NO. 19-__

In the Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA AND PETRÓLEOS DE VENEZUELA, S.A,

Petitioners,

v.

CRYSTALLEX INTERNATIONAL CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

JOSEPH D. PIZZURRO
JULIA B. MOSSE
KEVIN A. MEEHAN
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178
(212) 696-6000

Counsel for Petitioner Petróleos de Venezuela, S.A.

DONALD B. VERRILLI, JR.
Counsel of Record
ELAINE J. GOLDENBERG
GINGER D. ANDERS
ADELE M. EL-KHOURI
RACHEL G. MILLER-ZIEGLER
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100
Donald.Verrilli@mto.com

BRIAN J. SPRINGER
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner Bolivarian Republic of Venezuela

QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. 1330, 1602 *et seq*., provides that foreign sovereigns and their instrumentalities are immune from suit, and that foreign sovereign property is immune from attachment, unless one of the FSIA's enumerated exceptions to immunity applies. This case concerns respondent Crystallex's efforts to enforce a judgment obtained against the Bolivarian Republic of Venezuela by attaching the property of Venezuela's national oil company, Petróleos de Venezuela, S.A. (PDVSA). In the decision below, the Third Circuit affirmed the district court's exercise of ancillary enforcement jurisdiction with respect to PDVSA, despite the absence of any basis under the FSIA for doing so. The court of appeals further held that PDVSA was an alter ego of Venezuela, even though there was no connection between Venezuela's control over PDVSA and respondent Crystallex's injuries—as would be required to treat a private corporation as another entity's alter ego. The questions presented are:

1. Whether a judgment-enforcement action against a foreign sovereign and its instrumentality must be predicated on applicable exceptions to the immunity provided by the FSIA.

2. Whether a plaintiff can overcome the presumption of juridical separateness between a foreign sovereign and its instrumentality in the absence of any connection between the foreign sovereign's control over its instrumentality and the plaintiff's injuries.

PARTIES TO THE PROCEEDING

Petitioner Bolivarian Republic of Venezuela was a defendant in the district court and an appellant in the court of appeals, although it did not initially appear in the action. On January 10, 2019, while this case was pending before the court of appeals, National Assembly President Juan Guaidó began acting as interim President of Venezuela pursuant to Article 233 of the Venezuelan Constitution. On January 23, 2019, the United States officially recognized Mr. Guaidó as interim President of the Republic. On March 1, 2019, the Republic, under the Guaidó administration, moved to intervene in the court of appeals. The court of appeals granted the Republic's motion to intervene on March 20, 2019.

Petitioner Petróleos de Venezuela, S.A. was an intervenor in the district court and an intervenor-appellant in the court of appeals.

Respondent Crystallex International Corporation was a plaintiff in the district court and an appellee in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*, No. 18-3124 (3d Cir. July 29, 2019), *rehearing en banc denied* (3d Cir. Nov. 21, 2019)

Crystallex International Corporation v. *Bolivarian Republic of Venezuela*, No. 17-mc-151-LPS (D. Del. Aug. 10, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bolivarian Republic of Venezuela and Petróleos de Venezuela, S.A. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the consolidated appeals Nos. 18-2797 and 18-3124.

OPINIONS BELOW

The opinion of the court of appeals is reported at 932 F.3d 126 and reprinted in the Appendix (App.), *infra*, at 1a-44a. The opinion of the district court, App., *infra*, at 45a-136a, is reported at 333 F. Supp. 3d 380.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 2019. Petitions for rehearing en banc were denied on November 21, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Foreign Sovereign Immunities Act and Federal Rule of Civil Procedure 69 are reproduced at App., *infra*, 141a-149a.

INTRODUCTION

The Bolivarian Republic of Venezuela (Venezuela or the Republic) is experiencing an unprecedented fiscal and humanitarian crisis as a result of the corrupt and repressive regime of its former presidents Nicolás Maduro and Hugo Chávez. Last year, the United States joined other nations in recognizing Juan Guaidó as the interim President of the Republic. The United States also announced the urgent foreign-policy objective of supporting the Guaidó administration's efforts to restore democracy to the Republic and stabilize its economy.

The Third Circuit's decision in this case threatens those U.S. policy objectives and, in the process, creates two circuit splits on issues that threaten to upset U.S. foreign-relations interests more broadly. First, the Third Circuit held that the district court could rely on ancillary enforcement jurisdiction to hold Venezuela's national oil company, Petróleos de Venezuela, S.A. (PDVSA), liable for a judgment against Venezuela on the theory that PDVSA was Venezuela's alter ego. That holding is irreconcilable with this Court's decision in *Peacock* v. *Thomas*, 516 U.S. 349 (1996). It also conflicts with decisions of the First, Second, Fourth, and Tenth Circuits, which have all held that a federal court cannot invoke its ancillary enforcement jurisdiction to hold a third party liable for a judgment on an alter-ego theory.

Second, the Third Circuit treated PDVSA as an alter ego of Venezuela, even though the district court found that any control that Venezuela asserted over PDVSA had no connection to the injuries in this suit. As the court of appeals acknowledged, that holding created a direct conflict with the Fifth Circuit, which requires a nexus between a foreign sovereign's control of an instrumentality and a plaintiff's injury before that instrumentality can be held liable for the acts of the sovereign. Disregarding such a nexus requirement makes instrumentalities of foreign sovereigns subject to suit where similarly situated private parties would not be—even though the Foreign Sovereign Immunities Act (FSIA) requires that foreign sovereigns and their instrumentalities be subject to suit only "to the same extent" as a private party would be. 28 U.S.C. 1606.

The Third Circuit's approach has serious foreign-policy implications. It damages the FSIA's goal of international comity by threatening broad liability in U.S. courts against foreign-sovereign instrumentalities. And in creating substantial uncertainty about the exposure of foreign instrumentalities in the United States, the decision could also subject U.S. instrumentalities and corporations abroad to reciprocal adverse treatment.

Those results are particularly pernicious here. The Guaidó administration is working to establish an orderly debt restructuring process. By allowing a single creditor to use the federal courts to gain preferential treatment, the Third Circuit's decision subverts that process as well as the Executive Branch's own efforts to support the Guaidó administration and to preserve Venezuelan assets in the United States for the Venezuelan people.

STATEMENT

1. The FSIA provides that foreign states and their instrumentalities are presumptively immune from suit in U.S. courts, and sets forth limited exceptions to that immunity. 28 U.S.C. 1604-1605; see 28 U.S.C. 1603(a)-(b). Those exceptions constitute the exclusive circumstances in which federal courts may exercise jurisdiction over suits against foreign states or their instrumentalities. See 28 U.S.C. 1330(a); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). A plaintiff bears the burden of demonstrating that an exception applies. See *ibid.*[1]

[1] The FSIA also sets forth independent rules regarding immunity of the property of a foreign state or its instrumentalities, which is "immune from attachment[,] arrest[,] and execution"

To advance the goals of comity and reciprocity underlying its enactment, the FSIA provides that a non-immune foreign state or instrumentality generally may be held liable only "to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. Thus, as this Court recognized in *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611 (1983), "duly created instrumentalities of a foreign state," like separate corporate entities, "are to be accorded a presumption of independent status." *Id.* at 627. As a result, ordinarily a person who obtains a judgment against a foreign state cannot satisfy that judgment by attaching or executing against the property of that state's agencies or instrumentalities, which are separate juridical entities. See *ibid.*; see also *id.* at 625-626 (contrary approach "would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign").

That presumption of separateness may be overcome only in limited circumstances. Applying generally accepted corporate-law principles, *Bancec* concluded that a foreign-state instrumentality may be held responsible for the acts of the state if the instrumentality is "so extensively controlled by [the state] that a relationship of principal and agent is created" or if recognizing the instrumentality's separate juridical status would "'work fraud or injustice.'" 462 U.S. at 629 (citation omitted); see *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 822-823 (2018).

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unless an express FSIA exception applies. 28 U.S.C. 1609; see 28 U.S.C. 1610-1611.

2. In April 2016, respondent Crystallex International Corporation (Crystallex), a defunct Canadian mining company, filed an action against the Republic in the U.S. District Court for the District of Columbia. In that action, Crystallex sought to confirm an arbitration award entered against the Republic based on the 2011 expropriation of property carried out by the government of then-president Chávez. App., *infra*, 4a. Having exercised jurisdiction under an FSIA provision specific to confirmation of certain arbitration awards, see 28 U.S.C. 1605(a)(6), the D.C. district court confirmed the award in favor of Crystallex and issued a $1.4 billion judgment, App., *infra*, 2a, 4a.

In October 2016, Crystallex registered the D.C. judgment in Delaware federal court under 28 U.S.C. 1963. Crystallex named only the Republic as the defendant. But Crystallex nevertheless asked the Delaware court to attach and then sell U.S.-based assets of PDVSA, Venezuela's national oil company. PDVSA, which subsequently intervened in the action, is an "agency or instrumentality" of Venezuela within the meaning of the FSIA. App., *infra*, 57a. One of the world's largest oil companies, PDVSA owns all of the shares of PDV Holding (PDVH), a Delaware corporation, which is the holding company for CITGO Holding, Inc., which in turn owns CITGO Petroleum Corp., a leading U.S. refining company. App., *infra*, 2a.

In August 2018, the district court ruled that the PDVH shares owned by PDVSA could be attached to satisfy the judgment against the Republic. App., *infra*, 46a, 136a. The court acknowledged that the Republic and PDVSA are legally separate and that PDVSA had no connection to the underlying dispute. App., *infra*, 86a (no basis to believe that the Republic "used PDVSA as an instrument to defraud Crystallex"). But the court concluded that the Republic exercised sufficient control over PDVSA to render them alter egos, and that no independent basis of FSIA jurisdiction with respect to PDVSA was necessary to permit the court to make the alter-ego determination and order the attachment of PDVSA's assets. App., *infra*, 55a-110a. The U.S. Marshals Service served the writ of attachment on PDVH, but proceedings in the district court were then stayed. Dkt. No. 154, at 1-2.

3. On July 29, 2019, the Third Circuit affirmed. First, the court ruled that Crystallex need not identify an independent basis of jurisdiction with respect to PDVSA under the FSIA because the Delaware suit fell within the district court's ancillary enforcement jurisdiction, App., *infra*, 15a-18a—that is, a federal court's inherent power to enforce its judgments, *Peacock*, 516 U.S. at 356. The Third Circuit acknowledged that this Court's decision in *Peacock* held that courts may not exercise such ancillary jurisdiction over "subsequent lawsuit[s] to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment," *id.* at 356-357, but deemed that holding inapplicable in "a case involving foreign sovereigns or the [FSIA]," App., *infra*, 16a.

Second, the court of appeals found that the Republic exercised sufficient control over PDVSA to render PDVSA the Republic's alter ego. App., *infra*, 24a. In so ruling, the court adopted a categorical rule that this Court's decision in *Bancec* "does not require a connection between a sovereign's extensive control of its instrumentality and the plaintiff's injury" in order to disregard an instrumentality's separate status. App., *infra*, 24a. The court acknowledged that its interpretation of *Bancec* created a direct conflict with the Fifth Circuit. App., *infra*, 24a n.9.

The court of appeals therefore affirmed the district court's issuance of a writ of attachment against PDVSA's shares of PDVH and remanded for further proceedings.[2]

4. On remand, the district court stayed proceedings in its court until the conclusion of proceedings in this Court. Dkt. No. 154, at 3; Dkt. No. 166, at 2-3. In so doing, the district court recognized that before any further steps are taken toward any sale of PDVSA's shares of PDVH, Venezuela and PDVSA should have the opportunity to seek this Court's review of the substantial jurisdictional and liability questions presented in this case. Dkt. No. 154, at 4. The district court further explained that this case implicates "[i]ssues of international affairs and United States foreign policy, which are within the purview of the Executive Branch." *Id.* at 6.

As the district court acknowledged in issuing that stay, this case has played out against the backdrop of extraordinary turmoil in Venezuela. See *id.* at 4-10. As a result of the corruption and maladministration of former president Maduro and his predecessor Chávez, Venezuela is in the midst of an unprecedented fiscal and humanitarian crisis—"the worst on the planet other than in Syria." *Id.* at 7; see, *e.g.*, Colleen Walsh, *Understanding Venezuela's collapse*, The Harvard Gazette (Feb. 12, 2019), https://news.harvard.edu/gazette/story/2019/02/harvard-expert-tries-to-make-sense-of-venezuelas-collapse/.

[2] On November 29, 2019, the court of appeals denied petitions for rehearing en banc.

Venezuela's gross domestic product has fallen by more than 50 percent, and 90 percent of families are unable to obtain enough food. See, *e.g.*, Walsh, *supra*; State Dep't, *U.S. Government Support for the Democratic Aspirations of the Venezuelan People*, https://www.state.gov/u-s-government-support-for-the-democratic-aspirations-of-the-venezuelan-people/#crisis.

On January 10, 2019, in the midst of that crisis (and during the pendency of this case before the Third Circuit), opposition leader Juan Guaidó became the interim president of the Republic. The United States, along with a broad cross-section of the international community, recognized the Guaidó government as the sole legitimate government of Venezuela. App., *infra*, 8a n.2; see U.S. Presidential Statement (Jan. 23, 2019), https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-recognizing-venezuelan-national-assembly-president-juan-guaido-interim-president-venezuela/. President Guaidó took immediate steps to ensure the autonomy of PDVSA and its U.S. subsidiaries. See *Jiménez* v. *Palacios*, No. 2019-0490-KSJM, at 12-13 (Del. Ch. Aug. 2, 2019). He is also undertaking efforts to stabilize the oil industry (which is critical to the Venezuelan economy) and to establish an orderly claims restructuring process that will address the Republic's external debt. Declaration of Amb. Carlos Vecchio (3d Cir. Aug. 29, 2019) ¶¶ 13-15 (Vecchio Decl.). And shortly after he assumed the presidency, President Guaidó directed the Republic to appear in this litigation for the first time by intervening before the Third Circuit. See App., *infra*, 7a.

The United States has expressed its commitment to "use the full suite of its diplomatic and economic tools to support Interim President Juan Guaidó * * * and the Venezuelan people's efforts to restore their democracy." U.S. Dep't of the Treasury, *Treasury Sanctions Venezuela's State-Owned Oil Company Petroleos de Venezuela, S.A.* (Jan. 28, 2019), https://home.treasury.gov/news/press-releases/sm594 (Treasury Press Release).[3] To carry out that commitment, the U.S. government has implemented asset-blocking measures designed to protect Venezuelan assets—including PDVSA's assets—from exploitation by the Maduro regime and to "preserve these assets for the people of Venezuela." *Ibid.*; see U.S. Dep't of the Treasury, Office of Foreign Assets Control, FAQ 596, https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_other.aspx#venezuela (Treasury FAQ); see also E.O. 13835 (May 21, 2018); E.O. 13850 (Nov. 1, 2018).

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case has created a direct conflict in the circuits on two issues of vital importance to the sound administration of the FSIA and to U.S. foreign-relations interests—both systemically and with respect to the immediate crisis in Venezuela.

First, the Third Circuit's ruling that the district court could exercise ancillary enforcement jurisdiction with respect to PDVSA despite the lack of any

[3] That effort enjoys bipartisan support. See, *e.g.*, Kevin Derby, *Florida Delegation Helps Launch, Lead Venezuela Democracy Caucus to Take on Maduro Regime*, Florida Daily (Nov. 14, 2019); Venezuela Emergency Relief, Democracy Assistance, and Development Act of 2019, Pub. L. No. 116-94, div. J, title I, 133 Stat. 2534 (2019); State of the Union Address (Feb. 4, 2020) (president describing President Guaidó as "the true and legitimate president of Venezuela").

statutory authorization under the FSIA conflicts with the decisions of numerous courts of appeals, as well as with this Court's decision in *Peacock*. In creating a circuit conflict on that issue, the Third Circuit disregarded well-established law that an independent basis for jurisdiction must exist before a federal court can impose liability on a third party as an alter ego. As a result, in the Third Circuit foreign sovereigns and their instrumentalities are now denied even the basic protections the law affords to private parties, a result that is irreconcilable with the FSIA.

Second, the Third Circuit created a direct conflict with the Fifth Circuit by ruling that alter-ego liability may be established under *Bancec* without any showing that a foreign sovereign's control over a separate instrumentality caused the plaintiff's injury. That ruling violates settled common-law principles on which this Court relied in *Bancec*, and venerable principles of respect for corporate separateness that limit the scope of alter-ego liability. It is particularly troubling because it affords foreign-sovereign instrumentalities *less* protection than private companies enjoy under the common law, contrary to the FSIA. See 28 U.S.C. 1606.

Those rulings by the Third Circuit would independently warrant review even apart from their grave effects on the newly recognized government of Venezuela and its efforts to restore stability to the nation's economy and foreign relations. The Third Circuit has endorsed the imposition of alter-ego liability in situations that go well beyond not merely what the FSIA authorizes but even what the decisions of this Court and well-established law would permit in cases involving only private parties. The decision thus raises international comity and reciprocity concerns of the highest order.

That the Third Circuit's decision will severely disrupt the Guaidó government's efforts to address Venezuela's massive economic and humanitarian crisis—as well as the efforts of the United States to support the new government's actions—only strengthens the case for immediate review. If the decision below remains in place, entities with claims against Venezuela will rush to the courthouse to jockey for priority in payment of those claims, subverting the Guaidó government's efforts to create an orderly and comprehensive restructuring process, and transferring from the Executive to the courts the power to manage the foreign-policy consequences of that process. Review by this Court is thus manifestly warranted.

I. This Court should review the Third Circuit's expansion of enforcement jurisdiction against foreign sovereigns and their instrumentalities.

The Third Circuit held that the district court properly exercised ancillary enforcement jurisdiction over Crystallex's action seeking to hold PDVSA liable for Crystallex's judgment against the Republic on the ground that PDVSA is the Republic's alter ego. As a result, the Third Circuit held, the district court could exercise jurisdiction over a claim seeking to impose alter-ego liability on PDVSA—a foreign-sovereign instrumentality—despite the lack of any independent ground for such jurisdiction under the FSIA. Nothing in the FSIA—"the sole basis for obtaining jurisdiction over a foreign state in our courts," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)—authorizes such bootstrapping. To the contrary, the court of appeals' decision squarely conflicts with *Peacock*, which holds that federal courts *lack* ancillary enforcement jurisdiction over claims seeking to hold an alleged alter ego liable on a judgment, as well as with decisions of the courts of appeals that have followed *Peacock*. The Third Circuit's decision erroneously expands federal jurisdiction over foreign sovereigns not only beyond the limited circumstances set forth in the FSIA, but also beyond the circumstances in which federal courts would have enforcement jurisdiction over private parties.

A. The court of appeals' decision conflicts with this Court's precedent and the decisions of other courts of appeals.

The Third Circuit's decision conflicts with this Court's decision in *Peacock*, as well as with decisions of the First, Second, Fourth, and Tenth Circuits.

1. In *Peacock*, this Court held that a federal court's ancillary jurisdiction to enforce its judgments does not extend to a "new action[] in which a federal judgment creditor seeks to impose liability for a money judgment on a person not otherwise liable for the judgment." 516 U.S. at 351. There, the plaintiff had obtained a money judgment against his employer for ERISA violations. When the plaintiff was unable to enforce the judgment against the employer, he sued Peacock (an officer of the employer), asserting, as relevant here, a veil-piercing claim. *Id.* at 351-352.

This Court held that the plaintiff's suit did not fall within federal courts' ancillary jurisdiction. *Id.* at 356. The Court explained that ancillary enforcement jurisdiction is strictly "reserved" for attempts to execute an existing judgment—that is, proceedings to enforce a judgment against the judgment debtor itself, and certain actions to recover the judgment debtor's assets in the hands of a third party. See *id.* at 356-357. The latter suits include actions to garnish the judgment debtor's assets held by a third party such as a bank, as well as actions to void a fraudulent transfer of the judgment debtor's assets to a third party. See *id.* at 357 n.6. In such proceedings, the judgment creditor need only establish that the assets in question belong to the judgment debtor, such that the third party must hand them over to satisfy the judgment against the judgment debtor. The third party is not liable on the judgment, and therefore need not pay the full judgment amount; rather, it is obligated only to hand over the judgment debtor's assets in its possession. *Id*. at 356-357.

The *Peacock* veil-piercing claim was different in kind from such ancillary actions, however, because it sought "to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment." *Id.* at 357. "Piercing the corporate veil," the Court explained, "is a means of *imposing liability* on an underlying cause of action" against a third party who would not otherwise be liable. *Id*. at 354 (emphasis added; citation omitted). Moreover, the veil-piercing theory was a "new" theory of liability that was not asserted in the original suit and that turned on "different facts than the [original] suit." *Id*. at 358. For those reasons, the Court held that the veil-piercing action did not fall within the district court's ancillary jurisdiction and required an independent basis of federal jurisdiction. Because no such independent basis existed, the suit was not properly in federal court.

2. In the decision below, the Third Circuit held—contrary to *Peacock*—that the district court's ancillary jurisdiction "extend[ed]" to Crystallex's suit seeking to establish that PDVSA is the Republic's alter ego and is therefore liable to satisfy Crystallex's judgment against the Republic. App., *infra*, 14a. The court acknowledged that jurisdiction over Crystallex's judgment-enforcement action must be based, if at all,

on "federal courts['] * * * ancillary jurisdiction to enforce their judgments." App., *infra*, 11a. The court also recognized that Crystallex seeks to establish that PDVSA "is Venezuela's alter ego under *Bancec*"—that is, to pierce the veil between Venezuela and PDVSA. App., *infra*, 14a. And the court did not dispute that Crystallex seeks to pierce the veil in order to "shift liability for payment of an existing judgment" against the Republic "to a third party that is not otherwise liable," *i.e.*, PDVSA. App., *infra*, 16a. This suit is thus precisely the sort of veil-piercing action that *Peacock* holds is not within a federal court's ancillary enforcement jurisdiction.

Yet the Third Circuit held that *Peacock* does not apply in an FSIA suit involving a foreign sovereign, and that the district court therefore could exercise ancillary enforcement jurisdiction over Crystallex's alter-ego claim. The Third Circuit thought it determinative that *Peacock* did not involve an alter-ego claim asserted under *Bancec* against a foreign-sovereign instrumentality. The *Bancec* doctrine, the court of appeals stated, "exists specifically to enable federal courts * * * to disregard the corporate separateness of foreign sovereigns to avoid * * * unfair results." App., *infra*, 16a. That is a non sequitur. The question is not whether Crystallex may assert a *Bancec* claim against PDVSA, but whether it may invoke the district court's ancillary enforcement jurisdiction to do so when no independent basis for jurisdiction with respect to PDVSA exists.

Far from serving as a ground for distinguishing *Peacock*, a *Bancec* alter-ego claim is precisely the type of suit that *Peacock* held falls outside of ancillary jurisdiction. See 516 U.S. at 357. Because *Bancec* applied common-law principles of corporate veil piercing to foreign sovereigns, see 462 U.S. at 627-628, a

Bancec claim, like the veil-piercing action at issue in *Peacock*, is an "equitable" claim that allows a party to overcome the legal presumption of separateness between two entities, such that "one may be *held liable* for the actions of the other." *Bancec*, 462 U.S. at 629 (emphasis added); see *Rubin*, 138 S. Ct. at 823 (in FSIA judgment-enforcement context, successful *Bancec* claim establishes "the *liability* of agencies and instrumentalities of a foreign state" to "satisfy a judgment held against the foreign state") (emphasis added). The Third Circuit's holding that the district court had ancillary jurisdiction over Crystallex's *Bancec* claim therefore squarely conflicts with *Peacock*.

3. The court of appeals' decision also conflicts with decisions of the First, Second, Fourth, and Tenth Circuits. Those courts of appeals have held that *Peacock* means what it says—namely, that ancillary enforcement jurisdiction does not extend to any suit by a judgment creditor seeking to hold a third party liable to satisfy a judgment on alter-ego grounds.

In *Futura Development of Puerto Rico, Inc.* v. *Estado Libre Asociado de Puerto Rico*, 144 F.3d 7 (1998), the First Circuit held that *Peacock* requires an independent basis of jurisdiction *any time* a judgment creditor attempts to enforce a judgment against a third party on the ground that the third party's corporate separateness should be disregarded. The court explained that "[a]lter ego/veil-piercing claims involve a substantive theory for imposing liability upon entities that would, on first blush, not be thought liable for a tort or on a contract," and *Peacock* holds that such claims do not fall within ancillary enforcement jurisdiction. *Id.* at 12. The court reasoned that any claim seeking to overcome a third party's presumptively separate status—regardless of how the claim is characterized—"involves an independent theory of liability under equity, complete with new evidence," and therefore *Peacock* requires an independent basis of jurisdiction. *Ibid.*; see *Groden* v. *N&D Transp. Co.*, 866 F.3d 22 (1st Cir. 2017).

The Second, Fourth, and Tenth Circuits have similarly held that ancillary enforcement jurisdiction does not extend to a plaintiff's attempt to enforce a judgment against a third party based on an alter-ego or veil-piercing theory. See *Epperson* v. *Entm't Express, Inc.*, 242 F.3d 100, 106 (2d Cir. 2001) ("claims of alter ego liability and veil-piercing" require an independent basis for jurisdiction because they "raise an independent controversy with a new party in an effort to shift liability"); *C.F. Tr., Inc.* v. *First Flight Ltd. P'ship*, 306 F.3d 126, 133 (4th Cir. 2002) (*Peacock* requires "*independent* basis of jurisdiction" to hear "a subsequent, post-judgment alter ego claim"); see also *Flame S.A.* v. *Freight Bulk Pte. Ltd.*, 807 F.3d 572, 581-582 (4th Cir. 2015); *Ellis* v. *All Steel Constr., Inc.*, 389 F.3d 1031, 1035 (10th Cir. 2004).

B. The court of appeals incorrectly concluded that Crystallex's suit against PDVSA fell within the district court's ancillary enforcement jurisdiction.

1. The Third Circuit's decision is incorrect. For the reasons discussed above, the decision permits the district court to do precisely what *Peacock* forbade: invoke ancillary enforcement jurisdiction to hold a third party liable for a prior judgment. See 516 U.S. at 357. As a result of that erroneous ruling, the Third Circuit did not require Crystallex to demonstrate that this suit is supported by an independent

basis of federal jurisdiction. Had it done so, this suit would have been dismissed.

A federal court has jurisdiction over a suit against a foreign sovereign or its instrumentality only if the plaintiff establishes one of the exceptions to immunity under Section 1605. 28 U.S.C. 1330(a). Here, the only arguably relevant exception to immunity is the arbitral exception, Section 1605(a)(6)—but this suit (unlike Crystallex's earlier suit in the D.C. district court) was not brought to "enforce an agreement" to arbitrate or to "confirm an [arbitral] award," as that provision requires. And in all events, Crystallex would have to demonstrate a basis for holding PDVSA, a non-party to the arbitration, liable on the award rendered against Venezuela. See *Bridas S.A.P.I.C.* v. *Gov't of Turkmenistan* (*Bridas II*), 447 F.3d 411, 415 & n.4, 416 (5th Cir. 2006). No such basis exists here because the district court found as fact that PDVSA was not involved in the transaction that gave rise to the arbitration, and that the Republic's alleged control over PDVSA had no relation to that transaction. See C.A. J.A. 49. Thus, the district court lacked jurisdiction to hold PDVSA liable for the judgment against the Republic.

2. The Third Circuit's decision thus does far more than simply disregard the well-established limits on ancillary enforcement jurisdiction, thereby treating foreign states less favorably than private parties—a result that itself raises significant comity and reciprocity concerns. The decision also permits judgment creditors to circumvent the FSIA by using a judgment against one foreign-sovereign entity as a means to attach the assets of another presumptively independent sovereign instrumentality despite the latter's immunity from suit under Section 1605 of the FSIA.

The attempts by Crystallex and the Third Circuit to justify that indefensible result lack merit.

In addition to its erroneous suggestion that a *Bancec* alter-ego claim is somehow exempt from *Peacock*'s rule, see pp. 14-15, *supra*, the court of appeals appeared to believe that ancillary enforcement jurisdiction is broader in the context of FSIA litigation than in other contexts. App., *infra*, 15a-16a. But the court gave no reason why that should be so. The FSIA, which is the "sole basis for obtaining jurisdiction" in any action against a foreign state and its instrumentalities, *Amerada Hess*, 488 U.S. at 443, does not expressly confer ancillary jurisdiction to bring a subsequent judgment-enforcement action on an alter-ego theory, or otherwise suggest that the district court's ancillary jurisdiction would be broader than in other contexts. Quite the contrary: because the FSIA confers immunity from suit on foreign sovereigns and their instrumentalities, 28 U.S.C. 1604, it is all the more important in the FSIA context to ensure independent jurisdiction over each foreign-sovereign entity. See *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).[4]

To be sure, as the Third Circuit observed, this Court has acknowledged that judgment creditors may

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[4] The Third Circuit also erred by concluding that the Delaware district court had jurisdiction over the Republic by operation of 28 U.S.C. 1963. The FSIA supersedes prior congressional grants of subject-matter jurisdiction, see *Amerada Hess*, 488 U.S. at 434, and Section 1963 is itself a grant of such jurisdiction, see *Stanford* v. *Utley*, 341 F.2d 265, 268 (8th Cir. 1965). The FSIA permits subject-matter jurisdiction over certain types of enforcement actions, *e.g.*, 28 U.S.C. 1605(a)(4), 1605(b), but does not provide a blanket grant of jurisdiction for judgment-enforcement proceedings initiated in new district courts.

invoke *Bancec*'s alter-ego theory to attach the assets of an alter-ego instrumentality to satisfy a judgment against a foreign state. App., *infra*, 16a-17a (citing *Rubin*, 138 S. Ct. 823). But this Court's general observation about *Bancec*'s availability in judgment-enforcement actions does not even purport to address, much less resolve, whether the judgment creditor needs an independent basis of jurisdiction to support its invocation of *Bancec*'s equitable veil-piercing rule.

The decision below also draws no support from Crystallex's characterization of its suit as a judgment enforcement action under Federal Rule of Civil Procedure 69. A litigant's self-serving characterization cannot determine federal court jurisdiction. See *Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998). And Rule 69 simply provides procedures for enforcing a judgment; it does not confer jurisdiction, ancillary or otherwise, to determine an entity's liability in the first instance. See Fed. R. Civ. P. 82. Even in Rule 69 proceedings, therefore, a district court must have either ancillary jurisdiction or an independent basis of jurisdiction. See *Hudson* v. *Coleman*, 347 F.3d 138, 144 n.4 (6th Cir. 2003) (Rule 69 "does not purport to confer ancillary subject matter jurisdiction for all garnishment proceedings" and it is, instead, "*Peacock* [that] explains the limits of federal ancillary jurisdiction"); *USI Props. Corp.* v. *M.D. Const. Co.*, 230 F.3d 489, 498 (1st Cir. 2000). Because a Rule 69 proceeding based on an alter-ego theory seeks to impose liability for the judgment on a third party, it does not fall within the district court's ancillary jurisdiction.

Similarly unavailing is Crystallex's attempt to characterize this suit as merely an attempt to recover the Republic's property in the hands of PDVSA, in the nature of a fraudulent-conveyance or garnishment action that would fall within the court's ancillary jurisdiction. See *Peacock*, 516 U.S. at 356. When Crystallex filed this action, PDVSA was entitled to a presumption of juridical independence, pursuant to which the court was required to treat PDVSA's assets as its own. Crystallex could overcome the presumption of corporate separateness and establish that PDVSA's assets should be treated as though they were the Republic's only by first establishing an antecedent point: that the two entities are alter egos. It is that antecedent claim that *Peacock* and numerous other courts of appeals have held requires an independent basis of jurisdiction.

That is for a good reason: an alter-ego claim is fundamentally different from a fraudulent-conveyance or garnishment claim. A fraudulent-conveyance or garnishment claim focuses on specific property; the judgment creditor need only establish that the property was fraudulently conveyed or otherwise belongs to the judgment debtor. See, *e.g., Gilchinsky* v. *Nat'l Westminster Bank N.J.*, 732 A.2d 482, 488 (N.J. 1999); *Irwin* v. *O'Bryan*, No. 18-5997, 2019 WL 6112693, at *3 (6th Cir. Nov. 18, 2019). Such actions accordingly result in an order directed to property, undoing the fraudulent transaction or otherwise directing that the specific property in question be used to satisfy the judgment. By contrast, an alter-ego action requires a searching examination of the overall relationship between the two *entities*, and the resulting ruling is that the two should be treated as one, such that the third party is fully liable for the entire judgment against the judgment debtor (even if, as here, the alter-ego claim is tactically aimed at a particular category of property). See *Peacock*, 516 U.S. at 351.

II. This Court also should review the Third Circuit's conclusion that control alone is sufficient to deem a foreign-sovereign instrumentality an alter ego of the foreign state.

Having improperly enlarged federal jurisdiction over foreign-sovereign instrumentalities, the Third Circuit then vastly expanded the circumstances under which an instrumentality may be deemed an alter ego of the foreign state. The court of appeals held that *Bancec* permits a plaintiff to overcome the presumption of juridical separateness between a foreign sovereign and its instrumentality based solely on a showing of "extensive control"—even if that relationship of control has no nexus to the plaintiff's injury. That decision creates an acknowledged conflict with the Fifth Circuit, and it is also wrong.

A. The court of appeals' decision conflicts with decisions of the Fifth Circuit.

The Third Circuit held that *Bancec*'s "extensive control" analysis "does not require a connection between a sovereign's extensive control of its instrumentality and the plaintiff's injury." App., *infra*, 24a-25a. The Third Circuit therefore focused exclusively on whether the Republic exercised extensive control over PDVSA, a question that the court answered in the affirmative. The court's rejection of any nexus requirement was outcome-determinative, as the district court found that the Republic's alleged control over PDVSA had no connection at all to Crystallex's injury. C.A. J.A. 49 (finding that Republic's alleged control over PDVSA did not contribute to Crystallex's injury and was not used to commit a fraud or wrong against Crystallex).

The Third Circuit expressly acknowledged (App., *infra*, 24a & n.9) that its exclusive focus on extensive control conflicts with the Fifth Circuit's decision in *Bridas II*, 447 F.3d 411. There, the Fifth Circuit addressed whether to disregard the juridical separateness between the Turkmenistan government and a state-owned oil-and-gas company. *Id.* at 416. The court explained that *Bancec*'s alter-ego doctrine drew on "bedrock principle[s] of corporate law"—that is, common-law principles—and "applied" those principles to foreign sovereign entities. *Ibid*. Under the common law, the Fifth Circuit explained, a court may pierce the veil between presumptively separate entities only if "(1) the owner exercised complete control over the corporation with respect to the transaction at issue *and* (2) *such control was used to commit a fraud or wrong that injured the party* seeking to pierce the veil." *Ibid.* (emphasis added) (quoting *Bridas S.A.P.I.C.* v. *Gov't of Turkmenistan*, 345 F.3d 347, 359 (5th Cir. 2003), and citing *Bancec*).[5] The Fifth Circuit accordingly considered whether the government of Turkmenistan's abuse of the corporate form was a cause of the plaintiff's injury. *Id.* at 420. The court disregarded the corporate separateness between the government and the instrumentality

[5] Although the Third Circuit suggested that the Fifth Circuit's decision in *First Investment Corp. of Marshall Islands* v. *Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 752-753 (2012), is inconsistent with the Fifth Circuit's decision in *Bridas II*, that is incorrect. In *First Investment Corporation*, the Fifth Circuit approvingly cited *Bridas II*'s requirement of a nexus between the sovereign's control and the plaintiff's injury. *Id.* at 754. But because the *First Investment Corporation* court held that the foreign sovereign did not exercise the necessary level of control over the instrumentality's operations, it had no occasion to address the existence of a nexus.

only after concluding that the "[g]overnment used the lack of financial separateness" to injure the plaintiff. *Ibid.*; see *Janvey* v. *Libyan Inv. Auth.*, 840 F.3d 248, 265 (5th Cir. 2016) (declining to pierce the corporate veil where there was no evidence of control "generally or with specific regard to" the transaction at issue).[6]

B. The Third Circuit's decision is incorrect.

1. In holding that extensive control is itself sufficient to overcome *Bancec*'s presumption of juridical independence, the Third Circuit disregarded the *Bancec* doctrine's origin in the common law governing private corporations. *Bancec* started with the established rule in American corporate law that both private and public corporations are entitled to a presumption of juridical independence. 462 U.S. at 624-625; see *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."). The Court afforded the same protection to foreign-state instrumentalities, recognizing a presumption that such instrumentalities are distinct

[6] The Eleventh Circuit has also suggested that a nexus between extensive control and the plaintiff's injury is a relevant consideration, as it has stated that it would be "unfair" to disregard corporate separateness where a foreign-state-owned "airline was neither a party to the litigation nor was in any way connected with the underlying transaction giving rise to the suit." *Hercaire Int'l* v. *Argentina*, 821 F.2d 559, 563, 565 (11th Cir. 1987).

Consistent with the decision below, the Second Circuit has disregarded a foreign-state instrumentality's juridical independence on the basis of extensive control alone. See *Kirschenbaum* v. *Assa Corp.*, 934 F.3d 191, 197 (2d Cir. 2019). But there the instrumentality did not argue that *Bancec*'s "extensive control" prong includes a nexus requirement, so the court did not consider the question. *Id*. at 198.

entities from the foreign government itself. *Bancec*, 462 U.S. at 628.

To define the rare circumstances that would justify overcoming that presumption, the Court looked to the common law on attributing liability among "*private* corporations." *Ibid.* The Court explained that decisions of U.S. courts and corporate-law treatises identify limited situations in which equity calls for an entity to be held liable for the actions of another, related entity. *Id.* at 628-629 & n.19 (citing 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974)). Synthesizing those authorities, the Court stated that corporate form may be disregarded "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created." *Id.* at 629. The Court further stated that "our cases have long recognized 'the broader equitable principle that the doctrine of corporate entity * * * will not be regarded when to do so would work fraud or injustice.'" *Ibid.* (citation omitted). Because the Court concluded that Bancec's corporate status should be disregarded on the basis of "injustice," the Court had no occasion to elaborate further on "extensive control." *Id*. at 632-633.

Bancec's reliance on the common law to determine when a sovereign entity's juridical status should be disregarded nonetheless makes clear that the "extensive control" test draws its content from the common law. And the common-law rule is clear: extensive control alone does not justify piercing the corporate veil. A plaintiff must *also* demonstrate a nexus between the control and the plaintiff's injury. As the leading treatise cited in *Bancec* explains, courts normally do not disregard corporate separateness without a showing that "control and breach of duty proximately caused the injury or unjust loss." 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974); cf. *id.* § 43.60. Judicial decisions are to the same effect. See, *e.g.*, *Am. Fuel Corp.* v. *Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) ("[D]omination, standing alone, is not enough; some showing of a wrongful or unjust act toward the party seeking piercing is required.") (citation and alterations omitted); *Kirk* v. *Schaeffler Grp. USA, Inc.*, 887 F.3d 376, 388 (8th Cir. 2018); *Corrigan* v. *U.S. Steel Corp.*, 478 F.3d 718, 724 (6th Cir. 2007); *Morris* v. *N.Y. State Dep't of Taxation & Fin.*, 623 N.E.2d 1157, 1160-1161 (N.Y. 1993); 1 Treatise on the Law of Corporations § 7:8 (3d ed. 2019) ("[C]ontrol and breach of duty must proximately cause the injury or unjust loss complained of."); 18 C.J.S. *Corporations* § 14 (2019) (same).

2. The Third Circuit's rejection of that nexus requirement is irreconcilable with *Bancec*'s reliance on common-law principles. Rather than looking to the common law to determine the meaning of "extensive control," the court of appeals focused myopically on *Bancec*'s facts. It thought that extensive control alone sufficed to disregard juridical status because *Bancec* did not discuss a nexus between the Cuban government's control of Bancec and the plaintiff's injury. But *Bancec* did not analyze extensive control; instead, the Court relied on the "broader equitable principle" of "fraud or injustice" as the basis for ruling that Cuba could not avoid liability by invoking Bancec's separate status. 462 U.S. at 629, 632-633 (citations omitted) (explaining that it was unjust for Cuba to pursue a claim in U.S. court on behalf of Bancec and, at the same time, to use Bancec's separate status as a shield against liability on a counterclaim against Cuba). The Court did not silently elim-

inate the nexus requirement in a case where the extensive-control prong was not implicated.[7] To the contrary, as support for the extensive-control prong, the Court cited *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398 (1960), a case that involved quintessential abuse of extensive control to defraud the plaintiff—namely, siphoning assets to avoid a payment obligation. *Id.* at 401, 404.

The Third Circuit also worried that adopting the common-law nexus requirement would significantly narrow the scope of *Bancec*'s extensive-control test. App., *infra*, 24a. But that reasoning mistakes a *feature* of the doctrine for an error in its application. *Bancec* emphasizes that a foreign-sovereign instrumentality's juridical status should be disregarded only in rare circumstances, and that ordinarily the presumption of corporate separateness should control. By expanding alter-ego liability well beyond the circumstances allowed under the common law, the Third Circuit's permissive rule expands veil piercing far beyond what *Bancec* contemplated. See, *e.g.*, *Dole Food Co.*, 538 U.S. at 475 (discussing *Bancec* and stating that "doctrine of piercing the corporate veil * * * is the rare exception, applied in the case of fraud or certain other exceptional circumstances"); *De Letelier* v. *Republic of Chile*, 748 F.2d 790, 795 n.1 (2d Cir. 1984) (noting "injustice" inflicted if "separate status" is too "easily ignored").

[7] This Court's decision in *Rubin* (see App., *infra*, 16a-17a) is even further afield. *Rubin* was not a veil-piercing case and, accordingly, did not evaluate alter-ego standards. Instead, *Rubin* addressed an FSIA provision that concerns terrorism judgments and is not at issue here. See 138 S. Ct. at 823, 827.

The Third Circuit's rejection of the common-law nexus requirement is particularly troubling because it affords foreign-sovereign instrumentalities *less* protection against veil piercing under *Bancec* than private companies enjoy under the common law. That is contrary to *Bancec*, which recognized that "the efforts of sovereign nations to structure their governmental activities" must be accorded at least as much respect as the corporate-governance decisions of private parties. 462 U.S. at 626. It is also contrary to the FSIA, which codifies that equal-treatment principle by providing that a non-immune "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

III. The questions presented are exceptionally important.

This Court's review is urgently needed. The Third Circuit's decision raises grave comity, reciprocity, and other foreign-relations concerns because it broadens significantly the exposure of the assets of foreign-state instrumentalities to execution for acts committed by a separate entity: the foreign state itself. The decision dramatically constricts foreign sovereign immunity in a manner that undermines the FSIA and may expose the United States and its instrumentalities to a reciprocal expansion of liability abroad. Those concerns apply broadly to all foreign states and instrumentalities with U.S. assets, but they are particularly acute with respect to Venezuela, which is experiencing a major crisis that the Third Circuit's rulings will exacerbate—a result directly contrary to clearly expressed U.S. foreign-policy goals.

1. a. The FSIA is intended to promote "respect for the actions taken by foreign sovereigns and * * *

comity between nations." *Bancec*, 462 U.S. at 626. The statute is also intended to protect U.S. entities from reciprocal adverse treatment in foreign courts. See H.R. Rep. No. 94-1487, at 9 (1976) (House Report); see also *National City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 362 (1955). The Third Circuit's decision threatens both of those objectives because it treats foreign entities less favorably than private corporate entities.

The Third Circuit's holding that a court can exercise purported "ancillary" jurisdiction with respect to a foreign-state instrumentality despite the absence of any applicable exception to FSIA immunity from suit is likely to be perceived as disregard for that instrumentality's sovereign status. The decision permits any judgment creditor of a foreign state to hale that state's instrumentalities into court based on a mere allegation that the instrumentalities should be treated as alter egos of the foreign state—and without any regard to the FSIA's immunity-from-suit provisions. That will precipitate the very international friction that the FSIA was designed to prevent. And that friction will be exacerbated by the fact that the plaintiff's purpose is to attach the instrumentality's assets. As this Court has explained, the "judicial seizure" of foreign-sovereign property "may be regarded as an affront to [the] dignity" of the sovereign "and may * * * affect our relations with it." *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008) (citation omitted); see *Ex parte Rep. of Peru*, 318 U.S. 578, 588 (1943); *Conn. Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 255-256 (5th Cir. 2002) (execution may be viewed as "greater affront" to "sovereignty than merely permitting jurisdiction over the merits of an action"); Ian Brownlie, *Principles of Public International Law* 346 (5th ed. 1998).

In addition, the Third Circuit's approach to the alter-ego analysis disrespects the foreign state's decisions about how to "structure" its own sovereign entities "to promote economic development and efficient administration." *Bancec*, 462 U.S. at 626. This Court has warned that a lax approach to the "separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee." *Ibid*. Piercing the veil with respect to an instrumentality that had nothing to do with the plaintiff's injury causes just such harm. And that approach may also give rise to sovereign perceptions of "unfair[ness]," *Hercaire*, 821 F.2d at 565, thereby threatening significant friction between the United States and the foreign sovereign.

Moreover, because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984), the Third Circuit's decision is likely to result in adverse treatment for the United States and its instrumentalities—or even private U.S. corporations and their subsidiaries—in suits brought in foreign countries. See *Boos* v. *Barry*, 485 U.S. 312, 323 (1988); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). Indeed, in enacting the FSIA, Congress expressed specific concern that lack of sufficient "respect" for "separate juridical identities" could "encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." *Bancec*, 462 U.S. at 627-628 (quoting House Report 29-30).

b. All of those concerns are heightened here. First, the confluence of the Third Circuit's rulings—each of which weakens sovereign-immunity protections in different ways—intensifies the comity and reciprocity concerns. In the Third Circuit, not only may a foreign-state instrumentality be subjected to a suit seeking to hold it liable for a judgment that was not entered against it, despite the absence of any applicable exception to its immunity, but that instrumentality may then be held substantively responsible for acts of the foreign state in circumstances that go beyond those approved in *Bancec*. The decision below thus represents a one-two punch that weakens the juridical separation between a foreign state and its instrumentality.

Second, because the Third Circuit has departed from decisions of this Court and of other circuits, foreign-sovereign entities may now receive different treatment in different U.S. jurisdictions. But clarity and uniformity are exceptionally important when jurisdictional rules and international relations are at stake: foreign states and their instrumentalities need certainty about the underlying rules when deciding how to order their corporate affairs in the United States. See, *e.g.*, *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321-1322 (2017); see also *Verlinden B.V.*, 461 U.S. at 489; see generally *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1133 (2015). Many foreign-state instrumentalities established as separate entities hold assets in the United States. That serves U.S. interests, as foreign-state investment in the United States contributes to the U.S. economy and furthers the United States' position as a leader in global markets. But the Third Circuit's decision creates considerable uncertainty about the exposure of those assets to attachment and execution for acts committed by the foreign state, thereby threatening to discourage foreign-state instrumentalities' maintenance of U.S. assets. That is particularly so given that many foreign-state instrumentalities are incorporated in Delaware—*i.e.*, within the Third Circuit.

2. Those concerns are relevant to all foreign states and their instrumentalities. Still, petitioners' particular situation provides not only a vivid illustration of the problems inherent in the Third Circuit's approach but also an independent reason why this Court's review is important. The Third Circuit acknowledged—but chose to disregard—the fact that "U.S. foreign policy interests may be affected by attachment and execution of PDVSA's assets." App., *infra*, 43a.

This litigation has proceeded against the backdrop of, and has significant implications for, the United States' efforts to support the U.S.-recognized government of interim President Guaidó. Venezuela is in the midst of an unparalleled fiscal and humanitarian crisis that has been made much worse by the collapse of the Venezuelan oil industry.[8] In an effort to aid the Guaidó government's attempts to address that crisis and foster the stability of the government itself, the Executive Branch has taken steps to sanction the corrupt Maduro regime and preserve Venezuelan assets in the United States for the use of the Guaidó government and the Venezuelan people. Specifically, the United States has added PDVSA to

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[8] See pp. 7-9, *supra*; Walsh, *supra* (describing "the biggest economic collapse in human history outside of war or state collapse").

the list of Specially Designated Nationals, freezing its assets in the United States unless the Executive gives specific permission for them to be transferred. See, *e.g.*, Treasury Press Release. The U.S. Treasury Department explained that, "[a]s the illegitimate former Maduro regime continues to usurp power and plunder assets that rightfully belong to the Venezuelan people, the United States has implemented Venezuela-related sanctions to preserve such assets for the Venezuelan people." Treasury Dep't, *Guidance Related to the Provision of Humanitarian Assistance and Support to the Venezuelan People* 1 (Aug. 6, 2019), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/20190805_vz_humanitarian_guidance.pdf.[9]

That asset-control regime obligates Crystallex to seek a license from the Executive Branch before taking any concrete steps towards selling PDVSA's shares. Treasury FAQ, FAQ 809; see E.O. 13850 § 1(b); E.O. 13835 § 1(b); E.O. 13692 § 1(b). But that does not alter the need for immediate review. For one thing, the FSIA confers immunity from suit, which will be lost if petitioners are subject to further district court proceedings. Moreover, had the courts below properly applied the FSIA's jurisdictional immunity provisions and *Bancec*, the Executive Branch would not be forced to decide whether to grant a license—with all the foreign-relations consequences that decision entails—because this suit would not have proceeded in the first place. That sort of judicial intrusion into the Executive Branch's conduct of for-

[9] See also E.O. 13835 § 1(a); E.O. 13692 (Mar. 8, 2015) (declaring the situation in Venezuela "an unusual and extraordinary threat to the national security and foreign policy of the United States"); E.O. 13850; Treasury FAQ.

eign relations is exactly what the careful limits set forth in the FSIA, and discussed in *Bancec*, are intended to avoid. See generally *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 114-117 (2013) (warning of "the danger of unwarranted judicial interference in the conduct of foreign policy").

In addition, the Third Circuit's decision threatens to obstruct Venezuela's sovereign management of its monetary policy and U.S. efforts to support that policy. The Guaidó government has announced a plan to establish an orderly and consensual debt restructuring process, consistent with international norms and in coordination with the international financial community, to address the crisis that the Republic faces. See Vecchio Decl. ¶¶ 13-15. But under the Third Circuit's approach, a few creditors will be able to use U.S. courts to obtain preferential attachment of PDVSA's assets. That will disrupt any attempt to persuade creditors to participate in a voluntary restructuring, undermining the U.S. interest in fostering consensual restructuring of sovereign debts. See generally Brief of the United States, *Aurelius Capital Master, Ltd., et al.* v. *Republic of Argentina*, 2016 WL 1267524, at *4 (2d Cir Mar. 23, 2016); see also *De Letelier*, 748 F.2d at 795 n.1 ("abuse of corporate form must be clearly demonstrated to justify holding the 'subsidiary' liable for the debts of its sovereign 'parent,'" lest the court harm the subsidiary's "non-party creditors"). If such preferential treatment is to be granted to a few creditors, it should not be through a judge-made expansion of jurisdiction and corporate liability. See *Jesner*, 138 S. Ct. at 1403 ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.").

3. As this Court has explained, when it comes to delicate foreign-relations matters, courts must be especially "wary of impinging on the discretion of the Legislative and Executive Branches." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). This Court has frequently stepped in to review FSIA and other cases implicating that concern, and such review is likewise warranted here. At a minimum, the Court should invite the Solicitor General to express the views of the United States, as it has done in similar cases implicating foreign sovereign immunity and the foreign-relations interests of the United States. See, *e.g.*, *Rubin*, 138 S. Ct. 816; *Helmerich & Payne*, 137 S. Ct. 1312.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH D. PIZZURRO
JULIA B. MOSSE
KEVIN A. MEEHAN
CURTIS, MALLET-PREVOST,
COLT & MOSLE LLP
101 Park Avenue
New York, NY 10178
(212) 696-6000

Counsel for Petitioner Petróleos de Venezuela, S.A.

DONALD B. VERRILLI, JR.
Counsel of Record
ELAINE J. GOLDENBERG
GINGER D. ANDERS
ADELE M. EL-KHOURI
RACHEL G. MILLER-ZIEGLER
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, D.C. 20004
(202) 220-1100
Donald.Verrilli@mto.com

BRIAN J. SPRINGER
MUNGER, TOLLES & OLSON LLP
350 S. Grand Ave., 50th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner Bolivarian Republic of Venezuela

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