No. 22-

IN THE

Supreme Court of the United States

PDVSA U.S. LITIGATION TRUST, *et al.*,

Petitioners,

v.

LUKOIL PAN AMERICAS, LLC, LUKOIL PETROLEUM, LTD., COLONIAL OIL INDUSTRIES, INC., COLONIAL GROUP, INC., GLENCORE, LTD., *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the application of the political question doctrine deprives a court of subject matter jurisdiction.

2. Whether a lack of subject matter jurisdiction at the time of the district court's decision can be cured at any time thereafter, including when the Executive Branch changes its position with regard to recognition of a foreign government.

PARTIES TO THE PROCEEDING

Petitioners are: Petróleos de Venezuela, S.A. (Movant-Appellant) and PDVSA US Litigation Trust (Plaintiff-Appellant).

Respondents, all of whom were Defendants-Appellees below, are: Alvarez, Luis; BAC Florida Bank; Baquero, Leonardo; Colonial Group, Inc.; Colonial Oil Industries, Inc.; De la Vega, Sergio; Gabaldon, Gustavo; Glencore Energy UK Ltd.; Glencore Ltd.; Helsinge Holdings, LLC; Helsinge, Inc.; Helsinge, Ltd.; Larocca, Jose; Liendo, Luis; LUKOIL Pan Americas LLC; LUKOIL Petroleum, Ltd.; Lutz, Daniel; Maarraoui, Antonio; Morillo, Francisco; Poveda, Maximiliano; Rodriguez, Maria Fernanda; Rosado, Paul; Ryan, John; Trafigura Trading, LLC; Vitol Energy (Bermuda) Ltd.; and Vitol Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petróleos de Venezuela, S.A. and PDVSA US Litigation Trust ("Petitioners") certify that Petitioners are not a subsidiary or affiliate of a publicly owned corporation, and that Petitioners are not aware of any publicly owned corporation, not a party to the litigation, that has a financial interest in the outcome of this case.

RELATED PROCEEDINGS

PDVSA US Litig. Trust, et al. v. Lukoil Pan Americas LLC, et al., No. 22-10675, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered March 13, 2023.

PDVSA US Litig. Trust, et al. v. Lukoil Pan Americas LLC, et al., No. 1:18-cv-20818-DPG, U.S. District Court for the Southern District of Florida. Judgment entered February 2, 2022.

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JURISDICTION

The Eleventh Circuit decision affirming the order denying the motion of Petitioner Petróleos de Venezuela, S.A. ("PDVSA") to be substituted as the real party in interest and to intervene was entered on March 13, 2023. Petitioners timely bring this Petition for a Writ of Certiorari.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This Petition seeks review of two important interrelated issues that have both engendered substantial confusion and conflicting decisions in the lower courts. First, where a court decides that it must apply the political question doctrine, does it thereby lose subject matter jurisdiction? Second, even if application of the political question doctrine deprives the court of subject matter jurisdiction, can the lack of subject matter jurisdiction be cured if the Executive Branch changes its position with regard to the legitimacy of a foreign government in question?

Both questions are raised in this appeal, in which PDVSA, the Venezuelan state-owned oil company, seeks damages from corrupt former officers and their co-conspirators, doing business in the United States, who looted billions of dollars from the company through bid-rigging, fraud, and theft of assets. Originally, PDVSA brought the case in the United States by creating a litigation trust under New York law, to which it assigned its claims against the defendants, so that the litigation would be protected from political influence in Venezuela and to ensure that any recovery went to the Venezuelan people and not to corrupt private interests.

After the lower courts found that the assignment to the Trust was invalid because it violated New York's law of champerty, PDVSA, through its board, sought to intervene directly in the case. The Eleventh Circuit held that the courts lack subject matter jurisdiction to consider PDVSA's intervention because, at the time the intervention motion was heard by the district court, the United States recognized the so-called Guaidó government of Venezuela and not the Maduro government, while the PDVSA board seeking intervention was appointed by Maduro. Because the Guaidó government no longer exists, having been dissolved by the Venezuelan National Assembly, and the State Department now allows American oil companies to contract with the Maduro-controlled PDVSA, PDVSA asked the Eleventh Circuit to remand the case to the district court to consider the Executive Branch's current changed position with regard to recognition of the Maduro-appointed PDVSA board.

The Eleventh Circuit held, however, that any change in the Executive Branch's position was irrelevant because the

Maduro government was not recognized when the district court dismissed the case. The Eleventh Circuit based its ruling on its conclusion that subject matter jurisdiction must exist at all times during the pendency of an action. This is an issue on which the lower courts are sharply divided and which should be resolved by this Court.

Further, there exists confusion in the lower courts as to whether the presence of a political question deprives the federal courts of subject matter jurisdiction. This Court's decision in *Baker v. Carr* appears to resolve that issue, but some lower courts have expressly held that the presence of a political question deprives the court of subject matter jurisdiction.

Accordingly, this case presents two issues: (1) whether invocation of the political question doctrine deprives the federal courts of subject matter jurisdiction, or is merely a means by which the court defers to the judgment of other branches of government on certain issues; and (2) *even if* the presence of a political question deprives a court of subject matter jurisdiction, whether the absence of jurisdiction can be cured by a change in the Executive Branch's position with regard to the recognition of a foreign government.

STATEMENT OF THE CASE

In March 2018, Petitioner PDVSA US Litigation Trust (the "Trust"), of which PDVSA was the grantor and sole beneficiary, filed a complaint in the District Court for the Southern District of Florida alleging that Respondents perpetrated a multi-billion dollar fraud on PDVSA, the Venezuelan state oil company and, by extension, the

people of Venezuela. Respondents bribed numerous people to obtain proprietary information concerning PDVSA's oil trading operations, which they conspired to use to manipulate the pricing of purchases and sales of crude oil and of hydrocarbon products. Respondents Francisco Morillo and Leonardo Baquero, former PDVSA executives, hacked into PDVSA's computers, stole information concerning PDVSA's bid solicitations for purchase and sale of oil products, provided the information to Respondent oil traders in exchange for large kickbacks, and colluded to rig bids. As a result, PDVSA suffered billions of dollars in losses.

PDVSA brought the lawsuit through the Trust in order to insulate its efforts to hold Respondents accountable from the political and economic instability and rampant corruption in Venezuelan government and society. To further protect the Venezuelan people, the Trust would hold the proceeds of any recovery until the Venezuelan crisis is resolved and the distribution of assets recovered by the Trust in the litigation is approved by the U.S. Treasury Department.

On March 3, 2018, the Trust moved for a preliminary injunction to prevent Respondents from destroying evidence and dissipating assets given their demonstrated history of doing both. In opposing the motion, Respondents argued in part that the Trust lacked standing. The district court referred the issue of the Trust's standing to a magistrate judge who, after discovery and a hearing, recommended dismissal on November 5, 2018 for lack of standing and subject matter jurisdiction. On March 19, 2019, the district court affirmed the dismissal over the Trust's timely objections. The district court agreed

with the magistrate judge that the Trust had failed to authenticate the agreement by which PDVSA had assigned its claims to the Trust, and held that in any event, the assignment was champertous under New York law. Petitioners appealed to the Eleventh Circuit which affirmed only on the basis of champerty on March 18, 2021. *PDVSA US Litig. Trust v. Lukoil Pan Ams., LLC*, 991 F.3d 1187, 1193–1197 (11th Cir. 2021). On October 4, 2021, Petitioners filed a petition for a writ of certiorari, which this Court denied on November 8, 2021. *PDVSA US Litig. Trust v. Lukoil Pan Americas, LLC,* 142 S. Ct. 466 (2021).

During the pendency of this action, the position of the United States regarding recognition of the Venezuelan government has shifted. At the outset, the United States formally and exclusively recognized the government headed by President Nicolás Maduro as the legitimate government of Venezuela. It was not until January 2019, after Maduro's term expired and the National Assembly declared the office of the presidency vacant and declared Juan Guaidó to be Interim President, that the United States withdrew its recognition of the Maduro government. The United States recognized Guaidó as Venezuela's president and persons appointed by him as Venezuelan government officials.

More recently, however, the position of the United States has changed substantially. In March 2022, United States officials traveled to Venezuela to meet with Maduro and, subsequently, met with Guaidó officials to foster negotiations. The United States then began lifting economic sanctions against Venezuela and the Maduro administration, renewed the license of Chevron Corporation to operate in Venezuela by contracting with

PDVSA, and allowed European oil companies to resume business with PDVSA. The United States sought to work out a deal with the Maduro and Guaidó administrations to release hundreds of millions of dollars in Venezuelan state funds that had been frozen in banks in the United States. In October 2022, the United States freed two relatives of Maduro in a prisoner exchange to further negotiations with Maduro and promote democratic elections in 2024.

On December 30, 2022, the Venezuelan National Assembly voted to terminate the interim government of Guaidó and remove him as president, effective January 4, 2023. As a result, the Venezuelan embassy in Washington, D.C., led by Guaidó officials, immediately suspended operations and on February 6, 2023, the U.S. State Department took control of the Venezuelan embassy and official residences in D.C. and New York.

Meanwhile, in the underlying action, on May 18, 2021, with express authority from the Board of Directors appointed by the Maduro government, PDVSA moved in the district court for relief from the March 19, 2019 judgment and to be substituted as the real party in interest under Federal Rules of Civil Procedure 17(a) and 60(b). PDVSA sought to interpose a complaint that was substantively identical to the complaint brought by the Trust in March 2018. On February 2, 2022, the district court denied the motion, holding that it had no jurisdiction to allow PDVSA to intervene.

On March 1, 2022, Petitioners appealed, arguing that the district court had jurisdiction to allow substitution after the assignment to the Trust was invalidated. Petitioners cited extensive case law holding that, under

Rule 17(a)(3), a court has subject matter jurisdiction to substitute the real party in interest even though the original party lacked standing, particularly where, as here, there is clear common interest between the original party and the proposed new plaintiff. With respect to Respondents' political question defense, PDVSA argued that the action should be remanded to the district court to conduct further findings of fact addressing the current position of the Biden administration with regard to the recognition of the Maduro-appointed PDVSA board.

On March 13, 2023, the Eleventh Circuit affirmed the denial of Petitioners' substitution motion. The Eleventh Circuit did not address Petitioners' arguments relating to substitution. Rather, it decided the appeal on political question grounds, based on the fact that, at the time of the district court's February 2, 2022 opinion, the United States recognized the National Assembly and its designated interim president Guaidó as Venezuela's legitimate government. The Eleventh Circuit concluded, "And even if the Department of State declared today that the Maduro entity is authorized to bring suit in Petróleos de Venezuela's name, we would still affirm because, under Article III, a justiciable case or controversy must exist 'through all stages of the litigation,' including 'at the time the complaint is filed.'" App'x A at 11a (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 169 (2016)).

REASONS FOR GRANTING THE PETITION

I. THE PRESENCE OF A "POLITICAL QUESTION" DOES NOT DEPRIVE THE COURT OF SUBJECT MATTER JURISDICTION.

> Much that is said about the political question doctrine is wrong. The doctrine as the Supreme Court has developed it is not a limit on the subject matter jurisdiction of the federal courts. It is, however, a limit on judicial power in its relations with political power. . . . A substantial number of lower court decisions have seriously misunderstood the doctrine by treating it as a limit on subject matter jurisdiction. In the name of the political question doctrine, lower courts have refused to reach the merits of claims on grounds that have no foundation in the Court's cases or Article III.

John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457, 457 (2017).

The decision below is a perfect example of the confusion Professor Harrison describes, which is prevalent in the lower courts. Although the issue should have been settled by the Court's discussion in *Baker v. Carr*, 369 U.S. 186 (1962), the lower courts have failed to follow that clear lead. In *Baker*, the complaint alleged that Tennessee's apportionment of Congressional districts deprived voters of equal protection by effectively giving their votes vastly different weights. In holding that the claim was justiciable, the Court expressly distinguished between lack of justiciability arising from a political question and lack of subject matter jurisdiction:

> The distinction between the two grounds is significant. In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded. In the instance of lack of jurisdiction the cause either does not 'arise under' the Federal Constitution, laws or treaties (or fall within one of the other enumerated categories of Art. III, s 2), or is not a 'case or controversy' within the meaning of that section; or the cause is not one described by any jurisdictional statute.

Id. at 198. Because the complaint alleged denial of equal protection, the complaint clearly asserted a claim under the Fourteenth Amendment and was within the jurisdictional scope of 28 U.S.C. § 1343. *Id.* at 199.

Said the Court, "[d]ismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would, therefore, be justified only if that claim were so attenuated and unsubstantial as to be absolutely devoid of merit or frivolous." *Id.* at 198 (internal quotation marks and citations omitted). The Court further explained that, as in an earlier case, "the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution

and laws of the United States.'" *Id.* at 199–200 (quoting *Swafford v. Templeton*, 185 U.S. 487, 493 (1902)).

The Court then went on, in a separate section, to hold that the political question doctrine did not foreclose passing on the constitutionality of legislative apportionment. In addressing that issue, the Court explained that, of necessity, some consideration of the merits had to be made:

> In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.

Id. at 198. This analysis requires a "discriminating inquiry into the precise facts and posture of the particular case" before the court can determine whether to defer to the political decisions of another branch. *Id.* at 217. The Court identified six factors to consider in making this "discriminating inquiry,"[1] and concluded that the political

1. The six factors are: "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; [2] "a lack of judicially discoverable and manageable standards for resolving it"; [3] "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; [4] "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; [5] "an unusual need for unquestioning adherence to a political decision already made"; or [6] "the potentiality of embarrassment from multifarious pronouncements

question doctrine did not prevent deciding the case on the merits. *Id.* at 208–38. Even Justice Frankfurter's dissent recognized that there was a distinction between subject matter jurisdiction and political question:

> Although the District Court had jurisdiction in the very restricted sense of power to determine whether it could adjudicate the claim, the case is of that class of political controversy which, by the nature of its subject, is unfit for federal judicial action.

Id. at 330.

As Professor Harrison explains, this Court has exercised subject matter jurisdiction in a number of cases, even after applying the political question doctrine to foreclose inquiry into an action taken by another branch of government. The application of that doctrine merely applies "non-judicial finality" to the other branch's decision, but it does not deprive the courts of subject matter jurisdiction to address the merits of the case. Harrison, *supra* 8 at 468. This is no different from applying *res judicata* or declaring that a party is not entitled to equitable relief because it has failed to establish irreparable injury. *Id.* at 487–88.

For example, in *Luther v. Borden*, 48 U.S. 1 (1849), this Court held that a determination of the proper government of Rhode Island was a political question, but it went on to resolve the underlying trespass issue, accepting

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by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

the presumptive validity of the government that took the challenged action. In *Marshall Field & Company v. Clark*, 143 U.S. 649 (1892), the Court declined to inquire into the procedure by which a bill was passed by Congress, and proceeded to decide the case based on such presumed validity. And in *Williams v. Suffolk Insurance Company*, 38 U.S. 415 (1839), the Court decided the merits of an insurance claim after deferring to the Executive Branch as to the validity of Argentina's claim over the Falkland Islands.

A more recent example is *United States v. Belmont*, 301 U.S. 324 (1937), which involved a compact between the Soviet Union and the United States. The political question doctrine foreclosed challenge to the Executive's decision to enter the compact and its validity, but it did not deprive the courts of subject matter jurisdiction; the Court went on to decide the rights of the U.S. government (as a creditor, not a sovereign) vis-à-vis multiple other parties which also asserted claims to the corporation's assets. If the political question concerning the compact's validity went to the question of subject matter jurisdiction, the Court would have been duty bound to dismiss the action entirely without addressing any party's rights. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (noting the longstanding principle that, "[w]ithout jurisdiction, the court cannot proceed at all in any cause"). A few years ago, in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502 (2019), this Court undertook an extensive analysis before concluding that it could not grant relief to plaintiffs, who were challenging legislative gerrymandering because there were no "judicially discernible and manageable" means of distinguishing "fair" reapportionment from improper gerrymandering, and therefore the issue was

a political question. But in reaching that conclusion, the Court necessarily was exercising subject matter jurisdiction over the case. Otherwise, it would not have undertaken that analysis.

Yet, many lower courts have ignored the discussion in *Baker* and have equated the political question doctrine with subject matter jurisdiction. *See e.g.*, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1288 (11th Cir. 2008) (affirming dismissal for lack of subject matter jurisdiction after concluding that a political question was implicated); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 982 (9th Cir. 2007) ("We hold that if a case presents a political question, we lack subject matter jurisdiction to decide that question."); *Schneider v. Kissinger*, 412 F.3d 190, 198 (D.C. Cir. 2005) (court lacked subject matter jurisdiction because substantive claims were barred by political question doctrine).[2]

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2. Such erroneous logic may have been the result of confusing dicta from this Court. For example, in *Rucho*, this Court stated that, where the political question doctrine applies, the issue is "nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction." 139 S. Ct. at 2494 (citing *Baker*, 369 U.S. at 217). Presumably, use of the word "jurisdiction" did not refer to subject matter jurisdiction, since *Baker* clearly concludes otherwise, but rather to nonjusticiability which is discussed on the cited page in *Baker*. *See also* Harrison, *supra* 8 at 485–86, n.162, and Elizabeth Earle Beske, *Political Question Disconnects*, 67 Am. U. L. Rev. F. 35, 44–46 (2018), for other examples of confusing dicta. As Professor Beske concludes:

> At day's end, Professor Harrison definitely has unearthed a fascinating disconnect between what the Supreme Court has tended to *say* and what it has tended to *do*. The Court has repeatedly characterized

This Court has cautioned lower courts not to make "drive-by jurisdictional rulings . . . which too easily can miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (internal quotation marks omitted). The Court has further clarified that "the term jurisdictional properly applies only to prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) implicating that authority." *Id.* at 160–61 (internal quotation marks omitted). "Jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Id.* at 161 (internal quotation marks and citations omitted).

The present case, like so many political question cases, is a "class[] of case[]" (*id.* at 160) — seeking recovery of damages for bid-rigging, fraud and theft — which is well within a federal court's subject matter jurisdiction. The political question only affects PDVSA's right to obtain relief for those wrongs, which implicates issues relating to the Executive's decision as to who is the recognized Venezuelan government. As in the typical political question case, a case or controversy exists, and PDVSA has an injury that is traceable to the acts of the defendants

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> the political question doctrine as a species of justiciability doctrine and has hinted, in so doing, that it, like standing or mootness, goes to subject matter jurisdiction. And yet, in the limited data points in which at least five members of the Court have actually found a political question, the Court has not walked the walk.

Beske, *supra* note 2, at 45–46.

that could be remedied by a decision in its favor. The court may ultimately deny the requested relief because it will not second-guess the appropriateness of the intervening act of another branch, but its subject matter jurisdiction over the controversy is not in question. But by incorrectly characterizing the issue as one of subject matter jurisdiction, the court of appeals avoided the necessity of inquiring into the Executive Branch's current position on the recognition of PDVSA, even though doing so is essential to application of the political question doctrine.

Finally, treating the presence of a political question as a lack of subject matter jurisdiction raises several serious jurisprudential problems. First, because it involves subject matter jurisdiction, the political question defense could be raised at any time, even after verdict and appeal. Second, a court would be required to address the political question issue *ab initio* and *sua sponte*, before it addressed any issue in the case. Third, the result in a case possibly could be collaterally attacked, even if neither party ever raised the political question issue in the original action. *See* Restatement (Second) of Judgments § 12 and comments thereto. Fourth, and ironically, a court would be obligated to decide whether a political question is involved, even if the Executive Branch believed otherwise, since it is a court's non-delegable duty to decide if it has subject matter jurisdiction.

This Court should resolve the uncertainty and conflicting decisions in the lower courts, exemplified by the court of appeals in this case, and expressly reaffirm the holding in *Baker v. Carr* — that the application of the political question doctrine in a particular case does not deprive the court of subject matter jurisdiction.

II. THE COURT SHOULD RESOLVE THE CONFLICT AS TO WHETHER THE COURTS MAY CONSIDER CHANGES IN THE EXECUTIVE'S RECOGNITION POLICY THAT OCCUR DURING THE COURSE OF LITIGATION.

Because the political question doctrine did not deprive the courts below of subject matter jurisdiction, the Executive Branch's most recent position as to recognition should be determined and the case decided on that basis. This Court has never held that in applying the political question doctrine, the Executive's position at a particular point in a case is binding on the parties, if that position changes during the course of the litigation. For example, in *Oetjen v. Central Leather Company*, 246 U.S. 297 (1918), the Court decided the case based on the Executive's then-current position as to recognition of the government of Mexico, not its position at any earlier stage of the case. In *Oetjen*, the plaintiff was suing for the value of hides that had been seized by General Pancho Villa at a time when he was acting for a revolutionary Mexican government that was not recognized by the United States. After the trial, but before this Court decided the case, the U.S. formally recognized the Villa faction as the government of Mexico. The Court held that the subsequent recognition of the revolutionary government was binding on U.S. courts, and, under the act-of-state doctrine, the seizure could not be challenged. This was so even though that government was not recognized at the time of either the seizure or during earlier phases of the litigation. *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417 (1964) (describing the sequence of events in *Oetjen*); *United States v. Pink*, 315 U.S. 203, 233 (1942) (expressly reaffirming the holding in *Oetjen*); *Belmont*, 301 U.S. at 328–29 (retroactively

affirming acts of the Soviet government after it was recognized by the United States). "When a revolutionary government is recognized as a de jure government, 'such recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence.'" *Pink*, 315 U.S. at 233 (quoting *Oetjen*, 246 U.S. at 303).

Under this line of cases, the new position of the United States toward the Maduro regime should have been applied by the Eleventh Circuit, even though the Maduro-appointed PDVSA board was not recognized when PDVSA sought intervention, or when the district court ruled that it lacked subject matter jurisdiction. The Eleventh Circuit, however, dismissed the Executive's current position as irrelevant because it invoked the maxim that subject matter jurisdiction must exist at every phase of the litigation.

But that principle has not been consistently applied by the lower courts and has led to contradictory results. There is a clear circuit conflict on whether a defect in subject matter jurisdiction caused by the original plaintiff's lack of Article III standing can be cured by the intervention of the proper, real party in interest under Rule 17(a)(3). *See Fund Liquidation Holdings, LLC v. Bank of Am. Corp.*, 991 F.3d 370, 389 (2d Cir. 2020) (it would be "nonsensical" to decide jurisdiction based on the nominal plaintiff where there is a real party in interest that may be substituted "with the stake in the controversy"); *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 11 (2d Cir. 1997) ("corporation should have been permitted to amend complaint to substitute shareholders" as the real party in interest); *Delta Coal Program v. Libman*, 743 F.2d 852,

854 (11th Cir. 1984) (limited partnership that represented investors' interests and alleged injury in connection with those interests could invoke jurisdiction even though the original plaintiff lacked standing). *But see House v. Mitra QSR KNE LLC*, 796 F. App'x 783, 784 (4th Cir. 2019) (naming decedent, who lacked legal existence, as plaintiff was a jurisdictional defect that could not be cured through substitution of decedent's personal representative); *Zurich Ins. Co. v. Logitrans, Inc.*, 297 F.3d 528, 531 (6th Cir. 2002) (proper insurer could not be substituted for the original plaintiff because original plaintiff had no standing, thus, there was no jurisdictional basis to add the correct insurance company). *Compare Glennborough Homeowners Ass'n v. U.S. Postal Serv.*, No. 20-12526, 2021 WL 858730, at *4 (E.D. Mich. Mar. 8, 2021), *aff'd,* 21 F.4th 410 (6th Cir. 2021) (dismissing case where plaintiff lacked standing and rejecting request to substitute the real party in interest), *with Advanced Reimbursement Solutions LLC v. Aetna Life Ins. Co.*, No. CV-19-05395-PHX-DJH, 2022 WL 2220228, at *2 (D. Ariz. June 21, 2022) (permitting substitution of the real party in interest where original plaintiff did not have standing).

The timing of when subject matter jurisdiction must be ascertained also is the subject of conflicting decisions when addressing diversity jurisdiction. Many courts hold that diversity must be present from the commencement of the case. *See, e.g.*, *U.S. Life Ins. Co. in City of N.Y. v. Holtzman*, 723 F. App'x 141, 144 (3d Cir. 2018) ("The existence of diversity jurisdiction is generally determined at the time the complaint is filed.") (collecting cases); *Disability Advocates, Inc. v. N.Y. Coal. for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012) ("We have long recognized that if jurisdiction is lacking

at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim.") (internal quotation marks omitted); *Harris v. Garner*, 216 F.3d 970, 983 (11th Cir. 2000) ("It is well established that the only citizenship of the original parties that matters for purposes of determining whether diversity jurisdiction exists is their citizenship at the time the lawsuit is filed; any changes in a party's citizenship that occur after filing are irrelevant."); *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 954 (5th Cir. 1994) ("Subject matter jurisdiction is determined at the time that the complaint is filed."); *Rosa v. Resolution Trust Corp.*, 938 F.2d 383, 392 n.12 (3d Cir. 1991) ("It is a firmly established rule that subject matter jurisdiction is tested as of the time of the filing of the complaint.").

Yet, many other courts have recognized that absence of diversity jurisdiction can be cured by the removal of a non-diverse party. *See Mid-Continent Cas. Co. v. JWN Constr., Inc.*, 823 F. App'x 923, 927–28 (11th Cir. 2020) (dismissing non-diverse party cured jurisdictional defect); *La. Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1057 (9th Cir. 2016) (same); *Hardaway v. Checkers Drive-In Rests., Inc.*, 483 F. App'x 854, 855 (4th Cir. 2012) (same); *Ravenswood Inv. Co., L.P. v. Avalon Corr. Servs.*, 651 F.3d 1219, 1223 (10th Cir. 2011) (recognizing that a "district court can dismiss a dispensable nondiverse party . . . to cure a jurisdictional defect at any point in the litigation"); *In re Olympic Mills Corp.*, 477 F.3d 1, 12 (1st Cir. 2007) (addition of nondiverse, dispensable intervenors did not divest court of subject matter jurisdiction).

As Judge Sack of the Second Circuit emphasized in a separate opinion, which underscored the split among lower

courts, while recognizing that subject matter jurisdiction can be cured after filing a complaint:

> [T]he jurisdiction-at-commencement rule is not absolute. In cases where the *plaintiff lacked initial standing* or the case suffered from some other jurisdictional defect at the time suit is commenced, the Supreme Court's cases are less than clear as to whether and how a jurisdictional defect can be remedied in the course of litigation. In some cases, a jurisdictional defect existing at the outset of litigation *can* be cured by subsequent events. In the case of diversity jurisdiction, for example, the dropping-out of a nondiverse plaintiff whose presence would otherwise defeat diversity confers diversity jurisdiction upon a federal court, provided other jurisdictional requirements are satisfied. And several courts have held that a loss of standing *after* commencement of a litigation but prior to trial may be cured by reacquisition of standing or by joinder of a party with standing. Moreover, in the case of a substitution request such as in *Zurich Insurance Co.*, allowing substitution may be the wiser answer to the problem of expediting trials and avoiding unnecessary delay and expense of requiring an action to be started anew where a substitution is desired though the subject matter of the actions remains identical.

Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.a.r.l, 790 F.3d 411, 426-27 (2d Cir. 2015) (Sack, J., concurring) (emphasis added; internal quotation marks and citations omitted).

Thus, the oft-cited maxim, as invoked by the court below, that subject matter jurisdiction must appear at every phase of the litigation, including its initiation, is not only wrong, but is inconsistent with the Eleventh Circuit's own decisions which hold it to be a curable defect. The effect of such a rule, either in the case of substitution of a proper party or in realignment or removal of parties to ensure diversity, is to require the plaintiff needlessly to commence the case anew, but thereby risking loss of its substantive claim due to expiration of the statute of limitations.

The Court should grant certiorari and resolve the split of authority with respect to whether a defect in subject matter jurisdiction can be cured at any stage in the case. Applying that rule in this case would entitle PDVSA to show, on remand, that under the Executive Branch's recent policy changes concerning the Maduro government, it has standing to substitute in as the plaintiff real party in interest. If certiorari is granted on this question, the Court would not need to decide the first question presented – whether the existence of a political question deprives the court of subject matter jurisdiction, although that question is independently worthy of certiorari for the reasons demonstrated in Point I above.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: June 12, 2023

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED MARCH 13, 2023

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-10675

PDVSA US LITIGATION TRUST,

Plaintiff-Appellant,

PETROLEOS DE VENEZUELA, S.A. (PDVSA),

Intervenor Plaintiff-Appellant,

v.

LUKOIL PAN AMERICAS LLC, LUKOIL PETROLEUM LTD, COLONIAL OIL INDUSTRIES INC., COLONIAL GROUP, INC., GLENCORE LTD., *et al.*,

Defendants-Appellees.

March 13, 2023, Filed

Appeal from the United States District Court
for the Southern District of Florida.
D.C. Docket No. 1:18-cv-20818-DPG.

Before WILLIAM PRYOR, Chief Judge, MARCUS, Circuit Judge, and MIZELLE,* District Judge.

WILLIAM PRYOR, Chief Judge:

* Honorable Kathryn Kimball Mizelle, United States District Judge for the Middle District of Florida, sitting by designation.

Appendix A

This appeal involves a nonjusticiable political question: who has the authority to litigate in the name of the Venezuelan state oil company, Petróleos de Venezuela, S.A. The underlying action, brought by a litigation trust on behalf of Petróleos de Venezuela, alleged conspiracy, antitrust, cybercrime, and fraud claims against various individuals and entities. After the district court dismissed the action for lack of standing and this Court affirmed, an entity purporting to speak for Petróleos de Venezuela sought to substitute itself as the real party in interest. The entity's board was appointed by Nicolás Maduro, who claims to be the president of Venezuela. But the United States Department of State has concluded that Maduro is not Venezuela's legitimate political leader. The district court denied the motion. We affirm because the district court could not grant the motion without addressing a nonjusticiable political question.

I. BACKGROUND

The action underlying this appeal involves conspiracy, antitrust, cybercrime, and fraud claims brought on behalf of the Venezuelan state oil company, Petróleos de Venezuela, S.A. The plaintiff was a litigation trust established to pursue these claims. The movant that seeks substitution as the real party in interest purports to speak for Petróleos de Venezuela itself. In its complaint, the trust alleged that a collective of oil companies, oil traders, banks, and corrupt Venezuelan officials conspired to profit at Petróleos de Venezuela's expense.

Two key defendants—Venezuelan nationals Francisco Mo-rillo and Leonardo Baquero—along with numerous

co-conspirators allegedly engaged in a variety of fraudulent and anticompetitive activities. Morillo and Baquero purportedly formed an energy consulting firm, an energy advisory and trading firm, and a series of shell companies. The complaint alleged that the conspirators bribed Petróleos de Venezuela officials to provide inside information, fix prices, rig bids, "accept artificially low prices" for sales, "pay inflated prices" for purchases, "overlook" products and services that Petróleos de Venezuela paid for but never received, and "fraudulently conceal" what was owed to Petróleos de Venezuela. It further alleged that Morillo and Baquero delivered inside information about competing bids and Petróleos de Venezuela's future tenders to their oil-company clients, giving those companies an unfair advantage over their competitors, including competitors in the United States. The clients allegedly compensated Morillo and Ba-quero by paying "commissions." The complaint alleged violations of various state and federal antitrust, conspiracy, and cybercrime statutes, as well as other theories of civil liability.

At the outset of this litigation, a trust was "established pursuant to the laws of New York to investigate and pursue claims against [these] Defendants and others." The entity that now seeks substitution contends that it initially relied on the trust "so that efforts to hold [the alleged conspirators] accountable could proceed without interference from the political and economic instability and rampant corruption in Venezuelan government and society." In theory, the trust could distribute any damages awarded in a manner consistent with United States sanctions against Venezuela.

But the legitimacy of the trust immediately became a point of contention. Initially, the trust moved for a preliminary injunction and a temporary restraining order to prevent the alleged conspirators from destroying records and hiding or spending the proceeds of their alleged illegal activity. The alleged conspirators filed a motion to dismiss for lack of standing. The alleged conspirators argued that the trust agreement could not be authenticated and that it was void under New York law in part because it violated the ban on champerty. The law on champerty prohibits the assignment of claims "with the intent and for the primary purpose of bringing a lawsuit." *See Justinian Cap. SPC v. WestLB AG*, 28 N.Y.3d 160, 43 N.Y.S.3d 218, 65 N.E.3d 1253, 1254 (N.Y. 2016). They also argued that the validity of the trust under Venezuelan law presented a nonjusticiable political question that, if reached, must be decided against the trust—both because the signatories lacked authority to speak for Petróleos de Venezuela and because the agreement was not approved by the National Assembly.

The dispute over the agreement's validity under Venezuelan law is connected to a broader controversy over the legitimate political leadership of Venezuela. The United States ceased to recognize the government of Nicolás Maduro, who purports to serve as president of Venezuela, in August 2017. *See* Press Statement, Heather Nauert, Dep't Spokesperson, U.S. Dep't of State (Aug. 18, 2017). Instead, the United States Department of State recognizes the National Assembly elected in 2015 as "the last remaining democratic institution" in that country. *See* Press Statement, Ned Price, Dep't Spokesperson, U.S.

Dep't of State (Jan. 3, 2023) [hereinafter Price 2023]; *see also* Exec. Order No. 13,857, 84 Fed. Reg. 509 (Jan. 30, 2019) (recognizing the National Assembly as "the only legitimate branch of government duly elected by the Venezuelan People"). It also recognized the former president of that Assembly, Juan Guaidó, as interim president of Venezuela, *see* Readout, Ned Price, Dep't Spokesperson, U.S. Dep't of State (May 2, 2022), until the Assembly recently voted to remove him and replace his interim government with a committee. Early statements by the Biden Administration indicate that the Department of State continues to recognize the National Assembly. *See* Price 2023, *supra*. The executive branch has given no indication that it will change its longstanding position that the Maduro government is illegitimate. *See id.*

Two different boards of directors, appointed by the two persons who claimed to be the president of Venezuela, purport to govern Petróleos de Venezuela. Maduro officials approved the creation of the purported litigation trust and the commencement of the underlying action. The trust agreement was signed in July 2017, one month before the United States ceased to recognize the Ma-duro government. *See* Nauert, *supra*. The initial complaint was filed in March 2018. In April 2018, the National Assembly denounced the trust as unconstitutional and stated that Reinaldo Muñoz Pedroza—Maduro's attorney general and one of the purported signers of the trust agreement—lacked the authority to form the trust.

After a hearing and discovery on the standing question, the magistrate judge recommended dismissal.

The trust objected, but the district court adopted the magistrate judge's report and recommendation in part and dismissed the action for lack of subject-matter jurisdiction.

The district court reasoned that the litigation trust lacked standing because the trust was void and the trust agreement was inadmissible. It ruled that the trust agreement was inadmissible due to a lack of authenticated signatures. And it concluded that even if the agreement were admissible, it violated the New York law against champerty. The district court also stated that in the light of "the National Assembly's declaration that the Trust Agreement is unconstitutional," ruling that the trust was valid "would be ruling in direct contravention to a resolution by a foreign sovereign—likely in violation of the Act of State doctrine." But it declined to rest its judgment on that basis. On appeal, this Court affirmed on the ground that the agreement violated the New York law on champerty. *PDVSA US Litig. Tr. v. Lukoil Pan Ams., LLC*, 991 F.3d 1187, 1193, 1195, 1197 (11th Cir. 2021).

In response, an entity that purports to speak for Petróleos de Venezuela moved to reopen the judgment and to intervene or be substituted as the real party in interest under Federal Rules of Civil Procedure 60(b), 24(a)(2), and 17(a). The entity's board was appointed by Maduro, not Guaidó. By the time the Maduro entity filed the motion, nearly three years had passed since the alleged conspirators first disputed the trust's standing and more than two had passed since the district court dismissed the action for lack of standing.

The district court denied the motion. It stated that "[w]hile a motion to intervene may have been timely and appropriate much earlier in the case, it must be denied because the [district] [c]ourt does not have subject matter jurisdiction." It reasoned that it had already dismissed the action for lack of jurisdiction, and this Court had affirmed that order. The district court also determined that the motion was untimely under Rule 17.

II. STANDARD OF REVIEW

We review *de novo* issues of subject-matter jurisdiction. *See United States v. Grimon*, 923 F.3d 1302, 1305 (11th Cir. 2019). And this Court "may affirm on any ground supported by the record, regardless of whether that ground was relied upon or even considered below." *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017).

III. DISCUSSION

The district court could not grant the Maduro entity's motion to substitute without addressing a nonjusticiable political question. Rule 17 guarantees that "the *real party in interest*" will be allowed "a reasonable time . . . to ratify, join, or be substituted into the action." FED. R. CIV. P. 17(a)(3) (emphasis added). Two boards of directors purport to legally control Petróleos de Venezuela: one appointed by Maduro and one appointed by Guaidó. The Maduro entity asked the district court to determine whether it had the authority to prosecute this action in the name of Petróleos de Venezuela as the real party in interest. That question is nonjusticiable.

Appendix A

From the Founding to today, the Supreme Court has acknowledged that some questions can be answered only by the political branches. Chief Justice John Marshall in *Marbury v. Madison* explained that "[b]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." 5 U.S. (1 Cranch) 137, 165-66, 2 L. Ed. 60 (1803). And the Supreme Court has repeatedly held that it is the role of the political branches, not the courts, to identify the legitimate political leadership of a foreign country. "Who is the sovereign, *de jure or de facto*, of a territory is not a judicial, but is a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . . ." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302, 38 S. Ct. 309, 62 L. Ed. 726 (1918) (citation omitted); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) ("Political recognition is exclusively a function of the Executive."), *superseded on other grounds by statute*, 22 U.S.C. § 2370(e)(2); *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 135 S. Ct. 2076, 2086, 2094, 192 L. Ed. 2d 83 (2015) (explaining that because "the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not," the President's "power to recognize foreign nations and governments" is exclusive).

For more than five years, the executive branch has taken the position that the Maduro government is

illegitimate. *See* Nauert, *supra*. And, in its motion, the Maduro entity conceded that its board was appointed by Maduro. The judicial branch is bound to accept the President's statement that the 2015 National Assembly, not the Maduro government, is the legitimate political authority in Venezuela. *Oetjen*, 246 U.S. at 302; *see* Price, *supra*. And under the act-of-state doctrine, the district court is barred "from inquiring into the validity of a recognized foreign sovereign's public acts committed within its own territory." *Fogade v. ENB Revocable Tr.*, 263 F.3d 1274, 1293 (11th Cir. 2001) (citation omitted). The district court cannot question the validity of then-President Guaidó's appointment of an alternative board of directors. So, under the political-question doctrine, it was powerless to grant the Maduro entity's motion to substitute the entity as the real party in interest in contravention of the position taken by the United States Department of State.

The Maduro entity argues that it does not matter which board of directors is authorized to speak for Petróleos de Venezuela. It contends that "whether [the] board comprises Maduro appointees or Guaidó appointees is immaterial to this litigation which addresses the multibillion-dollar injury suffered by [Petróleos de Venezuela] as a corporate entity." It suggests that "this Court should hold in abeyance the distribution of any recovery in this action until the recognition of [Petróleos de Venezuela] is resolved."

We are not persuaded. To be sure, no one disputes that "Petróleos de Venezuela" is the real party in interest,

and no one disputes that there is functionally only one "Petróleos de Venezuela." Instead, the question is whether the Maduro entity had the authority to bring suit in Petróleos de Venezuela's name. A company may be an independent juridical entity, but it can speak only through its officers and directors. The identities of those officers and directors matter. Even if the Guaidó-appointed board might desire the same outcome in this litigation, as the Maduro entity contends, a party is entitled to decide if and how it wishes to litigate. No Guaidó-appointed officials have authorized this suit or the Maduro entity's motion to substitute, nor has any entity they control opted to bring suit itself.

The Maduro entity seems to suggest that by granting its motion the district court would simply allow it to serve as a placeholder. It states that it seeks to "preserve the claims asserted . . . against possible expiration of the statute of limitations." And it suggests that the district court could later distribute any "recovery . . . [when] the recognition of [Petróleos de Venezuela] is resolved."

This argument fails. As this Court has explained, "Rule 17 was not promulgated to allow lawyers to file placeholder actions . . . to keep a limitations period open while they investigate their claims and track down the proper parties." *In re Engle Cases*, 767 F.3d 1082, 1113 (11th Cir. 2014). The district court cannot grant a motion for substitution by an entity that is not authorized to litigate in Petróleos de Venezuela's name in hopes that the proper party will eventually request substitution.

Finally, the Maduro entity also requests that we remand this action to allow the district court to conduct a further factual inquiry into "who may properly represent the interests of [Petróleos de Venezuela] in light of the complex and ever-changing political situation within Venezuela" and into the "position of the United States Government." It suggests that relations between the United States and Maduro's government are "thawing," so permitting it to litigate in the name of Petróleos de Venezuela might be consistent with American foreign-policy interests. But federal courts are not empowered to decide what is consistent with American foreign-policy interests. The district court would not have jurisdiction to conduct the requested inquiry on remand. And even if the Department of State declared today that the Maduro entity is authorized to bring suit in Petróleos de Venezuela's name, we would still affirm because, under Article III, a justiciable case or controversy must exist "through all stages of the litigation," including "at the time the complaint is filed." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 136 S. Ct. 1969, 1975, 195 L. Ed. 2d 334 (2016) (citation omitted).

IV. CONCLUSION

The order denying the motion to reopen and substitute is **AFFIRMED**.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED FEBRUARY 2, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:18-cv-20818-GAYLES/OTAZO-REYES

PDVSA U.S. LITIGATION TRUST,

Plaintiff,

v.

LUKOIL PAN AMERICAS LLC, *et al.*,

Defendants.

ORDER

THIS CAUSE comes before the Court upon non-party Petróleos de Venezuela, S.A's ("PDVSA") Motion for Substitution as Real Party in Interest and to Intervene (the "Motion") [ECF No. 732]. The Court has reviewed the Motion and the record and is otherwise fully advised. For the following reasons, the Motion is denied.

BACKGROUND

PDVSA is a Venezuelan state-owned energy company. [ECF No. 12]. According to the Amended Complaint,

Defendants[1] conspired to deprive PDVSA of competitive prices for the sale and purchase of oil products and additives causing billions of dollars in damages. *Id.* PDVSA assigned its interest in claims against Defendants to Plaintiff PDVSA US Litigation Trust via a Litigation Trust Agreement. [ECF No. 517-4].

Plaintiff commenced this action on March 3, 2018. [ECF No. 1]. On July 23, 2018, several Defendants filed a Motion to Dismiss for Lack of Standing (the "Motion to Dismiss"). [ECF Nos. 517 & 522 (under seal)]. In the Motion to Dismiss, Defendants argued that Plaintiff lacked standing because PDVSA was the real party in interest and the assignment was invalid. After limited discovery, briefing, and an evidentiary hearing, on November 5, 2018, Magistrate Judge Alicia M. Otazo-Reyes issued her Report and Recommendation finding that Plaintiff has no standing and recommending that the Court dismiss this action for lack of subject matter

1. The named Defendants are: Lukoil Pan Americas LLC; Lukoil Petroleum Ltd.; Colonial Oil Industries, Inc.; Colonial Group, Inc.; Glencore Ltd.; Glencore International A.G.; Glencore Energy UK Ltd.; Masefield A.G.; Trafigura A.G.; Trafigura Trading LLC; Trafigura Beheer B.V.; Vitol Energy (Bermuda) Ltd.; Vitol S.A.; Vitol, Inc.; Francisco Morillo; Leonardo Baquero; Daniel Lutz; Luis Liendo; John Ryan; Helsinge Holdings, LLC; Helsinge, Inc.; Helsinge Ltd., Saint-Hélier; Waltrop Consultants, C.A.; Godelheim, Inc.; Hornberg Inc.; Societe Doberan, S.A.; Societe Hedisson, S.A.; Societe Hellin, S.A.; Glencore de Venezuela, C.A.; Jehu Holding lnc.; Andrew Summers; Maximiliano Poveda; Jose Larocca; Luis Alvarez; Gustavo Gabaldon; Sergio De La Vega; Antonio Maarraoui; Campo Elias Paez; Paul Rosado; BAC Florida Bank; EFG International A.G.; and Blue Bank International N.V.

jurisdiction (the "Report").[2] [ECF No. 636]. Following a *de novo* review, this Court entered an Amended Order on March 19, 2019, adopting in part the Report, granting the Motion to Dismiss, and dismissing without prejudice the action for lack of subject matter jurisdiction.[3] [ECF No. 684]. Specifically, the Court agreed that Plaintiff does not have Article III standing in this action. *Id.* On March 18, 2021, the Eleventh Circuit Court of Appeals affirmed the Court's decision. *PDVSA US Litig. Tr. v. Lukoil Pan Americas, LLC*, 991 F.3d 1187 (11th Cir. 2021), *cert. denied*, 142 S. Ct. 466, 211 L. Ed. 2d 283 (2021). On May 18, 2021, PDVSA filed the instant Motion. [ECF No. 732].

DISCUSSION

PDVSA seeks to be substituted in this action as the real party in interest pursuant to Rule 17 of the Federal Rules of Civil Procedure and/or to intervene as a party plaintiff pursuant to Rule 24 of the Federal Rules of Civil Procedure. The instant Motion was filed nearly three years after Defendants filed their Motion to Dismiss arguing that PDVSA, not Plaintiff, was the real party in interest. PDVSA does not assert that it was unaware of this action or the basis for Defendants' 2018 Motion to Dismiss. While a motion to intervene may have

2. This action was referred to Judge Otazo-Reyes, pursuant to 28 U.S.C. § 636(b)(1)(B), for a ruling on all pretrial, non-dispositive matters, and for a Report and Recommendation on any dispositive matters. [ECF No. 220].

3. The Amended Order simply corrected a scrivener's error in the Court's March 8, 2019 Order, [ECF No. 679].

been timely and appropriate much earlier in the case, it must be denied because the Court does not have subject matter jurisdiction. In 2019, this Court found that it did not have subject matter jurisdiction because Plaintiff lacked standing to bring this action. The Eleventh Circuit's Mandate, [ECF No. 731], brought finality to that determination and divested this Court of jurisdiction. Therefore, substitution and/or intervention in this action at this time would be improper. *See University of South Ala. v. Am. Tobacco*, 168 F. 3d 405, 410 (11th Cir. 1999) ("Simply put, once a federal court determines that it is without subject matter jurisdiction, the court is powerless to continue."); *see also Kendrick v. Kendrick*, 16 F.2d 744, 745 (5th Cir. 1926)[4] ("An existing suit within the court's jurisdiction is a prerequisite of an intervention . . . As the record does not show that at the time the petition to intervene was presented there was pending any suit or proceeding within the court's jurisdiction, that petition was not allowable.").

PDVSA's reliance on *Delta Coal Program v. Libman*, 743 F.2d 852 (11th Cir. 1984) for the proposition that the Court can grant its relief in spite of a lack of subject matter jurisdiction is unavailing. *See* [ECF No. 738 at 4]. In *Delta Coal*, the Eleventh Circuit affirmed the district court's order permitting the substitution of individual investors in place of their limited partnership, Delta Coal Program ("Delta"), after Delta was found not to have standing to

4. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted all cases decided by the Fifth Circuit Court of Appeals prior to the close of business on September 30, 1981, as binding precedent.

assert its federal claims. *Delta Coal*, 743 F.2d at 853-56. However, in the underlying district court case, the court still had subject matter jurisdiction over the action as other original plaintiffs remained and the court retained pendent jurisdiction over Delta's state claims. *See Delta Coal Program v. Libman*, 554 F. Supp. 684 (N.D. Ga. 1982). The facts here are distinguishable: The sole Plaintiff in this case lacks standing, the action was dismissed for lack of subject matter jurisdiction, and those decisions were affirmed on appeal.

As this Court noted in *Live Entertainment, Inc. v. Digex, Inc.*, "[t]he Federal Rules of Civil Procedure cannot expand the subject matter jurisdiction of federal courts . . . Rule 17(a) must be read with the limitation that this Court must at a minimum have subject matter jurisdiction over the original claims." *Live Entm't, Inc.*, 300 F. Supp. 2d 1273, 1279 (S.D. Fla. 2003) (dismissing the case and denying the plaintiff's and non-party's Rule 17 motions to substitute because the plaintiff had no standing to bring the action[5]). Thus, the Court finds that substitution and/or intervention at this time would be improper. *See, e.g., Crowley Mar. Corp. v. Robertson Forwarding Co.*, No. 20-CIV-20151, 2020 U.S. Dist. LEXIS 135131, 2020 WL 4366079, at *3 (S.D. Fla. July 30, 2020) (finding Rule 17 inapplicable where plaintiff lacks standing because "the Rules cannot displace the constitutional Case or Controversy requirement"); *Gonzalez ex rel. Gonzalez v. Reno*, 86 F. Supp. 2d 1167, 1180 (S.D. Fla. 2000) (holding

5. The Court in *Live Entertainment* also noted that the non-party's additional basis to intervene under Rule 24 failed because once the action was dismissed there was no action in which to intervene. *Live Entertainment*, 300 F. Supp. 2d at 1280 n.7.

that resolution of the Rule 17 issue first requires that plaintiff have Article III standing), *aff'd*, 212 F.3d 1338 (11th Cir. 2000); *Summit Office Park, Inc. v. U.S. Steel Corp.*, 639 F.2d 1278, 1282 (5th Cir. Mar. 19, 1981) ("Since there was no plaintiff before the court with a valid cause of action, there was no proper party available to amend the complaint."); *cf. Wright v. Dougherty Cty., Ga.*, 358 F.3d 1352, 1356 (11th Cir. 2004) ("By lacking standing to bring a claim the appellants also lack standing to amend the complaint to consolidate with a party who may have standing."). Moreover, given PDVSA's years-long knowledge that standing was at issue in this case, *see* [ECF No. 732 at 2], its requested relief is untimely. *See Crowley Mar. Corp.*, , 2020 U.S. Dist. LEXIS 135131, 2020 WL 4366079, at *4 (finding a reasonable time had passed after five-and-a-half months with no action by the real parties in interest to be substituted in the case under Rule 17). In light of the Court's findings, it need not address the parties' remaining arguments.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that non-party Petróleos de Venezuela, S.A's Motion for Substitution as Real Party in Interest and to Intervene, [ECF No. 732], is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida this 2nd day of February, 2022.

/s/ Darrin P. Gayles
DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE