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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

The Foreign Sovereign Immunities Act (FSIA) commands that a "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. The court of appeals transgressed that command twice over. First, the court held that federal courts need no independent basis of jurisdiction to impose alter-ego liability on instrumentalities of foreign states, thereby denying them the jurisdictional protections that this Court has prescribed for all other entities. Second, the court held that alter-ego liability may be imposed on such instrumentalities without any nexus between a foreign state's control over an instrumentality and the plaintiff's injury, denying foreign states the protections against veil piercing that apply at common law. Those erroneous rulings create circuit conflicts and threaten U.S. foreign-relations interests.

Crystallex does not defend the Third Circuit's decision on its own terms. Instead Crystallex muddies the waters, misstating both the holdings below and petitioners' arguments. To justify the court of appeals' ancillary jurisdiction ruling, Crystallex conjures a hypothetical alternative rationale that is absent from the court's opinion and irreconcilable with Crystallex's own alter-ego claim. And to defend the court's nexus ruling, Crystallex seeks to obscure the acknowledged conflict between the decision below and the Fifth Circuit by baselessly asserting that petitioners forfeited the argument and by mischaracterizing it.

Crystallex is also cavalier about the foreign-relations harms of the Third Circuit's decision. Wholly apart from the threat that the decision poses to the

fledgling Guaidó government, the decision subjects foreign states to a judgment-execution regime more onerous than the regime that applies to everyone else. But the FSIA limits judgment execution precisely because execution raises uniquely delicate foreign-relations issues. There is no merit to Crystallex's suggestion that the government's interests are protected by the OFAC licensing regime. The judgment-execution issues presented here will arise in situations in which OFAC has no role. And whatever OFAC's authority to license particular transactions, it is the FSIA that reflects Congress's overarching judgment about when, in view of comity and reciprocity concerns, U.S. courts should exercise jurisdiction over foreign sovereigns. The Third Circuit's constriction of FSIA immunity thus raises foreign-relations concerns that go far beyond those implicated by particular OFAC licensing requests. Those are precisely the kinds of concerns that warrant granting certiorari or, at minimum, requesting the views of the United States.

I. The Third Circuit's erroneous extension of ancillary enforcement jurisdiction creates a conflict that warrants review.

A. Crystallex does not dispute that this Court held in *Peacock* v. *Thomas* that federal courts lack ancillary enforcement jurisdiction over claims seeking "to impose liability for a money judgment" on a third party, and that alter-ego claims fall within that category. 516 U.S. 349, 351, 354 (1996). Nor does Crystallex dispute that the First, Second, Fourth, and Tenth Circuits have followed *Peacock* in requiring an independent basis of jurisdiction for claims seeking to enforce a judgment against an alleged alter ego. The

Third Circuit's decision directly conflicts with those decisions.

Rather than address that conflict, Crystallex mischaracterizes the holding below. As Crystallex would have it, the Third Circuit invoked alter-ego principles not to impose a "'new judgment' against the judgment debtor's alter ego," but only to "garnish[] 'specific property' that is 'nominally held in the alter ego's name.'" Opp. 14 (quoting Pet. App. 64a-65a) (alterations omitted). Crystallex's defense of the decision below bears no relation to what the Third Circuit decided, lacks any basis in existing law, and mischaracterizes the action Crystallex actually brought.

The court of appeals described the question before it as "whether PDVSA *could be liable for the arbitration award* as an 'alter ego' of Venezuela." Pet. App. 5a (emphasis added). That framing was correct: this Court has explained that where a "judgment holder seeks to satisfy a judgment held against the foreign state" by executing against the assets of a third-party instrumentality, *Bancec*'s alter-ego theory governs "*the liability* of agencies and instrumentalities of a foreign state." *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018) (emphasis added); accord *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983) (*Bancec*) (alter-ego theory allows one foreign sovereign entity to "be *held liable* for the actions of the other") (emphasis added). The Third Circuit, in upholding the district court's jurisdiction to execute against PDVSA's assets, thus squarely held that ancillary enforcement jurisdiction extends to an action to hold a third-party foreign sovereign instrumentality *liable* for a judgment as the state's alter ego. Pet. App. 14a-18a.

Tellingly, Crystallex cannot cite *a single precedent* that distinguishes between alter-ego claims to establish liability and alter-ego claims to garnish property. That is because, as court after court has explained, a judgment creditor's effort to enforce a judgment against a third party on an alter-ego theory "involve[s] a substantive theory *for imposing liability*." *E.g.*, *Futura Development of Puerto Rico, Inc.* v. *Estado Libre Asociado de Puerto Rico*, 144 F.3d 7, 12 (1st Cir. 1998) (emphasis added); Pet. 15-16. For that same reason, Crystallex's exposition of Delaware law (Opp. 15) is irrelevant. Those decisions do not address the distinction Crystallex would draw, and they do not involve federal ancillary jurisdiction.

In all events, Crystallex did not bring an action to garnish specific property. To prevail, Crystallex had to establish that the relationship between Venezuela and PDVSA justified treating the two as one for all purposes, Pet. App. 32a-39a—not that the PDVH shares are property of Venezuela in the hands of a third party, as would be the case in a garnishment action. See Pet. 20. Accordingly, the alter-ego finding enables Crystallex to attach *any* of PDVSA's assets if the PDVH shares are insufficient to satisfy the judgment. See, *e.g.*, *United States* v. *Bogart*, 715 F. App'x 161, 166 n.4 (3d Cir. 2017); *Harris* v. *United States*, 764 F.2d 1126, 1129 (5th Cir. 1985). That is the very definition of liability for the judgment.

Crystallex understands this perfectly well. It has instituted separate actions against PDVSA seeking other assets on the ground that PDVSA is an alter ego and is therefore "*liable* to Crystallex for the debts of Venezuela." Complaint ¶ 77 (emphasis added), *Crystallex Int'l Corp.* v. *PDV Holding Inc.*, 15-1082-LPS (D. Del.). Crystallex should not be heard to tell

this Court one thing and the district court something different.

B. Crystallex does not defend the Third Circuit's reasoning—no doubt because it cannot be defended. The court held that *Peacock*'s requirement of an independent basis of jurisdiction to impose alter-ego liability does not apply in a suit involving the FSIA. Pet App. 15a-16a. The court thus held that foreign sovereigns can be subjected to a federal court's ancillary jurisdiction in situations where private parties cannot. That is backwards. Because the FSIA's immunity provisions reflect a careful balancing of foreign-relations and comity concerns, it is *more* important in the FSIA context to ensure an independent basis for jurisdiction over each foreign-sovereign instrumentality.[1] See *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018). Crystallex has no response to that critical point.[2]

Instead of defending the Third Circuit's reasoning, Crystallex once again changes the subject, arguing that even if this action seeks to impose liability on a judgment and therefore requires an independent

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[1] *Rubin* does not support Crystallex. Contra Opp. 21. *Rubin* held that 28 U.S.C. 1610(g) enables enforcement of terrorism-related judgments against an instrumentality's non-immune property without regard to *Bancec*. See 138 S. Ct. at 826-827. *Rubin* did not consider whether a judgment holder must establish jurisdiction over the instrumentality under Section 1605.

[2] Crystallex cannot justify jurisdiction over Venezuela under 28 U.S.C. 1963, a statute that has been superseded by the FSIA in this context. See U.S. Br. 10, *Mobil Cerro Negro, Ltd.* v. *Bolivarian Republic of Venezuela*, 2016 WL 1319293 (2d Cir. Mar. 30, 2016) (FSIA supplants earlier-enacted jurisdictional statutes as applied to foreign states).

basis of jurisdiction over PDVSA, the FSIA's arbitration exception, 28 U.S.C. 1605(a)(6), supplies it. But the Third Circuit did not rely on that rationale, which is in all events meritless. The arbitration exception applies only to suits "in which the action is brought" to "confirm an [arbitral] award." *Ibid*. Crystallex already brought such an action in D.C. district court. In the Third Circuit, Crystallex described the instant case as an "enforcement action." Crystallex C.A. Br. 4, 17. It is therefore not an "action" to "confirm an award." And even if this were the sort of action to which Section 1605(a)(6) might apply, Crystallex would have to demonstrate that PDVSA is liable on the award rendered against Venezuela as Venezuela's alter ego—which Crystallex cannot do without proving a nexus between the putative alter ego's conduct and the underlying claim. See Part II, *infra*. The district court's finding that no such connection existed, Pet. App. 85a-87a, forecloses any possible reliance on Section 1605(a)(6).

II. The Third Circuit's incorrect holding that alter-ego standards require no nexus between the foreign state's control and the plaintiff's injury creates a conflict that warrants review.

Crystallex's argument on the "nexus" question attacks a straw man. Petitioners do not argue, as Crystallex contends, that the two prongs of the *Bancec* inquiry—"extensive control" and "fraud or injustice"—should be merged into one. The question is solely how *Bancec*'s "extensive control" prong should be *applied*—that is, whether "extensive control" in an FSIA case should have the same meaning that it has in the common law, which requires a nexus between control of the alter ego and the plaintiff's

injury. The Third Circuit articulated the argument in precisely those terms, rejected it, and acknowledged that its ruling creates a conflict with the Fifth Circuit. Pet. App. 22a-25a; *id.* at 24a n.9. This Court's resolution of that conflict is manifestly warranted.

A. Petitioners contend that *Bancec*'s "extensive control" test requires proof of a nexus between the foreign sovereign's control over its instrumentality and the plaintiff's injuries. Pet. 24. That requirement does not collapse the two *Bancec* prongs. Such a nexus can exist in the absence of the kind of "fraud or injustice" that *Bancec* discusses—for example, where a foreign sovereign uses extensive control to manage the instrumentality's assets in a manner that violates a contractual obligation. The district court expressly found that no such link exists here. Pet. 17.

Petitioners advanced the "nexus" argument below, see, *e.g.*, PDVSA C.A. Br. 21-22, 39-45; Venezuela C.A. Br. 23—and the Third Circuit understood and addressed it, holding "*Bancec*'s extensive control prong does not require a nexus between the plaintiff's injury and the instrumentality," Pet. App. 22a. The court understood that petitioners' nexus argument did not seek to merge the *Bancec* prongs. Indeed, the court treated separately from the nexus argument an entirely distinct, alternative argument that petitioners do not advance here: that "some element of unfairness" is a "necessary factor in an extensive-control inquiry." *Id*. at 31a; compare *id*. at 22a, with *id*. at 31a.

B. The Fifth Circuit has required a nexus in an FSIA case applying *Bancec*'s "extensive control" analysis. See *Bridas S.A.P.I.C.* v. *Government of Turk-*

menistan, 447 F.3d 411, 416 (5th Cir. 2006) (*Bridas II*). That decision is irreconcilable with the decision below. See Pet. 23.

Crystallex offers no basis for concluding otherwise. Crystallex suggests (Opp. 26) that *Bridas II* did not grapple with the fact that *Bancec* involves federal common law. But federal common law routinely draws on state law, especially in corporate-law matters where parties hold settled expectations. See *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991). The Fifth Circuit thus consulted established corporate-law principles to shape federal common law, just as this Court did in *Bancec*, see 462 U.S. at 628-629 & n.19—and just as the decision below declined to do.

Crystallex also suggests (Opp. 26) that *Bridas II*'s nexus holding is dicta because the Fifth Circuit also found "fraud or injustice" in that case. That is incorrect. The nexus-related analysis operates as a holding, regardless of any alternative holding. See *Whitaker* v. *Collier*, 862 F.3d 490, 496 n.14 (5th Cir. 2017).

Finally, Crystallex disputes (Opp. 27) that the nexus requirement is deeply rooted in common-law analyses of extensive control. But the petition documents widespread acceptance of that requirement, Pet. 25, and the Third Circuit acknowledged as much, see Pet. App. 24a n.9. The treatise on which *Bancec* relied recognizes that corporate separateness should be maintained unless "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); see *id.* § 43. And one of the cases that Crystallex cites actually articulates the same rule. See *Scott* v. *NG U.S. 1, Inc.*, 881 N.E.2d 1125, 1132 (Mass. 2008) (quoting Fletcher

treatise). The question for this Court is the same one presented by the conflict between *Bridas II* and the decision below: whether satisfying *Bancec*'s "extensive control" test requires abiding by that common-law consensus.

C. On the merits, Crystallex insists that *Bancec* and *Rubin* already decided that the "extensive control" test does not include any nexus requirement. That is wrong. The issue remains open—and that lack of clarity and predictability is especially harmful in the FSIA context. See Pet. 30-31.

1. *Bancec* had no occasion to apply the "extensive control" test, because the Court decided that—regardless of whether such control existed—the veil should be pierced to prevent a "fraud or injustice." 462 U.S. at 629-634. It is true, as Crystallex notes, that the Second Circuit decision under review in *Bancec* had declined to find alter-ego liability because the alleged wrongs were unrelated to the government's control of the instrumentality. *Id.* at 619. But *Bancec*, in reversing on the basis of "fraud or injustice," certainly did not sub silentio reject a nexus requirement as to the "extensive control" test—especially given that the Court otherwise drew on the common law to delineate alter-ego standards. See *id.* at 628.

Rubin is no more supportive of Crystallex's position. This Court had no reason to consider, much less resolve, the nexus issue in that case because—as Crystallex appears to realize, Opp. 26 n.2—the case did not involve alter-ego liability at all, see Pet. 26 n.7.

2. Crystallex also argues that a nexus requirement would unduly narrow *Bancec*'s extensive-control test. Opp. 28. But the common law contains just

such a requirement, and that law operates to pierce the corporate veil when warranted. See, *e.g.*, *Papo* v. *Aglo Restaurants of San Jose, Inc.*, 386 N.W.2d 177, 185 & n.15 (Mich. Ct. App. 1986). In contrast, dispensing with any nexus requirement would detach the *Bancec* test from the common law in which it is rooted. Foreign sovereigns and their instrumentalities would be treated less favorably than their private counterparts, thus raising serious comity and reciprocity concerns and contravening a statutory command, see 28 U.S.C. 1606; *Bancec*, 462 U.S. at 626—a problem as to which Crystallex is silent.

III. This Court's review is urgently needed.

The Third Circuit's decision substantially increases the exposure of the assets of foreign-state instrumentalities to execution, thereby raising significant comity, reciprocity, and other foreign-relations concerns—concerns that are particularly acute because that decision will govern federal actions filed in Delaware, where many such instrumentalities are incorporated.

Crystallex contends (Opp. 29) that foreign relations concerns are immaterial given its mistreatment by the Maduro regime and the judgment it obtained as a result. The same could be said whenever a party seeks to execute on a previously obtained judgment against a foreign sovereign. Yet the FSIA circumscribes judgment execution precisely because execution threatens an even greater affront to sovereign dignity than adjudication of the action itself. *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 866 (2008). The questions presented here go to the heart of those concerns. Pet. 27-31.

Crystallex next proffers several arguments that the decision below does not threaten U.S. comity and reciprocity interests. Each is wrong. Contrary to Crystallex's argument (Opp. 29), the United States' strong interest in the Guaidó government's ability to restructure its sovereign debt is not lessened by private parties' possession of U.S. judgments against Venezuela. See U.S. Br., *Aurelius Capital Master, Ltd.* v. *Republic of Argentina*, 2016 WL 1267524, at *4 (2d Cir. Mar. 23, 2016). Nor does the United States' position in *Bancec* suggest agreement with the decision below (Opp. 31); there, the United States emphasized Bancec's direct contribution to the plaintiff's injury. U.S. *Bancec* Amicus Br. 23-24. No such nexus exists here.

Falling back, Crystallex asserts (Opp. 30) that OFAC's licensing process will permit the United States "to assert any policy interests it may have." But Crystallex said the opposite below, arguing that OFAC's role is minimal and limited to approving the identity of a specific buyer. See, *e.g.*, Crystallex Letter Br. 2-3, No. 17-MC-00151 (D. Del. Nov. 25, 2019). More to the point, it is the FSIA, not the OFAC regime, that expresses Congress's judgment about how to balance diplomatic and foreign-relations interests against the interest in enforcing judgments. And the FSIA grants PDVSA immunity from suit, which further proceedings would vitiate; OFAC's licensing process is no substitute for that immunity.

Finally, Crystallex contends (Opp. 32) that the views of the United States on these questions can be inferred from the government's failure to participate uninvited below. But it is common knowledge that the government files uninvited only in rare circumstances not implicated here, regardless of the

strength of its interest or its disagreement with the decision. Indeed, the district court recently invited the United States to participate in any further judgment-execution proceedings in that court. Order 25, No. 17-MC-00151 (Dec. 12, 2019). As that request indicates, U.S. foreign-relations interests are directly at stake in this case. There is, however, no need to read tea leaves. If this Court concludes that it would benefit from receiving the views of the United States before granting certiorari, the Court can simply invite the Solicitor General to provide them.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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