No. 22-1209

IN THE

Supreme Court of the United States

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

Petitioners,

v.

LUKOIL PAN AMERICAS LLC, *et al.*,

Respondents.

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

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTION

The central holdings of the court of appeals in this case clearly warrant review by this Court. Defendants' attempt to obfuscate the need for review must be rejected. The critical holdings appear at the end of the Eleventh Circuit's opinion:

> [E]ven 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).

App'x A at 11.

These holdings raise two fundamental issues that require clarification. *First*, the Court's foundational decision in *Baker v. Carr*, 369 U.S. 186 (1962), expressly held that a political question does not deprive the court of Article III, or subject matter, jurisdiction. *See* Petition at 8–11. While a court must defer to the Executive on questions concerning recognition of a foreign government, that deference is not a matter of Article III jurisdiction. Yet, the court of appeals held the opposite. *Second*, the court of appeals, after concluding that the existence of a political question precludes Article III jurisdiction, then ruled that a defect in Article III jurisdiction cannot be cured. Several other courts of appeals have disagreed. On

both of these important issues, there are clear conflicts that this Court should resolve. This case presents an ideal opportunity to do so.

Defendants argue that these questions are "theoretical" and "abstract"; that they were not decided by the court below; and would not affect the result. Defendants are wrong on all three counts. The issues are not abstract or theoretical because they actually controlled the Eleventh Circuit's disposition of the case.

The Eleventh Circuit held that the political question doctrine was a matter of Article III jurisdiction, and that, because Article III jurisdiction must exist "at the time the complaint is filed," the initial absence of Article III jurisdiction could not be cured.[1] Based on those holdings, the court of appeals refused to remand the case to the district court to determine the Executive's current position concerning whether the actual, *de facto* PDVSA board had authority to pursue this action. It said that consideration of a change in recognition status was *foreclosed as a matter of law* because the political question precluded Article III jurisdiction. These important issues warrant review.

Defendants also argue that these issues were not addressed in Petitioners' briefing below. But this argument ignores the context of the appeal. The district court's decision was not based upon the political question doctrine. Rather, the district court held that it lacked subject

1. In fact, the Maduro regime was recognized by the United States when this action was commenced on March 3, 2018. The U.S. withdrew recognition on January 23, 2019.

matter jurisdiction to allow PDVSA to intervene because the original plaintiff, the PDVSA U.S. Litigation Trust (the "Trust"), lacked standing because the assignment of PDVSA's claims to the Trust was champertous under New York law. The district court further held that the motion to intervene was untimely. Petitioners' appellate briefs focused on those two issues. Petitioners argued that the district court had the ability, under Rule 17(a)(3), Fed.R.Civ.P., to substitute the real party in interest, citing numerous cases in the Eleventh Circuit and elsewhere. Further, Petitioners argued that the motion was not untimely because PDVSA was entitled to await final appellate determination as to the Trust's standing before it sought intervention. Moreover, Petitioners argued that Defendants themselves had asserted throughout the proceedings that PDVSA was, in fact, the real party in interest, so they could not possibly have suffered any prejudice.

In any event, Petitioners' briefing in the lower courts *did address* whether a defect in Article III jurisdiction could be cured. While Petitioners' arguments were made in the context of Rule 17(a)(3), the cases Petitioners cited below are the very same cases cited in the Petition (at 17–18) in addressing the political question doctrine. *See* Appellants' Br. in No. 22-10675 (11th Cir., filed May 11, 2022), Dkt. 43 ("Appellants' Br.") at 11–15, 24–25.

As to the political question doctrine, Petitioners asked the Eleventh Circuit to defer ruling on that issue based on the settled principle that an appellate court will not consider issues that were not addressed in the district court. *Id.* at 36–37. Petitioners urged the Eleventh Circuit to remand for consideration of the political question

issue, including allowing the district court to request the Executive Branch's current position with regard to the capacity of the *de facto* PDVSA Board to bring this action. The Eleventh Circuit denied that request solely because it found that any defect in Article III jurisdiction could not be cured.

I. APPLICATION OF THE POLITICAL QUESTION DOCTRINE DOES NOT IMPLICATE SUBJECT-MATTER JURISDICTION.

In addressing the question of Article III jurisdiction, Defendants grab snippets of language from various of this Court's decisions. But none of these quotes contains substantive analysis that is inconsistent with the holding of *Baker v. Carr*. *Baker* is the Court's only decision that actually addressed the issue analytically. In so doing, it drew a careful distinction between deference to the Executive's recognition decisions and lack of subject matter jurisdiction. Statements like those in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019), and other cases cited by Defendants (Opp. at 14–15) about "justiciability" of the political question of recognition may create confusion but they cannot be read as overruling *Baker's* comprehensive analysis.

Further, Defendants' one-sentence snippets are inconsistent with what this Court actually has *done*. As described in the Petition, in several cases which Defendants ignore, the Court has applied the political question doctrine to defer to the Executive Branch on the issue of recognition of a foreign government, but nonetheless proceeded to adjudicate other issues in light of the Executive Branch's position. If the Court actually lacked Article III jurisdiction, however, it would have had

no power to adjudicate the merits of these cases. Yet that is what it has done. *See* Petition at 11–13 and 13 at n.2.

Nor is there any logical reason why the Court's deference to the decisions of the Executive should foreclose the existence of subject matter jurisdiction. Because Article III requires a "Case" or "Controversy," there must be a live justiciable dispute between the parties. Thus, concepts of standing, mootness or ripeness go to questions of subject matter jurisdiction. By contrast, the existence of a political question does not preclude jurisdiction; it simply resolves one issue in the case based upon an Executive Branch decision as to recognition of a foreign government. But the underlying live controversy between the parties continues to exist, thereby establishing Article III jurisdiction.

Defendants argue that "[t]he Eleventh Circuit's holding that federal courts cannot countermand the Executive Branch's recognition determination would remain unchanged even if Petitioners prevailed on both questions presented." Opp. at 2. Even if this statement were true, it is irrelevant. Petitioners are not asking the Court to revisit the political question doctrine. Rather, they are asking the Court to decide: first, that the political question doctrine does not affect subject matter jurisdiction; and second, even if it is a matter of subject matter jurisdiction, it can be cured if the Executive Branch changes its position during the course of the litigation.

The latter issue is particularly important because, as discussed below, several courts have concluded that a lack of Article III jurisdiction cannot be cured, while others have held it can, leading to anomalous results and confusion among the lower courts.

II. LACK OF SUBJECT MATTER JURISDICTION CAN BE CURED BY A CHANGE IN THE EXECUTIVE BRANCH'S POSITION.

Even if this Court were to conclude that the political question doctrine deprives a court of subject matter jurisdiction, it nonetheless should expressly hold that federal courts can hear the case on the merits if the Executive's position changes during the course of the litigation. That is exactly what the Court has done in a number of cases (Petition at 16), all of which are ignored by Defendants. The court of appeals, however, repeating the shibboleth that subject matter jurisdiction must be present at "all stages of the litigation," drew the erroneous conclusion that lack of Article III jurisdiction cannot be cured. But that ruling conflates two separate issues. Certainly, once a defect in Article III jurisdiction is discovered, it must be cured before the court can reach the merits. That fact, however, does not mean that the jurisdictional defect cannot be cured.

A number of circuits have disagreed with the Eleventh Circuit's reasoning. As the Petition demonstrates, these courts have held that defects in a plaintiff's Article III standing can be cured by intervention of the proper real party in interest under Rule 17(a)(3). Petition at 17; Appellants' Br. at 11–15, 24–25; s*ee, e.g.*, *Branch of Citibank, N.A., v. De Nevares*, 74 F.4th 8 (2d Cir. 2023) (reaffirming *Fund Liquidation Holdings, LLC v. Bank of Am. Corp.*, 991 F.3d 370, 386 (2d Cir. 2021), and holding that real party in interest may be substituted to cure lack of Article III standing). Other courts hold to the contrary. *See* Petition at 18; *De Nevares*, 74 F.4th at 15 (noting that other circuits disagree with the Second Circuit's position). Defendants attempt to sidestep this clear split of authority

by suggesting that the Rule 17(a)(3) cases supposedly involved "prudential" standing, as opposed to Article III jurisdiction. That distinction is imaginary and finds absolutely no support in the cases.

Indeed, the very existence of Rule 17(a)(3) indicates that defects in Article III standing may be cured. According to the Advisory Committee Notes, the rule was intended to "codify" the decisions in *Levinson v. Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C. Cir. 1963). Adv. Comm. Notes to Rule 17. In both cases, amendment of the complaint was allowed to substitute the real party in interest for a plaintiff that lacked standing when the action was commenced. Because lack of standing is an Article III defect, *Whitmore v. Arkansas*, 495 U.S. 149, 154–56 (1990), Rule 17(a)(3) is an example of the principle that lack of subject matter jurisdiction can be cured.

Similar issues arise in other contexts. For instance, in *Matthews v. Diaz*, 426 U.S. 67, 75 (1976), the Court held that an applicant for Medicare who had failed to file his application before he filed the litigation, could nonetheless file an amended complaint after filing his application, despite the fact that 42 U.S.C. §405(g) "establishes filing of an application as a nonwaivable condition of jurisdiction." In *Northstar Financial Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1043–48 (9th Cir. 2015), the Ninth Circuit allowed an investment fund, which lacked standing to sue on behalf of its investors when it filed the complaint, to file an amended complaint after it obtained a post-filing assignment from an investor. *Northstar* approvingly cited Wright, Miller, & Kane, Federal Practice and Procedure: Civil 3d § 1505 at 262–63, which affirms that "Rule 15(d) permits a supplemental pleading to correct a defective

complaint and circumvents 'the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief.'" *Id.* at 1044; *see also Scahill v. District of Columbia*, 909 F.3d 1177, 1181–84 (D.C. Cir. 2018) ("a plaintiff may cure a standing defect under Article III through an amended pleading alleging facts that arose after filing the original complaint," relying on *Matthews* but noting a circuit split); *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008) (Article III standing can be based upon facts that arose after filing the complaint).

A similar split exists among the circuits as to whether subject matter jurisdiction based on diversity must be present at the time the action is commenced or if it can be cured. *See* Petition at 18–20. This Court has not spoken with a clear voice on whether a defect in diversity jurisdiction can be cured. *See Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 584 (2004) (Ginsburg, J., dissenting) (collecting cases). Defendants suggest that the conflict with regard to this issue is irrelevant because the instant case does not involve diversity jurisdiction. But the underlying issue is similar: may a defect in subject matter jurisdiction be cured during the course of a litigation?

As Judge Sack commented in his separate opinion in *Cortlandt Street Recovery Corp. v. Hellas Telecommunications, S.a.r.l.*, "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." 790 F.3d 411, 426 (2d Cir. 2015) (quoting *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1203 (Fed. Cir. 2005)). That uncertainty should be resolved.

III. DEFENDANTS' OTHER ARGUMENTS AGAINST CERTIORARI ARE UNPERSUASIVE.

This case is the perfect vehicle to decide the two important Questions Presented. The court of appeals' conclusions are clear and unequivocal: A political question deprives a court of Article III jurisdiction and the lack of Article III jurisdiction cannot be cured during the course of the litigation. Both issues are directly implicated by the Eleventh Circuit decision.

Defendants argue to the contrary, noting that the position of the Executive Branch with regard to recognition of Maduro's PDVSA board has not changed. But as demonstrated in the Petition (at 5–6), it is highly uncertain what the Executive Branch's position would be with regard to allowing the *de facto* PDVSA board to litigate this case. For example, the Biden administration, although not recognizing the Maduro government generally, has expressly allowed American companies to do extensive business with PDVSA notwithstanding its control by Maduro. As the Congressional Research Service summarized: "Since November 2022, the Department of the Treasury has issued licenses to allow certain companies to conduct business with [PDVSA], Venezuela's state oil company, as incentives for Maduro to resume negotiations." Clare Ribando Seelke, Cong. Research Serv., IF10230, Venezuela: Political Crisis and U.S. Policy (2023).

Moreover, no alternative PDVSA board exists that can protect the legitimate interest of the Venezuelan people to recover billions of dollars fraudulently stolen by Defendants (operating largely from within the United States) from PDVSA. The Guaidó government that

was established as an alternative to Maduro has been dissolved by Venezuela's National Assembly, which is the legislative entity recognized by the Biden administration. As the Congressional Research Service cogently noted, "the dissolution of the interim [Guaidó] government has complicated the future of Venezuelan assets frozen abroad."

As these statements concerning U.S. policy indicate, the Executive Branch is currently pursuing certain economic arrangements with the Maduro government, and is addressing the "complicated" issues arising from the dissolution of the Guaidó government and the continuing power of the Maduro government. It is entirely reasonable that in light of these circumstances, the Executive Branch would support prosecution of this litigation by the Maduro *de facto* PDVSA board in order to seek recovery of billions of dollars stolen by Defendants. As Petitioners suggested below, any recovery would be held for the benefit of the Venezuelan people subject to approval of its disbursement by the U.S. government. *See* Appellants' Br. at 39; Reply Br. at 22.

Further, by virtue of the acts of the National Assembly, the alternative, so-called *ad hoc* board of PDVSA, now exists only for the purpose of defending PDVSA's indirect ownership interest in Citgo assets in the United States. *See* Dkt. Nos. 89 and 89-1, Letter to Court of Appeals (February 24, 2023) and Exhibit A thereto. No other entity has stepped in, or could step in, to prosecute this case. Petitioners urged the court of appeals to remand so that the district court could determine the Executive Branch's position as to the specific question of recognition of the *de facto* PDVSA board as the entity that could pursue the interests of the Venezuelan people in this case.

Finally, Defendants argue that the relief Petitioners seek "is permission to serve as a 'placeholder' to keep this action alive 'in hopes' that the Executive Branch will 'eventually' reverse its position on recognition." Opp. at 17. On the contrary, once Petitioners' standing to pursue this action is confirmed by the Court, Petitioners seek remand to the district court to determine the Executive Branch's *current position* with regard to recognition of the *de facto* PDVSA board for purposes of *pursuing this litigation*.

IV. THIS PETITION SHOULD BE HELD IN ABEYANCE PENDING THE COURT'S DETERMINATION OF THE PETITION IN ANOTHER CASE RAISING A RELATED ISSUE AS TO RECOGNITION OF THE VENEZUELAN GOVERNMENT.

A Petition for Writ of Certiorari was filed in *Bolivarian Republic of Venezuela v. OI European Group B.V.*, No. 23-140, on August 11, 2023. The first Question Presented in that case involves whether, in addressing a claim of immunity under the Foreign Sovereign Immunities Act, the lower courts properly held that actions of the Maduro government constituted sovereign conduct that would make PDVSA an alter ego of Venezuela, notwithstanding that Maduro lacks any legal authority to control PDVSA due to the Executive Branch's recognition determinations. Thus, if certiorari were granted in the *OI European Group* case, this Court would likely analyze the authority of the Maduro and Guaidó governments, in light of the Executive Branch's recognition determinations, as it affects the operations and legal standing of PDVSA. While the instant case does not raise sovereign immunity issues,

Opp. at 21 n.6, it most certainly involves similar gateway issues with respect to who speaks for and controls PDVSA.

Consideration of the instant Petition therefore should await consideration of the petition in No. 23-140, and if it is granted, should await determination of that case.

CONCLUSION

For the foregoing reasons and those discussed in the Petition, certiorari should be granted in this case, or it should be held in abeyance pending determination of the petition in No. 23-140.

Respectfully submitted,

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