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 Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF FORMER STATE DEPARTMENT ATTORNEYS JOHN NORTON MOORE AND EDWIN D. WILLIAMSON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

MICHAEL J. GOTTLIEB
*Counsel of Record*
RYAN Y. PARK
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Suite 800
Washington, DC 20015
(202) 237-2727
mgottlieb@bsfllp.com

*Counsel for Amici Curiae*

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## INTEREST OF AMICI CURIAE[1]

Amici are former Executive Branch officials who served as senior attorneys in the U.S. Department of State, with responsibility for advising the Executive Branch on issues of international law.

John Norton Moore is the Walter L. Brown Professor of Law at the University of Virginia Law School, and is one of the nation's foremost experts on international law. Professor Moore served as Counselor on International Law to the Department of State in the early 1970s, where he participated both in the drafting of the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act") as submitted by the Executive to the Congress and in clearing the draft FSIA law through the interagency process within the Executive Branch. In that capacity, Professor Moore worked with the Department of Treasury's designated representative in the interagency process to draft the FSIA's "expropriation exception," 28 U.S.C. § 1605(a)(3), the purpose of which was to provide a judicial forum in the United States for claims against foreign sovereigns alleged to have taken property in violation of international law.

Edwin D. Williamson served as the Legal Adviser for the U.S. Department of State from 1990 to 1993. The Legal Adviser, an Assistant Secretary of State, 22 U.S.C. § 2651a, has responsibility for

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part, and no persons other than amici curiae or their counsel made a monetary contribution to its preparation or submission.

advising the Department and Executive Branch "on all legal and legal policy issues arising in connection with U.S. foreign policy and the work of the Department." 1 Foreign Affairs Manual § 241.1(1). The Legal Adviser is the highest-ranking legal officer in the Executive Branch with specific responsibility on matters of international law.

## SUMMARY OF ARGUMENT

The chief purpose of the FSIA was to promote adjudication of certain types of claims against foreign sovereigns according to the rule of law. The FSIA achieved this objective by replacing longstanding U.S. practice in which courts yielded to the Executive's discretionary "suggestions" with a comprehensive statutory framework that the federal courts interpret and apply according to traditional methods of statutory interpretation. The FSIA was designed to confer jurisdiction in some cases and preclude it in others—it was not, however, intended to erect a "presumption" of sovereign immunity that must be overcome before a federal court may exercise subject matter jurisdiction over the merits of any claim against a foreign state.

As this Court has recognized, Congress enacted the FSIA to create a comprehensive regulatory regime controlling the immunity of foreign sovereigns in U.S. courts. The overriding purpose of the FSIA was to remove discretionary and policy-driven considerations from the sovereign immunity calculus and replace them with concrete statutory rules to be applied by the federal courts. Meanwhile, as this Court has previously

recognized, courts ought not add extra requirements where the FSIA creates none. The exceptions Congress enumerated in the FSIA define categories of cognizable claims for which sovereign immunity is expressly denied, and the Act's text addresses the scope of those exceptions. There is no indication in the FSIA's text, structure, or legislative history that these exceptions were meant to be limited by additional judicially-implied presumptions. The principles of "international comity" and the "dignity" of foreign sovereigns—while generally important concepts that animated Congress's decision to grant or deny immunity for certain categories of claims—are not relevant to the interpretive task before this Court, which is to identify the appropriate pleading standard applicable to claims brought under the expropriation exception.

The expropriation exception was the product of a concerted effort by both the Executive Branch and Congress to respond to the widespread expropriation of U.S.-owned assets by foreign sovereigns, particularly in communist countries like Cuba following Fidel Castro's rise to power. The year before the Executive Branch drafted the FSIA, the White House announced a series of retaliatory measures against foreign sovereigns that expropriated property owned by American citizens. Congress included the expropriation exception in the FSIA to expand upon these measures by supplying victims of expropriation with a remedy directly against foreign sovereigns in U.S. courts. It is therefore backwards to assert, as the United States does in its *amicus curiae* brief, that principles of reciprocity require a narrow

interpretation of the expropriation exception. The purpose of the exception was to *achieve* reciprocity vis-à-vis expropriating nations that, like Venezuela here, could otherwise seize the assets of U.S. citizens and others with impunity.

Petitioners' proposed heightened standard for pleading jurisdiction over expropriation claims would depart from the text, structure, and history of the exception, and frustrate its purpose. Congress and the Executive Branch designed the expropriation exception to empower federal courts to resolve disputes as to whether a foreign sovereign's expropriation violated international law in the ordinary course. Nothing in the Act supports subjecting expropriation claims to heightened jurisdictional hurdles. At the time of the FSIA's enactment, Congress was well aware of the *Bell* v. *Hood* standard, which this Court had reaffirmed while Congress was considering the draft bill that would become the FSIA. The court of appeals' judgment applying that well-established standard to the FSIA's expropriation exception should be affirmed.

## ARGUMENT

### I. THE FSIA REPRESENTS A DECISION BY THE EXECUTIVE BRANCH AND THE CONGRESS TO ENTRUST SOVEREIGN IMMUNITY DECISIONS TO THE COURTS

#### A. The Views Of The Executive Branch At The Time Of The FSIA's Drafting And Enactment Are Relevant To Interpreting The Statute

This Court has repeatedly confirmed that the FSIA is interpreted and applied just like any other

statute, with "no special deference" to the views of the United States as *Amicus Curiae*. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) ("The issue now before us, to which the Brief for United States as *Amicus Curiae* is addressed, concerns interpretation of the FSIA's reach—a pure question of statutory construction . . . well within the province of the Judiciary. While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference.") (internal citation and quotation marks omitted). As a result, since "Congress abated the bedlam" of Executive discretion in matters of foreign sovereign immunity by enacting the FSIA, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text" and other indicia of congressional intent, not on Executive Branch preferences for one policy or another. *Republic of Argentina* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2255-2256 (2014).

The meaning of the FSIA's text must be understood in light of the articulated views of both the Executive Branch and Congress at the time the FSIA was enacted. The FSIA, like many statutes of its kind, was originally drafted and considered by the Executive Branch, which submitted the draft statute to Congress. *See infra* at 10-12; *see also* Robert A. Katzmann, *Judging Statutes* 26 (2015) (noting that "Executive branch staffers often draft bills that [congressional] committees consider . . . ."). Executive Branch officials continued to assist Congress during its deliberations over the FSIA, including by advising lawmakers as to the intended scope and purpose of particular exceptions to immunity, and by submitting a revised draft bill to

reflect Congress's concerns with the initial draft. *See infra* at 10-12. The Executive Branch's contemporaneous understanding of the FSIA therefore offers helpful guidance in understanding the scope of the FSIA's text. *See, e.g.*, *Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) ("[T]he purpose, the subject matter, the context, the legislative history, or the executive interpretation of the statute [may] indicate an intent . . . to bring [a] state or nation within the scope of the law.") (quoting *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941)).

### B. The Executive Branch Designed The FSIA To Transfer Responsibility For Foreign Sovereign Immunity Determinations From The Executive To The Judicial Branch

Foreign sovereign immunity is regulated by the FSIA's "comprehensive" statutory scheme. *NML Capital*, 134 S. Ct. at 2255 ("The key word . . . is *comprehensive*."). For most of our nation's history, however, the Executive Branch played a large role in determining whether claims against foreign sovereigns should be allowed to proceed in U.S. courts. *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Over time, that role expanded to the point where, by the mid-twentieth century, "courts increasingly . . . inclined toward the view that sovereign immunity [was] a political rather than a legal matter and rarely . . . questioned the propriety of executive suggestions." Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1612 (1962).

In the mid-twentieth century, at the State Department's initiative, the Executive Branch's foreign sovereign immunity determinations began to shift from a discretionary matter to a regime governed by the rule of law. In 1952, Acting Legal Adviser Jack Tate issued the "Tate Letter," in which he announced that the Department of State would adopt the "restrictive theory" of sovereign immunity as a blanket policy. Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952), *reproduced in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 714 (1976) ("Tate Letter"); Resp. Br. 32-33. The "restrictive" theory permitted claims to proceed in federal court against foreign sovereigns for their "private acts," while maintaining sovereign immunity for "public acts." *Ibid.* Even under the Tate Letter's restrictive theory, however, expropriation was not a "private" state act, and thus foreign states remained immune from expropriation claims in U.S. courts. Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (1966).

Following the Tate Letter, foreign sovereign immunity determinations continued to be conducted on a case-by-case basis based on the recommendation of the Department of State. *See Nat'l City Bank* v. *Republic of China*, 348 U.S. 356, 360 (1955) ("As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit."). Because "foreign nations often placed diplomatic pressure on the State Department in seeking immunity," the State Department's

recommendations to the courts sometimes departed from the restrictive theory of immunity ostensibly established by the Tate Letter. *Verlinden*, 461 U.S. at 487.

In 1973, the Executive Branch sought to remove the question of foreign sovereign immunity from its discretion entirely. That year, the Department of State and the Department of Justice jointly submitted a draft bill to Congress that would become the Foreign Sovereign Immunities Act of 1976. In their letter accompanying the draft bill, the Secretary of State and Attorney General noted that then-current sovereign immunity law was "the result of the joint articulation of the law by the judiciary and the Department [of State]." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Govt'l Relations of the H. Comm. on the Judiciary*, 93d Cong. 33 (1973) ("*1973 House Hearing*") (Letter from Richard G. Kleindienst, Attorney Gen., and William P. Rogers, Sec. of State, to the Speaker of the House). "The central principle of the draft bill" that would become the FSIA, they wrote, was "to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts, without participation by the Department of State." *Id.* at 34.

Legal Adviser Monroe Leigh argued to Congress that, under the Tate Letter, the State Department was presented with a "devil's choice." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 26 (1976) ("*1976 House Hearing*") (Testimony of Monroe

Leigh, State Dep't Legal Adviser). By following the Tate Letter, the State Department was in the "incongruous position of a political institution trying to apply a legal standard to litigation already before the courts. On the other hand, if forced to disregard the Tate letter in a given case, the Department [was] in the self-defeating position of abandoning the very international law principle it elsewhere espouse[d]." *Ibid.* Seeking to remove itself from this bind, the Executive Branch's draft bill largely sought to codify the Tate Letter's "restrictive theory" of sovereign immunity. "The restrictive theory rests, at bottom, on the consideration that the widespread practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." *1976 House Hearing* 30 (Testimony of Bruno A. Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice).

The Executive Branch's draft bill also included a new limit on foreign sovereign immunity that went beyond the restrictive theory of immunity adopted by the Tate Letter: the "expropriation exception" of Section 1605(a)(3).[2] In a section-by-section analysis accompanying the draft bill, its authors explained

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[2] The text of the expropriation exception as drafted, revised, and submitted to Congress by the Departments of State and Justice was identical to the text passed into law by Congress as Section 1605(a)(3), where it remains today. *Compare* Revised Draft Bill Enclosed with Executive Communication to the Speaker of the House, H.R. Rep. No. 94-1487, at 48 (1976), *with* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1605(a)(3), 90 Stat. 2891 (1976), *and* 28 U.S.C. § 1605(a)(3).

that the expropriation exception would strip immunity from foreign states and their instrumentalities for the purpose of lawsuits to recover expropriated property. *1973 House Hearing* 41.

After deliberation in the Congress, and further communication with the Executive Branch, the Departments of State and Justice submitted a revised draft bill in 1975. Letter from Robert S. Ingersoll, Deputy Sec. of State, & Harold R. Tyler, Jr., Deputy Attorney Gen., to Carl O. Albert, Speaker of the House of Representatives, Oct. 31, 1975, *reprinted in* H.R. Rep. No. 94-1487 at 44-45 (1976). The revised draft included the identical expropriation exception. The bill passed the House on September 29, 1976 and the Senate on October 1. President Ford signed it into law on October 21. *Statement by the President on Signing H.R. 11315 Into Law*, PRESIDENTIAL DOCUMENTS: GERALD R. FORD, 1976 (Oct. 22, 1976).

### C. Traditional Methods Of Statutory Interpretation Should Guide Judicial Interpretation Of The FSIA

Consistent with the enactment history described above, Congress expressed that among its central purposes in enacting the FSIA was to remove foreign sovereign immunity determinations from the Executive, and to entrust those determinations to the federal courts. *See* 28 U.S.C § 1602. The overriding goal was to replace what had been perceived as a policy-driven, discretionary system with a concrete and "comprehensive" set of legal rules that would "govern[] claims of immunity in every civil action against a foreign state or its

political subdivisions, agencies, or instrumentalities." *Altmann*, 541 U.S. at 691. Congress explained that enacting clear and uniform statutory rules to guide judicial immunity determinations "would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C § 1602. Accordingly, to the extent that Congress was concerned with "comity between nations" and "the dignity of foreign sovereigns," *see* U.S. Br. 20, those concerns were reflected in the enacted text of the FSIA.[3]

The enactment history described above demonstrates that discretionary considerations of "international comity" or "sovereign dignity" were not designed to control judicial interpretation of the Act's exceptions. Those concepts were important to the FSIA's identification of claims over which immunity would be available or unavailable, but they were not intended to operate as a further barrier against plainly exempted claims such as expropriation or commercial activities. Instead, like

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[3] In asserting that general principles of international comity and foreign sovereign dignity are relevant here, the United States cites predominantly to cases decided before the FSIA's enactment in 1976. *See* U.S. Br. 20-21 (citing *Nat'l City Bank* v. *Republic of China*, 348 U.S. 356 (1955); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Zschernig* v. *Miller*, 389 U.S. 429 (1968); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936)). The lone post-FSIA Supreme Court case cited by the United States is completely inapt. In that case, the Court was not even addressing the FSIA but rather the necessary joinder standard under Rule 19(b). *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008); *see ibid.* (noting the parties' agreement that none of the FSIA's exceptions applied and that "[i]mmunity in this case, then, is uncontested").

Congress, the Executive Branch believed that committing sovereign immunity questions to the federal courts, to be resolved in accordance with concrete statutory rules, would "be a significant step in the growth of international order under law, to which the United States has always been committed." U.S. Dep't of State, *Policy on Treatment of Foreign State Immunity*, U.S. Fed. Reg. Vol. 41, No. 224, p. 50883-50884 (Nov. 18, 1976) (statement of the State Department Legal Adviser). In other words, the Executive Branch expected the FSIA to be interpreted in accordance with its text—without consideration of the current administration's position on how a particular case might affect international comity or sovereign dignity. Indeed, considering such factors would be flatly inconsistent with the Executive Branch's position that enactment of the FSIA was necessary to relieve it of the "devil's choice" between adhering to the legal principles and yielding to international and political pressures to "abandon[]" those principles. *1976 House Hearing* 26.

Contrary to the suggestions of Petitioners and the United States, there is no generally applicable "presumption" in favor of sovereign immunity separate from what is reflected in the text and structure of the FSIA. Pet. Br. 17-18; U.S. Br. 9. While it is true that the FSIA provides a "general grant of immunity" for foreign sovereigns, it also "carves out certain exceptions" that "are central to the Act's functioning." *Altmann*, 541 U.S. at 691. "A foreign state *shall not be immune* from the jurisdiction of courts of the United States" where one of these exceptions apply. 28 U.S.C. § 1605(a) (emphasis added); *see id.* § 1604 (providing that a

foreign state "shall be immune from the jurisdiction of the courts of the United States and of the States *expect as provided* in sections 1605 to 1607 of this chapter") (emphasis added). Sections 1604 and 1605(a)'s equal and opposite language reflect the twin essential aspects of the FSIA's scheme: in addition to providing a general grant of immunity to foreign sovereigns, the Act was intended to grant jurisdiction and *deny* immunity for certain types of claims, thereby offering a federal forum for those claims' resolution. Far from being "express," Pet. Br. 14, Petitioners' supposed "presumption of immunity" has no basis in the FSIA's text.

Petitioners rest their claim that there is a "presumption" of immunity on one use of the word "presumptively" in *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) ("Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts[,] unless a specified exception applies . . . .") (citing *Verlinden*, 461 U.S. at 488-489). But in *Verlinden*, this Court used a different word: "A foreign state is *normally* immune from the jurisdiction of federal and state courts, subject to a set of exceptions . . . ." *Verlinden*, 461 U.S. at 488 (emphasis added). *Verlinden* correctly described the FSIA's scheme. Foreign states may be "normally," "ordinarily," *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009), or even "general[ly]," *Altmann*, 541 U.S. at 691, immune from suit in federal and state courts, but that does not make them *presumptively* so. Under the plain text of the Act, where a claim against a foreign sovereign falls under one of the FSIA's exceptions, such as when a foreign sovereign is alleged to have expropriated property in violation

of international law, the foreign sovereign is amenable to suit in federal court. 28 U.S.C. §§ 1330(a), 1605(a).

A "presumption" of immunity that imposed an exceptionally heavy burden on plaintiffs bringing expropriation claims against foreign sovereigns would be contrary to the purposes of the Act. The FSIA was intended to bring certain claims into federal court just as much as it was intended to keep other claims out. *See* H.R. Rep. No. 94-1487, at 45 (Letter of Deputy Sec. of State Ingersoll and Deputy Attorney Gen. Tyler to the Speaker of the House) ("The broad purposes of this legislation" are to "facilitate . . . litigation against foreign states and to minimize irritation in foreign relations arising out of such litigation."); *1973 House Hearing* 29 (Testimony of Bruno Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice) ("[W]e would like to afford to our local citizens and entities who deal with foreign governments in the United States effective redress through the instrumentality of our courts.").

In a dispute over the scope and applicability of a FSIA exception, including a dispute relating to threshold jurisdictional requirements, the Court's inquiry is therefore limited to determining whether the exception applies according to traditional methods of statutory interpretation. No court has ever held that there is a "thumb on the immunity side of the scale" in conducting this basic interpretive inquiry, as Petitioners urge. Pet. Br. 17. To the contrary, this Court has declined to read extra "unexpressed requirement[s] into the FSIA's exceptions. *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 618 (1992).

## II. THE EXPROPRIATION EXCEPTION WAS DESIGNED TO ALLOW EXPROPRIATION CLAIMS TO BE HEARD ON THE MERITS IN FEDERAL COURT

### A. Congress Enacted The Expropriation Exception To Provide An Adequate Remedy For A Serious Foreign Policy Concern

The FSIA's history does not support a narrow construction of the Act's pleading standards based upon the government's current articulation of its "reciprocal self interest." U.S. Br. 21. The FSIA represented the culmination of several decades of progress in the United States and the international community towards more formal mechanisms of dispute resolution between citizens and foreign states. At the time of the Tate Letter, the United States was among the last adherents to the "absolute" theory of sovereign immunity, along with the United Kingdom and "the Soviet Union and its satellites." *Alfred Dunhill*, 425 U.S. at 714 (Tate Letter). Meanwhile, there were "evidences that British authorities [were] aware of its deficiencies and ready for a change." *Ibid.* At the 1976 House hearing, in response to questioning from Representative Barbara Jordan as to whether "any states in the community of nations . . . would be irritated by our codification of the restrictive theory," Legal Adviser Monroe Leigh responded that the FSIA represented the United States' effort to catch up to the international community by enacting the restrictive theory into law. *1976 House Hearing* 54.

The expropriation exception represented an effort to bring U.S. claims for compensation from foreign sovereigns, which had previously been at the mercy of diplomatic and political machinations, into a formal adjudicatory process. The enactment of the expropriation exception followed an epidemic of foreign expropriation of U.S. assets, especially in communist countries. H. Comm. on Foreign Affairs, 88th Cong., *Report on Expropriation of American-Owned Property by Foreign Governments in the Twentieth Century* (Comm. Print 1963), 2 I.L.M. 1066, 1085 (1963) ("*Expropriation of American-Owned Property*") ("Since the end of the Second World War, the problem of expropriation has increased according to almost any measure. Expropriations have become more frequent; more countries have undertaken them; more American property holders have been affected. The most widespread expropriations have occurred in the countries which adopted communism.").

Cuban expropriation of U.S. property following Fidel Castro's revolution is an instructive example of the scope of the problem and the U.S government's attempts to respond. By 1963, Castro's four year-old government had expropriated "all but a relatively small amount of U.S. owned property" in Cuba. *Ibid.* As the Cuban government took increasingly aggressive steps to expropriate Americans' property, the U.S. government struggled to mount an effective response. On the same day that Cuba enacted a law "authoriz[ing] the nationalization of U.S.-owned property generally," for example, the United States retaliated by reducing its quota for importing Cuban sugar by 700,000 tons. *Id.* at 1086. The

United States cut off diplomatic relations with Cuba in 1961, and in July 1963, froze $30 million dollars of Cuban assets in the United States. *Ibid.* As of 1963, Americans had lost $1.3 billion in assets to Cuban expropriation, for which "no compensation was made in any instance." *Ibid.* These losses were equivalent to over $10 billion in 2016 dollars. *See* Bureau of Labor Statistics, *BLS Inflation Calculator*, http://www.bls.gov/data/inflation_calculator.htm.

In the years immediately preceding the FSIA's enactment, both Congress and the Executive Branch adopted measures to penalize foreign sovereigns who expropriated U.S.-owned property without just compensation. *See* Resp. Br. 34-36. Of particular relevance here, in 1972—the year before the Executive Branch began drafting the bill that would become the FSIA—the White House issued a formal policy statement announcing a series of retaliatory measures against foreign sovereigns that "expropriate[] a significant U.S. interest without making reasonable provision for [prompt, adequate, and effective] compensation." White House Press Release*, U.S. Statement on Economic Assistance and Investment in Developing Nations* (Jan. 19, 1972), 11 I.L.M. 239, 241 (1972).

Diplomatic retaliation could deter, but not repair, losses suffered to foreign expropriation. The inadequacy of diplomatic solutions, when combined with the limited remedies available to American citizens to recover expropriated assets in any court, made the need for a legislative solution apparent. *See, e.g.*, Ronald Mok, *Expropriation Claims in United States Courts: The Act of State Doctrine, The Sovereign Immunity Doctrine, and the Foreign*

*Sovereign Immunities Act*, 8 Pace Int'l L. Rev. 199, 217 (1996) ("Collectively, the Cuban expropriation cases led to the enactment of the FSIA."). The FSIA was predicated on an understanding that despite their diplomatic sensitivity, expropriation claims ought to be resolved according to settled legal principles rather than political negotiations. The Act's proponents emphasized that even "a successful plea of sovereign immunity interposed by a State does not terminate the claim. Rather, the claim is merely transferred to the diplomatic arena which is ill suited for the settlement of private-law or commercial disputes." *1976 House Hearing* 31 (Testimony of Bruno A. Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice).

The FSIA formalized the United States' decision to promote the resolution of expropriation claims against foreign sovereigns in the courts, rather than in the political or diplomatic arena. As such, the inclusion of the expropriation exception in the draft FSIA is best understood as a mechanism *for effectuating* reciprocity between the United States and expropriating nations such as Venezuela. *See 1973 House Hearing* 29 (Testimony of Bruno A. Ristau, Chief of the Foreign Litig. Section, Civil Div., Dep't of Justice) ("[A]s a partial answer to" an "earlier question, as to what effect this proposed legislation would have in the converse situation, when the United States or one of its agencies appears as a litigant abroad, I would suggest . . . that the affect we attempt to bring about in the United States is really the reverse. We would like, based on our experience as a litigant abroad to subsume to the jurisdiction of our domestic courts

foreign governments and foreign entities . . . to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts . . . ."). The Brief of the United States is therefore mistaken when it asserts, without citation to the relevant history, that "Congress would have wanted to avoid" any construction of the FSIA that would give to rise to reciprocity concerns. U.S. Br. 22. Faithful adherence to the concerns of Congress and the Executive Branch for achieving reciprocity in the face of widespread foreign expropriation of U.S.-owned property requires full and fair application of the FSIA's statutory text.

### B. Petitioners' Heightened Threshold Requirements Would Frustrate The Purposes Of The FSIA

Petitioners' plea that jurisdiction under the FSIA be held to a heightened pleading standard has no basis in the statute's text, structure, or enactment history. According to Petitioners, in order for a court to have jurisdiction over claims under the FSIA, "[a] plaintiff must plead facts that, if taken as true, establish the existence of all of the elements set out in the relevant statutory exception." Pet Br. 15. With respect to the expropriation exception in particular, Petitioners ask this Court to require plaintiffs to plead allegations that conclusively establish that "the rights claimed to be 'in issue' in the complaint actually *are* 'rights taken in violation of international law.'" *Ibid.* (quoting 28 U.S.C. § 1605(a)(3)). In other words, before taking jurisdiction of an expropriation claim, a court would have to be certain that the facts alleged "actually"

made out a violation of international law. Yet in the very cases that Congress intended the expropriation exception to cover, the question whether a defendant violated international law is to be decided on the merits by the federal courts. Congress never intended what Petitioners advocate: that the federal courts would lack jurisdiction to hear expropriation claims unless it was established at the outset that the alleged expropriation violated international law.

In essence, Petitioners seek to import the pleading standard for stating a substantive claim for relief under Rule 12(b)(6) into the threshold jurisdictional determination. *Compare* Fed. R. Civ. P. 12(b)(1) (permitting dismissal for "lack of subject-matter jurisdiction") *with* Fed. R. Civ. P. 12(b)(6) (permitting dismissal for "failure to state a claim upon which relief can be granted"). This Court has repeatedly admonished that it is "a threshold error" to confuse the issue of subject-matter jurisdiction, which "refers to a tribunal's power to a hear a case" with "what conduct [a statute] reaches . . ., which is a merits question." *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (determining, as a matter of law, that "the extraterritorial reach of § 10(b) [of the Securities and Exchange Act of 1934]" is a merits question properly considered under Rule 12(b)(6)); *see also* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1350 (3d ed. 2016) ("a motion under Rule 12(b)(1) [should not] be confused with a motion under Rule 12(b)(6) to dismiss for failure to state a claim for relief under federal or state law because the two are analytically different; as many courts have

observed, the former determines whether the plaintiff has a right to be in the particular court and the latter is an adjudication as to whether a cognizable legal claim has been stated").

Petitioners' desired standard misapprehends Congress's purpose in creating the expropriation exception, which was to empower federal courts to decide *whether* a foreign sovereign's taking has violated international law. The text of the exception provides no indication, let alone any direction, that courts are required to make an initial determination—without the aid of a developed factual record—that a particular foreign state's conduct violated international law before it may exercise jurisdiction over a plaintiff's claim. Requiring so abbreviated a procedure would be inconsistent with the role of the federal courts as authoritative interpreters of international law. *See The Paquette Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law."); Memorandum of the United States as *Amicus Curiae* 25 n.49, *Filartiga* v. *Pena-Irala*, No. 79-6090, 1980 WL 340146 (2d Cir. 1980) ("Customary international law is federal law, to be enunciated authoritatively by the federal courts.").

The threshold inquiry for determining whether a federal court has subject matter jurisdiction is well established. As this Court reaffirmed in 1974—while Congress was considering the draft version of the FSIA—"[o]nce a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not insubstantial on their face, no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter." *Hagans* v.

*Lavine*, 415 U.S. 528, 542 n.10 (1974) (citations and internal quotation marks omitted). In *Hagans* itself, this Court observed that the plaintiff's "reasoning . . . may ultimately prove correct, but it is not immediately obvious from the decided cases or so very plain under the Equal Protection Clause." *Id.* at 542 (internal quotation marks omitted). Despite the Court's uncertainty as to the *legal sufficiency* of the plaintiff's jurisdictional claim, it held that federal jurisdiction was proper without "further consideration of the merits." *Id.* at 542 n.10. There is nothing in the text or enactment history of the FSIA to indicate that Congress intended to depart from this well settled standard.

## CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

MICHAEL J. GOTTLIEB
*Counsel of Record*
RYAN Y. PARK
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Avenue, NW
Suite 800
Washington, DC 20015
(202) 237-2727
mgottlieb@bsfllp.com

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