No. 15-423

In the Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA, ET AL.,
PETITIONERS

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its instrumentalities are immune from suit in United States courts, subject to limited statutory exceptions. The expropriation exception provides that a foreign state is not immune from any suit "in which rights in property taken in violation of international law are in issue" and a specified commercial-activity nexus to the United States is present. 28 U.S.C. 1605(a)(3). The questions presented are:

1. Whether the complaint non-frivolously alleged that property was "taken in violation of international law," where petitioners seized the property of a corporation that is a national of the foreign state in order to discriminate against the corporation's United States parent;

2. Whether the complaint non-frivolously alleged that the United States parent corporation placed "rights in property" in issue within the meaning of Section 1605(a)(3); and

3. Whether a court lacks jurisdiction under Section 1605(a)(3) only when the plaintiff's claim that it has placed in issue "rights in property taken in violation of international law" is frivolous or completely devoid of merit.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the third question presented.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, defines the scope of immunity from suit enjoyed by a foreign state. The FSIA provides that a foreign state and its agencies and instrumentalities are "immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by the exceptions to immunity in Sections 1605-1607. 28 U.S.C. 1604; see 28 U.S.C. 1605-1607. The "expropria-

tion exception," which is at issue in this case, provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights in property taken in violation of international law are in issue," and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3).

2. a. For many decades, respondent Helmerich & Payne International Drilling Company (H&P-IDC), a United States company, provided oil-drilling services to petitioners (the Bolivarian Republic of Venezuela and two state-owned corporations) through a wholly owned subsidiary, most recently respondent Helmerich & Payne de Venezuela, C.A. (H&P-V). H&P-V is incorporated under Venezuelan law. Pet. App. 3a-4a, 39a. By 2009, petitioners had failed to pay approximately $100 million owed to H&P-V for its drilling services. In response, H&P-V disassembled its drilling rigs after fulfilling its existing contractual obligations. *Id.* at 4a-5a.

In June 2010, petitioners blockaded H&P-V's properties. Pet. App. 5a. Shortly thereafter, the Venezuelan National Assembly enacted a bill recommending that then-President Hugo Chavez expropriate H&P-V's property. *Id.* at 6a. President Chavez issued an expropriation decree the same day. *Id.* at 6a, 44a. Petitioners "now use[] H&P-V's rigs and other assets in [their] state-owned drilling business." *Id.* at 8a.

b. Respondents filed this suit in the District Court for the District of Columbia. Pet. App. 45a-46a. Respondents alleged that petitioners had taken their property in violation of international law, and that the

district court had jurisdiction over that claim pursuant to Section 1605(a)(3).[1] *Id.* at 8a.

As relevant here, petitioners moved to dismiss on the ground that respondents' expropriation claims did not fall within Section 1605(a)(3). Pet. App. 8a. The parties agreed to brief certain threshold issues, including whether "H&P-V is a national of Venezuela under international law," and "whether H&P-IDC has standing to assert a taking in violation of international law" based on Venezuela's expropriation of H&P-V's property. *Id.* at 9a.

The district court granted the motion to dismiss in part and denied it in part. The court dismissed H&P-V's expropriation claim because it determined that H&P-V is a national of Venezuela. Pet. App. 49a-59a, 91a; see *id.* at 12a ("[G]enerally, a foreign sovereign's expropriation of its own national's property does not violate international law."). But the court declined to dismiss H&P-IDC's expropriation claim, reasoning that although H&P-IDC did not own the property petitioners allegedly seized from H&P-V, H&P-IDC asserted that petitioners effectively took its interest in H&P-V as a going concern. *Id.* at 81a-90a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-29a.

a. The court of appeals first addressed the standard for determining whether respondents' claims fell within the expropriation exception. Pet. App. 11a-12a.

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[1] Respondents also alleged that petitioners had breached the drilling contracts, and that the court had jurisdiction over that claim under the FSIA's commercial-activity exception. Pet. App. 8a; see 28 U.S.C. 1605(a)(2). Respondents' contract claims are at issue in No. 15-698. At the Court's invitation, the United States is separately filing an amicus brief in that case.

The court first rejected petitioners' contention that respondents' claims did not fall within Section 1605(a)(3) because they did not describe a "tak[ing] in violation of international law." 28 U.S.C. 1605(a)(3); Pet. App. 11a. Relying on *Bell* v. *Hood*, 327 U.S. 678 (1946), and D.C. Circuit precedent, the court of appeals stated that subject-matter jurisdiction "is not defeated" by the possibility that a complaint "might fail to state a cause of action on which petitioners could actually recover." Pet. App. 11a; see *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940-941 (D.C. Cir. 2008). The court stated that "we will grant a motion to dismiss" for lack of jurisdiction under the FSIA "on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . . . in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Pet. App. 11a (citing *Chabad*, 528 F.3d at 943).

The court of appeals next held that H&P-V's expropriation claim was not frivolous. Pet. App. 12a-17a. The court acknowledged that, under the so-called domestic-takings rule, a foreign state's expropriation of its own national's property does not violate international law. *Id.* at 12a. But the court understood a pre-FSIA Second Circuit decision to hold that international law prohibits a state from expropriating the property of a domestic corporation based on discrimination against the corporation's foreign shareholders. *Id.* at 13a-14a (discussing *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964)). In light of *Sabbatino*, and in the absence of "any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to *inescapably* ren-

der the claim[] frivolous and *completely* devoid of merit," the court of appeals held that H&P-V's claim "has satisfied this Circuit's forgiving standard." *Id.* at 16a (citation and internal quotation marks omitted).

The court of appeals likewise held that H&P-IDC's claim that its own "rights in property" had been taken in violation of international law was not frivolous. Pet. App. 17a-22a. The court noted that "shareholders may have rights in corporate property" that are not derivative of the corporation's rights, *id.* at 20a, and that H&P-IDC alleged that it had suffered "a total loss of control over its subsidiary," *id.* at 22a.

b. Judge Sentelle dissented in part. Pet. App. 30a-36a. He disagreed with the court of appeals' expropriation holdings, and he would have held that both H&P-V and H&P-IDC had "failed to plead a taking in *violation of international law*." *Id.* at 34a.

DISCUSSION

In the first two questions presented, petitioners challenge the court of appeals' determination that H&P-V's and H&P-IDC's expropriation claims may proceed under Section 1605(a)(3). In the third question presented, petitioners challenge the court's use of the frivolousness standard to determine whether respondents had established jurisdiction under Section 1605(a)(3). The Court should grant the petition for a writ of certiorari, limited to the third question presented.

We first address the third question presented because it concerns the appropriate standard for adjudicating the issues addressed in the other two questions presented—namely, whether respondents' allegations satisfy Section 1605(a)(3)'s jurisdictional requirements. The court of appeals erred in holding that Section

1605(a)(3), which permits claims "in which rights in property taken in violation of international law are in issue," is satisfied whenever a plaintiff makes merely a *non-frivolous* allegation that the case places in issue "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). The court should have examined whether respondents' allegations *actually* describe a "tak[ing] in violation of international law" —that is, conduct that is prohibited by international law—and whether respondents' allegations *actually* identify their own "rights in property" that were impaired as a result of petitioners' conduct. The courts of appeals are divided on the appropriate pleading standard, and the question implicates important foreign-relations and uniformity concerns. This Court's review is warranted.

The Court should not grant plenary review with respect to the other two questions presented. The court of appeals held only that respondents' allegations that petitioners expropriated their property rights in violation of international law were not frivolous. Those limited conclusions, which followed from the court's use of the erroneous frivolousness standard, do not independently warrant review at this stage. That is so regardless of the Court's disposition of the pleading-standard question. If this Court reviews the pleading standard and concludes that the court of appeals should have considered whether respondents' allegations actually describe "rights in property taken in violation of international law," then the Court should permit the lower courts to undertake that inquiry in the first instance. Conversely, if the Court affirms, or declines to review, the court of appeals' use of the frivolousness standard, then there is no need for this

Court to review the court of appeals' case-specific application of that standard to respondents' allegations.

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE THE PROPER STANDARD FOR ESTABLISHING JURISDICTION UNDER THE FSIA'S EXPROPRIATION EXCEPTION

A. The Court Of Appeals' Decision Is Wrong

1. The FSIA provides that the district courts shall have jurisdiction over actions against a foreign state for "any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1330(a). Sections 1605-1607, in turn, set forth the specific standards governing whether a foreign nation is entitled to sovereign immunity. See *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488, 497 (1983). Thus, "subject matter jurisdiction" in any action against a foreign state "depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Id.* at 493; see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (same); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (same).

For that reason, "[a]t the threshold of every action in a District Court against a foreign state, * * * the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." *Verlinden*, 461 U.S. at 493-494. When the foreign state moves to dismiss on the ground that the claim, as pleaded, does not satisfy the requirements of the relevant exception

to immunity, the court must determine whether the allegations are legally sufficient to satisfy those requirements.[2] In *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007) (*Permanent Mission*), for instance, this Court determined whether, as a matter of law, the plaintiff's claim to enforce a tax lien under New York law fell within Section 1605(a)(4), which creates an exception to immunity for suits "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). The Court first determined the scope of Section 1605(a)(4)'s reference to "rights in * * * property," concluding that it extended to non-ownership and non-possessory interests. *Permanent Mission*, 551 U.S. at 198-199. The Court then analyzed the content of the lien right asserted under New York law, concluding that the tax lien encumbered the right to convey the property at issue. *Ibid.* The Court accordingly held that the lien-enforcement suit "implicates 'rights in immovable property'" within the meaning of the FSIA exception. *Id.* at 199. The Court thus determined that the claim pleaded in the complaint was legally sufficient to fulfill Section 1605(a)(4)'s requirements.

2. Using language parallel to that of Section 1605(a)(4), at issue in *Permanent Mission*, the expropriation exception to foreign sovereign immunity permits a suit against a foreign state in any case "in

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[2] When the foreign state challenges the factual basis for jurisdiction, by contrast, the court must go beyond the pleadings and resolve disputed issues of fact necessary to determine jurisdiction. *Phoenix Consulting Inc.* v. *Republic of Angl.*, 216 F.3d 36, 40 (D.C. Cir. 2000). This case involves a legal, not factual, challenge to jurisdiction under the expropriation exception.

which rights in property taken in violation of international law are in issue," and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3). Apart from the nexus requirement, which is not at issue in this case, Section 1605(a)(3) contains two primary substantive requirements. First, the case must be one in which "rights in property" are "in issue"—in other words, the complaint must identify the plaintiff's property rights that serve as the basis for its claims. See *Permanent Mission*, 551 U.S. at 198-199. Second, there must have been a "tak[ing] in violation of international law." For a court to "satisfy itself" that a claim comes within Section 1605(a)(3), *Verlinden*, 461 U.S. at 494, it must determine that the plaintiff's allegations fulfill those requirements, *Permanent Mission*, 551 U.S. at 198-199.

Accordingly, a court evaluating its jurisdiction under Section 1605(a)(3) must make a legal determination that the complaint places "in issue" property rights that were "taken in violation of international law." The court must verify that the complaint contains allegations that describe a taking prohibited by international law.[3] If the allegations are legally insufficient to describe such a violation—if, for instance, the alleged taking constitutes only a violation of municipal law—then the complaint has not placed "in

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[3] The legislative history provides guidance on the scope of the inquiry, stating that "[t]he term 'taken in violation of international law' would include" certain well-established claims under international expropriation law, such as "the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law," and "takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 19-20 (1976).

issue" rights in property "taken in violation of international law." Similarly, if the allegations are legally insufficient to establish that the plaintiff seeks to vindicate its own rights in property, the complaint has not placed "in issue" "rights in property." In either scenario, the allegations in the complaint do not satisfy Section 1605(a)(3)'s jurisdictional requirements.

3. The court of appeals did not undertake the required analysis. Instead of determining whether H&P-V's allegations actually state a violation of international law or H&P-IDC's allegations actually place its own "rights in property" in issue, the court examined only whether respondents' allegations on those points were "wholly insubstantial or frivolous." Pet. App. 11a (citation omitted); *id.* at 16a, 20a. The court thus failed to conduct the legal analysis necessary to determine whether the action falls within Section 1605(a)(3)'s exception to immunity.[4] *Verlinden*, 461 U.S. at 493-494.

In framing the question as whether respondents' expropriation claims were frivolous, the court of appeals relied on *Bell* v. *Hood*, 327 U.S. 678 (1946). There, this Court construed 28 U.S.C. 41(1) (1940), which conferred on federal courts jurisdiction over any action that "arises under" the Constitution, treaties, or laws of the United States. 28 U.S.C. 41(1)

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[4] Respondents' claims on the merits are that their property was taken in violation of international law. Resps. C.A. Br. 16; see 11-cv-1735 Docket entry No. 1 (D.D.C. Sept. 23, 2011) (Compl. ¶¶ 172-181). It is unclear, however, what right of action respondents invoke. To the extent respondents' complaint may be understood to assume that Section 1605(a)(3) itself provides an implied right of action, the court of appeals did not address that issue, and it is not presented here.

(1940); see 28 U.S.C. 1331. As the Court explained, a claim "arises under" federal law if the claim will be "sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Bell*, 327 U.S. at 685; see *Merrill Lynch* v. *Manning*, No. 14-1132 (May 16, 2016), slip op. 8-10 (describing "arising under" jurisdiction). Thus, the federal-question statute has been understood to separate the jurisdictional inquiry from any examination of the legal sufficiency of the claim: a claim may "arise[] under" federal law even if the court's ultimate construction of federal law will defeat the plaintiff's claim. The Court applied that principle in *Bell*, holding that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. at 682. The Court also explained, however, that a suit asserting an "alleged claim under the Constitution or federal statutes" that "is wholly insubstantial and frivolous" may be "dismissed for want of jurisdiction." *Id.* at 682-683.

The D.C. Circuit has understood *Bell* to establish a general rule, equally applicable to the FSIA as to Section 1331, that "jurisdiction . . . is not defeated . . . by the possibility that" a complaint "might fail to state a cause of action." Pet. App. 11a (quoting *Bell*, 327 U.S. at 682); see *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008) (*Chabad*). The D.C. Circuit has accordingly held that whenever, as in this case, "the plaintiff's claim on the merits directly mirror[s] the jurisdictional standard" set forth in the FSIA, the court should find the jurisdictional standard satisfied so long as the plain-

tiff's claim is not frivolous. *Simon* v. *Republic of Hung.*, 812 F.3d 127, 140 (2016).[5]

That approach is founded on a misunderstanding of the scope of *Bell*. Rather than announcing a general rule that would apply to other jurisdictional grants without regard to their text, *Bell* rested on an interpretation of the specific language of the federal-question statute. Under that statute, jurisdiction does not turn on the legal sufficiency of the claim; rather, the legal sufficiency of the claim is purely a merits question. See p. 11, *supra*. *Bell*'s rule that a purported federal claim may be dismissed for lack of jurisdiction only if it is frivolous preserves the independence of the jurisdictional and legal-merits inquiries by ensuring that they do not collapse into one another.

Bell's frivolousness standard has no application to the FSIA. Assessing whether a claim falls within a particular statutory grant of jurisdiction is a question of statutory construction. See *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22 (1983). Unlike the federal-question statute, the FSIA establishes substantive federal immunity standards that the court must apply in order to determine

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[5] *Simon* reaffirmed the D.C. Circuit's reliance on *Bell* in cases like this one, in which both jurisdiction under the expropriation exception in the FSIA and the legal sufficiency of the plaintiff's claim on the merits turn on whether international law prohibited the alleged taking. 812 F.3d at 140. *Simon* clarified, however, that the court will not apply the *Bell* standard in cases in which the plaintiff's claim on the merits does not rely on international law and therefore "the jurisdictional and merits inquiries do not overlap." *Id.* at 141. In *Simon*, the court declined to apply *Bell* because the plaintiffs asserted common-law conversion claims on the merits, and they alleged a taking that violated international law only to establish jurisdiction. *Ibid.*

whether it has jurisdiction. *Verlinden*, 461 U.S. at 497; see pp. 7-10, *supra*; cf. *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514-515 (2006) (explaining that Congress may condition subject-matter jurisdiction on satisfying a substantive requirement). In the case of the expropriation exception, one of those substantive standards is whether the case involves "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). The expropriation exception therefore requires a legal inquiry that the federal-question statute eschews: jurisdiction under Section 1605(a)(3) turns on the legal sufficiency of the plaintiff's claim that the alleged taking violated international law.

That conclusion adheres to the political Branches' judgment that foreign states should not be subjected to the burden of litigation unless a court "appl[ies] the detailed federal law standards set forth in the Act" and "satisf[ies] itself that one of the exceptions [to immunity] applies." *Verlinden*, 461 U.S. at 494. But the court of appeals' application of the *Bell* standard effectively nullifies the expropriation exception's requirements. Congress would not have anticipated that foreign states would be subject to the burdens of suit for expropriation claims in every case in which the plaintiff makes merely a non-frivolous assertion that the state's conduct violated international law.

B. The Proper Standard For Establishing Jurisdiction Under The Expropriation Exception Warrants This Court's Review

1. The courts of appeals disagree on how to evaluate a district court's jurisdiction over an expropriation claim against a foreign state.

The Second Circuit has held, contrary to the decision below, that the court must determine whether the

complaint's allegations set forth a taking that, if proven, would violate international law. *Zappia Middle E. Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 251-252 (2000) (holding that "breach of a commercial contract alone does not constitute a taking pursuant to international law"). In a subsequent decision, the Second Circuit expressly affirmed that courts must undertake that legal inquiry in determining jurisdiction. See *Robinson* v. *Government of Malay.*, 269 F.3d 133, 143 (2001); accord *id.* at 147 (Sotomayor, J., concurring in the judgment). In discussing *Zappia*, the court explained that "the applicability of the 'expropriation' exception to the FSIA * * * require[s] a determination whether the defendant's conduct violated 'international law'" as a legal matter, even though "the same question—the liability under international law of the foreign government for the behavior of the corporation—would have been presented on the merits." 269 F.3d at 143.

The Fifth, Seventh, and Eleventh Circuits similarly assess the legal sufficiency of the plaintiff's jurisdictional allegations. See, *e.g., de Sanchez* v. *Banco Cent. de Nicar.*, 770 F.2d 1385, 1396, 1395-1397 (5th Cir. 1985) (relevant question is "whether any generally accepted norm of international law prohibits" the foreign state's alleged expropriation; "[i]f not, * * * the foreign state is immune") (emphasis omitted); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 679-685 (7th Cir. 2012) (plaintiffs' complaint did not contain the elements that the court concluded were necessary to allege a taking in violation of international law); *Mezerhane* v. *República Bolivariana de Venez.*, 785 F.3d 545, 548-551 (11th Cir. 2015) (foreign state was immune because the alleged expropriation of the

property of its national does "not constitute a 'violation of international law'"), cert. denied, 136 S. Ct. 800 (2016).[6]

By contrast, the Ninth Circuit, like the D.C. Circuit, has held that, "[a]t the jurisdictional stage," the court "need not decide," as a legal matter, "whether the taking actually violated international law" to determine whether a claim comes within the expropriation exception. *Siderman de Blake* v. *Republic of Arg.*, 965 F.2d 699, 711 (1992), cert. denied, 507 U.S. 1017 (1993). Rather, "as long as a 'claim is substantial and nonfrivolous, it provides a sufficient basis for the exercise'" of jurisdiction. *Ibid.* (citation omitted).

2. This Court should grant review to resolve the conflict among the courts of appeals. That conflict undermines the FSIA's purpose of fostering the "'develop[ment of] a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976)). The disagreement may also encourage forum-shopping. Federal venue provisions permit any plaintiff to bring suit against a foreign state in the District of Columbia. 28 U.S.C. 1391(f)(4). The court of appeals' decision therefore may encourage plaintiffs to file expropriation claims in that court

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[6] Respondents observe (Br. in Opp. 23) that these decisions did not expressly consider whether the *Bell* "frivolousness" standard applies. But each squarely held that courts must determine, as a legal matter, whether the alleged conduct is prohibited by international law, thereby foreclosing any reliance on the frivolousness standard.

so that they may benefit from the D.C. Circuit's permissive approach to jurisdiction.

The appropriate standard for establishing jurisdiction under Section 1605(a)(3) is important. Recognizing that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden*, 461 U.S. at 493, Congress carefully crafted the FSIA's exceptions to immunity to reflect prevailing customary international-law standards of foreign state immunity, *id.* at 487-488. Section 1605(a)(3) provides a narrow exception to immunity for claims involving "rights in property taken in violation of international law," where there is a specified commercial-activity nexus to the United States. The D.C. Circuit's use of the frivolousness standard, however, effectively nullifies key elements of the immunity analysis whenever the plaintiff's claim purports to rely on international law and the plaintiff can muster a non-frivolous argument that international law recognizes the claim.[7] That permissive approach may result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts. See *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955).

In addition, the court of appeals' approach may extend to other FSIA exceptions that contain require-

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[7] As discussed above, see note 5, *supra*, the D.C. Circuit does not use the frivolousness standard when the plaintiff's merits claim does not mirror the jurisdictional standard. *Simon*, 812 F.3d at 140-141. Nothing in the FSIA suggests, however, that Congress intended the required jurisdictional showing to vary based on the nature of the plaintiff's claim. In addition, plaintiffs may attempt to recast their claims to take advantage of the frivolousness standard.

ments that parallel the legal merits of the plaintiff's claim. For instance, the terrorism exception provides both an exception to immunity and a right of action for claims for personal injury or death "that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking." 28 U.S.C. 1605A(a)(1) and (c). One district court, relying on *Chabad* and *Simon*, has applied the *Bell* standard to claims brought under that provision. See *Owens* v. *Republic of Sudan*, No. 01-2244, 2016 WL 1170919, at *22-*25 (D.D.C. Mar. 23, 2016) (plaintiffs need only make non-frivolous allegations of legal causation). In addition, the tort exception's requirements may overlap with the merits in some cases, as that exception applies to a claim for personal injury or death "caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. 1605(a)(5); see *Robinson*, 269 F.3d at 143-144 (discussing overlap between jurisdictional and merits inquiries in cases brought under Section 1605(a)(5)).

II. THE COURT OF APPEALS' CONCLUSION THAT RESPONDENTS' EXPROPRIATION CLAIMS ARE NOT FRIVOLOUS DOES NOT WARRANT REVIEW

Petitioners also challenge (Pet. 11-26) the court of appeals' holdings that both H&P-V's and H&P-IDC's claims fell within the expropriation exception. Contrary to petitioners' characterization (Pet. 12, 18), the court's conclusions were not based on a determination that respondents' allegations described conduct that actually constituted a taking that was prohibited by international law. Instead, the court held only that respondents' claims were not frivolous. Pet. App. 17a,

22a. Those conclusions do not warrant this Court's review.

A. The First Question Presented, Concerning Whether H&P-V's Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review

1. H&P-V argues that its expropriation claim satisfied Section 1605(a)(3)'s requirement of a "tak[ing] in violation of international law" because international law prohibits taking the property of a domestic corporation to discriminate against the corporation's foreign shareholders. Pet. App. 13a-17a. Petitioners contend (Pet. 12) that the court of appeals held that respondents' claim "*does* state a [violation of] international law." To the contrary, the court held only that H&P-V's argument was "non-frivolous." Pet. App. 17a. The court based that conclusion primarily on a single fifty-year-old appellate decision. *Id.* at 13a (citing *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), rev'd on other grounds by 376 U.S. 398 (1964)), reaff'd on remand by *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967). In *Sabbatino*, the Second Circuit held that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders," a court may disregard "the 'nationality' of the corporate fiction." 307 F.2d at 861.

Rather than asking only whether H&P-V's claim was frivolous, the court of appeals should have determined whether a "*generally accepted* norm" of international expropriation law does prohibit taking a domestic corporation's property to discriminate against foreign shareholders. *de Sanchez*, 770 F.2d at 1396 (emphasis added). In the view of the United States, the answer to that question is no. The international

law of expropriation generally imposes no limits on a state's taking of its own national's property. See Restatement (Third) of Foreign Relations of the United States § 712(1) (1987) (requiring without exception that a "taking by the state" must be "of the property of a national of another state" before the taking state is "responsible under international law"); see also *United States* v. *Belmont*, 301 U.S. 324, 332 (1937) (recognizing domestic-takings rule); *Mezerhane*, 785 F.3d at 546, 549-551; *Siderman de Blake*, 965 F.2d at 711. *Sabbatino* is the sole authority that suggests otherwise—but that decision rested on the incorrect premise that international law disregards the nationality of the corporation when it is different from that of most of the shareholders. See 307 F.2d at 861; but cf. *Case Concerning the Barcelona Traction, Light & Power Co. (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5), ¶¶ 9, 41 (*Barcelona Traction*) (holding, in case involving alleged expropriation of the property of a Canadian corporation whose shareholders were mostly Belgian nationals, that the corporation was to be treated as a national of its state of incorporation, not the state of its shareholders).[8]

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[8] Two courts of appeals have permitted plaintiffs to invoke Section 1605(a)(3) in asserting claims that their property was taken in violation of international-law norms against genocide. See *Simon*, 812 F.3d at 142-146; *Abelesz*, 692 F.3d at 674-677. Setting aside whether the expropriation exception encompasses such claims, international-law rules against genocide, unlike the distinct international-law rules governing expropriation, regulate a state's conduct toward its own nationals. Those decisions therefore do not suggest that where genocide is not involved, international law permits a national of a state to assert expropriation claims like those at issue here.

2. The court of appeals' holding that H&P-V's claim is not frivolous does not warrant review.

Petitioners assert (Pet. 12) that the decision below created a circuit split as to whether "pleading a foreign state's discriminatory expropriation of the property of its own nationals *does* state a [violation of] international law." But the decision did not create any such split, because the court of appeals did not actually render such a holding.

The court of appeals did err in permitting H&P-V's claim to proceed under the expropriation exception. But that error stemmed from its use of the frivolousness standard, not definitive legal conclusions about the conduct prohibited by international law. This Court should therefore review the proper standard for establishing jurisdiction under Section 1605(a)(3). See Pt. I, *supra*. Regardless of how the Court disposes of the frivolousness question, the question whether H&P-V's claim satisfies Section 1605(a)(3)'s requirements does not warrant review at this time.

If the Court grants review of the frivolousness question and concludes that Section 1605(a)(3) requires a court to determine whether the plaintiff's allegations actually set forth a violation of international law, that will mean that the court of appeals did not evaluate H&P-V's claim under the correct standard. Rather than granting certiorari now to conduct that inquiry in the first instance, the better course would be to permit the court of appeals to determine whether H&P-V's allegations do state a "tak[ing] in violation of international law." See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."). Because respondents' briefing before the court of appeals focused solely on

demonstrating that H&P-V's claim was not frivolous, Resps. C.A. Br. 34-44, the parties should have the opportunity to litigate the jurisdictional question under the correct standard.

Conversely, if this Court concludes that the frivolousness standard is correct (or denies certiorari on that question, thereby leaving the frivolousness standard in place), then there is no need for this Court to review the court of appeals' application of that standard to respondents' complaint. The question whether H&P-V's allegations are frivolous lacks significance beyond this case. The general standard of frivolousness is one that lower courts have ample experience applying in a range of contexts. See, *e.g.*, *Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015). In addition, reviewing H&P-V's allegations would not provide this Court with an opportunity to decide whether international law actually prohibits discriminatory takings of a national's property in some circumstances.

B. The Second Question Presented, Concerning Whether H&P-IDC's Allegations Satisfy Section 1605(a)(3), Does Not Warrant Review

1. In addressing the second question presented, the court of appeals held only that H&P-IDC's claim that its own "rights in property" were "in issue," 28 U.S.C. 1605(a)(3), was not frivolous. Pet. App. 22a; but cf. Pet. 18. The court acknowledged that because "the corporation and its shareholders are distinct entities," a shareholder generally does not have an ownership interest in the corporation's property. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474-475 (2003). But the court nonetheless held that H&P-IDC "may have rights in" H&P-V's property. Pet. App. 20a. The

court did not examine the source or scope of those potential rights. *Id.* at 20a-22a. The court then concluded, without analysis, that whatever rights H&P-IDC possessed might be "rights in property" for purposes of Section 1605(a)(3), because that provision does not contain any express "limitation" on what constitutes a "right[] in property." *Id.* at 19a.

Because the court of appeals employed the incorrect frivolousness standard, it failed to determine whether respondents' allegations were legally sufficient to place H&P-IDC's "rights in property" in issue. The court should have first examined whether the law of the state of H&P-V's incorporation—Venezuela—gave H&P-IDC, as its shareholder, any direct rights. Municipal law generally accords shareholders "direct rights" related to the corporation that are independent of the rights of the corporation, such as the right to receive dividends or to share in assets upon liquidation. *Barcelona Traction*, 1970 I.C.J. 3, ¶ 47. The court then should have considered whether any such rights constitute "rights in property" for purposes of Section 1605(a)(3). See *Permanent Mission*, 551 U.S. at 198-199 (analyzing rights under New York law and then considering whether they were "rights in immovable property" for purposes of Section 1605(a)(4)). Finally, the court should have determined whether the complaint sufficiently alleges that petitioner's actions constituted a "tak[ing] in violation of international law." 28 U.S.C. 1605(a)(3). While a shareholder's direct rights generally are not implicated by state action that depreciates the value of a corporation's shares, even severely, actions such as taking the shareholder's shares will implicate a shareholder's

direct rights. See generally *Barcelona Traction*, 1970 I.C.J. 3, ¶¶ 44, 47-49.

2. The question whether H&P-IDC's claim is frivolous does not warrant review. Like the question concerning H&P-V's takings claim, the deficiencies in the court of appeals' analysis stem from its use of the frivolousness standard, not from any actual determination of the scope of H&P-IDC's rights in property or any conclusion about what constitutes "rights in property" for purposes of Section 1605(a)(3). And like the question concerning H&P-V's claim, regardless of how the Court disposes of the pleading-standard question, the court of appeals' holding that H&P-IDC's claim could proceed under Section 1605(a)(3) does not warrant review at this time. See pp. 20-21, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the third question presented.

Respectfully submitted.

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