No. 15-410

IN THE

Supreme Court of the United States

NELSON J. MEZERHANE,

Petitioner,

v.

REPÚBLICA BOLIVARIANA DE VENEZUELA, FONDO DE PROTECCIÓN SOCIAL DE LOS DEPÓSITOS BANCARIOS, and SUPERINTENDENCIA DE LAS INSTITUCIONES DEL SECTOR BANCARIO,

Respondents.

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Venezuelan government expropriated more than $1 billion of petitioner's property without compensation in violation of binding international human rights treaties and norms of customary international law. As multiple reputable authorities—including the State Department and Human Rights Watch—have recognized, respondents' motives and methods were unlawful. Petitioner argues that this expropriation therefore violated "international law" within the meaning of the Foreign Sovereign Immunities Act (FSIA) and the Second Hickenlooper Amendment. Because of that, and because the perpetrators engage in commercial activity in the United States, this case falls within an exception to the rule that foreign governments are immune from the federal courts' jurisdiction. 28 U.S.C. § 1605(a)(3).

In their briefs in opposition,[1] respondents do not dispute that their conduct violated international treaty obligations. Nor do they dispute that they do business here. Instead, they contend that under the judge-made "domestic takings" rule, it is impossible for the unlawful expropriation in this case to violate "international law" solely because petitioner was nominally a Venezuelan national at the time—even though, in fact, he was a refugee in the United States when the expropriation occurred.

As the petition showed, other circuits have refused to apply the domestic takings rule when an expropriation violates a rule of international law, *e.g.*,

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[1] Respondents filed two briefs in opposition, cited herein as "Venezuela BIO" and "Instrumentalities BIO."

the norm against discrimination, *Helmerich & Payne Int'l Drilling Co. v. Bolivarian Republic of Venezuela*, 784 F.3d 804 (D.C. Cir. 2015), or the norm against genocide, *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012). The decision below conflicts with these precedents: the expropriation here not only violated multiple international human rights treaties, but was also part of a plan to perpetrate additional human rights violations by abridging freedom of expression and the press. The Eleventh Circuit nevertheless applied the domestic takings rule based on a crabbed understanding of international law that excludes treaties.

The most telling aspect of Venezuela's response is its quiet acknowledgment that *it has filed its own cert. petition* in a case on the other side of the split. Venezuela BIO 11 n.8; *see also* Petition for Writ of Certiorari, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, No. 15-423. There, Venezuela argues that the D.C. Circuit's decision created multiple circuit splits. But those splits are manifestations of the same confusion that created the anomalous result in this case: the lower courts are making up the judge-made domestic takings rule as they go along, without the benefit of any guidance from this Court. This Court should grant certiorari to determine whether the domestic takings rule is valid, and if so, when it applies.

I. This Decision Below Conflicts With This Court's Precedents.

This Court has explained that "any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA's] text. Or it must fall." *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). Applying that textual approach, this Court has frequently found against immunity. *See id.* at 2258 (no immunity from discovery in aid of judgment); *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (no immunity for individuals); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 198-99 (2007) (no immunity from tax litigation).

The same result should obtain here. Congress enacted especially strong protections for property rights in the FSIA:

> 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 . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality . . . engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). The Second Hickenlooper Amendment uses similar language. 22 U.S.C. § 2370(e)(2). The question is thus whether a domestic taking that violates international human rights law violates "international law."

The petition showed, in detail, that the answer is "yes." The domestic takings rule appears nowhere in

the statute, and so courts applying it have relied on their understanding of the phrase "international law." But "international law" has always been understood to include treaties as well as norms of customary international law. Pet. 23-25. And there is every reason to believe that Congress used "international law" in this well-established sense when it enacted the FSIA and the Second Hickenlooper Amendment. Pet. 26-27. The petition further showed that Venezuela's conduct violated its treaty and customary law obligations, including but not limited to its obligations under the American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Pet. 19-20, 28-30, Article 21 of which provides that "[n]o one shall be deprived of his property except upon payment of just compensation." Thus, the taking in this case violated "international law," and respondents are not immune from jurisdiction.

Venezuela is the only respondent that even attempts to defend the merits of the decision below, and it says almost nothing about any of this. Instead, Venezuela cites *Permanent Mission of India* for the proposition that the *purpose* of the FSIA was to codify both a "restrictive" view of immunity and international law as it stood at the time the statute was enacted. Venezuela BIO 14-16. Venezuela argues that immunity for domestic takings serves these purposes.

Venezuela's citation is misplaced for two reasons. First, the discussion of restrictive immunity arose in the context of the "commercial activities" exception, 28 U.S.C. § 1605(a)(2)—which makes sense because the restrictive theory is that sovereigns are immune for sovereign acts, but not commercial ones. Using that theory to limit the expropriation exception, however,

would render the exception a nullity because practically every taking that violates international law is a sovereign act. Had petitioner been a U.S. citizen, Venezuela's expropriation of his property would still be a sovereign act—but not even respondents argue that they would be immune from jurisdiction. Respondents' argument thus illustrates the risk of privileging a general statement of statutory purpose above the text that Congress enacted, and also illustrates how truly tenuous their position is.

Second, the result and analysis in *Permanent Mission* support petitioner. The Court there found against immunity, holding that New York could bring a declaratory judgment action regarding the validity of tax liens against the mission's property under an exception to immunity for "any case . . . in which . . . rights in immovable property . . . are in issue." 28 U.S.C. § 1605(a)(4). The mission argued that this language was limited to "actions contesting ownership or possession," while the city argued that "the exception encompasses additional rights in immovable property, including tax liens." 551 U.S. at 197.

The Court began, "as always, with the text of the statute," and noted that the FSIA does not "expressly limit itself to cases in which the specific right at issue is title, ownership, or possession," nor does it "specifically exclude cases in which the validity of a lien is at issue." *Id*. at 197-98. Instead, it "focuses more broadly on 'rights in' property." *Id*. at 198. The Court thus asked whether, at the time of the FSIA's adoption in 1976, tax liens were understood to implicate rights in property—and it concluded that the answer was "yes" based on historic definitions of "liens." Only then did the Court refer to the purpose of the statute to

confirm its textual analysis. *Id*. at 199-202. Finally, having determined the jurisdictional question, the court left resolution of the merits to the lower courts. *See id.* at 202 n.2.

A parallel inquiry in this case defeats respondents' claim to immunity. The FSIA's expropriation exception does not "expressly limit itself to cases in which" the victims of takings are foreign nationals, nor does it "specifically exclude cases in which" the takings are domestic. 551 U.S. at 197-98. Instead, it "focuses more broadly on" international law. *Id*. at 198. In 1976, treaties were plainly regarded as part of international law, and the American Convention had already entered into force. *See* Pet. 23-27. Thus, when the FSIA was enacted, international law prohibited Venezuela from doing exactly what it did to petitioner.[2]

Venezuela cites the Fifth Circuit's decision in *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985), for the proposition that in 1976, international law did not prohibit domestic takings. BIO 15. But as the petition explained, *de Sanchez* improperly conflated the "law of nations" with non-derogable "*jus cogens*" norms, and therefore adopted an unduly narrow conception of international law. Pet. 30-31. Respondents don't even attempt to answer that

[2] Although the FSIA generally codified international law as it existed in 1976, the specific phrase "in violation of international law" in the expropriation exception is more appropriately read to mean "in violation of international law as it stood at the time of the violation." Thus, as international law norms evolve over time, takings in violation of those norms also are not immune.

argument. Independently, *de Sanchez* does not address takings that violate a binding treaty, and it does not hold—as the Eleventh Circuit did—that the phrase "international law" excludes treaties like the American Convention, which prohibit even domestic takings.

Respondents briefly attempt to argue that the treaties petitioner cited do not apply. Venezuela BIO 13; Instrumentalities BIO 23-25. They do not argue that Venezuela's conduct was lawful under these treaties, because they cannot. Instead, they contend that these treaties do not independently give petitioner a right of action. That objection goes to the merits of petitioner's lawsuit—not the prior questions of sovereign immunity and the act of state doctrine. Here, as in *Permanent Mission*, the Court can and should leave the merits to the lower courts after it rejects Venezuela's unfounded immunity defense.

Respondents' reliance on *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), falls similarly flat. Venezuela BIO 12-13. The question in *Sosa* was which international norms are strong enough to support a common law right of action under the Alien Tort Statute—which itself is only jurisdictional. 532 U.S. at 725. The Court deliberately embraced a narrow construction because since the Alien Tort Statute had been enacted, both lawmaking via common law and implied rights of action had fallen out of favor. *Id*. at 726-28. But petitioner is not asking the Court to imply a cause of action; instead, he is asking the Court to interpret the FSIA's expropriation exception, which expressly strips foreign sovereigns of immunity "in any case . . . in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). To the extent *Sosa* matters at all, it supports

petitioner because the limited availability of causes of action under the Alien Tort Statute belies respondents' breathless warnings of a flood of tort litigation if they lose their immunity.

Respondents also dispute petitioner's contention that he is stateless, so that the expropriation of his property is not properly regarded as "domestic." Instrumentalities BIO 26-27; Venezuela BIO 16-17. The instrumentality respondents chide petitioner for citing "a law review article and UN Statement." But respondents themselves cite literally nothing. Moreover, the author of petitioner's article was "one of the world's leading international lawyers," *Sir Ian Brownlie Obituary*, The Guardian, Jan. 11, 2010, http://www.theguardian.com/theguardian/2010/jan/11/sir-ian-brownlie-obituary; and the "UN Statement" is by the High Commissioner for Refugees, who knows a bit about refugee status. The other key point, which respondents ignore, is that the texts petitioner cited are from the 1960s, thus establishing that when the FSIA was enacted, de facto stateless persons were recognized in international law and had rights equivalent to refugees (which respondents violated here). The fact that there was a specific, codified international legal regime for stateless persons belies the Eleventh Circuit's core premise that human rights violations do not violate international law unless they involve two or more nations.

In sum, the Eleventh Circuit's decision is unmoored from the statutory text—and therefore conflicts with this court's precedents, which hold that "[t]he question . . . is not what Congress would have wanted but what Congress enacted in the FSIA." *NML Capital*, 134 U.S. at 2258 (quotation marks omitted).

There is no plausible argument that the words "international law" exclude international treaties, and respondents have not even attempted to argue that their conduct was legal under the treaties that bound them, or the binding international norms embodied in those treaties. The decision below thus sets a new and disturbing high water mark for immunity, and this Court should grant certiorari to reverse.

II. The Circuit Courts Adopt Inconsistent Interpretations Of The Statutory Phrase "In Violation Of International Law."

Respondents argue that the circuit courts agree that domestic takings do not violate international law. But while courts accept the domestic takings rule as a general proposition, some suspend its application when a domestic taking nevertheless violates a rule of international law. *See Helmerich & Payne*, 784 F.3d at 813; *Abelesz*, 692 F.3d at 677. The Eleventh Circuit's decision conflicts with those cases because notwithstanding clearly alleged additional violations, it applied the domestic takings rule here.

Respondents note that the particular international legal rules at issue in *Helmerich & Payne* and *Abelesz* are different from the treaty obligations at issue here. Venezuela BIO 11; Instrumentalities BIO 14, 21. But they cannot explain why that distinction matters under the text of the FSIA or the Second Hickenlooper Amendment, which speak of "international law" without qualification. The common denominator in *Helmerich & Payne* and *Abelesz* is that notwithstanding the domestic nature of the takings in those cases, they still violated some binding norm of

international law that governed the sovereigns' treatment of their own nationals. Venezuela's human rights treaty obligations—which it assumed voluntarily—impose the same sort of restrictions on its behavior.

The petition further argued that the courts in *Helmerich & Payne* and *Abelesz* were motivated by the fact that the takings at issue were undertaken to further an agenda that was prohibited by international law violations. Courts that have applied the domestic takings rule, by contrast, generally have done so when the takings stood alone. Pet. 15-17. The instrumentality defendants respond that the Fifth and Ninth Circuits applied the domestic takings rule even in cases involving politically motivated takings. BIO 17-18. Assuming *arguendo* that this is correct, it does not diminish the tension between this case and the holdings of the D.C. and Seventh Circuits described above. In any event, respondents focus on the wrong variable: the question is not whether the takings in question were politically motivated, but instead whether the takings were part of a larger pattern of human rights violations that independently violate international law. *See Abelesz*, 692 F.3d at 674-75 (distinguishing cases involving "*only* expropriation of property" from cases in which takings are an "integral part" of another international law violation). Here, they were. *See* Pet. 17.[3]

[3] *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992), involved human rights violations, but nevertheless applied the domestic takings rule to bar some of the plaintiffs' claims. The analysis in *Siderman* is literally one

Ultimately, the key point is that the lower courts' decisions are fundamentally inconsistent with each other. The rules change from case to case and court to court. As Venezuela's own petition in *Helmerich & Payne* shows, nobody is satisfied with the status quo. This Court's intervention is the only way to address the ongoing uncertainty in the law.

III. Respondents' Remaining Arguments Lack Merit.

Respondents argue that there is no applicable norm of customary international law in this case. Instrumentalities BIO 27-28; Venezuela BIO 14. As the petition explained (at 24), customary international norms come into being when a sufficient number of agreements embrace them. The protection of property rights and the requirement for compensation are now well enshrined in international law, and have been for years. Pet. 27-30. There are also customary norms against arbitrary detention and mistreatment of refugees, all of which were violated here. But there is no need to get into the weeds: all of these are secondary to the treaty violations that respondents do not meaningfully dispute.

Next, the instrumentality respondents argue that there is no separate circuit split relating to the interpretation of the Second Hickenlooper

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paragraph, and it does not discuss the question of treaties at all—likely because another plaintiff in the case was a U.S. citizen and so the case moved forward on her claims anyway. *Id*. at 711. Petitioner has been unable to locate the *Siderman* complaint to determine whether any specific treaty violations or additional international law violations were alleged.

Amendment. BIO 22. But they concede—indeed argue—that the phrase "international law" means the same thing in that statute and the FSIA. *Id*. 21-22. Thus, it would make no sense for the Court to review one but not the other.

The instrumentality respondents argue that the Second Hickenlooper Amendment does not apply because the expropriated property is not in the United States. BIO 22 n.9. This argument was not passed upon below. It is also wrong: the statutory text imposes no such requirement. And, as respondents note, the D.C. Circuit has applied the statute to property outside the United States, creating another circuit split, and so their alternative argument only provides an additional reason to grant certiorari. *Id*.

Finally, respondents parrot the Eleventh Circuit's concern that petitioner's rule would lead to a flood of litigation. Venezuela BIO 18; Instrumentalities BIO 16. But respondents have no answer to petitioner's arguments that other mechanisms—including the FSIA's nexus requirement, and limitations on causes of action—prevent this. Pet. 35-36. Moreover, under this Court's precedents, it would be improper to attempt to address this issue by creating an atextual exception to the FSIA's requirements. *Id*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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