No. 15-423

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.
Respondents.

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

BRIEF IN OPPOSITION

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
ELISEBETH B. COLLINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

QUESTIONS PRESENTED

The expropriation exception of the Foreign Sovereign Immunities Act of 1976 provides, in relevant part, 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." 28 U.S.C. § 1605(a)(3). The questions presented are:

1. Whether the complaint in this case adequately pled a "tak[ing] in violation of international law," 28 U.S.C. § 1605(a)(3), by alleging that petitioners seized all of respondent Helmerich & Payne de Venezuela, C.A. ("H&P-V")'s oil rigs and productive assets without compensation based on discriminatory animus toward H&P-V's U.S. ownership.

2. Whether the complaint in this case adequately pled an injury to respondent Helmerich & Payne International Drilling Co. ("H&P-IDC")'s "rights in property," 28 U.S.C. § 1605(a)(3), by alleging that petitioners seized H&P-IDC's entire drilling business in Venezuela, including all the productive assets of H&P-IDC's wholly owned subsidiary.

3. Whether the court of appeals correctly applied this Court's decision in *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946), to hold that a court lacks subject-matter jurisdiction over a claim under the FSIA's expropriation exception only when the claim is "wholly insubstantial and frivolous."

CORPORATE DISCLOSURE STATEMENT

Helmerich & Payne International Drilling Company is a wholly owned subsidiary of Helmerich & Payne, Inc. Blackrock, a publicly traded company, owns approximately 10 percent of the stock of Helmerich & Payne, Inc.

Helmerich & Payne de Venezuela, C.A. is a wholly owned subsidiary of Helmerich & Payne International Drilling Company.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND RULES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

IN THE

Supreme Court of the United States

No. 15-423

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
AND PDVSA PETRÓLEO, S.A.,
Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
AND HELMERICH & PAYNE DE VENEZUELA, C.A.
Respondents.

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

BRIEF IN OPPOSITION

Respondents Helmerich & Payne International Drilling Company ("H&P-IDC") and Helmerich & Payne de Venezuela, C.A. ("H&P-V") submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT

This case arises on petitioners' motions to dismiss. In the district court, the parties stipulated that for purposes of those motions, the facts as alleged in the complaint, CAJA 11-68, must be accepted as true. CA-JA 122-123; Pet. App. 48a. The following statement of facts relies on those undisputed allegations.

A. Respondents' Venezuelan Business

H&P-IDC is a Delaware corporation based in Tulsa, Oklahoma. Pet. App. 3a; CAJA 16. For decades, until 2010, H&P-IDC operated a successful oil and gas drilling business in Venezuela. Pet. App. 3a. H&P-IDC conducted that business through a local subsidiary incorporated in Venezuela, most recently H&P-V. Pet. App. 3a-4a.

To conduct its drilling services in Venezuela, H&P-IDC provided H&P-V with powerful land-based drilling rigs and other equipment. Pet. App. 4a; CAJA 19-20. From the United States, H&P-IDC made all significant operational decisions, such as whether and when to move rigs and assets from one region to another or into or out of Venezuela, and whether and when to enter into new contracts or extend existing ones. CAJA 47. H&P-IDC also provided significant managerial, technical, and administrative guidance and support to H&P-V. CAJA 46-47. Although H&P-V is incorporated in Venezuela, the Venezuelan government has long designated and treated H&P-V as a "FOREIGN COMPANY at all relevant legal effects" under Venezuela's investment law due to H&P-V's 100% U.S. ownership. CAJA 39; *see also* CAJA 17.

Venezuela nationalized its oil industry in the mid-1970s, and thereafter H&P-V began providing drilling services directly—and, eventually, exclusively—to the state-owned petitioners Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A. (together, "PDVSA") and their affiliates. Pet. App. 4a. Both PDVSA companies are agencies or instrumentalities of petitioner Venezuela for purposes of the Foreign Sovereign Immunities Act ("FSIA"). Pet. App. 4a, 39a-40a; Pet. 6. H&P-V performed its drilling operations in Venezuela under a

series of contracts with PDVSA. Pet. App. 4a. The contracts typically had short terms ranging from five months to one year, with the understanding and expectation that upon completion they would be routinely extended. *Id.* In fact, they were routinely extended, effectuating a continuous work cycle. *Id.* The parties executed the most recent contracts in 2007.

Shortly after the 2007 contracts were executed, however, PDVSA began to fall substantially behind on payments. Despite complete performance by H&P-V, PDVSA failed to pay tens of millions of dollars due under the contracts. Pet. App. 4a-5a; CAJA 27-28. In negotiations, PDVSA repeatedly acknowledged its debt and promised to pay, but failed to do so. Pet. App. 4a; CAJA 27, 28-29. In 2009, H&P-V fulfilled its remaining obligations under the existing contracts and declined to enter into new ones, making clear that drilling could resume when PDVSA met its obligations. Pet. App. 4a-5a. By November 2009, H&P-V disassembled its drilling rigs and stacked the equipment in its yards pending payment by PDVSA. *Id.*

B. The Expropriation

PDVSA's refusal to honor its commitments under the parties' contractual relationship occurred against the backdrop of open and growing hostility by the Venezuelan government toward the United States and U.S.-owned companies. *See* CAJA 41-43. On September 11, 2008, the Venezuelan government had expelled the U.S. ambassador, CAJA 41; meanwhile, it deepened ties with U.S. adversaries like Iran, North Korea, and Syria, while its most senior officials directed virulent anti-U.S. rhetoric toward U.S. companies. *Id.* The U.S. Commerce Department reported that the Venezuelan

government was engaged in a campaign of "active discrimination" against American businesses. CAJA 42.

In June 2010, without apparent legal authority, petitioners seized respondents' Venezuelan drilling business. Pet. App. 5a; *see also* CAJA 29-35. Beginning on June 12, PDVSA employees, assisted by armed soldiers of the Venezuelan National Guard, blockaded the entrance of H&P-V's facility in Ciudad Ojeda, Venezuela and similarly seized H&P-V's other headquarters and property in Anaco, Venezuela. Pet. App. 5a; CAJA 29.

On June 29, 2010, the Venezuelan National Assembly issued a "Bill of Agreement" declaring the "public utility and social interest" of H&P-V's rigs and all associated "moveable and immoveable assets and other improvements of [H&P-V]." Pet. App. 6a; CAJA 31, 97-98. As the Bill proposed, then-Venezuelan President Hugo Chávez issued an Expropriation Decree that same day, authorizing the "forcible taking" of H&P-V's assets, including the rigs and "all the personal and real property and other improvements made by [H&P-V]." CAJA 31; *see also* Pet. App. 6a; CAJA 33-35. The Decree declared that "[t]he expropriated property will become the unencumbered and unlimited property of PDVSA, S.A., or its designee affiliate, as expropriating entity," and it directed PDVSA to "commence and carry out the expropriation procedure." CAJA 31. Two days later, PDVSA filed eminent domain proceedings in the Venezuelan courts. Pet. App. 8a; CAJA 32.

Despite H&P-V's participation in those proceedings, petitioners and the Venezuelan courts to this date—more than five years after petitioners seized respondents' entire Venezuelan business and initiated the Venezuelan proceedings—have failed to advance the proceedings beyond the preliminary stages. Pet. App.

8a; CAJA 32, 35. As alleged in the complaint, there is no prospect that the Venezuelan proceedings will result in any meaningful compensation, much less the "prompt[,] adequate[,] and effective compensation required by international law." H.R. Rep. No. 94-1487, at 19-20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618.

As the complaint explains in substantial detail—allegations that petitioners concede for present purposes to be true, *supra* p. 1—petitioners targeted and seized respondents' U.S.-owned business in Venezuela in substantial part because of the Chávez regime's pervasive anti-American animus. As set forth in the complaint, PDVSA and Venezuelan officials made clear in numerous public statements that H&P-V was being taken because of its U.S. ownership. *See* Pet. App. 5a-8a; CAJA 14, 30-31, 38-42. On June 23, 2010, before the Venezuelan legislature and President had formally authorized the expropriation, PDVSA trumpeted its seizure of respondents' U.S.-owned business: "[T]he Bolivarian Government, through [PDVSA] nationalized 11 drilling rigs" belonging to "the company Helmerich & Payne (HP), a U.S. transnational firm." CAJA 30; Pet. App. 5a. Two days later, PDVSA boasted about "[t]he nationalization of the oil production drilling rigs from the American contractor H&P," CAJA 30-31, and "emphatically reject[ed] statements made by spokesmen of the American empire—traced [sic] in our country by means of the oligarchy." CAJA 40; Pet. App. 5a-6a. They explained that the expropriation would "guarantee that the drills will be operated by PDVSA as a company of all Venezuelans"—no longer the property of an "American company" owned and managed by Americans. CAJA 41; Pet. App. 6a.

Petitioners further revealed their anti-American rationale for the expropriation as the seizure was being

finalized. When the Venezuelan National Assembly passed the Bill of Agreement, a Venezuelan official accused opponents of the expropriation of acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war, ... through the large military industry, of the [U.S.] Empire and its allies." CAJA 40; Pet. App. 7a. Two days later, with the seizure complete, Venezuela's oil minister—who also served as president of PDVSA at the time—spoke at a political rally of PDVSA employees at H&P-V's Anaco yard, condemning respondents' "foreign gentlemen investors" and announcing that employees of "this American company" would become employees of PDVSA. CAJA 14; Pet. App. 7a-8a.

Consistent with that prediction, PDVSA now operates respondents' former business as a state-owned concern, using respondents' confiscated real and personal property and employing H&P-V's rig managers, rig workers, and other professionals to perform the functions the business used to perform when run by respondents. CAJA 33-35. Respondents no longer possess any significant tangible property or maintain any commercial operations in Venezuela. CAJA 35. Stripped of all its productive assets, H&P-V ceased to operate and no longer exists as a going concern. CAJA 34.

As noted, respondents have received not one penny of compensation. Although petitioners initiated eminent domain proceedings in the Venezuelan courts in July 2010, those proceedings remain in their early stages. Pet. App. 8a; CAJA 32, 35. Nor can any compensation be expected from Venezuela's politically controlled courts. *See* CAJA 15 (citing U.S. Dep't of State, *2009 Human Rights Report: Venezuela* (Venezuelan appel-

late court "ruled in favor of the government in 324 of the 325 cases brought by private citizens against the government")); U.S. Trade Rep., *2011 National Trade Estimate Report on Foreign Trade Barriers* 375 (Mar. 2011) ("[S]eventy-six companies, including several U.S.-owned firms, were nationalized pursuant to [a 2009 law] and none have received compensation to date."); CAJA 35-38, 52-55 (citing reports).

C. Proceedings Below

In September 2011, respondents filed suit against Venezuela and PDVSA in federal district court, asserting jurisdiction under the FSIA's expropriation exception. When certain conditions are met, that provision denies immunity to a foreign state and its agencies and instrumentalities in any case "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).[1]

In August 2012, petitioners moved to dismiss on several grounds, some of which turned on factual questions requiring jurisdictional discovery, and some of which did not. Pet. App. 46a-49a. In a joint stipulation, the parties agreed to litigate four threshold issues based on the allegations in the complaint—before conducting any jurisdictional discovery—and to defer petitioners' other defenses for later adjudication following jurisdictional discovery. Pet. App. 8a-9a, 46a-49a; CAJA 121-124. Two of those initial issues are the subject

---

[1] H&P-V also alleged breach-of-contract claims against PDVSA, asserting jurisdiction under the FSIA's commercial-activity exception, 28 U.S.C. § 1605(a)(2). The court of appeals' holding that those claims cannot proceed under the FSIA, Pet. App. 23a-29a, is the subject of a separate pending petition for writ of certiorari. *See Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, No. 15-698 (Nov. 2015).

of this petition. First, petitioners invoked the so-called "domestic-takings rule" to contend that a taking by a sovereign state of the property of its own nationals is not a "violation of international law" as required under § 1605(a)(3), and that H&P-V—which is incorporated in Venezuela—therefore could not pursue a claim under the expropriation exception. Second, petitioners contended that H&P-IDC—which is incorporated in the United States—also could not sue in its own right because any injury was suffered solely by its subsidiary, H&P-V, which owned legal title to the seized property, and that H&P-IDC's own "rights in property" were therefore not "in issue" as required by § 1605(a)(3). Pet. App. 9a-10a.

The district court denied petitioners' motions to dismiss with respect to H&P-IDC's expropriation claim, Pet. App. 81a-91a, but granted it with respect to H&P-V's, Pet. App. 49a-59a, 91a. On appeal, the U.S. Court of Appeals for the D.C. Circuit affirmed in part and reversed in part. In an opinion by Judge Tatel, joined by Chief Judge Garland, the court held that H&P-IDC and H&P-V had each pled claims in which "rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3).

As to H&P-V, the court held that it had adequately pled a discriminatory taking in violation of international law by alleging that petitioners had targeted H&P-V based on its U.S. ownership. Pet. App. 12a-16a. The court explained that international law recognizes an exception to the domestic-takings rule for discriminatory takings in which a state is alleged to have targeted a domestically incorporated but foreign-owned corporation for expropriation based on the corporation's alien ownership. The court found persuasive the reasoning of two Second Circuit decisions addressing the Castro

regime's analogous expropriation of U.S.-owned corporations incorporated in Cuba, Pet. App. 14a-15a, agreeing that "'[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders,'" courts may properly look beyond the "'nationality' of the corporate fiction" and look instead to the nationality of the controlling shareholders, Pet. App. 14a (quoting *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962)); *see also Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967) (reaffirming *Sabbatino* "with emphasis"). The court also found confirmation in the *Restatement (Third) of Foreign Relations Law*, which "recognizes discriminatory takings as a violation of international law" and cites the *Sabbatino* litigation as an example of a discriminatory taking prohibited under international law. Pet. App. 14a-15a (citing *Restatement (Third) of Foreign Relations Law* § 712 & reporter's note 5 (1987)). And the court noted the absence of any contrary authority from any other circuit.[2]

As to H&P-IDC, the court held that its "rights in property" are "in issue" even though H&P-IDC did not own legal title to the expropriated assets. Pet. App. 17a-22a. The court rejected petitioners' reliance on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003), which addressed a provision of the FSIA that—unlike the expropriation exception—"expressly 'speaks of owner-

[2] The court also rejected petitioners' contention that the alleged facts did not show that the taking was discriminatory. Pet. App. 16a-17a. The court cited public statements made by petitioners and their officials that "went well beyond" any "economic and security need[]" for the expropriation and "could be viewed as demonstrating" the "'unreasonable distinction' based on nationality" required to establish a violation of international law under the *Restatement*. *Id.* (quoting *Restatement (Third)* § 712).

ship.'" Pet. App. 19a. Instead, the court followed this Court's analysis in *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 197 (2007), which held that the phrase "rights in immovable property" in the FSIA's real-estate exception, 28 U.S.C. § 1605(a)(4), should not be "'limit[ed] … to ownership or possession,'" but "'focuse[d] more broadly on "rights in" property.'" Pet. App. 19a (quoting *Permanent Mission*, 551 U.S. at 198). Applying *Permanent Mission*, the court of appeals recognized that shareholders like H&P-IDC may have rights in corporate property beyond their ownership of the subsidiary's shares. Pet. App. 19a-20a (citing *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R. Co.*, 417 U.S. 703, 713 (1974), and *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984) (en banc), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985)). The court found the case for recognizing H&P-IDC's "rights in property" to be "especially persuasive" here because H&P-IDC was the sole shareholder of H&P-V and, "as a result of the expropriation, has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise." Pet. App. 22a.

Judge Sentelle dissented with respect to the expropriation issues. Pet. App. 30a-36a.

The court of appeals denied petitioners' requests for panel rehearing or rehearing en banc, Pet. App. 97a-98a, and denied petitioners' motion to stay the mandate, CA Order (Aug. 25, 2015) (per curiam). The Chief Justice denied petitioners' application to this Court for a stay of the mandate. No. 15A258 (Sept. 1, 2015).

Petitioners' other jurisdictional defenses remain pending before the district court, where jurisdictional discovery recently commenced.

REASONS FOR DENYING THE PETITION

This case is extraordinary in several respects in light of petitioners' conduct, but it does not warrant this Court's review. Rarely does a foreign sovereign expropriate—without any prospect of prompt, adequate, and effective compensation—the entire business and productive assets of a U.S.-owned company based on overt discriminatory animus toward the company's U.S. ownership. The issues arising out of these exceptional facts are unlikely to recur, and the court of appeals' resolution of them was consistent with the precedent of other circuits and this Court and with principles of international law. Moreover, even if any of petitioners' several questions presented were otherwise certworthy (and they are not), review would be inappropriate in the case's current posture. More than four years after respondents filed their complaint and more than five years after petitioners' uncompensated and discriminatory taking of respondents' Venezuelan business, respondents should at last be permitted to proceed with jurisdictional discovery into the factual bases of petitioners' assertion of sovereign immunity and—if they survive those defenses—be permitted to pursue on the merits the "prompt" compensation guaranteed them under international law.

I. THE DECISION BELOW CONFLICTS WITH NO DECISION OF THIS OR ANY OTHER COURT AND CORRECTLY APPLIED PRINCIPLES OF INTERNATIONAL LAW

A. The Court's Holding That H&P-V Adequately Pled A Discriminatory Taking In Violation Of International Law Does Not Merit Review

1. The phrase "'taken in violation of international law'" in § 1605(a)(3) includes "takings which are arbitrary or discriminatory in nature." H.R. Rep. No. 94-

1487, at 19-20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618; *see also Restatement (Third) of Foreign Relations Law* § 712 cmt. f (1987). The court of appeals concluded that H&P-V's allegations stated such a discriminatory taking because the expropriation was motivated in substantial part by petitioners' discriminatory animus toward the United States and the nationality of H&P-V's U.S. owners. Pet. App. 5a-8a, 13a-17a; CA-JA 14, 30-31, 38-42; *supra* pp. 3-4, 5-6.

That ruling does not conflict with any decision of this Court or any circuit. In the only cases to have addressed circumstances analogous to the extraordinary facts here, the Second Circuit twice held that a foreign state violates international law when it expropriates a domestically incorporated corporation based on discriminatory animus toward the foreign nationality of the corporation's shareholders. Pet. App. 13a-15a. In *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964), the Second Circuit acknowledged that "acts of a state directed against its own nationals" ordinarily do not "give rise to questions of international law." *Id.* at 861. But *Sabbatino* nonetheless held that the Castro regime's expropriation of the property of a U.S.-owned company incorporated in Cuba violated international law. The court noted that, regardless of the expropriated subsidiary's place of incorporation, over 90% of its shareholders were U.S. nationals, and the expropriation decree "clearly indicated that the property was seized because [the company] was owned and controlled by Americans." *Id.* In such circumstances, "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent … to look only to the 'nationality' of the corporate fiction." *Id.* Rather, the court found "[t]he more

frequent practice in international litigation and negotiation seems to be that the nationality of the corporation is disregarded when it is different from the nationality of most of the corporation's shareholders." *Id.*

Although this Court reversed *Sabbatino* on other grounds, the Second Circuit on remand reaffirmed "with emphasis" that "the nationality of the corporate fiction" was not dispositive when a foreign state "treats a corporation in a particular way because of the nationality of its shareholders." *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 185 (2d Cir. 1967) (internal quotation marks omitted).

Three years after *Sabbatino*, the drafters of the *Restatement (Second) of Foreign Relations Law* adopted its precise holding as a paradigmatic illustration of a taking that entitles a domestically incorporated (but foreign-owned) entity to the protections of international law:

> Nationals of state A own all of the stock of X, a corporation of state B, doing business in B. B issues a decree nationalizing without compensation, the assets of all aliens and of all domestic corporations owned by aliens. X is an alien under the rule [for attribution of state responsibility] and the taking of its property is consequently a violation of international law[.]

Restatement (Second) of Foreign Relations Law § 171 cmt. d, illus. 3 (1965). In such circumstances, the *Restatement (Second)* explained, it would be "manifestly inequitable to permit the [expropriating] state to avoid responsibility on the ground that [the expropriated company] is also a national of that state." *Id.* § 171 cmt. d. When Congress enacted the FSIA's expropriation exception in 1976, it did so against this background

understanding of international law. *See Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 200 (2007) (interpreting FSIA's real-property exception and noting that the *Restatement (Second)* was "[t]he most recent restatement of foreign relations law at the time of the FSIA's enactment"). Subsequently, the *Restatement (Third)* again cited the facts of *Sabbatino* and *Farr* with approval as an example of a discriminatory taking. *Restatement (Third) of Foreign Relations Law* § 712 reporters' note 5; *see* Pet. App. 15a.

The decision below followed the reasoning of *Sabbatino*, *Farr*, and both *Restatements*, and no other circuit has deviated from that analysis. Petitioners claim to have identified a shallow circuit split, but the two allegedly conflicting decisions they cite (at 12-14)—*Fischer* v. *Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), and *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992)—did not address the question presented here. In *Fischer*, the Seventh Circuit reaffirmed that Hungarian Jews persecuted in the Holocaust—individual Hungarian citizens with no ties to any other nation—could state expropriation claims under international law because of the expropriation's "strong links to genocide." 777 F.3d at 858. Petitioners seize on dicta in *Fischer* observing that—absent genocide—"discrimination among a state's own nationals based on race, religion, ethnicity, or similar grounds" does not implicate international law. *Id.* at 857-858 (quoted at Pet. 13-14). But *Fischer* acknowledged at the same time that international law does prohibit "discrimination against aliens generally, or against aliens of a particular nationality or particular aliens." *Id.* at 857 (citing *Restatement (Third)* § 712 cmt. f). That statement is entirely consistent with *Sabbatino*, *Farr*, and the court of appeals' decision in this case, each of which simply recognizes

that "discrimination against aliens" is established when a domestically incorporated entity is targeted because of the sovereign's animus against that entity's foreign owners. As to that point, *Fischer*—which did not involve a corporate plaintiff, much less one wholly owned by foreign shareholders—is silent.

Similarly, in *Siderman*, the Ninth Circuit held in pertinent part that the FSIA's expropriation exception did not cover the claims of three individual Argentine citizens alleging that Argentina had seized their property due to a "discriminatory motivation *based on ethnicity*"—*i.e.*, the fact that they were Jewish. 965 F.2d at 712 (emphasis added). Like *Fischer*, *Siderman* did not decide the issue presented in this case: whether international law prohibits discriminatory takings targeting foreign-owned corporations based on the alienage of their owners.[3] But like *Fischer*, *Siderman* recognized—as petitioners concede (at 14)—that takings based on alienage "would violate international law." 965 F.2d at 712 (quoting *Restatement (Third)* § 712 cmt. f). There is no conflict for this Court to resolve.

2. Petitioners attack the decision below on its merits, citing *Barcelona Traction, Light & Power Co. (Belgium* v. *Spain)*, 1970 I.C.J. 3 (Feb. 5) (cited at Pet. 16). But their argument misses the mark entirely. *Barcelona Traction* did not involve a taking at all, much less one effectuated by the country of incorporation and motivated by animus toward the company's foreign ownership. In that case, the International Court of Justice

---

[3] *Mezerhane* v. *Republica Bolivariana de Venezuela*, 785 F.3d 545 (11th Cir. 2015), *cert. filed* (U.S. No. 15-410), is inapposite for the same reason: It did not involve a discriminatory taking targeting a corporation's *alien* ownership, but rather a claim by a Venezuelan individual claiming that Venezuela had violated various human rights treaties.

(ICJ) examined the respective rights of countries to assert "diplomatic protection" and held only that the country of incorporation (Canada), rather than the shareholder's country (Belgium), was the proper country to assert a corporation's interests against a third country (Spain). And the ICJ stressed that, in other circumstances, "considerations of equity might call for … protection of the shareholders in question by their own national State"—most notably where, as here, "the State whose responsibility is invoked [*i.e.*, Venezuela] is the national State of the company [*i.e.*, H&P-V]" that has suffered an injury in violation of international law. *Id.* at 48 ¶¶ 92-93. The *Restatement (Third)* accordingly explains that *Barcelona Traction* "does not preclude [diplomatic] representation of [a] company" in an action against the state of incorporation by another "state with significant links," including "the state of its parent corporation or of the parent's shareholders." *Restatement (Third)* § 213 reporters' note 3 (1987).[4]

Petitioners' reliance on *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), is also misplaced. *Sosa* admonished that courts generally "have no congressional mandate to seek out and define new and debatable violations of the law of nations" by creating new causes of action under the Alien Tort Statute. *Id.* at 728. But the FSIA's expropriation exception applies to takings that "violat[e] international law," 28 U.S.C. § 1605(a)(3), including "takings which are … discriminatory in nature," H.R. Rep. No. 94-1487, at 19-20, *reprinted in* 1976 U.S.C.C.AN. at 6618; *see also Restatement (Third)*

[4] Petitioners cite (at 16 n.4) *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), but that decision cited *Barcelona Traction* only for the proposition that separate corporate personality is not dispositive of liability under international law in all circumstances. *Id.* at 628 n.20.

§ 712 cmt. f. The FSIA therefore requires courts to determine which takings are "in violation of international law," 28 U.S.C. § 1605(a)(3), including by consulting the background precedent and authority (such as *Sabbatino* and the *Restatement*) against which Congress enacted the expropriation exception. *Sosa* does not diminish that obligation.

3. Petitioners finally attempt to distinguish *Sabbatino* on its facts because the "official decrees authorizing the expropriation" in this case were not discriminatory "[on] the[ir] face." Pet. 17. The court of appeals rejected that factbound purported distinction, however, *supra* p. 9 n.2, and petitioners do not suggest that this aspect of the ruling conflicts with this Court's precedent or implicates any circuit conflict. Nor does it. International law prohibits all "'unreasonable distinction[s]'" based on alienage "that invidiously single out property of persons of a particular nationality." Pet. App. 14a (citing *Restatement (Third)* § 712 cmt. f) (emphasis omitted). International law does not proscribe only those discriminatory takings that include invidious rhetoric within the four corners of the government's official decree, while turning a blind eye to equally discriminatory takings, like this one, where the expropriating government candidly admits—indeed, publicly announces—that it is acting for discriminatory reasons.[5] Petitioners' argument presents a factbound and

[5] Contrary to petitioners' suggestion, the court of appeals rejected petitioners' factual claim based on the extensive record of petitioners' public statements, Pet. App. 16a-17a; *see supra* pp. 5-6; CAJA 14, 30, 34, 40—not on "intrusive demands for discovery" into petitioners' private motivations, *cf.* Pet. 17; *see also Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2258 (2014) (rejecting reliance on "apprehensions" about the application of ordinary discovery rules to foreign states).

case-specific question that does not merit review. S. Ct. R. 10; Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), at 352 (10th ed. 2013).

B. The Court's Holding That H&P-IDC Adequately Pled A Claim Implicating Its Own "Rights In Property" Does Not Warrant Review

The court of appeals held that, as the sole shareholder of a subsidiary whose business was taken completely, H&P-IDC placed its own "rights in property … in issue" under the FSIA's expropriation exception. Pet. App. 17a-22a. Petitioners do not contend that the court of appeals' narrow holding creates a circuit conflict, arises frequently, or otherwise holds great federal significance. That alone warrants denial of the petition on this issue. Petitioners do argue that the decision below was incorrect, relying primarily on *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003). But the decision below is fully consistent with *Dole Food* and other precedent.

Petitioners read *Dole Food* to hold that only direct corporate ownership of legal title can constitute a "right[] in property" under the expropriation exception. Pet. 19-21 & n.5. But, as the court of appeals explained, *Dole Food* interpreted a separate FSIA provision that defined which entities qualify as "agenc[ies] or instrumentalit[ies] of a foreign state," 28 U.S.C. § 1603(b)(2), and "'speaks of ownership'" in that different context, Pet. App. 19a (quoting *Dole Food*, 538 U.S. at 474)); *see* 28 U.S.C. § 1603(b)(2) ("agency or instrumentality" includes any entity if "a majority of [the entity's] shares or other ownership interest is owned by a foreign state or political subdivision thereof"). Given the provision's textual references to "corporate" personhood, "owne[rship]" of shares, and "other ownership interest[s]," this Court concluded in *Dole Food* that "owner-

ship" under § 1603(b)(2) was limited to "direct ownership" under principles of "corporate law." 538 U.S. at 474-475. The Court did not suggest that such a definition should extend to other provisions lacking those specific textual limitations.

Unlike the provision at issue in *Dole Food*, the expropriation exception "speaks only of 'rights in property' generally." Pet. App. 19a; *see* 28 U.S.C. § 1605(a)(3). It suggests no textual limitations whatsoever on those rights. And petitioners cite no such limitations derived from the structure or history of the FSIA.

Moreover, even if petitioners were correct that *Dole Food* requires application of corporate-law principles to define the contours of "rights in property" under section 1605(a)(3), corporate-law principles would support the court of appeals' decision. In both the United States and Venezuela, corporate law recognizes that a parent corporation has the exclusive right to decide upon transactions in a subsidiary's property that change the nature of the subsidiary's business. *See, e.g.*, *Fletcher Cyclopedia of the Law of Corporations* § 2949.21 (2013 rev. ed.) ("Every state requires in some, if not all, instances where all, or substantially all, of the corporate assets are sold or transferred that there be shareholder consent."); *id.* § 2949.40 ("The pertinent inquiry … is whether the corporation can meaningfully continue the corporate enterprise in light of the sale."); Vz. Commercial Code, art. 280(4) (App. 1a-2a) (similar). Corporate law thus gives H&P-IDC a distinct "stick" in the "bundle" of property rights over H&P-V's assets: the exclusive power to control H&P-V's business by vetoing any substantial disposition of H&P-V's productive assets. By expropriating H&P-V's productive assets, petitioners took that "stick" when, in their words, they took the "company," CAJA 14; *see also* CAJA 34.

For similar reasons, and contrary to petitioners' contention (at 21-22), the court of appeals' holding is consistent with this Court's decision in *Franchise Tax Board of California* v. *Alcan Aluminium Ltd.*, 493 U.S. 331 (1990). There, this Court stressed that "there is … an exception to th[e shareholder-standing] rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Id.* at 336. In this case, the court of appeals—which carefully considered both *Franchise Tax Board* and the shareholder-standing rule, Pet. App. 17a-18a—merely found that H&P-IDC suffered precisely such a direct and personal injury: the "total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken." Pet. App. 22a.[6]

Petitioners finally attack the court of appeals' reliance on *Permanent Mission of India*, 551 U.S. 193, but that argument mischaracterizes the court's holding. The court of appeals did not hold that *Permanent Mission of India* "requir[ed] [it] to accept whatever right in proper-

[6] None of the appellate decisions petitioners cite (at 21-22)—most of which were nonprecedential even in their circuits—involved a majority shareholder's right to control its subsidiary's business by deciding upon the disposition of all or substantially all of its productive assets. *See Broad* v. *Sealaska Corp.*, 85 F.3d 422, 429-430 (9th Cir. 1996) (subset of shareholders sued over transfer of specific assets); *Anderson* v. *Cox*, 503 F. App'x 495 (9th Cir. 2012) (taking claim against SEC by shareholders of delisted public company); *Byers* v. *United States*, 4 F. App'x 763, 764 (Fed. Cir. 2001) (per curiam) (taking claim involving only discrete assets seized from plaintiff's corporation); *United States* v. *Acadiana Treatment Sys. Inc.*, 2000 WL 634145, at *4 (5th Cir. May 3, 2000) (taking claim involving only "some of the subsidiaries' assets"); *Duncan* v. *Peninger*, 624 F.2d 486, 490 (4th Cir. 1980) (involving only discrete financial assets).

ty a plaintiff claims" or to "deem[] the source of the asserted right irrelevant." Pet. 23. Rather, the court correctly interpreted *Permanent Mission of India* as rejecting artificial limitations on existing "'rights in property.'" Pet. App. 19a-20a. And, contrary to petitioners' suggestions, that was not the end of the court of appeals' analysis. The court next turned to authorities recognizing the existence of shareholders' rights in corporate property based on corporate-law principles. Pet. App. 20a (quoting *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc)); *Ramirez*, 745 F.2d at 1518 ("It is settled law that ownership of stock constitutes a specific interest in the corporation's property."); *see also id.* & n.67 (quoting *Fletcher Cyclopedia of the Law of Corporations* § 5100 (1971 ed.)); *supra* p. 19 (corporate-law provisions). That is precisely the framework this Court applied in *Permanent Mission of India*.[7]

---

[7] Petitioners chide the panel for failing to "account for international law" in resolving H&P-IDC's claim. Pet. 24. But the passage of *Barcelona Traction* on which petitioners rely merely described the general rule under municipal law, and the ICJ made clear that "[m]unicipal law"—not international law—"determines the legal situation … of those persons who hold shares in [corporate entities]." 1970 I.C.J. at 34 ¶41. The municipal-law principle *Barcelona Traction* recited, moreover, is exactly the rule embraced by respondents and the court of appeals here: "Whenever one of his direct rights is infringed, the shareholder has an independent right of action." *Id.* at 36 ¶47; *compare* Pet. App. 17a-18a, 22a. But Belgium had disclaimed reliance on that theory in that case. 1970 I.C.J. at 37 ¶49. Petitioners also criticize (at 25) the court of appeals' citation of *Ramirez*, 745 F.2d 1500, as an "example" of circumstances in which shareholders may have rights in corporate property. Pet. App. 20a. As the opinion makes clear, however, the majority did not feel itself constrained by *Ramirez*, but simply found it "especially persuasive" in light of its factual similarity to this case and its consistency with other decisions. *Id.* 22a; *see also id.* 19a-22a.

C. The Court Of Appeals' Application Of *Bell* v. *Hood* Does Not Warrant Review

The court of appeals analyzed petitioners' motions to dismiss under the standard set out in *Bell* v. *Hood*, 327 U.S. 678 (1946): "In an FSIA case, [a court] will grant a motion to dismiss 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 (quoting *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008)); *see also Agudas*, 528 F.3d at 940 (where "jurisdiction depends on the plaintiff's asserting a particular type of claim," "there typically is jurisdiction unless the claim is 'immaterial and made solely for the purpose of obtaining jurisdiction or … wholly insubstantial or frivolous,' *i.e.*, the general test for federal-question jurisdiction under [*Bell* v. *Hood*]." (citation and footnote omitted)).

Petitioners attack the court of appeals' reliance on that standard, arguing for a FSIA-specific exception to the *Bell* standard. But they embraced that standard without objection in their briefing before the panel. *See* Pet. CA Br. 20. The petition should be denied for that reason alone. And in any event, their arguments mischaracterize the relevant decisions and ignore the parties' joint stipulation.

1. There is no circuit conflict. No court has endorsed the exception to *Bell* that petitioners seek.

The D.C. Circuit has long held that there is no FSIA exception to the *Bell* standard. In *Agudas*, relying on *Bell*, 327 U.S. at 682-683, and *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006), the D.C. Circuit held in the context of a FSIA expropriation case that

the question whether a plaintiff has put in issue "rights in property" "taken in violation of international law," 28 U.S.C. § 1605(a)(3), is reviewed under *Bell*. Establishing jurisdiction under § 1605(a)(3), the court explained, "effectively requir[es] that the plaintiff assert a certain type of claim: that the defendant (or its predecessor) has taken the plaintiff's rights in property (or those of its predecessor in title) in violation of international law." *Agudas*, 528 F.3d at 941. And where jurisdiction "depends on the plaintiff's asserting a particular type of claim," *Bell* applies. *Id.* at 940.

As petitioners concede, the Ninth Circuit "applies the same test." Pet. 30-31 (citing *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010) (en banc)); *see also Siderman*, 965 F.2d at 712-713; *West* v. *Multibanco Comermex, S.A.*, 807 F.2d 820, 826 (9th Cir. 1987).

Contrary to petitioners' contentions, no circuit has held *Bell* inapplicable in circumstances like those here. Petitioners rely on the Second Circuit's decision in *Robinson* v. *Government of Malaysia*, 269 F.3d 133, 142 (2d Cir. 2001), in which the plaintiff invoked the FSIA's nondiscretionary-tort exception, 28 U.S.C. § 1605(a)(5). But *Robinson* did not depart from *Bell*. Rather, *Robinson* relied on *Bell* in stressing that "[a] district court does not … decide a case on the merits in order to decide jurisdiction" and that "'[j]urisdiction is not defeated by the possibility that the averment might fail to state a cause of action.'" 269 F.3d at 142 (quoting *Bell*, 327 U.S. at 682).

Petitioners cite dicta in *Robinson* in which the panel majority indicated—over the disagreement of then-Judge Sotomayor—that where "'the jurisdiction and merits inquiries overlap,'" district courts may "'go be-

yond the bare allegations of the complaint,'" Pet. 27 (citing *Robinson*, 269 F.3d at 142), in order to "resolve disputed issues of fact" where "the defendant challenges the factual basis of the plaintiff's claim," *Robinson*, 269 F.3d at 141; *cf. id.* at 148 (Sotomayor, J., concurring in the judgment) ("find[ing] no basis for the majority's … suggestion"). Whatever its merit, that dicta is not relevant here because petitioners expressly stipulated in the district court that their motions to dismiss do not challenge the truth of the factual allegations in the complaint. Pet. App. 48a. As a result of that stipulation and the purely legal nature of the petitioners' contentions, this case, like *Agudas*, did not require the D.C. Circuit to consider the point addressed by the *Robinson* dicta.[8]

Nor does *Robinson* support petitioners' effort to displace *Bell* in analyzing "the law as well as the facts." Pet. 27. The passage of *Robinson* petitioners cite simply observed that in deciding jurisdiction in FSIA cases, courts regularly encounter legal questions at the threshold that mirror questions that arise on the merits, such as whether an expropriation violates international law. *Robinson*, 269 F.3d at 143. *Robinson* did not hold—or have occasion to hold—that *Bell* would not

[8] In *Agudas*, the D.C. Circuit did "not express any opinion" on which standard applies "when jurisdiction depends on factual propositions intertwined with the merits of the claim." 528 F.3d at 940. Consistent with *Robinson*, though, the court acknowledged that where "jurisdiction depends on particular factual propositions" unrelated to the merits, the plaintiff must "present adequate supporting evidence"—citing with approval the same Second Circuit precedent on which *Robinson* relied. *See id.* (citing *Cargill Int'l S.A.* v. *M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993)); *cf. Robinson*, 269 F.3d at 140-141 (citing *Cargill*, 991 F.2d at 1016, 1019).

apply in resolving such questions. Instead, it endorsed *Bell*'s application in FSIA cases. *Supra* p. 23.[9]

The other circuit decisions petitioners cite (at 28-29) also do not hold *Bell* inapplicable in FSIA cases. In *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 684-685 (7th Cir. 2012), the Seventh Circuit held that plaintiffs' allegations were insufficient to satisfy a purported exhaustion requirement and remanded to allow plaintiffs to expand on those allegations. *Abelesz* did not discuss *Bell* or decide the relevant standard, and there is no indication in the court's decision that the issue was even raised. Had the court addressed that issue expressly, it likely would have found plaintiffs' claims lacking under *Bell*. In *Community Finance Group, Inc.* v. *Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011), the Eighth Circuit merely confirmed that, on a facial jurisdictional attack, district courts "'must accept all factual allegations in the pleadings as true and view them in the light most favorable to the nonmoving party.'" Petitioners stipulated to the same undisputed re-

[9] Like *Robinson*, *Moran* v. *Kingdom of Saudi Arabia*, 27 F.3d 169 (5th Cir. 1994), concerned only the propriety of "consider[ing] evidence presented beyond the pleadings," *id.* at 172—not the governing substantive standard. Petitioners' other Second Circuit citations—most of them nonprecedential—are even further afield, addressing facts that could not survive even under *Bell* and without mentioning the relevant standard. *Orkin* v. *Swiss Confederation*, 444 F. App'x 469, 470-471 (2d Cir. 2011) (plaintiff alleged a "taking" by a private individual); *Freund* v. *Société Nationale des Chemins de Fer Français*, 391 F. App'x 939, 940 (2d Cir. 2010) ("complaint itself allege[d] a sequence of events" that could not possibly satisfy the expropriation exception); *Zappia Middle E. Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 250-253 (2d Cir. 2000) (plaintiff offered "no evidence" after two years of jurisdictional discovery on dispositive issue).

quirement here. Pet. App. 48a.[10] Finally, the Eleventh Circuit's decision in *Mezerhane*, 785 F.3d 545, like *Abelesz*, merely rejected a plaintiff's legal arguments without discussing or purporting to choose between *Bell* and any other standard. *Id.* at 548-551.[11]

2. The D.C. Circuit's refusal to carve out a novel FSIA exception to *Bell*—an exception petitioners never sought before the panel—was correct. To proceed under the expropriation exception, a complaint must put "in issue" rights in property taken in violation of international law. 28 U.S.C. § 1605(a)(3). As the D.C. Circuit has explained, this language "effectively requir[es] that the plaintiff assert a certain type of claim," *Agudas*, 528 F.3d at 941—precisely the type of question to which *Bell* applies, *see Bell*, 327 U.S. at 681-685; *Arbaugh*, 546 U.S. at 514; Wright & Miller, *Federal Practice & Procedure* § 1350 (3d ed. 2004).[12] This Court reiterated *Bell*'s vitality just last month, reaffirming that "only 'wholly insubstantial and frivolous' claims" implicate a failure to raise a substantial federal question for jurisdictional purposes. *Shapiro* v. *McManus*, 136 S. Ct. 450, 455 (2015).

Adherence to *Bell* is also more faithful to the FSIA's purpose. In codifying the restrictive theory of sovereign immunity, Congress maintained a distinction

---

[10] *Hastings* v. *Wilson*, 516 F.3d 1055 (8th Cir. 2008), did not involve the FSIA and did not discuss *Bell*.

[11] *Mezerhane* cited *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 572 (2007) (Stevens, J. dissenting), only for the proposition that "at the pleading stage, we take [plaintiff's] factual allegations to be the operative facts." 785 F.3d at 547.

[12] Federal-question jurisdiction turns on an "arising under" standard analogous to § 1605(a)(3)'s "in issue" standard. *See* 28 U.S.C. § 1331.

between immunity determinations and adjudications of liability. *Compare* 28 U.S.C. § 1604 ("Claims of foreign states to immunity should henceforth be decided by courts … in conformity with the [FSIA]."), *with* H.R. Rep. No. 94-1487, at 12, *reprinted in* 1976 U.S.C.C.A.N. at 6610 ("The bill is not intended to affect the substantive law of liability."); *see also id.* at 20, *reprinted in* 1976 U.S.C.C.A.N. at 6618 (§ 1605(a)(3) "deals solely with issues of immunity" and "in no way affects existing [substantive] law"). Departing from *Bell* would eliminate this distinction "by removing the jurisdictional gateway to the statute and allowing a determination on the merits before jurisdiction is established." *Robinson*, 269 F.3d at 148 (Sotomayor, J., concurring in the judgment). Petitioners argue (at 31-32) that applying *Bell* undermines their perceived entitlement to be exempt from all burdens of litigation, but that argument is circular. The point of the dispute is whether petitioners are immune from suit in the first place. The only "burden" petitioners now face as a result of the court of appeals' decision is the burden of discovery into the factual bases of the jurisdictional defenses they have asserted.

II. THE QUESTIONS PRESENTED DO NOT RAISE RECURRING ISSUES OF GREAT NATIONAL SIGNIFICANCE

The issues presented in this case are unlikely to arise frequently. With respect to the H&P-V ruling, the court of appeals followed the rule applied by the Second Circuit in *Sabbatino* and *Farr*—two cases arising from the Castro regime's discriminatory expropriation of U.S.-owned businesses in 1960. In the more than 40 years between *Farr* and this case, no court of appeals has addressed the question. The reason is obvious: It is truly extraordinary for a state to enter into commercial contracts with a U.S.-owned company, target that com-

pany for expropriation based on its U.S. ownership, strip it of all its productive assets, refuse to pay even a penny in compensation, and then seek in the U.S. courts to hide behind corporate formalities. As to the H&P-IDC issue, no other court of appeals decision addresses the question. The reason again is unsurprising: States ordinarily do provide compensation for the taking of an entire business, obviating any separate claim for redress of the shareholder's separate injury. When they do not, relief is often available to both shareholders and subsidiaries before arbitral tribunals convened pursuant to bilateral investment treaties. It is only in the rare case where both avenues are foreclosed that shareholders might seek redress under the expropriation exception—and then only if they have full ownership over the subsidiary and all of the subsidiary's productive assets have been taken. There is thus no basis for petitioners' speculation that the decision below will encourage forum-shopping or have other implications for other cases.[13]

Petitioners suggest (at 33-34) that foreign sovereign immunity holds a privileged place on this Court's docket, and they assert a special need for uniformity in this area. To be sure, many questions arising under the FSIA do recur frequently, and the Court often ad-

[13] As for the *Bell* question, the issue is largely academic. As Justice Sotomayor noted in *Robinson*, "[l]itigants more commonly arrive at the result produced by [a merits-related] Fed. R. Civ. P. 12(b)(1) motion for lack of subject matter jurisdiction by moving early for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted." 269 F.3d at 149 n.1 (Sotomayor, J., concurring in the judgment). The issue arose in this case only because petitioners insisted on adjudication of their purely legal jurisdictional arguments at the outset, instead of having them adjudicated concurrently with their factual defenses to jurisdiction—another feature of this case unlikely to be frequently replicated.

dresses those issues—not only because of their impact on foreign sovereign interests, but because they affect the ability of U.S. nationals to order their affairs around settled expectations as to when federal courts will be available. For example, *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015)—on which petitioners rely (at 33-34)—involved an issue under the FSIA's commercial-activity exception with potentially broad implications for the many other cases in which U.S. businesses and individuals engage in commerce with foreign states or their agents. The same has not been true with respect to the expropriation exception. Only one of the cases petitioners cite (at 33 n.10) implicated the expropriation exception at all—and even then, only tangentially. *See Republic of Austria* v. *Altmann*, 541 U.S. 677, 692 (2004) ("[The Court] confin[ed its] grant of certiorari to the issue of the FSIA's general applicability to conduct that occurred prior to the Act's 1976 enactment."). And as discussed, the facts of this case are *sui generis* even within the expropriation category.

Nor does petitioners' concern for uniformity succeed, since the decision below poses no threat to uniformity. And uniformity is of diminished importance in the context of uncompensated expropriations—inherently a one-time event for potential plaintiffs—compared to the commercial-activity context, where parties must make investment decisions and structure their affairs against the ever-present risk of litigation.

III. Even If The Petition Presented Any Certworthy Issue, This Case Would Be A Poor Vehicle

Review of the issues presented here would be premature in any event. Based on the parties' stipulation, the district court addressed only some of petitioners' jurisdictional defenses—*i.e.*, those that petitioners

insisted on briefing before submitting to any jurisdictional discovery. Pet. App. 47a-48a, 91a. Several other defenses—including purely legal issues bearing on sovereign immunity—remain pending in the district court. *See* Dist. Ct. Dkt. 77 (Oct. 19, 2015) (order governing jurisdictional discovery and adjudication of petitioners' remaining defenses). The court of appeals' decision was even narrower. Pet. App. 8a-9a, 22a-23a (declining to exercise pendant appellate jurisdiction over portions of district court's order). On remand, the parties have barely begun litigating petitioners' remaining threshold defenses. Dist. Ct. Dkt. 77 (Oct. 19, 2015). Litigation of the merits is still further on the horizon. Review at this stage of the proceedings would be inappropriate. *E.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); Shapiro et al., *Supreme Court Practice* § 4.18, at 282-283.

In addition, with respect to the H&P-V issue, the ruling below is supported by independent, alternative grounds that might very well render any decision by this Court irrelevant. In the district court and court of appeals, H&P-V argued in the alternative that petitioners were estopped from invoking the domestic-takings rule because the Venezuelan government has long treated H&P-V as a foreign national under Venezuelan law, denying it the advantages of Venezuelan citizenship due to its foreign ownership. *See* CAJA 39 (classifying H&P-V as a "FOREIGN COMPANY at all relevant legal effects" under Venezuela's investment law); Resp. CA Br. 36-38; Resp. CA Reply 16-21; *see also de Csepel* v. *Republic of Hungary*, 808 F. Supp. 2d 113, 129-130 (D.D.C. 2011), *aff'd on alternative grounds*, 714 F.3d 591, 598 (D.C. Cir. 2013) (expropriation claim may proceed when the country of citizenship "*de facto*

strip[s]" its subjects "of their citizenship rights"). The court of appeals did not reach this alternative ground, which would independently entitle H&P-V's expropriation claim to proceed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DAVID W. OGDEN
Counsel of Record
DAVID W. BOWKER
CATHERINE M.A. CARROLL
ELISEBETH B. COLLINS
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
david.ogden@wilmerhale.com

JANUARY 2016

APPENDIX

VENEZUELA COMMERCIAL CODE, ART. 280

Código de Comercio

Articulo 280º

Cuando los estatutos no disponen otra cosa, es necesaria la presencia en la asamblea de un número de socios que represente las tres cuartas partes del capital social y el voto favorable de los que representen la mitad, por lo menos, de ese capital, para los objetos siguientes:

1º Disolución anticipada de la sociedad.

2º Prórroga de su duración.

3º Fusión con otra sociedad.

4º Venta del activo social.

5º Reintegro o aumento del capital social.

6º Reducción del capital social.

7º Cambio del objeto de la sociedad.

8º Reforma de los estatutos en las materias expresadas en los números anteriores.

En cualquier otro caso especialmente designado por la ley.

[English Translation]

Commercial Code

Article 280

When the bylaws do not provide otherwise, the presence in the meeting of a number of stockholders that represents three-fourths of the stated capital and the favorable vote of those who represent half, at least, of that capital is necessary for the following purposes:

(1) early dissolution of the company;

(2) extension of its duration;

(3) merger with another corporation;

(4) sale of firm assets;

(5) replenishment or increase of the stated capital;

(6) reduction of the stated capital;

(7) change of purpose of the corporation;

(8) amendments of the bylaws in the matters stated in the preceding numbers;

In any other case specially designated by law.