, in particular, were close to double the same quarter or same period last year. And as Chris had mentioned, and more importantly, the 9-month figure of $186 million is already in line with previous annual records.

Inside the earnings, market interest rates did reverse course during the third quarter and this impacts the discount rate that we use in valuation. That dropped approximately 90 basis points, which resulted in slightly less than $100 million of positive impact to fair value. As a point of comparison, we had seen rates rising through the first half of the year, which had created a headwind to unrealized fair value gains. The discount rates in general follow market trends and broader market volatility. But as I always say, we focus on the cash resolution of our assets and not the interim fluctuation created by rate volatility. And so, that brings me back to the record results with respect to net realized gains in the year-to-date.

I'm going to switch now to Page 8. So look, this -- as Chris mentioned, third quarter sometimes can be slow given the summer, but it was a productive quarter to continue building the portfolio. Burford-only capital provision direct new commitments remain consistent with what we traditionally see in first and third quarters. And as Chris mentioned, it significantly outpaced the third quarter of last year. From a Burford-only balance sheet perspective, the year-to-date figures practically identical on new commitments between 2023 and 2024 around $450 million.

Deployments remained in line with our expectations for the quarter in comparing 2023, recall that in Q2 of last year we had a large deal to support a Fortune 50 client. That resulted in a $325 million commitment and $190 million of that was for the Burford-only capital provision direct commitments. And it also had an immediately large deployment of $127 million by the balance sheet. So overall, Q3 looks good from that perspective and comparative. We expect deployments to continue to be robust, given that we've got approximately $700 million of definitive commitments to deploy on the existing portfolio.

And so, with that, I will move to Page 9. Looking at Page 9, you'll see that we have Burford-only capital provision direct realizations of $380 million, representing a 39% increase over the same period last year, which is obviously a great result. The bullet on the side of the slide highlights that this is driven from a diverse set of assets, not just one large item. We had 10 items that were greater than $10 million, five items that were greater than $20 million in realizations.

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And realizations is obviously then what turns in the critical component and what turns into creating cash and cash receipts have been consistent if you look at the previous eight quarters at near over $100 million. And, of course, if you look at the most recent quarter, we had a record of $310 million of cash receipts. And if you look overall for the Burford-only capital provision direct, we're just shy of $0.5 billion coming back to the balance sheet. So bottom line, the portfolio continues to produce a lot of cash.

And with that, I will turn it over to Jon for Slide 10.

Jonathan Molot

Before we turn the slide, I just wanted to say thanks Jordan back on Slide 9 and thanks to you all for joining. And, in fact, I just want to give some color, my perspective on the two slides Jordan just spoke to. On the one hand, commitments and deployments and on the other hand, realized gains because that's the bread and butter of what our team does.

And on the commitments and deployments front, I would just observe, as Chris said early, generally the third quarter, 2/3 of it is summer, July and August. Lawyers often take their holidays during that period. It's slower. They try to get work done in June and deals done in June before going away. But this year, I just felt like the pipelines were robust. The team was busy all the way through the summer into September. So we weren't playing that kind of September catch up to make up for slower quarters -- I mean, slower months before.

And the other thing about it is, it was very active in a broad, diverse way geographically and by types of cases. It's been years since we were a New York-based U.S. commercial litigation funder that happened to have satellite offices. Like we are a global provider. When I think about how active the EMEA and Asia Pacific groups have been, how active our patent team in the U.S. has been with intellectual property litigation. So that whether it's run out of Chicago, out of London, it's Asia or it's New York, there's just has been a ton going on consistently throughout the year and that's really fabulous.

And on the realizations point that Jordan just talked to on Slide 9, I'd just say, I've been saying on these calls for many years, particularly during COVID when things were slower and we weren't seeing the realizations that I still saw that the portfolio was strong, there were good things happening. I was very bullish on it and, of course, that was me because I saw it. You are investors who are supported us couldn't see that tangible results of that activity. And I'm so thrilled that you're getting to see it now because it's just a lot of money coming in.

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And if we turn to Slide 10. You will see that it is a lot of money coming in, in very good, attractive deals. On Slide 10, you've seen this slide before, but I just want to step back and say like we've brought in $3 billion on $1.679 billion out, like with an 84% return on invested capital. That's really something I'm very proud of the team for. And you see the breakdown of why we're able to do this with those kinds of returns because the resolutions are going to either go to adjudication or settle. The majority settle. And we have attractive IRRs and returns on invested capital with that. And in the adjudication gains, the gains far outpace the losses we bet right. And so, it just leads to a very attractive diverse portfolio.

You see the IRR ticked down to 26%. I wouldn't read anything into that. We've told you, a, that it bounces around and b, we've been talking for some time about how COVID slowed down some resolutions. So even though we're getting lots of cash now, it may be things that took a little longer. And the nice thing is, as we've also said, our deals traditionally have some time-based component in the return profile.

There'll be a preferred return with either an IRR, an interest rate or a rising multiple. But there's also a percentage of net usually. And so, it's not surprising there would be some effect on IRR for that period. Though I'm proud that it was not a market one and I wouldn't read anything into it. We certainly haven't changed our underwriting approach or seen any change in the quality of things coming into the pipeline.

Turning to Slide 11. You've seen this slide before, too, but I just observed one thing about it. One, this is sort of another way to demonstrate graphically what the prior slide did about just the return profiles that you have these adjudication wins that are really high end, very impressive returns on invested capital. But really part of the interesting story here is, you look at the losses and I don't know that people have focused on it before: but one, to have a loss rate that's below 10% lifetime; and two, when you look at the breakdown of those losses, those dark shaded bars, those are losses of less than $1 million.

Well, what does that mean? It means either it's kind of like an ante where you put money in and there was a gating issue you knew about at the beginning and a motion dismissed and you lost early for not much, or they went along and there was a fair bit of money in it, something didn't turn out the way was anticipated. And so, rather than going to trial and taking that risk, the parties decided to settle. And we didn't get our full investment back, but we didn't lose our full investment either.

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So when I just look at this profile, the spread of the big wins, the really solid singles and doubles and limited losses, it just has borne out. So, seeing the big realizations that Jordan talked about and seeing the profile of what those consist of, it's a really attractive asset class and we've got the best team in the business doing it.

And with that, I will hand it over, for Slide 12, to -- I'm going to, for a change, have Chris do a little YPF explanation.

Christopher Bogart

Thanks, Jon. Yes, it's been a little while since we talked at any length about YPF. And so, we thought that it was about time to give a little bit of an update about what we could say.

Look, we understand that there's a lot of shareholder interest in the YPF case. That's obvious given its size and its significance for the business. And we know that investors find it frustrating not to be able to get chapter and verse from us about our strategies and their progress. Unfortunately, that is simply the reality of conflict litigation. And none of you, no rational investor, would want us to disclose publicly any information that would give Argentina an edge in that ongoing litigation.

But what we can do is, provide here a bunch of information that is publicly available if you dig for it. So nothing I'm about to say is new or not already public, but we're just making it a bit easier than having you had to pour through court documents and media reports on your own. And we're also going to bring together some of what we've said in the past about what we're doing here and how it really relates to the end game.

There are essentially three buckets of activity going on right now in the case. The first bucket of activity is the appeal. Argentina has an appeal as of right from the trial court's judgment against it. That appeal is taken to the Second Circuit Court of Appeals, which is the federal appellate court that covers New York and some other states. And in addition to Argentina appealing its loss, the plaintiffs have also appealed the dismissal of YPF from the case.

Those appeals are now fully briefed. In other words, all of the papers for the case have been submitted. The next step is oral argument before a 3-judge panel, and we are waiting for the court to give us an argument date, which we would expect to be later this year or early next year. After oral argument, the court will go away and write its decision. There is no time limit for the release of that decision, but we would expect it later -- we would expect it some months after oral argument.

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It's worth remembering that this is not a matter of first impression for the Second Circuit. This case has been before the Appeals Court once already when it recognized that Argentina failed to comply with its obligation to make a tender offer for the remainder of YPF's outstanding shares. In fact, the Second Circuit actually characterized the minority shareholder protection for a compensated exit as undisputed.

So, although the 3-judge panel that will hear this appeal will be different than the prior panel, the new panel is bound by the decisions of the old panel. After the decision is released by -- from the Second Circuit, either party may seek leave from the U.S. Supreme Court to take a further appeal. There is no right to such an appeal and leave is granted less than 5% of the time on average and probably even lower numbers than that in commercial cases like this.

Appeal really -- the Supreme Court really only takes cases when there is a novel legal issue or a disagreement about the law among the various Circuit Courts of Appeal across the United States that doesn't exist here. You'll remember the Supreme Court declined to take this case previously when Argentina sought leave to appeal the Second Circuit's decision that the U.S. courts had jurisdiction to hear this case.

So, again, it's not a matter of first impression for the Supreme Court. The process of deciding whether to grant leave usually takes several months. If the court did elect to hear the matter, perhaps because of its size, that would add somewhere between 12 and 18 months to the process depending on the time of year the case is heard. So that's what's going on with the bucket #1, the appeal bucket.

The second bucket of activity is around enforcement and recognition proceedings. Because Argentina didn't satisfy the conditions for a stay of the judgment, the trial court judgment is enforceable even though it is on appeal. That allows us to do several things. We are pursuing post-judgment discovery from Argentina, YPF and the third parties in the New York Court, and we have been doing that actively, including engaging in motions to compel information where necessary. We're also seeking substantive enforcement assistance from the New York Court.

For example, we have filed a motion seeking to have Argentina's shares in YPF turned over to us. We're also engaged in global efforts. In order to enforce the judgment in other jurisdictions, we need first to have the local courts in those jurisdictions recognize the judgment. In other words, adopt it as though it was their own judgment. We have filed for recognition of the judgment in multiple non-U.S. jurisdictions, and those proceedings are winding their way through the procedural preliminaries in those local courts.

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Now, stepping back from the lawyering, it's important to bear in mind what enforcement is and isn't and its purpose. The goal of enforcement campaigns is to apply pressure and create friction so that a rational negotiation can occur. It is not in and of itself the goal to wander around the countryside, trying to pick up an asset here and an asset there and sell them at auction to pay off an enormous judgment. The law around enforcing judgments against sovereigns is complex and often unclear, and we will try many gambits that won't work as a strictly legal matter. That should not concern anyone.

However, what is really going on here is that, Argentina is rebuilding its economy and resuming its place on the world stage. And to do that, it needs to rejoin the capital markets and participate in the global economy. Having a large unsatisfied U.S. court judgment and ongoing enforcement proceedings around the world that also sweep in third parties is sand in the gears for that normalization process. And it should, in our view, ultimately lead to a commercial resolution. Put simply, we are a nagging problem that Argentina needs to solve.

I want to take a minute to address specifically a couple of filings by the U.S. Department of Justice in trial court recently, including one last night because this is a somewhat technical legal matter that has not been well reported by the media and has clearly been misunderstood by the market. First, to be clear, the DOJ filings relate only to the turnover motion I mentioned a moment ago and not to the case more broadly. Indeed, the U.S. government has previously supported the pursuit of this breach of contract matter against Argentina, and it also has not made any filings at all on the appeal and the time to do that has lapsed now.

So what is actually going on here? Now, we made a motion some months ago asking the U.S. court to order Argentina to bring its YPF shares into the U.S. so that we could then seize them. So just to think about that and put that in maybe layman's terms, this is a bit like you not paying your car loan, but the car now being located in a different country. And instead of us sending the repo man to that other country to get the car back, we are asking a court to require you to drive the car back to New York so that the repo man can grab it there.

There's no question that is a request that is out of the ordinary. We believe that it is supported by existing law, but we also knew that there was a good chance of governments seeing this differently. And in fact, more than a month ago, Bloomberg ran a piece on this, quoting me saying that the U.S. government might well say that we had gone too far in making this motion.

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The U.S. government is concerned about the precedent this would set when applied to foreign governments, both because it might interfere with diplomatic relations and also, maybe even more importantly, if it were applied globally, it could mean that other courts, foreign courts might try to make orders about U.S. government property. So the Department of Justice has asked the court not to grant this particular order, citing legal doctrines that are in some dispute. And again, this is narrowly just about this one turnover order. It has nothing to do with anything more broadly in the case.

Ultimately, the decision is up to the court, which is free to disregard the DOJ position, but this is a complex legal issue either way, and we will just have to see what happens over the coming months. In any event, this is just one motion in a broad multi-jurisdictional enforcement strategy. And as I said earlier, the purpose of our strategy is more about bringing Argentina to the table than it is about actually seizing and selling off assets. So that's the state of play on enforcement and recognition.

The third bucket of activity relates to diplomatic and political efforts. This is the bucket that we can say the least about as virtually nothing involved in it is public. It has, however, been publicly reported that Jon met in Buenos Aires with the Office of the Treasury Attorney General, which is in charge of the case for Argentina in December.

It has also been publicly reported that Gerry Mato, HSBC's former Head of Banking for the Americas is working on our behalf. Again, we're just trying to distill public information for you. Beyond that, we can't say anything specific, but this is an important part of our approach as we believe ultimately, this judgment will be resolved through negotiation and not formal legal process, and we have a number of very experienced advisers on our team in that regard.

So let's turn to Slide 13, which you have not seen before. Slide 13 is a reminder of the current economics and the accounting for the YPF matter. The judgment continues to accrue post-judgment interest at a rate of 5.42% compounding annually. That amounts to more than $2 million a day being added to the judgment every day it's outstanding. So the judgment today stands at around $17 billion, up from the original $16.1 billion, although we've made it clear that we don't expect full payment and instead seek a negotiated outcome that will inevitably include a discount.

From whatever is ultimately paid, Burford is entitled to a minority of those ultimate proceeds with the majority going to the Petersen estate, Eton Park, the secondary buyers and lawyers operating on risk. Burford's entitlement is around 35% of proceeds from the Petersen case and around 73% of proceeds from the Eaton Park case or in the aggregate, around 40% of the total.

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Burford obviously fair values its assets, including this one for accounting purposes and the carrying value of this asset today is around $1.5 billion. That is an effort to estimate what a third-party would pay to assume Burford's position today and bear all of the risks and reap the rewards associated with that position. That number does not include any entitlements other than Burford's, and it reflects a substantial discount for continuing appellate risk, collection risk and duration. Importantly, it should not be taken as any sort of indication of what the parties would be prepared to accept in a settlement.

As to Argentina's ability and willingness to pay once the appellate process is concluded, we note that since President Milei's term began in December, Argentina's economy is experiencing real growth. Inflation is significantly down and the government has a budget surplus for the first time this decade. Argentina's country risk Index, the EMBI+ Index, which measures the spread over U.S. treasuries that the country has to pay to finance itself in U.S. dollars as calculated by JPMorgan Chase, dropped under 1,000 points for Argentina for the first time since August 2019. If that trajectory continues, Argentina could certainly theoretically return to the international debt markets.

So while this is, of course, a large judgment, the process we follow to turn a judgment into cash is not really size dependent. And this process is unfolding largely as we would have expected or predicted when we obtained the judgment a little bit more than a year ago in September of last year. The only thing that's really different at all is that, because Argentina is a sovereign country, courts are generally prepared to give Argentina more time to move through the process if it asks for it, which Argentina repeatedly uses as a delaying tactic. Nevertheless, we are perfectly happy with and unsurprised by the current posture of things.

I think we can close this YPF discussion by just adverting to a couple of recent statements from Argentine officials. First, President Milei himself has admitted on Twitter that Argentina committed an illegal expropriation of YPF, those are his words. And recently, referencing our case, among others, posted, and this is a quote: "it's hard, but we are going to get out of the hole that politicians have sunk us into, and we are going to make Argentina great again."

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Also, just a couple of weeks ago, representative of Jose Luis Espert, an economist and former presidential candidate who is reported to be a close ally of President Milei's stated, it makes me sick when lawsuits come from a useless person like Kicillof in the province of Buenos Aires, who nationalized YPF in 2012, knowingly violating contracts, knowing that this was going to result in a lawsuit that Argentina was going to lose for sure. Because when you violate a contract in any civilized country, you lose the lawsuit because you violated a contract that you signed. Is that clear? It's two plus two. You sign a contract, you don't comply with it, you lose the lawsuit.

And finally, the Chief of Cabinet echoed similar words in reference to another lawsuit, again, just a couple of weeks ago, when he said, it is our greatest commitment to work every day to become a serious country for the world again. And becoming a serious country for world again implies ultimately getting to a resolution of your outstanding issues. So that's where we stand on YPF. We hope that was helpful.

We understand and sympathize with the frustration that we hear from investors about their inability to get us to explain more regularly and in more detail the inner workings of what's going on. But I'm afraid that we really will just have to live in a world where we can try occasionally to give updates like this to put things in context for you, but it's very difficult for us to expose the inner workings of our strategies and particularly the ongoing discussions and efforts on the political and diplomatic fronts.

And with that, I'll turn you back to Jordan.

Jordan Licht

Thanks, Chris. And I'll get through the next couple of slides, and then we can wrap up and turn to questions. Page 14, which is our traditional asset management slide. Look, that continues to perform. As I've discussed before, asset management business is predominantly driven by the partnership with the BOF-C, which takes a pro rata share of our balance sheet investments.

As a reminder, the asset management business is a cash-on-cash business. So predominantly, we receive cash when our investments are realized. If you look at the payout over the first nine months of the year, we've had a cash inflow of $17 million. However, on the income statement for Burford-only, you'll see positive fair value movements are going to move the recognition of some income for us.

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Switching to Page 15. I'm going to discuss the expenses rather than revenues. At $113 million during the nine months ended this September 30, our operating expenses are down 25% versus the same period last year. Of course, we see a lot of variations in the reported operating expenses that are driven by unrealized gains, as well as some of the other accounting items. One of the things that I know I've spoken about before on the call is that, we can't control the impact of our share price and how that then impacts deferred compensation.

We economically hedge deferred comp, but that hedge doesn't actually offset the movement of the share price in our P&L. And so, what you're seeing here in the salaries and benefits line, it appears to have reduced meaningfully when you're comparing the nine months of 2024 versus 2023 on the year-to-date periods, where, in actuality, the 2024 period would be slightly larger than 2023, and that would have been around $32 million. So, again, that's driven by the deferred compensation that our employees elected. And like I mentioned, we go out and buy those shares and economically hedge it.

Other highlights on Page 15 are case-related expenditures that are ineligible for inclusion in our asset base. That's significantly lower than last year. The annual incentive comp line is discretionary bonuses that's accrued throughout the year, but finalized in the fourth quarter. And then the last piece is G&A, which is tracking lower than last year. That's driven by the expense we had predominantly around the restatement in 2023, but it's slightly offset by the transition of accounting firms in 2024. Overall, though, we see a period-over-period, our cash operating expense levels remain largely consistent with last year.

And then finally, switching to Page 16, our liquidity and leverage page. Chris mentioned this, Jon mentioned it, I mentioned it, obviously, we've had a good quarter and a good year with respect to the cash position. We ended the third quarter with $629 million of cash and securities, driven, of course, by the case recoveries, as well as collections on last year's realizations. Obviously, this is a larger amount than we've historically carried. It is appropriate as we prepare to address the 2025 debt maturity.

And to that extent, we have been slowly chipping away at that outstanding balance, having purchased just about $35 million below -- of that issuance just below face value with another $145 million coming due in the summer of 2025. We're committed to keeping the latter debt schedule as we outlined at the top of the page. And if you look overall, our leverage levels at 0.8x are well below any covenants and our stated maximum of 1.25x.

I'll stop there and hand it back over to Chris for Slide 17.

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Christopher Bogart

Thanks. So I'll just close on Slide 17 and before we take your questions, and you've all seen this slide before, it's just a reminder of the overall value proposition that we think exists here, which comes with these 4 points. The first being the value of the portfolio that we've assembled. Jon talked at some length and eloquently about that earlier. And even if we did nothing else, that portfolio is going to throw off a lot of cash in the years to come.

We twin that with a significant origination platform, market-leading, again, that Jon described as being now a truly global platform that is feeding us business all over the world. An asset management business that supplies a little bit of ongoing leverage, although, as you know, we have been increasingly favoring using our own balance sheet capital instead of relying on what we feel is pretty expensive fund management capital and, obviously, the YPF assets that we've talked at significant length about today and which we believe will provide significant value to the business.

So we're excited about where the business stands. We're very pleased with how the portfolio is progressing, and we'd be delighted to take your questions.

Question-and-Answer Session

Operator

[Operator Instructions] Your first question comes from the line of Mark DeVries from Deutsche Bank. Your line is open.

Mark DeVries

Thanks and I appreciate all the comments on YPF. That was really helpful. I had a couple of follow-ups, though. And Chris, you may have answered this kind of indirectly, but has Argentina indicated that they're not willing to come to the table until this appeal is fully adjudicated?

Christopher Bogart

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So, again, I think we're constrained in being able to discuss with you any of our discussions or our advisers' discussions with Argentina. But what I can say, I suppose, as a more general proposition is, when you think about this purely as a logical matter, it's pretty unlikely from my perspective that while there's ongoing active litigation about a case that a government is going to find it particularly easy to resolve it. And so, I think the question is about positioning yourself to be in as good a position as possible when you get to the end of that process.

Mark DeVries

Okay. Makes sense. And did you indicate when you would expect the oral arguments to get scheduled?

Christopher Bogart

No, we don't have a date for oral argument yet. The way this works is, the case gets fully briefed first, and that happened towards the end of August. And so, then it becomes eligible to be assigned for oral argument. And we just simply don't yet have a date from the court for that. If you're one of the people who watches the docket closely in this case, you will have noticed that just in the last couple of days, there have been updated filings by the lawyers setting out the dates they are and aren't available for argument over the next few months. So it's -- you can sort of read into that an expectation that this is something that should happen, if not this year, then in the early part of next year.

Mark DeVries

Okay. That's helpful. And then just turning to your core business. Could you just talk about kind of the recent environment for deployments and identifying any new opportunities? Any kind of color on the types of new commitments made in the quarter?

Christopher Bogart

Yes. And I think as we do that, it's important for everybody to bear in mind because I'm going to sort of link your question to a question from Rakesh from Veld Capital that's been put in on the website. And that question is about cash versus commitments and deployments as well. And I think the thing that's important to bear in mind is that, and Jordan referred to this earlier, we do a couple of things, right?

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We do new business where we're signing up a new case. And that new case may result in a large deployment immediately when we're monetizing a position, or it may result in deployments over time as the case goes through the litigation process. And so, we do new business that doesn't necessarily result in immediate deployments, and that's the $775 million number that Jordan gave you of definitive undrawn commitments.

In other words, these come in a couple of flavors. We might say to you as a client, yes, we're going to be there for you when you come with your next case. That's a discretionary commitment because we don't like the case, we don't have to finance it. And we have hundreds of millions of dollars of those kinds of deals, which bond law firms and corporate clients to us in long-term relationships.

But the more precise version of these are definitive commitments. And that's when we actually have agreed to fund the case and the case exists and is alive and it's going through the litigation process. And we are looking at spending real money in that case over the years to come. So that second category, the definitive commitments is now pretty big at $775 million. So that's money all or most of which we expect to deploy over the forthcoming years as cases go through the process. The only reason that we wouldn't deploy that money is, if the case settles before it consumes all of the capital that we've committed to it.

And so, again, even if we didn't do any new business, this business would continue to deploy quite a lot of capital over the years to come. And then what we do on top of that is, we layer the new business that we write. So the brand-new case that comes in the door that we do. And that -- when we do that, we do that all over the world, and those are more variable because, obviously, we need clients to have cases that they want to finance, and we need them to need capital. And so, those are -- we do a substantial amount of that every year in all sorts of different kinds of litigation. And so, those two things together make up the way that we deploy capital.

And to the question about -- to Rakesh's question about cash, it's also why we need to sit with a fair bit of capital on the -- with a fair bit of cash on the balance sheet because those cases are going through the process. And this isn't like venture capital where the company comes back for the next round and you can say, well, I don't really feel it right now or my capital is low, so I'm going to put you on ice for six months.

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No, this is active litigation and the lawyers need to be paid and the experts need to be hired and the court is not about to extend the deadlines of anything because Burford says, "Oh, gee, we'd actually like to delay putting in some more money." So we need to be in a position to make all of those payments on the cases to which we've committed. And so, that drives the need to hold a fair bit of cash as well.

Operator

Your next question comes from the line of Alexander Bowers from Berenberg. Your line is open.

Alexander Bowers

Just two questions for me. Firstly, just starting with the core business. Commitments kind of tracking year-to-date, not far away from what they did in 2023. Could you just give us a bit of color on the competitive environment and what you're seeing? And, I guess, in terms of new client wins from your side, how those are going this year?

And then the second question, just on the DOJ YPF topic. Do you know why the DOJ decided to wait until the outcome of the U.S. election to [Technical Difficulty]

Operator

Speakers, we just lost connection with the analyst.

Christopher Bogart

I think I got enough of the gist of the question. So let me touch on both of those. And let me actually do them in reverse order because the answer to the second one is very easy. There's no connection between the U.S. election and the timing of the DOJ's filing. We made this motion some time ago. It's gone through the briefing process. The DOJ told the court some time ago that it wanted to think about whether it was going to weigh in on that particular motion.

And the court agreed to not decide the motion until the DOJ weighed in as long as it did so by November 6, which is yesterday. So the timing has absolutely nothing to do with the election and the decision about the DOJ position would have been made by career DOJ people. As we said, there's nothing particularly new or novel about this position, like DOJ here is acting as an advocate for its client, which is the U.S. government.

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And the U.S. government, on the one hand, has an interest in the enforceability of its court's judgments. But on the other hand, the U.S. government does not want a world in which the reverse could be true, where an Argentine court could come along and issue an order that says, "Hey, U.S. government, please bring some of your property into Argentina so that we can take it."

And that's why, as I said in my sort of longer presentation earlier, that's why even when we filed the motion, I said to Bloomberg, it's not at all impossible that the U.S. government will take the view on this that we have gone further than they would like. That doesn't settle the question. The court ultimately gets to decide how far to go. And in doing that, the court is going to have to weigh a number of competing factors. There is law out there that says you can do this kind of stuff, but there are also principles out there that say you need to be respectful of the foreign government issues. And so, we'll just see where that balancing comes out.

On the first question about new commitments and so on. I think the one thing to bear in mind is, and we've said this before, these numbers bounce around a little bit depending on whether we do or don't do in a period, a big chunky deal. Last year, we did a big chunky deal in June, a $325 million commitment for a Fortune 50. We haven't done a comparable deal like that this year. The largest monetization transaction we've done in 2024 is $100 million. So -- and that doesn't represent for us anything that is unsatisfactory.

In terms of the actual volume of business that we're doing, as Jon said, we're busy. We're doing at least a comparable amount of business. I think we might actually be doing more business in terms of the sheer number of investments. But in litigation, it's sort of like the taxi cab rule that applies to English barristers, you take it as it comes. And so, it just depends on what kind of size and nature of cases in the market.

In terms of trends right now, unsurprisingly, we're seeing a decent amount of activity in the antitrust and competition space. There has been quite a lot of government regulatory and investigative action there. And so, that's probably been a busier area for us than it has been in the last few years. And intellectual property has also been busy for us as -- and we've recently seen a fair bit of volume in the arbitration space. So -- but it really ebbs and flows just based on what individual clients are up to.

And then we have a webcast question that I'll hand to Jordan. This is Johannes' question about the YPF gains.

Jordan Licht

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Sure. So the question was on the gain with respect to YPF in Q3. Just for clarity, YPF asset is held on our balance sheet the same as all of our other capital provision assets, which means there's an underlying model associated with it. And those models are impacted, of course, as I mentioned, by discount rate given the discounting and then with respect to duration.

And so, you are going to see movement in a period when there was 90 basis points of movement in the discount rate that we saw given market volatility on rates. In the third quarter, you see some of that activity, just like you see the reverse when rates were to rise and the asset would change in value. So, almost similar to bond math, except for here, we are discounting our capital provision assets.

Christopher Bogart

So the next question on the webcast is from Richard Smith, who asks, is there a minimum amount that Burford are expected to make from the Argentina case?

And I think the one word answer to that is no. This is litigation and negotiation. So the parameters here are we've got a judgment that issue was for $16.1 billion, now worth $17 billion with some more accrued interest in it. And ultimately, our expectation, as we've said, is that, there's going to be a negotiation with Argentina about settling that judgment on some discounted basis. But I don't think that there's anything we can say about the -- our expectations or what the parties would be prepared to accept in settlement. That's sort of a core example of what wouldn't be good to have out in the public domain.

And I think we may have exhausted the pool of questions.

Operator

We do have a phone question. We have the line of Alex Bowers back from Berenberg.

Alexander Bowers

Chris, sorry, I think my line got cut off midway through my second question. I'm not sure whether you answered or not, so let me know if this case. But it was more just on the DOJ announcement last night, just the rationale for why they wait until...

Christopher Bogart

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I did actually answer your question. So I didn't know -- so you -- yes, we did answer that in full, and we'll circle around with you, Alex, if need be afterwards.

Alexander Bowers

Sure. No problem.

Operator

And we have another phone question from the line of Julian Roberts from Jefferies.

Julian Roberts

Just one quick one for me. Is there anything on the regulatory or legislative front in the either near term, but in the medium term that we should be thinking about that might affect litigation finance more broadly that we -- that is foreseeable?

Christopher Bogart

So there -- in the U.S. -- let's start with the U.S. market just because -- just surely because of its size. So what we've said for years is, not surprisingly, there's a certain lack of enthusiasm for the existence of litigation finance from companies that are regularly litigation defendants because what we've done here is, we've come and by applying capital into the litigation system, we have altered what used to be a historical advantage that those companies had in dealing with plaintiffs.

And, in fact, the very roots of this business and this industry can be traced back to Jon Molot's early academic work on this where he's written a number of papers analyzing this issue and the litigation advantages that go along with repeat established litigation players. And so, because we've disrupted that and because nobody likes to be sued, there has always been some degree of pressure around our business in the U.S. That pressure today takes the form really of only a fair bit of fussing about the level of disclosure of the presence of a litigation funder that should be made in an ongoing court proceeding.

And we engage with the various regulatory bodies, most notably the committee that oversees the Federal Rules of Civil Procedure, but also with state governments about these issues. And I am not today particularly concerned about the ultimate outcome of those discussions. There's probably a trend towards similar disclosure.

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And as long as that disclosure comes in an appropriate way, the way that it has outside the U.S., where we are routinely disclosed, I don't think that, that's particularly concerning. It's just a question of the sausage making to move in that direction. There's no other concerning regulatory activity in the United States.

In the U.K., as you know, the U.K. Supreme Court a while ago now released a decision called PACCAR, that took a fairly hypertechnical reading of a statute that really has nothing to do with litigation funding and applied it to litigation funding. That is yielding a strained result in the U.K., an unintended result. And both the former government and the current government have indicated that they intend to create a legislative fix for the Supreme Court's decision.

As part of moving towards that legislative fix, the current U.K. government has asked the Civil Justice Council, which is an arm of the Ministry of Justice that basically has jurisdiction here to conduct a review of the litigation funding industry. And so, that review is going on right now and is expected to go on, I think, for another year or so.

I'm not particularly, again, troubled by what's going to come out of that in part because while we do quite a lot of activity in Europe, including quite a lot of arbitration in and around London, we don't actually do all that much work in the English courts because the English courts are just not all that active. Just to give you a frame of reference, last year, the commercial court in London, which is the court that we would typically play in, only did about 90 or so judgments during the course of the year. And that's a very small pool. And so, I'm not particularly concerned by any of the range of outcomes in the U.K.

Then in Europe, there is a variety of activity going on. And maybe since Jon was just in Europe talking to people about this, I might pass the mic to him for the two minutes that we have remaining in the time for this call.

Jonathan Molot

Sure. Just there have been positive developments in the trend we've seen insofar as there -- it's increasingly possible for there to be group actions where groups of businesses or consumers have been injured in a similar way by misconduct. And there's an EU directive that the member states have to pass legislation implementing to facilitate those group actions. That obviously creates great opportunity for litigation finance because those actions need finance. So that's a positive legislative development that's been taking place.

Christopher Bogart

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So -- and that's sort of where we stand. Sure. Thanks, Julian. And with that, I think we have reached the hour. We hope you found that useful and helpful. And as always, we're delighted to talk to anybody off-line as well. Thank you all for your time and support, and we look forward to talking to you again in a few months when we can report to you on what the year-end looks like. Thanks, everybody.

Operator

This concludes today's conference call. Thank you for your participation. You may now disconnect.

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23-7370(L)

23-7463(XAP), 23-7614(XAP)

In the United States Court of Appeals for the Second Circuit

PETERSEN ENERGIA INVERSORA S.A.U., PETERSEN ENERGIA S.A.U.,
Plaintiffs-Appellees-Cross-Appellants,

v.

ARGENTINE REPUBLIC,
Defendant-Appellant-Cross-Appellee,

YPF, S.A.,
Defendant-Conditional Cross-Appellant.

On Appeal from the United States District Court for the Southern District of New York (Nos. 1:15-cv-02739) (Hon. Loretta A. Preska)

BRIEF FOR *AMICI CURIAE* THE FEDERATIVE REPUBLIC OF BRAZIL AND ORIENTAL REPUBLIC OF URUGUAY IN SUPPORT OF THE ARGENTINE REPUBLIC

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INTRODUCTION AND STATEMENT OF *AMICI CURIAE*'S INTEREST

Amici curiae the Federative Republic of Brazil ("Brazil") and the Oriental Republic of Uruguay ("Uruguay") are sovereign States located in South America.[1] Each shares a border with Appellant the Argentine Republic ("Argentina"). All three States are members of the Southern Common Market, known as MERCOSUL or MERCOSUR, per its Portuguese and Spanish initials, respectively. Since military rule ended four decades ago, Brazil and Uruguay have been vibrant democracies governed by the rule of law. Both countries are important economic partners of the United States. In 2022, goods and services traded between them and the United States exceeded $120 billion.

Brazil and Uruguay are acutely concerned that the District Court misapplied crucial doctrines that are designed to ensure respect for the prerogatives of foreign sovereigns and their courts, protect foreign litigants from the burdens of litigating in the United States, and safeguard against the misapplication of foreign law. Each of these protections—important under any circumstances—is essential when claims are asserted against foreign sovereigns.

[1] All parties have consented to this filing. Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part and no entity—other than *amici*—contributed money that was intended to fund preparing or submitting this brief.

However, the District Court, when adjudicating Argentina's motions to dismiss on the basis of *forum non conveniens* and international comity, despite agreeing that the courts of Argentina are both available and adequate for adjudicating the claims, nonetheless refused to cede jurisdiction over this fundamentally Argentine dispute. In so doing, the District Court failed to take account of Argentina's paramount public interest in having its own courts resolve disputes arising out of Argentina's exercise of its sovereign power to expropriate. Argentina lawfully exercised that power in regard to shares in YPF, S.A. ("YPF"), one of Argentina's largest companies, after its legislature and executive determined that doing so was in the interest of the Argentine public.

Not only did Argentina's exercise of its power to expropriate involve quintessential governmental action, the relief sought by the Plaintiffs turned on the resolution of questions of Argentine law that the District Court itself considered to present questions of first impression. These included whether claims based on the alleged breach of an Argentine company's corporate bylaws are cognizable under the Argentine Civil Code as breaches of contract. They also included whether any such claims could be maintained notwithstanding a public law regime in Argentina that comprehensively governs claims arising out of expropriations. Although the courts of Argentina, not the United States, are the proper forum for adjudicating such

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matters, the District Court forged ahead, depriving the Argentine judiciary of the opportunity to determine for itself the proper construction and effect of its own laws.

That was only the beginning of the District Court's errors. Having improperly retained jurisdiction, the District Court proceeded to transgress another bedrock principle: that a foreign state's interpretation of its own laws is entitled to *substantial weight*. Argentina fully and cogently explained how its laws are properly interpreted. The District Court, however, failed to respect those views, rejecting them without providing more than a cursory explanation. In some instances, the District Court provided no reasoned explanation whatsoever.

The District Court's failure to accord the required weight to Argentina's interpretation of its own laws led the court astray. Brazil and Uruguay have no doubt that the District Court misapprehended the relevant rules of Argentine law. Those rules have close analogues in the laws of Brazil and Uruguay, legal regimes that in many respects mirror Argentina's. For multiple outcome-determinative questions of Argentine law, the District Court adopted interpretations that are irreconcilable with how those laws are properly construed.

Finally, by finding Argentina liable for breach of contract despite the fact that its actions were prescribed by duly enacted laws authorizing the expropriation at issue, the District Court impermissibly passed judgment on Argentina's sovereign

acts. In so doing, the District Court contravened the act of state doctrine, which reinforces why the Court's exercise of jurisdiction was improper to begin with.

Brazil and Uruguay have grave concerns about the District Court's misguided approach. As sovereign States that may become involved in litigation in the courts of the United States, Brazil and Uruguay have a direct interest in ensuring that doctrines designed to protect the interests of foreign litigants generally—and foreign sovereigns in particular—are properly interpreted and applied. The District Court's serial failures in that connection require reversal by this Court.

This would be true regardless of the relief ordered by the District Court. But the unprecedented $16.1 billion judgment cannot be ignored either. If affirmed and enforced, this deeply flawed judgment would have serious repercussions not just for Argentina but for the wider region. As sovereign States committed to the rule of law, Brazil and Uruguay respect the judicial process, including for claims against governmental authorities. Such claims, however, must be adjudicated in the proper fora and by judges familiar with the relevant rules of law. The people of the region should not be forced to endure the economic consequences of a judgment that flagrantly misapplies the governing law, entered by a court that never should have exercised jurisdiction in the first place.

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ARGUMENT

I. The District Court Misapplied the Doctrine of *Forum Non Conveniens* When It Failed to Find that the Public Interest Factors Favored Litigation in Argentina.

The District Court erred by failing to dismiss under the doctrine of *forum non conveniens*. The court agreed that the courts of Argentina are both available and adequate for adjudicating Plaintiffs' claims. S.A. 48 at 27-28. And, in regard to whether the balance of public and private factors favors litigation in the foreign forum, the District Court found that "the private interest factors favor litigating in Argentina." *Id.* at 31.

The District Court nonetheless refused to dismiss on *forum non conveniens* grounds because it considered that the public interest factors did not also favor adjudication in Argentina. This was especially inexplicable in light of its determination that Argentina "maintain[s] a strong policy interest in having corporate disputes litigated in Argentine courts." S.A. 48 at 5. In reaching its decision, the District Court disregarded two additional highly pertinent public interest factors: (1) the interest in "having localized controversies decided at home"; and (2) the interest in "avoiding difficult problems in … the application of foreign law." *Aguinda v. Texaco, Inc.*, 303 F.3d 470, 480 (2d Cir. 2002). Both public interests decisively favored dismissal.

A. The Public Interest in Argentine Courts Resolving This Localized Argentine Dispute

The Supreme Court has repeatedly emphasized that, in deciding whether to dismiss under the doctrine of *forum non conveniens*, "there is 'a local interest in having localized controversies decided at home.'" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260 (1981) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947)). Courts thus routinely dismiss actions that raise localized foreign controversies. *See, e.g.*, *Base Metal Trading Ltd. v. Russian Aluminum*, 98 F. App'x 47, 51 (2d Cir. 2004) (affirming *forum non conveniens* dismissal of controversy localized in Russia); *Hefferan v. Ethicon Endo-Surgery Inc.*, 828 F.3d 488, 500 (6th Cir. 2016) (affirming dismissal where the center of the events was Germany); *City of New Orleans Emples. Ret. Sys. v. Hayward*, 508 F. App'x 293, 299 (5th Cir. 2013) (affirming dismissal of shareholder derivative action against British company that was localized in Great Britain).

The District Court, however, brushed aside the Supreme Court's instruction. It did so despite the overwhelmingly Argentine nature of the dispute. The Petersen Plaintiffs—who account for approximately 89% percent of the claimed damages—were controlled by Argentine nationals at the time of Argentina's expropriation of the shares in YPF, one of Argentina's largest companies. J.A. __, ECF 405 at 27. The claims are, without exception, connected to Argentina's expropriation of those shares. Argentina effectuated that expropriation under the applicable Argentine

legislation: its General Expropriation Law and a specially adopted law ("YPF Expropriation Law") that directed Argentina to expropriate 51% of YPF's shares. J.A. __, ECF 402 at 23. The specific claims alleged breach of contract under Argentine law in regard to an alleged tender offer obligation under the corporate bylaws of YPF, an Argentine company. *Id.* at 24. The defenses were based on Argentine law as well. *Id.* at 25-29.

The Argentine government's involvement in the underlying dispute makes the local interest particularly compelling. As this Court stated in *Aenergy, S.A. v. Republic of Angola*, there was a "significantly strong[]" public interest in the courts of Angola resolving a dispute "related to [Angolan] government contracts." 31 F.4th 119, 134 (2d Cir. 2022) (affirming dismissal for *forum non conveniens*). Disputes that implicate the acts of foreign governments are thus routinely dismissed for *forum non conveniens*. *See, e.g.*, *id.*; *Mendes Junior Int'l Co. v. Banco Do Brasil, S.A.*, 15 F. Supp. 2d 332, 341 (S.D.N.Y. 1998) (dismissing contract dispute involving Brazilian government agency in part because Brazil had a "puissant local interest in the outcome of th[e] litigation"), *aff'd* 215 F.3d 306 (2d Cir. 2000); *MBI Grp., Inc. v. Credit Foncier du Cameroun*, 558 F. Supp. 2d 21, 36 (D.D.C. 2008) (holding dismissal "plainly" warranted because the "dispute concern[ed] an agreement to build … housing projects" in Cameroon and involved allegations of corruption against the Cameroonian government); *China Tire Holdings Ltd. v. Goodyear Tire*

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& Rubber Co., 91 F. Supp. 2d 1106, 1111 (N.D. Ohio 2000) (giving preclusive effect to prior dismissal based on the Chinese government's interest in "adjudicat[ing] matters regarding its own government contracts"); *Hislop v. Paltar Petro. Ltd.*, No. 17-cv-02371-RBJ, 2018 U.S. Dist. LEXIS 177602, at *22 (D. Colo. Oct. 16, 2018) (recognizing the Australian government's strong interest in adjudicating in Australia a dispute concerning government-issued oil and gas permits).

Here, the nature of the claims underscores the weight of Argentina's interest in adjudicating the dispute and makes dismissal especially appropriate. The claims do not merely concern Argentina's governmental conduct. They are linked to its expropriation of YPF, an act that is "intimately involved with sovereign prerogative." *La. Power & Light Co. v. City*, 360 U.S. 25, 28 (1959). As this Court has squarely held, where "litigation is intimately involved with sovereign prerogative," the public interest favors litigation in the sovereign's own courts. *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Republic of Peru*, 665 F.3d 384, 392 (2d Cir. 2011) (internal quotation omitted).

Indeed, this was no run-of-the mill expropriation. Argentina expropriated 51% of the shares in YPF in direct response to a national energy crisis that endangered its ability to generate energy for Argentina's citizens. J.A. __, ECF 373 at 9. And the Plaintiffs' claims are extraordinary: the $16.1 billion awarded by the

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District Court amounts to "approximately 45% of [Argentina's] fiscal budget extended for 2024." Appellant's Br. at 4.

These facts place the local interest in resolving the dispute in Argentina beyond doubt. In *Croesus EMTR Master Fund L.P. v. Brazil*, 212 F. Supp. 2d 30, 40 (D.D.C. 2002), the district court observed that the "plaintiffs [sought] over $140,000,000 from the government, and hence the people, of Brazil." *Id*. The court thus found that the "magnitude of Brazil's interest" in adjudicating the case in its own courts was high as claims of this size would have "significant reverberations" for Brazil's "government and economy." *Id*. Here, the District Court awarded more than *a hundred times* the amount at issue in *Croesus*. The public interest in adjudicating this localized dispute in Argentina is patent.

B. The Public Interest in Argentine Courts Resolving the Dispute Because It Raises Complex Issues of Argentine Law

In refusing to dismiss on *forum non conveniens* grounds, the District Court also disregarded the fact that adjudicating the case required it to resolve complex and/or novel issues of Argentine law. The District Court's retention of jurisdiction thus flies in the face of consistent case law making clear the weighty public interest in Argentina's courts resolving those issues for themselves.

In *Piper*, the Supreme Court's affirmance of dismissal on *foreign non conveniens* grounds noted that "the need to apply foreign law pointed towards dismissal." 454 U.S. at 260. Likewise, in *Figueiredo*, this Court recognized the

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public interest in "'having foreign law interpreted by a foreign court.'" 665 F.3d at 389-90 (quoting *Gilbert*, 330 U.S. at 509). There, the Court reversed the denial of a *forum non conveniens* motion because Peruvian legal issues were at the core of the dispute. *Id.* at 392. As the Court put it, where a dispute implicates "the meaning of [a foreign] jurisdiction's statute," it is only natural to have "'the only tribunal empowered to speak authoritatively' on the meaning and operation" of that statute resolve the dispute. *Id.* (quoting *La. Power & Light Co.*, 360 U.S. at 28-29). Here, that is Argentina's courts.

The public interest in adjudicating in Argentina is especially compelling given the complex and/or novel Argentine law issues raised by the parties' claims and defenses. In *Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 983 (2d Cir. 1993), the Court affirmed dismissal on *forum non conveniens* grounds where the claims presented an "unclear" question of "whether shareholder derivative actions may be maintained in Venezuela." The Court explained that "questions of Venezuelan substantive and procedural law are better addressed by Venezuelan courts." *Id. See also Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (holding "an action should be dismissed" where the court may be required to "untangle problems" of law that are "foreign to itself") (internal quotations and citations omitted).

In line with these precedents, and contrary to the approach followed by the District Court, courts routinely dismiss cases for *forum non conveniens* where the claims and defenses raise complicated issues of foreign law. For instance, in *Finch v. Xandr, Inc.*, the district court dismissed claims implicating the United Kingdom's "complex" data protection statue. In the words of the court, given the complexity of the legal question at issue, "the public interest in having th[at] dispute adjudicated in the United Kingdom [was] especially great." No. 21 Civ. 5964 (VM), 2021 U.S. Dist. LEXIS 239963, at *13 (S.D.N.Y. Dec. 14, 2021).

The district court reached a similar result in *In re Air Crash Over the S. Indian Ocean, on March 8, 2014*, 352 F. Supp. 3d 19 (D.D.C. 2018). It dismissed for *forum non conveniens* because the case raised issues regarding the validity of a Malaysian law. *Id*. at 41. Then-Judge Ketanji Brown Jackson held: "[T]he possibility that this Court might have to address such complex, novel legal issues … weighs heavily in favor of dismiss[al]." *Id*.

The Argentine law issues presented by Plaintiffs' claims are at least as complex and/or novel as these foreign law issues. Specifically, the Court had to determine, *inter alia*:

(1) whether Argentine law permits shareholders to assert a claim against other shareholders for breach of corporate bylaws as a breach of

contract claim under the Civil Code and not as a corporate law claim, S.A. 89 at 15-18;

(2) whether, if such a claim could be brought under the Civil Code, damages could be awarded on it, *id*. at 43-46; and

(3) whether such a claim could be maintained notwithstanding the existence of the Argentine public law regime governing claims arising out of expropriations, *id*. at 48.

The parties' experts disagreed about these matters. *See* J.A. __, ECF 115; J.A. __, ECF 116; J.A. __, ECF 132; J.A. __, ECF 133; J.A. __, ECF 152; J.A. __, ECF 153. Where foreign law experts are locked in such a "sharp dispute" about foreign law, resolution of the dispute is "best left to knowledgeable [local] … jurists." *Fustok v. Banque Populaire Suisse*, 546 F. Supp. 506, 513 (S.D.N.Y. 1982). For that reason, the public interest favors dismissal in circumstances "where legal experts disagree about critical points in the application of the foreign law." *Lasala v. Lloyds TSB Bank*, 514 F. Supp. 2d 447, 467 (S.D.N.Y. 2007). *See also Croesus*, 212 F. Supp. 2d at 41 (existence of "unsettled, or at least hotly contested" foreign law issues favored dismissal); *Aenergy, S.A. v. Republic of Angl.*, No. 1:22-cv-02514 (TNM), 2023 U.S. Dist. LEXIS 105861, at *31 (D.D.C. June 20, 2023) (dismissing for *forum non conveniens* where expert declarations conflicted over whether plaintiff's claim was time-barred under Angolan law); *Trout v. Marriott Int'l, Inc.*,

No. 18-17686, 2019 U.S. Dist. LEXIS 106096, at *14 (D.N.J. June 24, 2019) (dismissing for *forum non conveniens* and explaining that, "[i]f, at some point, experts disagree on a question of Indian law, the Court will be ill-equipped to resolve the dispute").

***

Weighed against the overwhelming public interest in adjudication in Argentina, any public interest in litigating in New York pales in comparison. The fact that Plaintiffs happened to purchase securities registered in New York is insufficient to justify exercising jurisdiction, in light of the countervailing "predominant public policy interest" of Argentina, "whose corporation[] and corporate governance law are at issue." *In re Alcon S'holder Litig.*, 719 F. Supp. 2d 263, 275 (S.D.N.Y. 2010).

The Court's decision in *Allstate Life Ins. Co. v. Linter Grp., Ltd.*, 994 F.2d 996, 1002 (2d Cir. 1993), a federal securities fraud case that arose out of the liquidation of an Australian company that had issued SEC-registered securities, is instructive. The Court affirmed dismissal under the doctrine of *forum non conveniens*, holding that Australia's interest outweighed that of New York because the liquidation at issue was "one of the largest in Australian history" and the allegedly fraudulent actions were "carried out in Australia by Australian corporations." *Id.*

Nor does the late addition of a group of American plaintiffs, the Eton Park Plaintiffs, come anywhere close to justifying the District Court's retention of jurisdiction. It does not alter the fundamental calculus that, at base, this is an Argentine dispute arising from the acts of the Argentine government in Argentina that requires the determination of Argentine law issues. *See Paolicelli v. Ford Motor Co.*, 289 F. App'x 387, 391 (11th Cir. 2008) (affirming dismissal even though the defendant was an American company because "Argentina, Ecuador, and Colombia have the most relevant contacts … and their courts are the best equipped to interpret and apply their laws"); *Hefferan*, 828 F.3d at 500 (affirming dismissal because the controversy was local to a foreign forum and "[a]dding an American plaintiff to the mix does not necessarily tip the scales").

II. The District Court Disregarded International Comity.

The District Court erred as well by failing to accept that international comity also required dismissal. That principle guides "relations between foreign governments" by "tak[ing] into account the interests of the United States, the interests of the foreign state, and those mutual interests the family of nations have in just and efficiently functioning rules of international law." *Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.)*, 8 F.4th 136, 143-44 (2d Cir. 2021) (internal quotations omitted).

Applying the principle, courts routinely dismiss cases over which they have jurisdiction in favor of litigation in a foreign forum. In *Mujica v. AirScan Inc.*, the Ninth Circuit explained that comity favored dismissal so that the matter could be litigated in a foreign forum which had a strong interest in adjudicating the dispute and where the United States' interest was comparatively weak. 771 F.3d 580, 603 (9th Cir. 2014). *See also Cooper v. Tokyo Elec. Power Co. Holdings*, 960 F.3d 549, 566-569 (9th Cir. 2020) (affirming dismissal of tort claims arising out of the Fukushima nuclear accident against a publicly-funded energy company under comity principles); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (affirming comity-based dismissal of claim to recover Nazi-looted assets); *Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 586 (2d Cir. 1993) (affirming dismissal of tort claims arising out of Indian gas leak disaster under comity principles).

Comity weighs especially heavily in favor of dismissal where the defendant is a foreign sovereign State. *See Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (finding that "[g]iving full effect to sovereign immunity promotes … comity interests"). And, in cases where the "claims arise from historically and politically significant events," the foreign forum has a "unique interest in resolving" such claims. *Id*. at 854. Those factors certainly apply here. Not only did the multi-billion-dollar claims pertain to the expropriation by Argentina, a foreign sovereign,

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of a majority stake in one of its largest companies, they concerned sovereign acts undertaken by the Argentine government to address and obtain energy security in the face of an unprecedented energy crisis. The significance of the case to Argentina and its citizens cannot be overstated.

The fact that Plaintiffs' claims are inextricably bound up with Argentina's expropriation of the YPF shares—a quintessential sovereign act, *see Barnet v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 201 (2d Cir. 2020)—underscores they do not belong here. United States courts are "preclude[d] [from undertaking] any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State." *First Nat. City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972). And with good reason. "To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations." *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) (internal quotations and citations omitted).

III. The District Court Failed to Give Argentina's Views the Required Substantial Weight Regarding Issues of Argentine Law.

Having failed to dismiss in favor of litigating in Argentina, where Argentine courts could resolve the issues of Argentine law raised by the case, the District Court proceeded to misinterpret and misapply those very laws. Among other things, the

District Court incorrectly found that disputes between shareholders based on Argentine corporate bylaws are cognizable as breach of contract claims, S.A. 89 at 38-41, and that the existence of Argentina's public law regime governing the expropriation did not preempt and bar Plaintiffs' private law claims, *id.* at 52-53. In so doing, the District Court disregarded Argentina's explanations of how its own laws must be interpreted—explanations fully supported by Argentine statutory law and jurisprudence.

This never should have happened. To safeguard against the risk of such errors, the Supreme Court has instructed that U.S. courts must give substantial weight to the views of foreign sovereigns on their own laws. *See Animal Sci. Prods. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1875 (2018).

The requirement to give a foreign sovereign's interpretation of its own laws substantial weight follows from the foundational rule—recognized by the Supreme Court nearly two centuries ago—that "[n]o principle of general law is more universally acknowledged, than the perfect equality of nations," *The Antelope*, 23 U.S. (10 Wheat.) 66, 122 (1825). The respect that courts in the United States must accord the duly adopted laws of foreign states is a central aspect of that co-equal sovereignty. As the Supreme Court put it, "[e]ach [State] legislates for itself." *Id.* Thus, just as the various U.S. states are "the ultimate expositors of state law,"

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Mullaney v. Wilbur, 421 U.S. 684, 691 (1975), so too are foreign States the proper expositors of their own laws.

The failure to give a foreign sovereign's interpretation of its own laws the weight to which it is entitled contravenes the "spirit of cooperation" with which a court must "approach[] the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist.*, 482 U.S. 522, 543 n.27 (1987). *See also Animal Science*, 138 S. Ct. at 1873 (holding that "[i]n the spirit of international comity" a "federal court should carefully consider a foreign state's views about the meaning of its own laws").

This is a principle of law that applies in international litigation generally. As the International Court of Justice has held, "it is for each State, in the first instance, to interpret its own domestic law." *Ahmadou Sadio Diallo (Rep. of Guinea v. Dem. Rep. Congo)*, Merits, Judgment, 2010 I.C.J. Reports 639 (Nov. 30) at ¶ 70. Only "[e]xceptionally where a State puts forward a manifestly incorrect interpretation of its domestic law, particularly for the purpose of gaining an advantage in a pending case," should the sovereign's interpretation be disregarded. *Id.*

Indeed, failing to respect a sovereign state's interpretation of its own laws invites the "danger of contradicting the construction which has been placed on such law by the highest national tribunal." *Payment of Various Serbian Loans Issued in*

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France (Fr. v. Yugo.), Judgment, 1929 P.C.I.J. (ser. A) No. 20 (July 12) at 46. A court accordingly "must pay the utmost regard to the decisions of the municipal courts of, a country, for it is with the aid of their jurisprudence that it will be enabled to decide what are the rules which, in actual fact, are applied in the country the law of which is recognized as applicable in a given case." *Payment in Gold of Brazilian Loans Contracted in France (Fr. v. Braz.)*, Judgment, 1929 P.C.I.J. (ser. A) No. 15 (July 12) at 124.

The District Court had no cause to discount Argentina's interpretation of its own laws. Argentina's explanations were clear, thorough, and supported by primary and secondary sources, including by reference to the relevant Argentine statutes, jurisprudence, and treatises. *See, e.g.*, J.A. __, ECF 373 at 26-30; J.A. __, ECF 154 at 4-7; J.A. __, ECF 111 at 24-29. They were also buttressed by expert reports from distinguished Argentine legal scholars, including a former appellate judge. J.A. __, ECF 368, Exs. 1-3; J.A. __, ECF 366, Exs. 1-3; J.A. __, ECF 365, Ex. 1; J.A. __, ECF 153 at 2-6. J.A. __, ECF 115 at 4-21.[2] There is no suggestion that Argentina's interpretations contradicted any position that it had previously taken.

[2] Argentina also established through the depositions of Plaintiffs' experts that their contrary views were unreliable and otherwise unsupported. *See* J.A. __, ECF 373 at 26-29, 33-37.

The District Court wrongly decided at least two dispositive issues when it improperly rejected Argentina's interpretation of its laws. These were no mere methodological errors without consequence. Brazil and Uruguay have no doubt that Argentina's interpretations are correct and the District Court's erroneous—and egregiously so. Brazil and Uruguay have similar legal systems to Argentina's. Both interpret their laws in a manner consistent with that of Argentina. The District Court's construction of Argentine law is antithetical to *amici*'s understanding of how such laws are properly interpreted.

First, as Argentina explained to the District Court, under its laws, claims arising out of corporate bylaws, such as those asserted by the Plaintiffs, are only cognizable as corporate law claims; they are *not* cognizable as civil law breach of contract claims. In that connection, Argentina demonstrated that claims concerning a shareholder's alleged non-compliance with corporate bylaws are exclusively governed by its General Companies Law. They cannot be packaged as alleged breaches of contract under the Civil Code. *See* J.A. __, ECF 111 at 16-17; J.A. __, ECF 115 ¶¶ 13-16, 38-41, 67-77; J.A. __, ECF 116 ¶¶ 16-22; J.A. __, ECF 402 at 25-29; J.A. __, ECF 368, Ex. 1¶¶ 66, 72-76; Ex. 3 ¶¶ 8-11. This is so even if the shareholder has a role in drafting the corporation's bylaws. ECF 153 at 6. And, because any claims the Plaintiffs may have had concerning those bylaws are corporate law claims, under Argentina's Capital Markets Law (Law No. 26,831) and

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National Code of Civil and Commercial Procedure, the claims must be resolved in the court in the place of the corporation's registered domicile, which is the exclusive forum for "actions derived from corporate relations." J.A. __, ECF 154 at 4-5; J.A. __, ECF 152 ¶¶ 30-34. For claims pertaining to YPF's bylaws, that is Buenos Aires. *See* Appellant's Br. at 34.[3]

The same principles apply in Brazil. Under Brazilian law, a claim that a corporate shareholder breached corporate bylaws is actionable under Brazil's Corporate Law, not its Civil Code. And, while it is possible for a minority shareholder to assert a corporate governance claim against a majority shareholder for allegedly breaching an obligation owed under corporate bylaws or Brazil's Corporate Law, *see* Brazilian Corporate Law (Law No. 6,404), arts. 116, 117, 287(II)(b), the standards for determining the majority shareholder's liability, and the applicable damages principles under the Corporate Law, are different than those for breach of contract claims. Brazil is unaware of any Brazilian judicial decision treating a claim for breach of corporate bylaws as a breach of contract claim.[4] Such an approach would be a legal *non sequitur*.

[3] The District Court's misinterpretation of this point of Argentine law caused it to give improper deference to the Plaintiffs' choice of forum. S.A. 48 at 22.

[4] This holds true in all circumstances, including in situations where the shareholder against whom the claim is brought played a role in drafting the bylaws.

It would be equally nonsensical in Uruguay. A shareholder's claim for alleged non-compliance with corporate bylaws is not actionable as a breach of contract claim under the Uruguayan Civil Code. Instead, the claim is governed by Uruguay's Commercial Companies Law. Just as under Argentina's General Companies Law—on which Uruguay's Commercial Companies Law is based—a shareholder must take steps to have the applicable corporate governance mechanisms redress the alleged violation of the bylaws. *See* Uruguayan Commercial Companies Law (Law No. 16,060), arts. 365, 394. To Uruguay's knowledge, no Uruguayan court has ever permitted a shareholder to seek damages from another shareholder under Uruguay's Civil Code for breach of corporate bylaws, even if the shareholder participated in drafting the bylaws.[5]

Second, Argentina demonstrated to the District Court that its public law regime exclusively governs the remedies available to the Plaintiffs in connection with the expropriation of shares in YPF and precludes them from asserting claims under the Civil Code or any other private law. *See, e.g.*, J.A. __, ECF 402 at 23-24 (summarizing conclusions of Argentine legal experts). Moreover, under Argentine law, neither the expropriation nor its effects can be impeded or encumbered by

[5] In contrast, a shareholder that alleges another shareholder has violated a shareholder agreement (not a bylaw), which Article 331 of the Uruguayan Commercial Companies Law recognizes to be a contract, may institute proceedings under the Civil Code.

obligations that Argentina may have had as a shareholder or any private claims against it based on its status as a shareholder. *Id.* at 3, 22-23.

Argentina's interpretation is entirely consistent with *amici*'s similar legal regimes. Like Argentine law, under Brazil's Expropriation Law, no private obligation, contractual or otherwise, can impede the effects of an expropriation. That is because the sovereign acquires the expropriated asset free and clear of encumbrances. Brazilian Expropriation Law (Law No. 3,365), art. 31 ("Any encumbrances or rights over the expropriated property are subrogated to the price."). Moreover, a private party that claims damages arising out of an expropriation must seek its remedies from the expropriating party under the Brazilian Expropriation Law.[6]

The same is true under Uruguayan public law, which also forecloses private litigants from seeking compensation for damages allegedly caused by an expropriation under Uruguay's Commercial Companies Law or Civil Code, or in contract. Uruguayan Expropriation Law (Law No. 3,958), art. 21 ("[N]o claim or action by a third-party asserting rights over the property … can prevent expropriation or its effects. The third-party must assert their rights over the price or compensation

[6] A party may also challenge the legitimacy of the administrative procedure that led to the expropriation, but may not obtain damages through that process.

for the property separately and before the appropriate authority, leaving it free from any encumbrance or lien.").

The upshot is that the District Court contravened *Animal Science*'s directive that it had to give substantial weight to Argentina's interpretation of its own laws. As a result of this misstep, the District Court adopted interpretations of Argentine law that are plainly wrong. Indeed, *amici* are unaware of any post-*Animal Science* decision that has so summarily rejected a foreign sovereign's interpretation of its laws. The consequence was a flagrant misapplication of Argentine law on issues central to the resolution of the claims. This requires reversal. *See Cornea v. United States AG*, 771 F. App'x 944, 948 (11th Cir. 2019) (finding district court's disregard of Greece's "authoritative statement" of Greek law was "manifest error" requiring reversal).

IV. The Act of State Doctrine Precluded the District Court's Adjudication of the Claims.

The District Court committed additional reversible error by failing to dismiss under the act of state doctrine. S.A. 89 at 2.[7] There is no escaping the fact that the

[7] This Court declined to review the District Court's decision in its 2018 opinion. *Petersen Energía Inversora S.A.U. v. Argentine Republic* (*Petersen I*), 895 F.3d 194, 212 (2d Cir. 2018) ("We exercise our discretion not to accept jurisdiction over this aspect of the appeal.").

claims are inextricably bound up with a quintessential sovereign act: Argentina's expropriation of the YPF shares. *See* J.A. __, ECF 366-1 at 23-31.

Under the District Court's interpretation of Argentine law, the "expropriation triggered an obligation to make a tender offer for the remainder of YPF's outstanding shares." *Petersen I*, 895 F.3d at 206. The District Court then found Argentina liable for its failure to fulfill that obligation. S.A. 89 at 4-5. *See also* S.A. 163 at 17 (finding the enactment of the YPF Expropriation Law put Argentina "in default" of its purported tender offer obligation).

"Under the Act of State doctrine, U.S. Courts may not declare the official acts of a foreign sovereign to be invalid." *Celestin v. Caribbean Air Mail Inc.*, 30 F.4th 133, 133 (2d Cir. 2022). *See also Sabbatino*, 376 U.S. at 398. The doctrine applies to claims based upon commercial or private acts that are closely related to, or inextricably intertwined with, a foreign sovereign's official acts. *See, e.g.*, *Von Saher v. Norton Simon Museum of Art*, 897 F.3d 1141, 1143 (9th Cir. 2018) (dismissing claims disputing museum's ownership of artwork because "the act of state doctrine deems valid the Dutch government's … [initial] conveyance" of the artwork, on which the title was based); *Sea Breeze Salt, Inc. v. Mitsubishi Corp.*, No. CV 16-2345-DMG, 2016 U.S. Dist. LEXIS 139342 (C.D. Cal. Aug. 18, 2016) (dismissing antitrust and business tort claims under act of state doctrine because the

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alleged acts giving rise to the claim were "inextricably intertwined" with the acts of the defendant's Mexican government-owned joint venturer).[8]

In *Braka*, this Court affirmed dismissal of breach of contract and security fraud claims under the act of state doctrine. 762 F.2d at 225. There, the plaintiffs purchased dollar- and peso-denominated certificates of deposit from Bancomer, S.N.C., a Mexican bank. After the plaintiffs acquired their certificates, Mexico issued decrees that had the effects of nationalizing Bancomer, imposing foreign exchange controls, and "requiring that all domestic obligations be performed by delivery of an equivalent amount in pesos at the prevailing exchange rate." *Id.* at 223.

The plaintiffs brought suit, alleging that Bancomer breached its obligations under the certificates of deposit when the plaintiffs "tendered their certificates" for payment. *Id.* As a result of the Mexican government's decrees, they "received Mexican pesos at the officially prescribed exchange rates, approximately 70-80

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[8] For that reason, the Court's holding that the Foreign Sovereign Immunities Act's commercial activity exception, 28 U.S.C. § 1605(a)(2), applies to the claims since they seek "relief for injuries caused by commercial, rather than sovereign, activity," *Petersen I*, 895 F.3d at 206, does not foreclose applicability of the act of state doctrine. *See, e.g.*, *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 223-24 (2d Cir. 1985) (applying act of state doctrine in case where jurisdiction existed under Section 1605(a)(2)); *Oceanic Expl. Co. v. ConocoPhillips, Inc.*, No. 04-332, 2006 U.S. Dist. LEXIS 72231, at *34 (D.D.C. Sept. 21, 2006) ("Even when a court has jurisdiction over a foreign sovereign under the commercial activity exception to the FSIA, the act of state doctrine may apply.")

pesos per dollar," not "the then actual market exchange rate of 135-150 pesos per dollar, [and consequently] they lost over $900,000." *Id.*

Applying the act of state doctrine, this Court held that ruling on the plaintiffs' claims risked "contradict[ing] the result of the exchange controls." *Id.* at 225. The claims were accordingly barred because to find that Bancomer breached its obligations "would be an impermissible intrusion into the governmental activities of a foreign sovereign." *Id.*

Much in the same way as Bancomer's allegedly wrongful acts were compelled by the Mexican government's decrees, Argentina's allegedly wrongful acts under YPF's bylaws—the failure to make a tender offer for Plaintiffs' shares—were compelled by the General Expropriation Law and YPF Expropriation Law, which limited the Argentine government's acquisition to no more than 51% of YPF's shares and rendered any alleged contractual obligations against Argentina unenforceable. S.A. 233, Art. 28.[9]

[9] The District Court attempted to distinguish *Braka* because it found that Argentina had not shown "that performance of the alleged obligations would constitute a violation of Argentine law." S.A. 1 at 21-22. However, nothing in *Braka* requires that the relevant act of state prohibit performing the allegedly breached commercial obligation. *See generally Braka*, 762 F.2d at 222-225. For the act of state doctrine to apply, it is sufficient that, in passing judgment on an allegedly wrongful commercial act, the court would "contradict" or otherwise pass judgment on the act of state that caused or was inextricably intertwined with that commercial act. *Id.* at 224-225.

By ruling that Argentina breached the bylaws' tender offer obligation, the District Court treated as invalid the legal requirement imposed by Argentine law that Argentina acquire only 51% of YPF's shares. It also, more generally, invalidated the rule that an expropriation renders related contractual obligations unenforceable, a rule imposed by operation of Argentina's public law regime. *Id*. The District Court's decision thus contravenes the act of state doctrine. And, for that reason, it also further confirms that the action should have been dismissed for reasons of *forum non conveniens* and international comity, and that the decision misapplied the laws of Argentina.

CONCLUSION

For the foregoing reasons, Brazil and Uruguay respectfully submit that the Court should reverse and remand the case to the District Court with instructions to dismiss with prejudice under the doctrine of *forum non conveniens*, principles of international comity, and/or the act of state doctrine. Alternatively, the Court should instruct the District Court to issue a judgment dismissing the claims with prejudice as a matter of Argentine law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Brief complies with Second Circuit Local Rule 29.1(c) because it contains 6,438 words.

This Brief also complies with the requirements of Federal Rule of Appellate Procedure 32(a) because it was prepared in 14-point font using a proportionally spaced typeface.

/s/ Andrew B. Loewenstein
Andrew B. Loewenstein

February 29, 2024

CERTIFICATE OF SERVICE

I hereby certify that on February 29, 204, I filed the foregoing Brief with the Clerk of Court for the U.S. Court of Appeals for the Second Circuit through the appellate ACMS system. I certify that all participants in this case are registered ACMS users and that service will be accomplished by the appellate ACMS system.

/s/ Andrew B. Loewenstein
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February 29, 2024

No. 23-7370 (L)

23-7463 (XAP), 23-7614 (XAP)

IN THE

United States Court of Appeals for the Second Circuit

PETERSEN ENERGIA INVERSORA S.A.U. and PETERSON ENERGIA S.A.U.,

Plaintiffs-Appellees-Cross-Appellants,

v.

ARGENTINE REPUBLIC,

Defendant-Appellant-Cross-Appellee,

YPF, S.A.,

Defendant-Conditional-Cross-Appellant.

On Appeal from the United States District Court
for the Southern District of New York
No. 1:15-CV-02739 (Hon. Loretta A. Preska)

BRIEF OF *AMICI CURIAE* THE REPUBLIC OF CHILE AND THE REPUBLIC OF ECUADOR IN SUPPORT OF THE ARGENTINE REPUBLIC

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INTEREST OF *AMICI CURIAE*[1]

The Republic of Chile ("Chile") and the Republic of Ecuador ("Ecuador") (hereinafter, collectively, the "Sovereign Nations") are sovereign countries located in South America. While diverse and unique in important respects, like Defendant-Appellant the Argentine Republic ("Argentina"), the Sovereign Nations have legal systems derived from the civil law tradition. The Sovereign Nations, as well as innumerable business entities and other organizations that are at home in the Sovereign Nations, have complex and important economic, political, and legal relations with the United States ("U.S."). Additionally, corporations formed by and operated under the Sovereign Nations' laws conduct extensive business with U.S.-owned or domiciled corporations and participate in U.S. capital markets. The Sovereign Nations have an interest in this case because the District Court's ruling, if allowed to stand, will intrude on the Sovereign Nations' long-standing expectations

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), the Sovereign Nations certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Sovereign Nations or their counsel made any monetary contribution toward the preparation or submission of this brief. Counsel for all parties received timely notice of the Sovereign Nations' intention to file this brief, and all parties have consented to this filing.

that their own courts or tribunals will be the arbiter of corporate disputes that arise under their own laws related to their own resident companies in respect of legal statutes and principles that are exclusively the domain of each of the Sovereign Nations' respective legal systems. Moreover, if left undisturbed, the District Court's ruling threatens to disrupt long-standing commercial relations by and among the Sovereign Nations and their corporate residents and the United States.

INTRODUCTION

The Sovereign Nations are greatly concerned by the District Court's decision to exercise jurisdiction over a shareholder dispute involving an Argentine company, governed by Argentine law, that is subject to the exclusive jurisdiction of Argentine courts. If applied to the Sovereign Nations, the decision would have potential disruptive effects on their sovereign powers, legal systems, and economies. First, the District Court's decision threatens the Sovereign Nations' continued ability to adjudicate disputes involving corporations domiciled in the Sovereign Nations under the Sovereign Nations' own laws. The threat of increased and wide-roaming judgments by U.S. Courts, based on only the most tenuous connections to the U.S., also may chill participation by the

Sovereign Nations' corporations in U.S. capital markets and in conducting commerce with U.S.-domiciled companies. Second, the District Court's misapplication of fundamental aspects of civil law traditions exposes the Sovereign Nations and their corporate citizens to further legal causes of action that do not exist in the Sovereign Nations. U.S. court adjudication of the appropriateness of the Sovereign Nations' exercises of sovereign powers under their public laws, including expropriation, within their borders would usurp the Sovereign Nations of their self-government. Third, the District Court's lack of due consideration for a sovereign's interpretations and applications of its own laws is contrary to established precedent, increases the likelihood of inaccurate U.S. precedent that misapplies the Sovereign Nations' laws, and runs afoul of principles of international comity. The Sovereign Nations accordingly urge this Court to consider these widespread impacts and reverse the decision below.

ARGUMENT

I. The Exercise Of U.S. Court Jurisdiction Over The At-Issue Claims Encroaches On The Sovereign Nations' Ability To Decide Corporate Disputes Governed By Their Own Laws And Risks Interference With The Sovereign Nations' Legal Systems.

The District Court's exercise of jurisdiction in this case, if applied to the Sovereign Nations, threatens the continued ability of the Sovereign Nations' courts and tribunals to be the arbiter of disputes involving Sovereign Nation-domiciled corporations under the Sovereign Nations' own laws. The Sovereign Nations submit that their courts and tribunals—not U.S. courts—have the greater local interest in resolving such matters, and that U.S. courts should, as a matter of comity, defer to the Sovereign Nations' interpretation and application of their own laws.

The District Court elected to exercise jurisdiction over a dispute: (i) concerning shares of a foreign corporation, (ii) issued pursuant to a prospectus advising that shareholder Bylaw disputes must be adjudicated in foreign courts under foreign law, (iii) for corporate claims that, as persuasively argued by Argentina and supported by the relevant Argentine statutes and caselaw, are subject to mandatory and exclusive jurisdiction in Argentine courts. See Petersen Energia Inversora S.A.U. v. Argentine Republic and Eton Park Cap. Mgmt., L.P. v. Argentine

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Republic, Nos. 15 Civ. 2739 (LAP), 16 Civ. 8569 (LAP), 2020 WL 3034824, at *6-*14 (S.D.N.Y. June 5, 2020) ("Petersen"). The Sovereign Nations have all fashioned their own corporate laws and structures in a way that is consistent with their public policy goals, and the success or failure of their corporate entities has a direct impact on their local economies. The interference by U.S. courts in the Sovereign Nations' corporate disputes will potentially interfere with their established corporate laws and judicial systems, create uncertainty for their home businesses, and may lead to forum shopping. Courts should decline jurisdiction in order to "avoid[] [such] difficult problems in conflict of laws and the application of foreign law." Paulo v. Agence France-Presse, No. 21 Civ. 11209 (JLR) (SLC), 2023 WL 2873257, at *20 (S.D.N.Y. Jan. 19, 2023), report and recommendation adopted, 2023 WL 2707201 (S.D.N.Y. Mar. 30, 2023) (citations and quotations omitted). Equally important, the Sovereign Nations' companies may now hesitate to participate in U.S. capital markets lest they risk being subject to such expansive reach from a U.S. court merely because they raised capital from U.S. investors, amongst others, decades earlier and because their shares are traded on the

secondary market as American Depositary Receipts. The District Court's decision does not reflect consideration of these realities.

Additionally, because the District Court's grant of jurisdiction was predicated on an erroneous application of Argentina's laws, its approach is likely to cause increased conflicts between U.S. courts and foreign courts. This could force U.S. courts to increasingly grapple with issues of recognition of proceedings, and entangle U.S. courts in foreign relations issues properly reserved to the political branches. For example, in deciding whether or not to recognize and enforce a foreign judgment, U.S. courts consider *res judicata*. See, e.g., Ackermann v. Levine, 788 F.2d 830, 842 (2d Cir. 1986). To the extent that the District Court's decision recognizes a cause of action that is not available in a foreign country, it risks increased conflicts with foreign judgments, incorrect determinations as to whether matters have already been decided by a foreign court of competent jurisdiction, and is likely to lead other litigants to inappropriately use the U.S. court system as a backstop forum for actions already decided in a foreign country's courts. Moreover, U.S. courts are "understandably cautious" to decide matters that "'carr[y] foreign policy consequences not clearly intended by the political

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branches.'" In Re: Vitamin C Antitrust Litig., 8 F.4th 136, 162 (2d Cir. 2021) (quoting Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 116 (2013)). Here, the District Court overreached by not deferring to the Argentine legal system and instead adjudicating the validity of sovereign acts by Argentina pursuant to its public laws. But it is not for the U.S. judiciary to sit in judgment as to how a sovereign nation applies its own laws or conducts itself under its own political and legal regime. This Court should reverse the decision below to avoid such a result.

II. The District Court's Misapplications Of Civil Law Invade The Exclusive Province Of The Sovereign Nations To Establish and Administer Their Own Legal Systems.

The District Court's decision rests upon fundamental misunderstandings of civil law traditions that risk forced adoption of foreign legal causes of action that do not exist in the Sovereign Nations' countries. It also risks further judgments by U.S. courts regarding the appropriateness of the Sovereign Nations' exercise of their public law powers, such as expropriation, within their borders. "Foreign states, no less than the United States, have legitimate interests in regulating conduct that occurs within their borders, involves their nationals, [and] impacts their public and foreign policies." Mujica v. AirScan Inc., 771

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F.3d 580, 607 (9th Cir. 2014). Thus, if U.S. courts decide cases involving matters that occurred within the Sovereign Nations' borders, it could frustrate the Sovereign Nations' determinations, via its democratically elected officials, regarding "the most effective method[s] of dealing with [] difficult problem[s]" that occur within their borders. See Bi v. Union Carbide Chemicals & Plastics Co. Inc., 984 F.2d 582, 586 (2d Cir. 1993). The Sovereign Nations must be able to take decisive public actions within their borders to respond to emergency situations, including natural disasters, mass torts, or domestic attacks, as well as use their expropriation and self-regulatory powers to stabilize their economies and manage their resources, without U.S. court interference.

Civil law jurisdictions typically "have a comprehensive set of codified laws in place." Ace Am. Ins. Co. v. Wattles Co., 930 F.3d 1240, 1257 (11th Cir. 2019). A hallmark of civil law tradition is the dichotomy between public and private law. See Fed. Judicial Center, A Primer on the Civil Law System, 23 (1995). While the specific delineation varies across countries, generally, private law will include "at least the civil and commercial codes," while public law focuses on "the effectuation of the public interest by state action," and includes constitutional law,

administrative law, and criminal law. Id. This dichotomy is "quite different from that to which common-law lawyers are accustomed [but]…[t]o civil lawyers, this distinction is basic, necessary, and self-evident." Id.

The District Court's decision relies on two fundamental misunderstandings of civil law traditions. First, in civil law jurisdictions, it is understood, as a matter of law, that shareholder disputes brought under the governing bylaws will be adjudicated by the appropriate court or tribunal in that country. Corporate bylaws thus generally do not include forum selection provisions because they are practically and legally unnecessary, as the applicable civil Code provisions already provide that such corporate bylaws and disputes thereunder will be adjudicated under the home country's laws in the home country's courts or arbitral tribunals. The District Court's reliance on the lack of a forum selection clause in the Bylaws in support of its decision, see Petersen, 2020 WL 3034824, at *5, could have real (and perhaps unintended) consequences on corporations governed by similar bylaws—subjecting them to possible U.S. jurisdiction and the potential imposition of massive liabilities that would not exist under their own legal regimes. Thus, the

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exercise of jurisdiction here disrupts an entire ecosystem of entities that chose to incorporate in the Sovereign Nations under the settled principle that the Sovereign Nations' courts or tribunals would adjudicate shareholder disputes under the established legal framework. See Fed. Judicial Center, A Primer on the Civil Law System, at 1 ("'[C]ode-based' civil-law judges do not interpret the law but instead follow predetermined legal rules.").

Second, in civil law jurisdictions, public law is distinct from, and superior to, private law. Accordingly, no private law agreement (*e.g.*, a contract or shareholder agreement) can place conditions on, or interfere with, the enactment and effectuation of a public law. This is because the public law is meant to effectuate the public interest. See id. at 23. Yet, the District Court's decision—and its imposition of a $16 billion judgment—evidenced a lack of appreciation of the interplay between public and private laws. Instead, the District Court impermissibly adjudicated the appropriateness of a sovereign's governmental acts under its own expropriation powers, and effectively levied a $16 billion penalty on Argentina for exercising its own expropriation powers. As courts have recognized, "some aspects of international law touch much

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more sharply on national nerves than do others." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 n.16 (1976) (citation and quotations omitted). The District Court's ruling, if upheld, could result in similarly onerous conditions being applied to the Sovereign Nations' exercise of their expropriative and other public law powers within their own borders.[2] Expropriation powers, in particular, enable the Sovereign Nations to regulate conduct and resources efficiently and effectively, and take decisive actions to manage their economies, in order to protect the Sovereign Nations' citizens' interests. Further, U.S. court judgments passing on such expropriations only serve to question the validity of the Sovereign Nations' exercise of such powers pursuant to its

[2] Indeed, U.S. courts have found that it is often inadvisable for a court to decide complex issues of civil law. See Schertenleib v. Traum, 589 F.2d 1156, 1165 (2d Cir. 1978) (dismissal appropriate where case "necessitate[d] the introduction of inevitably conflicting expert evidence on numerous questions of Swiss law, and it create[d] the uncertain and time-consuming task of resolving such questions by an American judge unversed in civil law tradition"); see also Acosta v. JPMorgan Chase & Co., No. 05 Civ. 977 (NRB), 2006 WL 229196, at *8 (S.D.N.Y. Jan. 30, 2006), aff'd, 219 F. App'x 83 (2d Cir. 2007) (dismissal appropriate where case "require[d] extensive applications of both Uruguayan and Argentine law"); Navarrete De Pedrero v. Schweizer Aircraft Corp., 635 F. Supp. 2d 251, 263 (W.D.N.Y. 2009) (holding "it will be more efficient that the matter be tried by a Mexican court given its greater expected ability to understand and apply correctly the applicable Mexican law").

public laws, while simultaneously imperiling the ability of the Sovereign Nations to undertake expropriations that it has deemed necessary to its public interest by imposing massive financial penalties. More broadly, the Sovereign Nations fear that the District Court's decision will subject the Sovereign Nations to further adjudications by U.S. courts as to what constitutes a valid Sovereign Nation action taken pursuant to their public laws and, ultimately, a narrowing of the broad-spanning public versus private law principles that govern civil law countries.

Moreover, the District Court's decision—and its clear overreach into sensitive matters of public law—risks creating conflicts with the Sovereign Nations' courts and tribunals, which will need to decide whether to give effect to U.S. court judgments that run contrary to public order. Here, the District Court's decision effectively determined that the private law shareholder claims are superior to the public law. It is likely that other U.S. courts will follow the District Court's precedent and intrude into these sensitive areas concerning the interpretation and application of foreign public law. The Sovereign Nations' courts will then need to grapple with the difficult decision of whether to recognize U.S. court judgments with increased frequency. The Sovereign Nations

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submit that the District Court's decision should be reversed in order to avoid such conflicts amongst courts.

Accordingly, the Sovereign Nations urge the Court to consider the impact that the District Court's overarching misapplications could have for other countries whose laws emanate from the civil law tradition, and reverse the decision below.

III. The Failure to Accord Proper Deference To A Sovereign's Interpretation Of Its Own Laws Is Inconsistent With Precedent, Risks Inaccurate Application Of The Sovereign Nations' Laws By U.S. Courts, And Runs Afoul Of International Comity Principles.

The Sovereign Nations submit that continued rejection of a sovereign's submissions regarding its interpretations of its own laws, including the caselaw submitted, is: (1) contrary to established Supreme Court precedent regarding deferential treatment to a foreign country's interpretations of its own laws; (2) presents increased risk for the development of inaccurate precedent misapplying the Sovereign Nations' laws in U.S. courts; and (3) runs afoul of principles of international comity.

First, the Sovereign Nations are alarmed by the District Court's lack of due deference to Argentina's interpretations of its own laws, which, if applied to the Sovereign Nations, may result in a similar lack of respect to the Sovereign Nations' submissions and exercise of jurisdiction over disputes that should, under the Sovereign Nations' laws, be resolved in the Sovereign Nations' courts or tribunals. The Supreme Court has held that "a federal court should carefully consider a foreign state's views about the meaning of its own laws," and "a government's expressed view of its own law is ordinarily entitled to substantial . . . weight." Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 585 U.S. 33, 43, 46 (2018) ("Animal Science"). Therefore, consistent with this precedent, the Sovereign Nations expect that, at minimum, U.S. courts will afford "careful[] consider[ation]," and analysis of, their submissions regarding their own laws, including the caselaw submitted. See id., at 43. Instead, the District Court, without meaningfully addressing or attempting to reconcile its analysis with the Argentine caselaw, dismissed Argentina's arguments as "a strained reading of Argentine law." Petersen, 2020 WL 3034824, at *1. In the Sovereign Nations' view, the District Court's decision lacks careful consideration of the myriad issues of complex civil

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law raised in the parties' briefs, including the multiple expert declarations regarding the proper application of Argentine law and the supporting legal authority. If applied to the Sovereign Nations, the District Court's decision risks similar unreasoned disregard of the Sovereign Nations' submissions regarding how to interpret their own laws in U.S. courts and resultant improper U.S. court adjudication of disputes that are, under the Sovereign Nations' laws, reserved to the jurisdiction of the Sovereign Nations' courts and tribunals.

Second, if left undisturbed, the District Court's decision could result in U.S. courts developing inaccurate precedent interpreting the Sovereign Nations' laws in future cases that may be appropriately resolved in U.S. courts. Indeed, deference to a sovereign's interpretation of its own laws serves the additional goal of enhancing the accuracy of decisions because U.S. judges may "miss nuances in the foreign law, [or] fail to appreciate the way in which one branch of the other country's law interacts with another, or…assume erroneously that the foreign law mirrors U.S. law when it does not." Bodum, USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 638-39 (7th Cir. 2010) (Wood, J., concurring). The precedent established by the District Court here risks more U.S. court

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decisions that misapply, and directly conflict with, the Sovereign Nations' own interpretation of such laws.

Third, the Sovereign Nations are concerned that a lack of deference and due consideration of their laws would harm established norms of mutual respect among nations. International comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)). Thus, courts should take care to consider a country's interpretations of its own laws in "spirit of 'international comity.'" See Animal Science, 585 U.S. at 43 (internal citations omitted). If upheld, the District Court's decision may potentially serve to further chip away at this important principle of mutual respect.

CONCLUSION

For the foregoing reasons, the Sovereign Nations respectfully request that the Court reverse the decision below.

Dated: February 29, 2024

Respectfully submitted,

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This amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Local Rules 29.1(c) and 32.1(a)(4)(A) because this brief contains 3,147 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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