No. 19-1049

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

BRIEF IN OPPOSITION FOR RESPONDENT CRYSTALLEX INTERNATIONAL CORPORATION

ROBERT L. WEIGEL
RAHIM MOLOO
JASON W. MYATT
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MIGUEL A. ESTRADA
Counsel of Record
LUCAS C. TOWNSEND
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Respondent Crystallex International Corporation

QUESTIONS PRESENTED

Crystallex International Corporation ("Crystallex") holds a $1.2 billion, plus interest, judgment against the Bolivarian Republic of Venezuela ("Venezuela"). When Venezuela refused to pay the judgment, Crystallex registered the judgment in the District of Delaware and sought an order authorizing the attachment of Venezuela's commercial assets located in Delaware—shares of PDV Holdings, a Delaware holding company that indirectly owns CITGO Petroleum Corporation. Though the shares are nominally owned by Petróleos de Venezuela, S.A. ("PDVSA"), Venezuela's national energy company, the district court held that Venezuela so extensively controls PDVSA that PDVSA is Venezuela's alter ego and the shares are in fact Venezuela's property and subject to attachment in execution of Crystallex's judgment in an ordinary judgment enforcement proceeding against Venezuela. A unanimous Third Circuit panel affirmed. Venezuela and PDVSA seek to present two questions:

1. Whether federal courts have jurisdiction to enforce a judgment properly entered against a foreign sovereign that indisputably enjoys no immunity.

2. Whether the lower courts properly found that PDVSA is Venezuela's alter ego based on the undisputed factual record of extensive control.

RULE 29.6 STATEMENT

Respondent Crystallex International Corp. hereby discloses that it has no parent corporations, and no publicly held company owns 10% or more of its outstanding membership units. No publicly owned company not a party to these proceedings has a financial interest in the outcome of this litigation.

SUPPLEMENTAL STATEMENT OF RELATED PROCEEDINGS

Respondent Crystallex International Corp. hereby supplements the statement submitted by Petitioners under Rule 14.1(b)(iii) and identifies the following additional related proceedings:

Crystallex International Corporation v. Bolivarian Republic of Venezuela, No. 17-7068, 760 F. App'x 1 (D.C. Cir. Feb. 4, 2019) (per curiam)

Crystallex International Corporation v. Bolivarian Republic of Venezuela, No. 1:16-cv-661, 244 F. Supp. 3d 100 (D.D.C. Mar. 25, 2017)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

BRIEF IN OPPOSITION

Respondent Crystallex International Corp. ("Crystallex") respectfully submits that the petition for a writ of certiorari should be denied.

STATEMENT

1. Starting in 2002, Crystallex, a Canadian company, invested hundreds of millions of dollars developing Las Cristinas, a significant gold deposit in the Bolivarian Republic of Venezuela ("Venezuela"). Pet. App. 1a, 3a. In 2011, Venezuela, under then-President Hugo Chávez, openly seized Crystallex's property, concluding a years-long campaign to "take back … Las Cristinas." Dist. Ct. Dkt. 27-1, Ex. 1 ¶ 51. Crystallex commenced arbitration in Washington, D.C., pursuant to a bilateral investment treaty between Canada and Venezuela. Pet. App. 47a. In April 2016, an arbitration panel unanimously awarded Crystallex $1.2 billion plus interest for Venezuela's unlawful expropriation of Crystallex's investment. *Id*.

Crystallex sought confirmation of the arbitration award in federal court in the District of Columbia. Pet. App. 4a. Venezuela appeared in that action and challenged the award on several grounds, but did not contest the D.C. court's jurisdiction. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 105, 109 n.12 (D.D.C. 2017). The D.C. court found that it had subject-matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330(a), 1605(a)(6), which grants federal courts jurisdiction over actions to "confirm an [arbitral] award" issued against a foreign state. 244 F. Supp. 3d at 108-09. The D.C. court then rejected each of Venezuela's arguments, confirmed the award, and

entered a judgment for its full amount. *Id.* at 123. A panel of the D.C. Circuit unanimously affirmed, concluding that "[n]one of Venezuela's three arguments on appeal comes close to securing a reversal." *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 760 F. App'x 1, 2 (D.C. Cir. 2019) (per curiam). Venezuela sought no further review, and that judgment is now final. It is therefore undisputed—indeed, indisputable—that irrespective of who may ultimately control the levers of power in Venezuela, the *Republic* owes the underlying debt pursuant to the lawful and final judgment of our courts.

2. Because Venezuela steadfastly has refused to pay the D.C. district court judgment in full, Crystallex has been forced to bring enforcement actions seeking to seize Venezuela's commercial assets in the United States, as the FSIA expressly permits. *See* 28 U.S.C. § 1610(a)(6).

Venezuela's principal commercial asset in the United States is the multibillion-dollar oil refining company, CITGO Petroleum Corp. ("CITGO"). Pet. App. 2a. Venezuela owns CITGO through Petróleos de Venezuela, S.A. ("PDVSA"), Venezuela's state-owned oil company. *Id.* at 1a-2a. PDVSA holds 100% of the common-stock shares of PDV Holdings ("PDVH"). PDVH, in turn, wholly owns CITGO Holding, Inc., which wholly owns CITGO. *Id.* at 117a n.36. PDVH, CITGO Holding, and CITGO are all Delaware companies. *Id*.

PDVSA claims to be a distinct instrumentality of Venezuela, but in fact it lacks a meaningful separate personality and is Venezuela's alter ego. Under the decades-long dictatorships of former President Hugo Chávez, and his successor Nicolás Maduro—the internationally recognized President of Venezuela when

this case was litigated in the district court—PDVSA became synonymous with the Venezuelan government itself. Indeed, PDVSA repeatedly tweets, "PDVSAesVenezuela"—PDVSA *is* Venezuela. Pet. App. 93a. Under *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), courts disregard a state-owned instrumentality's corporate form if either: (1) the state "so extensively control[s]" the instrumentality "that a relationship of principal and agent is created"; or (2) recognizing the instrumentality as a separate entity "'would work fraud or injustice.'" 462 U.S. 611, 629-30 (1983). As the lower courts found, Venezuela so "extensively controlled" PDVSA that they are alter egos, legally and factually, and under *Bancec* must be treated as a single entity. Pet. App. 3a, 75a.

Whatever nominal independence PDVSA may have enjoyed at its inception was stripped from it by the Chávez and Maduro dictatorships. Chávez transformed PDVSA into a "Socialist and Revolutionary PDVSA," App. Ct. Joint Appendix ("JA-") 869, "expanding its corporate mission beyond … hydrocarbons" and into a "'more political role,'" Pet. App. 98a. At the government's direction, the "New PDVSA," as it was called internally, JA-1198, has spent hundreds of billions of dollars repaying loans made to the government by foreign countries, Pet. App. 83a, 100a; JA-47, 61, 1167, 1179, 2299; "sell[ing]" oil to Venezuela's creditors and allies for no, or nominal, consideration, Pet. App. 100a, 106a; JA-593, 926-45, 956-57; funding the regime by manipulating Venezuela's foreign exchange system (trading U.S. dollars to Venezuela's Central Bank for less than their worth), Pet. App. 83a, 101a; JA-62, 1175, 1202; and subsidizing the dictatorship's domestic priorities, Pet. App. 105a-06a; JA-513, 646, 892, 1176, 1197, 2011, 2300.

Venezuela has also used PDVSA as the designated entity through which it achieves many expropriations. Pet. App. 102a; JA-1024-26, 1034, 1043, 1152. Indeed, in this case, Venezuela initially held Crystallex's mining interests through PDVSA, using it as a receiver of the expropriated assets, and later arranged for PDVSA to divest a portion of those interests to Venezuela's Central Bank for $2.4 billion. JA-1194.

Venezuela controls its oil industry—to an extent "[f]ew oil producing countries can … claim," JA-594—through political control of PDVSA's senior leadership and even low-level employees. The government has appointed senior ministers and military officials to PDVSA's board and executive positions by Presidential decree, Pet. App. 94a-95a; JA-1195, 1999, 2387, and used the threat of firing to keep both leadership and employees in line. Chávez, for example, fired nearly 40% of the company's workforce—approximately 18,000 employees—because they opposed the government. JA-1054, 1168. He also personally and publicly fired multiple executives on live television. Pet. App. 95a; JA-2295. Maduro likewise threatened to fire employees that did not support the regime in an election. Pet. App. 95a; JA-540. And he later arrested 50 managers—including five U.S. citizens—on dubious corruption charges, JA-2250, 2253, and appointed a loyalist cousin of former-President Chávez as CITGO's new President, *id.* at 2245.

"PDVSA discloses Venezuela's control and willingness to direct the company to act against its interests as risk factors in its bond offering documents," Pet. App. 81a-82a, and warns investors that its assets could be attached to satisfy Venezuela's obligations, JA-1930. These warnings are well grounded: Venezuela's extensive control of PDVSA's management,

employees, and day-to-day activities; its disregard for corporate formalities; and its use of PDVSA's assets as its own are classic grounds for disregarding any ostensible separation between Venezuela and PDVSA and treating PDVSA's assets—including its ownership interest in PDVH—as Venezuela's assets. *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018); *EM Ltd. v. Banco Central de la República Argentina*, 800 F.3d 78, 91 (2d Cir. 2015); *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 447 F.3d 411, 417-18 (5th Cir. 2006).

3. Venezuela refused to pay Crystallex's judgment in full, choosing instead to embark on a well-documented, multi-year campaign of evasion and tactical litigation delay. Faced with this obstruction, Crystallex moved the D.C. district court for permission to register the judgment in the District of Delaware pursuant to 28 U.S.C. § 1963, the federal judgment registration statute, so that Crystallex could attach and sell Venezuela's common-stock shares of PDVH, which are located in Delaware. *See* Crystallex's Mot. for Relief Pursuant to 28 U.S.C. 1610(c) and 28 U.S.C. § 1963, No. 1:16-cv-661 (D.D.C. Apr. 25, 2017), Dkt. 36. Venezuela opposed the motion "on a variety of theories," JA-271, but did *not* argue that the Delaware district court would lack jurisdiction over the registered judgment, *see* Opp'n to Crystallex's Mot. Pursuant to 28 U.S.C. § 1610(c) and 28 U.S.C. § 1963, No. 1:16-cv-661 (D.D.C. May 9, 2017), Dkt. 37. The D.C. district court granted Crystallex's motion, finding that Venezuela had notice of the judgment, that a reasonable time had passed, and that Venezuela had no attachable assets in the District of Columbia. JA-273, 275. Venezuela did not appeal that ruling.

Crystallex thereafter registered the judgment in Delaware federal court. Pursuant to Section 1963, registration was automatically accomplished by "filing a certified copy" of the judgment with the Delaware district court. 28 U.S.C. § 1963. Once registered, the judgment "ha[s] the same effect as a judgment of [that court] and may be enforced in like manner." *Id*.

Thus equipped with the statutory equivalent of a Delaware district court judgment, Crystallex commenced post-judgment proceedings against the PDVH shares under Federal Rule of Civil Procedure 69. Rule 69(a)(1) provides that "the procedure of the state where the court is located" governs enforcement of a money judgment. In Delaware, a creditor attaches a local corporation's stock shares by writ of attachment served on the corporation. 8 Del. C. § 324(a)-(b). The court may then order the sale of the shares and apply the sale proceeds to the judgment. *Id*. § 324(c)-(d).

When a judgment debtor holds assets in Delaware through an alter ego, a creditor has two options to reach them. The creditor can file a new lawsuit against the alter ego seeking a new money judgment that can then be enforced against any or all of the alter ego's assets. Pet. App. 64a. Or the creditor can ask the court merely to "determine the nature of [the judgment debtor's] interest" in "'specific assets'" nominally held by the alter ego. *Kingsland Holdings, Inc. v. Bracco*, 1996 WL 104257, at *7 (Del. Ch. Mar. 5, 1996) (citation omitted). If the evidence warrants "'disregard[ing] the [alter-ego's] existence,'" the court may conclude that specific assets are in fact assets of the judgment debtor, and the creditor can "'look directly to [those] specific assets … for the satisfaction of [the] claim'" against the judgment debtor. *Id*.

Crystallex chose the second option: attaching the PDVH shares on the ground that they are *Venezuela's* property, merely held through a straw owner, its alter ego, PDVSA. Pet. App. 48a.

In addition to the requirements of Delaware law, the FSIA provides that a foreign state's property may not be attached "until the court has ordered such attachment and execution." 28 U.S.C. § 1610(c). Crystallex thus moved for an order authorizing issuance of a writ of attachment against Venezuela's shares of PDVH and presented its extensive alter-ego evidence to the district court. *See* JA-110, 112-1205.

Venezuela chose not to appear in the Delaware district court and instead dispatched PDVSA to intervene and oppose the motion. JA-1206. PDVSA moved to dismiss Crystallex's motion for lack of subject-matter jurisdiction. Pet. App. 48a-49a. It disputed the conclusion that PDVSA was Venezuela's alter ego and asserted that, as a purportedly separate instrumentality of a foreign state, it was entitled to its own immunity from jurisdiction under the FSIA. *Id.* at 74a-75a, 135a. PDVSA argued that under *Peacock v. Thomas*, 516 U.S. 349 (1996), Crystallex was required to bring a separate alter-ego complaint against PDVSA and identify an independent basis for subject-matter jurisdiction over PDVSA, rather than following the ordinary rules for enforcing a judgment under Rule 69 and Delaware law. Pet. App. 57a-58a

Following several rounds of motions, supplemental briefing, additional evidence, and oral argument, the district court granted Crystallex's motion for a writ of attachment and denied PDVSA's cross-motion to dismiss. Pet. App. 136a. The court held that it had jurisdiction under the FSIA to enforce Crystallex's judgment by attaching Venezuela's assets, including those

held "only nominally [by] Venezuela's alter ego, PDVSA." *Id.* at 63a; *see also id*. at 53a-65a. The court explained that it did not need an "independent basis" to exercise jurisdiction over PDVSA because Crystallex was not seeking "to impose personal liability on PDVSA"; instead, Crystallex merely "seeks to attach assets that it alleges belong to Venezuela." *Id*. at 63a. "Even if an independent basis for jurisdiction were required," the court held, 28 U.S.C. §§ 1330 and 1605(a)(6) provided an independent basis for jurisdiction over the alter-ego dispute pursuant to the FSIA's provision for enforcing arbitration agreements. Pet. App. 65a-66a n.10. The district court found that Venezuela's "extensive control" over PDVSA made PDVSA Venezuela's alter ego under *Bancec*, *id.* at 79a, and therefore, PDVSA's shares in PDVH were assets of Venezuela that could be attached to satisfy Venezuela's debt to Crystallex, *id.* at 135a.

4. PDVSA appealed. Pet. App. 6a. After the United States government recognized Juan Guiadó as interim President of Venezuela, the panel allowed Venezuela belatedly to intervene as an additional appellant and participate in briefing and oral argument. *Id.* at 7a. Relying on materials outside of the record before the district court, Venezuela argued that its changed political circumstances required reversal or remand of the district court's decision. *See* Venezuela App. Ct. Br. 1-3, 7-8, 24-25.

The panel unanimously affirmed. Pet. App. 3a. It held that "[n]othing in *Peacock*" restrained the district court's exercise of ancillary jurisdiction because *Peacock* did not "involv[e] foreign sovereigns" or the FSIA, and courts "routinely" apply "ancillary enforcement jurisdiction" in FSIA cases, including to adjudicate alter-ego allegations under *Bancec*. *Id.* at 11a-12a, 15a-

18a. The panel further held that Crystallex "easily" satisfied the *Bancec* standard for "ignor[ing] the formal separateness" between Venezuela and PDVSA. *Id.* at 44a. The panel emphasized both that Petitioners "d[id] not substantially contest the District Court's finding that it extensively controlled PDVSA," and that PDVSA had "profited directly from Crystallex's injury" when "Venezuela transferred the rights to the expropriated mines to PDVSA for no consideration." *Id.* at 3a, 39a. The panel rejected Venezuela's arguments based on alleged changed circumstances in Venezuela, explaining that Venezuela had offered no reason to deviate from "the normal course" of deciding appeals "based on the record before the district court" exclusively, and that any legally pertinent and "credible arguments to expand the record with later events" must be raised in the district court in the first instance. *Id.* at 28a.

The Third Circuit denied Venezuela and PDVSA's petitions for rehearing en banc with no recorded dissent. Pet. App. 137a-38a.

5. The Third Circuit remanded the case to the district court for further proceedings related to the sale of the PDVH shares. Pet. App. 3a. The Third Circuit lifted its stay of enforcement, leaving only a discretionary stay entered by the district court that remains in place pending this Court's disposition of Venezuela's petition. Dist. Ct. Dkt. 154, at 2-3. Once the stay is lifted, the district court will need to determine the appropriate "procedure by which to effectuate the sale of the PDVH shares," Pet. App. 134a, and to "issu[e] an order of sale," Dist. Ct. Dkt. 95, at 5.

Any sale procedure will be subject to input from the Executive Branch. Specifically, Venezuela's property in the United States is subject to a series of asset-

blocking sanctions imposed on the Maduro regime, which remains in power in Venezuela, by Executive Orders issued both before and after the State Department's recognition of Juan Guaidó as the legitimate President of Venezuela. *See* E.O. 13692 (Mar. 8, 2015); E.O. 13835 (May 21, 2018); E.O. 13850 (Nov. 1, 2018). The Treasury Department's Office of Foreign Assets Control ("OFAC") administers these sanctions and is authorized to issue licenses for otherwise prohibited transactions. Pet. App. 43a. The judicial sale process ordered by the district court will take into account any requirement to obtain an OFAC "license to cover the … sale." *Id*. As noted by the Third Circuit panel, these "Treasury sanctions provide an explicit mechanism to account for" any "short- or long-term U.S. foreign policy interests [that] may be affected by attachment and execution" of the PDVH shares. *Id*. These procedures may explain why the United States has opted thus far not to appear in this litigation, despite Venezuela's repeated entreaties—in each court that has considered this matter—to call for the United States' views.

REASONS FOR DENYING THE PETITION

Venezuela first asks this Court to review the jurisdictional requirements for "impos[ing] liability" for a judgment on a foreign state's alter ego. Pet. 10. Yet that issue is not presented because Crystallex does not seek, and the district court did not impose, any *liability* on PDVSA. While evidence of an alter-ego relationship may sometimes be used for that purpose, Crystallex used it here only to show that the judgment debtor, Venezuela, is in fact the owner of specific attached property. The actual exercise of subject-matter jurisdiction in this case—ancillary jurisdiction to enforce Crystallex's undisputed final judgment

against a specific asset of Venezuela—is not the subject of a circuit split, and is fully consistent with this Court's precedent.

Venezuela's second question—addressing the standard for an alter-ego finding—is fact-bound, and the purported circuit split that Venezuela asserts is illusory. This Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* ("*Bancec*") allows a court to disregard the corporate form based on evidence of either "extensive control" or "fraud or injustice." 462 U.S. 611, 629-30 (1983). Venezuela asserts a circuit split with the Fifth Circuit over whether control alone is sufficient, but it cites no decision that has held that extensive control alone is insufficient under *Bancec*. Venezuela has repeatedly conceded—and this Court's more recent decision in *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018) confirms—that Crystallex need only show extensive control *or* fraud or injustice, not both. And as the panel recognized, the extensive, unrebutted factual record makes this an "eas[y]" case for extensive control: "[I]f the relationship between Venezuela and PDVSA cannot satisfy [that] requirement, we know nothing that can." Pet. App. 44a. In any event, Venezuela does not even contest the panel's conclusion that Crystallex *did* show more than extensive control—it showed that PDVSA received the expropriated property and profited from the expropriation.

Venezuela knows all of this, which is why its petition belabors the supposed "foreign policy" implications of this case. Not a single foreign government, whether from an oil producing country or otherwise—or indeed any other party—has filed as *amicus* in support of Venezuela's position to express any misgivings

about how the FSIA or alter-ego principles were applied in this case. Petitioners nonetheless *again* assert that the United States government should be invited to file a brief—though the Executive Branch presumably does not believe, and would not assert, that foreign governments should defy the lawful judgments of our own courts. The Executive Branch has not intervened because (as the Third Circuit recognized) any foreign policy implications can be addressed, in due course, in the Executive Branch proceeding already designated for that purpose—the OFAC licensing process. Until then, there is no need for this Court to call for the Solicitor General's views, much less grant review.

I. Venezuela's Immunity Question Is Illusory And Splitless

Venezuela's first question frames an academic issue not presented by this case: "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." Pet. i. The issue is not presented because the premise of the question is false: This is not, and never has been, an "action seeking to hold PDVSA liable for Crystallex's judgment against the Republic." *Id*. at 11.

Rather than hold PDVSA liable, the district court authorized the attachment of specific assets—*Venezuela's* shares of PDVH held in PDVSA's name—based on a finding that those assets are in fact "property of Venezuela." Pet. App. 112a. This is a classic exercise of the federal district courts' "ancillary" jurisdiction to enforce their own judgments under *Peacock v. Thomas*, 516 U.S. 349 (1996), and Federal Rule of Civil Procedure 69. And the FSIA also provides an

independent basis of subject-matter jurisdiction because this suit *was* "predicated on [an] applicable exceptio[n] to the immunity" of Venezuela and, by extension, its alter ego PDVSA. Pet. i. No decision of this Court or any circuit conflicts with either basis for jurisdiction. Review is unwarranted.

A. The District Court's Exercise Of Ancillary Jurisdiction Does Not Conflict With Any Decision Of This Court Or A Court Of Appeals

The D.C. district court entered a valid judgment against Venezuela in 2017. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 123 (D.D.C. 2017), *aff'd*, 760 F. App'x 1 (D.C. Cir. 2019) (per curiam). That judgment is now unreviewable, and Venezuela does not dispute that the D.C. court had jurisdiction under the FSIA to enter it. *See id.* at 108-09 & n.12.

Federal courts retain "inherent power to enforce [their] judgments." *Peacock*, 516 U.S. at 356. In doing so, they exercise what *Peacock* called "ancillary enforcement jurisdiction." *Id*. That jurisdiction is embodied in Federal Rule of Civil Procedure 69(a), which "permits judgment creditors to use any execution method consistent with the practice and procedure of the State in which the district court sits," *id*. at 359 n.7—here, Delaware. Under Rule 69, the Supreme Court has "approved the exercise of ancillary jurisdiction over a broad range of supplementary proceedings involving third parties to assist in the protection and enforcement of federal judgments—including attachment, mandamus, garnishment, and the prejudgment avoidance of fraudulent conveyances." *Id*. at 356.

Venezuela asks this Court to determine whether ancillary jurisdiction can be used "to impose alter-ego *liability* on PDVSA." Pet. 11 (emphasis added). But the only liability at issue is Venezuela's liability to Crystallex for the unsatisfied portion of a $1.2 billion judgment entered by the D.C. district court and affirmed by the D.C. Circuit. Contrary to the entire premise of Venezuela's first question, Crystallex is not attempting to "impose liability" on, or otherwise obtain a judgment against, PDVSA. If Crystallex is successful, it can attach and sell a specific asset of *Venezuela* located in Delaware—the Delaware PDVH shares—held in the name of its alter ego, PDVSA. And if proceeds from a judicial sale of those shares are insufficient to satisfy the outstanding balance of Crystallex's judgment, Crystallex will not have recourse against PDVSA's other assets, as it would if Crystallex actually held a judgment against PDVSA. This is simply a proceeding to attach and execute on Venezuela's assets located within the Delaware district court's jurisdiction. It has nothing to do with PDVSA's "liability."

This precept is not altered because Crystallex used alter-ego principles to establish the ownership of Venezuela's asset. As the district court explained, a judgment creditor can use alter-ego evidence in "'two different contexts'": as a basis for seeking a "new judgment" against the judgment debtor's alter ego in a "new action," or as a basis for garnishing "'specific property'" that is "'nominally held in the [alter ego's] name.'" Pet. App. 64a-65a. Under the latter approach—which Crystallex followed—the judgment creditor seeks only to show that the property is "really the property of the judgment debtor." *Id*. at 65a (alteration omitted). The "action seeks no new determination of liability or wrong-doing"; rather, the finding

that the "entities are mere alter-egos of each other … allow[s] the plaintiff to treat their assets as if held by a single entity." *Aioi Seiki, Inc. v. JIT Automation, Inc.*, 11 F. Supp. 2d 950, 954 (E.D. Mich. 1998).

Using evidence of alter ego to show property ownership in garnishment actions is well established under applicable state law. Delaware law—applicable here pursuant to Rule 69—allows a court to "'disregard the existence of a subsidiary corporation'" in "determin[ing] the nature of [the parent's] interest" in property. *Kingsland Holdings, Inc. v. Bracco*, 1996 WL 104257, at *7 (Del. Ch. Mar. 5, 1996). The same procedures apply in other states as well. *E.g.*, *Aioi Seiki*, 11 F. Supp. 2d at 952 (Michigan); *Fleming v. Quaid*, 201 A.2d 252, 255 (Pa. Super. Ct. 1964); *Valley Mech. Contractors, Inc. v. Gonzales*, 894 S.W.2d 832, 835 (Tex. App. 1995); *Olen v. Phelps*, 546 N.W.2d 176, 181 (Wis. Ct. App. 1996). In the FSIA context, too, federal courts regularly adjudicate alter-ego allegations involving foreign states in Rule 69 garnishment proceedings. *See* Pet. App. 17a (citing *Alejandre v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277, 1284-85 (11th Cir. 1999); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 563-65 (11th Cir. 1987); and *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532-38 (5th Cir. 1992)). Even in criminal cases, the federal government has relied on alter-ego allegations to recover restitution from a convicted defendant's alter egos "through additional proceedings in the original case," rather than by obtaining a separate criminal conviction (or even filing a new civil case) against the alter egos. *E.g.*, *United States v. Vitek Supply Corp.*, 151 F.3d 580, 586 (7th Cir. 1998) (Easterbrook, J.).

Venezuela presents no circuit conflict as to the validity of this type of alter-ego proceeding or the exercise of ancillary jurisdiction therein. The only case they cite that even arguably involves the use of alter ego to establish property ownership—*Flame S.A. v. Freight Bulk Pte. Ltd.*, 807 F.3d 572 (4th Cir. 2015)—did not reach the defendant's challenge to ancillary jurisdiction because the court held that even if such jurisdiction were unavailable, "admiralty" provided an "'independent basis for jurisdiction.'" *Id.* at 581-82. The petition rightly relegates that decision to a string cite with no parenthetical explanation.

Venezuela is thus left primarily with cases in which the plaintiffs seek to hold the judgment debtor's alter ego "*liable* for the judgment," rather than to attach specific assets of the judgment debtor held by the alter ego. *Futura Dev. of P.R., Inc. v. Estado Libre Asociado de P.R.*, 144 F.3d 7, 8 (1st Cir. 1998) (emphasis added); *see also Groden v. N&D Transp. Co.*, 866 F.3d 22, 28 (1st Cir. 2017) (suit "to impose ERISA liability on an alter ego"); *Ellis v. All Steel Constr., Inc.*, 389 F.3d 1031, 1032 (10th Cir. 2004) (claim that "alter ego" was "liable for the unpaid judgment"); *C.F. Tr., Inc. v. First Flight Ltd. P'ship*, 306 F.3d 126, 129 (4th Cir. 2002) (claim that "alter ego" was "liable on the judgments"). Vague statements in some of these cases that "[a]lter ego/veil-piercing claims involve a substantive theory for imposing liability," *Futura Development*, 144 F.3d at 12, simply describe how alter-ego or veil-piercing theories were used in those cases, not how they must be used in every case. The Second Circuit's decision in *Epperson v. Entertainment Express, Inc.* is even further afield because the collection action that the court allowed there involved neither veil piercing nor alter ego, but fraudulent-conveyance

claims. 242 F.3d 100, 106 (2d Cir. 2001). Those statements do not address the distinct use of alter ego here—to show property ownership—because none of those cases involved that approach. The exercise of ancillary jurisdiction in these circumstances is not the subject of a circuit split.

Venezuela also argues that the district court's exercise of ancillary jurisdiction "conflicts with *Peacock*," Pet. 11, but *Peacock* merely limited the use of ancillary jurisdiction *outside* of Rule 69 enforcement proceedings—and thus reinforced the distinction between these two types of alter-ego proceedings. The plaintiff in *Peacock* obtained a money judgment under ERISA against a corporation, then brought a "new lawsuit" against a shareholder to pierce the corporation's veil so the district court could "ente[r] judgment" against him for the full amount awarded against the corporation. 516 U.S. at 351-52, 359. This Court held that the district court lacked jurisdiction to award that relief: ERISA did not provide an "independent" statutory basis for suing the shareholder. *Id*. at 352-55. And the court lacked "ancillary jurisdiction" because the plaintiff was not seeking to "*collect*" or "*execute*" a judgment; he was seeking a new judgment "*establish*[*ing*] [the new defendant's] *liability*," which could then be collected in later proceedings. *Id.* at 357 & n.6. The Court emphasized, however, that the plaintiff could still seek relief under the "Federal Rules of Civil Procedure"—including, under Rule 69, "any execution method" available under the forum state's laws. *Id.* 359 & n.7. It was only because the plaintiff had "expressly reject[ed] that characterization of his lawsuit," that such relief was unavailable. *Id*. at 357 n.6.

Venezuela's own cases recognize *Peacock*'s "distinction between postjudgment proceedings … to collect an existing judgment" and those seeking to "shift *liability*" to a "new party." *USI Props. Corp. v. M.D. Constr. Co.*, 230 F.3d 489, 498 (1st Cir. 2000) (emphasis added); *Epperson*, 242 F.3d at 106. A proceeding seeking "the assets of the judgment debtor"—even those "in the hands of a third party"—is a "mere continuation of the original action," and thus falls within "the residual jurisdiction stemming from the court's authority to render th[e] judgment." *USI Props.*, 230 F.3d at 498. An action to hold a new party "liable on the judgment," by contrast, "go[es] beyond an effort to reach the assets of the judgment debtor," and requires an independent basis for jurisdiction. *Epperson*, 242 F.3d at 106, 107 n.8; *see*, *e.g.*, *Hudson v. Coleman*, 347 F.3d 138, 140, 144 n.4 (6th Cir. 2003) (denying jurisdiction over claim that new party "would be liable to pay the … judgment").

Venezuela elides the critical distinction between garnishment and a new judgment. Garnishment is an order directed to a specific person (the garnishee, here, PDVH) regarding the disposition of property in that person's possession and no other property. *Pagliaro, Inc. v. Zimbo*, 1987 WL 10275, at *3 (Del. Super. Ct. Apr. 16, 1987). The order is not a money judgment against the alter ego (PDVSA) and does not allow the garnishor to attach the alter ego's other assets. *Id*. Thus, if selling the PDVH shares does not satisfy Crystallex's judgment, PDVSA has no obligation to pay the deficiency to Crystallex. PDVSA also can transfer other assets absent a separate judicial order attaching those assets. *See In re TB Westex Foods, Inc.*, 950 F. 2d 1187, 1191-92 (5th Cir. 1992). Whereas transferring any asset after a "debtor ha[s] been sued" for a money judgment can be considered fraud, 6 Del.

C. § 1304(b)(4), garnishment restrains only the "specific assets" attached, *TB Westex*, 950 F. 2d at 1191-92.

The distinction between this action and an action to "impos[e] … liability" on PDVSA, Pet. 10, thus runs far deeper than Crystallex's "characterization" of the proceeding, *id.* at 19. The distinct and more limited form of relief that Crystallex seeks in this proceeding falls squarely within the district court's ancillary jurisdiction and implicates no conflict warranting this Court's review.

B. The District Court Had FSIA Jurisdiction

Even if an "exception[n] to the immunity provided by the FSIA" were required in a garnishment action such as this, Pet. i, there was such an exception in this case. For this independent reason, Venezuela's first question is not actually presented.

Crystallex overcame Venezuela's immunity in the D.C. court action to confirm Crystallex's arbitration award because foreign states are not immune from actions "to confirm an [arbitration] award." 28 U.S.C. § 1605(a)(6). And once a judgment debtor's immunity is overcome, there is no need to separately overcome the alter ego's immunity because alter egos "'are treated as one entity' for jurisdictional purposes," *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009), including for the FSIA's exceptions to jurisdictional immunity, *e.g.*, *First City, Tex.-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172, 176-77 (2d Cir. 1998) (imputing alter egos' commercial activities to foreign agency for purposes of FSIA's commercial activity exception). As Venezuela's alter ego, therefore, PDVSA has no separate jurisdictional immunity to assert. Pet. App. 79a.

Because Crystallex overcame Venezuela's immunity in the D.C. district court action and proved that PDVSA was Venezuela's alter ego in the Delaware district court, the Delaware court has an independent statutory basis for subject-matter jurisdiction under the FSIA that further distinguishes *Peacock* and the other cases that Venezuela cites for its supposed circuit conflict. Pet. 15-16. Indeed, all of Venezuela's cited cases involve *private* litigants. As the Third Circuit panel recognized, the case for jurisdiction in the FSIA context is even stronger than in private litigation because the FSIA is a "specialized" regime designed to confer federal jurisdiction over the entire enforcement process for the claims it covers. Pet. App. 16a. It grants district courts party-based jurisdiction over "any nonjury civil action against a foreign state"—including a state "instrumentality" such as PDVSA, 28 U.S.C. § 1603(a)—in which "the foreign state is not entitled to immunity." *Id.* § 1330(a). Because Venezuela and PDVSA are not immune, the district court has jurisdiction under § 1330(a).

The FSIA also expressly authorizes the federal district courts to oversee judgment enforcement by "order[ing] … attachment [of] and execution" against a foreign state's non-immune assets. 28 U.S.C. § 1610(c). Jurisdiction to enter a judgment under the FSIA thus "continues long enough to allow proceedings in aid of any money judgment that is rendered in the case." *First City, Tex.-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 54 (2d Cir. 2002). Congress understood, and *Bancec* recognized, that in exercising that jurisdiction, "'[t]he courts will have to determine … whether property held by an agency is property of the foreign state.'" *Bancec*, 462 U.S. at 621 n.8 (first alteration in original) (quoting H.R. Rep. No. 94-1487,

at 28, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 (1976)).

Indeed, this Court has previously recognized the use of post-judgment proceedings in FSIA cases to reach the assets of a foreign state's instrumentalities. *Rubin*, 138 S. Ct. at 822-23. *Rubin* involved a statute, 28 U.S.C. § 1610(g), that displaces the *Bancec* standard in terrorism related cases, and thus provides an alternate basis for disregarding a state-owned instrumentality's corporate form. 138 S. Ct. at 822-23. Section 1610(g) does not purport to confer jurisdiction, so *Rubin* necessarily involved the same source of jurisdiction that the district court exercised here. *Rubin* thus "all but confirmed that *Bancec* can indeed be used to reach the assets of a foreign sovereign's extensively controlled instrumentality through post-judgment attachment proceedings." Pet. App. 16a.

As the panel recognized, the FSIA's grant of federal jurisdiction over proceedings against non-immune foreign states further distinguishes this case from *Peacock*. Pet. App. 16a. Where *Peacock*'s limits apply, a judgment creditor must proceed in state court unless an "independent basis for federal jurisdiction" exists. 516 U.S. at 355. The FSIA provides that independent basis by "channel[ing] cases against foreign sovereigns away from the state courts and into federal courts." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983). That some of those cases would have had to proceed in state court if the parties were not foreign states is not a "troubling" feature of the panel's decision, as PDVSA contends. Pet. 27. It is a deliberate feature of the FSIA.

There is no merit to Venezuela's argument that this approach "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." Pet. 28. Crystallex did not "hale" PDVSA "into court," *id.*; PDVSA *intervened* in a proceeding against Venezuela. Pet. App. 48a. And Crystallex did far more than "alleg[e]" that PDVSA was Venezuela's alter ego. It first overcame Venezuela's immunity and then *proved* that PDVSA was Venezuela's alter ego. To the extent that proof is also relevant to jurisdiction, the district court "always has jurisdiction to determine its own jurisdiction," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 (1998), even if jurisdiction overlaps with the merits. Venezuela well knows—because it argued successfully before this Court—that "where jurisdictional questions turn upon further factual development, the trial judge may take evidence and resolve relevant factual disputes," notwithstanding the foreign state's claim that that it is entitled to immunity under its view of those facts. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017).

Venezuela does not even attempt to present a circuit conflict as to this independent basis of jurisdiction. Although the panel found it dispositive that this case "involv[ed] foreign sovereigns," Pet. App. 16a, the petition fails to cite a single case addressing jurisdiction over an alter-ego proceeding against a foreign state. It offers no exception to the wide range of cases adjudicating alter-ego allegations against foreign states in post-judgment proceedings. *See supra*, at 15. With no split as to *either* of the alternative grounds for

subject-matter jurisdiction here, the Court should deny review.[1]

II. Venezuela's Alter-Ego Question Is Factbound And Splitless

Venezuela's challenge to the merits of the lower court's alter-ego determination fares no better. The court of appeals faithfully applied this Court's decisions in *Bancec* and *Rubin* to largely undisputed facts. Those decisions, and Petitioners' repeated concessions, undercut Venezuela's effort to rewrite the relevant test, and there is once again no circuit conflict that warrants this Court's intervention.

---

[1] Venezuela's incipient suggestion (in a footnote) that "[t]he FSIA supersedes" jurisdiction under § 1963, Pet. 18 n.4, is not expressed as a question presented, developed as an argument that supports a question presented, or developed at all, and is therefore forfeited. In any event, it is meritless. The panel based jurisdiction on the FSIA and ancillary jurisdiction, not § 1963. Pet. App. 11a-14a. The jurisdiction that Crystallex secured under the FSIA in obtaining its judgment against Venezuela extends to "[t]he district courts"—plural—not only the one district court where the underlying action was filed. 28 U.S.C. § 1330(a). Registering the judgment merely "continu[ed]" that action under the same font of jurisdiction. Pet. App. 14a. This Court has repeatedly exercised jurisdiction in cases involving the enforcement against foreign states of judgments registered under § 1963. *E.g.*, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1054 (2019); *Rubin*, 138 S. Ct. at 821; *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016). And Congress has ratified this practice by enacting legislation, 22 U.S.C. § 8772, for the sole purpose of facilitating a single, specific enforcement proceeding seeking specific assets *reachable only by registering a judgment against Iran under § 1963*, *Bank Markazi*, 136 S. Ct. at 1320—legislation that would have been a nullity if the judgments could not have been registered.

Under *Bancec*, the presumption that "instrumentalities of a foreign state are to be accorded … independent status … may be overcome" if either (1) the instrumentality "is so extensively controlled by its [sovereign] that a relationship of principal and agent is created," or (2) recognition of the instrumentality as a separate entity "'would work fraud or injustice.'" 462 U.S. at 627-29. PDVSA conceded in both the district court and court of appeals that these two prongs are "disjunctive," Pet. App. 71a n.14 (citing JA-2095-97); App. Ct. Oral Arg. Tr. ("Tr.") 76:17-19, meaning only *one* prong must be satisfied to establish alter-ego status, *Rubin*, 138 S. Ct. at 822. "[T]he Courts of Appeals [have] coalesced around … five factors" for "assessing the availability of [these] exceptions": (1) economic control by the government; (2) the instrumentality's profits go to the government; (3) government officials manage the entity or its daily affairs; (4) the government is the "'real beneficiary'" of the instrumentality's conduct; and (5) "'adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.'" *Id*. at 823 (quoting *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, 965 F.2d 1375, 1380 & n.7 (5th Cir. 1992)).

In the court of appeals, as here, Venezuela and PDVSA "d[id] not substantially contest the District Court's finding that it extensively controlled PDVSA." Pet. App. 3a. Indeed, they "effectively conceded" at oral argument that Crystallex satisfied all five *Rubin* factors. *Id*. at 32a. When prompted to address each factor "one by one," Tr. 97:22-98:5, PDVSA's counsel declined to refute *any* factor, Tr. 98:6-104:7, and instead assented to "dispens[ing] with the further discussion of the … factors," Tr. 104:8-12. The panel independently determined that each factor favored

Crystallex, Pet. App. 32a-39a, and together the factors "easily … satisf[ied] [*Bancec*'s] extensive-control requirement," *id.* at 44a.

Rather than disputing this overwhelming evidence of extensive control, the petition asserts a circuit split over whether "extensive control alone" is sufficient to satisfy *Bancec*. Pet. 24. Petitioners forfeited that argument, however, when they conceded that *Bancec*'s two prongs are disjunctive. *See supra*, at 25; JA-2096 (Q: "[Y]ou're saying that these two prongs of *Bancec* both have to be satisfied." A: "I'm not saying that."); JA-2096-97 (Q: "[Y]ou have not cited any cases that say you have to satisfy both prongs of *Bancec*?" A: "Correct."). Even the petition concedes Crystallex need only show "'extensiv[e] contro[l]' … *or* … 'fraud or injustice'"—not both. Pet. 4 (emphasis added). That concession leaves no room to *further* require a "nexus" between control and fraud or injustice. *Id.* at 21.

Venezuela's proposed "nexus" requirement would contravene *Bancec* and *Rubin*. As the panel observed, "no nexus existed" in *Bancec* "between the dominated instrumentality and the plaintiff's injury." Pet. App. 22a. To the contrary, *Bancec* expressly rejected a nexus requirement, reversing the Second Circuit's holding that alter-ego liability is limited to "state conduct in which the instrumentality had a key role." 462 U.S. at 619. Likewise "not a single factor recognized in *Rubin* suggests a link between the dominated instrumentality and the injury to the plaintiff." Pet. App. 23a. At oral argument, PDVSA's counsel could not point to any *Rubin* factor that supported a nexus requirement. Tr. 79:9-80:13. This Court's decisions

in *Bancec* and *Rubin* thus already dispose of Venezuela's second question and confirm that no nexus is required.[2]

Contrary to Venezuela's assertions, the Third Circuit did not "acknowledg[e]" a conflict with *Bridas*, Pet. 22, and there is no conflict. The panel merely recognized *Bridas*'s consideration of "state-law [alter-ego] requirements, many of which," according to the panel, "include a nexus requirement." Pet. App. 24a n.9. But everyone—including the Fifth Circuit—agrees that *Bancec* applies "'federal common law,'" *Bridas*, 447 F.3d at 416-18 & n.5. And as the district court recognized, the Fifth Circuit had no occasion to consider whether control alone is sufficient because "*both* portions of the [*Bancec*] test were satisfied" there. Pet. App. 71a n.14 (emphasis added); *see Bridas*, 447 F.3d at 416-20. While Venezuela concedes that "the Second Circuit has disregarded a foreign-state instrumentality's juridical independence on the basis of extensive control alone," Pet. 23 n.6 (citing *Kirschenbaum v. Assa Corp.*, 934 F.3d 191, 197 (2d Cir. 2019)), it cites no decision from any court that has refused to do the same.[3]

---

[2] Venezuela dismisses *Rubin*—in a footnote—as "not a veil piercing case." Pet. 26 n.7. But *Rubin* addressed *Bancec* at length in construing a statute (28 U.S.C. § 1610(g)) that provides an alternate basis for disregarding a foreign state instrumentality's corporate form in terrorism-related cases. 138 S. Ct. at 822-24, 826-27. This Court carefully considered the factors that apply under *Bancec* where § 1610(g) is not applicable, based on the consensus view of the courts of appeals—including the Fifth Circuit. *Id.* at 823-24.

[3] Like *Bridas*, neither *Janvey v. Libyan Investment Authority*, 840 F.3d 248 (5th Cir. 2016), nor the Eleventh Circuit's decision

Even if state law were relevant, it does not support a nexus requirement. Venezuela's own treatise recognizes that the alter-ego standard "var[ies] from jurisdiction to jurisdiction." 1 W.M. Fletcher, Cyclopedia of the Law of Private Corporations § 41 (rev. perm. ed. 1974). While "a number of courts *will* disregard the existence of a corporate entity" where extensive "control" of an alter ego "caused [an] injury," only a fraction of the sources cited in Venezuela's treatise consider that factor, *id.* & n.14 (emphasis added), while others do not, *e.g.*, *id.* nn. 13, 15. Indeed, Venezuela's treatise includes cases rejecting Venezuela's proposed requirement and holding, for example, that "'substantial disregard of the separate nature of … corporate entities" may warrant veil piercing even where "the plaintiff makes no claim of 'fraudulent or injurious consequence.'" *Scott v. NG U.S. 1, Inc.*, 881 N.E.2d 1125, 1132-33 (Mass. 2008). Even the Fifth Circuit has held that under Texas law, "if the shareholders themselves disregard the separation of the corporate enterprise, the law will also disregard it"—without the need to show "anything more … than the failure of the owners to maintain the corporation as a distinct legal entity." *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1288 (5th Cir. 1988) (quotation marks omitted).

---

in *Hercaire* involved or addressed "control alone." As the petition concedes, in *Janvey*, "there was no evidence of control" at all—either "'generally or with specific regard to" the transaction at issue.'" Pet. 23. And in *Hercaire*—which the petition consigns to a footnote—the Eleventh Circuit held that an alter-ego finding would be "unfair" because there was "no showing" of "extensive control" *and* the alleged alter ego had "no connection" to the "underlying transaction." 821 F.2d at 565.

In any event, the panel did not rely on "extensive control alone." Pet. 24. It held that even if some additional "equitable component" where required, Pet. App. 31a (heading), "it is easily satisfied here" for two independent reasons: (1) the inequity of letting Venezuela use PDVSA to access U.S. credit markets without exposing its assets to U.S. courts, *id.* at 32a, 38a-39a; and (2) because PDVSA "profited directly" from Venezuela's expropriation of Crystallex's mining rights when Venezuela transferred the mine to PDVSA "for no consideration," *id.* at 39a. Such unjust enrichment is a well-recognized basis for equitable relief. Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011).

Requiring anything more, as the panel explained, would "read the *Bancec* extensive-control test out of the doctrine." Pet. App. 24a. "When pressed at oral argument to identify the circumstances where *Bancec* could be applied" under its view of the law, "PDVSA offered two: under *Bancec*'s 'fraud or injustice' prong (*i.e.*, where a sovereign uses its instrumentality's separate status to perpetuate a fraud or injustice) or where the instrumentality was itself 'responsible on the arbitration award as a participant in the events.'" *Id*. (quoting Tr. 91:7-18). "But if the instrumentality were directly liable for the award, there would be no need to invoke *Bancec* at all." *Id*. Adopting Venezuela's position would thus nullify *Bancec*'s extensive-control test by confining it to circumstances where it is unnecessary. There is no basis to do so.

III. Venezuela's Political And Foreign Policy Arguments Present No Grounds For Review

Unable to meet the ordinary standard for Supreme Court review, Venezuela turns to foreign policy con-

sideration, Pet. 27-34, but those purported considerations only strengthen the case for denying certiorari and enforcing Crystallex's judgment without further delay.

Petitioners assert that in the absence of judicial enforcement of Crystallex's judgment, Venezuela will seek to force a "restructuring" of its debts on creditors rather than comply with its undisputed legal obligation to pay Crystallex immediately in full. Pet. 33. While Venezuela claims this restructuring will be "consensual," it concedes that creditors will not "participate … voluntar[ily]" unless this Court strips them of the remedies ordinarily available under the FSIA. *Id*. Venezuela has no "sovereign" right to force a cramdown of its debts on unwilling creditors. *Id*. It forfeited any right to "manag[e] … its monetary policy" in this way, *id*., when it expropriated Crystallex's mining interests in violation of international law and subjected itself to international arbitration and enforcement in U.S. courts.

The equities are not affected by the U.S. Treasury Department's statements that our government seeks to prevent "'plunder[ing]'" of Venezuela's assets by the Maduro regime and "'preserve such assets for Venezuelan people.'" Pet. 32. Enforcing the lawful and final judgments of our own courts is not "plunder." Regardless of whether the United States recognizes Juan Guaidó or somebody else as Venezuela's legitimate leader, Venezuela still owes Crystallex more than $1 billion on an unsatisfied judgment of the D.C. district court. "[T]he obligations of a foreign state are unimpaired by a change in that state's government." *Republic of Iraq v. ABB AG*, 768 F.3d 145, 164 (2d Cir. 2014) (citing *Comanche Cty. v. Lewis*, 133 U.S. 198, 205 (1890)); *see also* Moore's Digest International

Law, vol. 1, p. 249 ("[T]hough the government changes, the nation remains, with rights and obligations unimpaired."). Applying Venezuela's assets to satisfy that debt is consistent with Treasury Department statements.

Moreover, the Executive Branch, through OFAC, has published guidance explaining that parties in Crystallex's position must obtain a license before taking steps toward holding a judicial auction for their attached shares. *See* OFAC FAQ No. 809, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_other.aspx (last visited Apr. 9, 2020). Because current Treasury Department sanctions would prevent the transfer of title to the PDVH shares without an OFAC license, Pet. 32, it is clear that the United States will have an opportunity to assert any policy interests it may have in this dispute as part of that licensing process. The sanctions and licensing regime, however, is not a basis to pretermit the judgment-enforcement process.

There is similarly no basis for PDVSA's concern that the panel's interpretation of *Bancec* will expose assets of the United States to attachment in foreign countries. Pet. 29. The decision is premised on Venezuela's unique, longrunning disregard for the rule of law and PDVSA's corporate formalities, Pet. App. 44a—and this is obvious enough that not a single foreign government filed as *amicus* in support of Venezuela's position in this case. Further, the United States already made clear where its interests lie on this issue in *Bancec*: "Protecting overseas commerce and investment" by ensuring effective remedies against expropriation in the U.S. courts. U.S. *Amicus* Br. at 1-2, *First Nat'l City Bank v. Banco Para El*

Comercio Exterior de Cuba, 462 U.S. 611 (U.S. Dec. 1982).

In *Bancec*, the United States took the same position affirmed by the panel: State instrumentalities "should be considered [the state's] alter ego[s]" "when the sovereign exercises unfettered power to … control [them] and to assign their assets and liabilities free from legal constraints." U.S. *Bancec Amicus* Br. at 9; *see also id.* at 19 ("The Cuban government's close control over Bancec establishes that Bancec properly should be viewed as an alter ego of Cuba itself."). U.S. courts apply the same test to U.S. government instrumentalities, treating them "as one" with the government when it "retain[s] control over [their] finances, management, and operations." *Id.* at 18 (citing, *e.g.*, *Rainwater v. United States*, 356 U.S. 590, 591-92 (1958)). There is no conceivable policy interest in giving greater recognition to PDVSA than U.S. courts give to the U.S. government's own closely controlled instrumentalities.

In light of these prior statements and the specific actions already taken by the Treasury Department, there is no reason to suppose that calling for the views of the Solicitor General would be an especially helpful expression of Executive Branch policy in this case. The panel recognized as much, noting that even "[t]hough the U.S. State Department ha[d] not sought to provide a statement of interest," OFAC's licensing and sanctions tools "provide an explicit mechanism to account for" the ways that Crystallex's attachment and execution of the shares of PDVH might affect "U.S. foreign policy interests." Pet. App. 43a. In fact, the Executive Branch has consistently declined to express its views in these proceedings, despite repeated

entreaties from Venezuela that it do so. The Executive Branch has never sought to intervene in this case or argued that Crystallex is not entitled to prevail. That silence presumably reflects a recognition on the part of United States authorities that Venezuela stole Crystallex's property and drove the company into insolvency, and therefore deserves to pay for the stolen property that Venezuela now possesses. But whatever the government's motives, it is clear that the Executive Branch intends to participate through the OFAC licensing process, not by arguing in court that the judicial process should come out in a particular way.

What calling for the views of the Solicitor General would do, however—and why Venezuela requests it—is to delay this Court's decision on the petition. Venezuela knows that, were this Court to call for the views of the Solicitor General, the Solicitor General would have no deadline by which to file its invitation brief. And because the district court has stayed proceedings towards the eventual sale of the PDVH shares until this Court decides the petition, *see* Dist. Ct. Dkt. 154, Crystallex would be unable to execute on the attached property for perhaps a year or more while other creditors of Venezuela jockey for priority. Meanwhile, Crystallex's outstanding judgment of more than $1 billion remains unsecured by any bond because the lower courts denied Crystallex the usual, indeed mandatory, security of a supersedeas bond. *See* Fed. R. App. P. 8(a)(2)(E); Fed. R. Civ. P. 62(b). Rather than impede enforcement by pushing the resolution of the petition to next Term, causing further prejudice to Crystallex, this Court should deny certiorari without delay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT L. WEIGEL
RAHIM MOLOO
JASON W. MYATT
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MIGUEL A. ESTRADA
Counsel of Record
LUCAS C. TOWNSEND
MATTHEW S. ROZEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Respondent Crystallex International Corporation

April 13, 2020