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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure statement in the Brief for Petitioners remains accurate.

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ARGUMENT

Respondents' brief rests on two basic theories. The first is that the "exceptionally low" pleading standard set forth by the D.C. Circuit, J.A. 178, is the common and usual jurisdictional pleading standard, applicable in an FSIA case just as in any other. But there is nothing common or usual about the FSIA. Where subject-matter jurisdiction (or the lack of it) depends on sovereign immunity (or the lack of it), the jurisdictional inquiry must actually *answer the sovereign-immunity question*—not merely hypothesize about the possible existence of an exception to the statutory immunity the FSIA confers.

Respondents' second theory is that the pleading standard proffered by the United States and Venezuela impermissibly merges jurisdiction and merits. But Respondents themselves are constrained to admit that Congress can, and has, introduced substantive, merits-based standards into statutory jurisdictional inquiries. *See* Resp. Br. 42. Congress did just that in the FSIA. To the extent the FSIA's substantive jurisdictional requirements implicate the merits of the underlying claim, it properly remains the prerogative of the sovereign to dispute those requirements at the pleadings stage, later, or not at all.

I. THE COURT SHOULD ADOPT THE PLEADING STANDARD ADVOCATED BY VENEZUELA AND THE UNITED STATES.

Venezuela and the United States offer an interpretation of the FSIA's expropriation exception that is consistent with the exception's text, Court precedent, and the FSIA's history and purpose. A "court must satisfy itself," "[a]t the threshold of every action," *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 493-494 (1983), that the rights "in issue" in an FSIA expropriation-exception case qualify as "rights in property taken in violation of international law" within the meaning of 28 U.S.C. § 1605(a)(3). In other words, "rights" must (i) be "in issue," *and* (ii) meet the statutory definition.

This reading follows naturally from the statutory text. The words "rights in property taken in violation of international law are in issue" contain two distinct components. "[I]n issue" and "in property taken in violation of international law" are separate descriptive phrases modifying "rights." *See generally Chicago Manual of Style* § 5.173, at 248 (16th ed.

2010) ("A prepositional phrase consists of a preposition, its object, and any words that modify the object. A prepositional phrase can be used * * * as an adjective."). Grammatically, then, the expropriation exception's language describes two independent elements, each of which must be met to establish jurisdiction.

In this way, the expropriation exception is structured like the FSIA's immovable-property exception, which confers jurisdiction when "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). We know from *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193 (2007), that such "rights" are "in issue" when the plaintiff's claim "directly implicate[s] [those] rights." *Id.* at 201. The words "in issue" thus describe the relationship between the plaintiff's claim and the alleged rights. *See id.* at 198-199. For example, "a suit to establish the validity of a lien implicates 'rights in immovable property'" because a lien "inhibits one of the quintessential rights of property ownership—the right to convey." *Id.* But "claims incidental to property ownership, such as actions involving an 'injury suffered in a fall' on the property," do not place rights in immovable property "in issue" because the link between the property rights and the claim is not sufficiently "direct[]." *Id.* at 201 (citation omitted).

Permanent Mission separately determined that the right alleged in that case—a tax lien—qualified as a "right[] in immovable property." *Id.* at 198.[1] It

[1] *Permanent Mission* held that the exception was not limited "to cases in which the specific right at issue is title, ownership, or

reached its decision through an analysis similar to that applied to legal questions under Federal Rule of Civil Procedure 12(b)(6): the Court reviewed the relevant legal authorities and concluded that, under those authorities, "liens" are "interests in property." 551 U.S. at 198. The complaint therefore pleaded rights within the statutory definition, satisfying the jurisdictional pleading requirement. *Id.* at 197.

The expropriation exception similarly requires that certain "rights * * * are in issue," and similarly includes a statutory definition of those rights. 28 U.S.C. § 1605(a)(3). The same standard articulated in *Permanent Mission* therefore should apply to the expropriation exception. A plaintiff's claim must directly implicate rights that legally constitute "rights in property taken in violation of international law." *See Simon* v. *Republic of Hung.*, 812 F.3d 127, 148 (D.C. Cir. 2016) (describing analysis as "similar to that of Rule 12(b)(6)").

This standard comports with the FSIA's underlying purpose. It allows courts to "make the critical preliminary determination of [their] own jurisdiction as early in the litigation as possible," which "preserve[s] the full scope of [sovereign] immunity." *Phoenix Consulting, Inc.* v. *Republic of Angl.*, 216 F.3d 36, 39 (D.C. Cir. 2000) (quotation marks omitted). That is just what the FSIA is supposed to do: give foreign states "some protection from the inconvenience of suit as a gesture of comity between the United States

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possession," *in toto*. 551 U.S. at 198. Rather, the disputed right could be a *component* of one of those sources of property rights, such as "one of the quintessential rights of property ownership—the right to convey." *Id.*

and other sovereigns." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003).

II. *BELL* DOES NOT APPLY TO EXPROPRIATION-EXCEPTION PLEADINGS.

Respondents argue that a claimant adequately pleads jurisdiction under the expropriation exception if the plaintiff's allegations of "rights in property taken in violation of international law," 28 U.S.C. § 1605(a)(3), are not "wholly insubstantial and frivolous," *Bell* v. *Hood*, 327 U.S. 678, 682-683 (1946). This standard is inconsistent with all of the benchmarks described above: the FSIA's text, its history and purpose, and this Court's precedents.

A. Respondents' Text-Based Arguments Are Weak At Best And Contradictory At Worst.

Any proper interpretation of the FSIA should "begin, as always, with the text of the statute." *Permanent Mission*, 551 U.S. at 197. Respondents, however, discuss every statute they can *other* than the FSIA before getting around to the Act itself. *See* Resp. Br. 15-27. When they finally address the expropriation exception, they offer two contradictory arguments. *First*, they contend that *Bell* applies to a wide range of jurisdictional statutes because it is required by the "very 'nature of the jurisdictional inquiry' " rather than a "provision's particular phrasing." *Id.* at 17, 19 (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Manning*, 136 S. Ct. 1562, 1570 (2016); *Sisson* v. *Ruby*, 497 U.S. 358, 365 (1990)). We address and refute that overbroad notion below (at 11-12, 14-20).

Second, Respondents argue the exact opposite: that the particular phrasing of the expropriation exception *does* matter, and Congress used "the phrase 'in issue'" in the exception "to describe what the parties contested." *Id.* at 30. This argument is no more availing than the first. The expropriation exception requires both that rights are "in issue" *and* that those rights are "in property taken in violation of international law." 28 U.S.C. § 1605(a)(3). Respondents nonetheless claim that immunity is defeated, and jurisdiction established, whenever "one side asserts a taking of rights in property in violation of international law and the other side denies it." Resp. Br. 29. That reading disregards half the statute. Its singular focus on the existence of a dispute fails to give independent meaning to the statutory definition describing what the dispute must be *about*: "rights in property taken in violation of international law." It also makes no sense. Under Respondent's logic, jurisdiction would be *defeated* if the foreign state *admitted* the alleged taking. And, Respondents' rule is inconsistent with *Permanent Mission*, which interpreted the words "in issue" to require a direct relationship between the plaintiff's claim and the alleged rights—not the mere existence of disputed pleadings. *See supra* at 3.

Respondents' interpretation also requires some targeted edits to the FSIA's text. Respondents contend that the expropriation exception confers jurisdiction whenever the plaintiff "puts 'in issue' *a claim* that the plaintiff's rights in property have been taken in violation of international law." Resp. Br. 3 (emphasis added); *accord id.* at 14, 28. That is not what the statute says. Section 1605(a)(3) instructs that what must be "in issue" *are* "rights in property

taken in violation of international law," *not* a mere "*claim* that the plaintiff's rights in property have been taken in violation of international law." When Congress wishes to confer jurisdiction whenever a plaintiff asserts a particular *claim*, it knows how to do so. *See, e.g.*, 28 U.S.C. § 1338(b) ("The district courts shall have original jurisdiction of *any civil action asserting a claim* of unfair competition when joined with a substantial and related claim under the copyright, patent, plant variety protection or trademark laws." (emphasis added)); *infra* at 11. Congress did not include similar language in the expropriation exception. It created a substantive standard.

Two practical reasons also compel rejection of Respondents' statutory interpretation. *First*, Respondents reduce the expropriation exception to a provision defeating immunity, and conferring jurisdiction, whenever the parties disagree over the meaning of the statutory text; that is, whether "rights in property taken in violation of international law are in issue." *See* Resp. Br. 29. But that view extinguishes the proper division between the roles of parties and courts. *Parties* place disputed matters in issue. *Courts* have the "judicial responsibility to determine" what statutory requirements mean. *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 359 (1993). Properly construed, then, the expropriation exception requires the plaintiff to plead the necessary jurisdictional elements, and the court to determine whether the plaintiff's pleaded facts "qualify as" the necessary elements. *Id.* at 361. *See also OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 398 (2015) (requiring plaintiff "to demonstrate that her suit falls within the commercial activity exception").

Second, Respondents' statutory interpretation is complicated and impractical. According to them, no one pleading standard applies to all FSIA exceptions. Instead, the applicable standard depends on at least "three types of conditions" the pleaded exception may incorporate—two requiring a particular nexus, one requiring a type of claim. Resp. Br. 37. (We say *at least* three because Respondents' described categories do not account for the waiver exception, 28 U.S.C. § 1605(a)(1), or the commercial-activity exception's requirement that "the action is based upon a commercial activity," *id.* § 1605(a)(2).[2]) And because (according to Respondents) more than one type of condition may exist even within a single exception, a court must dissect the relevant exception and separately categorize its requirements. *See* Resp. Br. 37. But even *that* analysis might not resolve the pleading-standard question, because the answer may depend on whether the plaintiff has alleged the statutory jurisdictional standard as a cause of action—although Respondents are unclear on this point. *See id.* at 51 & n.11. This multi-step and indeterminate process has no place in interpretation of a law designed to promote uniformity. *See Verlinden*, 461 U.S. at 489.

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[2] The under-inclusiveness of Respondents' three categories reflects their contention that the FSIA's only substantive components are its nexus requirements. *See* Resp. Br. 38-39 (citing snippets of *Verlinden*). Incorrect. Only *one aspect* of the FSIA's "substantive provisions" is that they typically "requir[e] some form of substantial contact with the United States." *Verlinden*, 416 U.S. at 490 & n.15.

B. Respondents' Analogies To Other Statutes Are Misplaced.

Apart from their textual arguments, Respondents assert that *Bell*'s pleading standard applies to the expropriation exception because it applies to other federal jurisdictional statutes. *See* Resp. Br. 19-27. But the FSIA is not like other jurisdictional statutes; its text, history, and purpose are qualitatively different.

1. Most jurisdictional statutes "maintain the constitutional balance between state and federal judiciaries" by determining in which court system a plaintiff may bring suit—which is to say, they assign *where* a suit may be brought. *Manning*, 136 S. Ct. at 1573. The FSIA, in sharp contrast, dictates whether a suit may be brought at all. It is "the sole basis for obtaining jurisdiction over a foreign state in" state *or* federal court, and therefore accounts for foreign-policy concerns unique to suits against foreign states. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *see Verlinden*, 461 U.S. at 493. Unlike other statutes that merely "grant jurisdiction over a particular class of cases," *Verlinden*, 461 U.S. at 496, the FSIA is a "comprehensive regulatory statute" that "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law," *id.* at 497. And unlike other statutes, the FSIA begins with a presumption of immunity that may be overcome only in certain specified and limited circumstances. 28 U.S.C. § 1604.

Respondents largely ignore these differences, giving particularly short shrift to the FSIA's presumption of immunity—a characteristic of the statute this Court twice reaffirmed just last Term. *Bank Marka-*

zi v. *Peterson*, 136 S. Ct. 1310, 1317 n.1 (2016); *OBB Personenverkehr*, 136 S. Ct. at 394. Indeed, Respondents do not even cite 28 U.S.C. § 1604, apparently on the theory that the presumption of immunity falls away whenever a case "implicate[s] an exception." Resp. Br. 44. But that is the problem. The statutory presumption of immunity is not defeated by a plaintiff's mere invocation of an FSIA exception. A "court must satisfy itself that one of the exceptions applies"—not simply take the plaintiff's word for it. *Verlinden*, 461 U.S. at 494.

2. a. The statutes Respondents cite are not textually analogous to the expropriation exception, in any event. *See* Resp. Br. 15-27. None includes anything close to the "detailed," "substantive" standards contained in the expropriation exception. *Verlinden*, 461 U.S. at 494, 498. And none contains a jurisdictional predicate equivalent to the exception's requirement that the rights "in issue" are "rights in property taken in violation of international law." 28 U.S.C. § 1605(a)(3).

Some of Respondents' cited statutes broadly confer jurisdiction over a general subject matter. 28 U.S.C. § 1333(1) ("[a]ny civil case of admiralty or maritime jurisdiction"); Judicial Code of March 3, 1911, Pub. L. No. 61-475, § 24, 36 Stat. 1087, 1091 ("all crimes and offenses cognizable under the authority of the United States"). Others require only that the case present a substantial question of a particular type of law. U.S. Const. art. III, § 2, cl. 1 (cases "arising under" federal law); 28 U.S.C. § 1331 (same). Others grant jurisdiction where the plaintiff is asking the court to take a specified action. 15 U.S.C. § 78aa(a) ("all suits in equity and actions at law brought to enforce any liability or duty created by this chapter"); Sherman Anti-

Trust Act of July 2, 1890, ch. 647, § 4, 26 Stat. 209, 209 ("to prevent and restrain violations of this act"); Act of Feb. 5, 1903, Pub. L. No. 57-62, § 13, 32 Stat. 797, 800 (cases by bankruptcy trustees to void a bankrupt's preference and to "recover the property or its value from such person"). Another requires only that federal law authorize the action. 28 U.S.C. § 1343(a)(3) ("any civil action authorized by law to be commenced by any person" to redress civil-rights violations). The expropriation exception shares none of these features.

That leaves the Tucker Act—the sole sovereign-immunity-related statute that Respondents cite, other than the FSIA itself. But the Tucker Act includes the words that Respondents would *add* to the expropriation exception to support their reading, granting the Court of Federal Claims authority "to render judgment upon *any claim* against the United States founded *** upon" specified sources of law. 28 U.S.C. § 1491(a)(1) (emphasis added). The expropriation exception does not grant jurisdiction over "any claim." It imposes a substantive standard that the plaintiff must meet to extinguish immunity, and thus to trigger jurisdiction. *See Verlinden*, 461 U.S. at 498.

Respondents attempt to overcome this problem by asserting that this Court is not concerned with a jurisdictional "provision's particular phrasing." Resp. Br. 17 (quoting *Manning*, 136 S. Ct. at 1570). Quite the contrary. The Court in *Manning* explained that its interpretation of *the federal-question statute* was not dependent on that statute's "particular phrasing." 136 S. Ct. at 1570. But the *Manning* Court also explained that, out of respect for the federal-state jurisdictional divide, "this Court has time and again

declined to construe federal jurisdictional statutes more expansively than their language, most fairly read, requires." *Id.* at 1573. This canon applies with even greater force to the FSIA. The Act dictates not merely on which side of the federal-state divide a lawsuit may be filed, but *whether* a foreign state is subject to suit in the United States at all, in any court. That determination implicates "sensitive issues concerning the foreign relations of the United States" not present in any other jurisdictional statute. *Verlinden*, 461 U.S. at 493. And that is why the "particular phrasing" of the FSIA *does* matter: statutes relating to foreign sovereign immunity are "an exercise of congressional authority regarding foreign affairs, a domain in which the controlling role of the political branches is both necessary and proper." *Bank Markazi*, 136 S. Ct. at 1328.

b. The cases interpreting other jurisdictional statutes do not help Respondents, either. Several simply explain the difference between merits and jurisdictional dismissals. *See, e.g.*, *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 253-254 (2010) (dismissal on ground that the Securities Exchange Act lacks extraterritorial reach is on the merits)[3];

[3] Extraterritoriality is not *always* a merits issue, however. Following the holding in *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013), that the Alien Tort Statute (ATS), 28 U.S.C. § 1350, does not apply extraterritorially, federal courts of appeals have treated ATS extraterritoriality as a jurisdictional issue, due to the "singular character of the ATS as a jurisdictional statute," *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 179 (2d Cir. 2014). *See also Doe* v. *Drummond Co.*, 782 F.3d 576, 600 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1168 (2016); *Warfaa* v. *Ali*, 811 F.3d 653, 661 (4th Cir. 2016), *pet. for cert. filed*, Nos. 15-1345, 15-1464 (May 2 & June 3, 2016).

Binderup v. *Pathe Exch., Inc.*, 263 U.S. 291, 304-308 (1923) (dismissal for failure to state a cause of action is a merits dismissal); *Flanders* v. *Coleman*, 250 U.S. 223, 228-229 (1919) (jurisdictional dismissal must depend on "the grounds upon which federal jurisdiction is invoked" rather than "the conclusion on the merits of the action"). Others address *factual* disputes and stand only for the proposition that "the truth of jurisdictional allegations" need not "always be determined with finality at the threshold of litigation," but instead may be addressed through a "comparatively summary procedure before a judge alone," and then resolved conclusively "after the first jurisdictional skirmish," at the judge's discretion. *E.g.*, *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537-538 & n.3 (1995). But factual jurisdictional disputes are not before the Court in this case.

Respondents' remaining cited cases are those distinguishing statutory requirements that are jurisdictional from those that go to the merits. *See, e.g.*, *Sisson*, 497 U.S. at 365 (explaining that 28 U.S.C. § 1333(1) requires a substantial relationship between the disputed conduct and maritime activity, such that a court should examine only the "general character of the activity" in question at the jurisdictional stage, leaving more particular focus on "the causes of the harm" to the "merits"); *Lamar* v. *United States*, 240 U.S. 60, 64-65 (1916) (explaining that an "objection that the indictment does not charge a crime against the United States goes only to the merits of the case"). But the FSIA's exception is not akin to these mixed-question statutes; its requirements are indisputably jurisdictional. *See Republic of Austria* v. *Altmann*, 541 U.S. 677, 695 n.15 (2004); *Verlinden*,

461 U.S. at 489. Respondents' cited cases, which do not discuss statutes otherwise analogous to the expropriation exception, are thus irrelevant.

C. *Bell* Is Not A Universal Rule Of Jurisdictional Pleading.

Because the statute gives them little quarter and other statutes provide little help by way of analogy, Respondents are left to contend that the *Bell* standard applies to the FSIA's jurisdictional inquiry because it is a universal jurisdictional principle. *See* Resp. Br. 27. But *Bell itself* suggested that its "wholly insubstantial and frivolous" standard might better be described as a practical rule of judicial administration arising out of federalism concerns, rather than a jurisdictional doctrine. *See* 327 U.S. at 682-683. In any event, this Court has already rejected Respondents' reasoning—in the context of the FSIA, no less.

1. Respondents argue that courts should apply universal jurisdictional rules in all cases, absent express statutory instruction to the contrary. Resp. Br. 27 (citing *Powerex Corp.* v. *Reliant Energy Servs., Inc.*, 551 U.S. 224 (2007), a case about how to resolve arguably conflicting *statutes*). But they struggle to identify the supposed universal jurisdictional principle applicable here. The first contender is their blanket statement that "subject-matter jurisdiction does not turn on the merits." *Id.* at 15 (capitalization altered). But even Respondents themselves understand that this is not so; for as they elsewhere explain, "the jurisdictional inquiry" may "touch on issues that relate also to the merits." *Id.* at 42. Indeed, Congress regularly "exercise[s] its prerogative to restrict the subject-matter jurisdiction of federal

district courts based on a wide variety of factors, some of them also relevant to the merits of a case." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 515 n.11 (2006).

Land v. *Dollar*, 330 U.S. 731 (1947)—a case concerning the United States' sovereign immunity—is a close analogy. There, "the question of jurisdiction [wa]s dependent on decision of the merits." *Id.* at 735. The plaintiffs argued that U.S. Maritime Commissioners unlawfully refused to return their shares of stock. *Id.* at 733. To determine whether the plaintiffs' allegations overcame the United States' sovereign immunity, the Court applied the pleading standard Venezuela and the United States advocate here. It first "assume[d] the allegations of the complaint are proved." *Id.* at 737. It then asked whether those allegations were legally sufficient to state a basis for overcoming sovereign immunity and answered affirmatively: "if the allegations of the [complaint] are true, the shares of stock never were property of the United States and are being wrongfully withheld by [the Commissioners] who acted in excess of their authority as public officers." *Id.* at 738. Because the allegations were legally adequate to confer jurisdiction, the Court remanded the case, instructing the district court to determine the proper "mode" to resolve the factual disputes underlying the jurisdictional and merits inquiries. *Id.* at 735 n.4. As the Court explained, "the District Court has jurisdiction to determine its jurisdiction by proceeding to a decision on the merits." *Land*, 330 U.S. at 739.[4]

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[4] The Court later concluded that a federal officer's tortious conduct does not suffice to overcome sovereign immunity, *Larson* v.

As another example, the Judiciary Act of 1789 provided that "suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law." *Oelrichs* v. *Spain*, 82 U.S. 211, 228 (1872) (quoting Section 16 of the Act). Although the adequacy of a particular remedy normally would be a merits decision, the Judiciary Act required courts, as a jurisdictional matter, to determine "the character of the right" alleged, whether there was "a legal remedy" for that right, and whether "its adequacy * * * defeat[ed] * * * equity jurisdiction." *Stratton* v. *St. Louis Sw. Ry. Co.*, 284 U.S. 530, 534 (1932); *see also, e.g.*, *Oelrichs*, 82 U.S. at 227-228; *Knox* v. *Smith*, 45 U.S. 298, 316 (1846).[5]

2. Having failed to establish a universal divide between jurisdictional issues and merits issues, Respondents make the lesser-included argument that the Court should apply *Bell* to the FSIA because *Bell* governs statutes conferring jurisdiction over a particular "class of cases" or "type[ ] of action." Resp. Br. 1, 14, 37-39 (discussing examples of statutes governing a general subject matter or cases sharing a defined feature). That characterization of *Bell*'s reach is still too broad. The diversity statute, for example, can equally be described as conferring jurisdiction over a class of cases or type of action—those where, among other things, the plaintiff and the de-

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Domestic & Foreign Commerce Corp., 337 U.S. 682, 692-705 (1949), but otherwise left undisturbed *Land*'s reasoning.

[5] This statute, and the Court's analysis of it, belie Respondents' contention that it is overly burdensome for a court presented with an FSIA expropriation-exception case to determine at the jurisdictional stage whether compensation for expropriated property was "prompt, adequate, and effective." Resp. Br. 45.

fendant are "citizens of different States." 28 U.S.C. § 1332(a)(1). But *Bell* does not apply to allegations of citizenship. This Court has long required the pleadings in a diversity case to include legally adequate allegations establishing the required diversity. *See, e.g.*, *City of Indianapolis* v. *Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63, 69 (1941); *Hennessy* v. *Richardson Drug Co.*, 189 U.S. 25, 35 (1903); *Everhart* v. *Huntsville Female Coll.*, 120 U.S. 223, 224 (1887).

Nor does *Bell* apply to the FSIA exceptions that describe "the types of actions for which foreign sovereigns may be held liable in a court in the United States." *Verlinden*, 461 U.S. at 496-497. For instance, Respondents do not dispute that *Bell* is inapplicable to the expropriation exception's nexus prong. *See* Resp. Br. 48. They also do not dispute that *Bell* is inapplicable to the commercial-activity exception, which confers jurisdiction over actions "based upon a commercial activity" with the requisite nexus to the United States. 28 U.S.C. § 1605(a)(2). Respondents instead argue that this Court's decisions interpreting that exception are distinguishable because they "did not examine whether the actions fell within a defined class." Resp. Br. 40. But that is *exactly* what they did. The *Nelson* Court, for example, evaluated the plaintiffs' pleadings, determined that "the basis for the [plaintiffs'] suit" was the foreign-state defendants' sovereign—and allegedly tortious—conduct, and concluded that the action was not the type over which Section 1605(a)(2) conferred jurisdiction because "tortious conduct * * * fails to qualify as 'commercial activity' within the meaning of the Act." 507 U.S. at 358.

Bell likewise does not apply to the immovable-property exception, which this Court interpreted in

Permanent Mission. *See supra* at 3-4. Respondents minimize the importance of *Permanent Mission* by arguing that the Court did not consider whether the foreign state's immunity defense was jurisdictional or merits-based. Resp. Br. 43. That is again not so. The *Permanent Mission* Court made clear that "the only question before us is one of jurisdiction." 551 U.S. at 202 n.2.

Respondents also claim that *Permanent Mission* supports their argument because the Court declined to consider at the jurisdictional stage the "merits" question of "whether [the foreign state is] actually responsible for paying the taxes." *Id.*; *see* Resp. Br. 43. That point does not distinguish *Permanent Mission* from this case in the slightest. A foreign state's ultimate responsibility for paying taxes is not part of the jurisdictional standard under the immovable-property exception, *see* 28 U.S.C. § 1605(a)(4); therefore, the Court did not resolve that issue at the jurisdictional stage.

3. a. Receding still further in their third attempt, Respondents offer yet a narrower rule: perhaps *Bell* can be read to apply when a statute "confers jurisdiction over a particular type of claim." Resp. Br. 16; *accord id.* at 28, 30, 37-38, 40-41, 46. Respondents once again overstate *Bell*'s scope.

In *Amerada Hess*, this Court construed 28 U.S.C. § 1604 to contain an "exception" to foreign sovereign immunity for actions brought pursuant to "existing international agreements to which the United States is a party at the time of enactment of this Act." *Id.*; *Amerada Hess*, 488 U.S. at 442. *Cf.* Resp. Br. 41 n.9. If Respondents are correct, *Bell* should apply to Section 1604 because it establishes jurisdiction over "a

particular type of claim," Resp. Br. 16—that is, a claim brought pursuant to an international agreement, to which the United States was a party when the FSIA was enacted, and which waives the foreign state's sovereign immunity. To use Respondents' (quoted) words, an FSIA plaintiff's rights under the international agreement "may be defeated by one construction * * * and sustained by the opposite construction." *Id.* (citation omitted). Under this reasoning, jurisdiction would be established in *Amerada Hess* if the plaintiffs had nonfrivolously alleged that the defined international agreements conferred a right of action.

But that is not the test *Amerada Hess* applied. The Court instead evaluated whether the international agreements cited by the plaintiffs gave "foreign corporations" like plaintiffs "private rights of action * * * to recover compensation from foreign states in United States courts" and found that "[t]hey do not." 488 U.S. at 442. It therefore concluded that "none of the enumerated exceptions to the Act apply to the facts of this case." *Id.* at 443.

b. Separately, even if Respondents were right about their now something-much-less-than-universal rule that *Bell* applies to jurisdictional statutes requiring plaintiffs to state a particular claim, even *that* rule would not apply to the expropriation exception. Respondents' theory rests on the assumption that a plaintiff pleading jurisdiction under the expropriation exception *must* plead as their cause of action an " 'expropriation claim[ ]' seeking redress for 'nationalization or expropriation of property.' " Resp. Br. 37; *see* Resp. Supp. Br. 4 (distinguishing the expropriation exception from FSIA exceptions that "d[o] not fully overlap with the merits of the claims").

But nothing in the statute or Court precedent supports that assumption.

The expropriation exception does not specify the cause of action that a plaintiff must plead. Indeed, in *Altmann*, the Court *distinguished* the FSIA from the type of statute that imposes a " 'jurisdictional' limitation" that "adheres to [a] cause of action." 541 U.S. at 695 n.15. The FSIA, the Court explained, "does not create or modify any causes of action." *Id.* So, in *Altmann*, the plaintiff pleaded jurisdiction under the expropriation exception and asserted a variety of claims, including for declaratory relief, replevin, rescission, conversion, imposition of a constructive trust, and disgorgement. *Id.* at 685 n.4. Similarly, the plaintiff in *Simon* pleaded jurisdiction under the expropriation exception and alleged "garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution," but no cause of action for a violation for international law. 812 F.3d 127, 141. Although the statutory requirement that the claims directly implicate "rights in property taken in violation of international law," 28 U.S.C. § 1605(a)(3), was a necessary *jurisdictional characteristic* of their claims, it was not an *element* of all causes of action in *Altmann*, nor was it an element of any causes of action in *Simon*. The expropriation exception thus does not fall within Respondents' rule even as they articulate it.

D. The FSIA's History And Purpose, As Well As Practical Considerations, Support The Conclusion That *Bell* Does Not Apply To The Expropriation Exception.

1. The FSIA's history and purpose support the view that this Court should apply the same pleading

standard to the expropriation exception that it has applied to other FSIA exceptions. *See* Pet'rs Br. 34-48; U.S. Merits-Stage Br. 19-32. A foreign state should be able to challenge the legal sufficiency of the substance of a plaintiff's jurisdictional allegations "[a]t the threshold of every action," *Verlinden*, 461 U.S. at 493, to potentially avoid *all* discovery and secure a swift dismissal, *see In re Papandreou*, 139 F.3d 247, 254 (D.C. Cir. 1998). Conversely, a plaintiff should not be able to secure *Bell*'s "exceptionally low" standard of review, J.A. 178, through artful pleading—to take one relevant example, merely by reciting the expropriation exception's language as a cause of action.

The artful-pleading problem cannot be remedied simply by applying *Bell* regardless of the plaintiff's cause of action. *See* Resp. Br. 51 n.11. That would gut the "taking in violation of international law" requirement of meaning in cases where a plaintiff pleaded only common-law causes of action such as unjust enrichment. So long as the plaintiff alleged a supposed violation of international law that was not "completely foreclose[d]" by binding precedent, J.A. 182, jurisdiction would be satisfied, and the court might never determine whether there was an *actual* violation of international law—rendering that part of the expropriation exception a nullity.

2. Respondents counter by arguing that *Bell* should apply because it is most consistent with Congress's supposed intent to allow U.S. courts to decide expropriation claims on the merits. Resp. Br. 32-37. But the statute only removes immunity when the requirements of the expropriation exception are met. It does not facilitate a merits decision by creating a cause of action. *See Altmann*, 541 U.S. at 695 n.15.

Cf. 28 U.S.C. § 1605A(c) (creating a private right of action for terrorism-related injuries). In any event, *all* FSIA exceptions reflect circumstances where Congress concluded that foreign sovereign immunity should be abrogated. This point says nothing about how jurisdictional pleadings should be reviewed.

3. Respondents also maintain that a rule requiring courts to decide whether the allegations of a complaint, if accepted as true, satisfy the substantive requirements of the expropriation exception would frontload substantially more burdensome litigation. Resp. Br. 44-51. This argument rests on three flawed contentions.

First, Respondents characterize as a problem the fact that Venezuela's and the United States' rule would require a court "to interpret and apply [the FSIA's] legal requirements." *Id.* at 45. But that is precisely what this Court *already* requires: "applying [the FSIA's] standards will generally require interpretation of numerous points of federal law." *Verlinden*, 461 U.S. at 497. It is a court's "judicial responsibility" to interpret these standards, including at the pleading stage. *Nelson*, 507 U.S. at 358.

Second, Respondents contend that, under Venezuela's and the United States' view, a court must satisfy itself that all jurisdictional facts are true whenever jurisdiction is challenged. That is not so. A foreign state may (as here) elect to challenge first only the legal sufficiency of the pleadings to resolve the immunity question as early in the litigation, with as little expenditure of resources, as possible. *See I.T. Consultants, Inc.* v. *Islamic Republic of Pak.*, 351 F.3d 1184, 1188 (D.C. Cir. 2003); *Papandreou*, 139 F.3d at 254. Or it may choose to dispute jurisdic-

tional facts, such as the nexus prong of the expropriation exception. *See* U.S. Merits Br. 14 n.2; *cf. Hertz Corp.* v. *Friend*, 559 U.S. 77, 96-97 (2010) (citing diversity cases with factual disputes about citizenship). But that causes no major disruption; the court decides both jurisdiction and the merits anyway. *See* 28 U.S.C. § 1330(a).

Third and finally, Respondents argue that Venezuela's and the United States' rule would require courts to decide "merits" issues *sua sponte*. Resp. Br. 47. The statute itself refutes that argument: a foreign state may "waive[ ] its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1)—for example, by "fil[ing] a responsive pleading in an action without raising the defense of sovereign immunity," *Foremost-McKesson, Inc.* v. *Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) (citation omitted). And when a foreign state waives its immunity, the FSIA confers jurisdiction in U.S. courts. 28 U.S.C. § 1605(a)(1). Respondents offer no support for the proposition that a court is obligated to raise issues of foreign sovereign immunity *sua sponte* where a foreign state is participating in the litigation.

* * *

Under the FSIA, foreign states are "presumptively," "normally," and "ordinarily" immune from the jurisdiction of U.S. courts. *Bank Markazi*, 136 S. Ct. at 1317 n.1; *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 851 (2009); *Verlinden*, 461 U.S. at 488. The pleading standard Respondents advocate would replace that presumption of immunity with a presumption of *jurisdiction*—one satisfied merely by articulating a claim to an FSIA jurisdictional exception that can

pass a Rule 11 straight-face test. The FSIA's text, history, purpose, and past precedents all say otherwise.

CONCLUSION

For the foregoing reasons, and those in Venezuela's opening brief and that of the United States, the decision below should be reversed. *See Ashcroft* v. *Iqbal*, 556 U.S. 662, 687 (2009). Alternatively, the judgment should be vacated and the case remanded with instructions that the court of appeals apply the correct pleading standard.

Respectfully submitted,

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